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Precedents for the Usa Patriot Act: Military Tribunals

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Introduction

After the 9/11 attacks on New York and Washington, the Federal government enacted, with a minimal amount of Congressional hearings, far reaching legislation that was designed to help fight terrorism. The legislation gave the government, especially the executive branch, an unprecedented amount of power to arrest and to detain people who were thought to be terrorists or who were suspected of having information about possible terrorist threats. Some of those detained may be subject to special military tribunals.

This unit, designed for an 11th grade United States History class, will look at previous uses of military tribunals and will try to answer the following questions. First, at what times and under what circumstances have military tribunals been used? Second, what type of prisoner is subject to this type of tribunal? Third, what are the civil rights of the persons held and on what grounds may the government act? They will then compare these previous examples to procedures that are permitted under the USA PATRIOT Act.

Students who work with this unit will learn more about the rights of citizens and the limited constitutional safeguards for non-citizens, including illegal aliens. This second point will be of interest to my students, many of whom are recent immigrants to this country. They will see how the Bill of Rights is used today and will understand some of the threats to freedom that can result from an overzealous application of repressive measures. They will be able to evaluate various viewpoints and will separate valid and invalid arguments. Because new developments will be reported in the daily press, they will be encouraged to read a newspaper. Their reading comprehension and vocabulary will be increased.

I also hope that students will learn why people become angry when signs are posted in public transportation urging people to be vigilant in observing fellow passengers. Why were Maryland residents angered when signs urging this observation appeared recently in the Metro (Fenton 2005 C4)? How are signs such as these thought to be subversive or reminiscent of totalitarian governments? How do these signs differ from those posted in World War II warning people not to talk or give away information that might endanger the war effort?

The USA PATRIOT Act has several provisions that infringe or have the potential to infringe on an individual's privacy. Other legislation enables the government to detain people for indefinite periods of time without being charged with a crime. Regulations about secrecy allow the government to forbid the release of information

regarding the names of the detained and the specific crimes for which they have been apprehended. Those who have been detained have limited access to lawyers and such access, when granted, is subject to supervision by the government. Many people would maintain that limitations of these types violate basic rights as guaranteed or implied by the United States Constitution and its amendments.

This unit will look at some of the reasons given for these regulations and will focus on three earlier uses of military tribunals. Each of these examples has different circumstances and statuses of the persons involved. First, Andrew Jackson proclaimed martial law during his occupation of New Orleans in the War of 1812 (1815) and used a military tribunal to try a civilian. Second, the conspirators in the Lincoln assassination, all of whom were civilians, but hostile to the Union, were tried by a military tribunal. The third tribunal, that of the German saboteurs who were captured after they had landed on Long Island and Florida during World War II, is significant because it has been used as a precedent for the actions of the Bush administration regarding the rights of detainees and the extent of executive power.

Legal Terms

Habeas Corpus

The literal meaning is "may you have the body". It is a request to a court to order the individual who holds a prisoner to release him so he may go to court and hear the charges that have been brought against him. This is a legal right that goes back to early English law. The United States Constitution says that in times of war or rebellion, the writ of *habeas corpus* may be suspended. Consequently, during times of martial law the writ has often been suspended. The suspension of habeas corpus is a common element of all three of the situations described here.

Nulla poena sine (praevia) lege

"There (is) no punishment without a (previous) law". This maxim comes from Roman law. It means that you can't be charged for doing something for which no law has been written. Also, an act that was legal at the time it was committed can not be made illegal on the basis of a more recently passed law. A statute that criminalizes a previously legal act is called an *ex post facto* law. The Constitution bans such laws (Art.1, Sect. 9). This is one of the factors in the Quirin case.

Inter Arma Leges Silent

"Between arms the laws are silent" is the literal translation, but the expanded meaning is that in wartime civil statues are not applicable. This is a quotation from Marcus Tullius Cicero (106-43 BCE) in his speech in behalf of Milo, *Pro Milone* (52 BCE). The situation at Rome when Cicero offered his defense has some similarities with the war situations described in this unit.

In 52 BCE, there were two major political factions in Rome, a senatorial faction associated with Pompey and Cicero and an opposing faction allied with Julius Caesar who, at the time of this trial, was in Gaul. Rome did not have a police force. Wealthy individuals had to maintain their own bodyguards for protection, both in the city and on the roads. Milo was on trial for the murder of Clodius. Milo and Clodius were heads of opposing

forces or gangs that protected, respectively, members of the senatorial party and friends of Caesar. The crime occurred when entourages protected by Milo and Clodius, passed each other on the road. Something happened, a fight broke out and Clodius was killed. His body was taken back to Rome and displayed in the Forum so the crowd could see the wounds. As a result, violent riots broke out and arsonists burned the Senate building. The trial took place against this background of almost martial law. Soldiers were brought in to protect the court and various temples and buildings in the Forum. A special tribunal was set up to try Milo. Cicero used an argument of self-defense. He said that when a person is endangered by the weapons of highway robbers, every way of reaching safety is legitimate, the laws are silent and the laws don't require a person to suffer some sort of injustice before justice is served (Pro Mil. IV. 10-11). The second part of this statement is the justification for neglecting laws in wartime.

Attorney General Francis Biddle echoed similar sentiments regarding limitations on civil liberties imposed by a President during a war. In *In Brief Authority*, commenting on the internment of Americans of Japanese ancestry in World War II, he wrote that in war "What must be done to defend the country must be done.....the Constitution has never greatly bothered any wartime President" (Stone 2004 296).

Martial Law

Martial law or martial rule occurs when the civil government can not function and the military dispenses justice. This happens when an army invades and occupies a hostile territory. There are examples of martial law in non-hostile areas during wartime, as in Washington D.C. during the Civil War.

Prisoner of War

Prisoners of war are injured or uninjured enemy troops who are captured on or in the vicinity of the battlefield during wartime. People who support the army, such as cooks and journalists, when captured are also considered to be prisoners of war. Prisoners of war have rights to humane treatment. The geographical specificity is important to distinguish the soldier from a spy or saboteur who works behind enemy lines.

Military Tribunals

Modern thoughts about tribunals date to the American Civil War era when a code for warfare was developed by Francis Lieber and Henry Wager Halleck. Lieber, a Berlin-born political and legal philosopher who studied at the University of Jena, had fought with Prussian troops against Napoleon at Waterloo and later with the Greeks in their war for independence from the Ottoman Empire. He immigrated to the United States and taught at what are now the University of South Carolina and Columbia University. At South Carolina, he held the first chair in political philosophy, the forerunner of political science, established at a college in the United States. Lieber's military code combined ideas and values from ancient and medieval philosophers with his own military experience. It includes definitions of types of combatants and the types of law applicable to soldiers. Halleck, a General in the Union Army assigned to Missouri, had also written on the rules of war. Lieber's *Code of Rulesfor War* was released as General Orders 100 (1863) (Fisher 2005 71, 75). This release occurred after Taney's decision in *Ex parteMerryman* and before *Ex parte Milligan*. Lieber's Code had great influence on later United States military Codes and on the Hague Conventions (Fisher 2005 79).

One of the first problems to be decided is who can be tried by military courts during war time? Lieber (Article 3) stated that civilians should be tried in civil courts, if these courts were in operation, the view that is made explicit in *Ex parte Milligan*. (Fisher 2004 77). If civilian courts are not active, the military must administer the law.

Lieber (Article 13) refers to two types of military legal jurisdiction, one that deals with crimes committed against statutes enacted by Congress and a second that concerns violations of the codes of war. The first category is adjudicated by courts martial and has come to include violation of military regulations adopted under Congressional authority, but not passed by congress. Violations of the second category are tried by military tribunals. Enemy combatants also fall into two categories. Enemy soldiers who are captured on the battlefield and who are wearing some sort of uniform are entitled to prisoner of war status. These soldiers are eligible for courts martial. However, enemy combatants who are captured behind the battle line, whether or not they are wearing uniforms, can be tried by special military tribunals and, with fewer procedural protections than prisoners of war, are subject to the death penalty (Article 63, Fisher 2005 78).

Those tried by courts martial are entitled to legal counsel. A military judge presides. The members of the jury or court have a military rank equal or superior to the person on trial. The accused may confront his accusers and may see evidence introduced against him. He may call witnesses to testify on his behalf. People tried by a military tribunal or commission have many fewer rights and protections. Sometimes they might be denied the right to see the evidence used against them. Although the accused might have a lawyer, easy access to the attorney may be limited or monitored by the authorities. Holding the trial in secret eliminates the ability of observers to check on fairness and legality. In a capital offense case, the death penalty can be imposed with a majority vote.

Another difference between courts martial and tribunals lies in the review and appeal process. The judgment in a court martial has come out of the military justice system and may be appealed first to another military court, a service Court of Appeals; then to a special civil court, the U.S. Court of Appeals for the Armed Forces; and then they can be appealed to the U.S. Supreme Court. The order for military tribunals for terrorism suspects bans this appeal to the federal court system, although it is not clear that the federal courts will uphold that. Under the military tribunal system, there is a concentration of power in the executive branch of government (U.S. Military web site). The President may appoint the judge and the members of the court. The presiding judge can appoint the lawyers for the defense. The appeal is reviewed by the President (yes, that is what the executive branch has set up). As a result, the President controls the judge, jury, defense lawyers and hears the appeal. It is this type of trial that was used in the case of the German saboteurs in World War II.

1814-1815: New Orleans

When Andrew Jackson arrived in New Orleans (Dec. 1, 1814), he was worried about the attitudes of the local population toward the war. According to an early source, Jackson feared that the country was "filled with traitors and spies" (Eaton 1827 247). In addition, he worried that there were elements in the New Orleans population who might surrender to the enemy (Eaton 1827 291). Jackson asked the state legislature, whom he distrusted, to suspend the writ of habeas corpus, but when the legislature procrastinated, Jackson intervened and declared a state of martial law in New Orleans and vicinity. The rules required people leaving the city to get permission from the adjutant general's office and those entering the city to register with that office. A nine o'clock evening curfew was set and those out in the streets after that hour were assumed to be spies and were subject to arrest (Eaton 1827 251). These very unpopular restrictions were maintained even after the defeat of the British.

In March 1815, before the news of the end of the War of 1812 reached the United States, a French-speaking

member of the Louisiana legislature wrote an essay for a local French newspaper. According to one source, the story criticized the curfew (Lurie 1989 135). A source closer to the event said the story reported that a peace treaty had been signed. Jackson feared that this false rumor would encourage the disintegration of discipline and a lack of vigilance (Eaton 1827 352). Jackson worried about his troops' dedication because many of them were of French ancestry and citizenship. He ordered the editor to withdraw the story and issued orders to arrest the author of the article, Louis Louailler, on the grounds that he was trying to incite a mutiny and that he was a spy. Although Louailler was a civilian, a court martial was convened. Because civilian courts were in operation, a federal judge, Dominick A. Hall, issued a writ of habeas corpus in behalf of Louailler. Jackson then ordered Judge Hall to be arrested and put into prison because he was "aiding, abetting and exciting mutiny within my camp" (Lurie 1989 137). At his trial Louailler maintained that the court had no jurisdiction in his case because he was a civilian and not a member of the military. Therefore he should not be subject to military law. He also argued that if he were a spy he would not write his views in a generally circulated newspaper. Although Louailler did not respond to the charge of trying to start a mutiny, the court dismissed the case. Jackson, displeased with the verdict, intervened and ordered Louailler to be returned to prison (Lurie 1989 137). In the matter of Hall, Jackson reasoned that the judge probably could not be convicted. Therefore he ordered Hall to be taken beyond the lines surrounding New Orleans and released. On the day after this exile, word came that a peace treaty had been signed. Louailler was released from prison and Hall was allowed to return to the city on March 13, 1815 (Lurie 1989 138).

Jackson rationalized his actions during wartime with a statement that foreshadows Lincoln in the Civil War. Jackson said that when a country is threatened with invasion the commander should adopt a "course that should be efficient, even if it partially endangered the rights and privileges of the citizen" (Eaton 1827 251). He added that at a time like that "constitutional forms should be suspended, for the preservation of constitutional rights; ... it (was) better to depart, for a moment, from the enjoyment of our dearest privileges, or ... have them wrested from us forever" (Eaton 1827 252). "Is it wise...to sacrifice 'the spirit of the laws to the letter (and) lose the substance forever in order that we may ... preserve the shadow'". He invoked the Cicero statement "Laws must sometimes be silent when necessity speaks" (Lurie 1989 138).

Lincoln Conspiracy

On April 14, 1865 the Civil War was nearing the end and Abraham Lincoln, enjoying an evening at Ford's Theatre, was shot. The President died the next day. An attempt had been made to kill Secretary of State William Seward. Clearly, some sort of plot had been launched. John Wilkes Booth, the assassin, successfully escaped from the theatre and from the city and a few days later was apprehended in a Virginia barn and killed. Nine people were eventually charged with murder and conspiracy to commit murder. Under the rules of the day, if a felony resulted from a conspiracy that was originally planned to commit a misdemeanor, all of those involved would be charged with a felony (Steers 2001 210). All of the individuals captured were civilians, but they were closely involved with the Confederate cause and, in some cases, were clearly helping the Confederacy and might have been on the payroll.

Andrew Johnson, the new President, ordered that those charged with the murder be tried by a military tribunal, even though all of them were civilians and one of the accused, Mary Surratt, was female. This decision seems to have been made by Edwin Stanton, the Secretary of War. The reasons for a military tribunal in the opinion given by the Attorney General, James Speed, were that there was still martial law in the District;

a Civil War was still "flagrant"; Washington was defended by fortifications; Federal soldiers served a police function by guarding public buildings and property and were or should have been guarding the President and the President's house (UMKC, Attorney General's Opinion). The federal authorities worried that they might not be able to get an unbiased jury because of the pro-Southern sympathy in the District. Under military law, the government could keep close control on proceedings (Steers 2001 210-211).

Former Attorney General Edward Bates took an opposing view and thought that the civil courts were the proper venue for this trial because of the civilian status of the alleged perpetrators and because the crime was not military in nature (Steers 2001 212). The crime of killing was murder and could be tried in a civilian court. The military tribunal won out when Attorney General James Speed described the accused as enemy belligerents. The term "enemy belligerents" will be used in the case of the World War II saboteurs. Speed added that they did not commit this murder for personal motives, but because they wanted to oppose the military effort. He gave examples of other acts that were not crimes under the civil code, but were under the Laws of War. For instance, spying is not a civil crime, but it violates the laws of war (Steers 2001 213).

Sen. Reverdy Johnson (D- MD), representing Mary Surratt, and Thomas Ewing, the counsel for Samuel Mudd and Samuel Arnold, argued that the civilian courts were open and their clients should be tried there, an argument that anticipated by a year the issue in *Ex parte Milligan*. The commission denied the request and, under the regulations of the tribunal, the ruling could not be appealed. Frederick Aiken, another of Surratt's attorneys, later petitioned President Andrew Johnson for a writ of habeas corpus. The President denied this appeal and said that the writ was suspended for this trial. Secrecy, one of the reasons military tribunals are used, was not a factor in this trial. After the first day, a pool of reporters was allowed to hear the proceedings that took place in the penitentiary at the Old Washington arsenal. Verbatim copies of the daily testimony were given to the prosecution and the defense and to two newspapers, the *Washington Intelligencer* and the *Philadelphia Daily Inquirer*. In this respect the trial was "open" and used the latest courtroom technology, phonology, which was a type of shorthand (Steers 2001 215).

The Judge Advocate General presided. The court consisted of nine officers who had seen combat during the Civil War. One of these officers was Major General Lew Wallace, who later was the author of *Ben Hur*. The Government wanted to make the case that there were two conspiracies, one that involved the Confederate leaders and the second smaller one that involved only the immediate conspirators. In terms of conviction for a crime, this was really an unnecessary approach because the doctrine of "vicarious liability" that was in effect at this period stated that someone in a conspiracy is responsible for the actions of all (Steers 2001 210). After fifty days of testimony and 366 witnesses, on June 30, six of the eight accused, including Mary Surratt, were found guilty and sentenced to hang. The sentences were reviewed by President Johnson and none was commuted. There is controversy surrounding Mary Surratt's sentence. The commission is said to have sent along a request for clemency for Surratt, but Andrew Johnson denied ever having seen this request (Steers 2001 227). The sentences were carried out a week later on July 7.

The trial of the Lincoln conspirators was conducted fairly. Attorney General James Speed's opinion on the legality of a military tribunal is eloquently expressed and logically argued. He uses the term "public enemy" to refer to the conspirators, a usage adopted by John Edgar Hoover to describe 20th century gangsters. With the exception of this term, Speed follows the reasoning and definitions found in Lieber's Code. The trial was run fairly and the defendants were allowed their full legal rights and access to competent legal counsel. For many years popular histories of the trial pictured two of the conspirators, Samuel Mudd and Mary Surratt, as innocent bystanders who had been unjustly convicted. This belief led to the military tribunal being pictured as a biased hanging jury. Careful studies of the trial transcripts and other documents by Hanchett and Steers

have shown that there was ample evidence presented to justify a conviction.

Ex Parte Quirin

When the United States entered World War II residents of the west coast were worried about a Japanese invasion and east coast residents were worried about the Germans. Submarine attacks on shipping had occurred even before the United States entry into the war and the irregular Atlantic coast line with many secluded harbors and off-shore barrier islands offered opportunities for surreptitious landings.

In June 1942 two four-man groups of German saboteurs landed on the east coast, one on Long Island and one near Jacksonville, Florida. Two of the eight, Herbert Haupt and Peter Burger, were naturalized United States' citizens, a condition that might require them to be tried in a civil court (Fisher 2005 95). The purpose of the eight was to damage war production by attacking weak spots in transportation systems. Some of the explosives they brought with them included TNT designed to look like pieces of coal. This imitation coal would then be mixed in with the regular coal and at some random point would be shoveled into the engine's fire box, causing a huge explosion (Fisher 2005 91). Had this plan been successful it would have been equally effective against troop trains, freight trains and civilian passenger trains. The explosions would have been unpredictable and, consequently, more frightening. Even if there were relatively few explosions, the ensuing panic would have given rise to security measures that would delay the trains. A lot of manpower would have been involved in the Herculean task of trying to pick out the one piece of TNT in a ton of coal.

All eight were wearing German uniforms when they landed, a ploy that they hoped would allow them to be treated as prisoners-of-war if they were captured. The Florida group landed without being detected. The New York group met a Coastguardsman who directed them to follow him, an order to which they paid no attention. After landing, each person changed into civilian clothes, an action that definitely changed his status from soldier to saboteur/spy. Although each group got off the beach quickly, they were apprehended relatively soon. One saboteur, George John Dasch, turned himself in and Haupt called attention to himself by reporting to the FBI that he had returned from a trip to Mexico (Fisher 2005 93).

For his cooperation, Dasch was promised a civil trial, but considerations arose that made this impossible. First, it was important that the FBI continue to be seen as an effective and omniscient agency. A public civil trial would reveal that the capture was accomplished not by FBI sleuthing, but because one of the eight turned himself into the authorities. Second, it would be undesirable and even dangerous if it were known how easily two groups could approach and land on the coast without being detected. There were also several legal objections. Attorney General Francis Biddle thought that it would be difficult to get a conviction on sabotage because the crime had not been committed and the plans were in the early stage. He compared this to a person who has bought a gun with the intent to commit murder, but has not followed through with his plans. Such a person can not be charged with murder. Third, the government wanted a harsh penalty. If a conviction were to be obtained in civil court, the penalty was only thirty years. The eight could be charged with conspiracy, but a conviction on this charge would add only three years, at most, to the sentence (Fisher 2005 95). Espionage and treason did carry the death penalty, but Biddle thought it would be difficult to prove these charges in civil court (Fisher 2005 98).

The administration wanted to impose the death penalty on the saboteurs and, although the eight could have

been tried by either a court martial or a military tribunal, a trial by the latter was seen as the best way to achieve this aim. President Franklin D. Roosevelt issued two proclamations on July 4, 1942. Proclamation 74 set up the military tribunal that would try the case. It named the officers who would preside and judge, and gave the tribunal the power to make whatever rules that it thought necessary, as long as the rules were in accordance with the Articles of War. The tribunal could accept testimony that would not be admissible under the more stringent rules of a court martial. The military order appointed both the prosecution and the defense counsel (Fisher 2005 100).

Proclamation 75 defined who could be subject to military tribunals and the type of crime that could be tried. It could be seen as an *ex post facto* law. The status of the two naturalized American citizens was avoided by making any people who were "subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation and who enter … through coastal or boundary defenses" (FDR, Proc. 75) subject to the Law of War and to being tried by a military tribunal if they come in for the purpose of committing or attempting to commit espionage, or hostile acts. This definition made it unnecessary to worry about whether someone was a citizen. If he had been working for an enemy government, he would be covered by tribunals. Similarly, espionage was clearly included and the lesser charge of attempted espionage was elevated to be eligible for harsher punishments. FDR said that the eight were not eligible for trials in civil courts.

Before the trial started, Kenneth Royall, defense attorney, challenged the authority of the court, citing *Ex parte Milligan*, because the civil courts were functioning. He also questioned the ability of the members of the court to try the case because they had been appointed by the President (Fisher 2005 102). The men were charged with sabotage and espionage, attempted sabotage and espionage, and conspiracy to commit sabotage and espionage. The trial began on July 7. On July 21, Royall began appealing to civil courts. The District court denied his request for habeas corpus on the grounds that the defendants were in a category of people who were excluded from civilian courts (Fisher 2005 106). The Supreme Court agreed to hear the case even though no action had been taken by the Court of Appeals. Royall had four basic arguments. First, the civil courts were open and should have jurisdiction. Second, there was no proof the alleged acts had been committed. Third, no crime had been committed against the United States government. Fourth, Roosevelt's Proclamation had set up *ex post facto* laws and more severe penalties (Fisher 2005 109). After nine hours of argument, the Court upheld the authority of the tribunal and the military jurors then resumed their deliberations. All eight of the defendants were convicted and sentenced to death. Roosevelt reviewed the sentences and commuted the sentences of Dasch and Berger to imprisonment. The trial concluded on August 1 and the executions were carried out on August 8.

The Supreme Court did not release its full opinion until October 29.The Court was in a difficult position. It was wartime, six of the accused had been executed, and there were questions about the legality of parts of the process. The court differentiated between "lawful" and "unlawful" combatants, maintaining that the latter are not entitled to civil trials, and can be tried by tribunals. This fuzzy category of unlawful combatants has been adopted for use in today's "War on Terrorism." The Court upheld the decision, although Justice Felix Frankfurter, in his concurring opinion, wrote that the President did not follow Articles of War 46-53 (Fisher 2005 116). The case has left a legacy that is dangerous both for civil liberties and for the balance of powers. In making rules for the military tribunal, Roosevelt pushed his presidential powers to a new extreme. The President has the duty to preserve and protect the country, but how far should he go in performing this responsibility? The Court did not directly answer the question of whether the President had overstepped the limits of his constitutional authority.

The decision in *Ex parte Quirin* has been used by the George W. Bush administration to justify the imprisonment of "enemy combatants" in Guantanamo naval base and in other jails on the United States mainland. The problems raised by Royall regarding a court that had its judge, jury, and counsel appointed by the President are pertinent to trials by tribunal of the detainees. The right of the detained to be subject to writs of habeas corpus is also similar. The German saboteurs had the advantage of knowing the charges filed against them and, although their trial was held in secret, the fact that it was being held was known and the verdict was publicized soon after it was reached. There were three violations of the Law of War in the 1942 case. Under the Laws of War, the death penalty can not be given without a unanimous opinion; Roosevelt's Proclamation allowed a death penalty to be imposed with a two-thirds majority. In a trial by court martial or military tribunal, the case should be reviewed through the military justice system by the Judge Advocate General. Finally, Military Law can not make a new crime. This has to be done by congressional statute. (Fisher 2005 112). Since the time of *Quirin*, additional Geneva Accords signed in 1949 have been adopted that have explicitly given rights to Prisoners of War and have guaranteed each detainee a hearing to determine whether a particular individual is a lawful or an unlawful enemy combatant (Geneva Conventions 1949 Third Protocol).

The War on Terrorism

The USA PATRIOT Act has given the government some sweeping powers. Proposed programs such as the TIPS (Terrorism Information and Prevention Systems) and TIA (Total Information Awareness) that encourage civilians to observe other Americans have echoes of Stalinism. An initiative allowed by the Foreign Intelligence Surveillance Act has resulted in an increased number of requests to use clandestine observation devices. This use is legal if the request has been approved and authorized by a panel of federal judges. People do not have to be told that they are being observed. Furthermore, the standard needed for getting approval for a search or surveillance is that there need only be a slight suspicion that illegal foreign intelligence activities are possible (Schulhofer 2003 79).

Other intrusive government activities that have implications for civil liberties are investigative methods based on phone calls that have been updated and applied to e-mail. A "Pen-register" gets the phone numbers placed for outgoing calls. A "trap and trace" records the numbers from incoming calls. In either of these cases, the phone number can be identified with a person and usually an address. However, when these methods are used on e-mail, the content of the message is also vulnerable to interception.

New regulations allow these methods to be requested if the information needed is "relevant to the investigation" and not if there is a "probable cause" that something illegal is going on (Sullivan 2003 138). Again, this is a lowering of the standard that is similar to that allowed under the Foreign Intelligence Surveillance Act.

The most controversial aspects of new legislation passed to fight the War on Terror concern the detention and trials of people captured in the prosecution of this war. The current administration uses the descriptive status of "enemy combatant" instead of what many see as the appropriate legal status of "prisoner of war", a category that can include military and civilians. There is, however, a precedent for President Bush's designation of certain individuals as "enemy combatants" who are eligible for trial by a military tribunal. Lincoln, in a Proclamation of September 24, 1862, said that people who were involved in "disloyal practices" were subject to trial by military commission (Hanchett 1983 63). The basic conflict is the source of authority

for the President's declarations. Attorney General John Ashcroft argued that the President's power came from his position as Commander-in-Chief (Fisher 2005 167). Ashcroft further claimed that only the President had the authority to order these tribunals and that the Congress had no power to act in this area, a statement that is very controversial.

President Bush's Military Order (November 13 2001) had similarities to Franklin D. Roosevelt's order concerning the German saboteurs. In neither case was there judicial review. The final review was by the President. Roosevelt's order applied to the specific acts of a known group of people, whereas the Bush order applies to a much larger group that can include citizens as well as non-citizens. Definite proof of a crime is not necessary for detention, only a "reason to believe" someone is a member of al Qaida, has engaged in or plotted terrorism or has helped those who are terrorists. (Fisher 2005 168-169). The quality and reliability of the information used to detain people can be poor. Many individuals have been charged on the basis of reports in the Mobbs Declaration, which is a compilation of accounts gathered from detainees. No distinction is made between verified stories and rumors. Because some of this information might have been gathered from informants who were under torture, stress or duress, the validity of a particular accusation is difficult to gauge. The arrested person is also not able to confront his accuser, find the specific allegation or give evidence to oppose the claims.

Certain groups have also been listed as either supporting terrorism or as fronts for terrorists. People with connections to these organizations also come under suspicion. An example of the difficulties in assessing whether someone is helping terrorists occurred recently in Houston. A mosque, generously supported by the former Houston Rockets basketball player, Hakeem Olajuwon, was accused of giving aid to terrorists. The mosque, which donates a lot of its resources to a large number of charitable organizations, had given $80,000 to a group that had been listed as a terrorist front organization. No prosecutions were made (Hedges 2005 A23). This list of terrorist organizations has a parallel with the Attorney General's list of the McCarthy era. Once the name of a group is on a list, it is difficult to remove it and no discrimination is made between the nature of the group at different times.

Once the accused person comes before a military tribunal, he faces a judicial process that is different from a civil trial. All members of a military tribunal are officers in the military, with the possible exception of the defense attorney, who can be a civilian and is hired at the expense of the defendant. There are three to seven commissioned officers on the tribunal, which corresponds to the jury in a civil case. The presiding officer, who determines what evidence is admissible, must be a judge advocate from any of the military services. The trial is open to observers, although parts may be closed for security reasons. A two-thirds majority is necessary for conviction and a death sentence must be the unanimous verdict of a seven member panel. The decision is then reviewed by a three person committee appointed by the Secretary of Defense. Further review is provided by the Secretary of Defense and by the President. (Fisher 2005 180). This review process puts excessive power into the executive branch. If a person does have legal counsel, he can not meet privately with his lawyer. An observer must be present to avoid the danger of the accused being able to pass along information concerning terrorism.

The potential for infringement of civil rights increases as soon as a person is classified as an enemy combatant, a time well before the need for military tribunals. Both citizens and non-citizens may receive this designation and may be arrested and detained after being apprehended either on a foreign battlefield or in the United States. The reasons for an arrest include anything that relates to terrorist activity, a broad category that can include acts ranging from actually detonating a bomb to giving money to an organization that might have connections with groups identified as supporting terrorism (Chang 2002 62). Once a person is arrested

and detained he enters a shadowy realm of secrecy. He need not be given the grounds for his arrest, his name is not released, and he has no access to legal counsel. Therefore, neither he nor any other party can know that he has been arrested, can learn of the charges against him or contest the evidence. The detention is indefinite. One of the purposes of detention for a subject who is considered to be material witnesses is to give the government time to question him about terrorist activities. The secrecy of the imprisonment is conducive to illegal methods of questioning and illegal conditions of imprisonment. Information obtained under these circumstances may lead to further unjustified arrests and detentions.

Other questions concern who is eligible for trial in civil courts and who is subject to a trial by a military tribunal. Citizenship or non-citizenship and the place a person was captured are factors that influence the method of trial. In any of these situations, the definition of "enemy combatant" or "unlawful combatant" is the same - a person who does not follow the rules of war (Fisher 2005 201). He can be detained for the duration of the war or conflict. In a situation such as the War on Terrorism, in which the end of the conflict can not be defined, there is the possibility that an individual could be detained indefinitely.

Citizens, non-citizens and resident aliens have different legal protections. The U.S. Code (4001a) says that "no citizen may be imprisoned or otherwise detained… except pursuant to an Act of Congress" (Fisher 2000 222). The Bush administration has argued that the President has the authority to detain enemies during wartime. This authority comes from the Authorization for the Use of Force Act, signed on Sept 18, 2001, shortly after the attacks of September 11. The act's main objective was to authorize the President to engage in military action in Afghanistan, but it also gave him the power "to use all the necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided those (who committed)" acts of terrorism (Avalon project, AUFA). The "necessary and appropriate" phrase is the basis for the Presidential power to detain individuals. However, both citizens and non-citizens, if apprehended in the United States, should be eligible for writs of habeas corpus. Non-citizens arrested on the grounds of having engaged in terrorist activity are subject to deportation and may be held indefinitely pending a hearing that would result in an order that they leave the country (Chang 2002 64). If racial profiling is used, innocent people can become enmeshed in the arrest process.

Non-citizens apprehended in a foreign country have no rights to protection under United States Law. This precedent was established in *Eisentrager v. Johnson* (1949). Twenty-one enemy aliens were convicted by a military tribunal in China of crimes that violated the Laws of War. The Supreme Court ruled that their cases were not eligible for review by a United States civil court because the individuals had committed the crimes outside the United States and had never been imprisoned in the United States (Fisher 2005 155). Therefore, they had never been under United States sovereignty and did not have recourse to the federal legal system. The unusual status of the Guantanamo Naval Base led the Bush administration to argue that the *Eisentrager* precedent was valid in the cases of enemy combatants who were seized abroad and were detained at Guantanamo. Although the United States has perpetual control of the base through a lease drawn up after the Spanish American War, and the base is subject to United States military control, the United States does not own the land and Cuba retains sovereignty.

Since September 11, 2001, civil courts have been used to try those accused of crimes related to terrorist threats. The most prominent case has been the trial of Zacharias Moussaoui, who was arrested in Minnesota after he had paid a large amount of money in cash for lessons in a flight school. He was subsequently accused of being the twentieth hijacker, a charge that was later withdrawn. Moussaoui's trial was moved to a Virginia federal court. The parts of his trial that included testimony on classified matters were held in *camera*, a practice that shows that civil courts as well as military tribunals can protect legitimate government interests

for secrecy concerning matters of national security. After many delays, he entered a guilty plea to multiple counts of terrorist activity (CNN web site). The Government plans to ask for the death penalty when the sentencing part of the trial is reached in January 2006. The use of these courts strengthens the arguments of those who say that most of the acts included in the President's Military Order could be just as effectively tried in a non military setting. Those tried have included both citizens and non-citizens.

Supreme Court Decisions

Three major Supreme Court decisions regarding the rights of detained individuals were handed down on June 28, 2004. Each dealt with different aspects of the controversies regarding detention.

Rasul v. Bush (findlaw 2004, 03-334) involved two Australians and twelve Kuwaitis who had been captured in Afghanistan and detained at Guantanamo Bay. They requested writs of habeas corpus. After their requests were denied, an appeal was made to the Supreme Court. Justice John Paul Stevens, writing for the majority, held that federal courts were eligible to consider challenges to detentions that were filed by those imprisoned at Guantanamo. The Court specifically rejected the government claims that cited the *Eisentrager* case as a precedent. In the earlier case, the accused were never in an area in which the United States had sovereignty. The opinion also clarified the legal status of the naval base by stating that, although Cuba had sovereignty, the United States had exclusive jurisdiction, a condition that made appeal to United States Courts possible. In a concurring opinion, Justice Anthony Kennedy noted that resident aliens had always had access to federal courts (Fisher 2005 248).

Rumsfeld v. Padilla (03-1027) concerned an appeal for *habeas corpus* filed by an American citizen, Jose Padilla, who was arrested in Chicago on the grounds that he had been planning to set off a "dirty bomb". He was designated an enemy combatant by President Bush and was kept in jail in New York and then was later moved to the navy brig in Charleston, SC. Although he was held incommunicado, his attorney did file motions in his behalf. The questions in this case involved the legitimacy of the President's power and the definition of an enemy combatant. The Supreme Court ruled that the case had been filed in an incorrect court and that the person named as defendant should have been the Commander of the Brig in Charleston and not the Secretary of Defense. Because of the incorrect jurisdiction, the Court did not discuss the legal question of the President's authority.

The most significant case is *Hamdi v. Rumsfeld* (03-6696). Hamdi was born in Louisiana and was captured in Afghanistan. He was sent to Guantanamo and later was moved to the brig in Charleston. He requested counsel, asked that his questioning be stopped, claimed his detention violated rights protected by the Fifth and Fourteenth Amendments, and requested a release.

The Court upheld the legitimacy of his original detention, citing precedents in *Exparte Milligan*, *Quirin*, and sections of the Lieber Code. Unlike Milligan, who was arrested outside a war zone, Hamdi was apprehended in an area of war and had a weapon. This condition would classify him as a combatant. Following *Quirin*, the court held it is legal to classify a citizen as an enemy combatant if he helps the enemy. He was taken prisoner legitimately and could be detained because prisoners can be held for the duration of hostilities so they will not return to the battlefield. One of the difficulties of a war against insurgents is the difficulty of determining what or where the battle field is. Hamdi maintained that he was in the country to give humanitarian aid and that he

wasabout to surrender the gun.

However, the Court, with Justice Sandra Day O'Connor writing the majority opinion, vacated the order of the Circuit Court. She summed up the difficulty of the conflict between the public safety and the rights of individuals by saying that it is "during our most challenging ... moments that our nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to those principles for which we fight abroad" (C 3). One of the grounds was that the evidence was not conclusive and that his detention was of undetermined length and might be perpetual if there is no definite end to the War on Terrorism. The decision suggested that the government should review its decision to arrest a person using only a "some evidence" standard because there was a risk that too much power would be concentrated in the executive branch of the government if the courts were not allowed to review cases (III D).

The Court ruled that Hamdi was allowed to have a court review the grounds for his detention. This review must be before a neutral and impartial judge (Fisher 2005 228). The government decided to release Hamdi on the condition that he renounce his United States citizenship, return to Saudi Arabia and promise not to sue the government (Fisher 2005 229).

Currently, there are plans to convene military tribunals at the Naval Base on Guantanamo. The Circuit Court for the District of Columbia overruled a lower court ruling that these tribunals violated terms of the Geneva Convention. There are plans to try at least four detainees for war crimes. It is almost certain that this case will be appealed to the Supreme Court (Serrano 2005 A6).

In reviewing these cases, students should be reminded that often, the further in time one is from the crime, the less desire there is for punishment. Mary Surratt's son, John, escaped the round up of conspirators and went to Europe where he stayed for several years. On his return, he was tried in a civil court, not a military tribunal. The jury was hung and the case was never retried. Two of the German saboteurs who avoided execution and were sentenced to prison were released and pardoned after World War II. Even Andrew Jackson, who was fined for his imprisonment of the judge, had his money returned by Congress many years later. If the pattern continues, those currently imprisoned might get more lenient treatment.

Lesson Plans

Lesson # 1

The Rules of War Time: one 90 minute period

Source to be used: Yale Law School Avalon Project Web site. The Lieber Code.

Use the Internet to find information about the Lieber Code. When was it written? Why was it written? Are parts of it still used?

Vocabulary to be defined: Martial, hostile, incumbent, paramount, oppression, statute, siege, besieged.

Have students answer questions based on the following Articles of the Code:

Article 1. What is martial law? Where is it imposed? How long does it last?

Article 2. "Military oppression is not military law". What does this mean? Why must a soldier be guided by principles of "justice, honor and humanity". What advantage does he have over civilians?

Article 5. "Saving the country is paramount to all other considerations." Explain this statement.

Article 12. Who approves a death penalty? Must the chief executive always review it?

Article 13. What are the two types of military justice?

Articles 15 and 16. What does military necessity permit? What does it not permit?

Articles 17 and 18. What is permitted in a siege? What is the status of civilians?

Article 29. "The object of all modern war is Peace." "The more vigorously a war is pursued, the better it is for humanity". Explain this statement.

Article 35 and 36. What works of art should be protected? This is particularly relevant to Iraq and Bosnia.

Article 43. What happens to slaves?

Articles 49 and 50. Who are prisoners of war?

Articles 63, 65, 81-85. What people are not allowed to have prisoner of war status?

Articles 88-89. What is a spy?

Articles 74-76. How should prisoners of war be treated?

Lesson #2

Trial of Lincoln Conspirators Part I Time: 45 minutes

Use the University of Missouri-Kansas City Law School site.

1. Attorney General Speed defines two types of enemy (p.4).
2. What are these two types and into which category do the conspirators fall?
3. Tribunals exist to serve justice, save life and prevent cruelty (p.6).
4. Is this true in the case of the detainees in Cuba?
5. What is a "public enemy" (p.7)?
6. Was this description valid for the Lincoln Conspirators?
7. Was it valid for the German saboteurs?
8. Is it valid for currently held alleged terrorists?
9. What are the arguments against military tribunals (p. 8)?

Lesson #3

Lincoln Conspirators Part II Time: 45 minutes

Use the University of Missouri-Kansas City Law site.

Students will read a writ of habeas corpus.

The focus is on Mary Surratt. Students will answer the following questions:

- Why did Mary Surratt's lawyers want a writ?
- What was the evidence for and against her?
- Do you think she was innocent?
- The military commission asked for leniency for her. Did she get thisbenefit because she was female? Was this fair?
- Why was her son not tried?

Use some of the testimony and have students take parts to dramatize it.

There is a good Jeopardy game on the site.

Lesson #4

Ex Parte Quirin 45 minutes or group project

- What were the circumstances of this case?
- What were the arguments for trying them in a tribunal.
- What mistakes did FDR make?
- What parts of this are being used in the current fight against terrorism?

Post 9/11 trials: Group Projects

Use the *Hamdi, Padilla* and *Moussaoui* cases

- A. Trials of Guantanamo detainees will continue. Have students read a daily paper.
- B. What was the citizenship status of each person?
- What were the circumstances of the arrest of each?
- Was racial or ethnic profiling used?
- What were the charges brought against each?
- What were the legal issues?
- How was each case resolved?

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