IN THE SUPREME COURT OF THE UNITED STATES

July, Special Term, 1942.

Wednesday, July 29, 1942.

United States Ex Rel.,
Ernest Peter Burger, et al.,
Petitioners

v

Brig. Gen. Albert L. Cox, U. S. A.,
Provost Marshal of the Military
District of Washington,
Respondent

Transcript of Proceedings

Volume 1

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IN THE SUPREME COURT OF THE UNITED STATES

July, Special Term, 1942

In the Matters of the Applications of ERNEST PETER BURGER, HERBERT HANS HAUPT, HEINRICH HARM HEINCK, EDWARD JOHN KERLING, HERMANN OTTO NEUBAUER, RICHARD QUIRIN and WERNER THIEL FOR Writs of Habeas Corpus.	Nos.

United States Ex Rel., Ernest Peter Burger, et al.,

Petitioners,

v.

Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington,

Respondent.

- - - - -

Washington, D. C.,

Wednesday, July 29, 1942.

The above-entitled cause came on for argument before the Supreme Court of the United States at 12 o'clock noon, Wednesday, July 29, 1942.

Present:

Mr. Chief Justice Harlan F. Stone,
Mr. Justice Owen J. Roberts,
Mr. Justice Hugo Lafayette Black,
Mr. Justice Stanley Forman Reed,
Mr. Justice Felix Frankfurter,
Mr. Justice Wiley Rutledge,
Mr. Justice Robert H. Jackson.

APPEARANCES:

On behalf of Petitioners:

Colonel Cassius M. Dowell, U. S. Army,
Colonel Kenneth C. Royall, Armies of the United States,

On behalf of the Respondent:

Honorable Francis Biddle, The Attorney General of the United States,
Major General Myron C. Cramer, U. S. A.,
The Judge Advocate General,
Attorneys for the Respondent.

Oscar Cox,
Assistant Solicitor General,

Col. Erwin N. Treusch, U. S. A.,
George Thomas Washington,
Robert S. Stevens,
Myres S. McDougal,
Lloyd N. Cutler,
Of Counsel.

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P R O C E E D I N G S

The Chief Justice. Are there any applications for admissi

The Clerk. Cassius M. Dowell.

Colonel Royall. May it please the Court, I move the admission of Colonel Cassius M. Dowell, of Fort Dix. I have examined his credentials filed in the office of the Clerk and am satisfied that he possesses the necessary qualifications.

The Chief Justice. Colonel Dowell, you may take the oath.

(The oath was administered to Colonel Cassius M. Dowell by the Clerk.)

The Chief Justice. The Court has ordered that it convene in Special Term in order that certain applications might be presented to the Court, in open court, and argument be heard in respect thereto.

Mr. Justice Douglas is in the West and is on his way to attend, but he has not yet been able to arrive. He will be vouched in and participate in the decision of the Court.

Mr. Attorney General, from the papers filed, we are aware that this proceeding is brought to contest the validity of the

detention of certain persons now being tried by a military commission. I am informed that my son, who is an officer in the Army, was assigned to participate in the defense. Of course if that fact were regarded as ground for my not participating in the case, I should at once disqualify myself. In order that I may be advised and that the Court may be advised whether he has participated in this proceeding and what his connection with the case is, I will ask you, if you are so advised, to state, so that it may become of record.

The Attorney General. May it please the Court, and Mr. Chief Justice, the counsel for the Prosecution and the Defendants are agreed that your son, Major Lansom H. Stone, did not in any way participate in these habeas corpus proceedings. He assisted defense counsel in the presentation of the case before the Military Commission, under orders. He in no way worked on the proceedings or did anything in connection with the proceedings before this Court, and therefore counsel for both sides join in urging, Mr. Chief Justice, that you sit in this case.

The Chief Justice. Does counsel for the petitioners concur in that statement?

Colonel Royall. We do.

The Chief Justice. You may proceed.

OPENING ARGUMENT ON BEHALF OF PETITIONERS
BY
COLONEL KENNETH C. ROYALL

Colonel Royall. May it please the Court, on behalf of the petitioners, Ernest Peter Burger, Herbert Hans Haupt, Heinrich Harm Heinck, Edward John Kerling, Hermann Otto Neubauer, Richard Quirin, and Werner Thiel, Colonel Cassius M. Dowell and

I present to the Court and ask leave to file a petition for a writ of habeas corpus.

The record itself discloses--and this fact is noted in the brief--that on a previous day application had been made for leave to file this petition before Mr. Justice Morris of the District Court of the United States for the District of Columbia and that he refused to permit the filing of the petition for writ of habeas corpus in the District Court.

We therefore ask the consideration of this present writ in the appellate jurisdiction of the Supreme Court.

Mr. Justice Frankfurter. Did Judge Morris make any memorandum or write any decision?

Colonel Royall. He did make a memorandum.

Mr. Justice Frankfurter. Is that in the record?

Colonel Royall. That is also in the record. It should be attached to the petition. It is, on the copy which I have, and I assume it was so attached in the original.

Incidentally, there has been furnished to the Court, I think, a copy of one of the petitions, all of them being alike, with some minor differences; and also there has been attached thereto a notation of these minor differences.

Mr. Justice Reed. I have before me the original petition which appears to have been filed, but I do not see the document to which you refer.

Colonel Royall. It should be on the last page. If it has been omitted from any copy it was an inadvertence.

The Chief Justice. You made separate applications, and there is an entire file of these applications, the last page of which is the order, and also a memorandum statement of the

grounds upon which Justice Harris denied the application?

Colonel Royall. Yes, sir; that is correct. On that feature of the matter we have not thought it necessary to give any discussion in the brief itself. The question of the appellate jurisdiction of the Court and of the issuance of a writ of habeas corpus in connection with your appellate jurisdiction has been given careful study by the Attorney General's office, as well as by ourselves, if the Court desires any discussion of that.

The Chief Justice. Does the Attorney General challenge the jurisdiction of this Court?

The Attorney General. I do not, Mr. Chief Justice.

Mr. Justice Frankfurter. Will you state briefly the grounds on which you claim jurisdiction?

The Attorney General. We want to make it clear that we do not challenge the jurisdiction of the Court on this specific ground, that is, the Court's appellate jurisdiction to entertain a writ.

Mr. Justice Frankfurter. Will either you, Colonel Royall, or the Attorney General state briefly the grounds on which you claim this Court has jurisdiction, how it has such jurisdiction, over an order by certain Justice Harris' denial of the petition?

Colonel Royall. The Court is familiar with the statute which provides that the Supreme Court may issue a writ of habeas corpus. That statute must, of course, be construed consistently with the Constitution of the United States which limits the jurisdiction of this Court to an appellate jurisdiction. To give the statute any meaning at all, therefore,

it must be construed as being a method of appeal or a method of review. The ordinary methods of review are not included within the writ of habeas corpus. Therefore the ordinary procedure--

Mr. Justice Frankfurter. Why do you say that?

Colonel Royall. Because a writ of habeas corpus is, in and of itself, a different type of writ from a writ of certiorari or any other method of review with which I am familiar.

Mr. Justice Frankfurter. You mean that the restriction upon the appellate jurisdiction of this Court, Article 3, does not apply to habeas corpus cases?

Colonel Royall. I think it does apply to habeas corpus, but habeas corpus, being provided by statute, is an additional method of review. By "additional method" I mean it is an addition to certiorari or any other method of review prescribed by law.

That being true, when a lower court, whether it be District or Circuit, has denied or at least has refused to permit the filing of a petition for writ of habeas corpus, it is of course subject to review; and we think the statute means that an appropriate method of review is an application to this court for a writ of habeas corpus, and it appearing that upon the contention of the petitioners the petitioners are unlawfully detained in restraint of their liberty, and it further appearing from the petition that their effort to obtain habeas corpus from the court of primary jurisdiction has been unsuccessful--

Mr. Justice Frankfurter (interposing). Could Congress provide that appeal from the District Court should only lie to the Circuit Court of Appeals?

Colonel Royall. It could so provide.

Mr. Justice Frankfurter. And the question is whether it did?

Colonel Royall. The question is whether it did, when you construe the ordinary methods of review and also give effect to the provision that the Supreme Court may issue a writ of habeas corpus.

Mr. Justice Frankfurter. In other words, your argument boils down to this, that the Act of 1891 does not apply to habeas corpus?

Colonel Royall. That is correct, sir. That is the application of the argument.

This has been passed on, almost upon the exact facts, in two cases, to which we refer you. Incidentally, this memorandum has been worked out jointly. The case more nearly in point is the case of Ex Parte Yerger, 8 Wallace, 85.

Mr. Justice Frankfurter. What is the date?

Colonel Royall. 1868.

Mr. Justice Frankfurter. That was before the Act of 1891.

Colonel Royall. It was. The next case most nearly in point is also before that Act, the case of Ex Parte Bollman and Swartwout, 4 Cranch, 75.

So that, it seems to me, is the position that we must take and do take in this matter. I do not know whether it is appropriate to say or not, and if the Court does not think so, I will of course not pursue it further; but as a practical matter, this was all that we could do.

Mr. Justice Frankfurter. Do you mind spelling that out?

Colonel Royall. The Military Commission started its

sessions on the 8th day of July and counsel were appointed a few days before that and were under orders to take part in the proceedings before the Military Commission, which they did. It has been impossible, as a physical matter, to do anything but attend those hearings, until the evidense stopped. I think no one would deny that who knows the circumstances. As soon as the evidence closed, even prior thereto, we made an effort to present this matter in the best and quickest way possible.

The order appointing the Military Commission, which is a part of the record, provides for no review in the ordinary sense. That is, between the time the Commission takes its action and the time the Executive acts there is no period which anyone could safely count on between the conclusion of the hearing before the Commission and the execution of any sentence that might be imposed; and it is apparent that it would have been impossible, even in the matter of preparing papers, if nothing else, to have followed anything other than this procedure.

There is another practical reason in favor of the procedure. Defense counsel conceive that it is their duty to assert every right which these petitioners have to assert. They do not conceive it to be their duty to resort to anything of a dilatory nature; and this is a prompt method, if sound, of dealing with the matter.

Mr. Justice Frankfurter. The question on which I would like your view is why, after Justice Morris' denial, you did not take steps to appeal therefrom before the Circuit Court of Appeals for the District.

Colonel Royall. Justice Morris' denial was at 8 o'clock

last night, or probably thereafter. The Commission meets again tomorrow to dispose of this matter, at least to hear our arguments, and then to dispose of it as it sees fit.

Mr. Justice Frankfurter. Why could not the appeal have been perfected before the Circuit Court of Appeals? That does not require elaborate papers.

Colonel Royall. No; it does not. The appeal might have been perfected if we had had a little additional element of time.

The Chief Justice. That would not affect our jurisdiction.

Colonel Royall. No, it would not. All it would do would be to take one further step towards reaching this Court, and further steps would have to be taken.

Mr. Justice Frankfurter. But it would level the path from the Circuit Court of Appeals to this Court.

Colonel Royall. That might have been done, sir.

Mr. Justice Frankfurter. Then it furnishes an indispensable step in jurisdiction which otherwise the Court does not have?

Colonel Royall. That is entirely correct; and it was our purpose and, since the inquiry has reached this stage, it is still our purpose, to ask this Court to follow this procedure which I now suggest, that you hear this matter on argument, if that can be appropriately and properly done, and that we be permitted to take such additional procedural steps as may be necessary, if the Court desires to grant that permission. We do that out of an abundance of caution, because we feel that the habeas corpus statute as applicable to the Supreme Court, still being in existence, should be given some meaning,

and we know of no other meaning it can be given as a method of appeal.

I would like to suggest that perhaps the Attorney General has some views on this matter if it is appropriate for him to express them.

The Chief Justice. Have you filed the memorandum to which you have referred?

Colonel Royall. No, sir; we have not. There should be no difficulty in filing it. It was finished at quarter to 12, I think.

The Chief Justice. Do you cite the Siebold case?

The Attorney General. Yes, sir.

Mr. Justice Frankfurter. Is there any case, Colonel Royall, within the time you had to investigate this matter, since the Circuit Court of Appeals Act, in which this Court has held that a direct review of a denial of a habeas corpus in the District Court is properly here, although the Circuit Court of Appeals has completely disregarded it?

Colonel Royall. Not unless it was found since I left the office at quarter to 12.

Mr. Justice Frankfurter. We were talking about cases coming from the State courts.

Colonel Royall. Yes; I understand. I do not know of any, sir. It is possible that some have been found. I have not been able to find any.

Mr. Justice Roberts. There are two cases in which we have taken cognizance of direct appeals. One is in 255 U. S.. But that question was not discussed in those cases.

Mr. Justice Frankfurter. In the Siebold case was there any way by which the matter could have been reviewed? In other

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words, if this Court had not exercised its appellate jurisdiction, would there have been any other way to review it?

Colonel Royall. I have not analyzed the case to the extent that I am able to give you an answer to that question. I am sorry.

Mr. Justice Frankfurter. I do not mean that you have had time to examine these cases.

Colonel Royall. I will tell you that I have not.

I wonder if the Court would think it appropriate to hear from the Attorney General.

The Chief Justice. Since it is a jurisdictional matter I think it would be appropriate to get your position and then their position.

The Attorney General. As the Court sees, we have not examined the jurisdictional question to the extent that we should have. My view is this. I think I will first quote from the Constitution, so as to begin at the beginning.

Article 3 of course provides that in all cases affecting ambassadors and other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

So, it is perfectly clear in the Constitution that the Supreme Court has no original jurisdiction of writs of habeas corpus; and it was so held in the case of Marbury and Madison and the line of cases following.

However, the Supreme Court, in the cases which we cite in the memorandum, have given great latitude to entertaining

writs in their appellate jurisdiction. This seems to me to be a matter of discretion which may be exercised favorably to their jurisdiction, under the very unusual circumstances presented. In other words, if there is a color of a lower Federal court having denied the writ and the process under which by appeal the matter might be brought up, it seems to me to be within the discretion of the Supreme Court, in aid of the appellate jurisdiction, though not necessarily following the form of the appeal provided by the statute, to hasten the exercise of that jurisdiction by the issuance of a writ which is in aid of the jurisdiction which has been established in the lower court.

The analogy, of course, in the Mooney case is by no means a perfect one, but there the petition for a writ of habeas corpus was referred to by the Court in these words:

> "The motion of Mooney was to file a petition for an original writ of habeas corpus as a method of reviewing the validity of his detention by commitment by the State court."

In the decision in the Mooney case, referring to Mooney, the Court said:

> "He submits the records of proceedings set forth in his petition for a writ of habeas corpus presented to the District Court of the United States for the Northern District of California and dismissed upon the ground that he had not exhausted his legal remedies in the State court. Applications to the Judges of the Circuit Court of Appeals for the Ninth Circuit for allowance of an appeal to that court from the judgment of dismissal have severally been denied."

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Of course it is true that in that case there was the filing of an appeal, which method has not been pursued here, but that does not seem to me to go to the fundamental jurisdiction of this Court to exercise its discretion even before the steps had been taken to perfect an appeal from the District Court.

Mr. Justice Jackson. Your point is that if it did not come here by a paper called a writ of habeas corpus, it could be sent up by a paper called a writ of certiorari?

The Attorney General. Yes, your Honor.

Mr. Justice Jackson. And whether the Court exercises jurisdiction under the one title or the other is not important at this time?

The Attorney General. May I add a word to that. It seems to me that to say that you do not have jurisdiction would be to deny your ability to issue a writ in aid of the appellate jurisdiction which you clearly would have under the appeal.

Mr. Justice Frankfurter. But until there is an appeal you have not got any.

The Attorney General. I cannot concede that.

The Chief Justice. In the Siebold case the Court took jurisdiction on the ground that Congress had not allowed an appeal, but nevertheless had not prohibited the exercise of the writ in aid of jurisdiction.

The Attorney General. That is of course true, Mr. Chief Justice.

The Chief Justice. The real question we have here is whether or not by having granted only an appeal to the Circuit Court of Appeals on sentiment Congress intended to foreclose

16w the traditional exercise of the right to issue habeas corpus.

The Attorney General. That is the precise question. I take it, then, from what the Chief Justice says, that unless the Congress has foreclosed that appeal, it is not inappropriate for the Supreme Court to grant a writ in aid of that appeal unless you can find something in the statute which forecloses that action; and the argument is only that Congress, having provided methods of appeal, says to the Supreme Court that it cannot use other writs to expedite the method.

Not much light is thrown by the statute and the Code. I think it is pertinent to quote Section 262 of the Code, which is in 28 U. S., c.377. And again I say that it is not determinative of this, but, nevertheless, I think it throws some light upon the question. It says that the Circuit Courts of Appeal and the District Courts shall have power to issue all writs not specifically provided for by statute.

Of course it is contended that this writ is specific, but I think the language is broad enough to cover the right of the Supreme Court to issue writs generally.

It says, if I may finish it:

> "shall have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions."

In this case your respective jurisdiction is the appellate jurisdiction over writs of habeas corpus.

Mr. Justice Frankfurter. Does not that beg the whole question, namely, that we have appellate jurisdiction over writs of habeas corpus?

The Attorney General. I think the only way of knowing that is from a study of the statutes. It does not seem to me to

17w 15w beg the question to say that the statute indicates that other writs may be issued in aid of your jurisdiction.

Mr. Justice Frankfurter. But that statute was passed before there was a Circuit Court of Appeals Act, in 1891 and then 1925. Therefore we have to consider the Act of 1891 plus the Act of 1925 and the purposes for which those statutes were passed. Certainly Congress could say, as it did say, that you must first go to the Circuit Court of Appeals before you can go to the Supreme Court of the United States; and therefore the question really is on the matter of bringing cases to this Court directly from the District Court except in the specifically enumerated instances and whether it was impliedly excepted to as to habeas corpus.

The Attorney General. That is the question.

Mr. Justice Frankfurter. In the only case that I know of since the Act of 1925 the Court discharged the rule which it had granted for a writ of habeas corpus. It did not write any opinion, and one does not know whether it was on jurisdictional grounds or not. But the fact is, if you will be good enough to look at it when you get the time, that the Court did first grant leave and then discharged the writ; and I think there is reason for saying that it did it on jurisdictional grounds.

Mr. Justice Jackson. If there is no authority one way or the other on this matter, and if it is an open question, then I suppose it is a question whether, in dealing with it, we should send this to some other court and endure a period of delay, or go ahead and decide it. You see no reason as representing the Government to suggest delay, do you?

16w The Attorney General. I see no reason. Moreover, there is a very practical reason which defense counsel has urged and will urge, that even if an appeal be granted it might not act as a stay, and the case would very quickly become moot.

I would like to argue the matter a little further to meet Mr. Justice Frankfurter's suggestions, which of course are pretty vigorous and fundamental.

May I finish the reading of this section of the Code? (Reading):

> "all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

That is a very wide phrase, looking, it seems to me, to the aid of the aid of the Court by the use of any writs which can help its jurisdiction.

After all, I think it is important to remember that the appellate jurisdiction is granted by the Constitution, and I take it that the Constitution grants to the Supreme Court such a broad appellate jurisdiction that the jurisdiction can be aided in any way which the Court deems appropriate in the absence of clear language in the statute saying that the Supreme Court shall not aid its appellate jurisdiction by this method. I do think the circumstances of the case are important, because obviously that is a matter of discretion which certainly should only be exercised in the most exceptional cases.

Mr. Justice Frankfurter. This jurisdiction exists in this case and it exists in other cases, and it may be said and correctly said that criminal judgments should be quickly

17w disposed of, and therefore there is ground for arguing as to every criminal case that instead of going from the District Court to the Circuit Court of Appeals you can come to this Court by way of habeas corpus. But unless there is specific provision in the statute to the extent of stating explicitly what types of cases may come directly from the District Court to the Supreme Court, this Court might be deluged with cases.

The Attorney General. In answer to the suggestion that the Court might be deluged with other cases, if you have discretion you may refuse to exercise it merely because there may be other cases along this line where the exercise of discretion would be improper. It seems to me that a study of the cases shows, assuming I agree, as Mr. Justice Frankfurter pointed out, that the statute was not in existence at the time the Yerger case was decided, but nevertheless the Supreme Court did at that time where no appeal existed use this writ to help its appellate jurisdiction; and the fact that an appeal was later provided does not seem to me to necessarily bar it from the propriety of using a writ in aid of an appellate jurisdiction which had then been provided by the statute itself.

Mr. Justice Jackson. Would there be objection on your part to filing an additional piece of paper which would obviate the difficulty?

The Attorney General. I do not see how I could urge any objection. If counsel wishes to file any papers, let him do so.

The Chief Justice. You may take that under advisement if you wish. If you want to say more on the jurisdictional point or file further briefs, that may be done, and you can

18w now proceed to argue the case after you have completed what ever you wish to say on the subject of jurisdiction, and if counsel wish to make an application for certiorari I suppose that is open.

Colonel Royall. As I stated to the Court in my opening remarks, that is what we wanted to do. Time was the only thing that prevented it; and we were going to ask permission to do that, for this question seemed to be a serious one.

I would like to say one additional thing about the appeal. I recognize that the question is exactly as the Chief Justice and Mr. Justice Frankfurter have stated it to be, with one additional consideration. The practical facts which I outlined have some legal significance. A man is entitled to an appeal. I think this thought was suggested to me largely by what Mr. Justice Jackson said. He is entitled to an appeal. He is entitled to an appeal that has some prospect of being of practical value. If this were the only method of acting, I think the Supreme Court could do so.

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May it please the Court, on the principal argument itself there are two questions presented to the Court which are capable of various divisions and refinements, but in essence they are whether the petitioners have a right to enter the civil courts because of the fact that most or all of them are aliens; and second, if they do have the right to enter the civil courts, have they established by their allegations a case of unlawful detention and restraint?

Six of the seven petitioners are admittedly citizens of Germany. One of those six was originally a citizen, but by reason of the provisions of our statutes has lost his citizenship, he being a naturalized citizen and having failed to comply with some of the requisites necessary to keep alive his citizenship, so to speak.

The seventh member contends that he is a citizen; the prosecution contends otherwise.

All these persons lived in the United States for a considerable period of time. All of them returned to Germany at varying periods. All seven of them landed on the American coast from a German submarine. All seven of them had attended some course of instruction in Germany.

Mr. Justice Black. Does that include the citizen?

Colonel Royall. That includes the citizen.

Mr. Justice Black. That is admitted?

Colonel Royall. That is admitted. We are admitting only facts that the statements of the parties themselves definitely and specifically cover.

The group of seven was divided into two subgroups. Part of them landed in Long Island, and part of them in Florida.

The groups brought ashore certain explosives. As we see the facts, there was no definite plan as to how and when those explosives would be used. They have not been used, no damage has been done, and no person injured.

In connection with the facts which I have stated, I call the attention of the Court to a stipulation which was either filed this morning, within the past half or three-quarters of an hour, or will be filed--I now understand it has been filed--which provides that in lieu of the necessity of testimony or reference to a master, the evidence given before the alleged military commission may be considered by this Court and has been filed with the Court. Together with that there has been filed a request that that testimony, for military reasons, be impounded.

The Chief Justice. The Court has already considered that motion.

Colonel Royall. The Court has acted on that? I was not certain.

The stipulation serves the purpose of summarizing some of those facts covered by a voluminous stenographic report and includes facts as to which there is no controversy either way.

It is the contention of the petitioners that each of these alleged acts, or criminal acts, of the petitioners is covered by civil statute--that is, a criminal statute--in the civil courts and that the courts are open and these petitioners tried in the regular manner.

The Chief Justice. Before you go to that, may I ask you, Is the point involved between a citizen and a noncitizen merely whether a noncitizen does not have access to the courts and a

citizen may?

Colonel Royall. I think that is the only significance of that fact in this particular hearing. It happens that the facts relating to citizenship of the petitioner Haupt are so closely tied up with his guilt or innocence that it may be material elsewhere; but as far as this hearing is concerned, that is the only importance of whether or not he is a citizen.

Mr. Justice Frankfurter. I have not read any of the papers, Colonel Royall. Does it appear from the papers whether or not the nonaliens were members of the military establishment of a foreign power?

Colonel Royall. It appears with some equivocation. I may hesitate to answer some of these questions, because Colonel Dowell and myself, particularly, are under rather strict orders as to secrecy, and we do not want to violate those orders; for that reason there may be some discussion here that we probably cannot go into.

Mr. Justice Frankfurter. That is why I restricted my question to the papers. It was with reference to the question by the Chief Justice whether there was any difference between the citizens and the noncitizens.

Colonel Royall. Yes.

Mr. Justice Frankfurter. I was wondering whether military allegiance to a foreign power or enemy power did not raise any question as to the loss of citizenship as it pertained to the citizens.

Colonel Royall. There appear in the stipulation filed here certain facts that might tend to show that they were members of the foreign military power; there are other facts which we con-

e4 tend point otherwise in the case of certain of the petitioners.

The Chief Justice. Does it appear from the papers before us or from anything which you can speak of whether either of the alleged citizens ever took service in the German Army?

Colonel Royall. Yes, it does.

The Chief Justice. And whether or not they took the usual oath of allegiance to Germany or the German Reich?

Colonel Royall. It does not specifically appear in the stipulation that any of them took the oath of allegiance to the German Reich.

Mr. Justice Frankfurter. Do you represent both the citizens and the aliens?

Colonel Royall. Yes, we represent the one citizen--who is, as we contend, still a citizen--and the other six.

Mr. Justice Frankfurter. So, as far as you are concerned, all these seven petitioners are in the same legal situation?

Colonel Royall. There may possibly be a difference in the right to enter this Court between the aliens and the citizen.

Mr. Justice Frankfurter. But leaving that aside?

Colonel Royall. That aside, there is no difference. We think the aliens have a right to enter this Court. In fairness, I must say that there might conceivably be a difference.

Mr. Justice Byrnes. As to Haupt, who alleges he is a citizen, what was the subject of the contract you stipulated he entered into with the sabotage school? Is that one of the things you cannot tell?

Colonel Royall. I do not think, sir, that we should go into detail on that.

e5 Mr. Justice Byrnes. Would it disclose whether or not he had taken an oath of allegiance in that contract or had made any claim?

Colonel Royall. He stated that he did not, and there is no direct evidence to deny it.

Mr. Justice Byrnes. He was given a uniform upon entering the school? That is in the stipulation?

Colonel Royall. Yes, sir.

The Chief Justice. I am not quite sure whether I understood you. I thought you said you did not challenge Haupt's citizenship--that is, that the Government did not challenge Haupt's citizenship.

Colonel Royall. The Government contends that Haupt is not a citizen; we contend that he is. As to the other six, admittedly they are not citizens.

The Chief Justice. I suppose that in this proceeding the burden will devolve upon you to establish it, if it makes a difference?

Colonel Royall. The burden would be on us to establish it; but it having been stipulated that Haupt was a citizen of the United States in 1941, there may be some question of that carrying the burden to the point where the prosecution must show otherwise.

Mr. Justice Black. Do I understand you to concede that the power to try a citizen before a military commission and the power to try aliens before a military commission is identical?

Colonel Royall. I do think there is a difference there also, and I should correct my previous statement. I think that

06 in the case of citizens it is perhaps a little clearer that they cannot be tried by military commissions. That is correct, sir.

I thank Justice Black for calling that to my attention. We shall cover that later.

Mr. Justice Jackson. As I understand it, you say that they landed from a submarine operated by the German Government?

Colonel Royall. Right, sir.

Mr. Justice Black. They were brought here by the German Government and were landed on our shores?

Colonel Royall. That is correct, sir.

Mr. Justice Jackson. They constituted, I suppose, an invading force?

Colonel Royall. No, sir.

Mr. Justice Jackson. Why not? If you concede that much, why did they not constitute an invading force that had no rights whatever except, of course, under the laws of war?

Colonel Royall. Certain of the defendants, with varying degrees of corroboration, stated that they were using this as merely a means of escaping from Germany and reaching America and that they had no intention or purpose to commit any acts of sabotage or violence.

Mr. Justice Jackson. Would your argument be based on the fact that their application depends on our believing that or accepting that as a fact?

Colonel Royall. I do not know that it would, sir, because that involves, in turn, the question of where the burden is, and I do not know where the burden is. In other words, the fact is admitted that these men came from submarines.

o7 It is not admitted that they were members of the German military force.

Mr. Justice Frankfurter. Will it be, or is it, your argument that the kind of issue that was discussed in the exchange of colloquy between you and Mr. Justice Jackson is an issue that must be tried before a civil and not a military tribunal?

Colonel Royall. I think that would be our contention; and we think that regardless of whether they came to this country as an invading force, if they could be designated as an invading force, they are still entitled under our statute to be tried by a civil court and are further entitled to show that the order appointing the military commission is fatally defective because it violates express statutes.

I am running ahead of my story somewhat, but this is to indicate what we shall contend.

Mr. Justice Reed. Would it be fair to say from your argument that we must determine here a question of status but that it is not necessary for us to determine here a question of guilt or innocence?

Colonel Royall. Yes, sir. I think that is exactly the distinction, if you have to determine the question of fact.

Mr. Justice Reed. Do we have to determine the question of guilt or innocence?

Colonel Royall. No, sir, I do not think you do.

Mr. Justice Reed. Then, we may have other facts which relate solely to whether we should or should not issue the order of habeas corpus?

Colonel Royall. Yes.

c8 Mr. Justice Reed. That would depend upon their relation to the military force; is that your contention?

Colonel Royall. No, sir, not their relation to the military force; I do not think that is determinative of the question.

Mr. Justice Reed. Is it a question of their status as enemies or citizens of Germany, or citizens of the United States, or engaged in military enterprises? What is the status we must determine here?

Colonel Royall. If the Court accepts our view in its entirety, there is no question of fact or no question of status presented. We contend that regardless of the facts, regardless of whether they were citizens, and regardless of their method of entering this country, they are still entitled to be tried by a civil court.

Mr. Justice Reed. Assume that they were soldiers of the German Reich.

Colonel Royall. It would still be our contention that they would be entitled to be tried by a civil court; and further, that if they were not entitled to be tried by a civil court, this particular military commission is improperly constituted.

Mr. Justice Reed. That is a different question.

Mr. Justice Frankfurter. Would it be agreeable to your presentation, Colonel Royall, if you stated without argument the propositions which you will submit to the judgment of this Court?

Colonel Royall. I should be delighted to do so. If I may be permitted, I should like to answer Justice Reed's

question a little further.

I said our position, if taken in its entirety, makes the question of status, makes the question of the method of entering the country, entirely of no consequence. However, in frankness we must concede that it is possible, if the Court does not accept our view in its entirety, that on the question of the right to be tried by the civil courts there would be various stages where the line could be drawn, depending upon the exact status of the people and the exact method of entry. That would not, however, arise in any event on our other contention that I mentioned, that the Commission itself was not properly constituted.

In answer to Justice Frankfurter--

Mr. Justice Reed. Before you leave that, assume that this is a duly constituted military commission for the determining of the status of the parties before it. Who has the determination of that status? This Court or the Military Commission?

Colonel Royall. It is our contention that, so far as the jurisdictional question is concerned--

The Chief Justice. If the President is Commander-in-Chief. Include that.

Colonel Royall. Yes, sir; including that. We say that, so far as it is a jurisdictional fact, it must be determined by this Court. That would embrace both sorts of jurisdictional facts: first, whether the President has authority--

Mr. Justice Reed. We are not discussing that.

Colonel Royall. I think it is tied in with that, sir. I think this is true: that perhaps the word "jurisdiction" is not the appropriate term to use for the President's power, but that status might be material on the power of the President to

c10 act, and it might also be material upon the right of the men to be tried in a civil court.

The Chief Justice. Under the Constitution, the President, either with or without the authority of Congress, may declare martial law and enforce martial law?

Colonel Royall. Yes, sir.

The Chief Justice. I am not yet saying what was necessary in authorising him to do that, but if he does it under the authority of the Constitution and the laws of the United States, then no civil trial can take place. Are we agreed on that?

Colonel Royall. Yes, sir. If he has properly and constitutionally declared martial law, some form of military court would try it.

The Chief Justice. I am not sure whether you rely on the Act of Congress or merely the Proclamation and Order of the President, but our first question is whether a situation here exists authorizing martial law. If so, the civil courts are out of it. I suppose we can agree on that?

Colonel Royall. Well, sir, that may be true with this qualification: if there were in fact the conditions necessary for martial law and by reason of them the President had declared martial law.

The Chief Justice. Well, he did not use those words, but his Proclamation, as I recall it, did refer to this as an invasion, did it not, or used the word "invasion"; and the Constitution itself provides that in the event of insurrection or invasion, martial law may apply.

Colonel Royall. His exact language was as follows:

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"Whereas, the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage or other hostile or warlike acts, should be promptly tried in accordance with the Law of War."

The Chief Justice. That is martial law?

Colonel Royall. No, sir, I do not think it is. Martial law ordinarily is a territorial matter and not a matter dependent upon the character or conduct of the individual.

The Chief Justice. In the usual case, it is martial law throughout an area. The question here is whether the President may under his powers as Commander-in-Chief, and under the circumstances and the danger to the country in time of war, enforce martial law with respect to particular classes of individuals.

Colonel Royall. Well, sir, that is not our idea of martial law. There may be authority as indicated by the Chief Justice, but, as we understand it, martial law is a territorial matter. There are other circumstances, which are not under martial law, which can authorize the denial of civil rights. We say that the President has not sought to declare any type of martial law. We further say that he has neither statutory nor constitutional authority for doing what he did do by this Proclamation.

Mr. Justice Frankfurter. I am not now considering whether or not it was valid, but the purport of this Proclamation of the 2nd of July is the establishment of a particular procedure

e12 with reference to particular offenses. Is that a fair statement?

Colonel Royall. Yes, sir, it is fair. If it is not more restricted, it may be particular offenders.

Mr. Justice Frankfurter. Well, offenders must have committed offenses.

Colonel Royall. What I mean by that is that the Proclamation was issued the same day as was the Order appointing the Commission, and the Order appointing the Commission relates to eight individuals.

Mr. Justice Frankfurter. But the underlying Proclamation is broad?

Colonel Royall. The language is.

Mr. Justice Frankfurter. That establishes procedure. So, I take it under that, assuming that it is fully in the exercise of the President's power as Commander-in-Chief, he could then designate a military tribunal to try other offenders in the military territory?

Colonel Royall. That would follow from the Proclamation.

Mr. Justice Jackson. Before we get to the question of the particular acts of the President, do we not have to deal with the rights of your particular people? I suppose you have the burden of showing that these people are illegally detained?

Colonel Royall. That is correct.

Mr. Justice Jackson. That is what it really amounts to. You admit that they landed from a hostile submarine invading our territorial waters? The submarine was invading our territorial waters?

Colonel Royall. Yes, sir.

Mr. Justice Jackson. I suppose that if anyone had seen

o13 them landing, he would have had a right to shoot them. It would not have been murder; it would have been justifiable. What I want to know, if that is true, and if there was that right to do that, is, At what point and by what act did your men cease to be in that status and acquire the right to be tried by a civil court, even though the Government might have proceeded civilly?

Colonel Royall. Your questions are embracing territory that I have not covered in a long time in the practice of law, but may I respectfully suggest this: that the test by which a person landing on the shore could properly be shot or apprehended is not the test of whether or not he was committing a crime.

Mr. Justice Jackson. Such persons might be subject to prosecution in the criminal courts but also be subject to being repelled by such force as necessary. Could that not be true?

Colonel Royall. That could be based on reasonable apprehension of the persons.

Mr. Justice Jackson. Is it your contention that because they were not apprehended in the act of landing, the right of dealing with them in that manner is lost?

Colonel Royall. Yes. I think that if there was a right to repel them or shoot them or use any method of violence upon them because they were apparently invading our country, after that appearance disappeared and they got into the ordinary commerce of human beings in the country, you could not shoot them.

Mr. Justice Jackson. That is like the case of a criminal whom you might shoot at in order to stop the commission of a

o14 crime; but when he has committed it, he has a right to trial?

Colonel Royall. That is correct. That is my point; except that I do not concede the crime; I am conceding only the appearance of crime.

The Chief Justice. The question here is what he is charged with.

Colonel Royall. Well, sir, that brings up another question.

Mr. Justice Frankfurter. I think it really would help if you laid it down in the way in which your trend of thought will travel.

Colonel Royall. I shall do so as soon as I can.

The Chief Justice. I will join in that.

Colonel Royall. I do not mean to read the brief to the Court, but since some of the members have not had an opportunity to read it, we state on page 12 the following:

"The petitioners submit to the Court the following five propositions, to wit:

"First, the petitioners, including the aliens, are entitled to maintain this present proceeding.

"Second, the President's Proclamation, which assumes to deny the right of the petitioners to maintain this proceeding, is unconstitutional and invalid.

"Third, the President's Order, which assumes to appoint the alleged Military Commission, is unconstitutional and invalid.

015 "Fourth, the President's Order, relating to the alleged Military Commission, is contrary to statute and, therefore, illegal and invalid.

"Fifth, the petitioners are entitled to be tried by the civil courts for any offenses which they may have committed."

Mr. Justice Black. You have in your brief a breakdown as to the constitutionality of the charges and their validity?

Colonel Royall. Yes. May I answer that in this way, Mr. Justice Black:

We do not follow these five propositions throughout our brief in the order of 1, 2, 3, 4, and 5; we deal with the substance of these propositions under nine headings which are entered in the index, and we deal in the third division of our brief with the question of the jurisdiction of a military commission over the offenses charged, which included both statutory and constitutional considerations.

Under the fourth division of our brief we deal with jurisdiction over the person. That involves both statutory and constitutional considerations.

The fifth subdivision of our brief deals with the invalidity of the Proclamation. That deals with both the constitutional and statutory provisions.

The sixth division called attention to the portions of the Order which conflicted with the statutes. That involves no constitutional questions but merely questions of statute.

The same is true of the seventh and eighth divisions. They involve merely statutes and common law but do not involve the Constitution.

o16 That is the only way in which I can answer your question. It is not very clear that way, but that is the way it happens to be presented.

I want to follow in the argument whatever course the Court prefers. I do not mind doing so by answering inquiries. I have here a discussion of this matter in somewhat the order outlined in the brief, and if I may be permitted to do so, I should like to start on that, unless the Court prefers some other procedure.

On the question of Haupt's citizenship, which I shall not mention in any great detail, we set out the facts on pages 12 to 15 of our brief, and those facts are set out in more detail in the stipulation which has been filed with the Court.

Our contention is that Haupt having been a citizen and not having lost his citizenship in any of the ways prescribed by statute, which is 8 U. S. Code 801 and 802, he remains a citizen of the United States.

On the question of whether an alien is entitled to enter our civil courts for any purpose, leaving out of consideration for the time being the President's Proclamation--that is, whether an alien enemy is entitled--we state as our position that there is no decision, so far as we know, which denies an enemy alien the right to enter the courts in the absence of a proclamation. We shall deal with the proclamation later; we have cited authorities, we think, supporting that.

There is a line of authorities, one of which we cite and one of which the prosecution cites, and from which we draw opposite conclusions, that holds that an alien enemy can enter the court to determine whether he has been properly interned as an alien enemy. In other words, the jurisdictional facts,

017 so to speak, and the ultimate fact are the same. That necessarily presents a confusing situation, but the Court in both those cases dismissed the petition on the ground that the petitioner had failed to make out his case and not on the ground that he did not have a right to institute his action.

Therefore, we think that the decision cited by them--I think they cite it at about page 19 of their brief--and the decision which we cite in our brief both lead to the conclusion that where our courts have acted, they have permitted an alien enemy to sue.

It seems inconceivable to us that, under any system of democratic government, any person in America should be totally deprived of his right to protect his liberty. It would seem to us that it would require a rather express statute or express decision of the Court to reach that result.

I know from the brief of the respondent that he relies largely on English cases. We have not had an opportunity to examine carefully into those cases, but we have learned that England has a series of statutes which cover the situation and which we have referred to in part in our brief.

The Chief Justice. Are those English cases habeas corpus cases?

Colonel Royall. I am not certain about the English cases.

The Attorney General. Some of them are.

Colonel Royall. Some of them are. It is impossible to tell from the citation what the exact facts are. They are cited by the prosecution. We have not had the opportunity, having just received their brief this morning, to read it. I have to judge by what is stated in the brief.

The first two cases are the American cases, which are the ones I have summarized before, an application by an alien enemy to get out of internment.

Another distinguishing feature, aside from the possible and probable statutory basis for these English decisions, is the fact, of course, that England does not have a written constitution, and there is considerable difference in the detail of what the rights are to enter civil courts. It will be noted in those that they refer to habeas corpus as a prerogative right for subjects. I do not know what the significance of that term is or how it differs from our constitutional right to the writ of habeas corpus, but I believe there is a difference and that the constitutional right is more explicit and complete.

The Chief Justice. If these men had been indicted in the usual course in the civil courts as distinguished from military tribunals, they would have made a defense in those courts?

Colonel Royall. Yes, sir.

The Chief Justice. Would their right to make a defense extend to the right to appeal to the appellate jurisdiction of those courts for habeas corpus in order to make their defense effective?

Colonel Royall. I think, sir, in the absence of some statute or valid proclamation--and we do not think this is valid--they would have that right. I think an alien enemy has a right to enter the courts in order to protect his liberty.

Mr. Justice Frankfurter. There might be a difference. If the Government chose the civil route, then presumably it chose the whole route; and therefore, if the Government chose

to indict enemy aliens in the civil courts, it would be strange indeed to argue that after a conviction they could not appeal, on the theory that they could not enter the higher court. It makes a difference there.

Colonel Royall. I can see how there might possibly be a difference. There are no cases in either brief, I think, which present that situation. The cases I cited a moment ago do not present that situation. They are where the entrance into the court was to challenge an administrative determination that they were alien enemies and had to be interned.

Mr. Justice Frankfurter. But they were the prime movers, were they not? They initiated the proceedings?

Colonel Royall. They initiated the proceedings; that is right.

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Mr. Justice Jackson. Can you, even for legal purposes, classify all the enemy aliens in one basket and determine their rights in that way? Can there not be a difference between an enemy alien who resided here in peacetime and who was caught here in war, who has given no evidence of hostility to the country--there are cases of thousands of them--and the situation that your clients are in? It seems to me there is quite a difference in the classification of alien enemies.

Colonel Royall. I think that distinction might be drawn, but we do not think it is proper. We think that all alien enemies, no matter what their status, are entitled to enter the courts to protect their liberty, unless there is a statute or a valid proclamation to the contrary.

Mr. Justice Jackson. Would your contention go so far as to contend that if a regiment landed and marched into this country the members of that regiment have the right to resort to the courts, and that if they were captured they could not be treated as prisoners of war?

Colonel Royall. Of course, prisoners of war might fall into a different classification.

Mr. Justice Jackson. If they had uniforms on. If they had their uniforms off, they are, nevertheless, under the war power to be dealt with, are they not?

Colonel Royall. I do not think so. Prisoners of war have a special classification, and if they lose some rights they also gain some much more valuable rights in practice, because they are entitled to be treated as prisoners of war.

Mr. Justice Byrnes. Your contention is that if the Fuehrer and seven generals of the Army of the Reich should land

from a submarine on the banks of the Potomac, having discarded their uniforms, they are entitled to every right you have discussed in the application for a writ of habeas corpus and to require an indictment by a grand jury under the Constitution?

Colonel Royall. My argument would have to carry that fact, and does.

Mr. Justice Jackson. I supposed that a uniform was a means of identifying the armed forces. I think under the conventions that this country has entered with others, a man loses rights by taking off his uniform, rather than gains them, and I supposed that it was for that purpose that we had the second international convention at The Hague about the rights of men in uniform.

Colonel Royall. He does not lose any procedural rights. He loses some substantive rights.

Mr. Justice Jackson. Well, it is always hard for me to tell what the difference is when they lead to the same thing.

Colonel Royall. No, sir; I think there is a very great difference in these particular circumstances. What he does lose is a right to be treated as a prisoner of war. A prisoner of war has a right to receive his pay, to receive the same pay, and to be treated approximately as a soldier of our nation is treated, with the restriction that he is detained. That is, in general, the fact. If he takes his uniform off he loses that privilege.

Mr. Justice Frankfurter. He forfeits his standing as an honorable belligerent.

Colonel Royall. But that does not indicate that he loses

his standing as a party in the courts.

Mr. Justice Jackson. Well, if he ever got into a position to have such a standing, but when does an invader get into a position to have such a standing? That is what I cannot follow.

Colonel Royall. It is not a question of getting in there. I say when he is in this country, in this territory--

Mr. Justice Jackson. Just because he is in the territory?

Colonel Royall. Because he is in here, yes, sir; because he is a person in America. Then, in the absence of some definite rule to the contrary, he is entitled to enter the civil courts. That is the position we take.

Mr. Justice Reed. Does that mean that every spy is entitled to be heard by the civil courts?

Colonel Royall. No, that would not mean that every spy is entitled to be heard by the civil courts, because there is a specific statute which deals with spies.

Mr. Justice Reed. But you are charged with spying, are you not?

Colonel Royall. We do not think so.

Mr. Justice Reed. What about the specifications?

Colonel Royall. We do not think they charge spying.

Mr. Justice Frankfurter. In your answer to Mr. Justice Reed's question, your reliance is on the statute rather than on any constitutional limitation?

Colonel Royall. Yes, sir, in that particular instance. Where there is a statute as specific as that statute is on spying, and as well established, then I think that under the circumstances of that particular statute there is no question of its constitutionality. There are a lot of circumstances

that enter into that. I can go into those at this point, if you desire.

Mr. Justice Frankfurter. Let me see if I understood what you said. Referring to a person in non-military clothes, whether a citizen or an alien enemy--an American citizen, let us say--caught spying on behalf of the enemy, your answer to Mr. Justice Reed was that there was a statute which makes that a military offense?

Colonel Royall. Yes.

Mr. Justice Frankfurter. Do I understand that to be the answer?

Colonel Royall. That is right. It makes it a military offense, triable by a military commission.

Mr. Justice Frankfurter. Regardless of the question that was raised by the Chief Justice as to martial law? An American citizen caught spying in the city of Washington, for example, according to your view, is subject to a military trial?

Colonel Royall. The statute so says.

Mr. Justice Frankfurter. Is that statute valid?

Colonel Royall. I think that statute is valid. We could not argue otherwise. But the statute has an essential element that is lacking in this case, and I do not think that a statute or a proclamation providing for the trial of these men is valid.

The Chief Justice. That is, the statute is qualified by providing that it be near a fortified place or other military establishment?

Colonel Royall. That is right.

Mr. Justice Frankfurter. What you are saying is that that

which Congress can take out of the constitutional provisions by statute, the President as Commander-in-Chief cannot take out of civil statute by military proclamation?

Colonel Royall. That is correct, because the Constitution gives the right to Congress to do so. Under the First Article, it grants an exception from the civil process in the case of the Army and Navy. The exact language is:

"Congress shall have power to make rules for the government and regulation of the land and naval forces."

That is Article 1, Section 8. Amendment Five provides that:

"No person shall be held to answer for a capital, or otherwise infamous, crime unless on the presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces * * *."

Mr. Justice Frankfurter. The case I put to you was not that. Perhaps you misunderstood me. I was not thinking of a member of the armed forces engaged in spying; I was thinking of a civilian engaged in spying.

Colonel Royall. We think that "land and naval forces" goes a little further than members of those forces.

Mr. Justice Frankfurter. "Land and naval forces" means anybody in the land and naval forces.

Colonel Royall. No, sir.

Mr. Justice Frankfurter. Would you mind drawing the line?

Colonel Royall. Yes, sir. It means anyone who affects land and naval forces in the actual theater or zone of combat

6b operations.

Mr. Justice Frankfurter. Where did you get that from?

Colonel Royall. From common law and established decisions drawing that distinction.

Mr. Justice Frankfurter. And where do I find what is a theater of operations?

Colonel Royall. Well, in this particular case we think you find it rather specifically under the stipulations, because the stipulations show, as we interpret them, that originally the Eastern Seaboard was designated as a theater of operations by the United States Army, and then, on the 18th day of March, 1942, they transferred it from a theater of operations to the interior classification, and that that was the condition at the time of this landing.

Mr. Justice Frankfurter. Cannot the enemy determine what the theater of operations is by being the aggressor? If a parachutist should come into this building or near this building, would this not be a theater of operations?

Colonel Royall. I would think it would be, sir.

Mr. Justice Frankfurter. Well, why was not this made a theater of operations by the landing of the U-boats?

Colonel Royall. Of course, the U-boats did not land, but you mean the men from the U-boats?

Mr. Justice Frankfurter. Yes; the area of the U-boat landing.

Colonel Royall. They came unarmed. They came with explosives, of course--

Mr. Justice Frankfurter. I would like to know what "unarmed" is.

7b Colonel Royall. And they did not engage in any actual combat operations.

Mr. Justice Frankfurter. You mean there was nobody there militarily resisting?

Colonel Royall. There was nobody there militarily resisting, and there were no instructions to or intentions to do anything at that point except bury the explosives, which could not be more than the preparation to do something. It could not even be an attempt.

Mr. Justice Frankfurter. Does "theater of operations" therefore mean reciprocal shooting?

Colonel Royall. Not necessarily. But a theater of operations might be created by an armed force immediately intending to engage in combat if necessary. Now, that is the definition that I--

Mr. Justice Frankfurter. How about unilateral combat, as it were?

Colonel Royall. I am not familiar with that.

Mr. Justice Frankfurter. Suppose parachutists or other people are landed and they do mischief on their own, secretly, which is the purpose of surprise. Would that mean combat? Does "combat" mean that it must be dual? Does "combat" mean an announcement that you are going to carry on military operations?

Colonel Royall. Not necessarily an announcement. I think your question there is almost on the line.

Mr. Justice Frankfurter. Safely on your line?

Colonel Royall. Well, sir, I could not even say that. But I think that is almost on the line.

Mr. Justice Frankfurter. What I meant was, Are your facts different from the facts that you and I have been talking about? I meant to deal with your facts.

Colonel Royall. They are different in this respect. The stipulation shows that these men came ashore with explosives and buried them and left and were apprehended at varying periods--some of them in a week or so.

Mr. Justice Jackson. They did not go to any agency and say, "We got away fromthe Germans. Thank God we are free, and we will tell you where we buried them."

Colonel Royall. No, sir. If they had done that, there would not have been this litigation.

Mr. Justice Jackson. Not having done that, are we to assume that their intentions were innocent, when they came ashore with a lot of explosives?

Colonel Royall. I was not talking at this particular stage about their intentions. I was talking about the physical facts to which I understood Mr. Justice Frankfurter's questions were directed.

Mr. Justice Frankfurter. Would you say there would be a difference or that the case would be different if, instead of burying explosives, they had landed under cover of darkness in an out-of-the-way place and had buried tanks or planes for future use? Would there be any difference?

Colonel Royall. There might be a degree of difference there, but it certainly would be very similar, I think.

Mr. Justice Frankfurter. Yet you would say that that is outside of the conflict or theater of operations?

Colonel Royall. I would, sir, because that is, at the

9b most, a preparatory stage and not a stage of actual combat.

Mr. Justice Jackson. It is not your contention that the President should wait until these explosives are set off before we do anything with these persons, whatever they are, invaders or what not?

Colonel Royall. We are not dealing with the question, may it please the Court, of what he could do to repel them or--

Mr. Justice Jackson. He has taken them in possession and has them in possession of the General, and you say that is illegal and that we should release them?

Colonel Royall. That is right, sir.

Mr. Justice Jackson. What I do not get is how it is to be expected, if they were doing what you admit they were doing, that there would be complacency on the part of the Army or the F.B.I.

Colonel Royall. No, sir, we are not arguing for complacency, any more than we would argue that if a man is on a murder rampage we should be complacent. He can be apprehended or he can be killed; but it does not deprive him of the rights to go into a civil court.

Mr. Justice Reed. May I pursue the question of spying a little further?

Colonel Royall. Yes, sir.

Mr. Justice Reed. I understood you to say that the statute with regard to spying is unconstitutional when applied by a military tribunal.

Colonel Royall. I do not think I could argue otherwise.

Mr. Justice Reed. You say that you do not understand that these people are spies?

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Colonel Royall. That is what I said.

Mr. Justice Reed. Do we have to decide whether they are spies or not, or is it sufficient that they are charged with being spies?

Colonel Royall. I do not think the charge is sufficient to preclude this Court from making inquiry, if that is a jurisdictional, and we think that it is. In this case, however, from the stipulations, we think it affirmatively appears that they were not engaged in spying.

Mr. Justice Reed. Well, do we look at the stipulation in testing the power of the Commission, or do we look at the charges that were filed against these defendants?

Colonel Royall. Whichever you look at, we do not think they are charged with spying at all; and, second, we do not think, if they are charged with spying, that the stipulation shows spying.

Mr. Justice Reed. I have before me Charge 3, on page 7 of your brief, which reads:

> " * * * acting for and on behalf of the German Reich, a belligerent enemy nation, were, in time of war, found lurking or acting as spies in or about the fortifications, posts, and encampments of the Armies of the United States * * *."

Colonel Royall. Yes, sir, but it goes further.

Mr. Justice Reed. I did not understand you.

Colonel Royall. I say, the charge includes more than that.

Mr. Justice Reed. Well, but is it not your understanding that under those charges these persons are charged with spying?

Colonel Royall. They are the exact words, or practically the exact words, of the statutes, but it adds:

"and went about, through, and behind said lines and defenses and about the fortifications, posts, and encampments of the armies of the United States, in zones of military operations and elsewhere, disguised in civilian clothes and under false names, for the purpose of committing sabotage and other hostile acts against the United States, and for the purpose of communicating intelligence relating to such sabotage and other hostile acts to each other, to the German Reich, and to other enemies of the United States, during the course of such activities and thereafter."

Now, the charge of spying is defined by the rules of land warfare and by such precedents as we have been able to find. It requires some overt act toward obtaining information.

Mr. Justice Reed. The statute, as I recall it, says "lurking in and around the fortifications."

Colonel Royall. As a spy.

Mr. Justice Byrnes. And elsewhere.

Colonel Royall. And elsewhere. I am coming to that in a moment, sir. That does not arise on the charge. "Or elsewhere" arises on the evidence. That is the first defect.

The second defect is that it does not allege--although purporting to allege the facts in considerable detail--an essential element, which is at least an attempt to obtain information.

Mr. Justice Reed. You mean if you look at the fortifications that is not enough?

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Colonel Royall. It is not in the allegations that they looked at the fortifications. It totally omits what we conceive to be an essential element of the charge of spying--that is, at least an attempt or endeavor to obtain information.

Mr. Justice Byrnes. The charge is, "For the purpose of communicating intelligence relating to such sabotage."

Colonel Royall. Yes, sir, for the purpose of communicating it, sir, but it does not appear that they went so far as to try to get any information. In other words, we think the precedents show, and we have cited it in our brief, that in order to constitute the offense of spying, there must at least be some overt act toward obtaining information.

There is no charge of that, and we say the stipulations negative the existence of it.

Mr. Justice Reed. Would you say piercing the lines of the American forces and coming onto the land and going into where there are fortifications is not a sufficient overt act? Is that your contention?

Colonel Royall. That is not a sufficient overt act for spying.

Mr. Justice Reed. That is what I am talking about.

Mr. Justice Byrnes. What would be an overt act? Spying and looking?

Colonel Royall. Looking at something of a military nature and endeavoring to get that information.

Mr. Justice Frankfurter. Does not Charge 3 do that?

Colonel Royall. That is the one we are talking about.

Mr. Justice Frankfurter. The portion of that charge I have reference to reads, "were, in time of war, found lurking

13b or acting as spies in or about the fortifications."

Colonel Royall. I do not think you can stop there.

Mr. Justice Reed. That is at least one element. The others are additional to that.

Mr. Justice Frankfurter. You think what follows cuts that down?

Colonel Royall. Yes, because it purports to set out the details. That is the Act itself. This is the specification. The specification is supposed to specify the facts. If they had stopped there there would not have been any specification, because they are the words of the statute. To the extent that they specified, they failed to allege an essential element.

Mr. Justice Frankfurter. You think a charge of spying has to be more particular than a charge of murder in your State and mine?

Colonel Royall. I do not think it does, but I think where it undertakes to be specific and omits an essential element, it is defective, and that is what we say here.

Mr. Justice Jackson. Could they not amend the charges? Let us say they are defective. If they are illegally held for trial they could amend the charges, could they not?

Colonel Royall. I think that would answer the fact that they might amend the charges, and there is a very liberal method of amendment in the military courts. I do not believe that would answer the question unless we would concede that the mere charge of the violation of a statute is enough in itself to confer jurisdiction, which we do not concede.

14b

Mr. Justice Reed. If this was, in the view of the Court, a sufficient charge of spying, would that then bar any relief by habeas corpus, unless the Commission itself is invalid?

Colonel Royall. Yes, sir, we think so. We think so because we think it affirmatively appears from the stipulation in this case, not only that it is not properly charged but that the essential elements were in fact missing.

The Chief Justice. Suppose it were true that the charge is not proper and a conviction followed. Would that be any basis for review? In other words, can we correct the errors of a military court, assuming it has the authority to act as such?

Colonel Royall. You cannot do that, sir. In other words, habeas corpus, of course, is not a method of reviewing the facts.

The Chief Justice. So that if the Commission makes errors, it is subject to a review, as provided by the Articles of War, by both the Commanding General and the President?

Colonel Royall. Yes, sir; but may I say this, sir? We think that where the fact itself is a jurisdictional fact, and where it appears on the records of this Court--I say it does not appear--that the jurisdictional fact does not exist, that then you cannot afford relief.

The Chief Justice. I do not insist that it has a bearing, but it is familiar law that you cannot on habeas corpus examine the sufficiency of an indictment after conviction has been had, and I suppose there must be some scope for allowing the military tribunal to determine the sufficiency of the charge and the sufficiency of the evidence to support it.

15b

Colonel Royall. I think that must necessarily be true, sir, but I think there is a difference in this case from the case that the Chief Justice calls to my attention, and it lies in this fact. Here we are dealing with an unusual type of tribunal. So far as the Articles of War are concerned, there are only two Articles of War which provide for a military commission to try the offenses. One is Article 81 and the other is Article 82. Therefore, in order to establish a jurisdiction you have got to show--

The Chief Justice. May I get my eyes on 81 and 82?

Colonel Royall. Do you have a Court Martial Manual there?

The Chief Justice. Yes.

Colonel Royall. I think you will find that more convenient to use in discussing these Articles of War, and it appears on page 221 of that volume.

Mr. Justice Byrnes. What I do not understand is your position with reference to Article 82. The specification certainly includes the very language of Article 82, does it not?

Colonel Royall. That is correct, up to a point.

Mr. Justice Byrnes. Up to what point? Does it not contain the detailed charges?

Colonel Royall. Yes, sir; but, as I said a moment ago, the purpose of a specification in a military court is to go further than merely to charge a violation of the statute. The charge does that.

Charge I charges a violation of the 82nd Article of War. The language, through the word "elsewhere," is merely repetition of what has already been said when you say violation of

16b the 82nd Article of War.

Mr. Justice Frankfurter. Well, could not the pleader have stopped there and have alleged adequately? You are addressing one who is ignorant of these matters, but is the requirement of criminal pleading before a court martial stricter than it is before an ordinary civil court nowadays?

Colonel Royall. I am going to give you the best answer I can to that.

I think I will ask my associate. I do not know very much about courts martial. I have been in the Army a little less than two months, since the last war.

Colonel Bevell has called my attention to a page, which I will mention. My recollection is that there is in the Court Martial Manual--and if I am not correct, Colonel Bevell, please correct me--a form for specifications under certain charges, and I believe that on the charge of spying it is stated to be merely the words of the statute--that is, the declaration against interest--but I think that is--

Mr. Justice Frankfurter. One would assume that that would be so, in accordance with fair and decent pleading nowadays. Now, if that is so, I am really troubled by the kind of discrimination you try to make with respect to Charge 3.

Colonel Royall. The only contention I make is the one I made before, and I think it--

Mr. Justice Frankfurter. You think that they took away what they first gave? That is your argument?

Colonel Royall. Yes, as I said before.

Mr. Justice Black. As I understand it, you do not attack the validity of Article 82?

Colonel Royall. No, sir; we cannot attack it.

Mr. Justice Black. You admit that any man, citizen or otherwise, can be tried before a court martial--

Colonel Royall. Or a military commission.

Mr. Justice Black. Under the penalty of a sentence of death, on a charge that he has been lurking around somewhere within the United States? You raise no question whatever about that?

Colonel Royall. Well, sir, I do raise a question, as Justice Black has stated. We say this: that the mere charge, in the first place, does not authorize him to be tried by a military commission where it affirmatively appears, by stipulation, that he is not guilty of it.

Mr. Justice Black. Yes, but that is trying guilt or innocence.

Colonel Royall. I do not think it is, sir.

Mr. Justice Black. You think you would have to show that he is there and guilty before the Commission has jurisdiction; then that evidence is heard and any fact determined by the Commission?

Colonel Royall. I would not have to go that far, sir, on the death issue, but I do say that where it affirmatively appears in this record that he is not guilty of spying and it affirmatively appears that the jurisdictional facts do not exist, then they do not agree.

Mr. Justice Frankfurter. What you mean by "jurisdictional fact," in the sense in which you use it, is spying in and around places such as posts, encampments, and fortifications, or other territorial places; is that right?

Colonel Royall. That is one of them. That is one of the elements that is missing, and that is the thing we talked about a moment ago with reference to the theater of operations. They are very closely allied and probably the same thing.

Mr. Justice Frankfurter. In other words, if the charge was that he was spying in places that were not theaters of operations or encampments, you would say that on the face of it it negatives the charge in Article 82?

Colonel Royall. That is right.

I believe Mr. Justice Byrnes asked me about the word "elsewhere." "Elsewhere" is a rather inclusive term, but we have cited in our brief decisions which hold that "or elsewhere" means some similar location, and unless it does mean that, the statute would be unconstitutional.

We concede the validity--the constitutionality--of Article 82 if it is limited to the type of location specified in the definition of spying--I mean specified in the statute itself--that is, around or near specific military installations of some kind.

Mr. Justice Reed. Does that carry you to the point that the spying must be within the limits of military reservations?

Colonel Royall. No, sir, I do not think it would be that narrow.

Mr. Justice Reed. Do I understand that these people were on Long Island?

Colonel Royall. That is right.

Mr. Justice Reed. And I suppose we can take judicial notice of the fact that there are many camps on Long Island?

Colonel Royall. Yes, sir.

19b

Mr. Justice Reed. Is it your position that they were too far away to be able to make any effective investigation or espionage around those places?

Colonel Royall. There are two considerations there. The first is the absolute geographical mileage. If a man were a distance of 10 miles, we will say, and going toward an emplacement for a purpose, it might have a little different character than if a man were going to buy groceries.

The Chief Justice. On the question of nearness, who is to assume that? Assuming that this is a charge of spying, do you think we should look at the record and see if the evidence sustains it, and if it does not sustain it are we to assume that the Military Commission would not so find?

Colonel Royall. I say if the Military--

The Chief Justice. On a writ of habeas corpus you can bring every element of prosecution, under an Article of War, to this Court, on that basis, on the assertion that the evidence did not support the charge.

Colonel Royall. I do not think you have to go that far, sir. I say where it affirmatively appears in this case from the stipulation that an element is lacking--not where there is a failure to prove it, but where it affirmatively appears that it is lacking by stipulation--

The Chief Justice. You mean an element of proof?

Colonel Royall. No, not an element of proof; an essential element of theoffense is lacking.

8 The Chief Justice. On the proof?

Colonel Royall. On the stipulation.

The Chief Justice. Is that stipulation laid to the proof

20b or to the specification?

Colonel Royall. It is laid to the facts themselves.

The Chief Justice. That would be, of course, a matter of proof.

Mr. Justice Frankfurter. You say that this was not in a fortification and nowhere near a fortification?

Colonel Royall. That is right.

Mr. Justice Frankfurter. You cannot have spying in the Mellon Art Gallery?

Colonel Royall. No, sir. You can have espionage, which has a different meaning from military spying.

Mr. Justice Jackson. Could you not spy on an industrial plant?

Colonel Royall. I do not think so.

Mr. Justice Jackson. You think that the definition of spying would differ where it was done on an industrial establishment, which in modern warfare is very important?

Colonel Royall. I think that would be espionage.

Mr. Justice Reed. Suppose the plant were making guns.

Colonel Royall. I still do not think that would be military spying.

Mr. Justice Frankfurter. The reason you take that position is that, as you say, the permission of trial by military commission is unwarranted constitutionally by Article I, Section 8, and also by the Fifth Amendment?

Colonel Royall. Yes, the Fifth Amendment.

Mr. Justice Frankfurter You think they have restricted meanings, the restriction being--

Colonel Royall. Land and naval forces.

21b

Mr. Justice Frankfurter. Land and naval forces?

Colonel Royall. That is right.

Mr. Justice Frankfurter. That is your argument?

Colonel Royall. That is our argument.

Now, let me answer the question with regard to an industrial plant, because that is relevant to this inquiry here.

There is the crime of espionage, and I think it is very material that Congress has enacted a law covering the crime of espionage and has made a distinction between time of peace and time of war. In other words, they have legislated for this very circumstance that is confronting us today and have expressly and explicitly provided for punishment for just what these men are charged with today and it is stipulated they did, in the most unfavorable light to them, and those are matters which have to be tried in civil courts and not in military commissions.

The Chief Justice. What is the penalty?

Colonel Royall. In the case of sabotage it is a maximum of thirty years, and it is thirty years in the case of espionage other than military, and the death sentence is discretionary.

Is that correct, Colonel Dowell? I think that is correct. If I am not correct, I want to be corrected.

Mr. Justice Frankfurter. Colonel Royall, I suppose in this connection, the denial that the proclamation of July 2nd is a declaration of martial law bears upon your present argument?

Colonel Royall. It very materially bears on it.

22b

Do not think I am complaining about the questions--I do not mind them at all--but I have not been able to go at these things very logically, and sometimes I have had to jump ahead of my story.

Coming back to the Congressional enactments, I think they have a very material bearing, both legally and actually, in this connection. Here Congress has legislated on the subject, on the very thing that these men have done, at the most, and the difference in the case of these petitioners is a difference between a maximum of thirty years and a mandatory death sentence. That is the difference between them if they are guilty of spying. So it is a very material thing for them. Congress thought thirty years was enough.

Mr. Justice Reed. Has Congress legislated on spying?

9 Colonel Royall. Yes, sir, espionage.

Mr. Justice Reed. I know, but has Congress legislated on spying?

Colonel Royall. Yes, sir. I do not know whether it is called spying or military espionage. Congress has enacted or has an enactment--

The Chief Justice. They adopted Article 82.

Colonel Royall. Article 82, of course, is on spying, but you mean for ordinary criminal--

Mr. Justice Reed. For the civil court?

Colonel Royall. They have a charge of military espionage, I think. Maybe these gentlemen can help me on this.

The Chief Justice. We will take a recess now. You can answer that later.

(Thereupon, at 2 o'clock p.m., a recess was had until 2:30 o'clock p.m. of the same day.)