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ARGUMENT ON BEHALF OF THE RESPONDENT
by
THE ATTORNEY GENERAL

The Attorney General. May it please the Court: The United States and the German Reich are now at war. That seems to be the essential fact on which this case turns and to which all of our arguments will be addressed.

The other essential fact, as is clearly admitted in the stipulation, which itself as one of the stipulated facts admits the averments in our answer, is that these petitioners are enemies of the United States who have invaded this country, and that they are now asking this Court for the rights guaranteed by the Fifth and other Amendments to the Constitution to protect them in the trial by a military court from warlike acts calculated to destroy the country under whose Constitution they are now claiming these rights.

We will show first that alien enemies--and Mr. Justice Reed asked the status of these persons--have no rights to sue or to enter the courts of the United States under these circumstances, both because of the President's proclamation and because of the statutes governing the case, and also because of the very ancient and accepted common law rule that such enemies have no rights in the courts of the sovereign with which they are enemies.

Mr. Justice Reed asked Colonel Royall with respect to the status. The essential part of the status of these petitioners is not whether or not they are citizens. It is admitted by Colonel Royall that six of them are not citizens; and we contend that the acts of Haupt, the seventh, showed that he too has forfeited his citizenship.

5b However, that is not the essential factor of the status. The essential factor of the status is that all of these persons are enemies of the United States. So in judging their rights to come into court, we meet the case on the threshold to determine whether or not under this proclamation and under the law they have any rights to file this petition. In judging that we should consider not their citizenship, which seems to be irrelevant, but whether they are enemies of the United States, caught in the act of invading the United States, and now requesting the courts of the United States to help them. Under that status I think it is very clear that they have no rights.

Before going into a discussion of the common law rights of enemies, it seems to me important to remember the nature of the writ of habeas corpus itself as it is defined in Halsbury's Laws:

> "The writ * * * is a prerogative process for securing the liberty of the subject by affording an effective means of immediate relief."

Again, Halsbury points out that it will not be granted after conviction by a duly constituted court martial, the proceedings of which have in due course been confirmed by competent authority.

Now, it is true, as is mentioned by Blackstone in the early days, that the common law principle that enemies have no rights to the courts has under certain circumstances been relaxed. We have recognized that relaxation in America. Under certain circumstances, in other words, where, after the

declaration of war, it is found that an alien has lived here many years as a matter of privilege, the court may grant him, under certain circumstances, access to the courts; but it seems pretty clear that that is a matter for the discretion of the sovereign and does not go to any fundamental right of the alien.

In other words, the right of the alien to a habeas corpus in ordinary times of peace, such, for instance, as his right to test deportation proceedings, is clearly distinguishable and distinguished from any right that he may have in time of war, for war wipes out the rights of the alien in that regard, although, under the discretion of the sovereign, he may, for convenience and for the purpose of internal organization, be granted a right to use the courts for certain limited purposes.

The Chief Justice. He would have his right to defend himself? That is recognized even in a court martial.

The Attorney General. His right to defend himself would depend on the statute or the common law.

The Chief Justice. I suppose if he were indicted in the civil courts he would be allowed a defense.

The Attorney General. I think it is perfectly clear that a statute could be passed--

The Chief Justice. I mean under the statute as it stands today is there any question that an alien enemy, if he is accused of a crime, may defend himself?

The Attorney General. No.

The Chief Justice. Or in a civil suit may defend the suit?

The Attorney General. No, but I think a statute could be

7b passed under which other jurisdiction could be taken for the trial of any alien.

The Chief Justice. No such statute has been passed.

The Attorney General. No such statute has been passed.

The Chief Justice. What I am coming to is this. Is the writ of habeas corpus anything more than a mode of defense, and is one who seeks a writ of habeas corpus testing the validity of his trial, even though an alien enemy, in the same status as an alien enemy who comes into court and seeks to recover a judgment in a civil suit? I believe there is a case pending in which the Department of Justice contends he may do that.

The Attorney General. I think that makes a very good distinction. In other words, with reference to a case where he comes in to plead in court on a commercial suit, that would depend on the statute that has been passed after the declaration of war or some Executive Act of the President or both.

In a writ of habeas corpus it is perfectly clear that the alien enemy is not entitled to the use of the writ except to determine the basic jurisdictional fact of whether he is an alien enemy. When I say that that seems to me perfectly clear, I am speaking of all the apprehensions under the President's proclamation in this war and in the other war, directing the Attorney General to issue warrants apprehending dangerous alien enemies. If it were not for the war and the effect of the war on the alien's right to a petition, he would clearly be entitled to have the question of whether or not he was dangerous determined and, if there was no evidence that he was a dangerous alien enemy, to be released.

8b Our courts and the English courts have consistently held--and so has the House of Lords--that where apprehension is made during the war, under similar circumstances, the petitioning alien--and not necessarily an alien under the English law. Under the common law, known as the Defense of the Realm Act, it may be a petitioning citizen--has no right to test the grounds of the Home Secretary in making the apprehension; and where the Home Secretary makes a return that he did have such reasonable grounds, the courts won't go behind that. In one case the question was raised in a habeas and in another case on a motion for particulars.

It seems to me, therefore, that that is a holding that the right of the petitioner by habeas corpus to raise questions of fact which he normally could raise in times of peace will not be permitted to him in times of war.

Mr. Justice Frankfurter. But the argument, as I apprehend it, is that on the face of these papers, these petitioners are outside the category, excluding them from the right to resort to the courts. As I understand it, that is the argument that Colonel Royall makes. Therefore, it is a little different from the English law, where the Home Secretary said, "I have reasonable cause to believe that these are dangerous persons," and the House of Lords said they would not go behind that.

If the Home Secretary had said, "I detain this person, although I think he is not a dangerous person," on the face of that return the Home Secretary, I take it, would be outside the statute. I am not suggesting that that is this case. That is

the argument of Colonel Royall, if I understood it. Is it not?

The Attorney General. Yes, but I think in order to determine what rights these petitioners have, what must be considered is not only the statute and the proclamation, but the general common law rights which apply to enemies in time of war. All I am pointing out is that when war is declared the rights of enemies to relief in court is largely dependent on the discretion or will of the sovereign.

To put it in a different way, it was suggested here that the proclamation, although not in so many words, declaring martial law, exercises the same power that the President has in declaring martial law, on the ground that to a lesser or greater extent, the President has blocked off those circumstances under which invaders of the country--alien invaders of the country--shall not have application to the courts.

You can say positively that the President has said that they shall be tried by military tribunal, and negatively it follows that they shall not be tried by a civil court. He has said both. In the commission ordering the trial, he has said that they shall be tried by a military tribunal. At the same time he has blocked off trial in the courts.

Now, the question is whether or not the President can do that under the proclamation and under the statutes and under the general principle that in cases of war the rights of an enemy depend on the grace of the sovereign.

Mr. Justice Frankfurter. Mr. Attorney General, may I ask whether, assuming there had been no general proclamation, but merely the order constituting the commission, you would not be here making substantially the same argument?

10b The Attorney General. Yes. I think what the proclamation added to the law is this. In the first place, it expressed a policy of the Executive Branch of the Government.

Under President Wilson's proclamation, and today under the President's proclamation, confusion exists in the minds of the court, particularly now, as to whether or not aliens have any right in courts under those proclamations. The determination by the courts, as has been said by many courts, will depend very largely on the policy which the President has expressed with reference to his handling of alien enemies.

If it becomes perfectly clear that nothing in the proclamation prevents those enemies long resident in this country from having their normal rights to sue then the courts will permit them to sue.

If, on the other hand, there is anything found in the proclamation--I am speaking now of the general proclamation under which aliens were apprehended immediately after the war--that the President in that proclamation, by omitting the same clause as was in the proclamation--I think it was in 1916 that President Wilson signed it--has changed his policy with respect to alien enemies, then the courts will probably follow the express policy of the President in determining whether or not, under the proclamation made under statute, alien enemies have any right to sue.

I think the proclamation has a second effect, Mr. Justice Frankfurter. I think that if under the scope of the Milligan case, which, with your permission I will discuss a little later, there is any necessity for the declaration of that state of

4 facts to occur to which not martial law but military action may

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be applied, than that the President has found by the proclamation that that state of facts does exist--and the courts, of course, will be very reluctant to go behind the declaration of the Commander in Chief in the midst of a war--that these are such military circumstances that the conditions in the area in which the facts of the invasion occurred make it pertinent to try the petitioners in a military court.

The Chief Justice. Those, of course, are two very different questions. It might well be that, as Commander in Chief, the President has powers to try offenders under military law. If he has that power and applies it properly to these defendants, we are not then concerned with any question of alien enemies one way or the other. The question, I take it, has application only if we come to the conclusion that the President had no such power. Then the question would be whether the courts are open to them because they are alien enemies.

The Attorney General. Yes.

The Chief Justice. We recognize that ordinarily the courts are not open to an alien enemy plaintiff, but we also recognize that courts are open to a man charged with an offense to defend himself. We recognize that the courts are open to him, even in a civil suit, to defend himself. Under those circumstances he has that opportunity.

I come back to my question. If we come to the conclusion that the President has not the power to try them, under circumstances like these, by a military commission, the question then is whether we should treat it more like the defense of an alien found in this country or whether we should

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treat it like a suit to get affirmative relief.

Of course, its only object is defensive. I do not know of any authority in this country which disposes of that question. I am not quite sure that the English cases are, even in principle, controlling.

The Attorney General. There are certain cases which I should like to discuss. I think that is a perfectly fair statement. Then the question is, Is the right to a writ of habeas corpus in the hands of an enemy more similar on the one hand to defending a crime--

The Chief Justice. Where by assumption he is entitled to make a defense and to include in that defense the fact, if it is a fact, that he is being tried by a lawless tribunal.

The Attorney General. That is the question. In other words, is this writ of habeas corpus the type of relief which during war the courts give to enemies--

The Chief Justice. The only effect being, we will assume for the moment, to make a defense, which he is entitled to do, and which we will assume for the moment is a lawful defense and a valid one.

The Attorney General. I should care to make it different.

The Chief Justice. We have to make all those assumptions in order to make it effective.

The Attorney General. I should like to make my assumption. The only effect of it is to remove the alien from a military trial to a civil trial.

The Chief Justice. Which he is entitled to have if the President cannot try him by military commission, such as in this case.

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The Attorney General. But again let me say that the effect of that is not to wipe out the defense of the petitioner. It really is to relegate him to that type of jurisdiction which in time of war is relegated for enemies of this country.

Under the cases which I have cited in my brief, that seems to me, therefore, to point to the fact that a writ of habeas corpus in the hands of an enemy during war time is denied to him by the courts on the analogy of the commercial cases rather than on the analogy of the criminal cases, which, as the Chief Justice suggested, we permit even to criminals to defend themselves.

In other words, it seems to me that the analogy of the criminal defending himself through the writ, to go through the technique and hit at the heart of the thing, is not, perhaps, with due deference, quite an exact analogy as is the type of tribunal which the enemy claims he is entitled to choose. It may be that a citizen--well, I should not say citizen--that a non-enemy has far greater right to assert his jurisdiction in time of war than an enemy.

Mr. Justice Black. If that is true, then, who will determine whether or not he is an enemy?

5 The Attorney General. I assume that the question is directed to who will determine in his petition for a writ of habeas corpus whether he is an enemy?

Mr. Justice Black. You classify them and say that there is a difference between an enemy and a non-alien and you say the enemy might include a citizen. What I meant was, Suppose the man who is charged is a citizen, and you strenuously insist that he is not an enemy of the country; is that fact to be

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tried by a military commission or by the Court?

The Attorney General. I think every court or commission determines its jurisdiction. Now, the question as to whether or not it has final determination of that jurisdiction, and that cannot be questioned, is the very essence of this case.

Mr. Justice Roberts. You say it cannot be questioned?

The Attorney General. That is the question before you.

The Chief Justice. Under your argument.

The Attorney General. Under my argument, and we are dealing with the effect of the proclamation and the law and the statute as to whether or not, at the threshold of his case, he can exercise this right.

All of the argument up to this point has dealt solely with that first step. When we get beyond that step we then discuss whether or not the Commission is properly constituted, and I will argue that it is properly constituted and that it has jurisdiction over the persons and that it has jurisdiction over the offenses.

I will then show that nothing in the Milligan case affects this decision except a certain dictum in the Milligan case which seemed to me profoundly wrong.

I will then, in closing my argument, go into the question of whether the Commission technically obeyed the mandates of the statutes under which it was acting; and, even if it did not technically obey those, whether, under the writ of habeas corpus, this Court can go back into that trial before a military commission and determine those objections made to the manner of trying the case.

Mr. Justice Frankfurter. Do I understand, in view of what

you have said, that even though we went to full length with you on the question of alien enemies, we would still have to face the question of the jurisdiction of the Commission as to one of these petitioners because he is a citizen, though I understand that the argument is that the very circumstances in controversy have revoked his citizenship?

The Attorney General. Mr. Justice Frankfurter, I am very glad you asked that question, because I think, in my opening, in answer to Mr. Justice Reed's question as to the status, I said that the status was the status of being an enemy and not the status of being a citizen. Of course, citizenship has a great deal to do with whether a man is an enemy.

It is perfectly clear that when war breaks out all persons residing in Germany who go on residing there, and after a reasonable time they do not make any effort to leave, whether American citizens or not, become enemies of this country, and that has always been fundamental law. When war breaks out and the citizens of America, who have a duty in war to come back to this country, fail to do so, they are classed with enemies.

The definition of status of an enemy is not limited, nor can it be defined by the status of citizenship, although citizenship very clearly, and in some cases conclusively, proves the fact that he is an enemy. For instance, all Germans are enemies, but that does not exclude [the class of] enemies because there very clearly could be Americans who are also enemies.

Mr. Justice Jackson. When an American becomes an enemy he becomes an enemy by committing treason.

The Attorney General. I would not limit it, Mr. Justice Jackson, to treason. It seems to me to be the practical definition of the word and not a theoretical term. An enemy is someone who joins the army.

Mr. Justice Jackson. I understood that there was no joining of the army in this case.

The Attorney General. There is.

Mr. Justice Jackson. I may be mistaken on the facts. If he joined the army, that clearly would constitute treason, would it not?

The Attorney General. Yes, but what I was going to say is this. Suppose there was no statute saying that by joining the army you lost your citizenship. There is such a statute, but for the moment eliminate that. I take it that an American who joins the German Army immediately becomes an enemy. That constitutes the basis of the crime of treason, but the fact of joining and fighting makes him an enemy.

Mr. Justice Jackson. He loses his citizenship automatically, without any decree of the court?

The Attorney General. Under the statute he loses his citizenship.

9 Mr. Justice Jackson. Without any judgment of any court?

The Attorney General. Oh, yes. There is no question about that at all.

Mr. Justice Frankfurter. But suppose the question of fact of joining the enemy is in dispute in the case of one who, on the face of the papers, was an American citizen. There is a problem, is there not, that is raised by such a person, and the question of fact is so intermingled with the legal question of

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deciding it one way or the other? Is not the position of one who is an American citizen, on the face of documents, in a different category?

The Attorney General. I think it is.

Mr. Justice Frankfurter. I wanted to inquire as to the conceded circumstances in this case. Is the situation of the so-called American citizen in that category, where the facts of allegiance to this country's enemy are in dispute?

The Attorney General. I think the facts clearly show that he lost his citizenship.

Mr. Justice Frankfurter. The facts are open to us?

The Attorney General. The facts are here.

In that connection, perhaps it would be appropriate for me to refer to the appendix to my brief, for the convenience of the Court, and perhaps you would like to refer to the pages in following the argument.

Pages 63 and 64 are convenient references to the statutes.

You will find on page 65 a reference to the Annex to The Hague Convention, which, by the way, is found in the statute--the adoption of the Convention--and, in passing, I think Colonel Royall said there was some question as to whether there was such a thing as the law of war, but it is very clear that there is.

It is interesting to note on page 65 that the Annex to the Convention refers particularly, in paragraph 4, to the language, "To conduct their operations"--that is the law of armies--"in accordance with the laws and customs of war."

Going through this appendix, on page 66 we have listed those articles of war which we think appropriate.

18b On page 69 we have quoted a section from the Trading With The Enemy Act, and on page 70 the Nationality Act, which has particular reference, Mr. Justice Frankfurter, to the petitioner Haupt.

Then, in Appendix II, we have noted some of the history of military trials of belligerents, because, after all, we have to go back into the history of military trials in order to judge as far as possible what the law of war is. That covers the Revolutionary War--

The Chief Justice. I suppose you mean that there is a law of war which may apply, even though you find no specific provision in the Articles of War, to authorize this particular prosecution?

The Attorney General. That is precisely what I mean, Mr. Chief Justice. We must look first to the statutes. We
1 find 81 and 82 are helpful to us there. That is an Act of Congress making the Articles of War.

Then we look also to the common law of war. Now, some of that common law has been codified and expressed in The Hague Convention, but much of it is common law, which certainly existed long before the Convention which codified it in the same sense as our codifications of law; and for that common law we must look to the history of military tribunals and military commissions in order to determine the types of military offenses which are cognisant under military law during war.

This part of the Appendix touches very briefly--I am sorry we have not had opportunity to do more careful research on it--on the Revolution, the Civil War, cases after the Civil

19b War, and the World War.

The Chief Justice. I want to get clearly in mind what you are arguing. I understand from what you have said that if we should come to the conclusion that these men are not spies, even under Article 82, that does not close the case as far as you are concerned?

The Attorney General. Not at all.

The Chief Justice. You are saying that there is power to proceed against and punish in time of war those who are enemies of the United States, according to some rule or other. I suppose you would call it the law of war?

The Attorney General. Yes.

The Chief Justice. And the President may institute that prosecution without authority from Congress?

The Attorney General. Yes.

The Chief Justice. Specific authority?

The Attorney General. Yes; and, Mr. Chief Justice, in this case I say he has that specific authority.

In one of the questions of Mr. Justice Frankfurter's he raised a possible thought in my mind. The declaration and the conduct of war are obviously placed by the Constitution in the hands of Congress and of the President. There can be no question about that.

Now, there might conceivably be a conflict between the Executive and the Legislative. There might be a conflict, for instances, where the Congress, under its express authority, has passed regulations for the government of spies and where the President, not acting under those regulations, but under his power as Commander in Chief, has directed the manner in which

spies would be tried, contrary to the manner set down by the Congress. There a conflict would arise.

However, the strength of our case is that the actions of the President here, we claim, are completely under the specific authority of Congress and that it is a coordinated act of the United States Government.

I do not want to labor this one point too far, but a very interesting example is the Milligan case, to which I will come back. In the Milligan case you will remember that Congress, by the Act of 1863, provided the method by which certain persons arrested by the Executive, by the military, should be tried. What the Milligan case really held was that the statute had not been followed in the trial of Milligan, and therefore his petition should be granted.

I am not at all sure that the Government in that case could not have argued with some force that in time of war an act which prevented the President of the United States and he Commander in Chief as a soldier and as a commander from dealing with spies in his own way would have been unconstitutional.

Curiously enough, that question was never, so far as I know, raised in the Milligan case. The Court, although divided on other issues, were completely of the opinion that the statute should be followed.

However, we have no conflict in this case. In this case the President is acting not only under his constitutional powers as Commander in Chief but also under those statutes permitting him to set up commissions for the trial of offenses against the law of war, during the war, which authority is specifically given him by Congress under the Articles of War.

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Now, continuing with this reference to the Appendix, on page 78--

The Chief Justice. By "those statutes" you mean the Articles of War?

The Attorney General. Yes, but I keep referring to it as statutes.

The Chief Justice. I asked you in order to find out whether you had some other statute in mind.

The Attorney General. Yes. I say that because it is not always realized that that is a statute.

In the same manner I speak of offenses against the law of war, because offenses are totally different from crime. The reason they are made offenses is that they interfere with carrying on the war. The essence of a crime is that a man has committed an act considered criminal against the Government of the United States.

The offense here cognizable to the Military Commission is not that any crime has been committed, but that these men were interfering with waging battle, both defensively and offensively. Therefore, I am careful to use the words "an offense against the law of war," because then that goes into the heart of one of the issues here.

In other words, the fact that statutes exist which make it a criminal offense to do the acts done here does not prevent those acts from constituting the basis for an offense against the law of war, and that is best illustrated in the spying cases.

The Chief Justice. There are offenses or acts which, under the usages of war, are subject to punishment or penalty

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and treatment as prisoners of war?

The Attorney General. That is correct.

The Chief Justice. In other words, under the usages of war, our men who are fighting and who are captured have a status as prisoners, but no punishment may be imposed upon them, except for disciplinary reasons; but you say there is another statute which, under the usages of war, may summarily deal with them, even to the extent of imposing and inflicting the death sentence, and that is what you mean by "offenses"?

The Attorney General. Yes. Of course, the law of war covers both the military in your own army and soldiers on the other side, and I take it that you were speaking of soldiers on the other side.

The Chief Justice. For example, take a case that is a little different from the one we have. Suppose a regiment of men, equipped with uniforms of the United States Army, had been seen in Long Island as parachutists. Would the law deal with them any differently?

TheAttorney General. Mr. Chief Justice, I do not know. Parachutists being a rather modern branch of the army--

The Chief Justice. Perhaps you overlooked one thing. They were dressed in the uniform of the United States Army.

The Attorney General. Oh, that is perfectly clear. I am sorry. I did overlook that. It seems such a matter of degree that it is no different in this case. Somewhere in the brief we instance the case of disguised parachutists, as you said, being similar to this very case. In other words, one of the fundamental things about the law of war and the severe penalty which is applicable to spies is that one of the most dangerous

23b types of offensive warfare--

The Chief Justice. Now, they would be spies, if we forget the 82nd Article, and be punishable by death, according to usages of war?

The Attorney General. Oh, yes. I do not think the 82nd Article is exclusive. Prowlers, for example--

The Chief Justice. We have no statute of the United States declaring that to be spying, have we?

The Attorney General. No, Mr. Chief Justice, but I take it that--

The Chief Justice. And we have no proclamation by the Executive saying that it is an offense against the law of war?

The Attorney General; Except the proclamation before you.

The Chief Justice. Of course, the present proclamation would not apply to that situation, so that what we are faced with here is the question of whether an act such as I have described can be proceeded against summarily in any way except by the civil courts.

TheAttorney General. May I illustrate that more forcibly by another possible consideration? I take it that with respect to the sabotage here--

The Chief Justice. Do you think they would fall under the sabotage statutes?

The Attorney General. May I illustrate that, because I think it is a very suggestive question, if I can carry it on a little further?

The Chief Justice. Yes.

The Attorney General. There is a sabotage act. Now,

24b these men did not commit sabotage. That is clear. They
3 buried their stuff.

At what point is there even an attempt to commit sabotage? I do not know. I do not suppose an attempt to murder could be proved by purchasing a gun and ammunition. I think the Hornbook cases are pretty clear on that. I do not know, therefore, if these obviously military offensive measures could be punishable in a civil court on the theory that this was an attempt to commit sabotage. I am simply suggesting that doubt. I do not mean to put myself on record as giving an opinion.

I think the illustration is a good one, because it shows that an offense against war is a totally different thing from a crime, and that the type of punishment needed in the war--the swiftness, the sureness, the severeness of the type of punishment applicable by commissions--is meant to deal with situations which should not during the war be dealt with by the civil courts.

Mr. Justice Frankfurter. Would a necessity for secrecy be assigned to the situation?

The Attorney General. I think that would be true. Practically it would enter into it.

Mr. Justice Frankfurter. In this case documents were impounded as an act of security.

The Attorney General. I think that is true. It certain would be true in the trial of such a case that it would be necessary to apply secrecy.

Mr. Justice Frankfurter. So that the nature of the offense and its bearing upon the conduct of war may suggest or may compel the one who has command of the war, in his judgmen

25b to use one mode of disposition rather than the ordinary methods which are adopted in times of peace?

The Attorney General. I think that is very true.

Mr. Justice Black. To carry out the observation of the Chief Justice a little further, it would probably be closer to this case to give this example. Suppose there had been some landings. Several months thereafter a citizen was picked up on the street and it was charged that he belonged to that group. Where would he be tried?

The Attorney General. Well, that is this case, Mr. Justice Black. That is this very case.

Mr. Justice Black. The question would be whether this citizen--we will assume that he protested his innocence--should be tried by a military commission and in secrecy or by a court. That is this case?

The Attorney General. Yes, except that I do not admit that he is a citizen, but that is Haupt's case perfectly. Haupt landed, left his stuff buried in the sand, got away, and was arrested in the internal part of the country.

Mr. Justice Black. As far as jurisdiction is concerned, let us assume that there was a denial that Haupt had done that. In the question of jurisdiction I assume it is a question not of what can be proved. Assuming that that was denied and that the citizen had lived here, would he still be tried by court martial?

The Attorney General. Yes.

Mr. Justice Black. Suppose that he had not come in under the order, but that there had been some trouble in a plant and a man had been accused of trying to interfere with work in a

26b defense plant, and it was said that in some way he had received instructions from a foreign country. Under the order would he be tried by a court martial?

The Attorney General. It is right on the edge. When I say it is on the edge, let us take a case where clearly I would admit that he would not be tried by court martial--

Mr. Justice Frankfurter. But this citizen was a member of what might be called an invading party.

The Attorney General. That was not Mr. Justice Black's case.

Mr. Justice Frankfurter. That is this case.

The Attorney General. Yes.

Mr. Justice Black. Do you think that is determinative of the jurisdiction?

The Attorney General. Citizenship?

Mr. Justice Black. Of the fact that he came in and how he came. I am asking you about jurisdiction.

The Attorney General. For the purposes of this case I do, but I think that the territorial jurisdiction under which the President and the Congress can establish military law is today--and I will get into the phrase which seemed to be objectionable to Colonel Royall--based very much on total war.

Mr. Justice Black. In other words, as I understand your argument, it is based on the concept of total war, authorizing an order something like that which was issued in Hawaii, where

4 the courts are closed entirely?

The Attorney General. Mr. Justice Black, it seems to me that it is based not only on total war--and I do not think that that phrase includes this sort--but that war today is so

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swift and so sudden and so universal that it would be absurd to apply a doctrine like the doctrine in the Milligan case, where they said that Indiana during the Civil War had not recently been invaded. The facts existing in 1863 do not today exist, and a bomber may drop a bomb tomorrow on Chicago.

Can it be said that there is no area of warfare, no area of military operations in Chicago under those circumstances? I think not.

The suppositious question which you asked me with reference to a person working in a plant I think would to a certain extent depend on the nearness of the act toward war. I think certainly that if production were consciously stopped by enemies of the United States in the interior of the country that would come within the same type of facts that I believe this case to be under, which would justify the application of military law.

On the other hand, take a case a little on the other side. I do not believe we could try in military tribunals those persons recently indicted in the District of Columbia for acts of sedition.

Mr. Justice Jackson. Why not under the theory of total war? Where do you draw the line?

The Attorney General. That is the question, Mr. Justice Jackson, which always comes up in argument at a certain point, and that is where you draw the line.

Mr. Justice Jackson. That is the question that this sort of thing presents.

The Attorney General. It does.

Mr. Justice Jackson. Where is the line?

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The Attorney General. I do not know where you draw the line, but I know that you draw it where invaders invade the coast of the United States against a patrol which is directed against that, and the orders of the patrol, and it is an admitted fact, are to prevent an invasion and to be on the lookout for submarines. There can be no question of drawing it there.

Mr. Justice Jackson. That is your case for a military tribunal?

The Attorney General. Yes.

Mr. Justice Jackson. All in that?

The Attorney General. Well, not all in that, but it is the essence.

Mr. Justice Jackson. Without that you would not have any.

The Attorney General. Where do you draw the line of an illegal strike that hinders production? I would hardly think that that would come in the same category.

Mr. Justice Jackson. Where would you draw the line?

The Attorney General. I could hardly--

Mr. Justice Jackson. Would you say that they would be tried by a military tribunal?

The Attorney General. I do not think they could.

Mr. Justice Black. Suppose the charge was that they were acting under the direction of a foreign country. It would be tried where under this proclamation?

The Attorney General. That would tip it over. That could be tried not under this proclamation, but under a proclamation covering those facts.

The Chief Justice. Suppose it was ordered tried by a

military commission as part of the war power of the President. Do you allow any scope in his judgment or is it reviewable by a court to see whether he exercised his judgment properly?

The Attorney General. I discuss that in my brief and I say this: that it seems to me, where the matter is as vital as the life and defense of the Government of the United States and its people, that any court would hesitate to say that the Commander in Chief, having exercised his judgment as to what was necessary for the defense of that country and those people, was considered unreasonable or improper in his judgment.

The Chief Justice. I have in mind what was said by the Court in this Sterling case. They said there that there was no basis on which the proclamation of martial law could rest, but it was intimated that there was considerable scope for the Government to determine whether it was sufficiently dangerous to necessitate it.

The Attorney General. Yes. I would like to remind the Court what the Court has said in that connection. I am referring to pages 51 and 52, and particularly 52, of my brief.

In Moyer against Peabody, in 212 U. S. 78, where the Court refused to inquire into the necessity for the declaration of martial law by the Governor of Colorado--which, after all, is very similar to this case--Mr. Justice Holmes said this:

> "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."

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The Chief Justice. The case of Sterling I think limited that language, did it not?

The Attorney General. The Sterling case said this. I think Mr. Chief Justice Hughes wrote that opinion. It limited it to a certain extent. These are all matters of degree, Mr. Chief Justice, it seems to me. The Chief Justice in the Sterling case said:

> "The nature of the power also necessarily implies that there is a permitted range of honest judgment"--I think in time of war perhaps that limited range of honest judgment might be broader than in time of peace--"as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless."

Certainly there is a range behind which the Court will not go, and such measures, conceived in good faith in the face of the emergency and directed toward quelling the disorde fall within the discretion of the Executive.

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Mr. Justice Frankfurter. So I understand from the very candid answer of Colonel Royall that the circumstances in this case at least in part are these, that an enemy ship of war came into our waters and brought at least some members of the enemy military establishment under direction by the enemy authorities, for the purpose of carrying forward the enemy's war with this country?

The Attorney General. That is correct. I think it is unnecessary to draw the line. I will come back to my facts and ask you to decide the case on those facts.

May I very briefly review them?

Mr. Justice Black. Have we the right to review the facts?

The Attorney General. I think you have. I think the petition contends that you have the right to review certain jurisdictional facts, and I think you have a right to review very few, but I think it is appropriate, with the stipulation having been made, that the record may be treated in the same way as though the witnesses had been called to court and testified for the purposes of this motion.

It is certainly not inappropriate for me to refer to this fact. I take it that under certain circumstances facts before a military commission could be brought before a habeas corpus proceeding as dealing with a fundamental jurisdictional question. I take it that certainly under certain circumstances that could be done and has been done.

With your permission I am going to very briefly review the facts.

The Chief Justice. Mr. Biddle, we have sat beyond the usual hours of the Court. We thought we would continue until half past 5.

The Attorney General. All the facts are not spelled out in the stipulation, but they are all in the record. Most of them are in the answer or the stipulation.

On June 12 of this year one submarine landed or came within a few hundred yards of Amagansett Beach, Long Island, and a rubber boat took four persons from that submarine and landed them on that beach. The rubber boat brought with it boxes of explosives.

I might add here that practically all of this has appeared in the papers, so I am not giving away any very confidential information.

The things were buried and these men got away and, about a week later, were arrested by the F.B.I. and turned over to the military authorities.

On the 17th of June four men--and Haupt, as I remember, was in the latter expedition--landed on Ponte Vedra Beach, Florida, from a submarine, in a rubber boat, and buried boxes of explosives, time fuses, time clocks, and other explosive material at that spot. They then went inland to Chicago and they were later arrested and turned over to the military authorities.

The evidence before the Commission has closed. There will be no further evidence. There will be arguments, but as far as the evidence is concerned, it is closed.

The evidence consists mainly in the confessions of all eight of the persons who landed, including these seven petitioners.

The Chief Justice. That is made a part of the record before us?

The Attorney General. That is made a part of the record.

3w I should have pointed that out. The fact that the record is closed is part of the stipulation before this Court.

Each one of these defendants signed very long and detailed confessions, all of which were introduced on the record, offered, and the Commission permitted them to be received in evidence as against all of the other persons on the conspiracy charge and presumably for all charges.

Every defendant--and I do not think it is inappropriate to say this--took the stand before the Commission and substantially testified to what they had already stated in the confessions, and any question about the confessions being admissible or not goes out of the window. The case is so completely sustained by the direct evidence of the defendants themselves that any technical question of whether the Commission should or should not have followed the rule as to confessions in the common law, under the proclamation of the President which permitted them far greater latitude with respect to the introduction of evidence, is hardly worth arguing.

That evidence showed that these men had been trained in a sabotage school in May of this year. They had all been there and they had been trained specifically for the purpose of coming to the United States, all chosen as persons calculated to be competent in sabotage, because they had lived in America for several years, and they were chosen for that very position.

The evidence shows that they were shown certain plans and designs, and that the types of objects which they were instructed to dynamite and to destroy, and the objects themselves, were studied, and then they were taken to various

railroads and locks and canals and aluminum plants in order to be trained specifically in the method of best handling their explosives when they came to this country.

The evidence also shows that this school was conducted by a Lieutenant of the Germany Army. There is no question about that at all. They all say that. He was a Lieutenant of the German Army and he conducted this school and taught the men how to commit sabotage.

I take it that if there is any evidence, it is sufficient for our purposes. It is not a question of conflict. If there is any evidence it is sufficient to sustain the charges, if we go into the evidence at all.

There is evidence that every one of these men was assigned to a unit in the German Army. The petitioner Burger, for instance, himself is a member of the German Army, and so testified. There is no question about that at all. As I say, there is evidence that the others were assigned to the army.

Mr. Justice Byrnes. I dislike to interrupt you, but may I ask as to the status of Haupt? As to these other petitioners who entered that school, did they testify that when entering the school they pledged allegiance to the German Government?

The Attorney General. No; they did not. The petitioner Burger testified that he pledged allegiance to the government. There is no evidence, I believe, in Haupt's testimony, or in the evidence with respect to Haupt, that he took any specific pledge. There is evidence to this effect, Mr. Justice Byrnes, that Haupt and every one of these defendants signed a contract under the provisions of which Haupt's family would be paid a certain amount of money during his activities in this sabotage

work. But it is not clear, nor is there really any evidence specifically as to the other party to the contract. But I do not believe it is questioned that they were employed by the German Government and paid by the German Government. In other words, it seems to me a fair inference from the other evidence that these men were employed and paid by the German Government.

Have I answered your question?

Mr. Justice Byrnes. What I wanted to know was whether when they entered the school they were required to pledge allegiance to the government.

The Attorney General. They took an oath of secrecy, but I do not think there was any pledge in the sense that it would come under the statutes.

The Chief Justice. What do you mean by being assigned?

The Attorney General. There is evidence that the defendant Burger, who was the last to take the stand and who took the stand immediately before the case was closed, testified that the German Lieutenant in charge of the school stated to him, Burger, that every one of the other defendants, including Haupt, had been assigned to units of the German Army.

That evidence was objected to very strongly by Colonel Royall on the ground that it was a declaration which was not effective against the other defendants except Burger. But we claim, of course, that under the President's proclamation with respect to the admission of evidence which we believe to be valid, the evidence was properly admitted, just as the evidence of the confessions was properly admitted.

I am referring to the President's commission or precept setting up the commission, just in passing, in which the President directed that such evidence shall be admitted as

bw would in the opinion of the President of the Commission have probative value to reasonable men.

The Commission admitted all that evidence against all the defendants, and I take it that the Commission assumed that it had probative value to the members of the Commission. The evidence is this:

"Questions by the Attorney General:

"Q Pete"--

That is Burger, the witness, and one of the petitioners. He was the one who was in the army, you will remember--

"Were you told shortly before leaving Lorient"--

That was the submarine base in France from which the submarines left--

"or leaving Germany that in order to protect you members of the group who were not German soldiers they had been assigned to various units of the German Army in order to carry out their program?

"A I do not get that question."

Then the question was read by the reporter, and the witness answered:

"A Not in Lorient. At the school I was told; yes, sir.

"Q At the school you were told that every member of both groups had been assigned a number in the German Army?

"A I do not know about numbers, but they were assigned to the German Army.

"Q They were all assigned to the German Army before coming over?

"A Yes.

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"Q All eight of them?

"A I imagine so; yes, sir.

"Q Who told you that?

"A Kappe."

The other evidence showed that Kappe was the Lieutenant who was in charge of the school.

In that connection there is a discussion of the citizenship of both Burger and Haupt in Appendix 4 of our brief, starting on page 84. Burger was included in that discussion because I think at the time the brief was written counsel for the petitioner Burger had not agreed that he was not a citizen having joined the German Army.

I should like to come back for a few minutes to the question of their rights to sue, which I had touched on in the opening part of the argument, the rights of the petitioners to a writ of habeas corpus.

There is evidence that they were given methods of communicating among themselves in the United States, and there is evidence that they were given methods of communicating abroad. It is true that they stated that they received instructions that they were not to make any reports, but, nevertheless, that is simply a piece of evidence and would not exclude the not un-normal assumption from the evidence already given of a method of secret writing and the names which they had with them. That evidence would not exclude, as I say, the not unfair assumption that they were to use the technique of communication for other purposes. It seems to me that is a fair assumption.

Mr. Justice Jackson. Do you take the position that they were part of the combat force?

The Attorney General. They were persons waging war, prowling around the fortifications.

Mr. Justice Jackson. If they were part of the combat force and were captured or surrendered, to what extent are they prisoners of war?

The Attorney General. We do not for a moment base our case on the fact that they are spies. We contend that persons coming in behind the lines, concealed under those circumstances for the purpose of sabotage, clearly come under the law of war and that they are punishable by the most severe penalty. It is not based on any article, but based on the law of war.

Mr. Justice Jackson. Suppose they were met by members of the patrol and they shot members of the patrol?

The Attorney General. You mean, if they were dressed in the uniforms of their army?

Mr. Justice Jackson. Yes.

The Attorney General. But they were not. In other words, that type of going behind the enemy line dressed not as a soldier does not only go to spying but goes to similar offenses which are technically described as spying.

Mr. Justice Jackson. Do you have a case on that?

The Attorney General. I will refer you, Mr. Justice Jackson, to page 31 of my brief which covers the rules of land warfare. The rules of land warfare are simply a summary of the military code made for the benefit of the Army. It is a summary of the statutory and common law of war to which I have referred. It deals with the rules of land warfare (reading):

"348. Hostilities committed by individuals not of armed forces."

I am referring to the codification.

"Persons who take up arms'--

The Chief Justice. Are you reading from your brief?

The Attorney General. Yes, your Honor, from page 31. (Continuing reading):

"Persons who take up arms and commit hostilities without having complied with the conditions prescribed by the laws of war for recognition as belligerents are, when captured by the injured party, liable to punishment as war criminals."

That is exactly what these persons did, and it has nothing to do with spying. (Continuing reading):

"351. Men and bodies of men, who, without being lawful belligerents as defined in Paragraph 9, nevertheless commit hostile acts of any kind, are not entitled to the privileges of combatants. If captured, they have no right to be treated as prisoners of war. They may not, however, after being captured, be summarily put to death or otherwise punished, but may be brought to trial before a military commission or other tribunal, which may sentence them to death or such other punishment as it may consider proper."

Armed prowlers are not the same as spies. They are in the same general classification. (Continuing reading):

"Armed prowlers, by whatever names they may be called, or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing, or destroying the mail, or of cutting the telegraph wires, are not entitled to be treated as prisoners of war."

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these persons stole over our lines.

Mr. Justice Roberts. Were they armed?

The Attorney General. They were not armed; no. I take it, under the law of war, whether they were armed or unarmed, if they go behind the lines and try to dynamite behind the lines, they would be considered rowlers.

I suppose in some sense these men were armed. They were not armed with side arms, but they were armed with explosives.

The Chief Justice. This is merely a departmental promulgation having the force of administrative rules as to what the law of war is?

The Attorney General. I take it they are an attempt of the Army to codify the law of war.

The Chief Justice. It is a departmental matter, not an Act of Congress?

The Attorney General. No; not an Act of Congress.

The Chief Justice. I suppose it would be an administrative ruling such as certain departments of the government promulgate?

Mr. Justice Roberts. It is like a text book, is it not?

The Attorney General. It is more like that; yes. It is used as an administrative text book for the guidance of persons engaged in administrative work. I do not know to what extent they are bound by these requirements.

In our discussion of these offenses against the law of war I think it appropriate at this time to call attention to Article 15 on page 206 of the Manual for Courts-Martial. This is a statute, of course. This, by the way, Mr. Chief Justice, is referred to on page 32 of our brief, but the article is not quoted there, so I am going to refer to the

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article itself. It is found on page 236 of the Manual for Courts-Martial, and is headed, you will see, "Jurisdiction Not Exclusive." Reading:

"The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war be triable by such military commissions, provost courts, or other military tribunals."

I think it is a rather interesting fact that it does not end up with courts-martial, nor does it even mention them. I think the reason for that is that military commissions were always those military bodies which were chosen to try special offenses and that, roughly speaking, courts-martial were to try offenses committed by members of the Army and Navy--the Army in this case-- in time of peace, and that commissions which really grew out of the actions of General Winfield Scott in Mexico have always been considered as special tribunals, particularly applicable to special states of fact which were not adequately covered by the Articles of War, by the statutes, and where you have to find the offense in the law of war, so that the commissions were always considered rather special for that reason.

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I think that when I begin to analyze the Articles of War about which Colonel Royall has argued with respect to commissions, that thought that commissions are very special bodies and have always been treated as special bodies will be carried out through the expressions in the Articles of War which deal with court-martial in general terms and which, in our opinion exclude commissions from the general provision with respect to court-martial proceedings applicable to court-martial.

Mr. Justice Black. Is there any source to which we can go to find a recognition of that?

Mr. Justice Roberts. Ex Parte Vallandigham refers to it briefly.

The Attorney General. I think I can give you some source material; there is some in the brief. I am sure we can find it if we have more time. There are some historical references in the brief. And that case, by the way, Mr. Justice Roberts, in specific language recognizes the law of war. The Court in that case uses that very phrase, so that the Supreme Court, as far back as that, recognized the law of war.

Mr. Justice Reed. Is there a distinction between the law of war and martial law?

The Attorney General. I am very glad you asked me that, because I think one of the basic misconceptions of the Milligan case is the confusion between martial law and the law of war. I take it that for the purposes of this argument this rough division of the three types of martial law is sufficient.

Martial law is that law which is entirely created by the commanding officer who, having ousted the civil courts from

jurisdiction on account of the pressing needs of the invasion, or whatever it may be, supplants the civil law by martial law. Martial law, therefore, is a creature of the soldier. It is executive military law.

I do not mean by that to imply that there cannot be lesser forms of martial law, as has been here suggested before, and as might be shown by the President proclaiming that a certain type of law will apply. But that, strictly speaking, is not military law. When we use the term "martial law" correctly I think we mean a law which supersedes and supplants the ordinary law of the land and the courts.

The law of war has nothing to do with martial law, because martial law can fill any needs that may be deemed necessary from the circumstances.

The law of war is the well established law of nations existing for many hundreds of years which is found in the history of military tribunals and military commissions and in the textbooks and is occasionally referred to in the statutes, as we see here, as Mr. Justice Roberts suggested, in the Vallandi gham case.

Military law, I assume, is the kind of law which is applied to the military, and usually applied through the means of courts-martial, applied in peace as well as in war. It is the law which affects the soldiers; and I think an understanding of that makes the term in the Milligan case more clearer, as I will have the opportunity of pointing out tomorrow.

The Chief Justice. How much more time do you wish?

The Attorney General. It is a little hard to tell,

Mr. Chief Justice. I think I can finish in an hour tomorrow if I have a chance to end up after Colonel Royall has made his argument. You have been very generous to us in the matter. I do not know how long I have taken.

The Chief Justice. We are not disposed to limit the argument.

The Attorney General. You are very gracious, Mr. Chief Justice. If there are certain points that you feel have been thoroughly covered, I would be inclined not to argue on them at all, but only argue those points where you have some doubt.

The Chief Justice. I think you better use your own judgment about that.

The Attorney General. Do you wish me to continue now?

The Chief Justice. I think we can go on for another half hour.

The Attorney General. Those, then, are the three types of law that should be distinguished.

With the Court's permission I will go back very briefly to the original question of the right to sue that the petitioners may have, pointing out that I base my argument on the fact that they are alien enemies, and there is no question of citizenship.

Mr. Justice Jackson. In other words, they are enemies?

The Attorney General. Yes, sir.

Mr. Justice Reed. Are there any decisions which support the position you take as to their incapacity to appear in court and secure a writ of habeas corpus because they are enemies?

The Attorney General. The American cases to this extent

certain facts.

support it. They support it on proceedings brought by enemies who have been apprehended under the proclamation. The courts conceive that that is a proper way of questioning the sentence of whether or not they are enemies; but the President, under his executive power, under the Trading With The Enemy Act, and his Proclamation, acting through his Attorney General, apprehends and sends to internment for the duration of the war any alien, any enemy who, in the opinion of the President, is dangerous; and that discretion cannot be reviewed. That, of course, is not a direct authority for saying that the writ of habeas corpus cannot be used under those circumstances. It seems to me to illustrate the authority.

Mr. Justice Frankfurter. You stated a moment ago that you rested your case on the ground that these men are enemies. Would it be proper to say that they are enemies who are engaged in combat or in preparation for combat?

The Attorney General. I thought I had suggested that. I will agree that they are fighting enemies.

Mr. Justice Frankfurter. A moment ago you said that you rested your case on the fact that they are enemies.

The Attorney General. Yes. I think that is a very good point; and also that they had landed in the United States and had landed only for the purpose of fighting for Germany and had gone to Germany and had resided there for a substantial period of time.

Mr. Justice Frankfurter. They were active instruments of warfare?

The Attorney General. Yes, sir. I do not think we have admitted any conclusions from facts, but we have admitted certain facts.

05 Mr. Justice Jackson. It has been said that they had no intention of fighting, but that they were trying to get to this country and this was their only means of getting here. How far have we got to draw conclusions?

The Attorney General. I think if there is any evidence that sustains our conclusion that they are enemies, that is all you have to find. You are not going to balance the evidence and decide the case on its merits. They said they did not want to do any harm, that they took this means of getting out of Germany. So there is conflict on that specifically. There is no conflict on the fact that they were training for this purpose, and that so far as the purpose in the mind of the German Reich was concerned, the purpose was to send them over here and put them on the shore from a rubber boat from the submarine. There is no question about that. The only conflict is the intent in their minds.

Mr. Justice Frankfurter. If they were before a common law jury, the jury might either believe their story or disbelieve it and, disbelieving it, find they were human instruments of war?

The Attorney General. I do not think any jury would find anything else.

Mr. Justice Frankfurter. Is that a fair statement?

The Attorney General. Yes; it is a fair statement. In other words, so far as the evidence goes, all you are interested in is to see whether or not there is enough evidence to sustain the jurisdiction of the Commission.

I point out on one side that the charges sustain themselves and on the other, even if under any circumstances the Court will go into the evidence and, having gone into it, you see

that there is sufficient evidence to sustain them, it seems to me that having stipulated that reference may be made to the evidence in the same way as if it had been offered to you--and perhaps to a certain extent I have not gone into it--

Mr. Justice Roberts. In the Wessels case the district court entertained a habeas corpus on the merits, did it not? That case involved a German officer who had been tried by a military commission.

The Attorney General. I would have to look at that. That was Judge Manton's case in which he sustained the military tribunal?

Mr. Justice Roberts. Yes. He examined the merits on the return.

Mr. Justice Frankfurter. What is meant by saying he examined the merits on the return?

Mr. Justice Roberts. The return set forth the facts.

Mr. Justice Frankfurter. The writ was dismissed in that case?

The Attorney General. Yes, sir. I do not know whether Judge Manton did more than this Court is doing.

Mr. Justice Roberts. He said the courts were closed.

The Attorney General. He did not have a proclamation Mr. Justice Roberts, and that would make some difference. Probably he would have looked at the doorstep if he had had a proclamation.

Mr. Justice Roberts. He dismissed the writ?

The Attorney General. Yes, sir.

In connection with what I have called the threshold question, the question of whether the petitioners can ever get by

07 the proclamation and the common law that does not permit them to sue as aliens, the Act of 1798, which is still law, is, I think, particularly important. It is detailed on page 20 of our brief. That Act provides that--

> "Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the Territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of 14 years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies."

There you see the President has tremendous power to start with over these persons and has exercised it in the Proclamation

Then the Act goes on to say:

> "The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States"--

That is a very interesting phrase and, so far as I know, it has never been construed. What does Congress mean when it says that the President is authorized to direct the conduct to be observed on the part of the United States?

It seems to me that that might be broad enough to argue that Congress had said that where war exists the President may

o3 even so far as saying that the United States shall try these persons not in the civil courts, but in a military tribunal. Otherwise the language can have very little meaning.

Then, continuing:

"on the part of the United States, toward the aliens who become so liable;"--

In other words, it gives the President tremendous power with respect to the methods of handling these aliens, and he is not limited to courts of any particular form.

Then it goes on apparently with even a broader sweep:

"the manner and degree of the restraint to which they shall be subject"--

The very question which is before you, the restraint--

"and to establish any other regulations which are found necessary in the premises and for the public safety."

That statute of course tremendously strengthened the sweeping validity of the Proclamation which the President might, without the statute, as Commander-in-Chief of the Army, have issued in any event, but which in time of war under the statute, it seems to me, he is clearly authorized to issue, covering every kind of treatment of these aliens, including access to the courts.

There is a case which construes that in the Ninth Circuit as recently as 1918, in the last war, the De Lacey case, 249 Fed. 625, in which the Court said:

"While, as to property rights and life and liberty, all aliens domiciled in the United States, or temporarily therein, are accorded the equal

09 protection of the law, and due process of law, such is not the case as to alien enemies. There is nothing in the Constitution or laws of the United States which in any way has changed the common law rule, or restricted the power of Congress to enact the alien enemy law. Power to enact such a law may at times be essential to the preservation of the Government, and the right of all nations to exercise it is recognized in international law."

Let us assume that Congress had used the language of the proclamation as a statute. I can see no reason for suggesting that that in time of war would be unconstitutional. Congress has the power by regulation under the Constitution itself to provide for the method in which enemies may be tried; and I now say that Congress has delegated that power to the President, and the President exercises it and closes the door to these enemies of the country coming into this Court on a habeas corpus proceeding.

Colonel Dowell. Which act are you referring to now?

The Attorney General. I am referring to the Act of 1798.

I said at another point in my argument that the war-making power, the carrying on of the war, was divided between the Congress and the President. There was no conflict on that division, since both the Congress and the President in the Articles of War, in the statutes providing for commissions, and in the Proclamation were acting together.

In the First Article of the Constitution Congress is given power to define and punish piracies and felonies committed on the high seas and offenses against the law of nations. That

o10 is in the Constitution itself. And it is given power to declare war, grant letters of marque and reprisal and make rules concerning captures onland and water.

This, I take it, is a capture on land. I do not know what else a capture on land would mean. So the Constitution gives Congress power to pass statutes governing captures on land in time of war.

We look to the Act of 1798 and we find that Congress has exercised its power by a statute. We take a further step and we see that the President has buttressed that power given him by the Congress providing that he is authorized in time of war to direct the conduct to be observed on the part of the United States. He has directed that conduct by issuing this Proclamation.

I do not think the point should be labored, but I might add here that the same article of the Constitution gives Congress power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers.

The article dealing with the President is the second section of the second article which makes the President the Commander-in-Chief of the Army and Navy of the United States and the militia; and of course the courts have always held that any powers necessary or proper for carrying out the functions and powers of the Commander-in-Chief go with that.

At first the prisoners were under the F. B. I. and were handed over to the military only when the commission was signed. But had they been in the hands of the military they could very obviously have held them in any way they wanted,

oll not arraigning them or taking any legal steps had they wished to procure further information.

Mr. Justice Jackson. I do not think you have covered the status of these people under international law, have you? You have not covered that in your brief.

The Attorney General. I think you have noticed the reference to The Hague Convention on page 65 of our brief?

Mr. Justice Jackson. Are both combatants and non-combatants entitled to be treated as prisoners of war? There is a great body of learning back of The Hague Convention, of course.

The Attorney General. I take it that it is perfectly clear that the privileges of prisoners of war are extended only to those who are taken as prisoners in war, and that any privileges given by the law of war or given by The Hague Convention go only to soldiers, and that they lose those privileges when they take off their uniforms.

Mr. Justice Reed. The mere absence of uniforms makes a difference?

The Attorney General. All the difference in the world; and that runs especially through all the law of war.

Perhaps the statement as to the absence of a uniform was too narrow. Of course it is an identification. Where a man comes in as a soldier you know him and you can shoot him. When he sneaks in behind your lines dressed as a civilian you cannot shoot him, and therefore there is no reason why you should imprison him as a prisoner of war, and there is every reason that you should shoot him.

The First Article of the Convention states that the rules

ol. apply not only to armies but also to the militia and volunteer corps fulfilling the following conditions, reciting them, in accordance with laws and the customs of war. So I take it that it is sufficient in this article of the Convention to show that if we are dealing under the law of the Convention we are properly applying the laws, rights, and duties of war to the conduct of these petitioners and their operations.

Mr. Justice Jackson. There is a question as to whether or not the law of war applies if the uniform is off.

The Attorney General. It is perfectly clear that the law applies when the uniform is off. There is absolutely no question about that. I think I can point that out. With your permission I will defer that for the moment until I come to the argument of whether the Commission had jurisdiction of the defendants, because I shall have to say something about the law of war and that the law of war very definitely does apply to prisoners of war who have taken off their uniforms and thereby become spies or prowlers.

I had been dealing with the Act of 1798. Mr. Justice Marshall in the Brown case said that war gives to the civilian full right to take the person and confiscate the property of the enemy wherever found.

That of course does not only lay down the rule but it shows the length to which courts have gone in giving little or no rights to enemies during a time of war.

Section 7-b of the Trading with the Enemy Act, which has been re-enacted since the last war, makes it perfectly clear that that Act does not add any rights to alien enemies which they did not have at common law. That Act provides that--

"Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section N hereof."

That relates to trademarks and is not applicable here. The Act defines "enemy" so as to include an enemy country; and that was the basis of your recent decision in the Colonna case which was decided only a few months ago.

You will remember that in that case the Italian Ambassador asked for a writ of prohibition and mandamus, and the Court denied it in a per curiam decision. You first referred to the Act, as I said a moment ago, as defining a nation to be an alien enemy, subject to the provisions of the Act, and then said that this provision was inserted in the Act in the light of the principle recognized by the Congress and by this Court that war suspends the right of enemy plaintiffs to prosecute actions in our courts.

That is broad language. I do not want to overemphasize the fact that it is very broad. That was an application for a prerogative writ not unlike a habeas corpus which is being asked for here. But always the rule has been that enemies in time of war cannot apply to the courts.

The Chief Justice. We will suspend until tomorrow.

(Whereupon, at 6 o'clock p.m., the Court adjourned until tomorrow, Thursday, July 30, 1942, at 12 o'clock N.)

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