IN THE SUPREME COURT OF THE UNITED STATES

July, Special Term, 1942.

Thursday, July 30, 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.

Transcript of Proceedings

Volume 2

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C O N T E N T S .

Thursday, July 30, 1942.



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IN THE SUPREME COURT OF THE UNITED STATES

July, Special Term, 1942

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| In the Matters of the Applications of<br><br>ERNEST PETER BURGER,<br>HERBERT HANS HAUPT,<br>HEINRICH HARM HEINCK,<br>EDWARD JOHN KERLING,<br>HERMANN OTTO NEUBAUER,<br>RICHARD QUIRIN and<br>WERNER THIEL<br><br>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.,

Thursday, July 30, 1942.

Argument in the above-entitled cause was resumed before the Supreme Court of the United States at 12 o'clock noon, Thursday, July 30, 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 William O. Douglas,
Mr. Justice James Francis Byrnes,
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,

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

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P R O C E E D I N G S

The Chief Justice. Mr. Attorney General, you may proceed.

ARGUMENT ON BEHALF OF THE RESPONDENT (Resumed)
by
THE ATTORNEY GENERAL

The Attorney General. May it please the Court: I desire to point out one slight correction in my brief. On page 53 of my brief, in the second paragraph from the end, the figure "8" should come out. In the sentence beginning

"Under Articles of War 8, 15 and 38"

the "8" should come out; it is an incorrect reference.

In answer to a question by Mr. Justice Roberts with respect to the Wessels case, I find that that case came up from the district court to the Supreme Court and was dismissed by stipulation of the Supreme Court, and the court below,

Manton sitting in the district court, considered it solely on the petition and did not go into the evidence, stating that the sole inquiry was the jurisdiction of the court.

I should like to state a few additional facts, still in connection with the Government's claim that these petitioners have no right, as enemies of this country, to file a petition. I think it should be remembered that not only were they invaders; they were all born in Germany; they all lived for a certain number of years in the United States; and they all went back, apparently for permanent residence in Germany, sometime before war was declared. I think the latest arrival in Germany was the petitioner Haupt, who arrived on the day of Pearl Harbor.

I think it also should be remembered--and I am not certain to what extent I have brought this out--that these men were directed, in the sabotage school which they attended, to change their military uniforms, which were the fatigue uniforms of the German marines and which they were on the submarine, after they had landed, so that if during the invasion they were faced by troops acting in defense, they could be taken as prisoners of war. The purpose of the prisoners, therefore, in landing in their fatigue uniforms and in sending back their fatigue uniforms--in one case they were buried; in the other case they were sent back--was so that if they had been apprehended in the very act of landing, they would have had the advantages of prisoners of war, which they, of course, forfeited the moment they changed into civilian clothes and went behind the lines for the purposes for which they were instructed.

I think another significant fact is that most of these petitioners traveled back to Germany at the expense of the German Government, with money furnished them by the consul; and the petitioner Haupt, the only one who is even alleged to have retained his citizenship, traveled on a German passport.

Mr. Justice Frankfurter. You say, Mr. Attorney General, that these petitioners have no right to file a petition of habeas corpus. I understand you yesterday to agree upon the jurisdiction of this Court, which implies--or does it not?--that there is propriety here in determining whether they have a right.

The Attorney General. Yes. I was speaking of their rights and not of your jurisdiction.

Mr. Justice Frankfurter. I understand that, but there must be, therefore, access to the Court to ascertain whether they can secure a habeas corpus. Am I right about that? In other words, we are here discussing it.

The Attorney General. You are here discussing it. But I do not think they have any rights in this Court. I am sure, looking at the Proclamation, that the Court has no jurisdiction at all.

Take the case of prisoners of war. These men are prisoners of war, not in the technical sense, which helps them, but in the sense of being persons captured, belonging to the foreign forces; and therefore, surely, if prisoners of war have no rights for habeas corpus, it seems to me to follow a fortiori that these men have no rights. I think it is perfectly clear, certainly under the English cases, that prisoners of war have no rights to go in and ask the aid of

civil courts when they have been captured by the Army.

Mr. Justice Frankfurter. Is it your view that, having read the Proclamation referred to, we should at once say that we cannot listen to any more talk?

The Attorney General. That is my view; but I hope that you will listen to more talk, for this reason: I think that the case of Ex Parte Milligan is very bad law and that its effect not only on the courts but on the Army is harmful. I hope very definitely that even should you decide that the Proclamation stands in the way of any further action, you may think it advisable to consider whether now you shall not, at least, overrule that portion of the opinion of the majority in Ex Parte Milligan which says that where civil courts are sitting under the circumstances in the Milligan case, there can be no trial by military commission.

Mr. Justice Frankfurter. Is it not necessary to go beyond the Proclamation in order to ascertain whether the petition and the return bring the matter within the Proclamation?

The Attorney General. It seems to me not. It seems to me that the Proclamation itself is sufficient to bar these persons from any rights in this Court.

Mr. Justice Roberts. The Proclamation and the Order state the subject matter of the Military Commission's jurisdiction, do they not?

The Attorney General. Yes.

Mr. Justice Roberts. Would you contend that if on their face the charges and specifications were outside the President's Proclamation, we could not examine?

The Attorney General. I had assumed that Mr. Justice

Frankfurter included the charges. When he says "on the face of the Proclamation," I think this Court should look at the precept and the Proclamation filed--should look at the papers.

Mr. Justice Frankfurter. Where do we get this from except from the pleadings?

The Attorney General. Well, you can look at the pleadings, I suppose.

Mr. Justice Frankfurter. Then, we do have to entertain the case, if I may use that term, at least to the extent of finding whether it is within the Proclamation?

The Attorney General. Yes. That seems to me to be no more than saying that you have a right to look at the law in a preliminary way to see whether these persons have any rights.

The Chief Justice. Not only the right to look at the Proclamation to see whether it is within the law--I mean all the law--

The Attorney General (interposing). Of course, the law is not a matter of proof; it is a matter of all your knowledge. You know what the law is; you do not have to look at it. Having that knowledge, you can reach the determination.

The Chief Justice. If we know it, we have wasted a great deal of time. (Laughter.)

The Attorney General. Mr. Chief Justice, I think that Mr. Justice Frankfurter's question was directed to a highly technical and exact matter, and it seems to me that it is not unfair to assume that the Court knew the law for that purpose. I am not assuming that you know the law for any other purpose.

The Chief Justice. What you are now discussing, I take it, is quite apart from your contention that an alien enemy may not

apply for habeas corpus in any court?

The Attorney General. Yes; and may I carry that a little further, Mr. Chief Justice, now that you have mentioned it? You said yesterday that we should not look at the nature of the writ but should see what the actual purpose was--actually look to the purpose of the form.

The Chief Justice. The purpose of the writ is defensive?

The Attorney General. Defensive.

The Chief Justice. What I was raising is whether when a man has a right to make a defense, and that includes the court in which he should be tried, he is foreclosed from making that defense by way of habeas corpus because he is an alien enemy.

The Attorney General. Yes. It seems to me, Mr. Chief Justice, that there are two possible distinctions: one is whether an alien should be treated differently in being permitted to come in for a defensive purpose to collect a claim. As Mr. Justice Jackson has said, aliens are treated differently for many different purposes in time of war.

The Chief Justice. He may appear as a plaintiff in order to get an affirmative judgment. He may defend against judgment being taken against him. These men are engaged in defense of their liberty, and they are using this process as an instrument of defense.

The Attorney General. Let us first take the question of whether or not aliens are treated differently for the purposes of offensive action, if I may use that expression, or defensive action.

It seems to me that the Colonna case is exactly in point. I am not now treating the difference between criminal and civil

cases; I am treating whether or not they came into court to ask for relief or whether or not they are defending themselves.

Mr. Justice Roberts. You say Colonna was defending his possession of the ship?

The Attorney General. Exactly. The two rights are precisely the same. Why is not that an answer to the suggestion of the Chief Justice that the distinction should lie there, when the Italian Government came in and said, "You have taken my boat; I have the prerogative of a sovereign."

The Chief Justice. It would raise a rather nice question there; but, as I take it, this ship was seized not out of the possession of the Italian Government but out of private possession, and the Italian Government came in to establish title to the property which had not been in its possession.

The Attorney General. But if we can look through the form, surely he was defending himself against seizure.

The Chief Justice. I assume that the Italian Government could not bring suit to quiet title in our courts, but that if it were in possession and its prerogative were being assailed, that might be heard as a defense.

The Attorney General. But are we not basing this looking through forms and seeing whether it is offensive or defensive?

The Chief Justice. Precisely. I think it is the duty of the Court in coming abreast of habeas corpus to look through form.

The Attorney General. The second and more interesting question is whether or not aliens during time of war should be treated differently in criminal cases than in civil cases. I know of nothing in the law which says so. For the purposes of waging war, the importance of the power of the Executive

69 and of Congress over control of aliens is certainly as important over control of their persons as it is over control of their property. So, I can find no difference on that basis, either in logic or in the cases, which says that aliens shall be permitted to defend themselves in criminal cases.

It is true that aliens are permitted so to do, but how are they permitted? They are permitted under the laws of the United States, as evidenced in certain instances by the proclamations of the President, and the basic reason for that--the reason suggested yesterday by Mr. Justice Jackson in connection with another matter--is that we hope that our citizens who are aliens in another country will be given the same rights. For instance, during war it is the license or privilege of an alien who has lived for many years in the country--it is generally allowed him--to come in and enjoy the rights in the courts as a resident of the country. That can be changed by statute by Congress at any time. No constitutional question is involved.

The question seems to me to be, What is the law with respect to aliens? For that law we look to the Act of 1917, as brought back in this war, we look to the Act which I quoted yesterday, the Act of 1798, and we look to the President's proclamation. There are one or two cases which I should like to point out, which may throw some light on it.

Mr. Justice Reed. Before you pass that, may I ask a question, Mr. Attorney General? You speak of the right of an enemy to come into court, and you also connect that with the Order of the President. Would you take the same position if there were not a valid order of the President?

The Attorney General. I think that there is nothing in the statute which permits them to come into court without the proclamation.

Mr. Justice Reed. Without the proclamation.

The Attorney General. Therefore, I think that at common law and under the statutes to which I have referred they have no right; but to close any possibility, the President signed a proclamation.

The Chief Justice. Assume that your opponents are right in saying that there is no jurisdiction in a military court to try the case of these people on its merits. Would a proclamation change that?

The Attorney General. Oh, I think not.

The Chief Justice. So, we come down to the question whether or not these men, in the circumstances of this case, were following what has been called here the Law of War and whether under the Law of War they are subject to summary disposition by the military authorities?

The Attorney General. That is right.

The Chief Justice. That is really the crux of your case?

The Attorney General. Yes. I think, Mr. Chief Justice, that perhaps I answered your question a little too quickly. I think it is conceivable, as I just pointed out in the opening of this argument, that the powers of waging war, of raising armies, of making regulations governing the armies, and the powers of the President as Executive and Commander-in-Chief--these powers in the Constitution express all the powers of the Executive and of the Legislative.

It is conceivable that if there were no statute, or even

gll if the statute, as in the Milligan case, specifically provided that these men under certain circumstances could not be tried by a military tribunal, the President, in the exercise of his great authority as the Commander-in-Chief during the war and in the protection of the people in the United States, might issue such proclamations which no Congress could set aside, because it might be considered that those proclamations were a proper expression of his executive power; but, as I said yesterday--

The Chief Justice (interposing). We do not have to come to that?

The Attorney General. You do not have to come to that; that is all I said. But I wanted to be perfectly accurate in my answer.

The Chief Justice. As relating to that, I call your attention to the fact that you said it might have been argued in the Milligan case--

The Attorney General. Yes, but it was not.

The Chief Justice. You referred just a moment ago to the part of the majority opinion in the Milligan case which said that there could be no control by a commission as long as the courts were open.

The Attorney General. Yes.

The Chief Justice. Was that said with reference to the suspension of the writ under the martial law provisions of the Constitution? In other words, was the court doing more than addressing itself to whether that was a proper case for martial law?

The Attorney General. I think not, Mr. Chief Justice; I

e12 think the court went very much further, and I think that Mr. Chief Justice Chase's decision--

The Chief Justice (interposing). This man was tried according to the laws of war?

The Attorney General. Yes, but it was held that the laws of war did not apply in a peaceful community like Indiana and that the invasion, which had occurred a year or so before, was not sufficient to permit the test under which martial law could apply.

The Chief Justice. Was he an enemy?

The Attorney General. No, Milligan was a citizen of the United States.

The Chief Justice. I suppose a citizen might be an enemy?

The Attorney General. First, you asked, was he a citizen?

The Chief Justice. Yes.

The Attorney General. I do not think that he was an enemy was proved in the case. I think clearly he was an enemy. Clearly he was an enemy on whatever side of the line you want to draw.

Mr. Justice Frankfurter. Neither the Milligan nor the Merryman case went under the enemy concept?

The Attorney General. No, sir.

Mr. Justice Frankfurter. That was not the atmosphere of those cases?

The Attorney General. No.

Mr. Justice Black. He was not charged with being a spy?

The Attorney General. No. The specific charges were that he entered into a conspiracy under which he was going to relieve Confederate prisoners and, having done so, was going to

el3 get into the arsenals to obtain ordnance for the Confederate Army. I do not think there was a specific charge of spying in the Milligan case.

Mr. Justice Black. In view of the statute, Articles 81 and 82, do you think that makes any difference?

The Attorney General. No, I do not think so, because I think that irrespective of Articles 81 and 82, had they not existed--

Mr. Justice Black. Do you think the fact that they do exist now and that there was a charge that these men were engaged--

The Attorney General. I do not think that adds, because if they did not exist now, we could have tried them on the same charges under the laws of war. It just happens that the laws of war were codified, and there they are.

Mr. Justice Frankfurter. The suggestion is that by implication it negatives or restricts the area?

The Attorney General. Yes.

Mr. Justice Frankfurter. That is the suggestion?

The Attorney General. Yes. You mean the proclamation.

Mr. Justice Frankfurter. Do you say that Articles 81 and 82, being explicit, impliedly exclude the generality of the law of war, just as in the Milligan case?

The Attorney General. "Article 81. Relieving, Corresponding With, or Aiding the Enemy."

Because this article defines a certain type of spying, I do not think it necessarily excludes other acts of persons coming through enemy lines for the purposes of military acts against the United States.

Mr. Justice Frankfurter. Because you derive this from

e14 implications of the Commander of the Army?

The Attorney General. Yes.

Mr. Justice Black. Whether or not it did, is it your construction of your charges that they come within the scope of either Article 81 or Article 82?

The Attorney General. Clearly. I do not want to labor this too much, but I think I should read Article 81 again:

"Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death * * *"

The question is, Is that offense charged in those specifications?

Charge 3, on page 7, of the petitioners' brief reads:

"In that, during the month of June, 1942, Edward John Kerling (and others), being enemies of the United States and 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 and elsewhere"--

Stop--

"and secretly and covertly."

It is an accepted principle of court-martial and of military tribunals that the charges do not have to be spelled out in the minute way in which they have to be spelled out in those states where indictments are most liberally construed. I have not the slightest doubt that that rather general charge,

015 using the language of the statute, is amply sufficient.

Mr. Justice Frankfurter. The charge sheet purports very explicitly to charge an offense under Article 81 and another one under Article 82, does it not?

The Attorney General. Yes.

Mr. Justice Black. Assuming that that section is fully as we understand it to be, that the charge is passed on, that the charge is made, why is it necessary from your standpoint to seek to overrule the military or to modify it in any manner whatever?

The Attorney General. I think only the fact that the Milligan case is bad law and that the Milligan case would definitely throw it out on the constitutionality of that statute. The Milligan case would say, I take it, that that statute if applied to the circumstances of this case is unconstitutional.

Mr. Justice Black. Would it say that as to spies?

The Attorney General. It would say it if Milligan had been charged as a spy, because the essence of the Milligan case was the territorial limitation of martial law and the territorial limitation of the rights of military tribunals.

Mr. Justice Frankfurter. Do you mean that there could not have been spies in Indiana in 1863?

The Attorney General. Surely, but they would have said, "He is a spy who shall be tried by a court of law, not a military court."

Mr. Justice Jackson. I understood both from your brief and from your argument yesterday that it was your purpose to suggest that the Milligan case was so far different from the

016 facts of this case that it did not constitute a precedent to which we would be likely to defer.

The Attorney General. That is true, Mr. Justice Jackson. You can satisfy all the requirements of this case without touching a hair of the Milligan case; but this petition would not have been in this Court except for the Milligan case.

Mr. Justice Frankfurter. You want to touch the head as well as the hair?

The Attorney General. Yes.

The Chief Justice. That depends, I suppose, on whether the statement by the majority in the Milligan case was one of dictum or was one of the grounds of the decision.

The Attorney General. I could not say whether a thing is dictum. It could have been decided on the narrower issue, but the Court decided it on the broader issue. If the definition is dictum, as the narrower ground must be, on which the whole Court agrees, then it was; but I do not think it is a definition of dictum. I think dictum is that form of expression which was not the basis of the decision of the case. But whether you call it dictum or not, there it is as strong law.

Mr. Justice Jackson. Do you not think it is time for us to consider whether the Milligan case ought to be overruled? We would know at least what is proposed to be done if the Milligan case interferes with it.

The Attorney General. I think, Mr. Justice Jackson, that that is a matter of the policy of the Court--whether the Supreme Court thinks it is as important at this time to knock out a case which obviously by its implications interferes with the appropriate execution of orders of the Commander-in-Chief

017 under statutes of Congress during war. That seems to me to be a matter of policy and perhaps need not be decided solely on the narrower ground.

Mr. Justice Jackson. Unless you show where it interferes, we do not know what you want to do. The difficulty I have in deciding a case in the dark, as to what you want to do, is just that. If we are to set aside the Milligan case, we ought to know what we are setting it aside for.

The Attorney General. It is argued by the petitioner that the Milligan case applies here. We think it does. But even if it does apply, it is not very good law.

It is a little difficult to know what rights aliens have outside of the statute. Without laboring the point too much--I spent most of my argument on it yesterday--I wish to say a word or two more. If you will refer to page 17 of my opponent's brief--

Mr. Justice Reed. Are you referring to an alien or an enemy?

The Attorney General. I am referring to alien enemies. Is that what you ask?

Mr. Justice Reed. Whether it was aliens or enemies.

The Attorney General. The language usually is alien enemies, and in most cases that is the problem. The problem almost always is what rights alien enemies have, and it comes up in that way. But the basic argument goes to the fact that they are enemies.

Mr. Justice Jackson. That does not appear on the face of the petition. The appellant's petition does not show that.

The Attorney General. The facts alleged in the petition are stipulated to be true.

Mr. Justice Jackson. The question is whether we should consider those facts on the motion for leave to file the petition or whether, on leave to file, we should consider a matter which is only, as I understand, your stipulation, in case it is filed.

The Attorney General. I do not think the stipulation narrows it to its availability in case it is filed. The stipulation provides, I think, that it is stipulated and agreed by and between counsel that the following facts shall be deemed to be true for all purposes on the hearing of these causes. Is not this the hearing of the causes?

Mr. Justice Jackson. Well, I suppose it is, but I just wondered what counsel intended to state.

The Attorney General. Counsel clearly intended that on this argument today we could refer to all the records.

All right, Colonel Royall? We could refer to the record and use the stipulation in this argument that we are now engaged in?

Colonel Royall. To the extent that the Court thinks it is material and relevant.

The Attorney General. Well, of course.

I may be permitted to go back to this enemy question, on page 17 of the petitioners' brief it seems to me that the authorities cited by my opponent are authorities precisely for my position in this. At the top of the page he quotes an article from the Harvard Law Review, which says:

> "In any event, even if the courts are reluctant to grant relief to enemy aliens in commercial transactions, they should at least protect their bodily security --

819 certainly; then look at the circumstances--

"until positive executive action to the contrary"--

which has been taken here.

So also in the case of Kaufman v. Isenberg, in 32 New York Supplement (2nd). Quoting from the opinion of the Court, the Court said:

"It is my view that until it is manifested by legislative or presidential pronouncement that the right of a resident alien * * *."

I think it has been pretty clearly announced by the Proclamation.

If you will refer to page 14 of my brief, I should like to add a case which I think the Court would wish to read. Although it slants against me, I think it is one of those cases which should be examined. It is not cited in the brief. It is the case of Birge Forbes Company against Heye. The citation is 251 U. S. 317. That was a very interesting opinion by Mr. Justice Holmes. In that case a German cotton broker before the outbreak of the last war had obtained a judgment against an American cotton exporter. On appeal from the judgment, and war having broken out before the appeal was argued, it was argued that the judgment should be reversed in favor of the alien, on the ground that he was an alien. Mr. Justice Holmes decided against that argument and said that there was nothing particularly or mysteriously noxious to the judgment, but based his decision, I think pretty clearly, on the fact that the Government was protected because the money would have to be paid to the Alien Custodian and that there was no reason of public policy which should in any way lead the Court to even so modify the judgment that if there had been

any such policy found in the Proclamation, or otherwise, the Court might not have taken the same position.

There is one other case which, though in a state court, it seems to me to be perhaps worth looking at, and that is a case which is not in the brief and might be put perhaps on the same page. It is the case of Krachanake against Acme Manufacturing Company. It is found in 175 North Carolina 435 or 955 Eastern 851, if that is more convenient. I think the decision was wrong in that case.

The court stayed a case for personal injury brought by an alien. I think the court was mistaken in that, but the interesting thing is that the court stayed under language of President Wilson's Proclamation, or rather in spite of the language of President Wilson's Proclamation, which said that:

> "an alien shall be accorded the consideration due all peaceable and law-abiding persons except so far as restrictions may be necessary for their protection and for the safety of the United States."

I think clearly the Proclamation under those words should have permitted the suit. But there are two reasons why I cite the case. First, the courts, in looking to the policy, as I said yesterday, look at the executive action in the Proclamation of the President; second, those words in the Wilson Proclamation were omitted in the Proclamation of President Roosevelt immediately after Pearl Harbor. I do not think it is very important, but I think it is a slant in the case.

Mr. Justice Black on yesterday asked me a question which I felt perhaps was not sufficiently answered, and that was, what body, if I understood correctly--who?--had the actual

o21 test of the facts? I mean what body could determine this question. My answer is that in time of war it is for the President's determination, and that the President having delegated it to his Commission, the exact jurisdictional fact which must be determined is for the Commission to determine.

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12:30

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The Chief Justice. What fact are you referring to?

The Attorney General. The jurisdictional fact of whether or not these persons come under the proclamation.

Am I correct in stating the question? I thought that was what you had in mind, Mr. Justice Black.

Mr. Justice Black. The question I asked was where the charge is made that a citizen is doing a certain thing, and that is given as the basis for a military commissionb jurisdiction, who determines it? You get down to the question of whether he has a right to have any particular fact determined in a civil court or whether it is to be determined by the military commission.

The Attorney General. Our position is that he has no right to have any fact determined by a civil court. That is an extreme position and not necessary for the determination of this case.

The Chief Justice. We do not have to deal with that.

The Attorney General. You do not have to deal with that at all.

The Chief Justice. On your argument you say that the stipulated facts plus the charges establish the authority of the President, under the law of war, and that he can apply it under the Constitution?

The Attorney General. And that is why I say it is an extreme that is unnecessary for me to assume; but, having answered the question, that is my answer. In other words, this case does not deprive a man--

Mr. Justice Roberts. What is the difference, if we look at the facts, whether they are controverted or stipulated?

2b

The Attorney General. I do not think there is any.

Mr. Justice Roberts. We are examining the facts that appeared before the Commission hearing the case, are we not?

The Attorney General. That is right.

Mr. Justice Roberts. The question is how far we go, if we go at all.

The Attorney General. It may be that you will look at nothing but the charges themselves.

Mr. Justice Black. The question in the final analysis is what tribunal has the right under the Constitution to determine questions of the guilt or innocence as charged.

The Attorney General. Precisely.

The Chief Justice. Would you say that the courts could not look to see whether there was any foundation whatever for the charges?

The Attorney General. If you push me to that extreme, I would say that I will say that; but it is unnecessary for me to say that.

Mr. Justice Roberts. What do you say about a court martial, if a man is in the military service? The Constitution recognizes the military jurisdiction?

The Attorney General. I am to assume that there is no war and that the question assumes that there is peace?

Mr. Justice Roberts. The military law is the same whether there is war or not. It has administration as against officers and enlisted men of the United States Army.

The Attorney General. Yes, but those circumstances under which a special commission may oust all other citizen tribunals in time of war should be considered, it seems to me.

3b It seems to me then that the question here is not whether this man should be permitted to exercise his right. The question is, What tribunal is properly constituted in which he is going to exercise it? Therefore, it seems to me not logic to say that in time of war peace tribunals will not hear any rights of persons taken under these charges. But, as I say, that is a position which it is not necessary to reach in this particular case.

Mr. Justice Jackson. Why is it necessary, if we may consider the stipulated facts as true, to go into either the President's proclamation or the Milligan case? You have the stipulated facts, and you have a military operation against the United States.

The Attorney General. That is true.

Mr. Justice Jackson. Unless we choose to substitute our judgment that these people were really refugees.

The Attorney General. That is true.

Mr. Justice Jackson. Now, if that is true, you take the position that they did not have any rights in the civil courts, and, of course, the President's proclamation has taken nothing away from them in that case, and we do not need to consider it?

The Attorney General. That is right.

Mr. Justice Jackson. Are not we making something terribly complicated here that really is not?

The Attorney General. Yes; or you might simplify it in another direction. You might say that, the President's proclamation having stopped at the threshold, you do not care to look at the facts. That might be simpler. We urge that, from our view, as more practical.

Mr. Justice Jackson. Suppose it appeared that there was a reasonable range of doubt as to whether they were refugees.

The Attorney General. It does not make any difference.

Mr. Justice Jackson. It might very well be said that the Commander in Chief should deal with it, in view of the nation's safety, rather than in view--

The Attorney General. I would put it much more narrowly than a "reasonable range." I would say if there was any evidence.

Mr. Justice Jackson. You do not have to say that. It is enough to say if it is reasonable.

Mr. Justice Frankfurter.. If you go on that line, Mr. Attorney General, then you revert to the argument you made a few minutes ago, namely, that the burden of the exercise of his military powers under the Constitution could provide that all German aliens entering this country are detrimental to the conduct of this war, and therefore access to the courts would be denied them, refugees or not?

The Attorney General. Certainly.

Mr. Justice Frankfurter. That is a very different line.

The Attorney General. That is a very different line.

Mr. Justice Frankfurter. These people have entered the defensive boundaries of this country and have therefore been engaged in military operations and can be dealt with in a military way?

The Attorney General. Precisely.

Mr. Justice Frankfurter. That is a very different question.

The Attorney General. That is very different, and, as

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Mr. Justice Jackson said, when we spoke of aliens, you treat them differently according to what the circumstances of the aliens are. That is perfectly obvious. We have been doing it right along.

Mr. Justice Reed. We are not testing some other proclamation.

The Attorney General. No; it is this. However, of course, the President is interested in this Court's sustaining to the limit the power of the President in court, to which I have so constantly referred.

I think I won't argue, which is in the brief, the question of whether these prisoners come under this proclamation. It seems to me so obvious that they do that it is hardly worth wasting any time on that argument.

Now a word first about the offenses themselves. These offenses we claim are offenses not only under the Articles but under the common law of war. Then a word about the offenders. Has theCommission jurisdiction over the offenses and over the offenders?

As I have said already, the landing in the case refers to a common law of war. Mr. Justice Jackson asked me yesterday if I could give him some citations with respect to the law of war. There are many in the brief.

Mr. Justice Jackson. I referred to something in particular that I did not find and which I thought was in one of the conventions--the loss of rights suffered by appearing without uniform. I thought it was in there and I did not find it, and I did not know whether you might have the citation, but you need not bother.

6b The Attorney General. I think it is found in the footnote on pages 31 and 32. May I look at it for a moment?

Now, all of this law, Mr. Justice Jackson, of course is not found in common law reports. It is found in history, in books and treatises, in opinions of the Judge Advocate General, and in accounts of what actually took place on the battlefield.

In answer to your question, sir, I am reading the footnote on page 31:

"Thus where certain persons made their way early in the late war from Scotland to South Carolina"--

Mr. Justice Jackson. No one questions it. I thought it was embodied in the conventions to which Germany was a party, the country of which these persons are nationals. I did not find it, and I did not know whether you might have the citation which I had overlooked.

The Attorney General. I think I am right in saying that The Hague Convention is not binding, because, as I remember The Hague Convention, it is not binding unless signed by all the countries at war. The reason we referred to The Hague Convention is that it embodied and summarized a certain law of war. I do not remember whether it is found in thatConvention. It is found, of course, in the Rules of Land Warfare, which I have cited in the brief.

Mr. Cox points out that the Rules of Land Warfare had been adopted, as we set forth, by The Hague Convention. That is found on page 32 of our brief.

We then refer to the Rules of Land Warfare. I do not mean the rules in the sense of this book that is used as a

manual for the Army, but that the definition that was adopted, as I understand, by The Hague Convention was then made a part of the manual of the text book for the Army. However, that came out of The Hague Convention.

Mr. Justice Jackson. The definition of belligerence is the same in both.

The Attorney General. Yes.

Mr. Justice Reed. Does The Hague Convention undertake to codify the rules in treating those who are not prisoners of war or who have forfeited the rights of prisoners of war?

The Attorney General. Yes, precisely.

Mr. Justice Reed. Does it deal with that affirmatively or does it deal with that only negatively, by saying that they are not entitled to be treated as prisoners of war?

The Attorney General. As I said, The Hague Convention adopted the rules found in the Rules of Land Warfare, and those rules are set out in my brief on pages 31 and 32, specifically providing that prisoners of war who take up arms without having complied with the conditions--that is, uniforms--when captured by the injured party are punishable as war prisoners.

Does that answer that?

Mr. Justice Reed. Yes. Does The Hague Convention or do the Rules of Land Warfare, which we have published, as I understand it, in connection with The Hague Convention, specify how those who are not entitled to treatment as prisoners of war shall be dealt with? Are there any affirmative regulations?

The Attorney General. That, Mr. Justice Reed, I do not know. That is set forth, however, in a general way, on page

8b 32. It says:

"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."

What I meant to say is that I do not think that the rules contain specified ways other than that in which they shall be dealt with. All military commissions have the broadest kind of military power, and it is very difficult, except in the Articles of War, to find any procedural common law of war, if you could call it that. It is very difficult to find it, because the Army dealt with these people in the middle of a war pretty promptly, without any rules; but I think that answers the question as well as we are able to.

Mr. Justice Reed. Do these people correspond to the definition of unauthorized belligerents?

The Attorney General. Yes, and they correspond with the definition of armed prowlers, Section 352.

Mr. Justice Reed. When you come to armed prowlers there is no similar provision such as there is for unauthorized belligerents.

The Attorney General. No. It says they are not entitled to be treated as prisoners of war, and the provision before that says that they shall not be shot. So that I think that armed prowlers are to be treated as unauthorized belligerents, reading the two together.

The first section says:

"Men and bodies of men, who, without being lawful

9b belligerents * * * commit hostile acts of any kind."

The second provision, in order to make it perfectly clear that prowlers are considered the same thing, says:

"Armed prowlers, by whatever names they may be called, * * * are not entitled to be treated as prisoners of war."

I am not quite sure if I quoted the Vallandigham case yesterday, but I might point out again that it says:

"Military offenses, under the statute, must be tried in the manner therein directed"--it says military offenders must be tried under the Articles of War--"but military offenses which do not come within the statute"--this is the Supreme Court case talking in the Vallandigham case--"must be tried and punished under the common law of war."

4 Again let me emphasize that that is the basic reason for a military commission. The basic reason for and most of the activities of courts martial are for offenses committed by members of the armed forces in time of peace.

I do not say that that is the limit of their jurisdiction, but the rough distinction--and the distinction is important when we come to an examination of the Articles in meeting Colonel Royal's argument--is that the Articles of War are surrounded with procedure and definitions protective of the defendant. Why? Because the defendant is usually an American citizen in the Army, whereas these same protections do not apply to commissions. Why? Because commissions are set up to try prisoners of war under totally different circumstances.

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I think I shall not labor any more the question of offenses against the law of war. I come now to a discussion, very brief, of the jurisdiction of this Commission over the persons of these petitioners.

It is contended that the Fifth Amendment gives these persons certain rights. The amendment is copied in my brief, on page 37:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

I take it that the last phrase, "when in actual service in time of war or public danger," applies to the militia, the militia being a civilian body and it being natural for Congress to provide that there shall not be military trials of militia men except in cases of war or public danger--that is, when they were called out for protection of the State.

Therefore, the question is, What is the meaning of "except in cases arising in the land or naval forces"? I think under the authorities which I have cited and the cases that it is very clear that that does not mean--or it would have said so--except with respect to persons in the land and naval forces and that it does not apply to soldiers, but that it applies to cases with respect to the land and naval forces in time of peace and in time of war. I do not think the language is very clear, but the cases have always followed that construction.

Again I am sorry that I have to burden the Court with two

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more cases that are not in my brief, but these cases I think are important. One is In Re Craig. You may wish to add the reference on page 39, because on page 39 of my brief are the citations, chiefly from authorities on military law, which support my view.

One of the two cases that I have reference to is In Re Craig, which is found in 70 Federal 969. It was a Circuit Court for the District of Kansas case and was decided in 1895. I shall not refer further to it because that case and the Wildman case, cited in my brief, and the case of Kahn against Anderson which I shall presently give you, all have substantially identical facts, so that I shall point out what the Supreme Court held without referring to the decisions of the lower court.

Kahn against Anderson is found in 255 United States at

5 page 1.

All of these cases involve instances in which a member of the military force, a member of the Army, has been sentenced for a crime under the Articles of War and has been discharged--I presume in all cases dishonorably discharged--and then after the discharge, and when he was no longer a member of the military force, he commits another crime while undergoing imprisonment. He assaults the officer in command of the prison, or riots, or commits some other crime after he has been discharged, but while he is serving the sentence.

I say that that is authority, of course, only for the proposition that it is perfectly clear that a non-soldier citizen is not protected under the provisions of the Fifth Amendment under these circumstances.

12b The Supreme Court said--and I think my proposition has been very rarely questioned, although I admit there is no clear authority on it, and this was a case of habeas corpus brought by a soldier who had been discharged and who had been rearrested and was going to be tried for his second offense after his discharge from the Army by a military commission--:

"In connection with this subject, we observe as a further contention that, conceding the accused to have been subject to military law, they could not be tried by a military court, because Congress was without power to so provide constitutionally with the guarantees as to jury trial and presentment or indictment by a grand jury, respectively secured."

and then the Articles of the Constitution are noted.

The Court said:

"This is also without foundation, since it directly denies the existence of a power in Congress exerted from the beginning and disregards the numerous decisions of this Court by which this exercise has been sustained."

The decisions referred to, I think, are decisions in which this question is not raised, but the exercise of the military under the circumstances as the Court said had been sustained.

It would, I think, be an extraordinary construction of the amendment to provide that for offenses committed by our soldiers in time of peace the military commission would be sufficient, and that our American soldiers had no rights to compel jury trials, and to hold at the same time that this constitutional amendment permitted the soldiers of an enemy country at war

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with the United States to take advantage of the very clause from which American citizens were excluded.

I should now like to say a word about Ex Parte Milligan. It has already been somewhat discussed, but I would like to briefly refer to it, if I may. The discussion starts on page 41 of my brief.

I think the important thing to remember in Ex Parte Milligan is the Act of 1863. There had been a great deal of criticism of the Government, in and out of Congress, over the the arrest, both by the Secretary of State, Mr. Seward, and then by the Secretary of War, Mr. Stanton, of persons who were considered dangerous to the country and who were held without rights to go into any courts at all. As a result, I think, largely of that criticism, Congress passed the Act of 1863, which is the basis of the Milligan decision.

That Act provided that the President could suspend the writ, but limited his action in suspending the writ in this way. It was provided that where any persons were arrested by the military, within twenty days after the passage of the Act or within twenty days after the arrest the Secretary of War and the Secretary of State should submit lists of those persons to the district court; and that although under the Act the prisoners could be held with the suspension of the writ, law courts were sitting at that time and grand juries were in session, and the alleged offenses had to be brought to these grand juries.

A method was then provided under the statute by which, if the prisoners' names were not on the list or had not been furnished, they then could come before the court on a petition,

and the court could either direct them to file their own recognizance or else to hold them for civilian process.

Now, the Milligan petition was not, strictly speaking, a petition for a writ. It was a petition alleging that he, a citizen for twenty years in the State of Indiana, had been arrested by the military when the courts were open and when the grand jury was in session, and that he had been held for sixty days, alleging the circumstances bringing him under the provisions of the Act, and asking that the Supreme Court direct that the provisions of the Act be enforced, and asking that he should be released from the control of the military and given his freedom or else held to be tried under the provisions of the Act of 1863.

The facts of the Milligan case I think are interesting. It brings us back to a very pertinent question asked by Mr. Justice Frankfurter with respect to what could be considered the definition of the area of war. In other words, that area, as Mr. Justice Frankfurter suggested, can very obviously be created by the invading enemy, as it can be created by the conditions in the area or by regulations of the army.

It is not a paper matter. It is a matter of actual fact of the conditions in the territory.

Here it seems to me perfectly irrelevant what one command called this strip of beach. The point is that, threatened by invasions of submarines and the constant sinkings of our vessels along the coast, our patrols had been ordered to patrol that beach and be on the look out for submarines. That is the essential thing, not what were the names of the paper orders handed down with respect either to administration or to

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tactical activities in the area.

The Milligan case, as Mr. Justice Jackson has suggested, is totally dissimilar on its facts. The basic dissimilarity is that the Milligan case was decided in 1866 and that the conditions of modern warfare were not then created. Indiana, as the Court pointed out was not a rebellious State. Indiana had not recently been invaded. This man had been a citizen of that peaceful State for twenty years and there had been no military activities within the State.

It is obviously different from this case, in which German enemies invade the coast. It is perfectly fair to admit that there can be no connection of the facts in the Milligan case with the facts in our case.

I spoke of the facts. The majority of the Court went on to say, having dealt with the Act of 1863, and the Act of 1863 not having beenfollowed--the entire Court agreeing on this--that since the statute was valid and had not been followed, Milligan should be released and dealt with legally.

However, the majority went on to say that wherever martial law has not been declared and the courts are open to citizens and to others- although most of the argument of the case seems to deal with citizens--in that case Congress could not provide for military commissions to try military offenders.

The test seems to me a profoundly impractical one. Whether the courts are open or not does not meet the issue of what is going on in that territory, and it would be preposterous for the law to be that the President could not take proper steps to repel and capture attacking enemies because he had not closed

his own courts by proclamation

Mr. Justice Black. Did the Milligan case go that far?

The Attorney General. I think the Milligan case absolutely went that far.

Mr. Justice Black. With respect to invading enemies or spies or a violation of what you said was a well known military

The Attorney General. There is much confusion in the language of the Milligan case, but the Milligan case repeatedly sets forth the fact that where the courts are open and martial law has not been declared military commissions do not have any right to hear such cases.

Mr. Justice Black. Did it say it could try military offenses, however? You used the words "military offense."

The Attorney General. Well, there is language in the Milligan case which makes that very extreme talk a little uncertain.

The Chief Justice. Was it contended that that was a military offense?

The Attorney General. Oh, yes. It was contended that this was an offense against the law of war in the Milligan case, very definitely; and the Milligan case indicated--by saying that this did not occur in one of the rebellious States--that if it had occurred in one of the rebellious States, the question would be modified by that.

Mr. Justice Black. That is because in those States there was a military domination which was authorized to form a line of distinction between military offenses traditionally tried as military offenses and civil offenses.

The Attorney General. That is true.

Mr. Justice Black. This man was charged mainly, as I recall it, with making political speeches. He was charged with conspiracy, but linked up with it was the idea of civil offenses, which in the case of complete military domination by a conqueror, of course, would have been tried under military law. But I do not understand that you need to go so far in this case. I am not talking about which is correct, but I am saying that the Milligan case either directly or inferentially went to the extent of saying if there was an attempted invasion by a member of an enemy force, he would have to be tried in that way.

As I recall it, the arguments of counsel recognized the distinction between members of the armed forces of this nation and direct members of the armed forces of another nation and recognized that they had traditionally been tried under military law; but implicit in it, it seems to me, is the distinction between military offenses in times of war and peace and those which are traditionally a part of the great body of military law.

The Attorney General. I think it is fair to say that, Mr. Justice Black, if one adds that the court's continued insistance on the necessity of martial law having been declared certainly is proof that where an invasion did not occur, but where some military operations were going on, that declaration of martial law was one of the essentials on which the jurisdiction of the commission of the military power could be founded. I think it is perfectly clear, because the court reiterated again and again the necessity for martial law.

Mr. Justice Frankfurter. Was there not a difference

between the majority and the minority as to whether there was a military offense, it depending on whether there was a field of operation? Was not there a clash on that?

The Attorney General. I think that was one of the differences, but I think that one of themajor differences which Mr. Chief Justice Chase emphasized, if I may return for a moment to a portion of his dissent, is that a majority of the Court substantially held that no Act of Congress could have permitted Milligan to be tried under the circumstances of the case. Now, of course, the circumstances, I have said, are totally different from this case.

Mr. Justice Frankfurter. They all held that.

The Attorney General. The majority of the Court held that Milligan had to be tried under the Act of 1863, but the majority went much further than that and said that no Act of Congress could have permitted Milligan to be tried under the circumstances of the case. That was the majority, not the minority.

This is what the minority said in its dissent:

"We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the Fifth or any other amendment"--the majority had held that the Fifth Amendment did affect that power. Chief Justice Chase goes on to say this--"Congress has, therefore, the power to provide by law for carrying on the war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the

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conduct of campaigns."

He then adds:

"We cannot doubt that, in such a time of public danger"- and he is talking about Indiana at that time-- Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators."

Therefore, it seems to me that if the dissenting judges felt that they had to use language as strong as this, they certainly felt that the majority had gone far afield in basing the reasoning of its decision on the fact that the courts were open.

I would like to say one more thing with respect to the Milligan case. The expansion of modern warfare has been judicially recognized in the last war. The last war takes judicial notice of what modern warfare is, as in the McDonald case, in 265 Federal. This concerned a spy living in New York, who was giving information as to vessels sailing out of New York harbor. The Court said:

"Military authorities should have power to try spies

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wherever found; otherwise they may not be subject to trial for that offense. The term 'theater of war,' as used in the Milligan case, apparently was intended to mean the territory of activity of conflict"--that is what you had in mind, Mr. Justice Black--"With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations"--that is the territory of the United States--"One of the lessons taught by this war is that the ocean is no longer a barrier for safety or an insurance against America's being involved in European wars," and that, may it please the Court, was written twenty-two years ago.

With the Court's permission, I will say a few words with reference to the Articles of War. I should like the Court to note this. It is already in the brief, but when we come to discuss Article of War 8, the article as it appears in your volume of the Manual of Courts Martial in 1928 is not correct. It has been amended, as I set forth in the brief, but I think we ought to bear that in mind. That is the only article here relevant which has been amended, so far as I know.

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I have already suggested the doctrine, in dealing with the Articles of War, that general courts-martial are generally applicable in time of peace, and therefore that manners of standard procedure should and do more particularly apply to them than to commissions and other special military tribunals which are usually set up to meet specific circumstances, as this Commission was set up, and it seems to me that with that background the implications in the construction of these articles become far clearer.

The first article which deals with military commissions is article 38, and it is very brief. It provides that--

"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."

The interesting language there is "by the law of war be triable by such military commissions," indicating what I have said, that military commissions were always considered the appropriate tribunals for trying offenses against the law of war.

The next article which perhaps we should consider is article 38; and that really is the basic article guiding us in the construction of the other articles. I will read it. It is very brief:

"The President may, by regulations, which he may modify from time to time, prescribe the procedure, includ-

ing modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the District Courts of the United States: Provided, that nothing contrary to or inconsistent with these articles shall be so prescribed."

It seems to me, in view of the suggestion that I have given the Court with respect to the history of commissions and because, as in article 15, the Commissions seem to be those bodies which dealt with special cases, that it becomes clearer that this article means that rules may be prescribed for courts-martial, for special kinds of courts and commissions, and when those rules have been prescribed for courts-martial and commissions the President must adhere to them.

We must look to see what rules have been prescribed for commissions. It seems to me that is a fairly simple construction.

I think perhaps it is not inappropriate to refer to the rules established by the President's Order, because that is part of the whole system which is found on page 55 of my brief reading:

"The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of Military Commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it."

You see he there says that they must be consistent with

the rules governing commissions; and as the Chief Justice suggested yesterday, if the Commission disregards the law with respect, let us say, to the two-thirds rule in sentencing, if that rule does apply, it is disregarding the law. There is nothing in the proclamation which provides that it shall disregard any rules. On the contrary, it says "such rules as it shall deem necessary for a full and fair trial of the matters before it."

And then, with reference to evidence, it says:

"Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man."

Somewhere in their brief the petitioners raise the question of delegation of power; that the President has not properly delegated his powers to the Commission under the Statute. But the doctrine of the delegation of powers relates to the improper transfer of powers from one branch of the government to another, and has nothing to do with the delegation of the Commander-in-Chief's powers to his subordinate officers.

Mr. Justice Byrnes. Is it not conceivable that this refers to the Articles of War which prescribe certain rules as to the admission of testimony?

The Attorney General. Mr. Justice Byrnes, I think that it is not only conceivable, but true; and then we must look at those articles which have reference to that procedure.

Article 25 applies specifically to military commissions, treating of the refusal to appear or testify.

The next one, Article 24, deals with compulsory self-incrimination being prohibited. It applies to a military court or commission, so we are guided by that.

Article 25 provides when depositions are admissible. That article applies to commissions.

Article 26 provides before whom depositions may be taken, and applies specifically to military commissions.

Article 27 refers to records of courts of inquiry and military commissions.

You see that these articles and the others which I have mentioned--and I think I have mentioned substantially all of them now, having specifically provided certain rules with respect to the conduct of commissions, very obviously where the other regulations either actually, as in most cases, mention courts-martial or are silent with respect to military commissions, taking the regulations together, this very special kind of tribunal shall be guided by these rules in the Articles of War. So that the inclusive argument of the petitioners that substantially all of these articles apply to commissions is not accurate. That is the basis of the whole argument.

Let me illustrate it, for instance, with Article 70, which is the one which I stated had been amended. It says:

> "No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made."

That was the old form appearing in the Manual. Now, conceivably, since the language is general, it might be argued that it shall be referred to a commission; and this is one of the things under which the petitioners are making a complaint. But the amendment provides, and you will find it in my brief at page 57, that:

> "No charge will be referred to a general court

martial for trial until after a thorough and impartial investigation thereof shall have been made."

Let us assume that we did not have that amendment and that the article read--

"No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made."

The argument, I take it, then would have been made by the petitioners that that did not apply to commissions; and yet clearly the history of the amendment shows that there was some ambiguity in the original provision and that Congress specifically amended it, so that the amendment was intended to make it apply only to courts-martial, and that the type of language is the type of language which excludes commissions by mentioning courts-martial.

So we can go all through these articles. It seems to me perhaps unnecessary to take them up in detail. I think the basic theory of construction has been presented to the Court.

Article 46 is found on page 213 of the Manual for Courts-Martial. It is discussed in my brief on page 57. That article reads as follows:

"Under such regulations as may be prescribed by the President every record of trial by general court-martial or military commission"--

That clearly applies to Commissions--

"received by a reviewing or confirming authority"--

There is in this case no record of a military commission received by a reviewing or confirming authority.

The Chief Justice. You mean, there is no requirement,

or merely that it has not occurred?

The Attorney General. I mean that there is no requirement.

The Chief Justice. The President is not a reviewing authority.

The Attorney General. I was just coming to that. He may be.

This article, it seems to me, clearly is not an article under which the President is permitted to issue regulations to govern himself. It is for the governmnceof the reviewing officers. In all criminal proceedings they go to the Board of Review. Under this procedure, under the proclamation, the record goes directly to the President.

The Chief Justice. That is at his direction?

The Attorney General. Yes sir.

The Chief Justice. If it is to go directly to him, should not the order be submitted to the body provided for here, since he is the reviewing authority?

The Attorney General. Let us see, again, what Article 46 says:

"Under such regulations as may be prescribed by the President"--

That is, prescribed for whom? Not for himself.

The Chief Justice. Why not, since what he has done is to make a regulation which, it is argued, is contrary to the requirements of the Articles of War made applicable to a trial before a military commission?

The Attorney General. In this connection I was trying to see, first, what the article meant--did the article mean that the President should issue regulations with respect to his

sation?

The Chief Justice. The argument is that the Articles of War applicable to trial by a military commission make the regulations and the President cannot set them aside.

The Attorney General. I understand; but it seems to me that this article was not intended to apply to a case in which the President skipped the review board.

The Chief Justice. The suggestion is that the record be made applicable, and that the President, under his power to make regulations, if he makes regulations and acts inconsistently with them, is therefore acting contrary to the regulations.

The Attorney General. Certainly the President as President can prescribe the regulations which shall govern.

The Chief Justice. Provided they are not inconsistent with the Articles of War which relate to trial by military commission. I understand that is your argument.

The Attorney General. Does it seem inconsistent where his own Judge Advocate, to whom he can refer the case, is actually trying the case and making the recommendation?

The Chief Justice. That brings you to Article 50½.

The Attorney General. But this is a situation where the President's own Judge Advocate, who is an appropriate reviewing authority under the Article, is himself trying the case and making recommendations to the President. I think it is perfectly appropriate for the President to ask the prosecuting officer to review a case and report to him. I do not think, of course, that it is appropriate in a habeas corpus matter to raise any of these procedural questions. That is all they are. I think it is most inappropriate.

Mr. Justice Jackson. The claim here is that it is improper to hold these persons for trial before a military commission.

The Attorney General. If the sole question is one of jurisdiction, I cannot see how these questions go to jurisdiction, because the President's proclamation is specifically made subject to the law, so, very obviously, it seems to me, if there are parts of the proclamation that are illegal they can be disregarded.

The Chief Justice. Is there anything in the order which provides for review, so far as Article 46 is concerned?

The Attorney General. No. I thought of that, Mr. Chief Justice, and I hesitated in presenting it, because there is nothing in the order which requires him to do so.

The Chief Justice. What about Article 50½? Does that deal only with courts-martial?

The Attorney General. It is specifically limited. In dealing with Article 50½, which is on page 214 of the Manual for Courts-Martial, it refers to Article 48, and I should like to look at Article 48 a moment.

The Chief Justice. It refers to Article 46, also.

The Attorney General. Yes; but I want to take 48 first, because there is language in Article 48 which I think throws light on this.

Article 48 is limited to courts-martial, but the last sentence in Article 48 is as follows:

"When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary."

The authority in both instances is the President.

The Chief Justice. That comes back to the question of whether Article 46 applies to the President.

The Attorney General. But, nevertheless, the authority competent to confirm the sentence is the President. He has acted as the approving authority, and no additional confirmation by him is necessary.

Mr. Justice Reed. Article 46 refers both to courts-martial and military commissions?

The Attorney General. Yes; it refers to both; there is no question about that.

The Chief Justice. Would this be a record under Article 46?

The Attorney General. I am not quite sure what your Honor means.

The Chief Justice. Would this be a record in this case?

The Attorney General. I think it would, clearly.

The Chief Justice. Article 50½ provides:

"Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of Article 46, Article 48, or Article 51 is submitted to the President, such record shall be examined by the Board of Review. The Board shall submit its opinion, in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's opinion, with his recommendations, directly to the Secretary of War for the action of the President."

Would those regulations govern trials by commissions, and can the President act [illegible]?

The Attorney General. Article 50½ refers, as I take it, to two types of cases: first, cases in which a court-martial imposes certain types of sentences.

Then it refers to cases in which the President's approval of the sentence is required under Article 46.

Our argument is that Article 46 does not require review of any sentence imposed by a court-martial, and that Article 48 refers only to courts-martial.

The Chief Justice. Could the sentence be carried into execution without the approval of the President?

The Attorney General. No.

The Chief Justice. It requires confirmation by the President? That brings in Article 46. It is required to go to the President for confirmation.

The Attorney General. It does not seem to me that the language of Article 46 covers this:

> "Under such regulations as may be prescribed by the President every record of trial by general court-martial or military commission received by a reviewing or confirming authority"--

Is this a record of a trial received by a reviewing or confirming authority?

The Chief Justice. It would seem so, if the execution is carried into effect.

The Attorney General. As I argued in the beginning, this article seems to me to be intended to apply to the Board of Review and not to the President, because he, being the Commander-in-Chief, does not make regulations with respect to his action when it comes up to him.

Mr. Justice Frankfurter. In other words, he can make such

regulations in each case as he deems proper?

The Attorney General. Yes, sir.

The Chief Justice. What about Article 58? Is the power of regulation circumscribed?

The Attorney General. Certainly; but I claim that it is not a regulation circumscribing the circumstances in this case where it skips the board and goes directly to the President himself.

Mr. Justice Frankfurter. In cases where the record goes to the President something has to happen in addition to the sentence that is imposed by the Commission before there could be any execution of any sentence?

The Attorney General. Yes. I suppose he would approve it or modify it.

Mr. Justice Frankfurter. Therefore it has to go to him in the nature of things, because the Commission itself has no power to carry out the sentence, has it?

The Attorney General. No, sir.

Mr. Justice Frankfurter. Therefore the provisions of Article 46 will take care of Article 48. When this record goes to him he would have to do something, so that it comes under the confirming requirements of Article 48. But as to Article 46 it seems strange that the President should be told to issue regulations for his own conduct.

The Attorney General. If that is insisted on, it seems to me to be a strange construction; but if the President desires to make regulations for himself to act under he can still do it.

Mr. Justice Jackson. Suppose the President violates it:

could we have anything to say about it?

The Attorney General. No. In military law the Commander-in-Chief has the final word, and it is nothing more than the Commander-in-Chief asking for an investigation of the circumstances and then acting on them as he deems proper. That is all any court-martial is except, of course, as modified by Congress.

Mr. Justice Jackson. If a military commission disregards the rights of parties there is no remedy, and that is the reason that the Milligan case was cited and is regarded as a landmark?

The Attorney General. I would not agree that it is regarded in that way. I think it is well to remember that the Milligan case was decided after the war was over.

Mr. Justice Frankfurter. You have made one concession which is precisely within the scope of Colonel Royall's argument, when you said "except, of course, as modified by Congress."

The Attorney General. Perhaps I narrowed that too much. I have always claimed that the President had special powers as Commander-in-Chief. It seems to me, clearly, that the President is acting in concert with the statute laid down by Congress. But I am glad you have brought up the point, because I argue that the Commander-in-Chief, in time of war and to repel an invasion, is not bound by a statute.

Mr. Justice Roberts. That is to say that the Articles of War bind him sometimes and sometimes they do not?

The Attorney General. No. I do not say that, Mr. Justice Roberts. I say that it is perfectly clear that in this case

there is no conflict.

Mr. Justice Roberts. You mean, his action does not conflict with the Act of Congress?

The Attorney General. Yes, sir.

Mr. Justice Roberts. That is a perfectly understandable argument. But I understood you to say that if he acted in conflict with the acts of Congress it still was all right.

The Attorney General. I do not think I went quite as far as that. I think we could imagine situations where the President could act, in repelling an invasion, irrespective of an Act of Congress. He must have some constitutional power that Congress cannot interfere with, as Commander-in-Chief. I think it is unnecessary for me to argue it here, first, because he has acted clearly under the Articles of War and, secondly, whether or not that procedure is followed is not for this Court to go into.

It seems to me that the Court has been asked to decide a moot question. The President not having acted, you are asked to decide whether it would be legal if he did act.

I think, Mr. Chief Justice, also, if I am accurate in saying so, that Article 46 is the only one where there is a doubt. The other sections very clearly deal with courts-martial, if I am correct in my construction of Article 38. In Articles 50½, 46 and 48 the question goes solely to the matter of review. The other points I claim are not well taken, because they come under regulations which do not apply to the Commission under my construction of Article 38.

Do I make myself clear?

The Chief Justice. Yes.