CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

JULY SPECIAL TERM, 1942.

EX PARTE QUIRIN ET AL.[1]

NOS. ——, ORIGINAL. MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF HABEAS CORPUS

AND

UNITED STATES EX REL. QUIRIN ET AL. *v.* COX, PROVOST MARSHAL.[2]

NOS. 1–7. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Argued July 29–30, 1942.—Decided July 31, 1942.

Per Curiam decision filed, July 31, 1942.[3] Full Opinion filed, October 29, 1942.[4]

1. A federal court may refuse to issue a writ of habeas corpus where the facts alleged in the petition, if proved, would not warrant discharge of the prisoner. P. 24.

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[1] No. —, Original, *Ex parte Richard Quirin;* No. —, Original, *Ex parte Herbert Hans Haupt;* No. —, Original, *Ex parte Edward John Kerling;* No. ——, Original, *Ex parte Ernest Peter Burger;* No. ——, Original, *Ex parte Heinrich Harm Heinck;* No. ——, Original, *Ex parte Werner Thiel;* and No. —, Original, *Ex parte Hermann Otto Neubauer.*

[2] No. 1, *United States ex rel. Quirin* v. *Cox, Provost Marshal;* No. 2, *United States ex rel. Haupt* v. *Cox, Provost Marshal;* No. 3, *United States ex rel. Kerling* v. *Cox, Provost Marshal;* No. 4, *United States ex rel. Burger* v. *Cox, Provost Marshal;* No. 5, *United States ex rel. Heinck* v. *Cox, Provost Marshal;* No. 6, *United States ex rel. Thiel* v. *Cox, Provost Marshal;* and No. 7, *United States ex rel. Neubauer* v. *Cox, Provost Marshal.*

[3] See footnote, *post,* p. 18.

[4] *Post,* p. 18.

2. Presentation to the District Court of the United States for the District of Columbia of a petition for habeas corpus was the institution of a suit; and denial by that court of leave to file the petition was a judicial determination of a case or controversy reviewable by appeal to the U. S. Court of Appeals for the District of Columbia and in this Court by certiorari. P. 24.
3. The President's Proclamation of July 2, 1942, declaring that all persons who are citizens or subjects of, or who act under the direction of, any nation at war with the United States, and who during time of war enter the United States through coastal or boundary defenses, and are charged with committing or attempting to commit sabotage, espionage, hostile acts, or violations of the law of war, "shall be subject to the law of war and to the jurisdiction of military tribunals," does not bar accused persons from access to the civil courts for the purpose of determining the applicability of the Proclamation to the particular case; nor does the Proclamation, which in terms denied to such persons access to the courts, nor the enemy alienage of the accused, foreclose consideration by the civil courts of the contention that the Constitution and laws of the United States forbid their trial by military commission. P. 24.
4. In time of war between the United States and Germany, petitioners, wearing German military uniforms and carrying explosives, fuses, and incendiary and time devices, were landed from German submarines in the hours of darkness, at places on the Eastern seaboard of the United States. Thereupon they buried the uniforms and supplies, and proceeded, in civilian dress, to various places in the United States. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at a sabotage school, and had with them, when arrested, substantial amounts of United States currency, which had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States. Specification 1 of the charges on which they were placed on trial before a military commission charged that they, "being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United

1 Syllabus.

States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States." *Held:*

(1) That the specification sufficiently charged an offense against the law of war which the President was authorized to order tried by a military commission; notwithstanding the fact that, ever since their arrest, the courts in the jurisdictions where they entered the country and where they were arrested and held for trial were open and functioning normally. *Ex parte Milligan*, 4 Wall. 2, distinguished. Pp. 21, 23, 36, 48.

(2) The President's Order of July 2, 1942, so far as it lays down the procedure to be followed on the trial before the Commission and on the review of its findings and sentence, and the procedure in fact followed by the Commission, were not in conflict with Articles of War 38, 43, 46, 50½ and 70. P. 46.

(3) The petitioners were in lawful custody for trial by a military commission; and, upon petitions for writs of habeas corpus, did not show cause for their discharge. P. 47.

5. Articles 15, 38 and 46 of the Articles of War, enacted by Congress, recognize the "military commission" as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by courts-martial. And by the Articles of War, especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenses against the law of war in appropriate cases. Pp. 26–28.

6. Congress, in addition to making rules for the government of our Armed Forces, by the Articles of War has exercised its authority under Art. I, § 8, cl. 10 of the Constitution to define and punish offenses against the law of nations, of which the law of war is a part, by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And by Article of War 15, Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war and which may constitutionally be included within that jurisdiction. Pp. 28, 30.

7. This Court has always recognized and applied the law of war as including that part of the law of nations which prescribes, for the

conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. P. 27.

8. The offense charged in this case was an offense against the law of war, the trial of which by military commission had been authorized by Congress, and which the Constitution does not require to be tried by jury. *Ex parte Milligan*, 4 Wall. 2, distinguished. P. 45.
9. By the law of war, lawful combatants are subject to capture and detention as prisoners of war; unlawful combatants, in addition, are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. P. 30.
10. It has long been accepted practice by our military authorities to treat those who, during time of war, pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, as unlawful combatants punishable as such by military commission. This practice, accepted and followed by other governments, must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War. P. 35.
11. Citizens of the United States who associate themselves with the military arm of an enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. P. 37.
12. Even when committed by a citizen, the offense here charged is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other. P. 38.
13. Article III, § 2, and the Fifth and Sixth Amendments of the Constitution did not extend the right to demand a jury to trials by military commission or require that offenses against the law of war, not triable by jury at common law, be tried only in civil courts. P. 38.
14. Section 2 of the Act of Congress of April 10, 1806, derived from the Resolution of the Continental Congress of August 21, 1776, and which imposed the death penalty on alien spies "according to the law and usage of nations, by sentence of a general court martial," was a contemporary construction of Article III, § 2 of the Constitution and of the Fifth and Sixth Amendments, as not foreclosing trial by military tribunals, without a jury, for offenses against the law of war.

committed by enemies not in or associated with our Armed Forces. It is a construction which has been followed since the founding of our government, and is now continued in the 82nd Article of War. Such a construction is entitled to great respect. P. 41.

15. Since violation of the law of war is adequately alleged in this case, the Court finds no occasion to consider the validity of other specifications based on the 81st and 82nd Articles of War, or to construe those articles or decide upon their constitutionality as so construed. P. 46.

Leave to file petitions for habeas corpus in this Court denied.

Orders of District Court (47 F. Supp. 431), affirmed.

The Court met in Special Term, on Wednesday, July 29, 1942, pursuant to a call by the Chief Justice having the approval of all the Associate Justices.

The Chief Justice announced that the Court had convened in Special Term in order that certain applications might be presented to it and argument be heard in respect thereto.

In response to an inquiry by the Chief Justice, the Attorney General stated that the Chief Justice's son, Major Lauson H. Stone, U. S. A., had, under orders, assisted defense counsel before the Military Commission, in the case relative to which the Special Term of the Court was called; but that Major Stone had had no connection with this proceeding before this Court. Therefore, said the Attorney General, counsel for all the respective parties in this proceeding joined in urging the Chief Justice to participate in the consideration and decision of the matters to be presented. Colonel Kenneth C. Royall, of counsel for the petitioners, concurred in the statement and request of the Attorney General.

The applications, seven in number (*ante*, p. 1, n. 1), first took the form of petitions to this Court for leave to file petitions for writs of habeas corpus to secure the release of the petitioners from the custody of Brigadier General

Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington, who, pursuant to orders, was holding them in that District for and during a trial before a Military Commission constituted by an Order of the President of the United States. During the course of the argument, the petitioners were permitted to file petitions for writs of certiorari, directed to the United States Court of Appeals for the District of Columbia, to review, before judgment by that Court, orders then before it by appeal by which the District Court for the District of Columbia had denied applications for leave to file petitions for writs of habeas corpus.

After the argument, this Court delivered a Per Curiam Opinion, disposing of the cases (footnote, p. 18). A full opinion, which is the basis of this Report, was filed with the Clerk of the Court on October 29, 1942, *post*, p. 18.

Colonel Kenneth C. Royall and *Colonel Cassius M. Dowell* had been assigned as defense counsel by the President in his Order appointing the Military Commission. Colonel Royall argued the case and Colonel Dowell was with him on the brief.

Enemy aliens may resort to habeas corpus. *Ex parte Milligan*, 4 Wall. 2, at pp. 115–121; *Kaufman* v. *Eisenberg*, 32 N. Y. S. 2d 450; *Ex parte Orozco*, 201 F. 106; *Ex parte Risse*, 257 F. 102; 55 Harvard L. Rev. 1058; 31 Ops. Atty. Gen. 361.

50 U. S. C. § 21 relates only to internment and does not authorize a proclamation denying to alien enemies the right to apply for writ of habeas corpus.

The 82nd Article of War, which provides for trial and punishment of spies by courts-martial *or* by military commission, must be construed as applying only to offenses committed in connection with actual military operations, or on or near military fortifications, encampments, or installations.

Mere proof that persons in uniform landed on the American coast from a submarine, or otherwise, does not supply any of the elements of spying. None of the petitioners committed any acts on, near, or in connection with any fortifications, posts, quarters, or encampments of the Army; or on, near, or in connection with any other military installations; or at any location within the zone of operations. 2 Wheaton, Int. L., 6th Ed., 766; 2 Oppenheim, Int. L., 1905 Ed., 161; Halleck, Int. L., 3d Ed., 573. In the absence of evidence of any acts within this zone, there is no authority for a military commission under Article of War 82.

That the acts alleged to have been committed by the petitioners in violation of the 81st Article were not in the zone of military operations would also preclude the jurisdiction of a military commission to try this offense. See 18 U. S. C. § 1; 50 U. S. C. §§ 31–42, 101–106. The petitioners were arrested by the civil authorities, waived arraignment before a civil court, and also waived removal to another federal judicial district. The civil courts thereby acquired jurisdiction; and there was no authority for the military authorities to oust these courts of this jurisdiction.

The Rules of Land Warfare describe no such offense as that set forth in the specifications of the first charge. These Rules were prepared in 1940 under the direction of the Judge Advocate General, and purport to include all offenses against the law of war.

The so-called law of war is a species of international law analogous to common law. There is no common law crime against the United States.

The first charge sets out no more than the offenses of sabotage and espionage, which are specifically covered by 50 U. S. C., §§ 31–42, 101–106, and which are triable by the civil courts.

The charge of conspiracy can not stand if the other charges fall. Furthermore, 18 U. S. C. 88 deals expressly with the offense of conspiracy, and this charge is not triable by a military commission.

The conduct of the petitioners was nothing more than preparation to commit the crime of sabotage. The objects of sabotage had never been specifically selected and the plan did not contemplate any act of sabotage within a period of three months. These facts are not even sufficient to constitute an attempt to commit sabotage.

The civil courts were functioning both in the localities in which the offenses were charged to have been committed and in the District of Columbia where the alleged offenses were being tried. In these localities there was no martial law and no other circumstances which would justify action by a military tribunal.

The only way in which the petitioners as a practical matter could raise the jurisdictional question was by petition for writ of habeas corpus.

The military commission had no jurisdiction over petitioners. Article of War 2 defines the persons who are subject to military law, and includes members of the armed forces and other designated persons. Military courts-martial and other military tribunals have no jurisdiction to try any other person for offenses in violation of the Articles of War, except in the cases of Articles 81 and 82. The same is true of any alleged violations of the law of war. *Ex parte Milligan, supra;* 31 Ops. Atty. Gen. 356.

Civil persons who commit acts in other localities than the zone of active military operations are triable only in the civil courts and under the criminal statutes. While it is true that the territory along the coast was patrolled by the Coast Guard, the patrol was unarmed. It would be a strained use of language to say that this patrol made the beach a military line or part of the zone of active operations.

Nor is the situation changed by the fact that on the Long Island beach, some distance away, was located a Signal Corps platoon engaged in operating a radio locator station. The evidence shows that this platoon did not patrol the beach and was not engaged in any military offensive or defensive operation at the time the petitioners landed. The whole United States is divided into defense areas or sectors and the orders therefor are substantially similar to those providing for the southern and eastern defense sectors. If the prosecution were correct in its contention that the issuance of orders for these sectors creates a zone of active military operations, then the entire United States is a zone of active military operations, and persons located therein are subject to the jurisdiction of military tribunals. The Florida and Long Island seacoasts were not and are not in any true sense zones of active military operations, but are instead parts of the Zone of the Interior as defined in the Field Service Regulations.

Martial law is a matter of fact and not a matter of proclamation; and a proclamation assuming to declare martial law is invalid unless the facts themselves support it. See *Sterling* v. *Constantin,* 287 U. S. 378.

The President's Order and Proclamation did not create a state of martial law in the entire eastern part of the United States. In view of the facts, there was no adequate reason, either of military necessity or otherwise, for depriving any persons in that area of the benefit of constitutional provisions guaranteeing an ordinary and proper trial before a civil court. *Ex parte Milligan, supra.*

The President had no authority, in absence of statute, to issue the Proclamation. In England, the practice has been to obtain authority of Parliament for similar action. 4 and 5 Geo. V, c. 29; 5 and 6 Geo. V, c. 8; 10 and 11 Geo. V, c. 55; 2 and 3 Geo. VI, (1939) c. 62. Congress alone can suspend the writ of habeas corpus, and then only in cases of rebellion or invasion. Const., Art. I, § 9, cl. 2;

Ex parte Merryman, 17 Fed. Cas. 114; *Ex parte Bollman,* 4 Cranch 101; *McCall* v. *McDowell,* Fed. Cas. No. 8673; *Ex parte Benedict,* 3 Fed. Cas. No. 1292; Willoughby, Const. L., § 1057.

The Proclamation was issued after the commission of the acts which are charged as crimes and is *ex post facto.* Congress itself could not have passed valid legislation increasing the penalty for acts already committed. Const., Art. I, § 9, cl. 3; *Thompson* v. *Utah,* 170 U. S. 343; *Burgess* v. *Salmon,* 97 U. S. 384.

The Proclamation is violative of the Fifth and Sixth Amendments, of Art. III, § 2, cl. 3, and of Art. I, § 9, cl. 2, of the Constitution.

The Order is invalid because it violates express provisions of Article of War 38 respecting rules of evidence; and is inconsistent with provisions of Article 43 requiring concurrence of three-fourths of the Commission's members for conviction or sentence.

Article 70 requires a preliminary hearing like one before a committing magistrate, with liberty of the accused to cross-examine. This is ignored by the Order.

Whereas Article 50½ requires action by the Board of Review and the recommendation of the Judge Advocate General before the case is submitted to the President, the Order requires that the Commission transmit the record of the trial, including any judgment or sentence, *directly* to the President for his action thereon.

The Order has made it impossible to comply with the statutory provisions, by directing the Judge Advocate General (and the Attorney General) to conduct the prosecution, thereby disqualifying the Judge Advocate General and his subordinates from acting as a reviewing authority. The proceedings disclose that the Judge Advocate General has in fact assisted in the conduct of the prosecution.

This is a material violation of the statutory rights afforded accused persons by the Articles of War. The

provisions of Articles 46 and 50½ are the methods of appeal by a person tried before a military commission. The Order deprives them of this method of appeal.

A cardinal purpose of Article 38 was to provide a procedure for military commissions, with the proviso that nothing in the procedure shall be "contrary to or inconsistent with" the Articles of War.

The President had no authority to delegate the rule-making power under Art. 38 to the Commission. In violation of Articles 38 and 18 the petitioners were denied the right to challenge a member of the Commission peremptorily. Confessions of the defendants were improperly admitted against each other.

If it be suggested that these are matters which do not affect the jurisdiction of the Commission or the validity of the proceedings, but are merely questions which may be raised on appeal or review, the answer is that the Order deprived the petitioners of such appeal or review.

Citing *Ex parte Milligan,* 4 Wall. 2; *Sterling* v. *Constantin,* 287 U. S. 378; *Caldwell* v. *Parker,* 252 U. S. 376; *Kahn* v. *Anderson,* 255 U. S. 1; *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *Carter* v. *Carter Coal Co.,* 298 U. S. 330; 55 Harvard L. Rev. 1295; 31 Ops. A. G. 363.

Attorney General Biddle, with whom *Judge Advocate General Myron C. Cramer, Assistant Solicitor General Cox, and Col. Erwin M. Treusch* were on the brief, for respondent.

Enemies who invade the country in time of war have no privilege to question their detention by habeas corpus. Halsbury's Laws of England, 2d Ed., Vol. IX, p. 701, par. 1200; p. 710, par. 1212; Blackstone, 21 Ed., Vol. 1, c. 10, p. 372; *Sylvester's Case,* 7 Mod. 150 (1703); *Rex* v. *Knockaloe Camp Commandant,* 87 L. J. K. B. N. S. 43 (1917); *Rex* v. *Schiever,* 2 Burr. 765 (1759); *Furly* v. *Newnham,* 2 Doug. K. B. 419 (1780); *Three Spanish Sailors,* 2 W. B.

1324 (1779); *Rex* v. *Superintendent of Vine Street Police Station,* [1916] 1 K. B. 268; *Schaffenius* v. *Goldberg,* [1916] 1 K. B. 284; *Rules of Land Warfare,* pars. 9, 70, 351, 352, 356.

If prisoners of war are denied the privilege of the writ of habeas corpus, it is inescapable that petitioners are not entitled to it. By removal of their uniforms before their capture, they lost the possible advantages of being prisoners of war. Surely, they did not thus acquire a privilege even prisoners of war do not have.

Whatever privilege may be accorded to such enemies is accorded by sufferance, and may be taken away by the President. Alien enemies—even those lawfully resident within the country—have no privilege of habeas corpus to inquire into the cause of their detention as dangerous persons. *Ex parte Graber,* 247 F. 882; *Minotto* v. *Bradley,* 252 F. 600. See also *Ex parte Weber,* [1916] 1 K. B. 280, affirmed [1916] 1 A. C. 421; *Rex* v. *Superintendent of Vine Street Police Station,* [1916] 1 K. B. 268; *Rex* v. *Knockaloe Camp Commandant,* 87 L. J. K. B. N. S. 43; *Re Chamryk,* 25 Man. L. Rep. 50; *Re Beranek,* 33 Ont. L. Rep. 139; *Re Gottesman,* 41 Ont. L. Rep. 547; *Gusetu* v. *Date,* 17 Quebec Pr. 95; Act of July 6, 1798, 50 U. S. C. § 21; *De Lacey* v. *United States,* 249 F. 625.

The fact is that ordinary constitutional doctrines do not impede the Federal Government in its dealings with enemies. *Brown* v. *United States,* 8 Cranch 110, 121–123; *Miller* v. *United States,* 11 Wall. 268; *Juragua Iron Co.* v. *United States,* 212 U. S. 297; *De Lacey* v. *United States,* 249 F. 625.

The President's power over enemies who enter this country in time of war, as armed invaders intending to commit hostile acts, must be absolute.

In his Proclamation, the President took the action he deemed necessary to deal with persons he and the armed forces under his command reasonably believed to be enemy

invaders. He declared that all such persons should be subject to the law of war and triable by military tribunals. He removed whatever privilege such persons might otherwise have had to seek any remedy or maintain any proceeding in the courts of the United States.

These acts were clearly within his power as Commander in Chief and Chief Executive, and were lawful acts of the sovereign—the Government of the United States—in time of war.

The prisoners are enemies who fall squarely within the terms of the President's proclamation. Cf. Trading with the Enemy Act of 1917, §§ 2, 7 (b).

To whatever extent the President has power to bar enemies from seeking writs of habeas corpus, he clearly has power to define "enemy" as including a class as broad as that described in the Trading with the Enemy Act.

Even if it be assumed that Burger and Haupt are citizens of the United States, this does not change their status as "enemies" of the United States. Hall, Int. L. (1909) 490–497; 2 Oppenheim, Int. L. (1940) 216–218. This rule applies to all persons living in enemy territory, even if they are technically United States citizens. *Miller* v. *United States,* 11 Wall. 268; *Juragua Iron Co.* v. *United States,* 212 U. S. 297, 308. The return of Burger and Haupt to the United States can not by any possibility be construed as an attempt to divest themselves of their enemy character by reassuming their duties as citizens.

The offenses charged against these prisoners are within the jurisdiction of this military commission. Articles of War 81 and 82 (10 U. S. C., §§ 1553–4).

The law of war, like civil law, has a great *lex non scripta,* its own common law. This "common law of war" (*Ex parte Vallandigham,* 1 Wall. 243, 249) is a centuries-old body of largely unwritten rules and principles of international law which governs the behavior of both soldiers

and civilians during time of war. Winthrop, *Military Law and Precedents* (1920), 17, 41, 42, 773 ff.

The law of war has always been applied in this country. The offense for which Major André was convicted—passing through our lines in civilian dress, with hostile purpose—is one of the most dangerous offenses known to the law of war. The other offenses here charged—appearing behind the lines in civilian guise, spying, relieving the enemy, and conspiracy—are equally serious and also demand severe punishment. See *Digest of Opinions of Judge Advocate General,* Howland (1912), pp. 1070–1071. Cf. *Instruction for the Government of Armies of the United States in the Field* (G. O. 100, A. G. O. 1863) § I, par. 13; Davis, *Military Law of the United States* (1913), p. 310; Rules of Land Warfare, §§ 348, 351, 352; Article of War 15.

The definition of *lawful* belligerents appearing in the Rules of Land Warfare (Rule 9) was adopted by the signatories to the Hague Convention in Article I, Annex to Hague Convention No. IV of Oct. 18, 1907, Treaty Series No. 539, and was ratified by the Senate of the United States. 36 Stat. 2295. Our Government has thus recognized the existence of a class of *unlawful* belligerents. These unlawful belligerents, under Article of War 15, are punishable under the common law of war. See text writers, *supra; Ex parte Vallandigham,* 1 Wall. 243, 249.

Military commissions in the United States derive their authority from the Constitution as well as statutes, military usage, and the common law of war. Const., Art. I; Art. II, § 2 (1). In Congress and the President together is lodged the power to wage war successfully. *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426.

Military commissions have been acknowledged by Congressional statutes which have recognized them as courts of military law. Articles of War 15, 38, 81, 82; 10 U. S. C.

§§ 1486, 1509, 1553, 1554. Their authority has also been recognized in presidential proclamations and orders, rulings of the courts, and opinions of the Attorneys General.

The offenses charged here are unquestionably within the jurisdiction of military commissions. The prisoners are charged with violating Articles of War 81 and 82 (10 U. S. C., §§ 1553–4) which specifically provide for trial by military commission. They are also charged with violating the common law of war in crossing our military lines and appearing behind our lines in civilian dress, with hostile purpose, and with conspiring to commit all the above violations, which in itself constitutes an additional violation of the law of war. The jurisdiction of military commissions over these offenses under the law of war (in addition to the specific offenses codified in the Articles of War) is expressly recognized by Article of War 15 (10 U. S. C. § 1486).

The military commission has jurisdiction over the persons of these prisoners. *Ex parte Milligan,* 4 Wall. 2, 123, 138–139. The offenses charged here arise in the land or naval forces. The law of war embraces citizens as well as aliens (enemy or not); and civilians as well as soldiers are all within their scope. Indeed it was for the very purpose of trying civilians for war crimes that military commissions first came into use. Winthrop, *Military Law and Precedents* (1920) 831–841.

This broad comprehension of persons is well within the limits of the excepting clause of the Fifth Amendment. That clause has been almost universally construed to include civilians. Wiener, *Manual of Martial Law* (1940), 137; Morgan, *Court-Martial Jurisdiction over Nonmilitary Persons under the Articles of War,* 4 Minn. L. Rev. 79, 107; Winthrop, *Military Law and Precedents* (1920 ed.) 48, 767; Fletcher, *The Civilian and the War Power,* 2 Minn. L. Rev. 110, 126; 16 Op. Atty. Gen. 292; *Ex parte Wildman,* 29 Fed. Cas. 1232. Such construction

is founded in common sense: of all hostile acts, those by civilians are most dangerous and should be punished most severely.

By the law of war, war crimes can be committed anywhere "within the lines of a belligerent." Oppenheim's Int. L. (Lauterpacht's 6th ed. 1940) 457. Having violated the law of war in an area where it obviously applies, offenders are subject to trial by military tribunals wherever they may be apprehended. Congress may grant jurisdiction to try civilians for offenses which "occur in the theatre of war, in the theatre of operations, or in any place over which the military forces have actual control and jurisdiction." Cf. Morgan, *supra,* at 107; Wiener, *supra,* at 137. Neither the Bill of Rights nor *Ex parte Milligan* grants to such persons constitutional guarantees which the Fifth Amendment expressly denies to our own soldiers. Cf. 2 Warren, *The Supreme Court in United States History* (1937) 418; Corwin, *The President: Office and Powers* (2d ed. 1941) 165; *United States* v. *McDonald,* 265 F. 754. The test of whether or not the civil courts are open to punish civil crimes is too unrealistic a test to be applied blindly to all exercises of military jurisdiction.

The judgment of the President as to what constitutes necessity for trial by military tribunal should not lightly be disregarded. *Prize Cases,* 2 Black 635. The English courts have not only long since rejected the doctrine of *Ex parte Milligan,* which they once accepted, but also have recently sustained a wide discretion granted to the Executive for the detention of persons suspected of hostile associations. *Liversidge* v. *Anderson,* [1942] 1 A. C. 206; *Greene* v. *Secretary of State for Home Affairs,* [1942] 1 A. C. 284.

Courts do not inquire into the Executive's determination on matters of the type here involved. *Martin* v. *Mott,* 12 Wheat. 19. Cf. *United States* v. *George S. Bush*

& Co., 310 U. S. 371; *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320; *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163. Even if it be assumed that the President's nomination of a military commission to try war criminals, as specified by Congress, must be tested by the "actual and present necessity" criterion of the majority opinion in the *Milligan* case, this Court will not review the President's judgment save in a case of grave and obvious abuse. *Moyer* v. *Peabody*, 212 U. S. 78; *Sterling* v. *Constantin*, 287 U. S. 378.

The Commission was legally convened and constituted. *Kurtz* v. *Moffitt*, 115 U. S. 487, 500; *Keyes* v. *United States*, 109 U. S. 336.

The procedure and regulations prescribed by the President are proper. Article of War 43, requiring unanimity for a death sentence, refers to courts-martial. It has no application to charges referred to a military commission. The President's order did not make improper provision for review, Articles of War 46, 48, 50½ and 51 considered. There was no improper delegation of rule-making power.

The doctrine of unconstitutional delegation of powers relates only to the improper transfer of powers from one of the three branches of the government to another. It has nothing to do with delegations by the Chief Executive to his military subordinates within the executive branch. Military courts "form no part of the judicial system of the United States." *Kurtz* v. *Moffitt*, 115 U. S. 487, 500.

Objections to the actions of the Commission on a variety of grounds, ranging from its refusal to permit peremptory challenges to its rulings on the admissibility and sufficiency of evidence, are not cognizable by this Court. The writ of habeas corpus can only be used to question the jurisdiction of a military tribunal. It cannot be converted into a device for civil court review.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

These cases are brought here by petitioners' several applications for leave to file petitions for habeas corpus in this Court, and by their petitions for certiorari to review orders of the District Court for the District of Columbia, which denied their applications for leave to file petitions for habeas corpus in that court.

The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942,

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The following is the *per curiam* opinion filed July 31, 1942:

PER CURIAM.

In these causes motions for leave to file petitions for habeas corpus were presented to the United States District Court for the District of Columbia, which entered orders denying the motions. Motions for leave to file petitions for habeas corpus were then presented to this Court, and the merits of the applications were fully argued at the Special Term of Court convened on July 29, 1942. Counsel for petitioners subsequently filed a notice of appeal from the order of the District Court to the United States Court of Appeals for the District of Columbia, and they have perfected their appeals to that court. They have presented to this Court petitions for writs of certiorari before judgment of the United States Court of Appeals for the District of Columbia, pursuant to 28 U. S. C. § 347 (a). The petitions are granted. In accordance with the stipulation between counsel for petitioners and for the respondent, the papers filed and argument had in connection with the applications for leave to file petitions for habeas corpus are made applicable to the certiorari proceedings.

The Court has fully considered the questions raised in these cases and thoroughly argued at the bar, and has reached its conclusion upon them. It now announces its decision and enters its judgment in each case, in advance of the preparation of a full opinion which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the Clerk.

The Court holds:

(1) That the charges preferred against petitioners on which they are being tried by military commission appointed by the order of the

on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States.

After denial of their applications by the District Court, 47 F. Supp. 431, petitioners asked leave to file petitions for habeas corpus in this Court. In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942. The applications for leave to file the petitions were presented in open court on that day and were heard on the petitions, the answers to them of respondent, a stipulation of facts by counsel, and the record of the testimony given before the Commission.

While the argument was proceeding before us, petitioners perfected their appeals from the orders of the District Court to the United States Court of Appeals for the District of Columbia and thereupon filed with this

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President of July 2, 1942, allege an offense or offenses which the President is authorized to order tried before a military commission.

(2) That the military commission was lawfully constituted.

(3) That petitioners are held in lawful custody for trial before the military commission, and have not shown cause for being discharged by writ of habeas corpus.

The motions for leave to file petitions for writs of habeas corpus are denied.

The orders of the District Court are affirmed. The mandates are directed to issue forthwith.

MR. JUSTICE MURPHY took no part in the consideration or decision of these cases.

Court petitions for certiorari to the Court of Appeals before judgment, pursuant to § 240 (a) of the Judicial Code, 28 U. S. C. § 347 (a). We granted certiorari before judgment for the reasons which moved us to convene the special term of Court. In accordance with the stipulation of counsel we treat the record, briefs and arguments in the habeas corpus proceedings in this Court as the record, briefs and arguments upon the writs of certiorari.

On July 31, 1942, after hearing argument of counsel and after full consideration of all questions raised, this Court affirmed the orders of the District Court and denied petitioners' applications for leave to file petitions for habeas corpus. By per curiam opinion we announced the decision of the Court, and that the full opinion in the causes would be prepared and filed with the Clerk.

The following facts appear from the petitions or are stipulated. Except as noted they are undisputed.

All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship, or in any case that he has by his conduct renounced or abandoned his United States citizenship. See *Perkins* v. *Elg*, 307 U. S. 325, 334; *United States ex rel. Rojak* v. *Marshall*, 34 F. 2d 219; *United States ex rel. Scimeca* v. *Husband*, 6 F. 2d 957, 958; 8 U. S. C. § 801, and compare 8 U. S. C. § 808. For reasons presently to be stated we do not find it necessary to resolve these contentions.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses, and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned, and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness, wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned, and proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school and had received substantial sums in

United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States.[1]

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942,[2] appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War, and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. On the same day, by Proclamation,[3] the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation,

[1] From June 12 to June 18, 1942, Amagansett Beach, New York, and Ponte Vedra Beach, Florida, were within the area designated as the Eastern Defense Command of the United States Army, and subject to the provisions of a proclamation dated May 16, 1942, issued by Lieutenant General Hugh A. Drum, United States Army, Commanding General, Eastern Defense Command (see 7 Federal Register 3830). On the night of June 12–13, 1942, the waters around Amagansett Beach, Long Island, were within the area comprising the Eastern Sea Frontier, pursuant to the orders issued by Admiral Ernest J. King, Commander in Chief of the United States Fleet and Chief of Naval Operations. On the night of June 16–17, 1942, the waters around Ponte Vedra Beach, Florida, were within the area comprising the Gulf Sea Frontier, pursuant to similar orders.

On the night of June 12–13, 1942, members of the United States Coast Guard, unarmed, maintained a beach patrol along the beaches surrounding Amagansett, Long Island, under written orders mentioning the purpose of detecting landings. On the night of June 17–18, 1942, the United States Army maintained a patrol of the beaches surrounding and including Ponte Vedra Beach, Florida, under written orders mentioning the purpose of detecting the landing of enemy agents from submarines.

[2] 7 Federal Register 5103.

[3] 7 Federal Register 5101.

and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals."

The Proclamation also stated in terms that all such persons were denied access to the courts.

Pursuant to direction of the Attorney General, the Federal Bureau of Investigation surrendered custody of petitioners to respondent, Provost Marshal of the Military District of Washington, who was directed by the Secretary of War to receive and keep them in custody, and who thereafter held petitioners for trial before the Commission.

On July 3, 1942, the Judge Advocate General's Department of the Army prepared and lodged with the Commission the following charges against petitioners, supported by specifications:

1. Violation of the law of war.

2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.

3. Violation of Article 82, defining the offense of spying.

4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

The Commission met on July 8, 1942, and proceeded with the trial, which continued in progress while the causes were pending in this Court. On July 27th, before petitioners' applications to the District Court, all the evidence for the prosecution and the defense had been taken by the Commission and the case had been closed except for arguments of counsel. It is conceded that ever since petitioners' arrest the state and federal courts in Florida, New York, and the District of Columbia, and in

the states in which each of the petitioners was arrested or detained, have been open and functioning normally.

While it is the usual procedure on an application for a writ of habeas corpus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner. *Walker* v. *Johnston*, 312 U. S. 275, 284. Presentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari. See *Ex parte Milligan*, 4 Wall. 2, 110–13; *Betts* v. *Brady*, 316 U. S. 455, 458–461.

Petitioners' main contention is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that in consequence they are entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses. In any case it is urged that the President's Order, in prescribing the procedure of the Commission and the method for review of its findings and sentence, and the proceedings of the Commission under the Order, conflict with Articles of War adopted by Congress—particularly Articles 38, 43, 46, 50½ and 70—and are illegal and void.

The Government challenges each of these propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of

persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force, no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission. As announced in our per curiam opinion, we have resolved those questions by our conclusion that the Commission has jurisdiction to try the charge preferred against petitioners. There is therefore no occasion to decide contentions of the parties unrelated to this issue. We pass at once to the consideration of the basis of the Commission's authority.

We are not here concerned with any question of the guilt or innocence of petitioners.[4] Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. *Ex parte Milligan, supra,* 119, 132; *Tumey* v. *Ohio,* 273 U. S. 510, 535; *Hill* v. *Texas,* 316 U. S. 400, 406. But the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

Congress and the President, like the courts, possess no power not derived from the Constitution. But one of

[4] As appears from the stipulation, a defense offered before the Military Commission was that petitioners had had no intention to obey the orders given them by the officer of the German High Command.

the objects of the Constitution, as declared by its preamble, is to "provide for the common defence." As a means to that end, the Constitution gives to Congress the power to "provide for the common Defence," Art. I, § 8, cl. 1; "To raise and support Armies," "To provide and maintain a Navy," Art. I, § 8, cl. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14. Congress is given authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11; and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," Art. I, § 8, cl. 10. And finally, the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18.

The Constitution confers on the President the "executive Power," Art. II, § 1, cl. 1, and imposes on him the duty to "take Care that the Laws be faithfully executed." Art. II, § 3. It makes him the Commander in Chief of the Army and Navy, Art. II, § 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, § 3, cl. 1.

The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.

By the Articles of War, 10 U. S. C. §§ 1471–1593, Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts

martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. Arts. 1, 2. But the Articles also recognize the "military commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. See Arts. 12, 15. Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions. Articles 81 and 82 authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying. And Article 15 declares that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." Article 2 includes among those persons subject to military law the personnel of our own military establishment. But this, as Article 12 provides, does not exclude from that class "any other person who by the law of war is subject to trial by military tribunals" and who under Article 12 may be tried by court martial or under Article 15 by military commission.

Similarly the Espionage Act of 1917, which authorizes trial in the district courts of certain offenses that tend to interfere with the prosecution of war, provides that nothing contained in the act "shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial." 50 U. S. C. § 38.

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct

of war, the status, rights and duties of enemy nations as well as of enemy individuals.[5] By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law

[5] *Talbot* v. *Janson*, 3 Dall. 133, 153, 159–61; *Talbot* v. *Seeman*, 1 Cranch 1, 40–41; *Maley* v. *Shattuck*, 3 Cranch 458, 488; *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch 185, 199; *The Rapid*, 8 Cranch 155, 159–64; *The St. Lawrence*, 9 Cranch 120, 122; *Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cranch 191, 197–98; *The Anne*, 3 Wheat. 435, 447–48; *United States* v. *Reading*, 18 How. 1, 10; *Prize Cases*, 2 Black 635, 666–67, 687; *The Venice*, 2 Wall. 258, 274; *The William Bagaley*, 5 Wall. 377; *Miller* v. *United States*, 11 Wall. 268; *Coleman* v. *Tennessee*, 97 U. S. 509, 517; *United States* v. *Pacific Railroad*, 120 U. S. 227, 233; *Juragua Iron Co.* v. *United States*, 212 U. S. 297.

of war. It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan, supra.* But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.

It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing "the crime of piracy, as defined by the law of nations" is an appropriate exercise of its constitutional authority, Art. I, § 8, cl. 10, "to define and punish" the offense, since it has adopted by reference the sufficiently precise definition of international law. *United States* v. *Smith,* 5 Wheat. 153; see *The Marianna Flora,* 11 Wheat. 1, 40–41;

United States v. *Brig Malek Adhel,* 2 How. 210, 232; *The Ambrose Light,* 25 F. 408, 423–28; 18 U. S. C. § 481.[6] Similarly, by the reference in the 15th Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions," Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war (compare *Dynes* v. *Hoover,* 20 How. 65, 82), and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations[7] and also be-

[6] Compare 28 U. S. C. § 41 (17), conferring on the federal courts jurisdiction over suits brought by an alien for a tort "in violation of the laws of nations"; 28 U. S. C. § 341, conferring upon the Supreme Court such jurisdiction of suits against ambassadors as a court of law can have "consistently with the law of nations"; 28 U. S. C. § 462, regulating the issuance of habeas corpus where the prisoner claims some right, privilege or exemption under the order of a foreign state, "the validity and effect whereof depend upon the law of nations"; 15 U. S. C. §§ 606 (b) and 713 (b), authorizing certain loans to foreign governments, provided that "no such loans shall be made in violation of international law as interpreted by the Department of State."

[7] Hague Convention No. IV of October 18, 1907, 36 Stat. 2295, Article I of the Annex to which defines the persons to whom belligerent rights and duties attach, was signed by 44 nations. See also Great Britain, War Office, Manual of Military Law (1929) ch. xiv, §§ 17–19; German General Staff, Kriegsbrauch im Landkriege (1902) ch. 1; 7 Moore, Digest of International Law, § 1109; 2 Hyde, International Law (1922) § 653–54; 2 Oppenheim, International Law (6th ed. 1940) § 107; Bluntschli, Droit International (5th ed. tr. Lardy) §§ 531–32; 4 Calvo, Le Droit International Theorique et Pratique (5th ed. 1896) §§ 2034–35.

tween those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[8] The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. See Winthrop, Military Law, 2d ed., pp. 1196–97, 1219–21; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, §§ IV and V.

Such was the practice of our own military authorities before the adoption of the Constitution,[9] and during the Mexican and Civil Wars.[10]

[8] Great Britain, War Office, Manual of Military Law, ch. xiv, §§ 445–451; Regolamento di Servizio in Guerra, § 133, 3 Leggi e Decreti del Regno d'Italia (1896) 3184; 7 Moore, Digest of International Law, § 1109; 2 Hyde, International Law, §§ 654, 652; 2 Halleck, International Law (4th ed. 1908) § 4; 2 Oppenheim, International Law, § 254; Hall, International Law, §§ 127, 135; Baty & Morgan, War, Its Conduct and Legal Results (1915) 172; Bluntschli, Droit International, §§ 570 bis.

[9] On September 29, 1780, Major John Andre, Adjutant-General to the British Army, was tried by a "Board of General Officers" appointed by General Washington, on a charge that he had come within the lines for an interview with General Benedict Arnold and had been captured while in disguise and travelling under an assumed name. The Board found that the facts charged were true, and that when captured Major Andre had in his possession papers containing in-

Paragraph 83 of General Order No. 100 of April 24, 1863, directed that: "Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death." And Paragraph

telligence for the enemy, and reported their conclusion that "Major Andre . . . ought to be considered as a Spy from the enemy, and that agreeably to the law and usage of nations . . . he ought to suffer death." Major Andre was hanged on October 2, 1780. Proceedings of a Board of General Officers Respecting Major John Andre, Sept. 29, 1780, printed at Philadelphia in 1780.

[10] During the Mexican War military commissions were created in a large number of instances for the trial of various offenses. See General Orders cited in 2 Winthrop, Military Law (2d ed. 1896) p. 1298, note 1.

During the Civil War the military commission was extensively used for the trial of offenses against the law of war. Among the more significant cases for present purposes are the following:

On May 22, 1865, T. E. Hogg and others were tried by a military commission, for "violations of the laws and usages of civilized war," the specifications charging that the accused "being commissioned, enrolled, enlisted or engaged" by the Confederate Government, came on board a United States merchant steamer in the port of Panama "in the guise of peaceful passengers" with the purpose of capturing the vessel and converting her into a Confederate cruiser. The Commission found the accused guilty and sentenced them to be hanged. The reviewing authority affirmed the judgments, writing an extensive opinion on the question whether violations of the law of war were alleged, but modified the sentences to imprisonment for life and for various periods of years. Dept. of the Pacific, G. O. No. 52, June 27, 1865.

On January 17, 1865, John Y. Beall was tried by a military commission for "violation of the laws of war." The opinion by the reviewing authority reveals that Beall, holding a commission in the Confederate Navy, came on board a merchant vessel at a Canadian port in civilian dress and, with associates, took possession of the vessel in Lake Erie; that, also in disguise, he unsuccessfully attempted to derail a train in New York State, and to obtain military information. His conviction by the Commission was affirmed on the ground that he was both a spy

84, that "Armed prowlers, by whatever names they may be called, or persons of the enemy's 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 the privileges of the prisoner of war."[11] These and related provisions have

and a "guerrilla," and he was sentenced to be hanged. Dept. of the East, G. O. No. 14, Feb. 14, 1865.

On January 17, 1865, Robert C. Kennedy, a Captain of the Confederate Army, who was shown to have attempted, while in disguise, to set fire to the City of New York, and to have been seen in disguise in various parts of New York State, was convicted on charges of acting as a spy and violation of the law of war "in undertaking to carry on irregular and unlawful warfare." He was sentenced to be hanged, and the sentence was confirmed by the reviewing authority. Dept. of the East, G. O. No. 24, March 20, 1865.

On September 19, 1865, William Murphy, "a rebel emissary in the employ of and colleagued with rebel enemies," was convicted by a military commission of "violation of the laws and customs of war" for coming within the lines and burning a United States steamboat and other property. G. C. M. O. No. 107, April 18, 1866.

Soldiers and officers "now or late of the Confederate Army," were tried and convicted by military commission for "being secretly within the lines of the United States forces," James Hamilton, Dept. of the Ohio, G. O. No. 153, Sept. 18, 1863; for "recruiting men within the lines," Daniel Davis, G. O. No. 397, Dec. 18, 1863, and William F. Corbin and T. G. McGraw, G. O. No. 114, May 4, 1863; and for "lurking about the posts, quarters, fortifications and encampments of the armies of the United States," although not "as a spy," Augustus A. Williams, Middle Dept., G. O. No. 34, May 5, 1864. For other cases of violations of the law of war punished by military commissions during the Civil War, see 2 Winthrop, Military Laws and Precedents (2d ed. 1896) 1310–11.

[11] See also Paragraph 100: "A messenger or agent who attempts to steal through the territory occupied by the enemy, to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case."

Compare Paragraph 101.

been continued in substance by the Rules of Land Warfare promulgated by the War Department for the guidance of the Army. Rules of 1914, Par. 369–77; Rules of 1940, Par. 345–57. Paragraph 357 of the 1940 Rules provides that "All war crimes are subject to the death penalty, although a lesser penalty may be imposed." Paragraph 8 (1940) divides the enemy population into "armed forces" and "peaceful population," and Paragraph 9 names as distinguishing characteristics of lawful belligerents that they "carry arms openly" and "have a fixed distinctive emblem." Paragraph 348 declares that "persons who take up arms and commit hostilities" without having the means of identification prescribed for belligerents are punishable as "war criminals." Paragraph 351 provides that "men and bodies of men, who, without being lawful belligerents" "nevertheless commit hostile acts of any kind" are not entitled to the privileges of prisoners of war if captured and may be tried by military commission and punished by death or lesser punishment. And paragraph 352 provides that "armed prowlers . . . 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, of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to be treated as prisoners of war." As is evident from reading these and related Paragraphs 345–347, the specified violations are intended to be only illustrative of the applicable principles of the common law of war, and not an exclusive enumeration of the punishable acts recognized as such by that law. The definition of lawful belligerents by Paragraph 9 is that adopted by Article 1, Annex to Hague Convention No. IV of October 18, 1907, to which the United States was a signatory and which was ratified by the Senate in 1909. 36 Stat. 2295. The preamble to the Convention declares:

"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who, though combatants, do not wear "fixed and distinctive emblems." And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to "the law of war."

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law [12] that we think it must be regarded as

[12] Great Britain, War Office, Manual of Military Law (1929) § 445, lists a large number of acts which, when committed within enemy lines by persons in civilian dress associated with or acting under the direction of enemy armed forces, are "war crimes." The list includes: "damage to railways, war material, telegraph, or other means of communication, in the interest of the enemy. . . ." Section 449 states that all "war crimes" are punishable by death.

Authorities on International Law have regarded as war criminals such persons who pass through the lines for the purpose of (a) destroy-

a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

Specification 1 of the first charge is sufficient to charge all the petitioners with the offense of unlawful belligerency, trial of which is within the jurisdiction of the Commission, and the admitted facts affirmatively show that the charge is not merely colorable or without foundation.

Specification 1 states that petitioners, "being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States."

This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions. As we have seen, entry upon our territory

ing bridges, war materials, communication facilities, etc.: 2 Oppenheim, International Law (6th ed. 1940) § 255; Spaight, Air Power and War Rights (1924) 283; Spaight, War Rights on Land (1911) 110; Phillipson, International Law and the Great War (1915) 208; Liszt, Das Völkerrecht (12 ed. 1925), § 58 (B) 4; (b) carrying messages secretly: Hall, International Law (8th ed. 1924) § 188; Spaight, War Rights on Land 215; 3 Merignhac, Droit Public International (1912) 296–97; Bluntschli, Droit International Codifié (5th ed. tr. Lardy) § 639; 4 Calvo, Le Droit International Theorique et Pratique (5th ed. 1896) § 2119; (c) any hostile act: 2 Winthrop, Military Law and Precedents, (2nd ed. 1896) 1224. Cf. Lieber, Guerrilla Parties (1862), 2 Miscellaneous Writings (1881) 288.

These authorities are unanimous in stating that a soldier in uniform who commits the acts mentioned would be entitled to treatment as a prisoner of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war.

in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and warlike act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. Paragraphs 351 and 352 of the Rules of Land Warfare, already referred to, plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States. Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation, quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other. The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid,

guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. Cf. *Gates* v. *Goodloe,* 101 U. S. 612, 615, 617–18. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations. The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other. Cf. *Morgan* v. *Devine,* 237 U. S. 632; *Albrecht* v. *United States,* 273 U. S. 1, 11–12.

But petitioners insist that, even if the offenses with which they are charged are offenses against the law of war, their trial is subject to the requirement of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that such trials by Article III, § 2, and the Sixth Amendment must be by jury in a civil court. Before the Amendments, § 2 of Arti-

cle III, the Judiciary Article, had provided, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and had directed that "such Trial shall be held in the State where the said Crimes shall have been committed."

Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the Judiciary Article, *Ex parte Vallandigham,* 1 Wall. 243; *In re Vidal,* 179 U. S. 126; cf. *Williams* v. *United States,* 289 U. S. 553, and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures. As this Court has often recognized, it was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, *District of Columbia* v. *Colts,* 282 U. S. 63, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, § 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article. *Callan* v. *Wilson,* 127 U. S. 540, 549. Hence petty offenses triable at common law without a jury may be tried without a jury in the federal courts, notwithstanding Article III, § 2, and the Fifth and Sixth Amendments. *Schick* v. *United States,* 195 U. S. 65; *District of Colum-*

bia v. *Clawans,* 300 U. S. 617. Trial by jury of criminal contempts may constitutionally be dispensed with in the federal courts in those cases in which they could be tried without a jury at common law. *Ex parte Terry,* 128 U. S. 289, 302–04; *Savin, Petitioner,* 131 U. S. 267, 277; *In re Debs,* 158 U. S. 564, 594–96; *United States* v. *Shipp,* 203 U. S. 563, 572; *Blackmer* v. *United States,* 284 U. S. 421, 440; *Nye* v. *United States,* 313 U. S. 33, 48; see *United States* v. *Hudson and Goodwin,* 7 Cranch 32, 34. Similarly, an action for debt to enforce a penalty inflicted by Congress is not subject to the constitutional restrictions upon criminal prosecutions. *United States* v. *Zucker,* 161 U. S. 475; *United States* v. *Regan,* 232 U. S. 37, and cases cited.

All these are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within Article III, § 2, or the provisions of the Fifth and Sixth Amendments relating to "crimes" and "criminal prosecutions." In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

The fact that "cases arising in the land or naval forces" are excepted from the operation of the Amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth. *Ex parte Milligan, supra,* 123, 138–39. It is argued that the exception, which excludes from the Amendment cases arising in the armed forces, has also by implication extended its guaranty to all other cases; that since petitioners, not being members of the Armed Forces of the United States, are not within the exception, the Amendment operates to

give to them the right to a jury trial. But we think this argument misconceives both the scope of the Amendment and the purpose of the exception.

We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one "arising in the land . . . forces," when the accused is not a member of or associated with those forces. But even so, the exception cannot be taken to affect those trials before military commissions which are neither within the exception nor within the provisions of Article III, § 2, whose guaranty the Amendments did not enlarge. No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. An express exception from Article III, § 2, and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war.

Section 2 of the Act of Congress of April 10, 1806, 2 Stat. 371, derived from the Resolution of the Continental Congress of August 21, 1776,[13] imposed the death penalty on alien spies "according to the law and usage of nations, by sentence of a general court martial." This enactment must be regarded as a contemporary construction of both Article III, § 2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces. It is a construction of the Constitution which has been followed since the founding of our Government, and is now continued in the 82nd Article of War. Such a construction is entitled to

[13] See Morgan, Court-Martial Jurisdiction over Non-Military Persons under the Articles of War, 4 Minnesota L. Rev. 79, 107–09.

the greatest respect. *Stuart* v. *Laird,* 1 Cranch 299, 309; *Field* v. *Clark,* 143 U. S. 649, 691; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 328. It has not hitherto been challenged, and, so far as we are advised, it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury.[14]

[14] In a number of cases during the Revolutionary War enemy spies were tried and convicted by military tribunals: (1) Major John Andre, Sept. 29, 1780, see note 9 *supra.* (2) Thomas Shanks was convicted by a "Board of General Officers" at Valley Forge on June 3, 1778, for "being a Spy in the Service of the Enemy," and sentenced to be hanged. 12 Writings of Washington (Bicentennial Comm'n ed.) 14. (3) Matthias Colbhart was convicted of "holding a Correspondence with the Enemy" and "living as a Spy among the Continental Troops" by a General Court Martial convened by order of Major General Putnam on Jan. 13, 1778; General Washington, the Commander in Chief, ordered the sentence of death to be executed, 12 *Id.* 449–50. (4) John Clawson, Ludwick Lasick, and William Hutchinson were convicted of "lurking as spies in the Vicinity of the Army of the United States" by a General Court Martial held on June 18, 1780. The death sentence was confirmed by the Commander in Chief. 19 *Id.* 23. (5) David Farnsworth and John Blair were convicted of "being found about the Encampment of the United States as Spies" by a Division General Court Martial held on Oct. 8, 1778 by order of Major General Gates. The death sentence was confirmed by the Commander in Chief. 13 *Id.* 139–40. (6) Joseph Bettys was convicted of being "a Spy for General Burgoyne" by coming secretly within the American lines, by a General Court Martial held on April 6, 1778 by order of Major General McDougall. The death sentence was confirmed by the Commander in Chief. 15 *Id.* 364. (7) Stephen Smith was convicted of "being a Spy" by a General Court Martial held on Jan. 6, 1778. The death sentence was confirmed by Major General McDougall. *Ibid.* (8) Nathaniel Aherly and Reuben Weeks, Loyalist soldiers, were sentenced to be hanged as spies. Proceedings of a General Court Martial Convened at West Point According to a General Order of Major General Arnold, Aug. 20–21, 1780 (National Archives, War Dept., Revolutionary War Records, MS No. 31521). (9) Jonathan Loveberry, a Loyalist soldier, was sentenced to be hanged as a spy. Proceedings of a General Court Martial Convened at the Request of Major General

The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law. *Ex parte Mason*; 105 U. S. 696; *Kahn* v. *Anderson*, 255 U. S. 1, 8–9; *cf. Caldwell* v. *Parker*, 252 U. S. 376.

Arnold at the Township of Bedford, Aug. 30–31, 1780 (*Id.* MS No. 31523). He later escaped, 20 Writings of Washington 253n. (10) Daniel Taylor, a lieutenant in the British Army, was convicted as a spy by a general court martial convened on Oct. 14, 1777, by order of Brigadier General George Clinton, and was hanged. 2 Public Papers of George Clinton (1900) 443. (11) James Molesworth was convicted as a spy and sentenced to death by a general court martial held at Philadelphia, March 29, 1777; Congress confirmed the order of Major General Gates for the execution of the sentence. 7 Journals of the Continental Congress 210. See also cases of "M. A." and "D. C.," G. O. Headquarters of General Sullivan, Providence, R. I., July 24, 1778, reprinted in Niles, Principles and Acts of the Revolution (1822) 369; of Lieutenant Palmer, 9 Writings of Washington, 56n; of Daniel Strang, 6 *Id.* 497n; of Edward Hicks, 14 *Id.* 357; of John Mason and James Ogden, executed as spies near Trenton, N. J., on Jan. 10, 1781, mentioned in Hatch, Administration of the American Revolutionary Army (1904) 135 and Van Doren, Secret History of the American Revolution (1941) 410.

During the War of 1812, William Baker was convicted as a spy and sentenced to be hanged, by a general court-martial presided over by Brigadier General Thomas A. Smith at Plattsburg, N. Y., on March 25, 1814. National Archives, War Dept., Judge Advocate General's Office, Records of Courts Martial, MS No. O–13. William Utley, tried as a spy by a court martial held at Plattsburg, March 3–5, 1814, was acquitted. *Id.*, MS No. X–161. Elijah Clark was convicted as

Since the Amendments, like § 2 of Article III, do not preclude all trials of offenses against the law of war by military commission without a jury when the offenders are aliens not members of our Armed Forces, it is plain that they present no greater obstacle to the trial in like manner of citizen enemies who have violated the law of war applicable to enemies. Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal.

We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death. It is equally inadmissible to construe the Amendments—

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a spy, and sentenced to be hanged, by a general court martial held at Buffalo, N. Y., Aug. 5–8, 1812. He was ordered released by President Madison on the ground that he was an American citizen. Military Monitor, Vol. I, No. 23, Feb. 1, 1813, pp. 121–122; Maltby, Treatise on Courts Martial and Military Law (1813) 35–36.

In 1862 Congress amended the spy statute to include "all persons" instead of only aliens. 12 Stat. 339, 340; see also 12 Stat. 731, 737. For the legislative history, see Morgan, Court-Martial Jurisdiction over Non-Military Persons under the Articles of War, 4 Minnesota L. Rev. 79, 109–11. During the Civil War a number of Confederate officers and soldiers, found within the Union lines in disguise, were tried and convicted by military commission for being spies. Charles H. Clifford, G. O. No. 135, May 18, 1863; William S. Waller, G. O. No. 269, Aug. 4, 1863; Alfred Yates and George W. Casey, G. O. No. 382, Nov. 28, 1863; James R. Holton and James Taylor, G. C. M. O. No. 93, May 13, 1864; James McGregory, G. C. M. O. No. 152, June 4, 1864; E. S. Dodd, Dept. of Ohio, G. O. No. 3, Jan. 5, 1864. For other cases of spies tried by military commission, see 2 Winthrop, Military Law and Precedents, 1193 *et seq.*

whose primary purpose was to continue unimpaired presentment by grand jury and trial by petit jury in all those cases in which they had been customary—as either abolishing all trials by military tribunals, save those of the personnel of our own armed forces, or, what in effect comes to the same thing, as imposing on all such tribunals the necessity of proceeding against unlawful enemy belligerents only on presentment and trial by jury. We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.

Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the *Milligan* case, *supra*, p. 121, that the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." Elsewhere in its opinion, at pp. 118, 121–22 and 131, the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present, and not involved here—martial law might be constitutionally established.

The Court's opinion is inapplicable to the case presented by the present record. We have no occasion now to define

with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.

Since the first specification of Charge I sets forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional. *McNally* v. *Hill*, 293 U. S. 131.

There remains the contention that the President's Order of July 2, 1942, so far as it lays down the procedure to be followed on the trial before the Commission and on the review of its findings and sentence, and the procedure in fact followed by the Commission, are in conflict with Articles of War 38, 43, 46, 50½ and 70. Petitioners argue that their trial by the Commission, for offenses against the law of war and the 81st and 82nd Articles of War, by a procedure which Congress has prohibited would invalidate any conviction which could be obtained against them and renders their detention for trial likewise unlawful (see *McClaughry* v. *Deming*, 186 U. S. 49; *United States* v. *Brown*, 206 U. S. 240, 244; *Runkle* v. *United States*, 122 U. S. 543, 555–56; *Dynes* v. *Hoover*, 20 How. 65, 80–81); that the President's Order prescribes such an unlawful

procedure; and that the secrecy surrounding the trial and all proceedings before the Commission, as well as any review of its decision, will preclude a later opportunity to test the lawfulness of the detention.

Petitioners do not argue and we do not consider the question whether the President is compelled by the Articles of War to afford unlawful enemy belligerents a trial before subjecting them to disciplinary measures. Their contention is that, if Congress has authorized their trial by military commission upon the charges preferred—violations of the law of war and the 81st and 82nd Articles of War—it has by the Articles of War prescribed the procedure by which the trial is to be conducted; and that, since the President has ordered their trial for such offenses by military commission, they are entitled to claim the protection of the procedure which Congress has commanded shall be controlling.

We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents. For the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ. But a majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders, and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that—even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to "commissions"—the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been em-

ployed by the Commission, in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied.

MR. JUSTICE MURPHY took no part in the consideration or decision of these cases.