RECORD OF TRIAL
COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
ABDUL ZAHIR

ALSO KNOWN AS:

ABDUL BARI

NO. 060001

VOLUME II OF ___ TOTAL VOLUMES

REFERENCES
SELECTED SUPREME COURT DECISIONS
(NO REDACTIONS)

United States v. Abdul Zahir, NO. 060001

INDEX OF VOLUMES

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

VOLUME NUMBER	SUBSTANCE OF CONTENTS
ALLIED PAPERS	**Not part of "record of trial"**
I[1]	Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications)
II[1]	Supreme Court Decisions: *Rasul v. Bush*, 542 U.S. 466 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866)

[1] Interim volume numbers. Final numbers to be added when trial is completed.

United States v. Ali Hamza Sulayman Zahir, NO. 060001

INDEX OF VOLUMES

VOLUME NUMBER	SUBSTANCE OF CONTENTS
III[2]	DoD Decisions on Commissions including Appointing Authority orders and decisions, Chief Clerk of Commissions documents
IV[2]	Federal Litigation in *Hamdan v. Rumsfeld*, at U.S. Supreme Court and D.C. Circuit
V[2]	Federal Litigation at U.S. District Courts Not Filed by Counsel in *United States v. Zahir*
VI[2]	Selected filings and U.S. District Court decisions in *United States v. Zahir*

Record of Trial

VII[2]	Transcript (R. 1-75) (April 4, 2006 session)
VIII[2]	Review Exhibits 1-24 (April 4, 2006 session)

[2] Interim volume numbers. Final numbers to be added when trial is completed.

REFERENCES FOR

MILITARY COMMISSION TRIALS

Supreme Court Decisions: 1

***Rasul v. Bush*, 542 U.S. 466 (2004)** 1

***Johnson v. Eisentrager*, 339 U.S. 773 (1950)** 31

***In re Yamashita*, 327 U.S. 1 (1946)** 58

***Ex Parte Quirin*, 317 U.S. 1 (1942)** 115

***Ex Parte Milligan*, 71 U.S. 2 (1866)** 147

*542 U.S. 466; 124 S. Ct. 2686, *;*
*159 L. Ed. 2d 548, **; 2004 U.S. LEXIS 4760, ****

SHAFIQ RASUL, et al., Petitioners v. GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, et al. FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al., Petitioners v. UNITED STATES et al.

(No. 03-334), (No. 03-343)

SUPREME COURT OF THE UNITED STATES

542 U.S. 466; 124 S. Ct. 2686; 159 L. Ed. 2d 548; 2004 U.S. LEXIS 4760; 72 U.S.L.W. 4596; 2004 Fla. L. Weekly Fed. S 457

April 20, 2004, Argued
June 28, 2004, Decided *

* Together with No. 03-343, Al Odah et al. v. United States et al., also on certiorari to the same court.

NOTICE: [*1]**
The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. Al Odah v. United States, 355 U.S. App. D.C. 189, 321 F.3d 1134, 2003 U.S. App. LEXIS 4250 (2003)

DISPOSITION: Reversed and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner aliens filed various actions challenging the legality of their detention at the Guantanamo Bay Naval Base. They invoked the court's jurisdiction under 28 U.S.C.S. §§ 1331 and 1350 and asserted various causes of action including federal habeas corpus. The United States Court of Appeals for the District of Columbia Circuit affirmed dismissal for want of jurisdiction. The aliens petitioned for a writ of certiorari.

OVERVIEW: The U.S. military had held the aliens, along with approximately 640 other non-Americans captured abroad, at the Naval Base at Guantanamo Bay. The court distinguished them from the Eisentrager detainees in important respects: They were not nationals of countries at war with the United States, and they denied that they have engaged in or plotted acts of aggression against the United States; they had never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they had been imprisoned in territory over which the United States exercised exclusive jurisdiction and control. No party questioned the district court's jurisdiction over the aliens' custodians. The court held that 28 U.S.C.S. § 2241

required nothing more and that it conferred on the district court jurisdiction to hear the habeas corpus challenges. Furthermore, the fact that the aliens were being held in military custody was immaterial to the question of the district court's jurisdiction over their nonhabeas statutory claims. 28 U.S.C.S. § 1350 explicitly conferred the privilege of suing for a actionable tort on aliens.

OUTCOME: The judgment of the circuit court was reversed and the case was remanded for the district court to consider in the first instance the merits of the aliens' claims.

CORE TERMS: alien, prisoner, detainee, territory, custody, territorial jurisdiction, detained, military, writ of habeas corpus, detention, habeas corpus, sovereign, enemy, treaty, abroad, captured, jurisdictional, sovereignty, custodian, hostilities, legality, lease, federal district, territorial, confinement, convicted, domestic, confined, confer, realm

SYLLABUS: Pursuant to Congress' joint resolution authorizing the use of necessary and appropriate force against nations, organizations, or persons that **[**552]** planned, authorized, committed, or aided in the September 11, 2001, al Qaeda terrorist attacks, the President sent Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it. Petitioners, 2 Australians and 12 Kuwaitis captured abroad during the hostilities, are being held in military custody at the Guantanamo Bay, Cuba, Naval Base, which the United States occupies under a lease and treaty recognizing **[***2]** Cuba's ultimate sovereignty, but giving this country complete jurisdiction and control for so long as it does not abandon the leased areas. Petitioners filed suits under federal law challenging the legality of their detention, alleging that they had never been combatants against the United States or engaged in terrorist acts, and that they have never been charged with wrongdoing, permitted to consult counsel, or provided access to courts or other tribunals. The District Court construed the suits as habeas petitions and dismissed them for want of jurisdiction, holding that, under *Johnson v. Eisentrager*, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936, aliens detained outside United States sovereign territory may not invoke habeas relief. The Court of Appeals affirmed.

Held:

United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay.

(a) The District Court has jurisdiction to hear petitioners' habeas challenges under 28 U.S.C. § 2241 [28 USCS § 2241], which authorizes district courts, "within their respective jurisdictions," to entertain **[***3]** habeas applications by persons claiming to be held "in custody in violation of the . . . laws . . . of the United States," §§ 2241(a), (c)(3). Such jurisdiction extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."

(1) The Court rejects respondents' primary submission that these cases are controlled by *Eisentrager*'s holding that a District Court lacked authority to grant habeas relief to German citizens captured by U. S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in occupied Germany. Reversing a Court of Appeals judgment finding jurisdiction, the *Eisentrager* Court found six critical facts: The German prisoners were (a) enemy aliens who (b) had never been or resided in the United States, (c) were captured outside U. S. territory and there held in military custody, (d) were there tried and convicted by the military (e) for offenses committed there, and (f) were imprisoned there at all times. 339 U.S., at 777, 94 L. Ed. 1255, 70 S. Ct. 936. Petitioners here differ from the *Eisentrager* detainees in important **[***4]** respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. The *Eisentrager* Court also made clear that all six of the noted critical facts were relevant only to the question of the prisoners' *constitutional* entitlement to habeas **[**553]** review. *Ibid.* The Court's only statement on their *statutory* entitlement was a passing reference to its absence. *Id.,* at 768, 94 L. Ed. 1255, 70 S. Ct. 936. This cursory treatment is explained by the Court's then-recent decision in *Ahrens* v. *Clark,* 335 U.S. 188, 92 L. Ed. 1898, 68 S. Ct. 1443, in which it held that the District Court for the District of Columbia lacked jurisdiction to entertain the habeas claims of aliens detained at Ellis Island because the habeas statute's phrase "within their respective jurisdictions" required the petitioners' presence within the court's territorial jurisdiction, *id.,* at 192, 92 L. Ed. 1898, 68 S. Ct. 1443. **[***5]** However, the Court later held, in *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S. 484, 494-495, 35 L. Ed. 2d 443, 93 S. Ct. 1123, that such presence is not "an invariable prerequisite" to the exercise of § 2241 jurisdiction because habeas acts upon the person holding the prisoner, not the prisoner himself, so that the court acts "within [its] respective jurisdiction" if the custodian can be reached by service of process. Because *Braden* overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* does not preclude the exercise of § 2241 jurisdiction over petitioners' claims.

(2) Also rejected is respondents' contention that § 2241 is limited by the principle that legislation is presumed not to have extraterritorial application unless Congress clearly manifests such an intent, *EEOC* v. *Arabian American Oil Co.,* 499 U.S. 244, 248, 113 L. Ed. 2d 274, 111 S. Ct. 1227. That presumption has no application to the operation of the habeas statute with respect to persons detained within "the [United States'] territorial jurisdiction." *Foley Bros., Inc.* v. *Filardo,* 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575. By the express terms of its agreements with Cuba, the United States **[***6]** exercises complete jurisdiction and control over the Guantanamo Base, and may continue to do so permanently if it chooses. Respondents concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that § 2241 draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the statute's geographical coverage to vary depending on the

detainee's citizenship. Aliens held at the base, like American citizens, are entitled to invoke the federal courts' § 2241 authority.

(3) Petitioners contend that they are being held in federal custody in violation of United States laws, and the District Court's jurisdiction over petitioners' custodians is unquestioned, cf. *Braden*, 410 U.S., at 495, 35 L. Ed. 443, 93, S. Ct. 1123. Section 2241 requires nothing more and therefore confers jurisdiction on the District Court.

(b) The District Court also has jurisdiction to hear the *Al Odah* petitioners' complaint invoking 28 U.S.C. § 1331, the federal question statute, and § 1350, the Alien Tort Statute. The Court of Appeals, **[***7]** again relying on *Eisentrager*, held that the District Court correctly dismissed these claims for want of jurisdiction because the petitioners lacked the privilege of litigation in U. S. courts. Nothing in *Eisentrager* or any other of the Court's cases categorically excludes aliens detained in military custody outside the United States from that privilege. United States **[**554]** courts have traditionally been open to nonresident aliens. Cf. *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578, 52 L. Ed. 625, 28 S. Ct. 337. And indeed, § 1350 explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners are being held in military custody is immaterial.

(c) Whether and what further proceedings may become necessary after respondents respond to the merits of petitioners' claims are not here addressed. 321 F.3d 1134

, reversed and remanded.

COUNSEL: **John J. Gibbons** argued the cause for petitioners.

Theodore B. Olson argued the cause for respondents.

JUDGES: Stevens, J., delivered the opinion of the Court, in which O'Connor, Souter, Ginsburg, and Breyer, JJ., joined. Kennedy, J., filed an opinion concurring in the judgment. Scalia, J., filed a dissenting **[***8]** opinion, in which Rehnquist, C. J., and Thomas, J., joined.

OPINIONBY: STEVENS

OPINION: **[*2690]** Justice **Stevens** delivered the opinion of the Court.

[LEdHR1A]** [1A] These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

I

On September 11, 2001, agents of the al Qaeda terrorist network hijacked four commercial airliners and used them as missiles to attack American targets. While one

of the four attacks was foiled by the heroism of the plane's passengers, the other three killed approximately 3,000 innocent civilians, destroyed hundreds of millions of dollars of property, and severely damaged the U. S. economy. In response to the attacks, Congress passed a joint resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons." Authorization for Use of Military Force, **[***9]** Pub. L. 107-40, §§ 1-2, 115 Stat. 224. Acting pursuant to that authorization, the President sent U. S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.

Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban. n1 Since early 2002, the U. S. military has held them--along with, according to the Government's estimate, approximately 640 other non-Americans captured abroad--at the Naval Base at Guantanamo Bay. Brief for United States 6. The United States occupies the Base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the **[**555]** Agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," while "the Republic of Cuba consents that during the period of **[*2691]** the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas." n2 In 1934, **[***10]** the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect "[s]o long as the United States of America shall not abandon the . . . naval station of Guantanamo." n3

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 When we granted certiorari, the petitioners also included two British citizens, Shafiq Rasul and Asif Iqbal. These petitioners have since been released from custody.

n2 Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418 (hereinafter 1903 Lease Agreement). A supplemental lease agreement, executed in July 1903, obligates the United States to pay an annual rent in the amount of "two thousand dollars, in gold coin of the United States" and to maintain "permanent fences" around the base. Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U. S.-Cuba, Arts. I-II, T. S. No. 426.

n3 Treaty Defining Relations with Cuba, May 29, 1934, U. S.-Cuba, Art. III, 48 Stat 1683, T. S. No. 866 (hereinafter 1934 Treaty).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***11]**

In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U. S. District Court for the District of Columbia challenging the legality of their detention at the Base. All alleged that none of the petitioners has ever been a combatant against the United States or has ever engaged in any terrorist acts. n4 They also alleged that none has been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal. App. 29, 77, 108. n5

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n4 Relatives of the Kuwaiti detainees allege that the detainees were taken captive "by local villagers seeking promised bounties or other financial rewards" while they were providing humanitarian aid in Afghanistan and Pakistan, and were subsequently turned over to U. S. custody. App. 24-25. The Australian David Hicks was allegedly captured in Afghanistan by the Northern Alliance, a coalition of Afghan groups opposed to the Taliban, before he was turned over to the United States. *Id.,* at 84. The Australian Mamdouh Habib was allegedly arrested in Pakistan by Pakistani authorities and turned over to Egyptian authorities, who in turn transferred him to U. S. custody. *Id.,* at 110-111. **[***12]**

n5 David Hicks has since been permitted to meet with counsel. Brief for United States 9.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - -

The two Australians, Mamdouh Habib and David Hicks, each filed a petition for writ of habeas corpus, seeking release from custody, access to counsel, freedom from interrogations, and other relief. *Id.,* at 98-99, 124-126. Fawzi Khalid Abdullah Fahad Al Odah and the 11 other Kuwaiti detainees filed a complaint seeking to be informed of the charges against them, to be allowed to meet with their families and with counsel, and to have access to the courts or some other impartial tribunal. *Id.,* at 34. They claimed that denial of these rights violates the Constitution, international law, and treaties of the United States. Invoking the court's jurisdiction under 28 U.S.C. §§ 1331 and 1350 [28 USCS §§ 1331 and 1350], among other statutory bases, they asserted causes of action under the Administrative Procedure Act, 5 U.S.C. §§ 555, 702, 706 [5 USCS §§ 555, 702, 706]; the Alien Tort Statute, 28 U.S.C. § 1350 [28 USCS § 1350]; and the general federal habeas corpus statute, §§ 2241-2243. App. 19.

Construing all **[***13]** three actions as petitions for writs of habeas corpus, the District Court dismissed them **[**556]** for want of jurisdiction. The court held, in reliance on our opinion in *Johnson* v. *Eisentrager,* 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950), that "aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus." 215 F. Supp. 2d 55, 68 (DC 2002). The Court of Appeals affirmed. Reading *Eisentrager* to hold that "'the privilege of litigation' does not extend to aliens in military custody who have no

presence in 'any territory over which the United States is sovereign,'" 321 F.3d 1134, 1144 **[*2692]** (CADC 2003) (quoting *Eisentrager,* 339 U.S., at 777-778, 94 L. Ed. 1255, 70 S. Ct. 936), it held that the District Court lacked jurisdiction over petitioners' habeas actions, as well as their remaining federal statutory claims that do not sound in habeas. We granted certiorari, 540 U.S. 1003, 157 L. Ed. 2d 407, 124 S. Ct. 534 (2003), and now reverse.

II

HN1 Congress has granted federal district courts, "within their respective jurisdictions," the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the **[***14]** Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(a), (c)(3) [28 USCS §§ 2241(a), (c)(3)]. The statute traces its ancestry to the first grant of federal court jurisdiction: Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ of habeas corpus to prisoners "in custody, under or by colour of the authority of the United States, or committed for trial before some court of the same." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. In 1867, Congress extended the protections of the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. See *Felker* v. *Turpin,* 518 U.S. 651, 659-660, 135 L. Ed. 2d 827, 116 S. Ct. 2333 (1996).

Habeas corpus is, however, "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law." *Williams* v. *Kaiser,* 323 U.S. 471, 484, n. 2, 89 L. Ed. 398, 65 S. Ct. 363 (1945) (internal quotation marks omitted). The writ appeared in English law several centuries ago, became "an integral part of our common-law heritage" by the time the Colonies achieved independence, *Preiser* v. *Rodriguez,* 411 U.S. 475, 485, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973), **[***15]** and received explicit recognition in the Constitution, which forbids suspension of "[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it," Art. I, § 9, cl. 2.

As it has evolved over the past two centuries, the habeas statute clearly has expanded habeas corpus "beyond the limits that obtained during the 17th and 18th centuries." *Swain* v. *Pressley,* 430 U.S. 372, 380, n. 13, 51 L. Ed. 2d 411, 97 S. Ct. 1224 (1977). But "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS* v. *St. Cyr,* 533 U.S. 289, 301, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001). See also *Brown* v. *Allen,* 344 U.S. 443, 533, 97 L. Ed. 469, 73 S. Ct. 397 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without **[**557]** judicial trial"). As Justice Jackson wrote in an opinion respecting the availability of habeas corpus to aliens held in U. S. custody:

"Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should **[***16]** be imprisoned, dispossessed,

outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint." *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206, 218-219, 97 L. Ed. 956, 73 S. Ct. 625 (1953) (dissenting opinion).

Consistent with the historic purpose of the writ, HN2 this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in **[*2693]** wartime as well as in times of peace. The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, *Ex parte Milligan,* 71 U.S. 2, 4 Wall. 2, 18 L. Ed. 281 (1866), and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin,* 317 U.S. 1, 87 L. Ed. 3, 63 S. Ct. 2 (1942), and its insular possessions, *In re Yamashita,* 327 U.S. 1, 90 L. Ed. 499, 66 S. Ct. 340 (1946).

[LEdHR1B]** [1B] The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over **[***17]** which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty." n6

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 1903 Lease Agreement, Art. III.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

III

Respondents' primary submission is that the answer to the jurisdictional question is controlled by our decision in *Eisentrager.* In that case, we held that a Federal District Court lacked authority to issue a writ of habeas corpus to 21 German citizens who had been captured by U. S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in the Landsberg Prison in occupied Germany. The Court of Appeals in *Eisentrager* had found jurisdiction, reasoning that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." *Eisentrager* v. *Forrestal,* 84 U.S. App. D.C. 396, 174 F.2d 961, 963 (CADC 1949). In reversing **[***18]** that determination, this Court summarized the six critical facts in the case:

"We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus.* To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured

outside of our territory and there held in military **[**558]** custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." 339 U.S., at 777, 94 L. Ed. 1255, 70 S. Ct. 936.

On this set of facts, the Court concluded, "no right to the writ of *habeas corpus* appears." *Id.*, at 781, 94 L. Ed. 1255, 70 S. Ct. 936.

[LEdHR1C]** [1C] Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression **[***19]** against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Not only are petitioners differently situated from the *Eisentrager* detainees, but the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus. **[*2694]** *Id.*, at 777, 94 L. Ed. 1255, 70 S. Ct. 936. The Court had far less to say on the question of the petitioners' *statutory* entitlement to habeas review. Its only statement on the subject was a passing reference to the absence of statutory authorization: "Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.*, at 768, 94 L. Ed. 1255, 70 S. Ct. 936.

Reference to the historical context in which *Eisentrager* was decided explains why the opinion devoted so little attention to question of statutory jurisdiction. In 1948, just two months after the *Eisentrager* petitioners filed their petition for habeas corpus **[***20]** in the U. S. District Court for the District of Columbia, this Court issued its decision in *Ahrens* v. *Clark*, 335 U.S. 188, 92 L. Ed. 1898, 68 S. Ct. 1443, a case concerning the application of the habeas statute to the petitions of 120 Germans who were then being detained at Ellis Island, New York, for deportation to Germany. The *Ahrens* detainees had also filed their petitions in the U. S. District Court for the District of Columbia, naming the Attorney General as the respondent. Reading the phrase "within their respective jurisdictions" as used in the habeas statute to require the petitioners' presence within the district court's territorial jurisdiction, the Court held that the District of Columbia court lacked jurisdiction to entertain the detainees' claims. *Id.*, at 192, 92 L. Ed. 1898, 68 S. Ct. 1443. *Ahrens* expressly reserved the question "of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights." *Id.*, 192, 92 L. Ed. 1898, 68 S. Ct. 1443, n. 4 But as the dissent noted, if the presence of the petitioner in the territorial jurisdiction of a federal district court were truly a jurisdictional requirement, there could be only one **[***21]** response to that question. *Id.*, at 209, 92 L. Ed. 1898, 68 S. Ct. 1443 (opinion of Rutledge, J.). n7

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 Justice Rutledge wrote:

"[I]f absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court's capacity to act, . . . then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had . . . ." 335 U.S., at 209, 92 L. Ed. 1898, 68 S. Ct. 1443.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[559]** When the District Court for the District of Columbia reviewed the German prisoners' habeas application in *Eisentrager*, it thus dismissed their action on the authority of *Ahrens.* See *Eisentrager,* 339 U.S., at 767, 790, 94 L. Ed. 1255, 70 S. Ct. 936. Although the Court of Appeals reversed the District Court, it implicitly conceded that the District Court lacked jurisdiction under the habeas statute as it had been interpreted in *Ahrens.* The Court of Appeals instead held that petitioners had a constitutional **[***22]** right to habeas corpus secured by the Suspension Clause, U.S. Const., Art. I, § 9, cl. 2, reasoning that "if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal jurisdictional statute." *Eisentrager* v. *Forrestal,* 174 F.2d at 965. In essence, the Court of Appeals concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to "fundamentals." 174 F.2d, at 963. In its review of that decision, this Court, like the Court of Appeals, proceeded from the premise that "nothing in our statutes" conferred federal-court jurisdiction, and accordingly evaluated the Court of Appeals' resort to "fundamentals" on its own terms. 339 U.S., at 768, 94 L. Ed. 1255, 70 S. Ct. 936. n8

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n8 Although Justice Scalia disputes the basis for the Court of Appeals' holding, *post,* at ____, 159 L. Ed. 2d, at 567, what is most pertinent for present purposes is that this Court clearly understood the Court of Appeals' decision to rest on constitutional and not statutory grounds. *Eisentrager,* 339 U.S., at 767, 94 L. Ed. 1255, 70 S. Ct. 936 ("[The Court of Appeals] concluded that any person, including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal; [and] that, *although no statutory jurisdiction of such cases is given*, courts must be held to possess it as part of the judicial power of the United States . . ." (emphasis added)).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***23]**

[*2695] Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*'s resort to "fundamentals," persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the

Constitution as the source of their right to federal habeas review. In *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S. 484, 495, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (1973), HN3 this Court held, contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of § 2241 as long as "the custodian can be reached by service of process." 410 U.S., at 494-495, 35 L. Ed. 2d 443, 93 S. Ct. 1123*Braden* reasoned that its departure from the rule of *Ahrens* was warranted in light of developments that "had a profound impact on the continuing vitality of that decision. **[***24]** " 410 U.S., at **[**560]** 497, 35 L. Ed. 2d, 93 S. Ct. 1123. These developments included, notably, decisions of this Court in cases involving habeas petitioners "confined overseas (and thus outside the territory of any district court)," in which the Court "held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Id.,* at 498, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (citing *Burns* v. *Wilson,* 346 U.S. 137, 97 L. Ed. 1508, 73 S. Ct. 1045 (1953), rehearing denied, 346 U.S. 844, 851-852, 98 L. Ed. 363, 74 S. Ct. 3 (opinion of Frankfurter, J.); *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11, 100 L. Ed. 8, 76 S. Ct. 1 (1955); *Hirota* v. *MacArthur,* 338 U.S. 197, 199, 93 L. Ed. 1902, 69 S. Ct. 197 (1948) (Douglas, J., concurring)). *Braden* thus established that *Ahrens* can no longer be viewed as establishing "an inflexible jurisdictional rule," and is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all. 410 U.S., at 499-500, 35 L. Ed. 2d 443, 93 S. Ct. 1123.

Because *Braden* overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims. **[***25]** n9

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n9 The dissent argues that *Braden* did not overrule *Ahrens*' jurisdictional holding, but simply distinguished it. *Post,* at ____, 159 L. Ed. 2d, at 569. Of course, *Braden* itself indicated otherwise, 410 U.S., at 495-500, 35 L. Ed. 2d 443, 93 S. Ct. 1123, and a long line of judicial and scholarly interpretations, beginning with then-Justice Rehnquist's dissenting opinion, have so understood the decision. See, *e.g., id.,* at 502, 35 L. Ed. 2d 443, 93 S. Ct. 1123 ("Today the Court overrules *Ahrens*"); *Moore* v. *Olson*, 368 F.3d 757, 758 (CA7 2004) ("[A]fter *Braden* . . ., which overruled *Ahrens*, the location of a collateral attack is best understood as a matter of venue"); *Armentero* v. *INS*, 340 F.3d 1058, 1063 (CA9 2003) ("[T]he Court in *[Braden]* declared that *Ahrens* was overruled" (citations omitted)); *Henderson* v. *INS,* 157 F.3d 106, 126, n. 20 (CA2 1998) ("On the issue of territorial jurisdiction, *Ahrens* was subsequently overruled by *Braden*"); *Chatman-Bey* v. *Thornburgh,* 274 U.S. App. D.C. 398, 864 F.2d 804, 811 (CADC 1988) (en banc) ("[I]n *Braden*, the Court cut back substantially on *Ahrens* (and indeed overruled its territorially-based jurisdictional holding)"). See also, *e.g., Patterson* v. *McLean Credit Union,* 485 U.S. 617, 618, 99 L. Ed. 2d 879, 108 S. Ct. 1419 (1988) *(per curiam);* Eskridge, Overruling Statutory Precedents, 76 Geo. L. J. 1361, App. A (1988).

The dissent also disingenuously contends that the continuing vitality of *Ahrens*' jurisdictional holding is irrelevant to the question presented in these cases, "inasmuch as *Ahrens* did not pass upon any of the statutory issues decided by *Eisentrager.*" *Post,* at ____, 159 L. Ed. 2d, at 569. But what Justice Scalia describes as *Eisentrager*'s statutory holding--"that, unaided by the canon of constitutional avoidance, the statute did not confer jurisdiction over an alien detained outside the territorial jurisdiction of the courts of the United States," *post,* at ____, 159 L. Ed. 2d, at 569--is little more than the rule of *Ahrens* cloaked in the garb of *Eisentrager*'s facts. To contend plausibly that this holding survived *Braden*, Justice Scalia at a minimum must find a textual basis for the rule other than the phrase "within their respective jurisdictions"--a phrase which, after *Braden*, can no longer be read to require the habeas petitioner's physical presence within the territorial jurisdiction of a federal district court. Two references to the district of confinement in provisions relating to recordkeeping and pleading requirements in proceedings before circuit judges hardly suffice in that regard. See *post,* at ____, 159 L. Ed. 2d, at 566 (citing 28 U.S.C. §§ 2241(a), 2242 [28 USCS §§ 2241(a), 2242]).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***26]**

[*2696] IV

[LEdHR1D]** [1D] Putting *Eisentrager* and *Ahrens* to one side, respondents contend that we can discern a limit on § 2241 through application of the "longstanding principle of American law" that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. *EEOC* v. *Arabian American Oil Co.,* 499 U.S. 244, 248, 113 L. Ed. 2d 274, 111 S. Ct. 1227 **[**561]** (1991). HN4 Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States. *Foley Bros., Inc.* v. *Filardo,* 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949). HN5 By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. 1903 Lease Agreement, Art. III; 1934 Treaty, Art. III. Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Tr. of Oral Arg. 27. Considering that the statute **[***27]** draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. n10 HN6 Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n10 Justice Scalia appears to agree that neither the plain text of the statute nor his interpretation of that text provides a basis for treating American citizens differently from aliens. *Post,* at ____, 159 L. Ed. 2d, at 571. But resisting the practical

consequences of his position, he suggests that he might nevertheless recognize an "atextual exception" to his statutory rule for citizens held beyond the territorial jurisdiction of the federal district courts. *Ibid.*

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained **[***28]** within sovereign territory of the realm, n11 as well as the claims of **[*2697]** persons detained in the so-called "exempt jurisdictions," where ordinary writs did not run, n12 and all **[**562]** other dominions under the sovereign's control. n13 As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." *King* v *Cowle,* 2 Burr. 834, 854-855, 97 Eng. Rep. 587, 598-599 (K. B.). Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown." *Ex parte Mwenya,* [1960] 1 Q. B. 241, 303 (C. A.) (Lord Evershed, M. R.). n14

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n11 See, *e.g., King* v *Schiever,* 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759) (reviewing the habeas petition of a neutral alien deemed a prisoner of war because he was captured aboard an enemy French privateer during a war between England and France); *Sommersett* v *Stewart,* 20 How. St. Tr. 1, 79-82 (K. B. 1772) (releasing on habeas an African slave purchased in Virginia and detained on a ship docked in England and bound for Jamaica); *Case of the Hottentot Venus,* 13 East 195, 104 Eng. Rep. 344 (K. B. 1810) (reviewing the habeas petition of a "native of *South Africa*" allegedly held in private custody).

American courts followed a similar practice in the early years of the Republic. See, *e.g., United States* v. *Villato,* 2 Dall. 370, 2 U.S. 370, 1 L. Ed. 419 (CC Pa. 1797) (granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States); *Ex parte D'Olivera,* 7 F. Cas. 853, F. Cas. No. 3967 (CC Mass 1813) (Story, J., on circuit) (ordering the release of Portuguese sailors arrested for deserting their ship); *Wilson v. Izard,* 30 F. Cas. 131, F. Cas. No. 17810(CC NY 1815) (Livingston, J., on circuit) (reviewing the habeas petition of enlistees who claimed that they were entitled to discharge because of their status as enemy aliens). **[***29]**

n12 See, *e.g., Bourn's Case,* Cro. Jac. 543, 79 Eng. Rep. 465 (K. B. 1619) (writ issued to the Cinque-Ports town of Dover); *Alder* v *Puisy,* 1 Freeman 12, 89 Eng. Rep. 10 (K. B. 1671) (same); *Jobson's Case,* Latch 160, 82 Eng. Rep. 325 (K. B. 1626) (entertaining the habeas petition of a prisoner held in the County Palatine of Durham). See also 3 W. Blackstone, Commentaries on the Laws of England 79 (1769) (hereinafter Blackstone) ("[A]ll prerogative writs (as those of *habeas corpus*, prohibition, *certiorari*, and *mandamus*) may issue . . . to all these exempt jurisdictions; because the privilege,

that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king" (footnotes omitted)); R. Sharpe, Law of Habeas Corpus 188-189 (2d ed. 1989) (describing the "extraordinary territorial ambit" of the writ at common law).

n13 See, *e.g., King* v *Overton,* 1 Sid. 387, 82 Eng. Rep. 1173 (K. B. 1668) (writ issued to Isle of Jersey); *King* v *Salmon,* 2 Keble 450, 84 Eng. Rep. 282 (K. B. 1669) (same). See also 3 Blackstone 131 (habeas corpus "run[s] into all parts of the king's dominions: for the king is at all times [e]ntitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted" (footnotes omitted)); M. Hale, History of the Common Law 120-121 (C. Gray ed. 1971) (writ of habeas corpus runs to the Channel Islands, even though "they are not Parcel of the Realm of England"). **[***30]**

n14 *Ex parte Mwenya* held that the writ ran to a territory described as a "foreign country within which [the Crown] ha[d] power and jurisdiction by treaty, grant, usage, sufferance, and other lawful means." *Ex parte Mwenya,* 1 Q. B., at 265 (internal quotation marks omitted). See also *King* v *The Earl of Crewe ex parte Sekgome,* [1910] 2 K. B. 576, 606 (C. A.) (Williams, L. J.) (concluding that the writ would run to such a territory); *id.,* at 618 (Farwell, L. J.) (same). As Lord Justice Sellers explained:

"Lord Mansfield gave the writ the greatest breadth of application which in the then circumstances could well be conceived. . . . 'Subjection' is fully appropriate to the powers exercised or exercisable by this country irrespective of territorial sovereignty or dominion, and it embraces in outlook the power of the Crown in the place concerned.'" 1 Q. B., at 310.

Justice Scalia cites *In re Ning Yi-Ching*, 56 T. L. R. 3 (Vacation Ct. 1939), for the broad proposition that habeas corpus has been categorically unavailable to aliens held outside sovereign territory. *Post,* at ____, 159 L. Ed. 2d, at 576. *Ex parte Mwenya,* however, casts considerable doubt on this narrow view of the territorial reach of the writ. See *Ex parte Mwenya,* 1 Q. B., at 295 (Lord Evershed, M. R.) (noting that *In re Ning Yi-Ching* relied on Lord Justice Kennedy's opinion in *Ex parte Sekgome* concerning the territorial reach of the writ, despite the opinions of two members of the court who "took a different view upon this matter"). And *In re Ning Yi-Ching* itself made quite clear that "the remedy of *habeas corpus* was not confined to British subjects," but would extend to "any person . . . detained" within reach of the writ. 56 T. L. R., at 5 (citing *Ex parte Sekgome,* 2 K. B., at 620 (Kennedy, L. J.)). Moreover, the result in that case can be explained by the peculiar nature of British control over the area where the petitioners, four Chinese nationals accused of various criminal offenses, were being held pending transfer to the local district court. Although the treaties governing the British Concession at Tientsin did confer on Britain "certain rights of administration and control," "the right to administer justice" to Chinese nationals was not among them. 56 T. L. R., at 4-6.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***31]**

[LEdHR1E]** [1E] **[**LEdHR2A]** [2A] In the end, the answer to the

question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. n15 No party questions the District Court's jurisdiction over petitioners' custodians. Cf. *Braden*, 410 U.S., at 495, 35 L. Ed. 2d 443, 93 S. Ct. 1123. Section 2241, by its terms, requires nothing **[**563]** more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
n1

[LEdHR2B]** [2B] Petitioners' allegations--that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing--unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) [28 USCS § 2241(c)(3)]. Cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 277-278, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990) (Kennedy, J., concurring), and cases cited therein.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***32]**

V

[LEdHR3]** [3] In addition to invoking the District Court's jurisdiction under § 2241, the *Al Odah* petitioners' complaint invoked the court's jurisdiction under 28 U.S.C. § 1331 [28 USCS § 1331], the federal question statute, as well as § 1350, the Alien Tort Statute. The Court of Appeals, again relying on *Eisentrager*, held that the District Court correctly dismissed the claims founded on § 1331 and § 1350 for lack of jurisdiction, even to the extent that these claims "deal only with conditions of confinement and do not sound in habeas," because petitioners lack the "privilege of litigation" in U. S. courts. 321 F.3d, at 1144 (internal quotation marks omitted). Specifically, the court held that because petitioners' § 1331 and § 1350 claims "necessarily rest on alleged violations of the same category of laws listed in the habeas corpus statute," they, like claims founded on the habeas statute itself, must be "beyond the jurisdiction of the federal courts." *Id.*, at 1144-1145, 355 U.S. App. D.C. 189

As explained above, *Eisentrager* itself erects no bar to the exercise of federal court jurisdiction over the petitioners' habeas corpus claims. It therefore certainly does **[***33]** not bar the exercise of federal-court jurisdiction over claims that merely implicate the "same category of laws listed in the habeas corpus statute." But in any event, nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the "'privilege of litigation'" in U. S. courts. 321 F.3d, at 1139. *HN7* The courts of the United States have traditionally been open to nonresident aliens. Cf. *Disconto Gesellschaft* v. *Umbreit*, 208 U.S. 570, 578, 52 L. Ed. 625, 28 S. Ct. 337 (1908) ("Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for

the redress of wrongs and the protection of their rights"). And indeed, **[*2699]** 28 U.S.C. § 1350 [28 USCS § 1350] explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims.

VI

[LEdHR1F]** [1F] Whether and what further proceedings may become **[***34]** necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims.

It is so ordered. **[**564]**

CONCURBY: KENNEDY

CONCUR: Justice **Kennedy,** concurring in the judgment.

The Court is correct, in my view, to conclude that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals held at the Guantanamo Bay Naval Base in Cuba. While I reach the same conclusion, my analysis follows a different course. Justice Scalia exposes the weakness in the Court's conclusion that *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (1973), "overruled the statutory predicate to *Eisentrager*'s holding," *ante,* at ____ - ____, 159 L. Ed. 2d, at 559-560. As he explains, the Court's approach is not a plausible **[***35]** reading of *Braden* or *Johnson* v. *Eisentrager*, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950). In my view, the correct course is to follow the framework of *Eisentrager.*

Eisentrager considered the scope of the right to petition for a writ of habeas corpus against the backdrop of the constitutional command of the separation of powers. The issue before the Court was whether the Judiciary could exercise jurisdiction over the claims of German prisoners held in the Landsberg prison in Germany following the cessation of hostilities in Europe. The Court concluded the petition could not be entertained. The petition was not within the proper realm of the judicial power. It concerned matters within the exclusive province of the Executive, or the Executive and Congress, to determine.

The Court began by noting the "ascending scale of rights" that courts have recognized for individuals depending on their connection to the United States. *Id.*, at 770, 94 L. Ed. 1255, 70 S. Ct. 936. Citizenship provides a longstanding basis for jurisdiction, the Court noted, and among aliens physical presence within the United States also "gave the

Judiciary power to act." *Id.*, at 769, 771, 94 L. Ed. 1255, 70 S. Ct. 936. This contrasted **[***36]** with the "essential pattern for seasonable Executive constraint of enemy aliens." *Id.*, at 773, 94 L. Ed. 1255, 70 S. Ct. 936. The place of the detention was also important to the jurisdictional question, the Court noted. Physical presence in the United States "implied protection," *id.*, at 777-778, 94 L. Ed. 1255, 70 S. Ct. 936, whereas in *Eisentrager* "th[e] prisoners at no relevant time were within any territory over which the United States is sovereign," *id.*, at 778, 94 L. Ed. 1255, 70 S. Ct. 936. The Court next noted that the prisoners in *Eisentrager* "were actual enemies" of the United States, proven to be so at trial, and thus could not justify "a limited opening of our courts" to distinguish the "many [aliens] of friendly personal disposition to whom the **[*2700]** status of enemy" was unproven. *Id.*, at 778, 94 L. Ed. 1255, 70 S. Ct. 936. Finally, the Court considered the extent to which jurisdiction would "hamper the war effort and bring aid and comfort to the enemy." *Id.*, at 779, 94 L. Ed. 1255, 70 S. Ct. 936. Because the prisoners in *Eisentrager* were proven enemy aliens found and detained outside the United States, and because the existence of jurisdiction would have had a clear harmful effect on the Nation's military affairs, the matter was **[***37]** appropriately left to the Executive Branch and there was no jurisdiction **[**565]** for the courts to hear the prisoner's claims.

The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs. A faithful application of *Eisentrager*, then, requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented. A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated. See also *Ex parte Milligan*, 71 U.S. 2, 4 Wall. 2, 18 L. Ed. 281 (1866).

The facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions. First, Guantanamo Bay is in every practical **[***38]** respect a United States territory, and it is one far removed from any hostilities. The opinion of the Court well explains the history of its possession by the United States. In a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains "ultimate sovereignty" over it. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it. *Eisentrager, supra,* at 777-778, 94 L. Ed. 1255, 70 S. Ct. 936.

The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status. In *Eisentrager*, the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms. **[***39]** Having

already been subject to procedures establishing their status, they could not justify "a limited opening of our courts" to show that they were "of friendly personal disposition" and not enemy aliens. 339 U.S., at 778, 94 L. Ed. 1255, 70 S. Ct. 936. Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

[*2701] In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases. This approach would avoid creating **[**566]** automatic statutory authority to adjudicate the claims of persons located outside the United States, and remains true to the reasoning of *Eisentrager.* For these reasons, **[***40]** I concur in the judgment of the Court.

DISSENTBY: SCALIA

DISSENT: Justice **Scalia,** with whom the **Chief Justice** and Justice **Thomas** join, dissenting.

The Court today holds that the habeas statute, 28 U.S.C. § 2241 [28 USCS § 2241], extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied, *Johnson* v. *Eisentrager,* 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950). The Court's contention that *Eisentrager* was somehow negated by *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S. 484, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (1973) --a decision that dealt with a different issue and did not so much as mention *Eisentrager*--is implausible in the extreme. This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field. I would leave it to Congress to change § 2241, and dissent from the Court's unprecedented holding.

I

As we have repeatedly said: "Federal courts are courts of limited jurisdiction. They possess only **[***41]** that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction . . . ." *Kokkonen* v. *Guardian Life Ins. Co. of America,* 511 U.S. 375, 377, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994) (citations omitted). The petitioners do not argue that the Constitution independently requires jurisdiction here. n1 Accordingly, this case turns on the words of § 2241, a text the Court today largely ignores. Even a cursory reading of the habeas statute shows that it presupposes a federal district court with territorial jurisdiction over the detainee. Section 2241(a) states:

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 See Tr. of Oral Arg. 5 ("Question: And you don't raise the issue of any potential jurisdiction on the basis of the Constitution alone. We are here debating the jurisdiction under the Habeas Statute, is that right? [Answer]: That's correct . . .").

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

"Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit **[***42]** judge *within their respective jurisdictions.*" (Emphasis added).

It further requires that "[t]he order of a circuit judge shall be entered in the records of *the* district court of *the district wherein the restraint complained of is had.*" 28 U.S.C. § 2241(a) [28 USCS § 2241(a)] (emphases added). And § 2242 provides that a petition "addressed to the Supreme Court, a justice thereof or a circuit judge . . . shall state the reasons for not making application to *the* district court of *the district in which the applicant is held.*" (Emphases added). No matter to whom the writ is directed, custodian or detainee, the statute could not be clearer that a necessary requirement for issuing the writ is that *some* federal district court have territorial jurisdiction over the detainee. Here, as the Court allows, see *ante*, at ____, 159 L. Ed. **[**567]** 2d, at 559, the Guantanamo Bay detainees are not located within the territorial jurisdiction of any federal district court. One would think that is the end of this case.

[*2702] The Court asserts, however, that the decisions of this Court have placed a gloss on the phrase "within their respective jurisdictions" in § 2241 which allows jurisdiction in this case. That **[***43]** is not so. In fact, the only case in point holds just the opposite (and just what the statute plainly says). That case is *Eisentrager*, but to fully understand its implications for the present dispute, I must also discuss our decisions in the earlier case of *Ahrens* v. *Clark,* 335 U.S. 188, 92 L. Ed. 1898, 68 S. Ct. 1443 (1948), and the later case of *Braden.*

In *Ahrens*, the Court considered "whether the presence within the territorial jurisdiction of the District Court of the person detained is prerequisite to filing a petition for a writ of habeas corpus." 335 U.S., at 189, 92 L. Ed. 1898, 68 S. Ct. 1443 (construing 28 U.S.C. § 452, the statutory precursor to § 2241). The *Ahrens* detainees were held at Ellis Island, New York, but brought their petitions in the District Court for the District of Columbia. Interpreting "within their respective jurisdictions," the Court held that a district court has jurisdiction to issue the writ only on behalf of petitioners detained within its territorial jurisdiction. It was "not sufficient . . . that the jailer or custodian alone be found in the jurisdiction." 335 U.S., at 190, 92 L. Ed. 1898, 68 S. Ct. 1443.

Ahrens explicitly reserved "the question of **[***44]** what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights." *Id.*, at 192, n. 4 92 L. Ed. 1898, 68 S. Ct. 1443 That question, the same question presented to this Court today, was shortly thereafter resolved in

Eisentrager insofar as noncitizens are concerned. *Eisentrager* involved petitions for writs of habeas corpus filed in the District Court for the District of Columbia by German nationals imprisoned in Landsberg Prison, Germany. The District Court, relying on *Ahrens*, dismissed the petitions because the petitioners were not located within its territorial jurisdiction. The Court of Appeals reversed. According to the Court today, the Court of Appeals "implicitly conceded that the District Court lacked jurisdiction under the habeas statute as it had been interpreted in *Ahrens*," and "[i]n essence . . . concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to 'fundamentals.'" *Ante*, at ____, 159 L. Ed. 2d, at 559. That is not so. The Court of Appeals concluded that there *was* statutory jurisdiction. It arrived at that conclusion by applying the **[***45]** canon of constitutional avoidance: "[I]f the existing jurisdictional act be construed to deny the writ to a person entitled to it as a substantive right, the act would be unconstitutional. It should be construed, if possible, to avoid that result." *Eisentrager* v. *Forrestal*, 84 U.S. App. D.C. 396, 174 F.2d 961, 966 (CADC 1949). In cases where there was no territorial jurisdiction over the detainee, the Court of Appeals held, the writ would lie at the place of a respondent with directive power over the detainee. "It is not too violent an interpretation of 'custody' to construe it as including those who have directive custody, as well as **[**568]** those who have immediate custody, where such interpretation is necessary to comply with constitutional requirements . . . . *The statute must be so construed*, lest it be invalid as constituting a suspension of the writ in violation of the constitutional provision." *Id.*, at 967 (emphasis added). n2

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

N2 The parties' submissions to the Court in *Eisentrager* construed the Court of Appeals' decision as I do. See Pet. for Cert., O. T. 1949, No. 306, pp 8-9 ("[T]he court felt constrained to construe the habeas corpus jurisdictional statute--despite its reference to the 'respective jurisdictions' of the various courts and the gloss put on that terminology in the *Ahrens* and previous decisions--to permit a petition to be filed in the district court with territorial jurisdiction over the officials who have directive authority over the immediate jailer in Germany"); Brief for Respondent, O. T. 1949, No. 306, p 9 ("Respondent contends that the U. S. Court of Appeals . . . was correct in its holding that the statute, 28 U.S.C. 2241[28 USCS § 2241], provides that the U. S. District Court for the District of Columbia has jurisdiction to entertain the petition for a writ of habeas corpus in the case at bar"). Indeed, the briefing in *Eisentrager* was mainly devoted to the question of whether there was statutory jurisdiction. See, *e.g.*, Brief for Petitioner, O. T. 1949, No. 306, pp 15-59; Brief for Respondent, O. T. 1949, No. 306, pp 9-27, 38-49.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***46]**

[*2703] This Court's judgment in *Eisentrager* reversed the Court of Appeals. The opinion was largely devoted to rejecting the lower court's constitutional analysis, since the doctrine of constitutional avoidance underlay its statutory conclusion. But the opinion *had* to pass judgment on whether the statute granted jurisdiction, since that was the basis for the judgments of both lower courts. A conclusion of no constitutionally conferred right would obviously not support reversal of a judgment

that rested upon a statutorily conferred right. n3 And absence of a right to the writ under the clear wording of the habeas statute is what the *Eisentrager* opinion held: "Nothing in the text of the Constitution extends such a right, *nor does anything in our statutes.*" 339 U.S., at 768, 94 L. Ed. 1255, 70 S. Ct. 936 (emphasis added). "[T]hese prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment *were all beyond the territorial jurisdiction of any court of the United States.*" *Id.*, at 777-778, 94 L. Ed. 1255, 70 S. Ct. 936. See also *id.*, at 781, 94 L. Ed. 1255, 70 S. Ct. 936 (concluding that **[**569]** "no right to the **[***47]** writ of *habeas corpus* appears"); *id.*, at 790, 94 L. Ed. 1255, 70 S. Ct. 936 (finding "no basis for invoking federal judicial power in any district"). The brevity of the Court's statutory analysis signifies nothing more than that the Court considered it obvious (as indeed it is) that, unaided by the canon of constitutional avoidance, the statute did not confer jurisdiction over an alien detained outside the territorial jurisdiction of the courts of the United States.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n3 The Court does not seriously dispute my analysis of the Court of Appeals' holding in *Eisentrager.* Instead, it argues that this Court in *Eisentrager* "understood the Court of Appeals' decision to rest on constitutional and not statutory grounds." *Ante*, at ____, n 8, 159 L. Ed. 2d, at 559. That is inherently implausible, given that the Court of Appeals' opinion clearly reached a statutory holding, and that both parties argued the case to this Court on that basis, see n 2, *supra.* The only evidence of misunderstanding the Court adduces today is the *Eisentrager* Court's description of the Court of Appeals' reasoning as "that, although no statutory jurisdiction of such cases is given, courts must be held to possess it as part of the judicial power of the United States . . . ." 339 U.S., at 767, 94 L. Ed. 1255, 70 S. Ct. 936. That is no misunderstanding, but an entirely accurate description of the Court of Appeals' reasoning--the penultimate step of that reasoning rather than its conclusion. The Court of Appeals went on to hold that, in light of the constitutional imperative, the statute should be interpreted as supplying jurisdiction. See *Eisentrager* v. *Forrestal*, 84 U.S. App. D.C. 396, 174 F.2d 961, 965-967 (CADC 1949). This Court in *Eisentrager* undoubtedly understood that, which is why it immediately followed the foregoing description with a description of the Court of Appeals' *conclusion* tied to the language of the habeas statute: "[w]here deprivation of liberty by an official act occurs outside the territorial jurisdiction of any District Court, the petition will lie in the District Court which has territorial jurisdiction over officials who have directive power over the immediate jailer." 339 U.S., at 767, 94 L. Ed. 1255, 70 S. Ct. 936.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - - **[***48]**

Eisentrager's directly-on-point statutory holding makes it exceedingly difficult for the Court to reach the result it desires today. To do so neatly and cleanly, it must either argue that our decision in *Braden* overruled *Eisentrager*, or admit that *it* is overruling *Eisentrager.* The former **[*2704]** course would not pass the laugh test, inasmuch as *Braden* dealt with a detainee held within the territorial jurisdiction of a district court, and never *mentioned Eisentrager.* And the latter course would require the Court to

explain why our almost categorical rule of *stare decisis* in statutory cases should be set aside in order to complicate the present war, *and*, having set it aside, to explain why the habeas statute does not mean what it plainly says. So instead the Court tries an oblique course: "*Braden*," it claims, "overruled *the statutory predicate* to *Eisentrager*'s holding," *ante*, at ____, 159 L. Ed. 2d, at 560 (emphasis added), by which it means the statutory analysis of *Ahrens.* Even assuming, for the moment, that *Braden* overruled some aspect of *Ahrens*, inasmuch as *Ahrens* did not pass upon any of the statutory issues decided by *Eisentrager*, it is hard **[***49]** to see how any of that case's "statutory predicate" could have been impaired.

But in fact *Braden* did not overrule *Ahrens;* it distinguished *Ahrens. Braden* dealt with a habeas petitioner incarcerated in Alabama. The petitioner filed an application for a writ of habeas corpus in Kentucky, challenging an indictment that had been filed against him in that Commonwealth and naming as respondent the Kentucky court in which the proceedings were pending. This Court held that Braden was in custody because a detainer had been issued against him by Kentucky, and was being executed by Alabama, serving as an agent for Kentucky. We found that jurisdiction existed in Kentucky for Braden's petition challenging the Kentucky detainer, notwithstanding his physical confinement in Alabama. *Braden* was careful to *distinguish* that situation from the general rule established in *Ahrens.*

"A further, *critical* development since our decision in *Ahrens* is the emergence of *new classes of prisoners* who are able to petition for habeas corpus because of the adoption of a more expansive definition of the 'custody' requirement of the habeas statute. The overruling of *McNally* v. *Hill,* 293 U.S. 131, [79 L. Ed. 238, 55 S. Ct. 24] (1934), **[***50]** made it possible for prisoners in custody under one sentence to attack a sentence which they had not yet begun to serve. And it also enabled a petitioner held in one State to attack a detainer lodged against him by another State. In such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State, and the custodian State is presumably indifferent to the resolution of **[**570]** the prisoner's attack on the detainer. Here, for example, the petitioner is confined in Alabama, but his dispute is with the Commonwealth of Kentucky, not the State of Alabama. *Under these circumstances*, it would serve no useful purpose to apply the *Ahrens* rule and require that the action be brought in Alabama." 410 U.S., at 498-499, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (citations and footnotes omitted; emphases added).

This cannot conceivably be construed as an overturning of the *Ahrens* rule *in other circumstances.* See also *Braden*, *supra*, at 499-500, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (noting that *Ahrens* does not establish "an inflexible jurisdictional rule dictating the choice of an inconvenient forum *even in a class of cases which could not have been foreseen at the time of that decision*" (emphasis added)). **[***51]** Thus, *Braden* stands for the proposition, and only the proposition, that where a petitioner is in custody in multiple jurisdictions within the United States, he may seek a writ of habeas corpus in a jurisdiction in which he suffers legal confinement, though not physical confinement, if his challenge is to that legal confinement. Outside that class of cases, *Braden* did not question the general rule of *Ahrens* (much less that of *Eisentrager*). Where, as here, **[*2705]** present physical custody is at issue, *Braden* is inapposite,

and *Eisentrager* unquestionably controls. n4

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 The Court points to Court of Appeals cases that have described *Braden* as "overruling" *Ahrens.* See *ante*, at ____, n 9, 159 L. Ed. 2d, at 560. Even if that description (rather than what I think the correct one, "distinguishing") is accepted, it would not support the Court's view that *Ahrens* was overruled *with regard to the point on which Eisentrager relied.* The *ratio decidendi* of *Braden* does not call into question the principle of *Ahrens* applied in *Eisentrager*: that habeas challenge to present physical confinement must be made in the district where the physical confinement exists. The Court is unable to produce a single authority that agrees with its conclusion that *Braden* overruled *Eisentrager.*

Justice Kennedy recognizes that *Eisentrager* controls, *ante*, at ____, 159 L. Ed. 2d, at 564 (opinion concurring in judgment), but misconstrues that opinion. He thinks it makes jurisdiction under the habeas statute turn on the circumstances of the detainees' confinement--including, apparently, the availability of legal proceedings and the length of detention, see *ante*, at ____ - ____, 159 L. Ed. 2d, at 565-566. The *Eisentrager* Court mentioned those circumstances, however, only in the course of its *constitutional* analysis, and not in its application of the statute. It is quite impossible to read § 2241 as conditioning its geographic scope upon them. Among the consequences of making jurisdiction turn upon circumstances of confinement are (1) that courts would *always* have authority to inquire into circumstances of confinement, and (2) that the Executive would be unable to know with certainty that any given prisoner-of-war camp is immune from writs of habeas corpus. And among the questions this approach raises: When does definite detention become indefinite? How much process will suffice to stave off jurisdiction? If there is a terrorist attack at Guantanamo Bay, will the area suddenly fall outside the habeas statute because it is no longer "far removed from any hostilities," *ante*, at ____, 159 L. Ed. 2d, at 565? Justice Kennedy's approach provides enticing law-school-exam imponderables in an area where certainty is called for.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***52]**

The considerations of forum convenience that drove the analysis in *Braden* do not call into question *Eisentrager*'s holding. The *Braden* opinion is littered with venue reasoning of the following sort: "The expense and risk of transporting the petitioner to the Western District of Kentucky, should his presence at a hearing prove necessary, would in all likelihood be outweighed by the difficulties of transporting records and witnesses from Kentucky to the district where petitioner is confined." 410 U.S., at 494, 35 L. Ed. 2d 443, 93 S. Ct. 1123. Of course nothing could **[**571]** be *more* inconvenient than what the Court (on the alleged authority of *Braden*) prescribes today: a domestic hearing for persons held abroad, dealing with events that transpired abroad.

Attempting to paint *Braden* as a refutation of *Ahrens* (and thereby, it is suggested, *Eisentrager*), today's Court imprecisely describes *Braden* as citing with approval post-*Ahrens* cases in which "habeas petitioners" located overseas were allowed to proceed (without consideration of the jurisdictional issue) in the District Court for the District of

Columbia. *Ante*, at ____, 159 L. Ed. 2d, at 559. In fact, what *Braden* said is that "[w]here *American* **[***53]** *citizens* confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus, we have held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to consideration of the claim." 410 U.S., at 498, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (emphasis added). Of course "the existence of unaddressed jurisdictional defects has no precedential effect," *Lewis* v. *Casey*, 518 U.S. 343, 352, n. 2, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996) (citing cases), but we need not "overrule" those implicit holdings to decide this case. Since *Eisentrager itself* made an exception for such cases, they in no way impugn its holding. "With the citizen," *Eisentrager* said, "we are now little concerned, except to set his case apart *as untouched by this decision* and to take measure of the difference between his status and that of all **[*2706]** categories of aliens." 339 U.S., at 769, 94 L. Ed. 1255, 70 S. Ct. 936. The constitutional doubt that the Court of Appeals in *Eisentrager* had erroneously attributed to the lack of habeas for an alien abroad might indeed exist with regard to a *citizen* abroad--justifying a strained construction of the habeas statute, or (more honestly) **[***54]** a determination of constitutional right to habeas. Neither party to the present case challenges the atextual extension of the habeas statute to United States citizens held beyond the territorial jurisdictions of the United States courts; but the possibility of one atextual exception thought to be required by the Constitution is no justification for abandoning the clear application of the text to a situation in which it raises no constitutional doubt.

The reality is this: Today's opinion, and today's opinion alone, overrules *Eisentrager;* today's opinion, and today's opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgment of its consequences made. By spurious reliance on *Braden* the Court evades explaining why *stare decisis* can be disregarded, *and why Eisentrager was wrong.* Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never **[***55]** before been thought to be within their jurisdiction--and thus making it a foolish place to have housed alien wartime detainees.

II

In abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of **[**572]** the earth. Part III of its opinion asserts that *Braden* stands for the proposition that "a district court acts 'within [its] respective jurisdiction' within the meaning of § 2241 as long as 'the custodian can be reached by service of process.'" *Ante*, at ____, 159 L. Ed. 2d, at 559. Endorsement of that proposition is repeated in Part IV. *Ante*, at ____, 159 L. Ed. 2d, at 563 ("Section 2241, by its terms, requires nothing more [than the District Court's jurisdiction over petitioners' custodians]").

The consequence of this holding, as applied to aliens outside the country, is breathtaking. It permits an alien captured in a foreign theater of active combat to

bring a § 2241 petition against the Secretary of Defense. Over the course of the last century, the United States has held millions of alien prisoners abroad. See, *e.g.*, Department of Army, G. Lewis & J. Mewha, History of Prisoner of War Utilization by the United States Army 1776-1945, Pamphlet **[***56]** No. 20-213, p 244 (1955) (noting that, "[b]y the end of hostilities [in World War II], U. S. forces had in custody approximately two million enemy soldiers"). A great many of these prisoners would no doubt have complained about the circumstances of their capture and the terms of their confinement. The military is currently detaining over 600 prisoners at Guantanamo Bay alone; each detainee undoubtedly has complaints--real or contrived--about those terms and circumstances. The Court's unheralded expansion of federal-court jurisdiction is not even mitigated by a comforting assurance that the legion of ensuing claims will be easily resolved on the merits. To the contrary, the Court says that the "[p]etitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" *Ante*, at ____, n 15, 159 L. Ed. 2d, at 562 (citing **[*2707]** *United States* v. *Verdugo-Urquidez,* 494 U.S. 259, 277-278, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990) (Kennedy, J., concurring)). From this point forward, federal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect **[***57]** of the Executive's conduct of a foreign war.

Today's carefree Court disregards, without a word of acknowledgment, the dire warning of a more circumspect Court in *Eisentrager*:

"To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation for shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the **[**573]** military offensive abroad to the legal defensive at **[***58]** home. Nor is it unlikely that the result of such enemy litigiousness would be conflict between judicial and military opinion highly comforting to enemies of the United States." 339 U.S., at 778-779, 94 L. Ed. 1255, 70 S. Ct. 936.

These results should not be brought about lightly, and certainly not without a textual basis in the statute and on the strength of nothing more than a decision dealing with an Alabama prisoner's ability to seek habeas in Kentucky.

III

Part IV of the Court's opinion, dealing with the status of Guantanamo Bay, is a puzzlement. The Court might have made an effort (a vain one, as I shall discuss) to distinguish *Eisentrager* on the basis of a difference between the status of Landsberg

Prison in Germany and Guantanamo Bay Naval Base. But Part III flatly rejected such an approach, holding that the place of detention of an alien has no bearing on the statutory availability of habeas relief, but "is strictly relevant only to the question of the appropriate forum." *Ante*, at ____, 159 L. Ed. 2d, at 560. That rejection is repeated at the end of Part IV: "In the end, the answer to the question presented is clear . . . . No party questions the District Court's jurisdiction over petitioners' **[***59]** custodians. . . . Section 2241, by its terms, requires nothing more." *Ante*, at ____ - ____, 159 L. Ed. 2d, at 562-563. Once that has been said, the status of Guantanamo Bay is entirely irrelevant to the issue here. The habeas statute is (according to the Court) being applied *domestically*, to "petitioners' custodians," and the doctrine that statutes are presumed to have no extraterritorial effect simply has no application.

Nevertheless, the Court spends most of Part IV rejecting respondents' invocation of that doctrine on the peculiar ground that it has no application to Guantanamo Bay. Of course if the Court is right about that, not only § 2241 but presumably *all* United States law applies there--including, for example, the federal cause of action recognized in *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), which would allow prisoners to sue their captors for damages. Fortunately, however, the **[*2708]** Court's irrelevant discussion also happens to be wrong.

The Court gives only two reasons why the presumption against extraterritorial effect does not apply to Guantanamo Bay. First, the Court says (without any further elaboration) that "the United States exercises 'complete **[***60]** jurisdiction and control' over the Guantanamo Bay Naval Base [under the terms of a 1903 lease agreement], and may continue to exercise such control permanently if it so chooses [under the terms of a 1934 Treaty]." *Ante*, at ____, 159 L. Ed. 2d, at 561; see *ante*, at ____ - ____, 159 L. Ed. 2d, at 554-555. But that lease agreement explicitly recognized "the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418, and the Executive Branch--whose head is "exclusively responsible" for the "conduct of diplomatic and foreign affairs," *Eisentrager, supra*, at 789-- --affirms that the lease and **[**574]** treaty do not render Guantanamo Bay the sovereign territory of the United States, see Brief for Respondents 21.

The Court does not explain how "complete jurisdiction and control" without sovereignty causes an enclave to be part of the United States for purposes of its domestic laws. Since "jurisdiction and control" obtained through a lease is no different in effect from "jurisdiction and control" acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic **[***61]** laws. Indeed, if "jurisdiction and control" rather than sovereignty were the test, so should the Landsberg Prison in Germany, where the United States held the *Eisentrager* detainees.

The second and last reason the Court gives for the proposition that domestic law applies to Guantanamo Bay is the Solicitor General's concession that there would be habeas jurisdiction over a United States citizen in Guantanamo Bay. "Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the

statute to vary depending on the detainee's citizenship." *Ante*, at ____ - ____, 159 L. Ed. 2d, at 561. But the reason the Solicitor General conceded there would be jurisdiction over a detainee who was a United States citizen had *nothing to do* with the special status of Guantanamo Bay: "Our answer to that question, Justice Souter, is that citizens of the United States, because of their constitutional circumstances, may have greater rights with respect to the scope and reach of the Habeas Statute as the Court has or would interpret it." Tr. of Oral Arg. 40. See also *id.*, at 27-28. And *that* position **[***62]** --the position that United States citizens throughout the world may be entitled to habeas corpus rights--is precisely the position that this Court adopted in *Eisentrager*, see 339 U.S., at 769-770, 94 L. Ed. 1255, 70 S. Ct. 936, even while holding that aliens abroad *did not have* habeas corpus rights. Quite obviously, the Court's second reason has no force whatever.

The last part of the Court's Part IV analysis digresses from the point that the presumption against extraterritorial application does not apply to Guantanamo Bay. Rather, it is directed to the contention that the Court's approach to habeas jurisdiction--applying it to aliens abroad--is "consistent with the historical reach of the writ." *Ante*, at ____, 159 L. Ed. 2d, at 561. None of the authorities it cites comes close to supporting that claim. Its first set of authorities involves claims by aliens detained in what is indisputably domestic territory. *Ante*, at ____, n 11, 159 L. Ed. 2d, at 561. Those cases are irrelevant because they do not purport to address the territorial reach of the writ. The remaining **[*2709]** cases involve issuance of the writ to "'exempt jurisdictions'" and "other dominions under the sovereign's control." *Ante*, at ____ - ____, and nn 12-13, 159 L. Ed. 2d, at 561-562. These cases **[***63]** are inapposite for two reasons: Guantanamo Bay is not a sovereign dominion, and even if it were, jurisdiction would be limited to subjects.

"Exempt jurisdictions"--the Cinque Ports and Counties Palatine (located in modern-day England)--were local franchises granted by the Crown. See 1 W. Holdsworth, History of English Law 108, 532 (7th ed. rev. 1956); 3 W. Blackstone, Commentaries **[**575]** *78-*79 (hereinafter Blackstone). These jurisdictions were "exempt" in the sense that the Crown had ceded management of municipal affairs to local authorities, whose courts had exclusive jurisdiction over private disputes among residents (although review was still available in the royal courts by writ of error). See *id.*, at *79. Habeas jurisdiction nevertheless extended to those regions on the theory that the delegation of the King's authority did not include his own prerogative writs. *Ibid.;* R. Sharpe, Law of Habeas Corpus 188-189 (2d ed. 1989) (hereinafter Sharpe). Guantanamo Bay involves no comparable local delegation of pre-existing sovereign authority.

The cases involving "other dominions under the sovereign's control" fare no better. These cases stand only for the proposition that the **[***64]** writ extended to dominions of the Crown outside England proper. The authorities relating to Jersey and the other Channel Islands, for example, see *ante*, at ____, n 13, 159 L. Ed. 2d, at 562, involve territories that are "dominions of the crown of Great Britain" even though not "part of the kingdom of England," 1 Blackstone *102-*105, much as were the colonies in America, *id.*, at *104-*105, and Scotland, Ireland, and Wales, *id.*, at *93. See also *King* v *Cowle*, 2 Burr. 834, 853-854, 97 Eng. Rep. 587, 598 (K. B. 1759) (even if Berwick was "no part of the realm of England," it was still a "dominion of the Crown").

All of the dominions in the cases the Court cites--and all of the territories Blackstone lists as dominions, see 1 Blackstone *93-*106--are the sovereign territory of the Crown: colonies, acquisitions and conquests, and so on. It is an enormous extension of the term to apply it to installations merely leased for a particular use from another nation that still retains ultimate sovereignty.

The Court's historical analysis fails for yet another reason: To the extent the writ's "extraordinary territorial ambit" did extend to exempt jurisdictions, outlying dominions, **[***65]** and the like, that extension applied only to British *subjects.* The very sources the majority relies on say so: Sharpe explains the "broader ambit" of the writ on the ground that it is "said to depend not on the ordinary jurisdiction of the court for its effectiveness, but upon the authority of the sovereign over all her *subjects.*" Sharpe, *supra*, at 188 (emphasis added). Likewise, Blackstone explained that the writ "run[s] into all parts of the king's dominions" because "the king is at all times entitled to have an account why the liberty of any of his *subjects* is restrained." 3 Blackstone *131 (emphasis added). *Ex parte Mwenya*, [1960] 1 Q. B. 241 (C. A.), which can hardly be viewed as evidence of the *historic* scope of the writ, only confirms the ongoing relevance of the sovereign-subject relationship to the scope of the writ. There, the question was whether "the Court of Queen's Bench can be debarred from making an order in favour of a British citizen unlawfully or arbitrarily detained" in Northern Rhodesia, which was at the time a protectorate of the Crown. *Id.*, at 300 (Lord Evershed M. R.). Each judge made clear that the detainee's **[***66]** status as a subject was material to the resolution of the case. See *id.*, at 300, 302 (Lord Evershed, M. R.); *id.*, at 305 **[*2710]** (Romer, L. J.) ("[I]t is difficult to see why the sovereign should be deprived of her right to be informed through her High Court as to the validity of the detention of her **[**576]** subjects in that territory"); *id.*, at 311 (Sellers, L. J.) ("I am not prepared to say, as we are solely asked to say on this appeal, that the English courts have no jurisdiction in any circumstances to entertain an application for a writ of habeas corpus ad subjiciendum in respect of an unlawful detention of a British subject in a British protectorate"). None of the exempt-jurisdiction or dominion cases the Court cites involves someone not a subject of the Crown.

The rule against issuing the writ to aliens in foreign lands was still the law when, in *In re Ning Yi-Ching*, 56 T. L. R. 3 (Vacation Ct. 1939), an English court considered the habeas claims of four Chinese subjects detained on criminal charges in Tientsin, China, an area over which Britain had by treaty acquired a lease and "therewith exercised certain rights of administration **[***67]** and control." *Id.*, at 4. The court held that Tientsin was a foreign territory, and that the writ would not issue to a foreigner detained there. The Solicitor-General had argued that "[t]here was no case on record in which a writ of *habeas corpus* had been obtained on behalf of a foreign subject on foreign territory," *id.*, at 5, and the court "listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominions or realm," *id.*, at 6. n5

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n5 The Court argues at some length that *Ex parte Mwenya*, [1960] 1 Q. B. 241 (C. A.), calls into question my reliance on *In re Ning Yi-Ching.* See *ante*, at ____, n 14, 159 L.

Ed. 2d, at 562. But as I have explained, see *supra*, at ____ - ____, 159 L. Ed. 2d, at 575-576, *Mwenya* dealt with a British subject and the court went out of its way to explain that its expansive description of the scope of the writ was premised on that fact. The Court cites not a single case holding that aliens held outside the territory of the sovereign were within reach of the writ.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***68]**

In sum, the Court's treatment of Guantanamo Bay, like its treatment of § 2241, is a wrenching departure from precedent. n6

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 The Court grasps at two other bases for jurisdiction: the Alien Tort Statute (ATS), 28 U.S.C. § 1350[28 USCS § 1350], and the federal-question statute, 28 U.S.C. § 1331[28 USCS § 1331]. The former is not presented to us. The ATS, while invoked below, was repudiated as a basis for jurisdiction by all petitioners, either in their petition for certiorari, in their briefing before this Court, or at oral argument. See Pet. for Cert. in No. 03-334, p 2, n 1 ("Petitioners withdraw any reliance on the Alien Tort Claims Act . . ."); Brief for Petitioners in No. 03-343, p 13; Tr. of Oral Arg. 6.

With respect to § 1331, petitioners assert a variety of claims arising under the Constitution, treaties, and laws of the United States. In *Eisentrager*, though the Court's holding focused on § 2241, its analysis spoke more broadly: "We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." 339 U.S., at 777-778, 94 L. Ed. 1255, 70 S. Ct. 936. That reasoning dooms petitioners' claims under § 1331, at least where Congress has erected a jurisdictional bar to their raising such claims in habeas.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***69]**

* * *

Departure from our rule of *stare decisis* in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the **[*2711]** cumbersome machinery of our domestic **[**577]** courts into military affairs. Congress is in session. If it wished to change federal judges' habeas jurisdiction from what this Court had previously held that to be, it could have done so. And it could have done so by intelligent revision of the statute, n7 instead of by today's clumsy, countertextual reinterpretation that confers upon wartime prisoners greater habeas rights than domestic detainees. The latter must challenge their present physical confinement in the district of their

confinement, see *Rumsfeld* v *Padilla, ante*, whereas under today's strange holding Guantanamo Bay detainees can petition in any of the 94 federal judicial districts. The fact that extraterritorially located detainees lack the district of detention that the statute requires has been **[***70]** converted from a factor that precludes their ability to bring a petition at all into a factor that frees them to petition wherever they wish--and, as a result, to forum shop. For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort. I dissent.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 It could, for example, provide for jurisdiction by placing Guantanamo Bay within the territory of an existing district court; or by creating a district court for Guantanamo Bay, as it did for the Panama Canal Zone, see 22 U.S.C. § 3841(a) [22 USCS § 3841(a)] (repealed 1979).

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

REFERENCES: ◆ Go To Full Text Opinion

◆ Go to Supreme Court Brief(s)

◆ Go to Supreme Court Brief(s)

◆ Go to Supreme Court Transcripts

3C Am Jur 2d, Aliens and Citizens §§ 2583 **[***71]** , 2584; 39 Am Jur 2d, Habeas Corpus and Postconviction Remedies §§ 18, 90, 104

28 USCS § 2241

L Ed Digest, Habeas Corpus § 5

L Ed Index, Aliens

Annotation References

When is person "in custody" in violation of Federal Constitution, so as to be eligible for relief under federal habeas corpus legislation--Supreme Court cases. 104 L Ed 2d 1122.

Jurisdiction of federal court to grant writ of habeas corpus in proceeding concerning alien detainees held outside the United States. 192 ALR Fed 595.

Construction and application of Alien Tort Statute (28 U.S.C.A. § 1350 [28 U.S.C.S. § 1350]), providing for federal jurisdiction over alien's action for tort committed in violation of law of nations or treaty of United States. 116 ALR Fed 387.

*339 U.S. 763, *; 70 S. Ct. 936, **;*
*94 L. Ed. 1255, ***; 1950 U.S. LEXIS 1815*

JOHNSON, SECRETARY OF DEFENSE, ET AL. v. EISENTRAGER, ALIAS EHRHARDT, ET AL.

No. 306

SUPREME COURT OF THE UNITED STATES

339 U.S. 763; 70 S. Ct. 936; 94 L. Ed. 1255; 1950 U.S. LEXIS 1815

April 17, 1950, Argued
June 5, 1950, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The District Court dismissed a petition for a writ of habeas corpus to inquire into the confinement of respondents by the United States Army in occupied Germany. The Court of Appeals reversed. 84 U. S. App. D. C. 396, 174 F.2d 961. This Court granted certiorari. 338 U.S. 877. Reversed, p. 791.

DISPOSITION: 84 U. S. App. D. C. 396, 174 F.2d 961, reversed.

CASE SUMMARY

PROCEDURAL POSTURE: The Court granted certiorari to the United States Court of Appeals for the District of Columbia Circuit, which reversed a district court's decision to dismiss a petition for a writ of habeas corpus brought by petitioners, foreign nationals.

OVERVIEW: Petitioners have been convicted of violating laws of war, by engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan. Petitioners were repatriated to Germany to serve their sentences. Their petition for habeas corpus alleged that their trial, conviction, and imprisonment violated U.S. Const. arts. I and III, and U.S. Const. amend. V. The court of appeals held that any person, including an enemy alien deprived of his liberty anywhere under any purported authority of the United States, was entitled to the writ if he could show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal. The Court held that the Constitution did not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States. The Court further found that the petition failed to allege any fact showing lack of jurisdiction in the respondents to accuse, try and condemn petitioners or that

respondents acted in excess of their lawful powers.

OUTCOME: The Court reversed and held that the petition was properly dismissed because petitioners had no constitutional right to personal security or immunity from military trial and punishment.

CORE TERMS: enemy, prisoner, alien, military, habeas corpus, military commission, imprisoned, laws of war, alien enemy, alien enemies, hostilities, citizenship, abroad, territorial jurisdiction, enemy alien, resident, Fifth Amendment, military authorities, armed forces, territory, tribunal, writ of habeas corpus, nonresident, convicted, belligerent, war crimes, army, imprisonment, allegiance, sentence

LexisNexis(R) Headnotes ◆ Hide Headnotes

International Law > Dispute Resolution
Immigration Law > Citizenship > General Overview

HN1

When any citizen is deprived of his liberty by any foreign government, it is made the duty of the President to demand the reasons and, if the detention appears wrongful, to use means not amounting to acts of war to effectuate his release. It is neither sentimentality nor chauvinism to repeat that "Citizenship is a high privilege." More Like This Headnote | *Shepardize:* Restrict By Headnote

International Law > Dispute Resolution

HN2

See 8 U.S.C.S. § 903b.

Immigration Law > Deportation & Removal > Administrative Proceedings > Respondent Rights > General Overview
Immigration Law > Citizenship > General Overview

HN3

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, the court has steadily enlarged his right against executive deportation except upon full and fair hearing. And, at least since 1886, the United States has extended to the person and property of resident aliens important constitutional guaranties -- such as the due process of law of the Fourteenth Amendment. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Substantive Due Process > Privileges & Immunities
Constitutional Law > Substantive Due Process > Scope of Protection

HN4

It is the alien's presence within its territorial jurisdiction

that gives the judiciary power to act. The Fourteenth Amendment provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. An alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Substantive Due Process > Privileges & Immunities
Constitutional Law > Substantive Due Process > Scope of Protection

HN5

The nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even a qualified access to American courts, for he neither has comparable claims upon American institutions nor could his use of them fail to be helpful to the enemy. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Substantive Due Process > Privileges & Immunities
Constitutional Law > Substantive Due Process > Scope of Protection

HN6

If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. More Like This Headnote | *Shepardize:* Restrict By Headnote

Immigration Law > Duties & Rights of Aliens > General Overview
Constitutional Law > Substantive Due Process > Privileges & Immunities
International Law > Dispute Resolution > Laws of War

HN7

The Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States. More Like This Headnote | *Shepardize:* Restrict By Headnote

International Law > Dispute Resolution

HN8

The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long-established. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Congressional Duties & Powers > War Powers Clause

HN9

Among powers granted to Congress by the Constitution is power to provide for the common defense, to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces. U.S. Const. art. I, § 8. It also gives power to make rules concerning

captures on land and water, which the Supreme Court has construed as an independent substantive power. More Like This Headnote | *Shepardize:* Restrict By Headnote

- Show Lawyers' Edition Display

SYLLABUS: Respondents, who are nonresident enemy aliens, were captured in China by the United States Army and tried and convicted in China by an American military commission for violations of the laws of war committed in China prior to their capture. They were transported to the American-occupied part of Germany and imprisoned there in the custody of the Army. At no time were they within the territorial jurisdiction of any American civil court. Claiming that their trial, conviction and imprisonment violated Articles I and III, the Fifth Amendment, and other provisions of our Constitution, laws of the United States and provisions of the Geneva Convention, they petitioned the District Court for the District of Columbia for a writ of habeas corpus directed to the Secretary of Defense, the Secretary of the Army, and several officers of the Army having directive power over their custodian. *Held*:

1. A nonresident enemy alien has no access to our courts in wartime. Pp. 768-777.

(a) Our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments. P. 769.

(b) In extending certain constitutional protections to resident aliens, this Court has been careful to point out that it was the aliens' presence within its territorial jurisdiction that gave the Judiciary power to act. P. 771.

(c) Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to wartime security. P. 774.

(d) A resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists. Courts will entertain his plea for freedom from executive custody only to ascertain the existence of a state of war and whether he is an alien enemy. Once these jurisdictional facts have been determined, courts will not inquire into any other issue as to his internment. P. 775.

(e) A nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts. P. 776.

2. These nonresident enemy aliens, captured and imprisoned abroad, have no right to a writ of habeas corpus in a court of the United States. *Ex parte Quirin*, 317 U.S. 1; *In re Yamashita*, 327 U.S. 1, distinguished. Pp. 777-781.

3. The Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States. Pp. 781-785.

(a) The term "any person" in the Fifth Amendment does not extend its protection to alien enemies everywhere in the world engaged in hostilities against us. Pp. 782-783.

(b) The claim asserted by respondents and sustained by the court below would, in practical effect, amount to a right not to be tried at all for an offense against our armed forces. P. 782.

4. The petition in this case alleges no fact showing lack of jurisdiction in the military authorities to accuse, try and condemn these prisoners or that they acted in excess of their lawful powers. Pp. 785-790.

(a) The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long-established. P. 786.

(b) It being within the jurisdiction of a military commission to try these prisoners, it was for it to determine whether the laws of war applied and whether they had been violated. Pp. 786-788.

(c) It is not the function of the Judiciary to entertain private litigation -- even by a citizen -- which challenges the legality, wisdom or propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. P. 789.

(d) Nothing in the Geneva Convention makes these prisoners immune from prosecution or punishment for war crimes. P. 789.

(e) Article 60 of the Geneva Convention, requiring that notice of trial of prisoners of war be given to the protecting power, is inapplicable to trials for war crimes committed before capture. Pp. 789-790.

(f) Article 63 of the Geneva Convention, requiring trial of prisoners of war "by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power," is likewise inapplicable to trials for war crimes committed before capture. P. 790.

5. Since there is no basis in this case for invoking federal judicial power, it is not necessary to decide where, if the case were otherwise, the petition should be filed. Pp. 790-791.

COUNSEL: Solicitor General Perlman argued the cause for petitioners. With him on the brief were Assistant Attorney General McInerney, Oscar H. Davis, Robert S. Erdahl and Philip R. Monahan.

A. Frank Reel and Milton Sandberg argued the cause for respondents. With them on the brief were Wallace M. Cohen and Richard F. Wolfson.

JUDGES: Vinson, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton

OPINIONBY: JACKSON

OPINION: [*765] [937] [***1259]** MR. JUSTICE JACKSON delivered the opinion of the Court.

The ultimate question in this case is one of jurisdiction of civil courts of the United States *vis-a-vis* military authorities in dealing with enemy aliens overseas. The issues come here in this way:

Twenty-one German nationals petitioned the District Court of the District of Columbia for writs of *habeas corpus*. They alleged that, prior to May 8, 1945, they were in the service of German armed forces in China. They amended to allege that their employment there was by civilian agencies of the German Government. Their exact affiliation is disputed, and, for our purposes, immaterial. On May 8, 1945, the German High Command **[*766]** executed an act of unconditional surrender, expressly obligating all forces under German control at once to cease active hostilities. These prisoners have been convicted of violating laws of war, by engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan. Their hostile operations consisted principally of collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces. They, with six others who were acquitted, were taken into custody by the United States Army after the Japanese surrender and were tried and convicted by a Military Commission constituted by our Commanding General at Nanking by delegation from the Commanding General, United States Forces, China Theatre, pursuant to authority specifically granted by the Joint Chiefs of Staff of the United States. The Commission sat in China, with express consent of the Chinese Government. The proceeding was conducted wholly under American auspices and involved no international participation. After conviction, the sentences were duly reviewed and, with immaterial modification, approved by military reviewing authority.

The prisoners were repatriated to Germany to serve their sentences. Their immediate custodian is Commandant of Landsberg Prison, an American Army officer under the Commanding General, Third United States Army, and the Commanding General, European Command. He could not be reached by process from **[**938]** the District Court. Respondents named in the petition are Secretary of Defense, Secretary of the Army, **[***1260]** Chief of Staff of the Army, and the Joint Chiefs of Staff of the United States.

The petition alleges, and respondents denied, that the jailer is subject to their direction. The Court of Appeals assumed, and we do likewise, that, while prisoners are **[*767]** in immediate physical custody of an officer or officers not parties to the proceeding, respondents named in the petition have lawful authority to effect their release.

The petition prays an order that the prisoners be produced before the District Court, that it may inquire into their confinement and order them discharged from such offenses and confinement. It is claimed that their trial, conviction and imprisonment violate Articles I and III of the Constitution, and the Fifth Amendment thereto, and other provisions of the Constitution and laws of the United States and provisions of the Geneva Convention governing treatment of prisoners of war.

A rule to show cause issued, to which the United States made return. Thereupon the petition was dismissed on authority of *Ahrens* v. *Clark*, 335 U.S. 188.

The Court of Appeals reversed and, reinstating the petition, remanded for further proceedings. 84 U. S. App. D. C. 396, 174 F.2d 961. It concluded that any person, including an enemy alien, deprived of his liberty anywhere under any purported

authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal; that, although no statutory jurisdiction of such cases is given, courts must be held to possess it as part of the judicial power of the United States; that where deprivation of liberty by an official act occurs outside the territorial jurisdiction of any District Court, the petition will lie in the District Court which has territorial jurisdiction over officials who have directive power over the immediate jailer.

The obvious importance of these holdings to both judicial administration and military operations impelled us to grant certiorari. 338 U.S. 877. The case is before us only on issues of law. The writ of *habeas corpus* must be granted "unless it appears from the application" that the applicants are not entitled to it. 28 U. S. C. § 2243.

[*768] We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes. Absence of support from legislative or juridical sources is implicit in the statement of the court below that "The answers stem directly from fundamentals. They cannot be found by casual reference to statutes or cases." The breadth of the court's premises and solution requires us to consider questions basic to alien enemy and kindred litigation which for some years have been beating upon our doors. n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 From January 1948 to today, motions for leave to file petitions for *habeas corpus* in this Court, and applications treated by the Court as such, on behalf of over 200 German enemy aliens confined by American military authorities abroad were filed and denied. *Brandt* v. *United States*, and 13 companion cases, 333 U.S. 836; *In re Eichel* (one petition on behalf of three persons), 333 U.S. 865; *Everett* v. *Truman* (one petition on behalf of 74 persons), 334 U.S. 824; *In re Krautwurst*, and 11 companion cases, 334 U.S. 826; *In re Ehlen "et al.*," and *In re Girke "et al.*," 334 U.S. 836; *In re Gronwald "et al.*," 334 U.S. 857; *In re Stattmann*, and 3 companion cases, 335 U.S. 805; *In re Vetter*, and 6 companion cases, 335 U.S. 841; *In re Eckstein*, 335 U.S. 851; *In re Heim*, 335 U.S. 856; *In re Dammann*, and 4 companion cases, 336 U.S. 922-923; *In re Muhlbauer*, and 57 companion cases, covering at least 80 persons, 336 U.S. 964; *In re Felsch*, 337 U.S. 953; *In re Buerger*, 338 U.S. 884; *In re Hans*, 339 U.S. 976; *In re Schmidt*, 339 U.S. 976; *Lammers* v. *United States*, 339 U.S. 976. And see also *Milch* v. *United States*, 332 U.S. 789.

These cases and the variety of questions they raised are analyzed and discussed by Fairman, Some New Problems of the Constitution Following the Flag, 1 Stanford L. Rev. 587.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[939]** **[***1261]** I.

Modern American law has come a long way since the time when outbreak of war

made every enemy national **[*769]** an outlaw, subject to both public and private slaughter, cruelty and plunder. But even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, n2 nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.

[1]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 ". . . In the primary meaning of the words, an alien friend is the subject of a foreign state at peace with the United States; an alien enemy is the subject of a foreign state at war with the United States (1 Kent Comm., p. 55; 2 Halleck Int. L. [Rev. 1908], p. 1; Hall Int. Law [7th ed.], p. 403, § 126; Baty & Morgan War: Its Conduct and Legal Results, p. 247; 1 Halsbury Laws of England, p. 310; *Sylvester's Case*, 7 Mod. 150; *The Roumanian*, 1915, Prob. Div. 26; affd., 1916, 1 A. C. 124; *Griswold* v. *Waddington*, 16 Johns. 437 [438], 448; *White* v. *Burnley*, 20 How. [U.S.] 235, 249; *The Benito Estenger*, 176 U.S. 568, 571; *Kershaw* v. *Kelsey*, 100 Mass. 561; so all the lexicographers, as, *e. g*., Webster, Murray, Abbott, Black, Bouvier). . . ." Cardozo, J. in *Techt* v. *Hughes*, 229 N. Y. 222, 229, 128 N. E. 185, 186.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

With the citizen we are now little concerned, except to set his case apart as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens. Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection. If a person's claim to United States citizenship is denied by any official, Congress has directed our courts to entertain his action to declare him to be a citizen "regardless of whether he is within the United States or abroad." 54 Stat. 1171, 8 U. S. C. § 903. This Court long ago extended *habeas corpus* to one seeking admission to the country to assure fair hearing of his claims to citizenship, *Chin Yow* v. **[*770]** *United States*, 208 U.S. 8, and has secured citizenship against forfeiture by involuntary formal acts, *Perkins* v. *Elg*, 307 U.S. 325. n3 Because the Government's obligation of protection is correlative with the duty of loyal support inherent in the citizen's allegiance, Congress has directed the President to exert the full diplomatic and political power of the United States on behalf of any citizen, but of no other, in jeopardy abroad. HN1 When any citizen is deprived of his liberty by any foreign government, it is made the duty of the President to demand the reasons and, if the detention appears wrongful, to use means not amounting to acts of war to effectuate his release. n4 **[***1262]** It is neither sentimentality nor chauvinism to repeat that "Citizenship is a **[**940]** high privilege." *United States* v. *Manzi*, 276 U.S. 463, 467.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 For cases in lower courts, see Note, 18 Geo. Wash. L. Rev. 410.

n4 HN2 "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress." 15 Stat. 224, 8 U. S. C. § 903b.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

HN3 The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, **[*771]** this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. *The Japanese Immigrant Case*, 189 U.S. 86; *Low Wah Suey* v. *Backus*, 225 U.S. 460; *Tisi* v. *Tod*, 264 U.S. 131; *United States ex rel. Vajtauer* v. *Comm'r*, 273 U.S. 103; *Bridges* v. *Wixon*, 326 U.S. 135; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties -- such as the due process of law of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356.

[*HR2]** [2]
But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that HN4 it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act. In the pioneer case of *Yick Wo* v. *Hopkins*, the Court said of the Fourteenth Amendment, "These provisions are universal in their application, *to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; . . . ." (Italics supplied.) 118 U.S. 356, 369. And in *The Japanese Immigrant Case*, the Court held its processes available to "an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here." 189 U.S. 86, 101.

Since most cases involving aliens afford this ground of jurisdiction, and the civil and property rights of immigrants or transients of foreign nationality so nearly approach equivalence to those of citizens, courts in peace time have little occasion to inquire whether litigants before them are alien or citizen.

[*HR3]** [3]
It is war that exposes the relative vulnerability of the alien's status. The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us. While his lot is

far more humane **[*772]** and endurable than the experience of our citizens in some enemy lands, it is still not a happy one. But disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage. Judge Cardozo commented concerning this distinction: "Much of the obscurity which surrounds **[***1263]** the rights of aliens has its origin in this confusion of diverse subjects." *Techt* v. *Hughes*, 229 N. Y. 222, 237, 128 N. E. 185, 189.

[941]**

[*HR4]** [4]
American doctrine as to effect of war upon the status of nationals of belligerents took permanent shape following our first foreign war. Chancellor Kent, after considering the leading authorities of his time, declared the law to be that ". . . in war, the subjects of each country were enemies to each other, and bound to regard and treat each other as such." *Griswold* v. *Waddington*, 16 Johns. (N. Y.) 438, 480. If this was ever something of a fiction, it is one validated by the actualities of modern total warfare. Conscription, compulsory service and measures to mobilize every human and material resource and to utilize nationals -- wherever they may be -- in arms, intrigue and sabotage, attest the prophetic realism of what once may have seemed a doctrinaire and artificial principle. With confirmation of recent history, we may reiterate this Court's earlier teaching that in war "every individual of the one nation must acknowledge every individual of the other nation as his own enemy -- because the enemy of his country." *The Rapid*, 8 Cranch 155, 161. See also *White* v. *Burnley*, 20 How. 235, 249; *Lamar* v. *Browne*, 92 U.S. 187, 194. And this without regard to his individual sentiments or disposition. *The Benito Estenger*, 176 U.S. 568, 571. The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, **[*773]** regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign.

The United States does not invoke this enemy allegiance only for its own interest, but respects it also when to the enemy's advantage. In World War I our conscription act did not subject the alien enemy to compulsory military service. 40 Stat. 885, c. XII, § 4. The Selective Service Act of 1948, 62 Stat. 604, 50 U. S. C. App. § 454 (a), exempts aliens who have not formally declared their intention to become citizens from military training, service and registration, if they make application, but if so relieved, they are barred from becoming citizens. Thus the alien enemy status carries important immunities as well as disadvantages. The United States does not ask him to violate his allegiance or to commit treason toward his own country for the sake of ours. This also is the doctrine and the practice of other states comprising our Western Civilization. n5

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n5 See Delaney, The Alien Enemy and the Draft, 12 Brooklyn L. Rev. 91.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The essential pattern for seasonable Executive constraint of enemy aliens, not on the

basis of individual prepossessions for their native land but on the basis of political and legal relations to the enemy government, was laid down in the very earliest days of the Republic and has endured to this day. It was established by the Alien Enemy Act of 1798. 1 Stat. 577, as amended, 50 U. S. C. § 21. And it is to be noted that, while the Alien and Sedition Acts of that year provoked a reaction which helped sweep the party of Mr. Jefferson into power in 1800, and though his party proceeded to undo what was regarded as the mischievous legislation of the Federalists, **[*774]** this enactment was never repealed. n6 Executive power over **[***1264]** enemy aliens, undelayed and unhampered by litigation, **[**942]** has been deemed, throughout our history, essential to war-time security. This is in keeping with the practices of the most enlightened of nations and has resulted in treatment of alien enemies more considerate than that **[*775]** which has prevailed among any of our enemies and some of our allies. This statute was enacted or suffered to continue by men who helped found the Republic and formulate the Bill of Rights, and although it obviously denies enemy aliens the constitutional immunities of citizens, it seems not then to have been supposed that a nation's obligations to its foes could ever be put on a parity with those to its defenders.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 ". . . In 1798, the 5th Congress passed three acts in rapid succession, 'An Act concerning Aliens,' approved June 25, 1798 [1 Stat. 570], 'An Act respecting Alien Enemies,' approved July 6, 1798 [1 Stat. 577, 50 U. S. C. A. § 21 *et seq*.], and 'An Act in addition to the act, entitled "An Act for the punishment of certain crimes against the United States,"' approved July 14, 1798. [1 Stat. 596.] The first and last were the Alien and Sedition Acts, vigorously attacked in Congress and by the Virginia and Kentucky Resolutions as unconstitutional. But the members of Congress who vigorously fought the Alien Act saw no objection to the Alien Enemy Act. [8 Annals of Cong. 2035 (5th Cong., 1798)]. In fact, Albert Gallatin, who led that opposition, was emphatic in distinguishing between the two bills and in affirming the constitutional power of Congress over alien enemies as part of the power to declare war. [*Id*. at 1980.] James Madison was the author of the Virginia Resolutions, and in his report to the Virginia House of Delegates the ensuing year after the deluge of controversy, he carefully and with some tartness asserted a distinction between alien members of a hostile nation and alien members of a friendly nation, disavowed any relation of the Resolutions to alien enemies, and declared, 'With respect to alien enemies, no doubt has been intimated as to the federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and of course to treat it and all its members as enemies.' [Madison's Report, 4 Elliot's Deb. 546, 554 (1800).] Thomas Jefferson wrote the Kentucky Resolutions, and he was meticulous in identifying the Act under attack as the Alien Act 'which assumes power over alien friends.' [Kentucky Resolutions of 1798 and 1799, 4 Elliot's Deb. 540, 541.] It is certain that in the white light which beat about the subject in 1798, if there had been the slightest question in the minds of the authors of the Constitution or their contemporaries concerning the constitutionality of the Alien Enemy Act, it would have appeared. None did.

"The courts, in an unbroken line of cases from Fries' case [Case of Fries, C. C. D. Pa. 1799, 9 Fed. Cas. at pages 826, 830 *et seq*., No. 5,126], in 1799 to Schwarzkopf's case [United States ex rel. Schwarzkopf v. Uhl, 2 Cir., 1943, 137 F.2d 898] in 1943, have asserted or assumed the validity of the Act and based numerous decisions upon the assumption. [Brown v. United States, 1814, 8 Cranch 110, 3 L. Ed. 504; De

Lacey v. United States, 9 Cir., 1918, 249 F. 625, L. R. A. 1918E, 1011; Grahl v. United States, 7 Cir., 1919, 261 F. 487; Lockington's Case, Brightly (Pa., 1813) 269, 283; Lockington v. Smith, C. C. D. Pa., 1817, 15 Fed. Cas. page 758, No. 8,448; Ex parte Graber, D. C. N. D. Ala. 1918, 247 F. 882; Minotto v. Bradley, D. C. N. D. Ill. 1918, 252 F. 600; Ex parte Fronklin, D. C. Miss. 1918, 253 F. 984; Ex parte Risse, D. C. S. N. Y. 1919, 257 F. 102; Ex parte Gilroy, D. C. S. D. N. Y. 1919, 257 F. 110.] The judicial view has been without dissent.

"At common law 'alien enemies have no rights, no privileges, unless by the king's special favour, during the time of war.' [1 Blackstone * 372, 373.]" Prettyman, J. in *Citizens Protective League* v. *Clark*, 81 U. S. App. D. C. 116, 119-120, 155 F.2d 290, 293.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*HR5]** [5]
The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment. *Ludecke* v. *Watkins*, 335 U.S. 160. n7

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 See also Notes, 22 So. Calif. L. Rev. 307; 60 Harv. L. Rev. 456; 47 Mich. L. Rev. 404; 17 Geo. Wash. L. Rev. 578; 27 N. C. L. Rev. 238; 34 Cornell L. Q. 425. In this respect our courts follow the practice of the English courts. 44 Am. J. Int'l L. 382.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*776] [*1265]**

[*HR6]** [6]
The standing of the enemy alien to maintain any action in the courts of the United States has been often challenged and sometimes denied. The general statement was early made on combined authority of Kent and Story "That they have no power to sue in the public courts of the enemy nation." *Griswold* v. *Waddington*, 16 Johns. (N. Y.) 438, 477. Our rule of generous access to the resident enemy alien was first laid down **[**943]** by Chancellor Kent in 1813, when, squarely faced with the plea that an alien enemy could not sue upon a debt contracted before the War of 1812, he reviewed the authorities to that time and broadly declared that "A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity." *Clarke* v. *Morey*, 10 Johns. (N. Y.) 70, 72. A unanimous Court recently clarified both the privilege of access to our courts and the limitations upon it. We said: "The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or

give aid to the enemy. This may be taken as the sound principle of the common law today." *Ex parte Kawato*, 317 U.S. 69, 75.

[*HR7]** [7]
But HN5 the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy. Our law on this subject first emerged about 1813 when the Supreme Court of the State of New York had occasion, in a series of cases, to examine the foremost authorities of the Continent and of England. It concluded the rule of the common law and the law of nations to be that alien enemies resident in the country of the enemy could not maintain an action in its courts during the period of hostilities. *Bell* v. *Chapman*, 10 Johns. (N. Y.) 183; *Jackson* v. *Decker*, 11 Johns. (N. Y.) 418; **[*777]** *Clarke* v. *Morey*, 10 Johns. (N. Y.) 70, 74-75. This Court has recognized that rule, *Caperton* v. *Bowyer*, 14 Wall. 216, 236; *Masterson* v. *Howard*, 18 Wall. 99, 105, and followed it, *Ex parte Colonna*, 314 U.S. 510, and it continues to be the law throughout this country and in England. n8

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n8 See cases collected in Annotations, 137 A. L. R. 1335, 1355; 1918B L. R. A. 189, 191. See also Borchard, The Right of Alien Enemies to Sue in Our Courts, 27 Yale L. J. 104; Gordon, The Right of Alien Enemies to Sue in American Courts, 36 Ill. L. Rev. 809, 810; Battle, Enemy Litigants in Our Courts, 28 Va. L. Rev. 429; Rylee, Enemy Aliens as Litigants, 12 Geo. Wash. L. Rev. 55, 65; Notes, 5 U. of Detroit L. J. 106, 22 Neb. L. Rev. 36, 30 Calif. L. Rev. 358, 54 Harv. L. Rev. 350.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

II.

The foregoing demonstrates how much further we must go if we are to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts.

We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the **[***1266]** United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied **[*778]** protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United

States.

Another reason for a limited opening of **[**944]** our courts to resident aliens is that among them are many of friendly personal disposition to whom the status of enemy is only one imputed by law. But these prisoners were actual enemies, active in the hostile service of an enemy power. There is no fiction about their enmity. Yet the decision below confers upon them a right to use our courts, free even of the limitation we have imposed upon resident alien enemies, to whom we deny any use of our courts that would hamper our war effort or aid the enemy.

[*HR8]** [8]
[*HR9]** [9]
A basic consideration in *habeas corpus* practice is that the prisoner will be produced before the court. This is the crux of the statutory scheme established by the Congress; n9 indeed, it is inherent in the very term "*habeas corpus*." n10 And though production of the prisoner may be dispensed with where it appears on the face of the application that no cause for granting the writ exists, *Walker* v. *Johnston*, 312 U.S. 275, 284, we have consistently adhered to and recognized the general rule. *Ahrens* v. *Clark*, 335 U.S. 188, 190-191. To grant the **[*779]** writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n9 28 U. S. C. § 2243 provides in part: "Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."

n10 "Habeas corpus . . . thou (shalt) have the body (sc. in court).

"A writ issuing out of a court of justice . . . requiring the body of a person to be brought before the judge or into the court for the purpose specified in the writ; . . . requiring the body of a person restrained of liberty to be brought before the judge or into court, that the lawfulness of the restraint may be investigated and determined." The Oxford English Dictionary (1933), Vol. V, p. 2.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - -

Moreover, we could expect no reciprocity for placing the litigation weapon in unrestrained enemy **[***1267]** hands. The right of judicial refuge from military action, which it is proposed to bestow on the enemy, can purchase no equivalent for benefit of our citizen soldiers. Except in England, whose law appears to be in harmony with the views we have expressed, and other English-speaking peoples in whose practice nothing has been cited to the contrary, the writ of *habeas corpus* is generally unknown.

The prisoners rely, however, upon two decisions of this Court to get them over the threshold -- *Ex parte Quirin*, 317 U.S. 1, and *In re Yamashita*, 327 U.S. 1. Reliance on the *Quirin* case is clearly mistaken. Those prisoners were in custody in the District of Columbia. One was, or **[*780]** claimed to be, a citizen. They were tried by a Military Commission sitting in the District of Columbia at a time when civil courts were open and functioning normally. **[**945]** They were arrested by civil authorities and the prosecution was personally directed by the Attorney General, a civilian prosecutor, for acts committed in the United States. They waived arraignment before a civil court and it was contended that the civil courts thereby acquired jurisdiction and could not be ousted by the Military. None of the places where they were acting, arrested, tried or imprisoned were, it was contended, in a zone of active military operations or under martial law or any other military control, and no circumstances justified transferring them from civil to military jurisdiction. None of these grave grounds for challenging military jurisdiction can be urged in the case now before us.

Nor can the Court's decision in the *Yamashita* case aid the prisoners. This Court refused to receive Yamashita's petition for a writ of *habeas corpus*. For hearing and opinion, it was consolidated with another application for a writ of certiorari to review the refusal of *habeas corpus* by the Supreme Court of the Philippines over whose decisions the statute then gave this Court a right of review. 28 U. S. C. § 349, repealed by Act of June 25, 1948, c. 646, § 39, 62 Stat. 992, 1000. By reason of our sovereignty at that time over these insular possessions, Yamashita stood much as did Quirin before American courts. Yamashita's offenses were committed on our territory, he was tried within the jurisdiction of our insular courts and he was imprisoned within territory of the United States. None of these heads of jurisdiction can be invoked by these prisoners.

[*HR10]** [10]
Despite this, the doors of our courts have not been summarily closed upon these prisoners. Three courts have considered their application and have provided their counsel opportunity to advance every argument in their **[*781]** support and to show some reason in the petition why they should not be subject to the usual disabilities of nonresident enemy aliens. This is the same preliminary hearing as to sufficiency of application that was extended in *Quirin, supra*, *Yamashita, supra*, and *Hirota* v. *MacArthur*, 338 U.S. 197. After hearing all contentions they have seen fit to advance and considering every contention we can base on their application and the holdings below, we arrive at the same conclusion the Court reached in each of those cases, *viz*.: that no right to the writ of *habeas corpus* appears.

III.

The Court of Appeals dispensed with all requirement of territorial jurisdiction based on place of residence, captivity, trial, offense, or confinement. It could not predicate relief upon any intraterritorial contact of these prisoners with our laws or institutions.

Instead, it gave our Constitution an extraterritorial application to embrace our enemies in arms. Right to the writ, it reasoned, **[***1268]** is a subsidiary procedural right that follows from possession of substantive constitutional rights. These prisoners, it considered, are invested with a right of personal liberty by our Constitution and therefore must have the right to the remedial writ. The court stated the steps in its own reasoning as follows: "*First*. The Fifth Amendment, by its terms, applies to 'any person.' *Second*. Action of Government officials in violation of the Constitution is void. This is the ultimate essence of the present controversy. *Third*. A basic and inherent function of the judicial branch of a government built upon a constitution is to set aside void action by government officials, and so to restrict executive action to the confines of the constitution. In our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power. *Fourth* . The writ **[*782]** of habeas corpus is the established, time-honored process in our law for testing the authority of one who deprives another of his liberty, -- 'the best and only sufficient defense of personal freedom.' . . ." 84 U. S. App. D. C. 396, 398-399, 174 F.2d 961, 963-964.

The doctrine that the term "any person" in the Fifth Amendment spreads its protection **[**946]** over alien enemies anywhere in the world engaged in hostilities against us, should be weighed in light of the full text of that Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

When we analyze the claim prisoners are asserting and the court below sustained, it amounts to a right not to be tried at all for an offense against our armed forces. If the Fifth Amendment protects them from military trial, the Sixth Amendment as clearly prohibits their trial by civil courts. The latter requires in all criminal prosecutions that "the accused" be tried "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." And if the Fifth be held to embrace these prisoners because it uses the inclusive term "no person," the Sixth must, for it applies to all "accused." No suggestion is advanced by the court below, or by prisoners, of any constitutional **[*783]** method by which any violations of the laws of war endangering the United States forces could be reached or punished, if it were not by a Military Commission in the theatre where the offense was committed.

The Court of Appeals has cited no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses, except to quote extensively from a dissenting opinion in *In re Yamashita*, 327 U.S. 1, 26. The holding of the Court in that case is, of course, to the contrary.

If this Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers. American citizens conscripted into the military service are thereby stripped

of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans. *Cf.* *Humphrey* v. *Smith*, 336 U.S. 695; *Wade* v. *Hunter*, 336 U.S. 684. **[***1269]** Can there be any doubt that our foes would also have been excepted, but for the assumption "any person" would never be read to include those in arms against us? It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies. And, of course, it cannot be claimed that such shelter is due them as a matter of comity for any reciprocal rights conferred by enemy governments on American soldiers. n11

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n11 "All merchants, if they were not openly prohibited before, shall have their safe and sure conduct to depart out of England, to come into England, to tarry in, and go through England, as well by land as by water, to buy and sell without any manner of evil tolles by the old and rightful customs, except in time of war; *and if they be of a land making war against us, and be found in our realm at the beginning of the wars, they shall be attached without harm of body or goods, until it be known unto us, or our chief justice, how our merchants be entreated who are then found in the land making war against us; and if our merchants be well intreated there, theirs shall be likewise with us*." (Emphasis added.) C. 30 of the Magna Carta, in 3 The Complete Statutes of England (Halsbury's Laws of England 1929) at p. 27.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*784] The decision below would extend coverage of our Constitution to nonresident alien enemies denied to resident alien enemies. The latter are entitled only to judicial hearing to determine what the petition of these prisoners admits: that they are really alien **[**947]** enemies. When that appears, those resident here may be deprived of liberty by Executive action without hearing. *Ludecke* v. *Watkins*, 335 U.S. 160. While this is preventive rather than punitive detention, no reason is apparent why an alien enemy charged with having committed a crime should have greater immunities from Executive action than one who it is only feared might at some future time commit a hostile act.

HN6 If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "werewolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. *Cf.* *Downes* v. *Bidwell*, 182 U.S. **[*785]** 244. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

[*HR11]** [11]
We hold that HN7 the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.

IV.

The Court of Appeals appears to have been of opinion that the petition shows some action by some official of the United States in excess of his authority which confers a private right to have it judicially voided. Its Second and Third propositions were that "action by Government officials in violation of the Constitution is void" and "a basic and inherent function of the judicial **[***1270]** branch . . . is to set aside void action by government officials . . . ." For this reason it thought the writ could be granted.

The petition specifies four reasons why conviction by the Military Commission was in excess of its jurisdiction: two based on the Geneva Convention of July 27, 1929, 47 Stat. 2021, with which we deal later; and two apparently designed to raise constitutional questions. The constitutional contentions are that "the detention of the prisoners as convicted war criminals is illegal and in violation of Articles I and III of the Constitution of the United States and of the Fifth Amendment thereto, and of other provisions of said Constitution and laws of the United States . . . , in that:

"(a) There being no charge of an offense against the laws of war by the prisoners, the Military Commission was without jurisdiction.

"(b) In the absence of hostilities, martial law, or American military occupation of China, and in view of treaties between the United States and China **[*786]** dated February 4, 1943, and May 4, 1943, and between Germany and China, dated May 18, 1921, the Military Commission was without jurisdiction."

The petition does not particularize, and neither does the court below, the specific respects in which it is claimed acts of the Military were *ultra vires*.

[*HR12]** [12]
HN8 The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long-established. By the **[**948]** Treaty of Versailles, "The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war." Article 228. This Court has characterized as "well-established" the "power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war. " *Duncan v. Kahanamoka*, 327 U.S. 304, 312, 313-314. And we have held in the *Quirin* and *Yamashita* cases, *supra*, that the Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war. n12

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n12 See Green, The Military Commission, 42 Am. J. Int'l L. 832.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*HR13]** [13]
It is not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission. The petition shows that these prisoners were formally accused of violating the laws of war and fully informed of particulars of these charges. As we observed in the *Yamashita* case, "If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed **[*787]** facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions." 327 U.S. 1, 8. "We consider here only the lawful power of the commission to try the petitioner for the offense charged." *Ibid.*

[*HR14]** [14]
[*HR15]** [15]
That there is a basis in conventional and long-established law by which conduct ascribed to them might amount to a violation seems beyond question. Breach of the terms of an act of surrender is no novelty among war crimes. "That capitulations must be scrupulously adhered to is an old customary rule, since enacted by Article 35 of the Hague **[***1271]** Regulations. n13 Any act contrary to a capitulation would constitute an international delinquency if ordered by a belligerent Government, and a war crime if committed without such order. Such violation may be met by reprisals or punishment of the offenders as war criminals." II Oppenheim, International Law 433 (6th ed. rev., Lauterpacht, 1944). Vattel tells us: "If any of the subjects, whether military men or private citizens, offend against the truce . . . the delinquents should be compelled to make ample compensation for the damage, and severely punished. . . ." Law of Nations, **[*788]** Book III, c. XVI, § 241. And so too, Lawrence, who says, "If . . . the breach of the conditions agreed upon is the act of unauthorized individuals, the side that suffers . . . may demand the punishment of the guilty parties and an indemnity for any losses it has sustained." Principles of International Law (5th ed.) p. 566. It being within the jurisdiction of a Military Commission to try the prisoners, it was for it to determine whether the laws of war applied and whether an offense against them had been committed.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n13 Article XXXV of Convention IV signed at The Hague, October 18, 1907, 36 Stat. 2277, 2305, provides: "Capitulations agreed upon between the contracting parties must take into account the rules of military honour.

"Once settled, they must be scrupulously observed by both parties."

And see VII Moore, International Law Digest (1906) 330: "If there is one rule of the law of war more clear and peremptory than another, it is that compacts between enemies, such as truces and capitulations, shall be faithfully adhered to; and their non-observance is denounced as being manifestly at variance with the true interest and duty, not only of the immediate parties, but of all mankind. Mr. Webster, Sec. of State, to Mr. Thompson, Apr. 5, 1842, 6 Webster's Works, 438."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

We can only read "(b)" to mean either that the presence of the military forces of the United States in China at the times in question was unconstitutional or, if lawfully there, that they had no right under **[**949]** the Constitution to set up a Military Commission on Chinese territory. But it can hardly be meant that it was unconstitutional for the Government of the United States to wage a war in foreign parts. *HN9* Among powers granted to Congress by the Constitution is power to provide for the common defense, to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces. Art. I, § 8, Const. It also gives power to make rules concerning captures on land and water, *ibid*., which this Court has construed as an independent substantive power. *Brown* v. *United States*, 8 Cranch 110, 126. Indeed, out of seventeen specific paragraphs of congressional power, eight of them are devoted in whole or in part to specification of powers connected with warfare. The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. Art. II, § 2, Const. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution.

[*789]

[*HR16]** [16]
[*HR17]** [17]
Certainly it is not the function of the Judiciary to entertain private litigation -- even by a citizen -- which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. China appears to have fully consented to the trial within her territories and, if China had complaint at the presence of American forces there, China's grievance does not become these prisoners' right. The issue tendered by "(b)" involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible. *United States* v.

Curtiss-Wright Corp., **[***1272]** 299 U.S. 304; *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103.

These prisoners do not assert, and could not, that anything in the Geneva Convention makes them immune from prosecution or punishment for war crimes. n14 Article 75 thereof expressly provides that a prisoner of war may be detained until the end of such proceedings and, if necessary, until the expiration of the punishment. 47 Stat. 2021, 2055.

[18]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n14 We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*HR19]** [19]
The petition, however, makes two claims in the nature of procedural irregularities said to deprive the Military Commission of jurisdiction. One is that the United States was obliged to give the protecting power of Germany **[*790]** notice of the trial, as specified in Article 60 of the Convention. This claim the Court has twice considered and twice rejected, holding that such notice is required only of proceedings for disciplinary offenses committed during captivity and not in case of war crimes committed before capture. *Ex parte Quirin, supra; Ex parte Yamashita, supra.*

The other claim is that they were denied trial "by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power," required by Article 63 of the Convention. It may be noted that no prejudicial disparity is pointed out as between the Commission that tried prisoners and those that would try an offending soldier of the American forces of like rank. By a parity of reasoning with that in the foregoing decisions, this Article also refers to those, and only to those, proceedings for **[**950]** disciplinary offenses during captivity. Neither applies to a trial for war crimes.

[*HR20]** [20]
We are unable to find that the petition alleges any fact showing lack of jurisdiction in the military authorities to accuse, try and condemn these prisoners or that they acted in excess of their lawful powers.

V.

The District Court dismissed this petition on authority of *Ahrens* v. *Clark*, 335 U.S. 188. The Court of Appeals considered only questions which it regarded as reserved in that decision and in *Ex parte Endo*, 323 U.S. 283. Those cases dealt with persons both residing and detained within the United States and whose capacity and standing to invoke the process of federal courts somewhere was unquestioned. The issue was where.

Since in the present application we find no basis for invoking federal judicial power in any district, we need **[*791]** not debate as to where, if the case were otherwise, the petition should be filed.

For reasons stated, the judgment of the Court of Appeals is reversed and the judgment of the District Court dismissing the petition is affirmed.

Reversed.

DISSENTBY: BLACK

DISSENT: MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON concur, dissenting.

Not only is United States citizenship a "high privilege," it is a priceless treasure. For that citizenship is enriched beyond price by our goal **[***1273]** of equal justice under law -- equal justice not for citizens alone, but for all persons coming within the ambit of our power. This ideal gave birth to the constitutional provision for an independent judiciary with authority to check abuses of executive power and to issue writs of habeas corpus liberating persons illegally imprisoned. n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Article I, § 9, cl. 2 of the Constitution provides:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

This case tests the power of courts to exercise habeas corpus jurisdiction on behalf of aliens, imprisoned in Germany, under sentences imposed by the executive through military tribunals. The trial court held that, because the persons involved are imprisoned overseas, it had no territorial jurisdiction even to consider their petitions. The Court of Appeals reversed the District Court's dismissal on the ground that the judicial rather than the executive branch of government is vested with final authority to determine the legality of imprisonment for crime. 84 U. S. App. D. C. 396, 174 F.2d 961. This Court now affirms the District Court's dismissal. I agree with the Court of Appeals and need add little to the **[*792]** cogent reasons given for its decision. The broad reach of today's opinion, however, requires discussion.

[*HR21]** [21]
First. In Part IV of its opinion the Court apparently bases its holding that the District Court was without jurisdiction on its own conclusion that the petition for habeas corpus failed to show facts authorizing the relief prayed for. But jurisdiction of a federal district court does not depend on whether the initial pleading sufficiently states a cause of action; if a court has jurisdiction of subject matter and parties, it should proceed to try the case, beginning with consideration of the pleadings. *Bell* v. *Hood*, 327 U.S. 678, 682-683; *Ex parte Kawato*, 317 U.S. 69, 71. n2 Therefore Part IV of the opinion is wholly irrelevant and lends no support whatever to the Court's holding that the District Court was without jurisdiction.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 Cases are occasionally dismissed where the claims are "wholly insubstantial and frivolous," *Bell* v. *Hood, supra,* but the very complexity of this Court's opinion belies any such classification of this petition.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[951]**

[*HR22]** [22]
Moreover, the question of whether the petition showed on its face that these prisoners had violated the laws of war, even if it were relevant, is not properly before this Court. The trial court did not reach that question because it concluded that their imprisonment outside its district barred it even from considering the petition; its doors were "summarily closed." And in reversing, the Court of Appeals specifically rejected requests that it consider the sufficiency of the petition, properly remanding the cause to the District Court for that determination -- just as this Court did in the *Hood* and *Kawato* cases, *supra*. The Government's petition for certiorari here presented no question except that of jurisdiction; and neither party has argued, orally or in briefs, that this Court should pass on the sufficiency of the petition. **[*793]** To decide this unargued question under these circumstances seems an unwarranted and highly improper deviation from ordinary

judicial procedure. At the very least, fairness requires that the Court hear argument on this point.

[*HR23]** [23]
Despite these objections, the Court now proceeds to find a "war crime" in the fact that after Germany had surrendered these prisoners gave certain information to Japanese military forces. I am not convinced that this unargued question is correctly decided. The petition alleges that when the information **[***1274]** was given, the accused were "under the control of the armed forces of the Japanese Empire," in Japanese-occupied territory. Whether obedience to commands of their Japanese superiors would in itself constitute "unlawful" belligerency in violation of the laws of war is not so simple a question as the Court assumes. The alleged circumstances, if proven, would place these Germans in much the same position as patriotic French, Dutch, or Norwegian soldiers who fought on with the British after their homelands officially surrendered to Nazi Germany. There is not the slightest intimation that the accused were spies, or engaged in cruelty, torture, or any conduct other than that which soldiers or civilians might properly perform when entangled in their country's war. It must be remembered that legitimate "acts of warfare," however murderous, do not justify criminal conviction. In *Ex parte Quirin*, 317 U.S. 1, 30-31, we cautioned that military tribunals can punish only "unlawful" combatants; it is no "crime" to be a soldier. See also *Dow* v. *Johnson*, 100 U.S. 158, 169; *Ford* v. *Surget*, 97 U.S. 594, 605-606. Certainly decisions by the trial court and the Court of Appeals concerning applicability of that principle to these facts would be helpful, as would briefs and arguments by the adversary parties. It should not be decided by this Court now without that assistance, particularly since **[*794]** failure to remand deprives these petitioners of any right to meet alleged deficiencies by amending their petitions.

Second. In Parts I, II, and III of its opinion, the Court apparently holds that no American court can even consider the jurisdiction of the military tribunal to convict and sentence these prisoners for the alleged crime. Except insofar as this holding depends on the gratuitous conclusions in Part IV (and I cannot tell how far it does), it is based on the facts that (1) they were enemy aliens who were belligerents when captured, and (2) they were captured, tried, and imprisoned outside our realm, never having been in the United States.

The contention that enemy alien belligerents have no standing whatever to contest conviction for war crimes by habeas corpus proceedings has twice been emphatically rejected by a unanimous Court. In *Ex parte Quirin*, 317 U.S. 1, we held that status as an enemy alien did not foreclose "consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." *Id*. at 25. This we did in the face of a presidential proclamation denying such prisoners access to our courts. Only after thus upholding jurisdiction of the courts to consider such **[**952]** habeas corpus petitions did we go on to deny those particular petitions upon a finding that the prisoners had been convicted by a military tribunal of competent jurisdiction for conduct that we found constituted an actual violation of the law of war. Similarly, in *Yamashita* v. *United States*, 327 U.S. 1, we held

that courts could inquire whether a military commission, promptly after hostilities had ceased, had lawful authority to try and condemn a Japanese general charged with violating the law of war before hostilities had ceased. There we stated: "The Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to **[*795]** make such inquiry into the authority of the commission as may be made by habeas corpus." *Id.* at 9. That we went on to deny the requested writ, as in the *Quirin* case, in no way detracts from the clear holding that habeas corpus jurisdiction is available even to belligerent **[***1275]** aliens convicted by a military tribunal for an offense committed in actual acts of warfare.

Since the Court expressly disavows conflict with the *Quirin* or *Yamashita* decisions, it must be relying not on the status of these petitioners as alien enemy belligerents but rather on the fact that they were captured, tried and imprisoned outside our territory. The Court cannot, and despite its rhetoric on the point does not, deny that if they were imprisoned in the United States our courts would clearly have jurisdiction to hear their habeas corpus complaints. Does a prisoner's right to test legality of a sentence then depend on where the Government chooses to imprison him? Certainly the *Quirin* and *Yamashita* opinions lend no support to that conclusion, for in upholding jurisdiction they place no reliance whatever on territorial location. The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations.

If the opinion thus means, and it apparently does, that these petitioners are deprived of the privilege of habeas corpus solely because they were convicted and imprisoned overseas, the Court is adopting a broad and dangerous principle. The range of that principle is underlined by the argument of the Government brief that habeas corpus is not even available for American citizens convicted and imprisoned in Germany by American military tribunals. While the Court wisely disclaims any such necessary effect for its holding, rejection of the Government's argument is certainly made difficult by the logic of today's **[*796]** opinion. Conceivably a majority may hereafter find citizenship a sufficient substitute for territorial jurisdiction and thus permit courts to protect Americans from illegal sentences. But the Court's opinion inescapably denies courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared. n3

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 The Court indicates that not even today can a nonresident German or Japanese bring even a civil suit in American courts. With this restrictive philosophy compare *Ex parte Kawato*, 317 U.S. 69; see also *McKenna* v. *Fisk*, 1 How. 241, 249.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Third. It has always been recognized that actual warfare can be conducted successfully only if those in command are left the most ample independence in the theatre of operations. Our Constitution is not so impractical or inflexible that it unduly restricts such necessary independence. It would be fantastic to suggest that alien enemies could hail our military leaders into judicial tribunals to account for their day-to-day activities on the battlefront. Active fighting forces must be free to fight while hostilities are in progress. But that undisputable axiom has no bearing on this **[**953]** case or the general problem from which it arises.

When a foreign enemy surrenders, the situation changes markedly. If our country decides to occupy conquered territory either temporarily or permanently, it assumes the problem of deciding how the subjugated people will be ruled, what laws will govern, who will promulgate them, and what governmental agency of ours will see that they are properly administered. This responsibility immediately raises questions concerning the extent to which our domestic laws, constitutional and statutory, are transplanted abroad. Probably no one would suggest, and certainly I would not, that this nation either must or should attempt to apply every constitutional **[*797]** provision of the Bill of Rights in controlling temporarily occupied countries. But that does not mean that the **[***1276]** Constitution is wholly inapplicable in foreign territories that we occupy and govern. See *Downes* v. *Bidwell*, 182 U.S. 244.

The question here involves a far narrower issue. Springing from recognition that our government is composed of three separate and independent branches, it is whether the judiciary has power in habeas corpus proceedings to test the legality of criminal sentences imposed by the executive through military tribunals in a country which we have occupied for years. The extent of such a judicial test of legality under charges like these, as we have already held in the *Yamashita* case, is of most limited scope. We ask only whether the military tribunal was legally constituted and whether it had jurisdiction to impose punishment for the conduct charged. Such a limited habeas corpus review is the right of every citizen of the United States, civilian or soldier (unless the Court adopts the Government's argument that Americans imprisoned abroad have lost their right to habeas corpus). Any contention that a similarly limited use of habeas corpus for these prisoners would somehow give them a preferred position in the law cannot be taken seriously.

Though the scope of habeas corpus review of military tribunal sentences is narrow, I think it should not be denied to these petitioners and others like them. We control that part of Germany we occupy. These prisoners were convicted by our own military tribunals under our own Articles of War, years after hostilities had ceased. However illegal their sentences might be, they can expect no relief from German courts or any other branch of the German Government we permit to function. Only our own courts can inquire into the legality of their imprisonment. Perhaps, as some nations believe, there is merit in leaving the administration of criminal laws **[*798]** to executive and military agencies completely free from judicial scrutiny. Our Constitution has emphatically expressed a contrary policy.

As the Court points out, Paul was fortunate enough to be a Roman citizen when he was made the victim of prejudicial charges; that privileged status afforded him an appeal to Rome, with a right to meet his "accusers face to face." Acts 25:16. But other martyrized disciples were not so fortunate. Our Constitution has led people everywhere to hope and believe that wherever our laws control, all people, whether our citizens or not, would have an equal chance before the bar of criminal justice.

Conquest by the United States, unlike conquest by many other nations, does not mean tyranny. For our people "choose to maintain their greatness by justice rather than violence." n4 Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies. Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where **[**954]** they happen to live. Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress. I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern. n5 Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 This goal for government is not new. According to Tacitus, it was achieved by another people almost 2,000 years ago. See 2 Works of Tacitus 326 (Oxford trans., New York, 1869).

n5 See the concurring opinion of MR. JUSTICE DOUGLAS in *Hirota* v. *MacArthur*, 338 U.S. 197, 199.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

*327 U.S. 1, *; 66 S. Ct. 340, **;*
*90 L. Ed. 499, ***; 1946 U.S. LEXIS 3090*

IN RE YAMASHITA

No. 61, Misc.

SUPREME COURT OF THE UNITED STATES

327 U.S. 1; 66 S. Ct. 340; 90 L. Ed. 499; 1946 U.S. LEXIS 3090

January 7, 8, 1946, Argued
February 4, 1946, Decided

PRIOR HISTORY: APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS AND WRIT OF PROHIBITION. *

* Together with No. 672, Yamashita v. Styer, Commanding General, on petition for writ of certiorari to the Supreme Court of the Commonwealth of the Philippines. For earlier orders in these cases see 326 U.S. 693, 694.

No. 61, Misc. Application for leave to file a petition for writs of habeas corpus and prohibition in this Court challenging the jurisdiction and legal authority of a military commission which convicted applicant of a violation of the law of war and sentenced him to be hanged. Denied.

No. 672. Petition for certiorari to review an order of the Supreme Court of the Commonwealth of the Philippines, 42 Off. Gaz. 664, denying an application for writs of habeas corpus and prohibition likewise challenging the jurisdiction and legal authority of the military commission which tried and convicted petitioner. Denied.

DISPOSITION: Leave and petition denied.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner, commanding general of the Japane army, sought a writ of habeas corpus challenging: 1) the jurisdiction and legal authority of a military commission which convicted him of a violatio the law of war, and, 2) an order of the Supreme Court of the Commonwe of the Philippines, which denied his petition challenging the jurisdiction of the military commission.

OVERVIEW: Petitioner contended that the military commission which tri him was unlawfully created and without jurisdiction. The court disagreed denied the writ. First, the commission was not only created by a comman

competent to appoint it, but his order conformed to the established policy the government and was in complete conformity with the Articles of War, U.S.C.S. §§ 1471-1593. Second, there was authority to convene the commission, even after hostilities had ended, to try violations of the law o war that were committed before the war's cessation, at least until peace officially recognized by treaty or proclamation. Third, the charge against petitioner, which alleged that he breached his duty to control the operatio of the members of his command by permitting them to commit specified atrocities, adequately alleged a violation of the law of war. And finally, petitioner was not entitled to any of the protections afforded by the Gene Convention, part 3, Chapter 3, § V, Title III, because that chapter applied only to persons subjected to judicial proceedings for offenses committed while prisoners of war.

OUTCOME: The court denied the petition for certiorari, and the motion fo leave to file in the United States Supreme Court petitions for writs of hab corpus and prohibition.

CORE TERMS: military, military commission, enemy, commander, tribunal, troop, prisoners of war, atrocity, articles of war, prisoner of war, laws of war, army, prisoner, duty, treaty, armed forces, belligerent, hostilities, courts-martial, deposition, Fifth Amendment, combatant, convention, sentence, civilian, court-martial, international law, military command, probative value, supplemental

- Show Lawyers' Edition Display

SYLLABUS: Prior to September 3, 1945, petitioner was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. On that day, he surrendered to the United States Army and became a prisoner of war. Respondent was the Commanding General of the United States Army Forces, Western Pacific, whose command embraced the Philippine Islands. Respondent appointed a military commission to try the petitioner on a charge of violation of the law of war. The gist of the charge was that petitioner had failed in his duty as an army commander to control the operations of his troops, "permitting them to commit" specified atrocities against the civilian population and prisoners of war. Petitioner was found guilty and sentenced to death. *Held*:

1. The military commission appointed to try the petitioner was lawfully created. P. 9.

(a) Nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war, and principles governing the exercise of jurisdiction by such commissions, considered. Citing *Ex parte Quirin*, 317 U.S. 1, and other cases. Pp. 7-9.

(b) A military commission may be appointed by any field commander, or by any commander competent to appoint a general court martial, as was respondent by order of the President. P. 10.

(c) The order creating the military commission was in conformity with the Act of Congress (10 U. S. C. §§ 1471-1593) sanctioning the creation of such tribunals for the trial of offenses against the law of war committed by enemy combatants. P. 11.

2. Trial of the petitioner by the military commission was lawful, although hostilities had ceased. P. 12.

(a) A violation of the law of war, committed before the cessation of hostilities, may lawfully be tried by a military commission after hostilities have ceased, at least until peace has been officially recognized by treaty or proclamation by the political branch of the Government. P. 12.

(b) Trial of the petitioner by the military commission was authorized by the political branch of the Government, by military command, by international law and usage, and by the terms of the surrender of the Japanese government. P. 13.

3. The charge preferred against the petitioner was of a violation of the law of war. P. 13.

(a) The law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery; and he may be charged with personal responsibility for his failure to take such measures when violations result. Pp. 14, 16.

(b) What measures, if any, petitioner took to prevent the alleged violations of the law of war, and whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him, were questions within the peculiar competence of the military officers composing the commission and were for it to decide. P. 16.

(c) Charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment. P. 17.

(d) The allegations of the charge here, tested by any reasonable standard, sufficiently set forth a violation of the law of war; and the military commission had authority to try and to decide the issue which it raised. P. 17.

4. In admitting on behalf of the prosecution a deposition and hearsay and opinion evidence, the military commission did not violate any Act of Congress, treaty or military command defining the commission's authority. Pp. 18, 23.

(a) The Articles of War, including Articles 25 and 38, are not applicable to the trial of an enemy combatant by a military commission for violations of the law of war, and imposed no restrictions upon the procedure to be followed in such trial. Pp. 19, 20.

(b) Article 63 of the Geneva Convention of 1929, which provides that "Sentence may be

pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power," does not require that Articles 25 and 38 of the Articles of War be applied in the trial of the petitioner. Article 63 refers to sentence "pronounced against a prisoner of war" for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant. P. 20.

(c) The Court expresses no opinion on the question of the wisdom of considering such evidence as was received in this proceeding, nor on the question whether the action of a military tribunal in admitting evidence which Congress or controlling military command has directed to be excluded may be drawn in question by petition for habeas corpus or prohibition. P. 23.

5. On an application for habeas corpus, the Court is not concerned with the guilt or innocence of the petitioner. P. 8.

6. By sanctioning trials of enemy aliens by military commission for offenses against the law of war, Congress recognized the right of the accused to make a defense, and did not foreclose their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. P. 9.

7. The Court does not appraise the evidence on which the petitioner here was convicted. P. 17.

8. The military commission's rulings on evidence and on the mode of conducting the proceedings against the petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require. Pp. 8, 23.

9. Article 60 of the Geneva Convention of 1929, which provides that "At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial," applies only to persons who are subjected to judicial proceedings for offenses committed while prisoners of war. P. 23.

10. The detention of the petitioner for trial and his detention upon his conviction, subject to the prescribed review by the military authorities, were lawful. P. 25.

COUNSEL: Colonel Harry E. Clarke, pro hac vice, Captain A. Frank Reel and Captain Milton Sandberg argued the cause for petitioner. With them on the brief were Lt. Col. Walter C. Hendrix, Lt. Col. James G. Feldhaus and Major George F. Guy.

Solicitor General McGrath and Assistant Solicitor General Judson argued the cause for respondent. With them on the brief were The Judge Advocate General of the Army, Frederick Bernays Wiener, George Thomas Washington, David Reich, Irving Hill, Colonel William J. Hughes, Jr. and Captain D. C. Hill.

JUDGES: Stone, Black, Reed, Frankfurter, Douglas, Murphy, Rutledge, Burton; Jackson

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

OPINIONBY: STONE

OPINION: [*4] [343] [***503]** MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

No. 61 Miscellaneous is an application for leave to file a petition for writs of habeas corpus and prohibition in this Court. No. 672 is a petition for certiorari to review an order of the Supreme Court of the Commonwealth of the Philippines (28 U. S. C. § 349), denying petitioner's application to that court for writs of habeas corpus and prohibition. As both applications raise substantially like questions, and because of the importance and novelty of some of those presented, we set the two applications down for oral argument as one case.

[*5] From the petitions and supporting papers it appears that prior to September 3, 1945, petitioner was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. On that date he surrendered to and became a prisoner of war of the United States Army Forces in Baguio, Philippine Islands. On September 25th, by order of respondent, Lieutenant General Wilhelm D. **[***504]** Styer, Commanding General of the United States Army Forces, Western Pacific, which command embraces the Philippine Islands, petitioner was served with a charge prepared by the Judge Advocate General's Department of the Army, purporting to charge petitioner with a violation of the law of war. On October 8, 1945, petitioner, after pleading not guilty to the charge, was held for trial before a military commission of five Army officers appointed by order of General Styer. The order appointed six Army officers, all lawyers, as defense counsel. Throughout the proceedings which followed, including those before this Court, defense counsel have demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged.

On the same date a bill of particulars was filed by the prosecution, and the commission heard a motion made in petitioner's behalf to dismiss the charge on the ground that it failed to state a violation of the law of war. On October 29th the commission was reconvened, a supplemental bill of particulars was filed, and the motion to dismiss was denied. The trial then proceeded until its conclusion on December 7, 1945, the commission hearing two hundred and eighty-six witnesses, who gave over three thousand pages of testimony. On that date petitioner was found guilty of the offense as charged and sentenced to death by hanging.

The petitions for habeas corpus set up that the detention of petitioner for the purpose of the trial was unlawful for **[*6]** reasons which are now urged as showing that the military commission was without lawful authority or jurisdiction to place petitioner on trial, as follows:

(a) That the military commission which tried and convicted petitioner was not lawfully created, and that no military commission to try petitioner for violations of the law of war could lawfully be convened after the cessation of hostilities between the armed

forces of the United States and Japan;

(b) That the charge preferred against petitioner fails to charge him with a violation of the law of war;

(c) That the commission was without authority and jurisdiction to try and convict petitioner because the order governing the procedure of the commission permitted the admission in evidence of depositions, affidavits and hearsay and opinion evidence, and because the commission's rulings admitting such evidence were in violation of the 25th and 38th Articles of War (10 U. S. C. §§ 1496, 1509) and the Geneva Convention (47 Stat. 2021), and deprived petitioner of a fair trial in violation of the due process clause of the Fifth Amendment;

(d) That the commission was without authority and jurisdiction in the premises because of the failure to give advance notice of petitioner's trial to the neutral power **[**344]** representing the interests of Japan as a belligerent as required by Article 60 of the Geneva Convention, 47 Stat. 2021, 2051.

On the same grounds the petitions for writs of prohibition set up that the commission is without authority to proceed with the trial.

The Supreme Court of the Philippine Islands, after hearing argument, denied the petition for habeas corpus presented to it, on the ground, among others, that its jurisdiction was limited to an inquiry as to the jurisdiction of the commission to place petitioner on trial for the offense charged, and that the commission, being validly constituted **[*7]** by the order of General Styer, had jurisdiction over the person of petitioner and over the trial for the offense charged.

In *Ex parte Quirin*, 317 U.S. 1, we had occasion to consider at length the sources and nature of the authority to create **[***505]** military commissions for the trial of enemy combatants for offenses against the law of war. We there pointed out that HN1 Congress, in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to "define and punish . . . Offences against the Law of Nations . . . ," of which the law of war is a part, had by the Articles of War (10 U. S. C. §§ 1471-1593) recognized the "military commission" appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war. 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." See a similar provision of the Espionage Act of 1917, 50 U. S. C. § 38. HN2 Article 2 includes among those persons subject to the Articles of War the personnel of our own military establishment. But this, as Article 12 indicates, does not exclude from the class of persons subject to trial by military commissions "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.

We further pointed out that Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the **[*8]** preexisting jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties.

[*HR1]** [1]
[*HR2]** [2]
[*HR3]** [3]
We also emphasized in *Ex parte Quirin*, as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged. In the present cases it must be recognized throughout that HN3 the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. See *Ex parte Vallandigham*, 1 Wall. 243; *In re Vidal*, 179 U.S. 126; cf. *Ex parte Quirin, supra*, 39. They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." 28 U. S. C. §§ 451, 452. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. HN4 If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review **[***506]** merely because they **[**345]** have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions. See *Dynes* v. *Hoover*, 20 How. 65, 81; *Runkle* v. *United States*, 122 U.S. 543, 555-556; **[*9]** *Carter* v. *McClaughry*, 183 U.S. 365; *Collins* v. *McDonald*, 258 U.S. 416. Cf. *Matter of Moran*, 203 U.S. 96, 105.

[*HR4]** [4]
[*HR5]** [5]
Finally, we held in *Ex parte Quirin, supra*, 24, 25, as we hold now, that HN5 Congress by sanctioning trials of enemy aliens by military commission for offenses against the law of war had recognized the right of the accused to make a defense. Cf. *Ex parte Kawato*, 317 U.S. 69. It has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.

With these governing principles in mind we turn to the consideration of the several

contentions urged to establish want of authority in the commission. We are not here concerned with the power of military commissions to try civilians. See *Ex parte Milligan*, 4 Wall. 2, 132; *Sterling* v. *Constantin*, 287 U.S. 378; *Ex parte Quirin, supra*, 45. The Government's contention is that General Styer's order creating the commission conferred authority on it only to try the purported charge of violation of the law of war committed by petitioner, an enemy belligerent, while in command of a hostile army occupying United States territory during time of war. Our first inquiry must therefore be whether the present commission was created by lawful military command and, if so, whether authority could thus be conferred on the commission to place petitioner on trial after the cessation of hostilities between the armed forces of the United States and Japan.

[*HR6]** [6]
The authority to create the commission. General Styer's order for the appointment of the commission was made by him as Commander of the United States Army Forces, Western Pacific. His command includes, as part **[*10]** of a vastly greater area, the Philippine Islands, where the alleged offenses were committed, where petitioner surrendered as a prisoner of war, and where, at the time of the order convening the commission, he was detained as a prisoner in custody of the United States Army. The congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war to which we have referred, sanctioned their creation by military command in conformity to long-established American precedents. *HN6* Such a commission may be appointed by any field commander, or by any commander competent to appoint a general court-martial, as was General Styer, who had been vested with that power by order of the President. 2 Winthrop, Military Law and Precedents, 2d ed., * 1302; cf. Article of War 8.

Here the commission was not only created by a commander competent to appoint it, but his order conformed to the established policy of the Government and to higher military commands authorizing his action. *HN7* In a proclamation of July 2, 1942 (56 Stat. 1964), the President proclaimed that enemy belligerents who, during time of war, enter the **[***507]** United States, or any territory or possession thereof, and who violate the law of war, should be subject to the law of war and to the jurisdiction of military tribunals. Paragraph 10 of the Declaration of Potsdam of July 26, 1945, declared that ". . . stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." U.S. Dept. of State Bull., Vol. XIII, No. 318, pp. 137-138. This Declaration was accepted by the Japanese government by its note of August 10, 1945. U.S. Dept. of State Bull., Vol. XIII, No. 320, p. 205.

By direction of the President, the Joint Chiefs of Staff of the American Military Forces, on September 12, 1945, instructed General MacArthur, Commander in Chief, United States Army Forces, Pacific, to proceed with the trial, before **[*11]** appropriate military tribunals, of such Japanese war criminals **[**346]** "as have been or may be apprehended." By order of General MacArthur of September 24, 1945, General Styer was specifically directed to proceed with the trial of petitioner upon the charge here involved. This order was accompanied by detailed rules and regulations which General MacArthur prescribed for the trial of war criminals. These regulations directed, among other things, that review of the sentence imposed by the commission should be by the

officer convening it, with "authority to approve, mitigate, remit, commute, suspend, reduce or otherwise alter the sentence imposed," and directed that no sentence of death should be carried into effect until confirmed by the Commander in Chief, United States Army Forces, Pacific.

It thus appears that the order creating the commission for the trial of petitioner was authorized by military command, and was in complete conformity to the Act of Congress sanctioning the creation of such tribunals for the trial of offenses against the law of war committed by enemy combatants. And we turn to the question whether the authority to create the commission and direct the trial by military order continued after the cessation of hostilities.

[*HR7]** [7]
[*HR8]** [8]
HN8 An important incident to the conduct of war is the adoption of measures by the military commander, 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 of war. *Ex parte Quirin, supra*, 28. The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so **[*12]** long as a state of war exists -- from its declaration until peace is proclaimed. See *United States* v. *Anderson*, 9 Wall. 56, 70; *The Protector*, 12 Wall. 700, 702; *McElrath* v. *United States*, 102 U.S. 426, 438; *Kahn* v. *Anderson*, 255 U.S. 1, 9-10. The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced. See *Stewart* v. *Kahn*, 11 Wall. 493, 507.

[*HR9]** [9]
We cannot say that there is no **[***508]** authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.

No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended. n1 In our own military history **[*13]** there have been numerous instances in which offenders were tried by military commission after **[**347]** the cessation of hostilities and before the proclamation of peace, for offenses against the law of war committed before the cessation of hostilities. n2

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 The Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties of the Versailles Peace Conference, which met after cessation of hostilities in the First World War, were of the view that violators of the law of war could be tried by military tribunals. See Report of the Commission, March 9, 1919, 14 Am. J. Int. L. 95, 121. See also memorandum of American commissioners concurring on this point, *id*., at p. 141. The treaties of peace concluded after World War I recognized the right of the Allies and of the United States to try such offenders before military tribunals. See Art. 228 of Treaty of Versailles, June 28, 1919; Art. 173 of Treaty of St. Germain, Sept. 10, 1919; Art. 157 of Treaty of Trianon, June 4, 1920.

The terms of the agreement which ended hostilities in the Boer War reserved the right to try, before military tribunals, enemy combatants who had violated the law of war. 95 British and Foreign State Papers (1901-1902) 160. See also trials cited in Colby, War Crimes, 23 Michigan Law Rev. 482, 496-7.

n2 See cases mentioned in *Ex parte Quirin, supra*, p. 32, note 10, and in 2 Winthrop, *supra*, * 1310-1311, n. 5; 14 Op. A. G. 249 (Modoc Indian Prisoners).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*HR10]** [10]
HN9 The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace. Here, peace has not been agreed upon or proclaimed. Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the law of war. The conduct of the trial by the military commission has been authorized by the political branch of the Government, by military command, by international law and usage, and by the terms of the surrender of the Japanese government.

[*HR11]** [11]
The charge. Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war. The charge, so far as now relevant, is that petitioner, between October 9, 1944 and September 2, 1945, in the Philippine Islands, "while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to **[*14]** control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and

of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war."

Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, **[***509]** committed by members of the forces under petitioner's command during the period mentioned. The first item specifies the execution of "a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity." Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments.

It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war. Articles 4, 28, 46, and 47, Annex to the Fourth Hague Convention, 1907, 36 Stat. 2277, 2296, 2303, 2306-7. But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes **[*15]** on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose **[**348]** to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence HN10 the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

This is recognized by the Annex to the Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article 1 lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." 36 Stat. 2295. Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out." 36 Stat. 2389. And Article 26 of the Geneva Red

Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commanders-in-chief of the belligerent **[*16]** armies to provide for the details of execution of the foregoing articles, [of the convention] as well as for unforeseen cases . . ." And, finally, Article 43 of the Annex of the Fourth Hague Convention, 36 Stat. 2306, requires **[***510]** that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals. n3 A like principle has been applied so as to impose liability on the United States in international arbitrations. *Case of Jeannaud*, 3 Moore, International Arbitrations, 3000; *Case of The Zafiro*, 5 Hackworth, Digest of International Law, 707.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n3 Failure of an officer to take measures to prevent murder of an inhabitant of an occupied country committed in his presence. Gen. Orders No. 221, Hq. Div. of the Philippines, August 17, 1901. And in Gen. Orders No. 264, Hq. Div. of the Philippines, September 9, 1901, it was held that an officer could not be found guilty for failure to prevent a murder unless it appeared that the accused had "the power to prevent" it.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - -

[*HR12]** [12]
We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution. There is no contention that the present charge, thus read, is without the support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances. n4 **[*17]** We do not here appraise the evidence on which petitioner was convicted. We do not consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide. See *Smith* v. *Whitney*, 116 U.S. 167, 178. **[**349]** It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 In its findings the commission took account of the difficulties "faced by the Accused with respect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply . . . , training, communication, discipline and morale of his troops," and the "tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character . . . of his troops." It nonetheless found that petitioner had not taken such measures to control his troops as were "required by the circumstances." We do not weigh the evidence. We merely hold that the charge sufficiently states a violation against the law of war, and that the commission, upon the facts found, could properly find petitioner guilty of such a violation.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*HR13]** [13]
HN11 Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment. Cf. *Collins v. McDonald, supra*, 420. But we conclude that the allegations of the charge, tested by any reasonable standard, adequately allege a violation of the law **[***511]** of war and that the **[*18]** commission had authority to try and decide the issue which it raised. Cf. *Dealy v. United States*, 152 U.S. 539; *Williamson v. United States*, 207 U.S. 425, 447; *Glasser v. United States*, 315 U.S. 60, 66, and cases cited.

The proceedings before the commission. The regulations prescribed by General MacArthur governing the procedure for the trial of petitioner by the commission directed that the commission should admit such evidence "as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man," and that in particular it might admit affidavits, depositions or other statements taken by officers detailed for that purpose by military authority. The petitions in this case charged that in the course of the trial the commission received, over objection by petitioner's counsel, the deposition of a witness taken pursuant to military authority by a United States Army captain. It also, over like objection, admitted hearsay and opinion evidence tendered by the prosecution. Petitioner argues, as ground for the writ of habeas corpus, that Article 25 n5 of the Articles of War prohibited the reception in evidence by the commission of depositions on behalf of the prosecution in a capital case, and that Article 38 n6 prohibited the reception of hearsay and of opinion evidence.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n5 HN12 Article 25 provides: "A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, . . . *Provided*, That testimony by deposition may be adduced for the defense in capital cases."

n6 HN13 Article 38 provides: "The President may, by regulations, which he may modify

from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: . . ."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*19]

[*HR14]** [14]
We think that HN14 neither Article 25 nor Article 38 is applicable to the trial of an enemy combatant by a military commission for violations of the law of war. Article 2 of the Articles of War enumerates "the persons . . . subject to these articles," who are denominated, for purposes of the Articles, as "persons subject to military law." In general, the persons so enumerated are members of our own Army and of the personnel accompanying the Army. Enemy combatants are not included among them. Articles 12, 13 and 14, before the adoption of Article 15 in 1916, made all "persons subject to military law" amenable to trial by courts-martial for any offense made punishable by the Articles of War. Article 12 makes triable by general court-martial "any other person who by the law of war is subject to trial by military tribunals." Since Article 2, in its 1916 form, includes some persons who, by the law of war, were, prior to 1916, triable by military commission, it was feared by the proponents of the 1916 legislation that in the absence of a saving provision, the authority given by Articles 12, 13 and 14 to try such persons before courts-martial might be construed to deprive the non-statutory military commission of a portion of what was considered to be its traditional jurisdiction. To avoid this, and to preserve that jurisdiction **[**350]** intact, Article 15 was added to the Articles. n7 HN15 It declared **[***512]** that "The provisions of these articles **[*20]** conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that . . . by the law of war may be triable by such military commissions."

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n7 General Crowder, the Judge Advocate General, who appeared before Congress as sponsor for the adoption of Article 15 and the accompanying amendment of Article 25, in explaining the purpose of Article 15, said:

"Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, [Arts. 12, 13, and 14] it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced: . . ." (Sen. R. 130, 64th Cong., 1st Sess., p. 40.)

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*HR15]** [15]
By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not, apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.

[*HR16]** [16]
Petitioner further urges that by virtue of Article 63 of the Geneva Convention of 1929, 47 Stat. 2052, he is entitled to the benefits afforded by the 25th and 38th Articles of War to members of our own forces. *HN16* Article 63 provides: "Sentence may be pronounced against a prisoner of war **[*21]** only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Since petitioner is a prisoner of war, and as the 25th and 38th Articles of War apply to the trial of any person in our own armed forces, it is said that Article 63 requires them to be applied in the trial of petitioner. But we think *HN17* examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence "pronounced against a prisoner of war" for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant.

Article 63 of the Convention appears in part 3, entitled "Judicial Suits," of Chapter 3, "Penalties Applicable to Prisoners of War," of § V, "Prisoners' Relations with the Authorities," one of the sections of Title III, "Captivity." All taken together relate only to the conduct and control of prisoners of war while in captivity as such. Chapter 1 of § V, Article 42 deals with complaints of prisoners of war **[***513]** because of the conditions of captivity. Chapter 2, Articles 43 and 44, relates to those of their number chosen by prisoners of war to represent them.

Chapter 3 of § V, Articles 45 through 67, is entitled "Penalties Applicable to Prisoners of War." Part 1 of that chapter, Articles 45 through 53, indicate what acts of prisoners of war, committed while prisoners, shall be considered offenses, and defines to some extent the punishment which the detaining power may **[**351]** impose on account of

such offenses. n8 Punishment is of two kinds -- "disciplinary" and **[*22]** "judicial," the latter being the more severe. Article 52 requires that leniency be exercised in deciding whether an offense requires disciplinary or judicial punishment. Part 2 of Chapter 2 is entitled "Disciplinary Punishments," and further defines the extent of such punishment, and the mode in which it may be imposed. Part 3, entitled "Judicial Suits," in which Article 63 is found, describes the procedure by which "judicial" punishment may be imposed. The three parts of Chapter 3, taken together, are thus a comprehensive description of the substantive offenses which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of such offenses, and of the procedure by which guilt may be adjudged and sentence pronounced.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n8 Part 1 of Chapter 3, "General Provisions," provides in Articles 45 and 46 that prisoners of war are subject to the regulations in force in the armies of the detaining power, that punishments other than those provided "for the same acts for soldiers of the national armies" may not be imposed on prisoners of war, and that "Collective punishment for individual acts" is forbidden. Article 47 provides that "Acts constituting an offense against discipline, and particularly attempted escape, shall be verified immediately; for all prisoners of war, commissioned or not, preventive arrest shall be reduced to the absolute minimum. Judicial proceedings against prisoners of war shall be conducted as rapidly as the circumstances permit . . . In all cases, the duration of preventive imprisonment shall be deducted from the disciplinary or judicial punishment inflicted . . ."

Article 48 provides that prisoners of war, after having suffered "the judicial or disciplinary punishment which has been imposed on them," are not to be treated differently from other prisoners, but provides that "prisoners punished as a result of attempted escape may be subjected to special surveillance." Article 49 recites that prisoners "given disciplinary punishment may not be deprived of the prerogatives attached to their rank." Articles 50 and 51 deal with escaped prisoners who have been retaken or prisoners who have attempted to escape. Article 52 provides: "Belligerents shall see that the competent authorities exercise the greatest leniency in deciding the question of whether an infraction committed by a prisoner of war should be punished by disciplinary or judicial measures. This shall be the case especially when it is a question of deciding on acts in connection with escape or attempted escape. . . . A prisoner may not be punished more than once because of the same act or the same count."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

We think it clear, from the context of these recited provisions, that part 3, and Article 63, which it contains, apply only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war. Section **[*23]** V gives no indication that this part was designed to deal with offenses other than those referred to in parts 1 and 2 of Chapter 3.

[*HR17]** [17]
We cannot say that the commission, in admitting evidence to which objection is now

made, violated any act of Congress, treaty or military command defining the commission's authority. For reasons already stated we hold that HN18 the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one **[***514]** way or the other is to be implied. Nothing we have said is to be taken as indicating any opinion on the question of the wisdom of considering such evidence, or whether the action of a military tribunal in admitting evidence, which Congress or controlling military command has directed to be excluded, may be drawn in question by petition for habeas corpus or prohibition.

[*HR18]** [18]
Effect of failure to give notice of the trial to the protecting power. HN19 Article 60 of the Geneva Convention of July 27, 1929, 47 Stat. 2051, to which the United States and Japan were signatories, provides that "At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial." Petitioner relies on the failure to give the prescribed notice to the protecting power n9 to **[**352]** establish want of authority in the commission to proceed with the trial.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n9 Switzerland, at the time of the trial, was the power designated by Japan for the protection of Japanese prisoners of war detained by the United States, except in Hawaii. U.S. Dept. of State Bull., Vol. XIII, No. 317, p. 125.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*24] For reasons already stated we conclude that HN20 Article 60 of the Geneva Convention, which appears in part 3, Chapter 3, § V, Title III of the Geneva Convention, applies only to persons who are subjected to judicial proceedings for offenses committed while prisoners of war. n10

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n10 One of the items of the bill of particulars, in support of the charge against petitioner, specifies that he permitted members of the armed forces under his command to try and execute three named and other prisoners of war, "subjecting to trial without prior notice to a representative of the protecting power, without opportunity to defend, and without counsel; denying opportunity to appeal from the sentence rendered; failing to notify the protecting power of the sentence pronounced; and executing a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offense charged." It might be suggested that if Article 60 is inapplicable to petitioner it is inapplicable in the cases specified, and that hence he could not be lawfully held or convicted on a charge of failing to require the notice, provided for in Article 60, to be given.

As the Government insists, it does not appear from the charge and specifications that the prisoners in question were not charged with offenses committed by them as prisoners rather than with offenses against the law of war committed by them as enemy combatants. But apart from this consideration, independently of the notice requirements of the Geneva Convention, it is a violation of the law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording to them opportunity to make a defense. 2 Winthrop, *supra*, * 434-435, 1241; Article 84, Oxford Manual, Laws and Customs of War on Land; U.S. War Dept., Basic Field Manual, Rules of Land Warfare (1940) par. 356; Lieber's Code, G. O. No. 100 (1863) Instructions for the Government of Armies of the United States in the Field, par. 12; Spaight, War Rights on Land, 462, n.

Further, the commission, in making its findings, summarized as follows the charges, on which it acted, in three classes, any one of which, independently of the others if supported by evidence, would be sufficient to support the conviction: (1) execution or massacre without trial and maladministration generally of civilian internees and prisoners of war; (2) brutalities committed upon the civilian population, and (3) burning and demolition, without adequate military necessity, of a large number of homes, places of business, places of religious worship, hospitals, public buildings and educational institutions.

The commission concluded: "(1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces" under command of petitioner "against people of the United States, their allies and dependencies . . . ; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers"; (2) that during the period in question petitioner "failed to provide effective control of . . . [his] troops, as was required by the circumstances." The commission said: ". . . where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them."

The commission made no finding of non-compliance with the Geneva Convention. Nothing has been brought to our attention from which we could conclude that the alleged non-compliance with Article 60 of the Geneva Convention had any relation to the commission's finding of a series of atrocities committed by members of the forces under petitioner's command, and that he failed to provide effective control of his troops, as was required by the circumstances; or which could support the petitions for habeas corpus on the ground that petitioner had been charged with or convicted for failure to require the notice prescribed by Article 60 to be given.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*25] **[***515]** It thus appears that the order convening the commission was a lawful order, that the commission was lawfully constituted, that petitioner was charged with violation of the law of war, and that the commission had **[**353]** authority to

proceed with the trial, and in doing so did not violate any military, statutory or constitutional command. We have considered, but find it unnecessary to discuss, other contentions which we find to be without merit. We therefore conclude that the detention of petitioner for trial and his detention upon his conviction, subject to the prescribed review by the military authorities, were lawful, and that the petition for certiorari, and leave to file in this Court **[*26]** petitions for writs of habeas corpus and prohibition should be, and they are.

Denied.

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

DISSENTBY: MURPHY; RUTLEDGE

DISSENT: MR. JUSTICE MURPHY, dissenting.

The significance of the issue facing the Court today cannot be overemphasized. An American military commission has been established to try a fallen military commander of a conquered nation for an alleged war crime. The authority for such action grows out of the exercise of the power conferred upon Congress by Article I, § 8, Cl. 10 of the Constitution to "define and punish . . . Offences against the Law of Nations . . ." The grave issue raised by this case is whether a military commission so established and so authorized may disregard the procedural rights of an accused person as guaranteed by the Constitution, especially by the due process clause of the Fifth Amendment.

The answer is plain. The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest **[*27]** army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

The existence of these rights, unfortunately, is not always respected. They are often trampled under **[***516]** by those who are motivated by hatred, aggression or fear. But in this nation individual rights are recognized and protected, at least in regard to governmental action. They cannot be ignored by any branch of the Government, even the military, except under the most extreme and urgent circumstances.

The failure of the military commission to obey the dictates of the due process

requirements of the Fifth Amendment is apparent in this case. The petitioner was the commander of an army totally destroyed by the superior power of this nation. While under heavy and destructive attack by our forces, his troops committed many brutal atrocities and other high crimes. Hostilities ceased and he voluntarily surrendered. At that point he was entitled, as an individual protected by the due process clause of the Fifth Amendment, to be treated fairly and justly according to the accepted rules of law and procedure. He was also entitled to a fair trial as to any alleged crimes and to be free from charges of legally unrecognized crimes that would serve only to permit his accusers to satisfy their desires for revenge.

A military commission was appointed to try the petitioner for an alleged war crime. The trial was ordered to be held in territory over which the United States has complete sovereignty. No military necessity or other emergency demanded the suspension of the safeguards of due process. Yet petitioner was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most **[*28]** elementary rules of evidence and summarily sentenced to be hanged. In all this needless and unseemly **[**354]** haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed, dependent upon its biased view as to petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in certain less respected nations in recent years.

In my opinion, such a procedure is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind. The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure. That has been the inevitable effect of every method of punishment disregarding the element of personal culpability. The effect in this instance, unfortunately, will be magnified infinitely, for here we are dealing with the rights of man on an international level. To subject an enemy belligerent **[*29]** to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and **[***517]** hinders the reconciliation necessary to a peaceful world.

That there were brutal atrocities inflicted upon the helpless Filipino people, to whom tyranny is no stranger, by Japanese armed forces under the petitioner's command is undeniable. Starvation, execution or massacre without trial, torture, rape, murder and

wanton destruction of property were foremost among the outright violations of the laws of war and of the conscience of a civilized world. That just punishment should be meted out to all those responsible for criminal acts of this nature is also beyond dispute. But these factors do not answer the problem in this case. They do not justify the abandonment of our devotion to justice in dealing with a fallen enemy commander. To conclude otherwise is to admit that the enemy has lost the battle but has destroyed our ideals.

War breeds atrocities. From the earliest conflicts of recorded history to the global struggles of modern times inhumanities, lust and pillage have been the inevitable by-products of man's resort to force and arms. Unfortunately, such despicable acts have a dangerous tendency to call forth primitive impulses of vengeance and retaliation among the victimized peoples. The satisfaction of such impulses in turn breeds resentment and fresh tension. Thus does the spiral of cruelty and hatred grow.

If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion rather than by vengeance. In this, the first case involving this momentous problem ever to reach this Court, our responsibility is both lofty and difficult. We must insist, within the confines of our proper **[*30]** jurisdiction, that the highest standards of justice be applied in this trial of an enemy commander conducted under the authority of the United States. Otherwise stark retribution will be free to masquerade in a cloak of false legalism. And the hatred and cynicism engendered by that retribution will supplant the great ideals to which this nation is dedicated.

This Court fortunately has taken the first and most important step toward insuring the supremacy of law and justice in the treatment of an enemy belligerent accused of violating the laws of war. Jurisdiction properly has been asserted to inquire "into the cause of restraint of liberty" of such a person. 28 U. S. C. § 452. Thus the obnoxious **[**355]** doctrine asserted by the Government in this case, to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review, has been rejected fully and unquestionably. This does not mean, of course, that the foreign affairs and policies of the nation are proper subjects of judicial inquiry. But when the liberty of any person is restrained by reason of the authority of the United States the writ of habeas corpus is available to test the legality of that restraint, even though direct court review of the restraint is prohibited. The conclusive presumption must be made, in this country at least, that illegal restraints are unauthorized and unjustified by any foreign policy of the Government and that commonly accepted juridical standards are to be recognized and enforced. On that basis judicial inquiry into these matters may proceed within its proper sphere.

The determination of the extent of review of war trials calls for judicial statesmanship of the highest order. The ultimate nature and scope of the writ of habeas corpus are within the discretion of the judiciary unless validly circumscribed by Congress. Here we are confronted **[***518]** with a use of the writ under circumstances novel in the

history of the **[*31]** Court. For my own part, I do not feel that we should be confined by the traditional lines of review drawn in connection with the use of the writ by ordinary criminals who have direct access to the judiciary in the first instance. Those held by the military lack any such access; consequently the judicial review available by habeas corpus must be wider than usual in order that proper standards of justice may be enforceable.

But for the purposes of this case I accept the scope of review recognized by the Court at this time. As I understand it, the following issues in connection with war criminal trials are reviewable through the use of the writ of habeas corpus: (1) whether the military commission was lawfully created and had authority to try and to convict the accused of a war crime; (2) whether the charge against the accused stated a violation of the laws of war; (3) whether the commission, in admitting certain evidence, violated any law or military command defining the commission's authority in that respect; and (4) whether the commission lacked jurisdiction because of a failure to give advance notice to the protecting power as required by treaty or convention.

The Court, in my judgment, demonstrates conclusively that the military commission was lawfully created in this instance and that petitioner could not object to its power to try him for a recognized war crime. Without pausing here to discuss the third and fourth issues, however, I find it impossible to agree that the charge against the petitioner stated a recognized violation of the laws of war.

It is important, in the first place, to appreciate the background of events preceding this trial. From October 9, 1944, to September 2, 1945, the petitioner was the Commanding General of the 14th Army Group of the Imperial Japanese Army, with headquarters in the Philippines. The reconquest of the Philippines by the armed forces of the United States began approximately at the time when **[*32]** the petitioner assumed this command. Combined with a great and decisive sea battle, an invasion was made on the island of Leyte on October 20, 1944. "In the six days of the great naval action the Japanese position in the Philippines had become extremely critical. Most of the serviceable elements of the Japanese Navy had been committed to the battle with disastrous results. The strike had miscarried, and General MacArthur's land wedge was firmly implanted in the vulnerable flank of the enemy . . . There were 260,000 Japanese troops scattered over the Philippines but most of them might as well have been on the other side of the world so far as the enemy's ability to shift them to meet the American thrusts was concerned. If General MacArthur succeeded in establishing himself in the Visayas where he could stage, exploit, and spread under cover of overwhelming naval and air superiority, nothing could prevent him from overrunning the Philippines." Biennial Report of the Chief of Staff of the United States Army, July 1, 1943, to June 30, 1945, to the Secretary of War, p. 74.

By the end of 1944 the island of Leyte was largely in American hands. And on January 9, 1945, the island of Luzon was invaded. "Yamashita's inability to cope with General MacArthur's swift moves, **[**356]** his desired reaction to the deception measures, the guerrillas, and General Kenney's aircraft combined to place the Japanese in an impossible situation. The enemy was forced into a piecemeal committment of his troops." *Ibid*., p. 78. It was at this time and place that most of the alleged atrocities

took place. Organized resistance around Manila ceased on February 23. Repeated land and air assaults pulverized the **[***519]** enemy and within a few months there was little left of petitioner's command except a few remnants which had gathered for a last stand among the precipitous mountains.

As the military commission here noted, "The Defense established the difficulties faced by the Accused with respect **[*33]** not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply with especial reference to food and gasoline, training, communication, discipline and morale of his troops. It was alleged that the sudden assignment of Naval and Air Forces to his tactical command presented almost insurmountable difficulties. This situation was followed, the Defense contended, by failure to obey his orders to withdraw troops from Manila, and the subsequent massacre of unarmed civilians, particularly by Naval forces. Prior to the Luzon Campaign, Naval forces had reported to a separate ministry in the Japanese Government and Naval Commanders may not have been receptive or experienced in this instance with respect to a joint land operation under a single commander who was designated from the Army Service."

The day of final reckoning for the enemy arrived in August, 1945. On September 3, the petitioner surrendered to the United States Army at Baguio, Luzon. He immediately became a prisoner of war and was interned in prison in conformity with the rules of international law. On September 25, approximately three weeks after surrendering, he was served with the charge in issue in this case. Upon service of the charge he was removed from the status of a prisoner of war and placed in confinement as an accused war criminal. Arraignment followed on October 8 before a military commission specially appointed for the case. Petitioner pleaded not guilty. He was also served on that day with a bill of particulars alleging 64 crimes by troops under his command. A supplemental bill alleging 59 more crimes by his troops was filed on October 29, the same day that the trial began. No continuance was allowed for preparation of a defense as to the supplemental bill. The trial continued uninterrupted until December 5, 1945. On December 7 petitioner was found guilty as charged and was sentenced to be hanged.

[*34] The petitioner was accused of having "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes." The bills of particulars further alleged that specific acts of atrocity were committed by "members of the armed forces of Japan under the command of the accused." Nowhere was it alleged that the petitioner personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command.

The findings of the military commission bear out this absence of any direct personal charge against the petitioner. The commission merely found that atrocities and other high crimes "have been committed by members of the Japanese armed forces under your command . . . that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; . . . That

during the period in question you failed to provide effective control of your troops as was required by the circumstances."

In other words, read against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this: "We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, **[***520]** your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective **[**357]** control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or **[*35]** condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them."

Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.

International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviations from duty. The probability that vengeance will form the major part of the victor's judgment is an unfortunate but inescapable fact. So great is that probability that international law refuses to recognize such a judgment as a basis for a war crime, however fair the judgment may be in a particular instance. It is this consideration that undermines the charge against the petitioner in this case. The indictment permits, indeed compels, the military commission of a victorious nation to **[*36]** sit in judgment upon the military strategy and actions of the defeated enemy and to use its conclusions to determine the criminal liability of an enemy commander. Life and liberty are made to depend upon the biased will of the victor rather than upon objective standards of conduct.

The Court's reliance upon vague and indefinite references in certain of the Hague Conventions and the Geneva Red Cross Convention is misplaced. Thus the statement in Article 1 of the Annex to Hague Convention No. IV of October 18, 1907, 36 Stat. 2277, 2295, to the effect that the laws, rights and duties of war apply to military and

volunteer corps only if they are "commanded by a person responsible for his subordinates," has no bearing upon the problem in this case. Even if it has, the clause "responsible for his subordinates" fails to state to whom the responsibility is owed or to indicate the type of responsibility contemplated. The phrase has received differing interpretations by authorities on international law. In Oppenheim, International Law (6th ed., rev. by Lauterpacht, 1940, vol. 2, p. 204, fn. 3) it is stated that "The meaning of the word 'responsible' . . . is not clear. It probably means 'responsible to some higher authority,' whether the person is appointed **[***521]** from above or elected from below; . . ." Another authority has stated that the word "responsible" in this particular context means "presumably to a higher authority," or "Possibly it merely means one who controls his subordinates and who therefore can be called to account for their acts." Wheaton, International Law (7th ed., by Keith, London, 1944, p. 172, fn. 30). Still another authority, Westlake, International Law (1907, Part II, p. 61), states that "Probably the responsibility intended is nothing more than a capacity of exercising effective control." Finally, Edmonds and Oppenheim, Land Warfare (1912, p. 19, par. 22) state that it is enough "if the commander of the corps is regularly or temporarily commissioned as an officer or is a person of **[*37]** position and authority . . ." It seems apparent beyond dispute that the word "responsible" was not used in this particular Hague Convention to hold the commander of a defeated army to any high standard of efficiency when he is under destructive attack; nor was it used to impute to him any criminal responsibility for war crimes committed by troops under his command under such circumstances.

[358]** The provisions of the other conventions referred to by the Court are on their face equally devoid of relevance or significance to the situation here in issue. Neither Article 19 of Hague Convention No. X, 36 Stat. 2371, 2389, nor Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, refers to circumstances where the troops of a commander commit atrocities while under heavily adverse battle conditions. Reference is also made to the requirement of Article 43 of the Annex to Hague Convention No. IV, 36 Stat. 2295, 2306, that the commander of a force occupying enemy territory "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." But the petitioner was more than a commander of a force occupying enemy territory. He was the leader of an army under constant and devastating attacks by a superior re-invading force. This provision is silent as to the responsibilities of a commander under such conditions as that.

Even the laws of war heretofore recognized by this nation fail to impute responsibility to a fallen commander for excesses committed by his disorganized troops while under attack. Paragraph 347 of the War Department publication, Basic Field Manual, Rules of Land Warfare, FM 27-10 (1940), states the principal offenses under the laws of war recognized by the United States. This includes all of the atrocities which the Japanese troops were alleged to have committed in this instance. Originally **[*38]** this paragraph concluded with the statement that "The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall." The meaning of the phrase "under whose authority they are committed" was not clear. On November 15, 1944, however, this sentence was deleted and a new paragraph was added relating

to the personal liability of those who violate the laws of war. Change 1, FM 27-10. The new paragraph 345.1 states that "Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished." From this the conclusion seems inescapable that the United States recognizes individual criminal responsibility for violations of the laws of **[***522]** war only as to those who commit the offenses or who order or direct their commission. Such was not the allegation here. Cf. Article 67 of the Articles of War, 10 U. S. C. § 1539.

There are numerous instances, especially with reference to the Philippine Insurrection in 1900 and 1901, where commanding officers were found to have violated the laws of war by specifically ordering members of their command to commit atrocities and other war crimes. Francisco Frani, G. O. 143, Dec. 13, 1900, Hq. Div. Phil.; Eugenio Fernandez and Juan Soriano, G. O. 28, Feb. 6, 1901, Hq. Div. Phil.; Ciriaco Cabungal, G. O. 188, Jul. 22, 1901, Hq. Div. Phil.; Natalio Valencia, G. O. 221, Aug. 17, 1901, Hq. Div. Phil.; Aniceta Angeles, G. O. 246, Sept. 2, 1901, Hq. Div. Phil.; Francisco Braganza, G. O. 291, Sept. 26, 1901, Hq. Div. Phil.; Lorenzo Andaya, G. O. 328, Oct. 25, 1901, Hq. Div. Phil. And in other cases officers have been held **[*39]** liable where they knew that a crime was to be committed, had the power to prevent it and failed to exercise that power. Pedro Abad Santos, G. O. 130, June 19, 1901, Hq. Div. Phil. Cf. Pedro A. Cruz, G. O. 264, Sept. 9, 1901, Hq. Div. Phil. In no recorded instance, however, has the mere inability to control troops under fire or attack by superior forces been made the basis of a charge of violating the laws of war.

The Government claims that the principle that commanders in the field are bound to control their troops has been applied so as to impose liability on the United States in international arbitrations. *Case of Jeannaud* (1880), 3 Moore, International Arbitrations (1898) 3000; *Case of The Zafiro* (1910), 5 Hackworth, Digest of International Law (1943) 707. The difference between arbitrating property rights and charging an individual with a crime against the laws of war is too obvious to require elaboration. But even more significant is the fact that even these arbitration cases fail to establish any principle **[**359]** of liability where troops are under constant assault and demoralizing influences by attacking forces. The same observation applies to the common law and statutory doctrine, referred to by the Government, that one who is under a legal duty to take protective or preventive action is guilty of criminal homicide if he willfully or negligently omits to act and death is proximately caused. *State* v. *Harrison*, 107 N. J. L. 213, 152 A. 867; *State* v. *Irvine*, 126 La. 434, 52 So. 567; Holmes, The Common Law, p. 278. No one denies that inaction or negligence may give rise to liability, civil or criminal. But it is quite another thing to say that the inability to control troops under highly competitive and disastrous battle conditions renders one guilty of a war crime in the absence of personal culpability. Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different. Moreover, it must be remembered that we are not dealing **[*40]** here with an ordinary tort or criminal action; precedents in those fields are of little if any value. Rather we are concerned with a proceeding involving an international crime, the treatment of which may have untold effects upon the future peace of the world.

That fact must be kept uppermost in our search for precedent.

The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history. This is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities. But that punishment should be based upon charges fairly drawn in light of established rules of international law and recognized concepts of justice.

But the charge in this case, as previously noted, was speedily drawn and filed but three weeks after the petitioner surrendered. The trial **[***523]** proceeded with great dispatch without allowing the defense time to prepare an adequate case. Petitioner's rights under the due process clause of the Fifth Amendment were grossly and openly violated without any justification. All of this was done without any thorough investigation and prosecution of those immediately responsible for the atrocities, out of which might have come some proof or indication of personal culpability on petitioner's part. Instead the loose charge was made that great numbers of atrocities had been committed and that petitioner was the commanding officer; hence he must have been guilty of disregard of duty. Under that charge the commission was free to establish whatever standard of duty on petitioner's part that it desired. By this flexible method a victorious nation may convict and execute any or all leaders of a vanquished foe, depending upon the prevailing degree of vengeance and the absence of any objective judicial review.

At a time like this when emotions are understandably high it is difficult to adopt a dispassionate attitude toward **[*41]** a case of this nature. Yet now is precisely the time when that attitude is most essential. While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others. We live under the Constitution, which is the embodiment of all the high hopes and aspirations of the new world. And it is applicable in both war and peace. We must act accordingly. Indeed, an uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit. The people's faith in the fairness and objectiveness of the law can be seriously undercut by that spirit. The fires of nationalism can be further kindled. And the hearts of all mankind can be embittered and filled with hatred, leaving forlorn and impoverished the noble ideal of malice toward none and charity to all. These are the reasons that lead me to dissent in these terms.

MR. JUSTICE RUTLEDGE, dissenting.

Not with ease does one find his views at odds with the Court's in a matter of this character and gravity. Only the most deeply felt convictions could force one to differ. That reason alone leads me to do so now, against strong considerations for withholding dissent.

[360]** More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there

can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process **[*42]** of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.

This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered. If we need not or cannot be magnanimous, we can keep our own law on the plane from which it has not descended hitherto and to which the defeated foes' never rose.

With all deference to the opposing views of my brethren, whose attachment to that tradition needless to **[***524]** say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command. Because I cannot reconcile what has occurred with their measure, I am forced to speak. At bottom my concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guaranties, the nation fought to keep; that our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that this Court shall not fail in its part under the Constitution to see that these things do not happen.

This trial is unprecedented in our history. Never before have we tried and convicted an enemy general for action taken during hostilities or otherwise in the course of military operations or duty. Much less have we condemned one for failing to take action. The novelty is not lessened by the trial's having taken place after hostilities ended and the enemy, including the accused, had surrendered. Moreover, so far as the time permitted for our **[*43]** consideration has given opportunity, I have not been able to find precedent for the proceeding in the system of any nation founded in the basic principles of our constitutional democracy, in the laws of war or in other internationally binding authority or usage.

The novelty is legal as well as historical. We are on strange ground. Precedent is not all-controlling in law. There must be room for growth, since every precedent has an origin. But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead. If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice, including this one, both in their own judging and in their new creation. The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand.

I.

It is not in our tradition for anyone to be charged with crime which is defined after his conduct, alleged to be criminal, has taken place; n1 or in language not sufficient to inform him of the nature of the offense or to enable him to make defense. n2 Mass guilt we do not impute to individuals, perhaps in any case but certainly in none where the person is not charged or shown actively to have participated in or knowingly to have failed in taking action to **[*44]** **[**361]** prevent the wrongs done by others, having both the duty and the power to do so.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 *Cummings* v. *Missouri*, 4 Wall. 277; *Kring* v. *Missouri*, 107 U.S. 221.

n2 *Armour Packing Co*. v. *United States*, 209 U.S. 56, 83-84; *United States* v. *Cohen Grocery Co*., 255 U.S. 81; cf. *Screws* v. *United States*, 325 U.S. 91. See note 17 and text.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defense; n3 in capital or other serious crimes to convict on "official documents . . . ; affidavits; . . . documents or translations thereof; **[***525]** diaries . . . , photographs, motion picture films, and . . . newspapers" n4 or on hearsay, once, twice or thrice removed, n5 more particularly when the documentary evidence or some of it is prepared *ex parte* by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination. n6

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 *Hawk* v. *Olson*, 326 U.S. 271; *Snyder* v. *Massachusetts*, 291 U.S. 97, 105: "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it." See Part III.

n4 The commission's findings state: "We have received for analysis and evaluation 423 exhibits consisting of official documents of the United States Army, The United States State Department, and the Commonwealth of the Philippines; affidavits; captured enemy documents or translations thereof; diaries taken from Japanese personnel, photographs, motion picture films, and Manila newspapers." See notes 19 and 20.

Concerning the specific nature of these elements in the proof, the issues to which they were directed, and their prejudicial effects, see text *infra* and notes in Part II.

n5 *Queen* v. *Hepburn*, 7 Cranch 290; *Donnelly* v. *United States*, 228 U.S. 243, 273. See Part II; note 21.

n6 *Motes* v. *United States*, 178 U.S. 458; *Paoni* v. *United States*, 281 F. 801. See Parts II and III.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Our tradition does not allow conviction by tribunals both authorized and bound n7 by the instrument of their creation to receive and consider evidence which is expressly excluded by Act of Congress or by treaty obligation; nor is it in accord with our basic concepts to make the tribunal, specially constituted for the particular trial, regardless of those prohibitions the sole and exclusive judge of the credibility, **[*45]** probative value and admissibility of whatever may be tendered as evidence.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 See Part II at notes 10, 19; Part III.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The matter is not one merely of the character and admissibility of evidence. It goes to the very competency of the tribunal to try and punish consistently with the Constitution, the laws of the United States made in pursuance thereof, and treaties made under the nation's authority.

All these deviations from the fundamental law, and others, occurred in the course of constituting the commission, the preparation for trial and defense, the trial itself, and therefore, in effect, in the sentence imposed. Whether taken singly in some instances as departures from specific constitutional mandates or in totality as in violation of the Fifth Amendment's command that *no* person shall be deprived of life, liberty or property without due process of law, a trial so vitiated cannot withstand constitutional scrutiny.

One basic protection of our system and one only, petitioner has had. He has been represented by able counsel, officers of the army he fought. Their difficult assignment has been done with extraordinary fidelity, not only to the accused, but to their high conception of military justice, always to be administered in subordination to the Constitution and consistent Acts of Congress and treaties. But, as will appear, even this conceded shield was taken away in much of its value, by denial of reasonable opportunity for them to perform their function.

On this denial and the commission's invalid constitution specifically, but also more generally upon the totality of departures from constitutional norms inherent in the idea of a fair trial, I rest my judgment that the commission was without jurisdiction from the beginning to try or punish the petitioner and that, if it had acquired jurisdiction then, its power to proceed was lost in the course of what was done before and during trial.

Only on one view, in my opinion, could either of these conclusions be avoided. This would be that an enemy **[*46]** belligerent **[**362]** in petitioner's position is altogether beyond the **[***526]** pale of constitutional protection, regardless of the fact that hostilities had ended and he had surrendered with his country. The

Government has so argued, urging that we are still at war with Japan and all the power of the military effective during active hostilities in theatres of combat continues in full force unaffected by the events of August 14, 1945, and after.

In this view the action taken here is one of military necessity, exclusively within the authority of the President as Commander-in-Chief and his military subordinates to take in warding off military danger and subject to no judicial restraint on any account, although somewhat inconsistently it is said this Court may "examine" the proceedings generally.

As I understand the Court, this is in substance the effect of what has been done. For I cannot conceive any instance of departure from our basic concepts of fair trial, if the failures here are not sufficient to produce that effect.

We are technically still at war, because peace has not been negotiated finally or declared. But there is no longer the danger which always exists before surrender and armistice. Military necessity does not demand the same measures. The nation may be more secure now than at any time after peace is officially concluded. In these facts is one great difference from *Ex parte Quirin*, 317 U.S. 1. Punitive action taken now can be effective only for the next war, for purposes of military security. And enemy aliens, including belligerents, need the attenuated protections our system extends to them more now than before hostilities ceased or than they may after a treaty of peace is signed. Ample power there is to punish them or others for crimes, whether under the laws of war during its course or later during occupation. There can be no question of that. The only question is how it shall be done, consistently **[*47]** with universal constitutional commands or outside their restricting effects. In this sense I think the Constitution follows the flag.

The other thing to be mentioned in order to be put aside is that we have no question here of what the military might have done in a field of combat. There the maxim about the law becoming silent in the noise of arms applies. The purpose of battle is to kill. But it does not follow that this would justify killing by trial after capture or surrender, without compliance with laws or treaties made to apply in such cases, whether trial is before or after hostilities end.

I turn now to discuss some of the details of what has taken place. My basic difference is with the Court's view that provisions of the Articles of War and of treaties are not made applicable to this proceeding and with its ruling that, absent such applicable provisions, none of the things done so vitiated the trial and sentence as to deprive the commission of jurisdiction.

My brother MURPHY has discussed the charge with respect to the substance of the crime. With his conclusions in this respect I agree. My own primary concern will be with the constitution of the commission and other matters taking place in the course of the proceedings, relating chiefly to the denial of reasonable opportunity to prepare petitioner's defense and the sufficiency of the evidence, together with serious questions of admissibility, to prove an offense, all going as I think to the commission's jurisdiction.

Necessarily only a short sketch can be given concerning each matter. And it may be stated at the start that, although it was ruled in *Ex parte Quirin, supra,* that this Court had no function to review the evidence, it was not there or elsewhere determined that it could not ascertain whether conviction is founded upon evidence expressly excluded **[***527]** by Congress or treaty; nor does the Court purport to do so now.

[*48] II.

Invalidity of the Commission's Constitution.

The fountainhead of the commission's authority was General MacArthur's directive by which General Styer was ordered to and pursuant to which he did proceed with constituting the commission. n8 The directive **[**363]** was accompanied by elaborate and detailed rules and regulations prescribing the procedure and rules of evidence to be followed, of which for present purposes § 16, set forth below, n9 is crucial.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n8 The line of authorization within the military hierarchy extended from the President, through the Joint Chiefs of Staff and General MacArthur, to General Styer, whose order of September 25th and others were made pursuant to and in conformity with General MacArthur's directive. The charge was prepared by the Judge Advocate General's Department of the Army. There is no dispute concerning these facts or that the directive was binding on General Styer and the commission, though it is argued his own authority as area commanding general was independently sufficient to sustain what was done.

n9 "16. Evidence. -- a. The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) Any document which appears to the commission to have been signed or issued officially by any officer, department, agency, or member of the armed forces of any government, without proof of the signature or of the issuance of the document.

(2) Any report which appears to the commission to have been signed or issued by the International Red Cross or a member thereof, or by a medical doctor or any medical service personnel, or by an investigator or intelligence officer, or by any other person whom the commission finds to have been acting in the course of his duty when making the report.

(3) Affidavits, depositions, or other statements taken by an officer detailed for that purpose by military authority.

(4) Any diary, letter or other document appearing to the commission to contain

information relating to the charge.

(5) A copy of any document or other secondary evidence of its contents, if the commission believes that the original is not available or cannot be produced without undue delay. . . ."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*49] Section 16, as will be noted, permits reception of documents, reports, affidavits, depositions, diaries, letters, copies of documents or other secondary evidence of their contents, hearsay, opinion evidence and conclusions, in fact of anything which in the commission's opinion "would be of assistance in proving or disproving the charge," without any of the usual modes of authentication.

A more complete abrogation of customary safeguards relating to the proof, whether in the usual rules of evidence or any reasonable substitute and whether for use in the trial of crime in the civil courts or military tribunals, hardly could have been made. So far as the admissibility and probative value of evidence was concerned, the directive made the commission a law unto itself.

It acted accordingly. As against insistent and persistent objection to the reception of all kinds of "evidence," oral, documentary and photographic, for nearly every kind of defect under any of the usual prevailing standards for admissibility and probative value, the commission not only consistently ruled against the defense, but repeatedly stated it was bound by the directive to receive the kinds of evidence it specified, n10 reprimanded counsel for continuing to make objection, declined **[***528]** to hear further objections, and in more than one instance during the course of the proceedings reversed its rulings favorable to the defense, where initially it had declined to receive what the prosecution offered. Every conceivable kind of statement, rumor, report, at first, second, third or further hand, written, printed or oral, and one "propaganda" film were allowed to come in, most of this relating to atrocities committed **[*50]** by troops under petitioner's command throughout the several thousand islands of the Philippine Archipelago during the period of active hostilities covered by the American forces' return to and recapture of the Philippines. n11

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n10 In one instance the president of the commission said: "The rules and regulations which guide this Commission are binding upon the Commission and agencies provided to assist the Commission. . . . We have been authorized to receive and weigh such evidence as we can consider to have probative value, and further comments by the Defense on the right which we have to accept this evidence is decidedly out of order." But see note 19.

n11 Cf. text *infra* at note 19 concerning the prejudicial character of the evidence.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The findings reflect the character of the proof and the charge. The statement quoted above n12 gives only a numerical idea of the instances in which ordinary safeguards in reception of written evidence were ignored. **[**364]** In addition to these 423 "exhibits," the findings state the commission "has heard 286 persons during the course of this trial, most of whom have given eye-witness accounts of what they endured or what they saw."

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n12 Note 4.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

But there is not a suggestion in the findings that petitioner personally participated in, was present at the occurrence of, or ordered any of these incidents, with the exception of the wholly inferential suggestion noted below. Nor is there any express finding that he knew of any one of the incidents in particular or of all taken together. The only inferential findings that he had knowledge, or that the commission so found, are in the statement that the "crimes *alleged to have been permitted* by the Accused in violation of the laws of war may be grouped into three categories" set out below, n13 in the further statement that "the Prosecution **[*51]** presented evidence to show that the crimes were so extensive and widespread, both as to time and area, n14 that *they must* either have been *wilfully permitted* by the Accused, *or secretly ordered* by" him; and in the conclusion of guilt and the sentence. n15 (Emphasis added.) Indeed the commission's ultimate **[***529]** findings n16 draw no express conclusion of knowledge, but state only two things: (1) the fact of widespread atrocities and crimes; (2) that petitioner "failed to provide effective control . . . as was required by the circumstances."

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n13 Namely, "(1) Starvation, execution or massacre without trial and maladministration generally of civilian internees and prisoners of war; (2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives; (3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions. In point of time, the offenses extended throughout the period the Accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended throughout the Philippine Archipelago, although by far the most of the incredible acts occurred on Luzon."

n14 Cf. note 13.

n15 In addition the findings set forth that captured orders of subordinate officers gave proof that "they, at least," ordered acts "leading directly to" atrocities; that "the *proof offered* to the Commission *alleged* criminal *neglect* . . . as well as complete failure *by*

the higher echelons of command *to detect* and prevent cruel and inhuman treatment accorded by local commanders and guards"; and that, although the "Defense established the difficulties faced by the Accused" with special reference among other things to the discipline and morale of his troops under the "swift and overpowering advance of American forces," and notwithstanding he had stoutly maintained his complete ignorance of the crimes, still he was an officer of long experience; his assignment was one of broad responsibility; it was his duty "*to discover* and control" crimes by his troops, if widespread, and therefore

"The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances.

"Accordingly upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging." (Emphasis added.)

n16 See note 15.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

This vagueness, if not vacuity, in the findings runs throughout the proceedings, from the charge itself through the proof and the findings, to the conclusion. It affects **[*52]** the very gist of the offense, whether that was wilful, informed and intentional omission to restrain and control troops *known* by petitioner to be committing crimes or was only a negligent failure on his part *to discover* this and take whatever measures he then could to stop the conduct.

Although it is impossible to determine from what is before us whether petitioner in fact has been convicted of one or the other or of both these things, n17 the case **[**365]** has been **[*53]** presented on the former basis and, unless as is noted below there is fatal duplicity, it must be taken that the crime charged and sought to be proved was only the failure, with knowledge, to perform the commander's function of control, although the Court's opinion nowhere expressly declares that knowledge was essential to guilt or necessary to be set forth in the charge.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n17 The charge, set forth at the end of this note, is consistent with either theory -- or both -- and thus ambiguous, as were the findings. See note 15. The only word implying knowledge was "permitting." If "wilfully" is essential to constitute a crime or charge of one, otherwise subject to the objection of "vagueness," cf. *Screws* v. *United States*, 325 U.S. 91, it would seem that "permitting" alone would hardly be sufficient to charge "wilful and intentional" action or omission; and, if taken to be sufficient to charge

knowledge, it would follow necessarily that the charge itself was not drawn to state and was insufficient to support a finding of mere failure to detect or discover the criminal conduct of others.

At the most, "permitting" could charge knowledge only by inference or implication. And reasonably the word could be taken in the context of the charge to mean "allowing" or "not preventing," a meaning consistent with absence of knowledge and mere failure to discover. In capital cases such ambiguity is wholly out of place. The proof was equally ambiguous in the same respect, so far as we have been informed, and so, to repeat, were the findings. The use of "wilfully," even qualified by a "must have," one time only in the findings hardly can supply the absence of that or an equivalent word or language in the charge or in the proof to support that essential element in the crime.

The charge was as follows: "Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the laws of war."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

It is in respect to this feature especially, quite apart from the reception of unverified rumor, report, etc., that perhaps the greatest prejudice arose from the admission of untrustworthy, unverified, unauthenticated evidence which could not be probed by cross-examination or other means of testing credibility, **[***530]** probative value or authenticity.

Counsel for the defense have informed us in the brief and at the argument that the sole proof of knowledge introduced at the trial was in the form of ex parte affidavits and depositions. Apart from what has been excerpted from the record in the applications and the briefs, and such portions of the record as I have been able to examine, it has been impossible for me fully to verify counsel's statement in this respect. But the Government has not disputed it; and it has maintained that we have no right to examine the record upon any question "of evidence." Accordingly, without concession to that view, the statement of counsel is taken for the fact. And in that state of things petitioner has been convicted of a crime in which knowledge is an essential element, with no proof of knowledge other than what would be inadmissible in any other capital case or proceeding under our system, civil or military, and which furthermore Congress has expressly commanded shall not be received in such cases tried by military commissions and other military tribunals. n18

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n18 Cf. text *infra* Part IV.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Moreover counsel assert in the brief, and this also is not denied, that the sole proof made of certain of the specifications **[*54]** in the bills of particulars was by ex parte affidavits. It was in relation to this also vital phase of the proof that there occurred one of the commission's reversals of its earlier rulings in favor of the defense, n19 a fact in itself conclusive demonstration of the necessity to the prosecution's case of the prohibited type of evidence and of its prejudicial effects upon the defense.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n19 On November 1, early in the trial, the president of the commission stated: "I think the Prosecution should consider the desirability of striking certain items. The Commission feels that there must be witnesses introduced on each of the specifications or items. *It has no objection to considering affidavits, but it is unwilling to form an opinion of a particular item based solely on an affidavit*. Therefore, until evidence is introduced, these particular exhibits are rejected." (Emphasis added.)

Later evidence of the excluded type was offered, to introduction of which the defense objected on various grounds including the prior ruling. At the prosecution's urging the commission withdrew to deliberate. Later it announced that "after further consideration, the Commission reverses that ruling [of November 1] and affirms its prerogative of receiving and considering affidavits or depositions, if it chooses to do so, for whatever probative value the Commission believes they may have, without regard to the presentation of some partially corroborative oral testimony." It then added: "The Commission *directs* the Prosecution again to introduce the affidavits or depositions then in question, and other documents of a similar nature which the Prosecution stated had been prepared for introduction." (Emphasis added.)

Thereafter this type of evidence was consistently received and again, by the undisputed statement of counsel, as the sole proof of many of the specifications of the bills, a procedure which they characterize correctly in my view as having "in effect, stripped the proceeding of all semblance of a trial and converted it into an ex parte investigation."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[366]** These two basic elements in the proof, namely, proof of knowledge of the crimes and proof of the specifications in the bills, that is, of the atrocities themselves, constitute the most important instances perhaps, if not the most flagrant, n20 **[*55]** of departure not only from the express command of Congress against receiving such proof but from the whole British-American tradition of the common law and the Constitution. Many others occurred, which **[***531]** there is neither time nor space to mention. n21

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n20 This perhaps consisted in the showing of the so-called "propaganda" film, "Orders from Tokyo," portraying scenes of battle destruction in Manila, which counsel say "was not in itself seriously objectionable." Highly objectionable, inflammatory and prejudicial, however, was the accompanying sound track with comment that the film was "evidence which will convict," mentioning petitioner specifically by name.

n21 Innumerable instances of hearsay, once or several times removed, relating to all manner of incidents, rumors, reports, etc., were among these. Many instances, too, are shown of the use of opinion evidence and conclusions of guilt, including reports made after ex parte investigations by the War Crimes Branch of the Judge Advocate General's Department, which it was and is urged had the effect of "putting the prosecution on the witness stand" and of usurping the commission's function as judge of the law and the facts. It is said also that some of the reports were received as the sole proof of some of the specifications.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Petitioner asserts, and there can be no reason to doubt, that by the use of all this forbidden evidence he was deprived of the right of cross-examination and other means to establish the credibility of the deponents or affiants, not to speak of the authors of reports, letters, documents and newspaper articles; of opportunity to determine whether the multitudinous crimes specified in the bills were committed in fact by troops under his command or by naval or air force troops not under his command at the time alleged; to ascertain whether the crimes attested were isolated acts of individual soldiers or were military acts committed by troop units acting under supervision of officers; and, finally, whether "in short, there was such a 'pattern' of" conduct as the prosecution alleged and its whole theory of the crime and the evidence required to be made out.

He points out in this connection that the commission based its decision on a finding as to the extent and number **[*56]** of the atrocities and that this of itself establishes the prejudicial effect of the affidavits, etc., and of the denial resulting from their reception of any means of probing the evidence they contained, including all opportunity for cross-examination. Yet it is said there is no sufficient showing of prejudice. The effect could not have been other than highly prejudicial. The matter is not one merely of "rules of evidence." It goes, as will appear more fully later, to the basic right of defense, including some fair opportunity to test probative value.

Insufficient as this recital is to give a fair impression of what was done, it is enough to show that this was no trial in the traditions of the common law and the Constitution. If the tribunal itself was not strange to them otherwise, it was in its forms and modes of procedure, in the character and substance of the evidence it received, in the **[**367]** denial of all means to the accused and his counsel for testing the evidence, in the brevity and ambiguity of its findings made upon such a mass of material and, as will appear, in the denial of any reasonable opportunity for preparation of the defense. Because this last deprivation not only is important in itself, but is closely related to the departures from all limitations upon the character of and modes of making the proof, it will be considered before turning to the important legal questions relating to whether all

these violations of our traditions can be brushed aside as not forbidden by the valid Acts of Congress, treaties and the Constitution, in that order. If all these traditions can be so put away, then indeed will we have entered upon a new but foreboding era of law.

III.

Denial of Opportunity to Prepare Defense.

Petitioner surrendered September 3, 1945, and was interned as a prisoner of war in conformity with Article 9 **[*57]** of the Geneva Convention of July 27, 1929. n22 He was served with the charge on September 25 and put in confinement as an accused war criminal. On October 8 he was arraigned and pleaded not guilty. On October 29 the trial began and it **[***532]** continued until December 7, when sentence was pronounced, exactly four years almost to the hour from the attack on Pearl Harbor.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n22 Also with Paragraph 82 of the Rules of Land Warfare.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

On the day of arraignment, October 8, three weeks before the trial began, petitioner was served with a bill of particulars specifying 64 items setting forth a vast number of atrocities and crimes allegedly committed by troops under his command. n23 The six officers appointed as defense counsel thus had three weeks, it is true at the prosecution's suggestion a week longer than they sought at first, to investigate and prepare to meet all these items and the large number of incidents they embodied, many of which had occurred in distant islands of the archipelago. There is some question whether they then anticipated the full scope and character of the charge or the evidence they would have to meet. But, as will appear, they worked night and day at the task. Even so it would have been impossible to do thoroughly, had nothing more occurred.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n23 Typical of the items are allegations that members of the armed forces of Japan under the command of the accused committed the acts "During the months of October, November and December 1944 [of] brutally mistreating and torturing numerous unarmed noncombatant civilians at the Japanese Military Police Headquarters located at Cortabitarte and Mabini Streets, Manila" and "On about 19 February 1945, in the Town of Cuenca, Batangas Province, brutally mistreating, massacring and killing Jose M. Laguo, Esteban Magsamdol, Jose Lanbo, Felisa Apuntar, Elfidio Lunar, Victoriana Ramo, and 978 other persons, all unarmed noncombatant civilians, pillaging and unnecessary [sic], deliberately and wantonly devastating, burning and destroying large areas of that town."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

But there was more. On the first day of the trial, October 29, the prosecution filed a supplemental bill of particulars, **[*58]** containing 59 more specifications of the same general character, involving perhaps as many incidents occurring over an equally wide area. n24 A copy had been given the defense three days earlier. One item, No. 89, charged that American soldiers, prisoners of war, had been tried and executed without notice having been given to the protecting power of the United States in accordance with the requirements of the Geneva Convention, which it is now argued, strangely, the United States was not required to observe as to petitioner's trial. n25

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n24 The supplemental bill contains allegations similar to those set out in the original bill. See note 23. For example, it charged that members of the armed forces of Japan under the command of the accused "during the period from 9 October 1944 to about 1 February 1945, at Cavite City, Imus, and elsewhere in Cavite Province," were permitted to commit the acts of "brutally mistreating, torturing, and killing or attempting to kill, without cause or trial, unarmed noncombatant civilians."

n25 See note 39 and text, Part V.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

But what is more important is that defense counsel, as they felt was their duty, at once moved for a continuance. n26 The application was denied. However the commission indicated that if, at the end of the prosecution's presentation **[*59]** concerning **[**368]** **[***533]** the original bill, counsel should "believe they require additional time . . . , the Commission will consider such a motion at that time," before taking up the items of the supplemental bill. Counsel again indicated, without other result, that time was desired at once "as much, if not more" to prepare for cross-examination "as the Prosecution's case goes in" as to prepare affirmative defense.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n26 In support of the motion counsel indicated surprise by saying that, though it was assumed two or three new specifications might be added, there had been no expectation of 59 "about entirely different persons and times." The statement continued:

"We have worked earnestly seven days a week in order to prepare the defense on 64 specifications. And when I say 'prepare the defense,' sir, I do not mean merely an affirmative defense, but to acquaint ourselves with the facts so that we could properly cross examine the Prosecution's witnesses.

". . . 'In advance of trial' means: Sufficient time to allow the Defense a chance to prepare its defense.

"We earnestly state that we must have this time in order to adequately prepare a defense. I might add, sir, we think that this is important to the Accused, but far more important than any rights of this Accused, we believe, is the proposition that this Commission should not deviate from a fundamental American concept of fairness . . ."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

On the next day, October 30, the commission interrupted the prosecutor to say it would not then listen to testimony or discussion upon the supplemental bill. After colloquy it adhered to its prior ruling and, in response to inquiry from the prosecution, the defense indicated it would require two weeks before it could proceed on the supplemental bill. On November 1 the commission ruled it would not receive affidavits without corroboration by witnesses on any specification, a ruling reversed four days later.

On November 2, after the commission had received an affirmative answer to its inquiry whether the defense was prepared to proceed with an item in the supplemental bill which the prosecution proposed to prove, it announced: "Hereafter, then, unless there is no [sic] objection by the Defense, the Commission will assume that you are prepared to proceed with any items in the Supplemental Bill." On November 8, the question arose again upon the prosecution's inquiry as to when the defense would be ready to proceed on the supplemental bill, the prosecutor adding: "Frankly, sir, it took the War Crimes Commission some three months to investigate these matters and I cannot conceive of the Defense undertaking a similar investigation with any less period of time." Stating it realized "the tremendous task which we placed upon the Defense" and its "determination to give them the time they require," the commission again adhered to its ruling of October 29.

[*60] Four days later the commission announced it would grant a continuance "only for the most urgent and unavoidable reasons." n27

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n27 The commission went on to question the need for all of the six officers representing the defense to be present during presentation of all the case, suggested one or two would be adequate and others "should be out of the courtroom" engaged in other matters and strongly suggested bringing in additional counsel in the midst of the trial, all to the end that "need to request a continuance may not arise."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

On November 20, when the prosecution rested, senior defense counsel moved for a reasonable continuance, recalling the commission's indication that it would then consider such a motion and stating that since October 29 the defense had been "working day and night," with "no time whatsoever to prepare any affirmative defense," since counsel had been fully occupied trying "to keep up with that new Bill of Particulars."

The commission thereupon retired for deliberation and, on resuming its sessions

shortly, denied the motion. Counsel then asked for "a short recess of a day." The commission suggested a recess until 1:30 in the afternoon. Counsel responded this would not suffice. The commission stated it felt "that the Defense should be prepared at least on its opening statement," to which senior counsel answered: "We haven't had time to do that, sir." The commission then recessed until 8:30 the following morning.

Further comment is hardly required. Obviously the burden placed upon the defense, in the short time allowed for preparation on the original bill, was not only "tremendous." In view of all the facts, it was an impossible one, even though the time allowed was a week longer than asked. But **[**369]** the grosser vice was later when the burden was more than doubled by service of the supplemental bill on the eve of trial, a procedure which, taken in connection with the consistent denials of continuance and the commission's **[***534]** later reversal of its rulings favorable to the defense, **[*61]** was wholly arbitrary, cutting off the last vestige of adequate chance to prepare defense and imposing a burden the most able counsel could not bear. This sort of thing has no place in our system of justice, civil or military. Without more, this wide departure from the most elementary principles of fairness vitiated the proceeding. When added to the other denials of fundamental right sketched above, it deprived the proceeding of any semblance of trial as we know that institution.

IV.

Applicability of the Articles of War.

The Court's opinion puts the proceeding and the petitioner, in so far as any rights relating to his trial and conviction are concerned, wholly outside the Articles of War. In view of what has taken place, I think the decision's necessary effect is also to place them entirely beyond limitation and protection, respectively, by the Constitution. I disagree as to both conclusions or effects.

The Court rules that Congress has not made Articles 25 and 38 applicable to this proceeding. I think it has made them applicable to this and all other military commissions or tribunals. If so, the commission not only lost all power to punish petitioner by what occurred in the proceedings. It never acquired jurisdiction to try him. For the directive by which it was constituted, in the provisions of § 16, n28 was squarely in conflict with Articles 25 and 38 of the Articles of War n29 and therefore was void.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n28 See note 9.

n29 Article 25 is as follows: "A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before *any military court or commission in any case not capital, or* in any proceeding before a *court of inquiry or a military board*, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of

trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: *Provided, That testimony by deposition may be adduced for the defense in capital cases*." (Emphasis added.) 10 U. S. C. § 1496.

Article 38 reads: "The President may, by regulations, which he may modify from time to time, prescribe the procedure, *including modes of proof*, in cases before *courts-martial, courts of inquiry, military commissions, and other military tribunals*, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules made in pursuance of this article shall be laid before the Congress annually*." (Emphasis added.) 10 U. S. C. § 1509.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*62] Article 25 allows reading of depositions in evidence, under prescribed conditions, in the plainest terms "before *any* military court or commission *in any case not capital*," providing, however, that "testimony by deposition may be adduced *for the defense in capital cases*." (Emphasis added.) This language clearly and broadly covers every kind of military tribunal, whether "court" or "commission." It covers all capital cases. It makes no exception or distinction for any accused.

Article 38 authorizes the President by regulations to prescribe procedure, including modes of proof, even more all-inclusively if possible, "in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals." Language could not be more broadly inclusive. No exceptions are mentioned or suggested, whether of tribunals or of accused persons. Every kind of military body for performing **[***535]** the function of trial is covered. That is clear from the face of the Article.

Article 38 moreover limits the President's power. He is so far as practicable to prescribe "the rules of evidence generally recognized in the trial of criminal cases in the **[*63]** district courts of the United States," a clear mandate that Congress intended all military trials to conform as closely as possible **[**370]** to our customary procedural and evidentiary protections, constitutional and statutory, for accused persons. But there are also two unqualified limitations, one "that nothing contrary to or inconsistent with *these* articles [specifically here Article 25] shall be so prescribed"; the other "that all rules made in pursuance of this article shall be laid before the Congress annually."

Notwithstanding these broad terms the Court, resting chiefly on Article 2, concludes the petitioner was not among the persons there declared to be subject to the Articles of War and therefore the commission which tries him is not subject to them. That Article does not cover prisoners of war or war criminals. Neither does it cover civilians in occupied territories, theatres of military operations or other places under military jurisdiction within or without the United States or territory subject to its sovereignty, whether they be neutrals or enemy aliens, even citizens of the United States, unless they are connected in the manner Article 2 prescribes with our armed forces, exclusive

of the Navy.

The logic which excludes petitioner on the basis that prisoners of war are not mentioned in Article 2 would exclude all these. I strongly doubt the Court would go so far, if presented with a trial like this in such instances. Nor does it follow necessarily that, because some persons may not be mentioned in Article 2, they can be tried without regard to any of the limitations placed by any of the other Articles upon military tribunals.

Article 2 in defining persons "subject to the articles of war" was, I think, specifying those to whom the Articles in general were applicable. And there is no dispute that most of the Articles are not applicable to the petitioner. It does not follow, however, and Article 2 does not provide, that there may not be in the Articles specific provisions **[*64]** covering persons other than those specified in Article 2. Had it so provided, Article 2 would have been contradictory not only of Articles 25 and 38 but also of Article 15 among others.

In 1916, when the last general revision of the Articles of War took place, n30 for the first time certain of the Articles were specifically made applicable to military commissions. Until then they had applied only to courts-martial. There were two purposes, the first to give statutory recognition to the military commission without loss of prior jurisdiction and the second to give those tried before military commissions some of the more important protections afforded persons tried by courts-martial.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n30 Another revision of the Articles of War took place in 1920. At this time Article 15 was slightly amended.

In 1916 Article 15 was enacted to read: "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals *of concurrent jurisdiction* in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals." (Emphasis added.)

The 1920 amendment put in the words "by statute or" before the words "by the law of war" and omitted the word "lawfully."

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In order to effectuate the first purpose, the Army proposed Article 15. n31 To effectuate **[**371]** the second purpose, **[***537]** Articles **[*66]** 25 and 38 and several others were proposed. n32 But as the Court now construes the Articles of War, they have no application to military commissions before which alleged offenders against the laws of war are tried. What the Court holds in effect is that there are two types of military commission, one to try offenses which might be cognizable by a court-martial, the other to try war crimes, **[**372]** and that Congress intended the Articles of War referring in terms to military commissions without exception to be applicable only to the

first type.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n31 Speaking at the Hearings before the Committee on Military Affairs, House of Representatives, 62d Cong., 2d Sess., printed as an Appendix to S. Rep. 229, 63d Cong., 2d Sess., General Crowder said:

"The next article, No. 15, is entirely new, and the reasons for its insertion in the code are these: In our War with Mexico two war courts were brought into existence by orders of Gen. Scott, viz, the military commission and the council of war. By the military commission Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. *The council of war did not survive the Mexican War period, and in our subsequent wars its jurisdiction has been taken over by the military commission*, which during the Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code *the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase 'Persons subject to military law.' There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts*, and the question would arise whether Congress having vested jurisdiction by statute the common law of war *jurisdiction* was not ousted. I wish to make it *perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent*." S. Rep. No. 229, 63d Cong., 2d Sess., p. 53. (Emphasis added.)

And later, in 1916, speaking before the Subcommittee on Military Affairs of the Senate at their Hearings on S. 3191, a project for the revision of the Articles of War, 64th Cong., 1st Sess., printed as an Appendix to S. Rep. 130, 64th Cong., 1st Sess., General Crowder explained at greater length:

"Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by court-martial, *I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced . . .*

"It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war *will be at liberty to employ either form of court* that happens to be convenient. *Both classes of courts have the same procedure*. For the information of the committee and in explanation of these war courts to which I have referred I insert here an explanation from Winthrop's Military Law and Precedents --

"'The military commission -- a war court -- had its origin in G. O. 20, Headquarters of the Army at Tampico, February 19, 1847 (Gen. Scott). Its jurisdiction was confined mainly to criminal offenses of the class cognizable by civil courts in time of peace committed by inhabitants of the theater of hostilities. A further war court was originated by Gen. Scott at the same time, called "council of war," with jurisdiction to try the same classes of persons for violations of the laws of war, mainly guerrillas. These two jurisdictions were united in the later war court of the Civil War and Spanish War periods, for which the general designation of "military commission" was retained. The military commission was given statutory recognition in section 30, act of March 3, 1863, and in various other statutes of that period. The United States Supreme Court has acknowledged the validity of its judgments (Ex parte Vallandigham, 1 Wall., 243, and Coleman *v.* Tennessee, 97 U.S., 509). It tried more than 2,000 cases during the Civil War and reconstruction period. *Its composition, constitution, and procedure follows the analogy of courts-martial*. Another war court is the provost court, an inferior court with jurisdiction assimilated to that of justices of the peace and police courts; and other war courts variously designated "courts of conciliation," "arbitrators," "military tribunals," have been convened by military commanders in the exercise of the war power as occasion and necessity dictated."

"Yet, as I have said, these war courts never have been formally authorized by statute.

"Senator COLT. They grew out of usage and necessity?

"Gen. CROWDER. Out of usage and necessity. I thought it was just as well, as inquiries would arise, to put this information in the record." S. Rep. No. 130, 64th Cong., 1st Sess. (1916) p. 40. (Emphasis added.)

Article 15 was also explained in the "Report of a committee on the proposed revision of the articles of war, pursuant to instructions of the Chief of Staff, March 10, 1915," included in Revision of the Articles of War, Comparative Prints, etc., 1904-1920, J. A. G. O., as follows:

"A number of articles . . . of the revision have the effect of giving courts-martial jurisdiction over certain offenders and offenses which, under the law of war or by statute, are also triable by military commissions, provost courts, etc. Article 15 is introduced for the purpose of making clear that in such cases a court-martial has only a concurrent jurisdiction with such war tribunals."

n32 Of course, Articles 25 and 38, at the same time that they gave protection to defendants before military commissions, also provided for the application by such tribunals of modern rules of procedure and evidence.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*67] This misconceives both the history of military commissions and the legislative history of the Articles of War. There is only one kind of military commission. It is true, as the history noted shows, that what is now called "the military commission" arose from two separate military courts instituted during the Mexican War. The first military

court, called by General Scott a "military commission," was given jurisdiction in Mexico over criminal offenses of the class cognizable by civil courts in time of peace. The other military court, called a "council of war," was given jurisdiction over offenses against the laws of war. Winthrop, Military Law and Precedents (2d ed., reprinted 1920) * 1298-1299. During the Civil War "the two jurisdictions of the earlier commission and council respectively . . . [were] *united* in the . . . war-court, for which the general designation of 'military commission' was retained as the preferable one." Winthrop, *supra*, at *1299. Since that time there has been only one type of military tribunal called the military commission, though it may exercise different kinds of jurisdiction, n33 according to the circumstances under which and purposes for which it is convened.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n33 Winthrop, speaking of military commissions at the time he was writing, 1896, says: "The offences cognizable by military commissions may thus be classed as follows: (1) Crimes and statutory offences cognizable by State or U.S. courts, and which would properly be tried by such courts if open and acting; (2) *Violations of the laws and usages of war* cognizable by military tribunals only; (3) Breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." (Emphasis added.) Winthrop, at *1309. And cf. Fairman, The Law of Martial Rule (2d ed. 1943): "Military commissions take cognizance of three categories of criminal cases: *offenses against the laws of war*, breaches of military regulations, and civil crimes which, where the ordinary courts have ceased to function, cannot be tried normally." (Emphasis added.) Fairman, 265-266. See also Davis, A Treatise on the Military Law of the United States (1915) 309-310.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The testimony of General Crowder is perhaps the most authoritative evidence of what was intended by the legislation, **[*68]** for he was its most active official sponsor, spending years in securing its adoption and revision. Articles 15, 25 and 38 particularly are traceable to his efforts. His concern to secure statutory recognition for military commissions was equalled by his concern that the statutory provisions giving this should not restrict their preexisting jurisdiction. He did not wish by securing additional jurisdiction, overlapping partially that of **[***538]** the court-martial, to surrender other. Hence Article 15. That Article had one purpose and one only. It was to make sure that the acquisition of partially concurrent jurisdiction with courts-martial should not cause loss of any other. And it was jurisdiction, not procedure, which was covered by other Articles, with which he and Congress were concerned in that Article. It discloses no purpose to deal in any way with procedure or to qualify Articles 25 and 38. And it is clear that General Crowder at all times regarded all military commissions as being governed by the identical procedure. In fact, so far as Articles 25 and 38 are concerned, this seems obvious for all types of military tribunals. The same would appear to be true of other Articles also, e. g., 24 (prohibiting compulsory self-incrimination), 26, 27, 32 (contempts), all except the last dealing with procedural matters.

Article 12 is especially significant. It empowers general courts-martial to try two classes of offenders: (1) "any person *subject to military law*," under the definition of Article 2,

for any offense "made punishable by these articles"; (2) "and any other person who *by the law of war* is subject to trial *by military tribunals*," not covered by the terms of Article 2. (Emphasis added.)

Article 12 thus, in conformity with Article 15, gives the general court-martial concurrent jurisdiction of war crimes and war criminals with military commissions. Neither it nor any other Article states or indicates there are to be *two* kinds of general courts-martial for trying war crimes; yet **[*69]** **[**373]** this is the necessary result of the Court's decision, unless in the alternative that would be to imply that in exercising such jurisdiction there is only one kind of general court-martial, but there are two or more kinds of military commission, with wholly different procedures and with the result that "the commander in the field" will not be free to determine whether general court-martial or military commission shall be used as the circumstances may dictate, but must govern his choice by the kind of procedure he wishes to have employed.

The only reasonable and, I think, possible conclusion to draw from the Articles is that the Articles which are in terms applicable to military commissions are so uniformly and those applicable to both such commissions and to courts-martial when exercising jurisdiction over offenders against the laws of war likewise are uniformly applicable, and not diversely according to the person or offense being tried.

Not only the face of the Articles, but specific statements in General Crowder's testimony support this view. Thus in the portion quoted above n34 from his 1916 statement, after stating expressly the purpose of Article 15 to preserve unimpaired the military commission's jurisdiction, and to make it concurrent with that of courts-martial in so far as the two would overlap, "so that the *military commander in the field* in time of war will be at liberty to employ either form of court that happens to be convenient," he went on to say: "Both classes of courts have the same procedure," a statement so unequivocal as to leave no room for question. And his quotation from Winthrop supports his statement, namely: "Its [i. e., the military commission's] composition, constitution and procedure follow the analogy of courts-martial."

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n34 Note 31.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

At no point in the testimony is there suggestion that there are two types of military commission, one bound by **[*70]** the procedural provisions of the Articles, the other wholly free from their restraints or, as the Court strangely puts the matter, that there is only one kind of commission, but that it is bound or not bound by the Articles applicable in terms, depending upon who is being tried and for what offense; for that very difference makes the difference **[***539]** between one and two. The history and the discussion show conclusively that General Crowder wished to secure and Congress intended to give statutory recognition to all forms of military tribunals; to enable commanding officers in the field to use either court-martial or military commission as convenience might dictate, thus broadening to this extent the latter's jurisdiction and

utility; but at the same time to preserve its full preexisting jurisdiction; and also to lay down identical provisions for governing or providing for the government of the procedure and rules of evidence of every type of military tribunal, wherever and however constituted. n35

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n35 In addition to the statements of General Crowder with relation to Article 15, set out in note 31 *supra*, see the following statements made with reference to Article 25, in 1912 at a hearing before the Committee on Military Affairs of the House: "We come now to article 25, which relates to the admissibility of depositions. . . . It will be noted further that *the application of the old article has been broadened to include military commissions, courts of inquiry, and military boards*.

"Mr. SWEET. Please explain what you mean by military commission.

"Gen. CROWDER. That is our common law of war court, and was referred to by me in a prior hearing. [The reference is to the discussion of Article 15.] This war court came into existence during the Mexican War, and was created by orders of Gen. Scott. It had jurisdiction to try all cases usually cognizable in time of peace by civil courts. Gen. Scott created another war court, called the 'council of war,' with jurisdiction to try offenses against the laws of war. The constitution, composition, and jurisdiction of these courts *have never been regulated by statute*. The council of war did not survive the Mexican War period, since which its jurisdiction has been taken over by the military commission. The military commission received express recognition in the reconstruction acts, and its *jurisdiction* has been affirmed and supported by all our courts. It was extensively employed during the Civil War period and also during the Spanish-American War. It is highly desirable that this important war court should be continued to be governed as heretofore, by the laws of war rather than by statute." S. Rep. No. 229, 63d Cong., 2d Sess., 59; cf. S. Rep. 130, 64th Cong., 1st Sess., 54-55. (Emphasis added.) See also Hearings before the Subcommittee of the Committee on Military Affairs of the Senate on Establishment of Military Justice, 66th Cong., 1st Sess., 1182-1183.

Further evidence that procedural provisions of the Articles were intended to apply to all forms of military tribunal is given by Article 24, 10 U. S. C. § 1495, which provides against compulsory self-incrimination "before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation." This article was drafted so that "The prohibition should reach all witnesses, *irrespective of the class of military tribunal* before which they appear . . ." (Emphasis added.) Comparative Print showing S. 3191 with the Present Articles of War and other Related Statutes, and Explanatory Notes, Printed for use of the Senate Committee on Military Affairs, 64th Cong., 1st Sess., 17, included in Revision of the Articles of War, Comparative Prints, Etc., 1904-1920, J. A. G. O.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*71] [374]** Finally, unless Congress was legislating with regard to all military

commissions, Article 38, which gives the President the power to "prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals," takes on a rather senseless meaning; for the President would have such power only with respect to those military commissions exercising concurrent jurisdiction with courts-martial.

All this seems so obvious, upon a mere reading of the Articles themselves and the legislative history, as not to require demonstration. And all this Congress knew, as that history shows. In the face of that showing I cannot accept the Court's highly strained construction, first, because I think it is in plain contradiction of the facts disclosed by the history of Articles 15, 25 and 38 as well as their language; and also because that construction defeats at least two of the ends General Crowder **[***540]** had in mind, namely, to secure statutory recognition for every form of military tribunal and to provide for them a basic uniform **[*72]** mode of procedure or method of providing for their procedure.

Accordingly, I think Articles 25 and 38 are applicable to this proceeding; that the provisions of the governing directive in § 16 are in direct conflict with those Articles; and for that reason the commission was invalidly constituted, was without jurisdiction, and its sentence is therefore void.

V.

The Geneva Convention of 1929.

If the provisions of Articles 25 and 38 were not applicable to the proceeding by their own force as Acts of Congress, I think they would still be made applicable by virtue of the terms of the Geneva Convention of 1929, in particular Article 63. And in other respects, in my opinion, the petitioner's trial was not in accord with that treaty, namely, with Article 60.

The Court does not hold that the Geneva Convention is not binding upon the United States and no such contention has been made in this case. n36 It relies on other **[*73]** **[**375]** arguments to show that Article 60, which provides that the protecting power shall be notified in advance of a judicial proceeding directed against a prisoner of war, and Article 63, which provides that a prisoner of war may be tried only by the same courts and according to the same **[***541]** procedure as in the case of persons belonging to the armed forces of the detaining power, are not properly invoked by the petitioner. Before considering the Court's view that these Articles are not applicable to this proceeding by their terms, it may be noted that on his surrender petitioner was interned in conformity with Article 9 of this Convention.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n36 We are informed that Japan has not ratified the Geneva Convention. See discussion of Article 82 in the paragraphs below. We are also informed, however -- and the record shows this at least as to Japan -- that at the beginning of the war both the United States and Japan announced their intention to adhere to the provisions of that treaty.

The force of that understanding continues, perhaps with greater reason if not effect, despite the end of hostilities. See note 40 and text.

Article 82 provides:

"The provisions of the present Convention must be respected by the High Contracting Parties under all circumstances.

"In case, in time of war, one of the belligerents is not a party to the Convention, its provisions shall nevertheless remain in force as between the belligerents who are parties thereto."

It is not clear whether the Article means that during a war, when one of the belligerents is not a party to the Convention, the provisions must nevertheless be applied by all the other belligerents to the prisoners of war not only of one another but also of the power that was not a party thereto or whether it means that they need not be applied to soldiers of the nonparticipating party who have been captured. If the latter meaning is accepted, the first paragraph would seem to contradict the second.

"Legislative history" here is of some, if little, aid. A suggested draft of a convention on war prisoners drawn up in advance of the Geneva meeting by the International Committee of the Red Cross (Actes de la Conference Diplomatique de Geneve, edited by Des Gouttes, pp. 21-34) provided in Article 92 that the provisions of the Convention "ne cesseront d'etre obligatories qu'au cas ou l'un des Etats belligerents participant a la Convention se trouve avoir a combattre les forces armees d'un autre Etat que n'y serait par partie et a l'egard de cet Etat seulement." See Rasmussen, Code des Prisonniers de Guerre (1931) 70. The fact that this suggested article was not included in the Geneva Convention would indicate that the nations in attendance were avoiding a decision on this problem. But I think it shows more, that is, it manifests an intention not to foreclose a future holding that under the terms of the Convention a state is bound to apply the provisions to prisoners of war of nonparticipating states. And not to foreclose such a holding is to invite one. We should, in my opinion, so hold, for reasons of security to members of our own armed forces taken prisoner, if for no others.

Moreover, if this view is wrong and the Geneva Convention is not strictly binding upon the United States as a treaty, it is strong evidence of and should be held binding as representing what have become the civilized rules of international warfare. Yamashita is as much entitled to the benefit of such rules as to the benefit of a binding treaty which codifies them. See U.S. War Dept., Basic Field Manual, Rules of Land Warfare (1940), par. 5-*b*.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*74] The chief argument is that Articles 60 and 63 have reference only to offenses committed by a prisoner of war while a prisoner of war and not to violations of the laws of war committed while a combatant. This conclusion is derived from the setting in which these Articles are placed. I do not agree that the context gives any support to this argument. The argument is in essence of the same type as the argument the Court

employs to nullify the application of Articles 25 and 38 of the Articles of War by restricting their own broader coverage by reference to Article 2. For reasons set forth in the margin, n37 I think it equally invalid here.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n37 Title III of the Convention, which comprises Articles 7 to 67, is called "Captivity." It contains § I, "Evacuation of Prisoners of War" (Articles 7-8); § II, "Prisoners-of-War Camps" (Articles 9-26); § III, "Labor of Prisoners of War" (Articles 27-34); § IV, "External Relations of Prisoners of War" (Articles 35-41); and § V, "Prisoners' Relations with the Authorities" (Articles 42-67). Thus Title III regulates all the various incidents of a prisoner of war's life while in captivity.

Section V, with which we are immediately concerned, is divided into three chapters. Chapter 1 (Article 42) gives a prisoner of war the right to complain of his condition of captivity. Chapter 2 (Articles 43-44) gives prisoners of war the right to appoint agents to represent them. Chapter 3 is divided into three subsections and is termed "Penalties Applicable to Prisoners of War." Subsection 1 (Articles 45-53) contains various miscellaneous articles to be considered in detail later. Subsection 2 (Articles 54-59) contains provisions with respect to disciplinary punishments. And subsection 3 (Articles 60-67), which is termed "Judicial Suits," contains various provisions for protection of a prisoner's rights in judicial proceedings instituted against him.

Thus, subsection 3, which contains Articles 60 and 63, as opposed to subsection 2, of Chapter 3, is concerned not with mere problems of discipline, as is the latter, but with the more serious matters of trial leading to imprisonment or possible sentence of death; cf. Brereton, The Administration of Justice Among Prisoners of War by Military Courts (1935) 1 Proc. Australian & New Zealand Society of International Law 143, 153. The Court, however, would have the distinction between subsection 2 and subsection 3 one between minor disciplinary action against a prisoner of war for acts committed while a prisoner and major judicial action against a prisoner of war for acts committed while a prisoner. This narrow view not only is highly strained, confusing the different situations and problems treated by the two subdivisions. It defeats the most important protections subsection 3 was intended to secure, for our own as well as for enemy captive military personnel.

At the most, there would be logic in the Court's construction if it could be said that all of Chapter 3 deals with acts committed while a prisoner of war. Of course, subsection 2 does, because of the very nature of its subject-matter. Disciplinary action will be taken by a captor power against prisoners of war only for acts committed by prisoners after capture.

But it is said that subsection 1 deals exclusively with acts committed by a prisoner of war after having become a prisoner, and this indicates subsection 3 is limited similarly. This ignores the fact that some of the articles in subsection 1 appear, on their face, to apply to all judicial proceedings for whatever purpose instituted. Article 46, for example, provides in part:

"Punishments other than those provided for the same acts for soldiers of the national armies may not be imposed upon prisoners of war by the military authorities and courts of the detaining Power."

This seems to refer to war crimes as well as to other offenses; for surely a country cannot punish soldiers of another army for offenses against the laws of war, when it would not punish its own soldiers for the same offenses. Similarly, Article 47 in subsection 1 appears to refer to war crimes as well as to crimes committed by a prisoner after his capture. It reads in part:

"Judicial proceedings against prisoners of war shall be conducted as rapidly as the circumstances permit; preventive imprisonment shall be limited as much as possible."

Thus, at the most, subsection 1 contains, in some of its articles, the same ambiguities and is open to the same problem that we are faced with in construing Articles 60 and 63. It cannot be said, therefore, that all of Chapter 3, and especially subsection 3, relate only to acts committed by prisoners of war after capture, for the meaning of subsection 3, in this argument, is related to the meaning of subsection 1; and subsection 1 is no more clearly restricted to punishments and proceedings in disciplinary matters than is subsection 3.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*76] [376] [***542]** Neither Article 60 nor Article 63 contains such a restriction of meaning as the Court reads into them. n38 In the absence of any such limitation, it would seem that they were intended to cover all judicial proceedings, whether instituted for crimes allegedly committed before capture or later. Policy supports this view. For such a construction is required for the security of our own soldiers, taken prisoner, as much as for that of prisoners we take. And the opposite one leaves prisoners of war open to any form of trial and punishment for offenses against the laws of war their captors may wish to use, while safeguarding them, to the extent of the treaty limitations, in cases of disciplinary offense. This, in many instances, would be to make the treaty strain at a gnat and swallow the camel.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n38 Article 60 pertinently is as follows: "At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial.

"This advice shall contain the following information:

"a) Civil state and rank of prisoner;

"b) Place of sojourn or imprisonment;

"c) Specification of the [count] or counts of the indictment, giving the legal provisions

applicable.

"If it is not possible to mention in that advice the court which will pass upon the matter, the date of opening the trial and the place where it will take place, this information must be furnished to the representative of the protecting Power later, as soon as possible, and at all events, at least three weeks before the opening of the trial."

Article 63 reads: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The United States has complied with neither of these Articles. It did not notify the protecting power of Japan in advance of trial as Article 60 requires it to do, although the supplemental bill charges the same failure to petitioner **[*77]** in Item 89. n39 **[**377]** It is said that, although this may be true, the proceeding is not thereby invalidated. The argument is that our noncompliance merely gives Japan a right of indemnity against us and that Article 60 was not intended to give Yamashita any personal rights. I cannot agree. The treaties made by the United States are by the Constitution made the supreme law of the land. In the absence of something in the treaty indicating that its provisions were not intended to be enforced, upon breach, by more than subsequent indemnification, it is, as I conceive it, the duty of the courts of this country to insure the nation's compliance with such treaties, except in the case of political questions. This is especially true where the treaty has provisions -- such as Article 60 -- for the protection of a man being tried for an offense the punishment for which **[***543]** is death; for to say that it was intended to provide for enforcement of such provisions solely by claim, after breach, of indemnity would be in many instances, especially those involving trial of nationals of a defeated nation by a conquering one, to deprive the Articles of all force. Executed men are not much aided by postwar claims for indemnity. I do not think the adhering powers' purpose was to provide only for such ineffective relief.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n39 Item 89 charged the armed forces of Japan with subjecting to trial certain named and other prisoners of war "without prior notice to a representative of the protecting power, without opportunity to defend, and without counsel; denying opportunity to appeal from the sentence rendered; failing to notify the protecting power of the sentence pronounced; and executing a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offense charged."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Finally, the Government has argued that Article 60 has no application after the actual cessation of hostilities, as there is no longer any need for an intervening power between the two belligerents. The premise is that Japan no longer needs Switzerland to

intervene with the United **[*78]** States to protect the rights of Japanese nationals, since Japan is now in direct communication with this Government. This of course is in contradiction of the Government's theory, in other connections, that the war is not over and military necessity still requires use of all the power necessary for actual combat.

Furthermore the premise overlooks all the realities of the situation. Japan is a defeated power, having surrendered, if not unconditionally then under the most severe conditions. Her territory is occupied by American military forces. She is scarcely in a position to bargain with us or to assert her rights. Nor can her nationals. She no longer holds American prisoners of war. n40 Certainly, if there was the need of an independent neutral to protect her nationals during the war, there is more now. In my opinion the failure to give the notice required by Article 60 is only another instance of the commission's failure to observe the obligations of our law.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n40 Nations adhere to international treaties regulating the conduct of war at least in part because of the fear of retaliation. Japan no longer has the means of retaliating.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

What is more important, there was no compliance with Article 63 of the same Convention. Yamashita was not tried "according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Had one of our soldiers or officers been tried for alleged war crimes, he would have been entitled to the benefits of the Articles of War. I think that Yamashita was equally entitled to the same protection. In any event, he was entitled to their benefits under the provisions of Article 63 of the Geneva Convention. Those benefits he did not receive. Accordingly, his trial was in violation of the Convention.

VI.

The Fifth Amendment.

Wholly apart from the violation of the Articles of War and of the Geneva Convention, I am completely unable to **[*79]** accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.

The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could understand but not accept. Neither does it **[**378]** affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done. I think the effect of what it does is in substance to deny him all such safeguards. And this is the great issue in the cause.

For it is exactly here we enter **[***544]** wholly untrodden ground. The safe signposts to the rear are not in the sum of protections surrounding jury trials or any other proceeding known to our law. Nor is the essence of the Fifth Amendment's elementary protection comprehended in any single one of our time-honored specific constitutional safeguards in trial, though there are some without which the words "fair trial" and all they connote become a mockery.

Apart from a tribunal concerned that the law as applied shall be an instrument of justice, albeit stern in measure to the guilt established, the heart of the security lies in two things. One is that conviction shall not rest in any essential part upon unchecked rumor, report, or the results of the prosecution's ex parte investigations, but shall stand on proven fact; the other, correlative, lies in a fair chance to defend. This embraces at the least the rights to know with reasonable clarity in advance of the trial the exact nature of the offense with which one is to be charged; to have reasonable time for preparing to meet the charge and to have the aid of counsel in doing so, as also in the **[*80]** trial itself; and if, during its course, one is taken by surprise, through the injection of new charges or reversal of rulings which brings forth new masses of evidence, then to have further reasonable time for meeting the unexpected shift.

So far as I know, it has not yet been held that any tribunal in our system, of whatever character, is free to receive such evidence "as *in its opinion* would be *of assistance* in proving or disproving the charge," or, again as in its opinion, "would have probative value in the mind of a reasonable man"; and, having received what in its unlimited discretion it regards as sufficient, is also free to determine what weight may be given to the evidence received without restraint. n41

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n41 There can be no limit either to the admissibility or the use of evidence if the only test to be applied concerns probative value and the only test of probative value, as the directive commanded and the commission followed out, lies "in the Commission's opinion," whether that be concerning the assistance the "evidence" tendered would give in proving or disproving the charge or as it might think would "have value in the mind of a reasonable man." Nor is it enough to establish the semblance of a constitutional right that the commission declares, in receiving the evidence, that it comes in as having only such probative value, if any, as the commission decides to award it and this is accepted as conclusive.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

When to this fatal defect in the directive, however innocently made, are added the broad departures from the fundamentals of fair play in the proof and in the right to defend which occurred throughout the proceeding, there can be no accommodation with the due process of law which the Fifth Amendment demands.

All this the Court puts to one side with the short assertion that no question of due process under the Fifth Amendment or jurisdiction reviewable here is presented. I do not think this meets the issue, standing alone or in conjunction with the suggestion

which follows that the Court gives no intimation one way or the other concerning **[*81]** what Fifth Amendment due process might require in other situations.

It may be appropriate to add here that, although without doubt the directive was drawn in good faith in the belief that it would expedite the trial and that enemy belligerents in petitioner's position were not entitled to more, that state of mind and purpose cannot cure the nullification of basic constitutional standards which has taken place.

It is not necessary to recapitulate. The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority **[***545]** or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.

I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being **[**379]** through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.

It was a great patriot who said:

"He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself." n42

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n42 2 The Complete Writings of Thomas Paine (edited by Foner, 1945) 588.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

MR. JUSTICE MURPHY joins in this opinion.

*317 U.S. 1, *; 63 S. Ct. 2, **;*
*87 L. Ed. 3, ***; 1942 U.S. LEXIS 1119*

EX PARTE QUIRIN ET AL.; n1 UNITED STATES EX REL. QUIRIN ET AL. v. COX, PROVOST MARSHAL n2

n1 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.

n2 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.

Nos. , Original, Nos. 1-7

SUPREME COURT OF THE UNITED STATES

317 U.S. 1; 63 S. Ct. 2; 87 L. Ed. 3; 1942 U.S. LEXIS 1119

July 29-30, 1942, Argued
July 31, 1942, Decided. Per Curiam decision filed, July 31, 1942. Full Opinion filed, October 29, 1942.

PRIOR HISTORY:

MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF HABEAS CORPUS; CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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.

DISPOSITION: Leave to file petitions for habeas corpus in this Court denied. Orders of District Court (47 F.Supp. 431), affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioners, eight German born U.S. residents challenged the judgment of the U.S. Court of Appeals for the District of Columbia, which held that the President of the United States could try petitioners under the Articles of War, 10 U.S.C.S. §§ 1471-1593, at a military tribunal, and not in a civil proceeding for offenses against the law war.

OVERVIEW: Petitioners, eight German-born U.S. residents, were capture by the United States, as they tried to enter the country during war time, the purpose of sabotage, espionage, hostile or warlike acts, or violations under the law of war. The President of the United States held that petitioners were to be tried before a military tribunal under the Articles of War, 10 U.S.C.S. §§ 1471-1593. Petitioners challenged the President's authority, arguing that under the U.S. Const. art. III, § 2, amends. V and VI, petitioners had a right to demand a jury trial at common law in the civ courts. The court found that petitioners were alleged to be unlawful belligerents, and that under the Articles of War, they were not entitled to tried in a civil proceeding, nor by a jury. The court also determined that trying petitioners before a military court was not illegal and did not violat the U.S. Const. amends. V and VI relating to "crimes" and "criminal prosecutions." Thus, the court affirmed the President's authority to try petitioners before a military tribunal without a jury.

OUTCOME: The court affirmed the judgment of the lower court and held that petitioners did not have a constitutional right to a civil tribunal befor jury, but instead that the President of the United States could try petitioners in a military tribunal without a jury.

CORE TERMS: enemy, military, military commission, belligerent, spy, tribunal, armed forces, hostile, international law, convicted, martial, army, time of war, leave to file, habeas corpus, proclamation, alien, Sixth Amendments, specification, triable, civilian dress, common law, hanged, combatant, sentence, offender, destroying, sentenced, punishable, territory

- Show Lawyers' Edition Display

SYLLABUS: 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.

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 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, 50 1/2 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.

COUNSEL: 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 50 1/2 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 50 1/2 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 Andre 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, 50 1/2 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.

JUDGES:

Stone, Roberts, Black, Reed, Frankfurter, Douglas, Byrnes, Jackson; Murphy took no part in the consideration or decision of these cases.

OPINIONBY: STONE

OPINION: [*18] [6] [***7]** 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, **[*19]** 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 **[**7]** 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 **[*20]** 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 **[***8]** 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.

[*21] After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near **[***9]** 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 **[**8]** 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 **[*22]** 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. n1

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n1 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.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942, n2 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, n3 the President declared that "all persons who are subjects, citizens or residents of any nation at war with the **[***10]** United States or who give obedience to or act under the direction of any such nation, **[*23]** 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."

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 7 Federal Register 5103.

n3 7 Federal Register 5101.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

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' **[**9]** 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 **[*24]** the states in which each of the petitioners was arrested or detained, have been open and functioning normally.

[*HR1]** [1]
[*HR2]** [2]
HN1 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, 50 1/2 and 70 -- and are illegal and void.

[*HR3]** [3]
The Government challenges each of **[***11]** 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 **[*25]** 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.

[*HR4]** [4]
[*HR5]** [5]
We are not here concerned with any question of the guilt or innocence of petitioners. n4 HN2 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.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 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.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[10]**

[*HR6]** [6]
HN3 Congress and the President, like the courts, possess no power not derived from the Constitution. But one of **[*26]** the objects of the Constitution, as declared by its preamble, is to "provide for the common defence." As a means to that end, HN4 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.

HN5 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.

[*HR7]** [7]
HN6 The Constitution thus invests the **[***12]** 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.

HN7 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 **[*27]** 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 HN8 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.

[*HR8]** [8]
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 **[*28]** of war, the status, rights and duties of enemy nations as well as of enemy individuals. n5 HN9 By the Articles **[**11]** 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 **[***13]** 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.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n5 *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.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

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 **[*29]** 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.

[*HR9]** [9]
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; **[*30]** *United States* v. *Brig Malek Adhel*, 2 How. 210, 232; *The Ambrose Light*, 25 F. 408, 423-28; 18 U. S. C. § 481. n6 Similarly, by **[***14]** the reference in **[**12]** 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.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 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."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

*HN10*By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations n7 and also between **[*31]** 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. n8 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.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 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.

n8 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.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Such was the practice of our own military authorities before the adoption of the Constitution, n9 and during the Mexican and **[**13]** Civil Wars. n10

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n9 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 intelligence 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.

n10 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 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.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*32] **[***15]** 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 **[*33]** 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 **[**14]** privileges of the prisoner of war." n11 These and related provisions **[***16]** have **[*34]** 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:

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n11 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.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - -

[*35] "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."

[*HR10]** [10]
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 n12 that we think it **[***17]** must **[**15]** be regarded as **[*36]** a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n12 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) destroying 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 Volkerrecht (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 Codifie (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.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*HR11]** [11]
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."

[*HR12]** [12]
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 **[*37]** 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 **[***18]** unlawful belligerents subject to trial and punishment.

[*HR13]** [13]
HN11 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, **[*38]** guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention **[**16]** 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.

[*HR14]** [14]
[*HR15]** [15]
HN12 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.

[*HR16]** [16]
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 Article **[*39]** 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."

[*HR17]** [17]
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 **[***19]** then well understood that a jury trial could not be demanded as of right.

[*HR18]** [18]
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 Columbia* **[*40]** 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; **[**17]** *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 HN13 § 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.

[*HR19]** [19]
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 **[*41]** 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 **[***20]** 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.

[*HR20]** [20]
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, n13 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 **[*42]** 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. n14

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n13 See Morgan, Court-Martial Jurisdiction over Non-Military Persons under the Articles of War, 4 Minnesota L. Rev. 79, 107-09.

n14 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 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 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*.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*43] **[**18]** The exception from the Amendments of "cases arising in the land **[***21]** 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 **[**19]** 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.

[*44] 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 **[***22]** the Amendments -- whose **[*45]** 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.

[*HR21]** [21]
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 **[*46]** with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons **[**20]** 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.

[*HR22]** [22]
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.

[*HR23]** [23]
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, 50 1/2 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* **[***23]** 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 **[*47]** 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 employed **[*48]** 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 **[**21]** 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. 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 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.

REFERENCES: Return To Full Text Opinion

*71 U.S. 2, *; 18 L. Ed. 281, **;*
*1866 U.S. LEXIS 861, ***; 4 Wall. 2*

EX PARTE MILLIGAN.

SUPREME COURT OF THE UNITED STATES

71 U.S. 2; 18 L. Ed. 281; 1866 U.S. LEXIS 861; 4 Wall. 2

April 3, 1866, Decided

PRIOR HISTORY: [*1]**

THIS case came before the court upon a certificate of division from the judges of the Circuit Court for Indiana, on a petition for discharge from unlawful imprisonment.

The case was thus:

An act of Congress -- the Judiciary Act of 1789, n1 section 14 -- enacts that the Circuit Courts of the United States

"Shall have power to issue writs of habeas corpus. And that either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided," &c.

n1 1 Stat at Large, 81.

Another act -- that of March 3d, 1863, n2 "relating to habeas corpus, and regulating judicial proceedings in certain cases" -- an act passed in the midst of the Rebellion -- makes various provisions in regard to the subject of it.

n2 12 Id. 755.

The first section anthorizes the suspension, during the Rebellion, of the writ of habeas corpus, throughout the United States, by the President.

Two following sections limited the authority in certain respects.

The second section required that lists of all persons, being citizens of States in which the administration of the **[***2]** laws had continued unimpaired in the Federal courts, who were then held, or might thereafter be held, as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war, should be furnished by the Secretary of State and Secretary of War to the judges of the Circuit and District Courts. These lists were to contain the names of all persons, residing within their respective jurisdictions, charged with violation of national law. And it was required, in cases where the grand jury in attendance upon any of these

courts should terminate its session without proceeding by indictment or otherwise against any prisoner named in the list, that the judge of the court should forthwith make an order that such prisoner, desiring a discharge, should be brought before him or the court to be discharged, on entering into recognizance, if required, to keep the peace and for good behavior, or to appear, as the court might direct, to be further dealt with according to law. Every officer of the United States having custody of such prisoners was required to obey and execute the judge's order, under penalty, for refusal or delay, of fine and imprisonment.

The third **[***3]** section enacts, in case lists of persons other than prisoners of war then held in confinement, or thereafter arrested, should not be furnished within twenty days after the passage of the act, or, in cases of subsequent arrest, within twenty days after the time of arrest, that any citizen, after the termination of a session of the grand jury without indictment or presentment, might, by petition alleging the facts and verified by oath, obtain the judge's order of discharge in favor of any person so imprisoned, on the terms and conditions prescribed in the second section.

This act made it the duty of the District Attorney of the United States to attend examinations on petitions for dis charge.

By proclamation, n3 dated the 15th September following the President reciting this statute suspended the privilege of the writ in the cases where, by his authority, military, naval, and civil officers of the United States "hold persons in their custody either as prisoners of war, spies, or aiders and abettors of the enemy, . . . or belonging to the land or naval forces of the United States, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed **[***4]** for the military or naval services, by authority of the President, or for resisting a draft, or for any other offence against the military or naval service"

n3 13 Stat. at Large, 734.

With both these statutes and this proclamation in force, Lamdin P. Milligan, a citizen of the United States, and a resident and citizen of the State of Indiana, was arrested on the 5th day of October, 1864, at his home in the said State, by the order of Brevet Major-General Hovey, military commandant of the District of Indiana, and by the same authority confined in a military prison, at or near Indianapolis, the capital of the State. On the 21st day of the same month, he was placed on trial before a "military commission," convened at Indianapolis, by order of the said General, upon the following charges; preferred by Major Burnett, Judge Advocate of the Northwestern Military Department, namely:

1. "Conspiracy against the Government of the United States;"

2. "Affording aid and comfort to rebels against the authority of the United States;"

3. "Inciting insurrection;"

4. "Disloyal practices;" and

5. "Violation of the laws of war."

Under each of these charges there were various specifications. **[***5]** The substance of them was, joining and aiding, at different times, between October, 1863, and August, 1864, a secret society known as the Order of American Knights or Sons of Liberty, for the purpose of overthrowing the Government and duly constituted authorities of the United States; holding communication with the enemy; conspiring to seize munitions of war stored in the arsenals; to liberate prisoners of war, &c.; resisting the draft, &c.; . . . "at a period of war and armed rebellion against the authority of the United States, at or near Indianapolis, [and various other places specified] in Indiana, a State within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy." These were amplified and stated with various circumstances.

An objection by him to the authority of the commission to try him being overruled, Milligan was found guilty on all the charges, and sentenced to suffer death by hanging; and this sentence, having been approved, he was ordered to be executed on Friday, the 19th of May, 1865.

On the 10th of that same May, 1865, Milligan filed his petition **[***6]** in the Circuit Court of the United States for the District of Indiana, by which, or by the documents appended to which as exhibits, the above facts appeared. These exhibits consisted of the order for the commission; the charges and specifications; the findings and sentence of the court, with a statement of the fact that the sentence was approved by the President of the United States, who directed that it should "be carried into execution without delay;" all "by order of the Secretary of War."

The petition set forth the additional fact, that while the petitioner was held and detained, as already mentioned, in military custody (and more than twenty days after his arrest), a grand jury of the Circuit Court of the United States for the District of Indiana was convened at Indianapolis, his said place of confinement, and duly empanelled, charged, and sworn for said district, held its sittings, and finally adjourned without having found any bill of indictment, or made any presentment whatever against him. That at no time had he been in the military service of the United States, or in any way connected with the land or naval force, or the militia in actual service; nor within the limits **[***7]** of any State whose citizens were engaged in rebellion against the United States, at any time during the war; but during all the time aforesaid, and for twenty years last past, he had been an inhabitant, resident, and citizen of Indiana. And so, that it had been "wholly out of his power to have acquired belligerent rights, or to have placed himself in such relation to the government as to have enabled him to violate the laws of war."

The record, in stating who appeared in the Circuit Court, ran thus:

"Be it remembered, that on the 10th day of May, A.D. 1865, in the court aforesaid, before the judges aforesaid, comes Jonathan W. Gorden, Esq., of counsel for said Milligan, and files here, in open court, the petition of said Milligan, to be discharged." . . . "At the same time comes John Hanna, Esquire, the attorney prosecuting the pleas of the United States in this behalf. And thereupon, by agreement, this application is submitted to the court, and day is given, &c."

The prayer of the petition was that under the already mentioned act of Congress of March 3d, 1863, the petitioner might be brought before the court, and either turned

over to the proper civil tribunal to be proceeded **[***8]** with according to the law of the land, or discharged from custody altogether.

At the hearing of the petition in the Circuit Court, the opinions of the judges were opposed upon the following questions:

I. On the facts stated in the petition and exhibits, ought a writ of habcas corpus to be issued according to the prayer of said petitioner?

II. On the facts stated in the petition and exhibits, ought the said Milligan to be discharged from custody as in said petition prayed?

III. Whether, upon the facts stated in the petition and exhibits, the military commission had jurisdiction legally to try and sentence said Milligan in manner and form, as in said petition and exhibit is stated?

And these questions were certified to this court under the provisions of the act of Congress of April 29th, 1802, n4 an act which provides "that whenever any question shall occur before a Circuit Court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of cither party or their counsel, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, **[***9]** at their next session to be held thereafter; and shall by the said court be finally decided: and the decision of the Supreme Court and their order in the premises shall be remitted to the Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order: Provided, That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

n4 2 Stat. at Large, 159.

The three several questions above mentioned were argued at the last term. And along with them an additional question raised in this court, namely:

IV. A question of jurisdiction, as -- 1. Whether the Circuit Court had jurisdiction to hear the case there presented? -- 2. Whether the case sent up here by certificate of division was so sent up in conformity with the intention of the act of 1802? in other words, whether this court had jurisdiction of the questions raised by the certificate?

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner prisoner was arrested and confined in a military prison. At trial, the prisoner objected to the authority of the military commission to try him, but he was sentenced to death. He filed a petition for discharge from unlawful imprisonment in the Circuit Court of the United States for the District of Indiana. The judges of the Circuit Court for Indiana filed a certificate of division and certified questions to the Court.

OVERVIEW: The prisoner argued that the military commission (commission) did not have jurisdiction to try him. It was also argued that the Indiana circuit court did not have authority to certify questions and that the Court did not

have jurisdiction to hear and determine them. The Court held that the circuit court had jurisdiction to entertain the prisoner's application for writ of habeas corpus and to hear and determine it. The judges of the circuit court also had the duty to certify the questions on which they could not agreed to the Court for final decision. After reviewing the Constitution, the Court determined that the commission was not a court vested with judicial power by Congress, and therefore the prisoner's rights were infringed upon when he was tried by the commission. The prisoner's rights were further infringed upon when he was denied a trial by jury. Thus, the Court held that the appropriate remedy was to issue the writ of habeas corpus. Moreover, because the military trial of the prisoner was contrary to law, on the facts stated in his petition, the prisoner should have been released from custody.

OUTCOME: The Court held that the proper orders were entered in the last term, and, accordingly, a writ of habeas corpus should be issued and that the prisoner should be released from custody. Further the Court held that the commission did not have jurisdiction to try and sentence the prisoner because Congress did not sanction the commission.

CORE TERMS: milligan, military, writ of habeas corpus, grand jury, military commission, rebellion, prisoner, arrest, martial law, sentence, discharged, imprisonment, army, presentment, invasion, indictment, custody, session, militia, peace, duty, prisoner of war, public safety, naval service, suspension, suspended, safeguards, arrested, tribunal, resident

LexisNexis(R) Headnotes Hide Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

HN1 The sixth section of the Act of 1802 declares that whenever any question shall occur before a circuit court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court at their next session to be held thereafter; and shall by the said court be finally decision. And the decision of the Supreme Court and their order in the premises shall be remitted to the circuit court and be there entered of record, and shall have effect according to the nature of the said judgment and order: provided, that nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits. More Like This Headnote

Criminal Law & Procedure > Appeals > Reviewability > Certified Questions

HN2 A circuit court has authority to certify any question to the Supreme Court for adjudication. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Habeas Corpus > Habeas Corpus Procedure

HN3 It is usual for a court, on application for a writ of habeas corpus, to issue the writ, and, on the return, to dispose of the case; but

the court can elect to waive the issuing of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Habeas Corpus > Habeas Corpus Procedure

HN4 The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded if the court is satisfied that the prisoner would be remanded to prison. More Like This Headnote

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues

HN5 If a party is unlawfully imprisoned, the writ of habeas corpus is his appropriate legal remedy. It is his suit in court to recover his liberty. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Habeas Corpus > Habeas Corpus Procedure

HN6 When the petition is filed and the writ prayed for, it is a suit, -- the suit of the party making the application. If it is a suit under the 25th section of the Judiciary Act when the proceedings are begun, it is, by all the analogies of the law, equally a suit under the sixth section of the Act of 1802. More Like This Headnote

Governments > Legislation > Interpretation

HN7 In interpreting a law, the motives which must have operated with the legislature in passing it are proper to be considered. The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty. More Like This Headnote | *Shepardize:* Restrict By Headnote

Governments > Courts > Authority to Adjudicate

HN8 Courts are not, always, in session, and can adjourn on the discharge of the grand jury; and before those, who are in confinement, could take proper steps to procure their liberation. To provide for this contingency, authority was given to the judges out of court to grant relief to any party, who could show, that, under the law, he should be no longer restrained of his liberty. More Like This Headnote

Constitutional Law > Equal Protection > Scope of Protection

HN9 The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. More Like This Headnote

Governments > Courts > Authority to Adjudicate

Constitutional Law > Separation of Powers

Constitutional Law > The Judiciary > Congressional Limits

HN10 The Constitution expressly vests judicial power in one supreme court and such inferior courts as the Congress may from time to

time ordain and establish. The President is controlled by law, and has his appropriate sphere of duty is to execute, not to make, the laws; and there is no unwritten criminal code to which resort can be had as a source of jurisdiction. More Like This Headnote

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial
Constitutional Law > Procedural Due Process > Scope of Protection
Constitutional Law > Criminal Process > Speedy Trial

HN11 The Sixth Amendment affirms that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, language broad enough to embrace all persons and cases; but the Fifth Amendment, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the Sixth amendment, to those persons who were subject to indictment or presentment in the Fifth. More Like This Headnote | *Shepardize:* Restrict By Headnote

Governments > Courts > Authority to Adjudicate
Constitutional Law > The Judiciary > Congressional Limits

HN12 In pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. More Like This Headnote

- Show Lawyers' Edition Display

SYLLABUS: 1. Circuit Courts, as well as the judges thereof, are authorized, by the fourteenth section of the Judiciary Act, to issue the writ of habeas corpus for the purpose of inquiring **[***10]** into the cause of commitment, and they have jurisdiction, except in cases where the privilege of the writ is suspended, to hear and determine the question, whether the party is entitled to be discharged.

2. The usual course of proceeding is for the court, on the application of the prisoner for a writ of habeas corpus, to issue the writ, and on its return to hear and dispose of the case; but where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged.

3. When the Circuit Court renders a final judgment refusing to discharge the prisoner, he may bring the case here by writ of error; and if the judges of the Circuit Court, being opposed in opinion, can render no judgment, he may have the point upon which the disagreement happens certified to this tribunal.

4. A petition for a writ of habeas corpus, duly presented, is the institution of a cause on behalf of the petitioner; and the allowance or refusal of the process, as well as the subsequent disposition of the prisoner, is matter of law and not of **[***11]** discretion.

5. A person arrested after the passage of the act of March 3d, 1863, "relating to habeas corpus and regulating judicial proceedings in certain cases," and under the authority of the said act, was entitled to his discharge if not indicted or presented by the grand jury convened at the first subsequent term of the Circuit or District Court of the United States for the district.

6. The omission to furnish a list of the persons arrested, to the judges of the Circuit or District Court as provided in the said act, did not impair the right of such person, if not indicted or presented, to his discharge.

7. Military commissions organized during the late civil war, in a State not invaded and not engaged in rebellion, in which the Federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest them with any such power.

8. The guaranty of trial by jury contained in the Constitution was intended for a state **[***12]** of war as well as a state of peace; and is equally binding upon rulers and people, at all times and under all circumstances.

9. The Federal authority having been unopposed in the State of Indiana, and the Federal courts open for the trial of offences and the redress of grievances, the usages of war could not, under the Constitution, afford any sanction for the trial there of a citizen in civil life, not connected with the military or naval service, by a military tribunal, for any offence whatever.

10. Cases arising in the land or naval forces, or in the militia in time of war or public danger, are excepted from the necessity of presentment or indictment by a grand jury; and the right of trial by jury, in such cases, is subject to the same exceptions.

11. Neither the President. nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus.

12. A citizen not connected with the military service and resident in a State where the

courts are open and in the proper exercise of their jurisdiction cannot, even when **[***13]** the privilege of the writ of habeas corpus is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law.

13. Suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and, on its return, the court decides whether the applicant is denied the right of proceeding any further.

14. A person who is a resident of a loyal State, where he was arrested; who was never resident in any State engaged in rebellion, nor connected with the military or naval service, cannot be regarded as a prisoner of war.

COUNSEL: Mr. J. E. McDonald, Mr. J. S. Black, Mr. J. H. Garfield, and Mr. David Dudley Field, for the petitioner. Mr. McDonald opening the case fully, and stating and examining the preliminary proceedings.

Mr. Speed, A. G., Mr. Stanbery, and Mr. B. F. Butler, special counsel of the United States, contra. Mr. Stanbery confining himself to the question of jurisdiction under the act of 1802.

ON THE SIDE OF THE UNITED STATES.

I. JURISDICTION.

1. As to the jurisdiction of the Circuit Court. -- The record shows that the application was made to the court in open session. The language of **[***14]** the third section contemplates that it shall be made to a "judge."

But, independently of this, the record does not state the facts necessary to bring the case within the act of 1863. It does not show under which section of the act it is presented; nor allege that the petitioners are state or political prisoners otherwise than as prisoners of war; nor that a list has been brought in, or that it has not been brought in. If a list had been brought in containing the name of one of these petitioners, it would have been the judge's duty to inquire into his imprisonment; if no list had been brought in, his case could only be brought before the court by some petition, and the judge, upon being satisfied that the allegations of the petition were true, would discharge him. But there is no certificate in the division of opinion that the judges were or were not satisfied that the allegations of these petitioners were true; nor were the petitions brought under the provisions of that duty. But conceding, for argument's sake, this point, a graver question exists.

2. As to the jurisdiction of this court. -- If there is any jurisdiction over the case here, it must arise under the acts of Congress **[***15]** which give to this court jurisdiction to take cognizance of questions arising in cases pending in a Circuit Court of the United States and certified to the court for its decision, and then to be remanded to the Circuit Court. This is appellate jurisdiction, and is defined and limited by the single section of

the act of April 29, 1802.

The case is not within the provisions of this section.

First. The question in the court below arose upon the application for a habeas corpus, before there was a service upon the parties having the petitioner in custody, before an answer was made by those parties, before the writ was ordered or issued, while yet there was no other party before the court, except the petitioner. The case was then an ex parte case, and is so still. The proceeding had not yet ripened into a "cause."

No division of opinion in such a case is within the purview of the section. The division of opinion on which this court can act, must occur in the progress of a case where the parties on both sides are before the court, or have a status in the case. The right to send the question or point of division to this court can only arise upon the motion of the parties, or either **[***16]** of them, -- not by the court on its own motion or for its own convenience. The record hardly exhibits the Attorney of the United States, Mr. Hanna, as taking any part.

The parties have an equal right to be heard upon the question in the court below. It must appear to them in open court that the judges are divided in opinion. They must have an equal right to move for its transfer to this court. They must have an equal opportunity to follow it here and to argue it here, -- not as volunteers, not as amici curiae, not by permission, but as parties on the record, with equal rights.

This record shows no parties, except the petitioner. Its title is Ex parte Milligan. The persons who are charged in the petition as having him in wrongful custody are not made parties, and had, when the question arose, no right to be heard as parties in the court below, and have no right to be heard as parties in this court.

In such a case, this court cannot answer any one of the questions sent here especially the one, "Had the Military Commission jurisdiction to try and condemn Milligan?" For if the court answer that question in the negative, its answer is a final decision, and, as it is asserted, **[***17]** settles if for all the future of the case below; and when, hereafter, that case shall, in its progress, bring the parties complained of before the court, silences all argument upon the vital point so decided. n5 What becomes of the whole argument which will be made on the other side, of the right of every man before being condemned of crime, to be heard and tried by an impartial jury?

n5 United States v. Daniel, 6 Wheaton, 542; Davis v. Braden, 10 Peters, 289

Second. This being an ex parte application for a writ of habeas corpus made to a court, the division of opinion then occurring was in effect a decision of the case.

The case was ended when the court declined to issue the writ. It was not a division of

opinion occurring in the progress of a case or the trial of a case, and when it was announced to the petitioner that one judge was in favor of granting the writ, and that the other would not grant it -- that settled and ended the case. The case had not arisen within the meaning of the statute, when from necessity the case and the progress of the case must stop until the question should be decided. And as Milligan was sentenced to be hanged on the 19th May, for aught **[***18]** that appears, we are discussing a question relating to the liberty of a dead man. Having been sentenced to be hanged on the 19th, the presumption is that he was hanged on that day. Any answer to the questions raised will therefore be answers to moot points -- answers which courts will not give. n6

n6 6 Wheaton, 548; 10 Peters, 290.

Third. If the parties had all been before the court below, and the case in progress, and then the questions certified, and the parties were now here, the court would not answer these questions.

1. Every question involves matters of fact not stated in an agreed case, or admitted on demurrer, but alleged by one of the parties, and standing alone on his ex parte statement. n7

n7 Wilson v. Barnum, 8 Howard, 262.

2. All the facts bearing on the questions are not set forth, so that even if the parties had made an agreed state of facts, yet if this court find that other facts important to be known before a decision of the question do not appear, the questions will not be answered. n8

8 United States v. City Bank of Columbus, 19 Id. 385.

3. The main question certified, the one, as the counsel for the petitioners assert, on which **[***19]** the other two depend, had not yet arisen for decision, especially for final decision, so that if the parties had both concurred in sending that question here, this court could not decide it.

If it be said this question did arise upon the application for the writ, it did not then arise for final decision, but only as showing probable cause, leaving it open and undecided until the answer should be made to the writ. A case, upon application for the writ of habeas corpus, has no status as a case until the service of the writ on the party having the petitioner in custody, and his return and the production of the body of the petitioner. No issue arises until there is a return, and when that is made the issue arises upon it, and in the courts of the United States it is conclusive as to the facts contained in the return. n9

n9 Commonwealth v. Chandler, 11 Massachusetts 83.

4. The uniform practice in this court is against its jurisdiction in such a case as this upon ex parte proceedings.

All the cases (some twenty in number) before this court, on certificates of division, during all the time that this jurisdiction has existed, are cases between parties, and stated in the usual **[***20]** formula of A. v. B., or B. ad sectam A.

So, too, all the rules of this court as to the rights and duties of parties in cases before this court, exclude the idea of an ex parte case under the head of appellate jurisdiction.

II. THE MERITS OR MAIN QUESTION.

Mr. Speed, A. G., and Mr. Butler: By the settled practice of the courts of the United States, upon application for a writ of habeas corpus, if it appear upon the facts stated by the petitioner, all of which shall be taken to be true, that he could not be discharged upon a return of the writ, then no writ will be issued. Therefore the questions resolve themselves into two:

I. Had the military commission jurisdiction to hear and determine the case submitted to it?

II. The jurisdiction failing, had the military authorities of the United States a right, at the time of filing the petition, to detain the petitioner in custody as a military prisoner, or for trial before a civil court?

1. A military commission derives its powers and authority wholly from martial law; and by that law and by military authority only are its proceedings to be judged or reviewed. n10

n10 Dynes v. Hoover, 20 Howard, 78; Ex parte Vallandigham, 1 Wallace, 243. **[***21]**

2. Martial law is the will of the commanding officer of an armed force, or of a geographical military department, expressed in time of war within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief, or supreme executive ruler. n11

n11 Hansard's Parliamentary Debates, 3d series, vol. 95, p. 80. Speech of the Duke of

Wellington. Opinions of Attorneys-General, vol. 8, p. 367.

3. Military law is the rules and regulations made by the legislative power of the State for the government of its land and naval forces. n12

n12 Kent's Co mentaries, vol. 1, p. 341, note A.

4. The laws of war (when this expression is not used as a generic term) are the laws which govern the conduct of belligerents towards each other and other nations, flagranti bello.

These several kinds of laws should not be confounded, as their adjudications are referable to distinct and different tribunals.

Infractions of the laws of war can only be punished or remedied by retaliation, negotiation, or an appeal to the opinion of nations.

Offences against military laws are determined by tribunals established **[***22]** in the acts of the legislature which create these laws -- such as courts martial and courts of inquiry.

The officer executing martial law is at the same time supreme legislator, supreme judge, and supreme executive. As necessity makes his will the law, he only can define and declare it; and whether or not it is infringed, and of the extent of the infraction, he alone can judge; and his sole order punishes or acquits the alleged offender.

But the necessities and effects of warlike operations which create the law also give power incidental to its execution. It would be impossible for the commanding general of an army to investigate each fact which might be supposed to interfere with his movements, endanger his safety, aid his enemy, or bring disorder and crime into the community under his charge. He, therefore, must commit to his officers, and in practice, to a board of officers, as a tribunal, by whatever name it may be called, the charge of examining the circumstances and reporting the facts in each particular case, and of advising him as to its disposition -- the whole matter to be then determined and executed by his order. n13

n13 Examination of Major Andre before board of officers, Colonial pamphlets, vol. 18. **[***23]**

Hence arise military commissions, to investigate and determine, not offences against military law by soldiers and sailors, not breaches of the common laws of war by belligerents, but the quality of the acts which are the proper subject of restraint by martial law.

Martial law and its tribunals have thus come to be recognized in the military operations of all civilized warfare. Washington, in the Revolutionary war, had repeated recourse to military commissions. General Scott resorted to them as instruments with which to govern the people of Mexico within his lines. They are familiarly recognized in express terms by the acts of Congress of July 17th, 1862, chap. 201, sec. 5; March 18th, 1863, chap. 75, sec. 36; Resolution No. 18, March 11th, 1862; and their jurisdiction over certain offences is also recognized by these acts.

But, as has been seen, military commissions do not thus derive their authority. Neither is their jurisdiction confined to the classes of offences therein enumerated.

Assuming the jurisdiction where military operations are being in fact carried on, over classes of military offences, Congress, by this legislation, from considerations of public safety, has **[***24]** endeavored to extend the sphere of that jurisdiction over certain offenders who were beyond what might be supposed to be the limit of actual military occupation.

As the war progressed, being a civil war, not unlikely, as the facts in this record abundantly show, to break out in any portion of the Union, in any form of insurrection, the President, as commander-in-chief, by his proclamation of September 24th, 1862, ordered:

"That during the existing insurrection, and as a necessary means for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels, against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commission.

"Second. That the writ of habeas corpus is suspended in respect to all persons arrested, or who now, or hereafter during the Rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court martial **[***25]** or military commission."

This was an exercise of his sovereignty in carrying on war, which is vested by the Constitution in the President. n14

n14 Brown v. The United States, 8 Cranch, 153.

This proclamation, which by its terms was to continue during the then existing insurrection, was in full force during the pendency of the proceedings complained of, at the time of the filing of this petition, and is still unrevoked.

While we do not admit that any legislation of Congress was needed to sustain this proclamation of the President, it being clearly within his power, as commander-in-chief, to issue it; yet, if it is asserted that legislative action is necessary to give validity to it, Congress has seen fit to expressly ratify the proclamation by the act of March 3d, 1863, by declaring that the President, whenever in his judgment the public safety may require it, is authorized to suspend the writ of habeas corpus in any case throughout the United States, and in any part thereof.

The offences for which the petitioner for the purpose of this hearing is confessed to be guilty, are the offences enumerated in this proclamation. The prison in which he is confined is a "military **[***26]** prison" therein mentioned. As to him, his acts and imrpisonment, the writ of habeas corpus is expressly suspended.

Apparently admitting by his petition that a military commission might have jurisdiction in certain cases; the petitioner seeks to except himself by alleging that he is a citizen of Indiana, and has never been in the naval or military service of the United States, or since the commencement of the Rebellion a resident of a rebel State, and that, therefore, it had been out of his power to have acquired belligerent rights and to have placed himself in such a relation to the government as to enable him to violate the laws of war.

But neither residence nor propinquity to the field of actual hostilities is the test to determine who is or who is not subject to martial law, even in a time of foreign war, and certainly not in a time of civil insurrection. The commander-in-chief has full power to make an effectual use of his forces. He must, therefore, have power to arrest and punish one who arms men to join the enemy in the field against him; one who holds correspondence with that enemy; one who is an officer of an armed force organized to oppose him; one who is preparing **[***27]** to seize arsenals and release prisoners of war taken in battle and confined within his military lines.

These crimes of the petitioner were committed within the State of Indiana, where his arrest, trial, and imprisonment took place; within a military district of a geographical military department, duly established by the commander-in chief; within the military lines of the army, and upon the theatre of military operations; in a State which had been and was then threatened with invasion, having arsenals which the petitioner plotted to seize, and prisoners of war whom he plotted to liberate; where citizens were liable to be made soldiers, and were actually ordered into the ranks; and to prevent whose becoming soldiers the petitioner conspired with and armed others.

Thus far the discussion has proceeded without reference to the effect of the Constitution upon war-making powers, duties, and rights, save to that provision which makes the President commander-in-chief of the armies and navies.

Does the Constitution provide restraint upon the exercise of this power?

The people of every sovereign State possess all the rights and powers of government. The people of these States in forming **[***28]** a "more perfect Union, to insure domestic

tranquillity, and to provide for the common defence," have vested the power of making and carrying on war in the general government, reserving to the States, respectively, only the right to repel invasion and suppress insurrection "of such imminent danger as will not admit of delay." This right and power thus granted to the general government is in its nature entirely executive, and in the absence of constitutional limitations would be wholly lodged in the President, as chief executive officer and commander-in-chief of the armies and navies.

Lest this grant of power should be so broad as to tempt its exercise in initiating war, in order to reap the fruits of victory, and, therefore, be unsafe to be vested in a single branch of a republican government, the Constitution has delegated to Congress the power of originating war by declaration, when such declaration is necessary to the commencement of hostilities, and of provoking it by issuing letters of marque and reprisal; consequently, also, the power of raising and supporting armies, maintaining a navy, employing the militia, and of making rules for the government of all armed forces while **[***29]** in the service of the United States.

To keep out of the hands of the Executive the fruits of victory, Congress is also invested with the power to "make rules for the disposition of captures by land or water."

After war is originated, whether by declaration, invasion, or insurrection, the whole power of conducting it, as to manner, and as to all the means and appliances by which war is carried on by civilized nations, is given to the President. He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration. n15

n15 Luther v. Borden, 7 Howard, 42-45; Martin v. Mott, 12 Wheaton, 19.

During the war his powers must be without limit, because, if defending, the means of offence may be nearly illimitable; or, if acting offensively, his resources must be proportionate to the end in view, -- "to conquer a peace." New difficulties are constantly arising, and new combinations are at once to be thwarted, which the slow movement of legislative action cannot meet. n16

n16 Federalist, No. 26, by Hamilton; No. 41, by Madison.

These propositions are axiomatic in the absence of all restraining legislation by Congress.

Much of the argument **[***30]** on the side of the petitioner will rest, perhaps, upon certain provisions -- not in the Constitution itself, and as originally made, but now seen in the Amendments made in 1789: the fourth, fifth, and sixth amendments. They may as well be here set out:

4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

5. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

6. In all criminal **[***31]** prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

In addition to these, there are two preceding amendments which we may also mention, to wit: the second and third. They are thus:

2. A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

3. No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

It will be argued that the fourth, fifth, and sixth articles, as above given, are restraints upon the war-making power; but we deny this. All these amendments are in pari materia, and if either is a restraint upon the President in carrying on war, in favor of the citizen, it is difficult to see why all of them are not. Yet will it be argued that **[***32]** the fifth article would be violated in "depriving of life, liberty, or property, without due process of law," armed rebels marching to attack the capital? Or that the fourth would be violated by searching and seizing the papers and houses of persons in open insurrection and war against the government? It cannot properly be so argued, any more than it could be that it was intended by the second article (declaring that "the right of the people to keep and bear arms shall not be infringed") to hinder the President from disarming insurrectionists, rebels, and traitors in arms while he was carrying on war against them.

These, in truth, are all peace provisions of the Constitution, and, like all other conventional and legislative laws and enactments, are silent amidst arms, and when the safety of the people becomes the supreme law.

By the Constitution, as originally adopted, no limitations were put upon the war-making and war-conducting powers of Congress and the President; and after discussion, and after

the attention of the country was called to the subject, no other limitation by subsequent amendment has been made, except by the Third Article, which prescribes that "no soldier shall **[***33]** be quartered in any house in time of peace without consent of the owner, or in time of war, except in a manner prescribed by law."

This, then, is the only expressed constitutional restraint upon the President as to the manner of carrying on war. There would seem to be no implied one; on the contrary, while carefully providing for the privilege of the writ of habeas corpus in time of peace, the Constitution takes it for granted that it will be suspended "in case of rebellion or invasion (i.e., in time of war), when the public safety requires it."

The second and third sections of the act relating to habeas corpus, of March 3d, 1863, apply only to those persons who are held as "state or political offenders," and not to those who are held as prisoners of war. The petitioner was as much a prisoner of war as if he had been taken in action with arms in his hands.

They apply, also, only to those persons, the cause of whose detention is not disclosed; and not to those who, at the time when the lists by the provisions of said sections are to be furnished to the court, are actually undergoing trial before military tribunals upon written charges made against them.

The law was framed **[***34]** to prevent imprisonment for an indefinite time without trial, not to interfere with the case of prisoners undergoing trial. Its purpose was to make it certain that such persons should be tried.

Notwithstanding, therefore, the act of March 3, 1863, the commission had jurisdiction, and properly tried the prisoner.

The petitioner does not complain that he has been kept in ignorance of the charges against him, or that the investigation of those charges has been unduly delayed.

Finally, if the military tribunal has no jurisdiction, the petitioner may be held as a prisoner of war, aiding with arms the enemies of the United States, and held, under the authority of the United States, until the war terminates, then to be handed over by the military to the civil authorities, to be tried for his crimes under the acts of Congress, and before the courts which he has selected.

ON THE SIDE OF THE PETITIONER.

Mr. David Dudley Field:

Certain topics have been brought into this discussion which have no proper place in it, and which I shall endeavor to keep out of it.

This is not a question of the discipline of camps; it is not a question of the government of armies in the field; it is **[***35]** not a question respecting the power of a conqueror

over conquered armies or conquered states.

It is not a question, how far the legislative department of the government can deal with the question of martial rule. Whatever has been done in these cases, has been done by the executive department alone.

Nor is it a question of the patriotism, or the character, or the services of the late chief magistrate, or of his constitutional advisers.

It is a question of the rights of the citizen in time of war.

Is it true, that the moment a declaration of war is made, the executive department of this government, without an act of Congress, becomes absolute master of our liberties and our lives? Are we, then, subject to martial rule, administered by the President upon his own sense of the exigency, with nobody to control him, and with every magistrate and every authority in the land subject to his will alone? These are the considerations which give to the case its greatest significance.

But we are met with the preliminary objection, that you cannot consider it for want of

JURISDICTION.

The objection is twofold: first, that the Circuit Court of Indiana had not jurisdiction to hear **[***36]** the case there presented; and, second, that this court has not jurisdiction to hear and decide the questions thus certified.

First. As to the jurisdiction of the Circuit Court. That depended on the fourteenth section of the Judiciary Act of 1789, and on the Habeas Corpus Act of 1863. The former was, in Bollman's case, n17 held to authorize the courts, as well as the judges, to issue the writ for the purpose of inquiring into the cause of commitment.

n17 4 Cranch, 75.

The act of March 3d, 1863, after providing that the Secretaries of State and of War shall furnish to the judges of the Circuit and District Courts a list of political and state prisoners, and of all others, except prisoners of war, goes on to declare, that if a grand jury has had a session, and has adjourned without finding an indictment, thereupon "it shall be the duty of the judge of said court forthwith to make an order, that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged."

Upon this act the objection is, first, that the application of the petitioner should have been made to one of the judges of the circuit, instead of the court itself; and, second, **[***37]** that the petition does not show whether it was made under the second or the

third section.

To the former objection the answer is, first, that the decision in Bollman's case, just mentioned, covers this case; for the same reasoning which gives the court power to proceed under the fourteenth section of the act of 1789, gives the court power to proceed under the second and third sections of the act of 1863. The second answer is that, by the provisos of the second section, the court is expressly mentioned as having the power.

The other objection to the jurisdiction of the Circuit Court is, that the petition does not show under which section of the act it was presented. It states that the petitioner is held a prisoner under the authority of the President; that a term has been held, and that a grand jury has been in attendance, and has adjourned without indicting. It does not state whether a list has been furnished to the judges by the Secretary of State and the Secretary of War, and, therefore, argues the learned counsel, the court has no jurisdiction. That is to say, the judges, knowing themselves whether the list has, or has not been furnished, cannot proceed, because we have **[***38]** not told them by our petition what they already know, and what we ourselves might not know, and perhaps could not know, because the law does not make it necessary that the list shall be filed, or that anybody shall be informed of it but the judges.

Second. As to the jurisdiction of this court. Supposing the Circuit Court to have had jurisdiction, has this court jurisdiction to hear these questions as they are certified? There are various objections. It is said that a division of opinion can be certified only in a cause, and that this is not a cause.

It was decided by this court, in Holmes v. Jennison, n18 that a proceeding on habeas corpus is a suit, and suit is a more comprehensive word than cause. The argument is, that it is not a cause until the adverse party comes in. Is not a suit commenced before the defendant is brought into court? Is the defendant's appearance the first proceeding in a cause? There have been three acts in respect to this writ of habeas corpus. The first of 1789; then the act passed in 1833; and, finally, the act of 1842. The last act expressly designates the proceeding as a cause.

n18 14 Peters, 566.

Another objection is, that there must **[***39]** be parties; that is, at least two parties, and that here is only one. This argument is derived from the direction in the act, that the point must be stated "upon the request of either party" or their counsel. It is said that "either party" imports two, and if there are not two, there can be no certificate. This is too literal: "qui haeret in litera haeret in cortice." The language is elliptical. What is meant is, "any party or parties, his or their counsel." Again: "either," if precisely used, would exclude all over two, because "either" strictly means "one of two;" and if there are three parties or more, as there may be, you cannot have a certificate. It is not unusual, in proceedings in rem, to have several intervenors and claim ants: what are we to do then? The answer must

be, that "either" is an equivalent word for "any;" and that who ever may happen to be a party, whether he stand alone or with others, may ask for the certificate.

The words "either party" were introduced, not for restriction but enlargement. The purpose was to enable any party to bring the case here; otherwise it might have been argued, perhaps, that all parties must join in asking for the certificate. **[***40]** The purpose of the act was to prevent a failure of justice, when the two judges of the Circuit Court were divided in opinion. The reason of the rule is as applicable to a case with one party as if there were two. Whether a question shall be certified to this court, depends upon the point in controversy. If it concerns a matter of right, and not of discretion, there is as much reason for its being sent ex parte as for its being sent inter partes. This very case is an illustration. Here a writ is applied for, or an order is asked. The judges do not agree about the issue of the writ, or the granting of the order. Upon their action the lives of these men depend. Shall there be a failure of justice? The question presented to the Circuit Court was not merely a formal one; whether an initial writ should issue.It is the practice, upon petitions for habeas corpus, to consider whether, upon the facts presented, the prisoners, if brought up, would be remanded. The presentation of the petition brings before the court, at the outset, the merits, to a certain extent, of the whole case. That was the course pursued in Passmore Williamson's case; n19 in Rex v. Ennis; n20 in the case of the **[***41]** Three Spanish Sailors; n21 in Hobhouse's case; n22 in Husted's case; n23 and in Ferguson's case; n24 and in this court, in Watkins's case, n25 where the disposition of the case turned upon the point whether, if the writ were issued, the petitioner would be remanded upon the facts as they appeared.

n19 26 Pennsylvania State, 9.

n20 1 Burrow, 765.

n21 2 W. Blackstone, 1324.

n22 3 Barnewall and Alderson, 420.

n23 1 Johnson's Cases, 136.

n24 9 Id. 239.

n25 3 Peters 202.

There may, indeed, be cases where only one party can appear, that are at first and must always remain ex parte. Here, however, there were, in fact, two parties. Who were they? The record tells us:

"Be it remembered, that on the 10th day of may, A.D. 1865, in the court aforesaid, before the judges aforesaid, comes Jonathan W. Gordon, Esq., of counsel for said Milligan, and

files here in open court the petition of said Milligan to be discharged. At the same time comes, also, John Hanna, Esq., the attorney prosecuting the pleas of the United States in this behalf. And thereupon, by agreement, this application is submitted to the court, and day is given," &c.

The next day the case came on again, **[***42]** and the certificate was made.

In point of fact, therefore, this cause had all the solemnity which two parties could give it. The government came into court, and submitted the case in Indiana, for the very purpose of having it brought to Washington.

A still additional objection made to the jurisdiction of this court is, that no questions can be certified except those which arise upon the trial.

The answer is, first, that there has been a trial, in its proper sense, as applicable to this case. The facts are all before the court.A return could not vary them. The case has been heard upon the petition, as if that contained all that need be known, or could be known. The practice is not peculiar to habeas corpus; it is the same on application for mandamus, or for attachments in cases of contempt; in both which cases the court sometimes hears the whole matter on the first motion, and sometimes postpones it till formal pleadings are put in. In either case, the result is the same.

But, secondly, if it were not so, is it correct to say that a certificate can only be made upon a trial? To sustain this position, the counsel refers to the case of Davis v. Burden. n26 But that case **[***43]** expressly reserves the question.

n26 10 Peters, 289.

It is admitted that the question of jurisdiction is a question that may be certified. The qualification insisted upon is, that no question can be certified unless it arose upon the trial of the cause, or be a question of jurisdiction. This is a question of jurisdiction. It is a question of the jurisdiction of the Circuit Court to grant the writ of habeas corpus, and to liberate these men; and that question brings up all the other questions in the cause.

Yet another objection to the jurisdiction of this court is, that the case must be one in which the answer to the questions when given shall be final; that is to say, the questions some here to be finally decided. What does that mean?Does it mean that the same thing can never be debated again? Certainly not. It means that the decision shall be final for the two judges who certified the difference of opinion, so that when the answer goes down from this court they shall act according to its order, as if they had originally decided in the same way.

Another objection to the jurisdiction of this court is, that the whole case is certified. The answer is, that no question **[***44]** is certified except those which actually arose before

the court at the time, and without considering which it could not move at all. That is the first answer. The second is, that if too much is certified, the court will divide the questions, and answer only those which it finds to be properly certified, as it did in the Silliman v. Hudson River Bridge Company n27 case.

n27 1 Black, 583.

The last objection to the jurisdiction of this court is, that the case is ended; because, it is to be presumed that these unfortunate men have been hanged. Is it to be presumed that any executive officer of this country, though he arrogate to himself this awful power of military government, would venture to put to death three men, who claim that they are unjustly convicted, and whose case is considered of such gravity by the Circuit Court of the United States that it certifies the question to the Supreme Court?

The suggestion is disrespectful to the executive, and I am glad to believe that it has no foundation in fact.

All the objections, then, are answered. There is nothing, then, in the way of proceeding to

II. THE MERITS AND MAIN QUESTION.

The argument upon the questions naturally **[***45]** divides itself into two parts:

First. Was the military commission a competent tribunal for the trial of the petitioners upon the charges upon which they were convicted ans sentenced?

Second. If it was not a competent tribunal, could the petitioners be released by the Circuit Court of the United States for the District of Indiana, upon writs of habeas corpus or otherwise?

The discussion of the competency of the military commission is first in order, because, if the petitioners were lawfully tried and convicted, it is useless to inquire how they could be released from an unlawful imprisonment.

If, on the other hand, the tribunal was incompetent, and the conviction and sentence nullities, then the means of relief become subjects of inquiry, and involve the following considerations:

1. Does the power of suspending the privilege of the writ of habeas corpus appertain to all the great departments of government concurrently, or to some only, and which of them?

2. If the power is concurrent, can its exercise by the executive or judicial department be restrained or regulated by act of Congress?

3. If the power appertains to Congress alone, or if Congress may control its exercise **[***46]** by the other departments, has that body so exercised its functions as to leave to the petitioners the privilege of the writ, or to entitle them to their discharge?

In considering the first question, that of the competency of the military tribunal for the trial of the petitioners upon those charges, let me first call attention to the dates of the transactions.

Let it be observed next, that for the same offences as those set forth in the charges and specifications, the petitioners could have been tried and punished by the ordinary civil tribunals.

Let it also be remembered, that Indiana, at the time of this trial, was a peaceful State; the courts were all open; their processes had not been interrupted; the laws had their full sway.

Then let it be remembered that the petitioners were simple citizens, not belonging to the army or navy; not in any official position; not connected in any manner with the public service.

The evidence against them is not to be found in this record, and it is immaterial. Their guilt or their innocence does not affect the question of the competency of the tribunal by which they were judged.

Bearing in mind, therefore, the nature of the charges, and **[***47]** the time of the trial and sentence; bearing in mind, also, the presence and undisputed authority of the civil tribunals and the civil condition of the petitioners, we ask by what authority they were withdrawn from their natural judges?

What is a military commission? Originally, it appears to have been an advisory board of officers, convened for the purpose of informing the conscience of the commanding officer, in cases where he might act for himself if he chose. General Scott resorted to it in Mexico for his assistance in governing conquered places. The first mention of it in an act of Congress appears to have been in the act of July 22, 1861, where the general commanding a separate department, or a detached army, was authorized to appoint a military board, or commission, of not less than three, or more than five officers, to examine the qualifications and conduct of commissioned officers of volunteers.

Subsequently, military commissions are mentioned in four acts of Congress, but in none of them is any provision made for their organization, regulation, or jurisdiction, further than that it is declared that in time of war or rebellion, spies may be tried by a general court-martial **[***48]** or military commission; and that "persons who are in the military service of the United States, and subject to the Articles of War," may also be tried by the same, for murder, and certain other infamous crimes.

These acts do not confer upon military commissions jurisdiction over any persons other than those in the military service and spies.

There being, then, no act of Congress for the establishment of the commission, it depended entirely upon the executive will for its creation and support. This brings up the true question now before the court: Has the President, in time of war, upon his own mere will and judgment, the power to bring before his military officers any person in the land, and subject him to trial and punishment, even to death? The proposition is stated in this form, because it really amounts to this.

If, the President has this awful power, whence does he derive it? He can exercise no authority whatever but that which the Constitution of the country gives him. Our system knows no authority beyond or above the law. We may, therefore, dismiss from our minds every thought of the President's having any prerogative, as representative of the people, or as interpreter **[***49]** of the popular will. He is elected by the people to perform those functions, and those only, which the Constitution of his country, and the laws made pursuant to that Constitution, confer.

The plan of argument which I propose is, first to examine the text of the Constitution. That instrument, framed with the greatest deliberation, after thirteen years' experience of war and peace, should be accepted as the authentic and final expression of the public judgment, regarding that form and scope of government, and those guarantees of private rights, which legal science, political philosophy, and the experience of previous times had taught as the safest and most perfect. All attempts to explain it away, or to evade or pervert it, should be discountenanced and resisted. Beyond the line of such an argument, everything else ought, in strictness, to be superfluous. But, I shall endeavor to show, further, that the theory of our government, for which I am contending, is the only one compatible with civil liberty; and, by what I may call an historical argument, that this theory is as old as the nation, and that even in the constitutional monarchies of England and France that notion of executive **[***50]** power, which would uphold military commissions, like the one against which I am speaking, has never been admitted.

What are the powers and attributes of the presidential office? They are written in the second article of the Constitution, and, so far as they relate to the present question, they are these: He is vested with the "executive power;" he is "commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States;" he is to "take care that the laws be faithfully executed;" and he takes this oath: "I do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States." The "executive power" mentioned in the Constitution is the executive power of the United States. The President is not clothed with the executive power of the States. He is not clothed with any executive power, except as he is specifically directed by some other part of the Constitution, or by an act of Congress.

He is to "take care that the laws be faithfully executed." He is to execute **[***51]** the

laws by the means and in the manner which the laws themselves prescribe.

The oath of office cannot be considered as a grant of power.Its effect, is merely to superadd a religious sanction to what would otherwise be his official duty, and to bind his conscience against any attempt to usurp power or overthrow the Constitution.

There remains, then, but a single clause to discuss, and that is the one which makes him commander-in-chief of the army and navy of the United States, and of the militia of the States when called into the federal service. The question, therefore, is narrowed down to this: Does the authority to command an army carry with it authority to arrest and try by court-martial civilians -- by which I mean persons not in the martial forces; not impressed by law with a martial character? The question is easily answered. To command an army, whether in camp, or on the march, or in battle, requires the control of no other persons than the officers, soldiers, and camp followers. It can hardly be contended that, if Congress neglects to find subsistence, the commander-in-chief may lawfully take it from our own citizens. It cannot be supposed that, if Congress fails **[***52]** to provide the means of recruiting, the commander-in-chief may lawfully force the citizens into the ranks. What is called the war power of the President, if indeed there by any such thing, is nothing more than the power of commanding the armies and fleets which Congress causes to be raised. To command them is to direct their operations.

Much confusion of ideas has been produced by mistaking executive power for kingly power. Because in monarchial countries the kingly office includes the executive, it seems to have been sometimes inferred that, conversely, the executive carries with it the kingly prerogative. Our executive is in no sense a king, even for four years.

So much for that article of the Constitution, the second, which creates and regulates the executive power. If we turn to the other portions of the original instrument (I do not now speak of the amendments) the conclusion already drawn from the second article will be confirmed, if there be room for confirmation. Thus, in the first article, Congress is authorized "to declare war, and make rules concerning captures on land and water;" "to raise and support armies;" "to provide and maintain a navy;" "to make rules for **[***53]** the government and regulation of the land and naval forces;" "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" "to provide for organizing, arming, and disciplining the militia, and governing such part of them as may be in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;" "to exercise exclusive legislation in all cases whatsoever over . . . . all places purchased. . . . for the erection of forts, magazines, arsenals, dock-yards;" "to make all laws which shall be necessary and proper for carrying into execution the . . . . powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

These various provisions of the first article would show, if there were any doubt upon the construction of the second, that the powers of the President do not include the power to raise or support an army, or to provide or maintain a navy, or to call forth the militia, to

repel an invasion, or to suppress an insurrection, or execute **[***54]** the laws, or even to govern such portions of the militia as are called into the service of the United States, or to make law for any of the forts, magazines, arsenals, or dock-yards. If the President could not, even in flagrant war, except as authorized by Congress, call forth the militia of Indiana to repel an invasion of that State, or, when called, govern them, it is absurd to say that he could nevertheless, under the same circumstances, govern the whole State and every person in it by martial rule.

The jealousy of the executive power prevailed with our forefathers. They carried it so far that, in providing for the protection of a State against domestic violence, they required, as a condition, that the legislature of the State should ask for it if possible to be convened. n28

n28 Const., Art. 4, § 4.

I submit, therefore, that upon the text of the original Constitution, as it stood when it was ratified, there is no color for the assumption that the President, without act of Congress, could creat military commissions for the trial of persons not military, for any cause or under any circumstances whatever.

But, as we well know, the Constitution, in the process of ratification, **[***55]** had to undergo a severe ordeal. To quiet apprehensions, as well as to guard against possible dangers, ten amendments were proposed by the first Congress sitting at New York, in 1789, and were duly ratified by the States. The third and fifth are as follows:

"ART. III. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

"ART. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation."

If there could have been any doubt whatever, whether military commissions or courts-martial for the trial of persons not "in the land or naval forces, or the militia" **[***56]** in actual service, could ever be established by the President, or even by Congress, these amendments would have removed the doubt. They were made for a state of war as well as a state of peace; they were aimed at the military authority, as well as the civil; and they were as explicit as our mother tongue could make them.

The phrase "in time of war or public danger" qualifies the member of the sentence

relating to the militia; as otherwise, there could be no court-martial in the army or navy during peace.

This is the argument upon the text of the Constitution.

I will now show that military tribunals for civilians, or non-military persons, whether in war or peace, are inconsistent with the liberty of the citizen, and can have no place in constitutional government. This is a legitimate argument even upon a question of interpretation; for if there be, as I think there is not, room left for interpretation of what seem to be the plain provisions of the Constitution, then the principles of liberty, as they were understood by the fathers of the Republic; the maxims of free government, as they were accepted by the men who framed and those who adopted the Constitution; and those occurrences **[***57]** in the history of older states, which they had profoundly studied, may be called in to show us what they must have meant by the words they used.

The source and origin of the power to establish military commissions, if it exist at all, is in the assumed power to declare what is called martial law. I say what is called martial law, for strictly there is no such thing as martial law; it is martial rule; that is to say, the will of the commanding officer, and nothing more, nothing less.

On this subject, as on many others, the incorrect use of a word has led to great confusion of ideas and to great abuses. People imagine, when they hear the expression martial law, that there is a system of law known by that name, which can upon occasion be substituted for the ordinary system; and there is a prevalent notion that under certain circumstances a military commander may, by issuing a proclamation, displace one system, the civil law, and substitute another, the martial. A moment's reflection will show that this is an error. Law is a rule of property and of conduct, prescribed by the sovereign power of the state. The Civil Code of Louisiana defines it as "a solemn expression of legislative **[***58]** will." Blackstone calls it "a rule of civil conduct prescribed by the supreme power in the state;" . . . "not a transient, sudden order from a superior to or concerning a particular person, but something permanent, uniform, and universal." Demosthenes thus explains it: "The design and object of laws is to ascertain what is just, honorable, and expedient; and when that is discovered, it is proclaimed as a general ordinance, equal and impartial to all"

There is a system of regulations known as the Rules and Articles of War, prescribed by Congress for the government of the army and navy, under that clause of the Constitution which empowers Congress "to make rules for the government and regulation of the land and naval forces." This is generally known as military law. n29

n29 See Mills v. Martin, 19 Johnson, 70; Martin v. Mott, 12 Wheaton, 19 1 Kent's Com 370, note.

There are also certain usages, sanctioned by time, for the conduct towards each other of

nations engaged in war, known as the usages of war, or the jus belli, accepted as part of the law of nations, and extended from national to all belligerents. These respect, however, only the conduct of belligerents towards each **[***59]** other, and have no application to the present case.

What is ordinarily called martial law is no law at all. Wellington, in one of his despatches from Portugal, in 1810, in his speech on the Ceylon affair, so describes it.

Let us call the thing by its right name; it is not martial law, but martial rule. And when we speak of it, let us speak of it as abolishing all law, and substituting the will of the military commander, and we shall give a true idea of the thing, and be able to reason about it with a clear sense of what we are doing.

Another expression, much used in relation to the same subject, has led also to misapprehension; that is, the declaration, or proclamation, of martial rule; as if a formal promulgation made any difference.It makes no difference whatever.

It may be asked, may a general never in any case use force but to compel submission in the opposite army and obedience in his own? I answer, yes; there are cases in which he may. There is a maxim of our law which gives the reason and the extent of the power: "Necessitas quod cogit defendit." This is a maxim not peculiar in its application to military men; it applies to all men under certain circumstances. **[***60]**

Private persons may lawfully tear down a house, if necessary, to prevent the spread of a fire. Indeed, the maxim is not confined in its application to the calamities of war and conflagration. A mutiny, breaking out in a garrison, may make necessary for its suppression, and therefore justify, acts which would otherwise be unjustifiable. In all these cases, however, the person acting under the pressure of necessity, real or supposed, acts at his peril. The correctness of his conclusion must be judged by courts and juries, whenever the acts and the alleged necessity are drawn in question.

The creation of a commission or board to decide or advise upon the subject gives no increased sanction to the act. As necessity compels, so that necessity alone can justify it. The decision or advice of any number of persons, whether designated as a military commission, or board of officers, or council of war, or as a committee, proves nothing but greater deliberation; it does not make legal what would otherwise be illegal.

Let us proceed now to the historical part of the argument.

First. As to our own country. The nation began its life in 1776, with a protest against military usurpation. **[***61]** It was one of the grievances set forth in the Declaration of Independence, that the king of Great Britain had "affected to render the military independent of and superior to the civil power." The attempts of General Gage, in Boston, and of Lord Dunmore, in Virginia, to enforce martial rule, excited the greatest indignation. Our fathers never forgot their principles; and though the war by which they maintained their independence was a revolutionary one, though their lives depended on

their success in arms, they always asserted and enforced the subordination of the military to the civil arm.

The first constitutions of the States were framed with the most jealous care. By the constitution of New Hampshire, it was declared that "in all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power;" by the constitution of Massachusetts of 1780, that "no person can in any case be subjected to law martial, or to any penalties or pains by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by the authority of the legislature;" by the constitution of Pennsylvania of 1776, "that the **[***62]** military should be kept under strict subordination to, and governed by the civil power;" by the constitution of Delaware of 1776, "that in all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power;" by that of Maryland of 1776, "that in all cases, and at all times, the military ought to be under strict subordination to, and control of the civil power;" by that of North Carolina, 1776, "that the military should be kept under strict subordination to, and governed by the civil power;" by that of South Carolina, 1778, "that the military be subordinate to the civil power of the State;" and by that of Georgia, 1777, that "the principles of the habeas corpus act shall be part of this constitution; and freedom of the press, and trial by jury, to remain inviolate forever."

Second. As to England, the constitutional history of that country is the history of a struggle on the part of the crown to obtain or to exercise a similar power to the one here attempted to be set up. The power was claimed by the king as much in virtue of his royal prerogative and of his feudal relations to his people as lord paramount, as of his title as commander **[***63]** of the forces. But it is enough to say that, from the day when the answer of the sovereign was given in assent to the petition of right, courts-martial for the trial of civilians, upon the authority of the crown alone, have always been held illegal.

Third. As to France -- as France was when she had a constitutional government. I have shown what the king of England cannot do. Let me show what the constitutional king of France could not do.

On the continent of Europe, the legal formula for putting a place under martial rule is to declare it in a state of siege; as if there were in the minds of lawyers everywhere no justification for such a measure but the exigencies of impending battle. The charter established for the government of France, on the final expulsion of the first Napoleon, contained these provisions:

"ART. The king is the supreme chief of the state; he commands the forces by sea and land; declares war; makes treaties of peace, alliance, and commerce; appoints to every office and agency of public administration; and makes rules and ordinances necessary for the execution of the laws, without the power ever of suspending them, or dispensing with their execution." **[***64]**

"ART. The king alone sanctions and promulgates the laws."

"ART. No person can be withdrawn from his natural judges."

"ART. Therefore there cannot be erected commissions or extraordinary tribunals."

When Charles the Tenth was driven from the kingdom the last article was amended, by adding the words, "under what name or denomination soever;" Dupin giving the reason thus:

"In order to prevent every possible abuse, we have added to the former text of the charter 'under what name or denomination soever,' for specious names have never been wanting for bad things, and without this precaution the title of 'ordinary tribunal' might be conferred on the most irregular and extraordinary of courts."

Now, it so happened, that two years later the strength of these constitutional provisions was to be tested. A formidable insurrection broke out in France. The king issued an order, dated June 6, 1832, placing Paris in a state of siege, founded "on the necessity of suppressing seditious assemblages which had appeared in arms in the capital, during the days of June 5th and 6th; on attacks upon public and private property; on assassinations of national guards, troops of the line, municipal **[***65]** guards and officers in the public service; and on the necessity of prompt and energetic measures to protect public safety against the renewal of similar attacks." On the 18th of June, one Geoffroy, designer, of Paris, was, by a decision of the second military commission of Paris, declared "guilty of an attack, with intent to subvert the government and to excite civil war," and condemned to death.

He appealed to the Court of Cassation. Odilon Barrot, a leader of the French bar, undertook his case, and after a discussion memorable forever for the spirit and learning of the advocates, and the dignity and independence of the judges, the court gave judgment, thus:

"Whereas Geoffroy, brought before the second military commission of the first military division, is neither in the army nor impressed with a military character, yet nevertheless said tribunal has implicitly declared itself to have jurisdiction and passed upon the merits, wherein it has committed an excess of power, violated the limits of its jurisdiction, and the provisions of articles 53 and 54 of the charter and those of the laws above cited: On these grounds the court reverses and annuls the proceedings instituted against **[***66]** the appellant before the said commission, whatsoever has followed therefrom, and especially the judgment of condemnation of the 18th of June, instant; and in order that-further proceedings be had according to law, remands him before one of the judges of instruction of the court of first instance of Paris," &c.

Thereupon the prisoner was discharged from military custody.

This closes my argument against the competency of the military commission.

It remains to consider what remedy, if any, there was against this unlawful judgment and its threatened execution.

The great remedy provided by our legal and political system for unlawful restraint, whether upon pretended judgments, decrees, sentences, warrants, orders, or otherwise, is the writ of habeas corpus.

The authority to suspend the privilege of the habeas corpus is derived, it is said, from two sources: first, from the martial power; and, second, from the second subdivision of the ninth section of the first article of the Federal Constitution.

As to the martial power, I have already discussed it so fully that I need not discuss it again.

How, then, stands the question upon the text of the Constitution?This is the language: **[***67]** "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

The clause in question certainly either grants the power, or implies that it is already granted; and in either case it belongs to the legislative, executive, and judicial departments concurrently, or to some excluding the rest.

There have been four theories: one that it belongs to all the departments; a second, that it belongs to the legislature; a third, that it belongs to the executive; and the fourth, that it belongs to the judiciary.

Is the clause a grant or a limitation of power? Looking only at the form of expression, it should be regarded as a limitation.

As a grant of power, it would be superfluous, for it is clearly an incident of others which are granted.

Then, regarding the clause according to its place in the Constitution, it should be deemed a limitation; for it is placed with six other subdivisions in the same section, every one of which is a limitation.

If the sentence respecting the habeas corpus be, as I contend, a limitation, and not a grant of power, we must look into other parts of the Constitution to **[***68]** find the grant; and if we find none making it to the President, it follows that the power is in the legislative or the judicial department. That it lies with the judiciary will hardly be contended. That department has no other function than to judge. It cannot refuse or delay justice.

But if the clause in question were deemed a grant of power, the question would then be, to whom is the grant made? The following considerations would show that it was made to Congress:

First. The debates in the convention which framed the Constitution seem, at least, to suppose that the power was given to Congress, and to Congress alone.

Second. The debates in the various State conventions which ratified the Constitution do most certainly proceed upon that supposition.

Third. The place in which the provision is left indicates, if it does not absolutely decide, that it relates only to the powers of Congress. It is not in the second article, which treats of the executive department. It is not in the third, which treats of the judicial department. It is in the first article, which treats of the legislative department. There is not another subdivision in all the seven subdivisions of the ninth **[***69]** section which does not relate to Congress in part, at least, and most of them relate to Congress alone.

Fourth. The constitutional law of the mother country had been long settled, that the power of suspending the privilege of the writ, or, as it was sometimes called, suspending the writ itself, belonged only to Parliament. With this principle firmly seated in the minds of lawyers, it seems incredible that so vast a change as conferring the grant upon the executive should have been so loosely and carelessly expressed.

Fifth. The prevailing sentiment of the time when the Constitution was framed, was a dislike and dread of executive authority. It is hardly to be believed, that so vast and dangerous a power would have been conferred upon the President, without providing some safeguards against its abuse.

Sixth. Every judicial opinion, and every commentary on the Constitution, up to the period of the Rebellion, treated the power as belonging to Congress, and to that department only.

And so we submit to the court, that the answers to the three questions, certified by the court below, should be, to the first, that, on the facts stated in the petition and exhibits, a writ of habeas **[***70]** corpus ought to be issued according to the prayer ot the petition; to the second, that, on the same facts, the petitioner ought to be discharged; and to the third, that the military commission had not jurisdiction to try and sentence the petitioner, in manner and form as in the petition and exhibits is stated.

Mr. Garfield, on the same side.

Had the military commission jurisdiction legally to try and sentence the petitioner? This is the main question.

The Constitution establishes the Supreme Court, and empowers Congress --

"To constitute tribunals inferior to the Supreme Court."

"To make rules for the government of the land and naval forces, and to provide for governing such part of the militia as may be employed in the service of the United

States."

For all cases not arising in the land or naval forces, Congress has provided in the Judiciary Act of September 24th, 1789, and the acts amendatory thereof. For all cases arising in the naval forces, it has fully provided in the act of March 2d, 1799, "for the government of the navy of the United States," and similar subsequent acts.

We are apt to regard the military department of the government as an organized despotism, **[***71]** in which all personal rights are merged in the will of the commander-in-chief. But that department has definitely marked boundaries, and all its members are not only controlled, but also sacredly protected by definitely prescribed law. The first law of the Revolutionary Congress, passed September 20th, 1776, touching the organization of the army, provided that no officer or soldier should be kept in arrest more than eight days without being furnished with the written charges and specifications against him; that he should be tried, at as early a day as possible, by a regular military court, whose proceedings were regulated by law, and that no sentence should be carried into execution till the full record of the trial had been submitted to Congress or to the commander-in-chief, and his or their direction be signified thereon. From year to year Congress has added new safeguards to protect the rights of its soldiers, and the rules and articles of war are as really a part of the laws of the land as the Judiciary Act or the act establishing the treasury department. The main boundary line between the civil and military jurisdictions is the muster into service. In Mills v. Martin, n30 **[***72]** a militiaman, called out by the Governor of the State of New York, and ordered by him to enter the service of the United States, on a requisition of the President for troops, refused to obey the summons, and was tried by a Federal court-martial for disobedience of orders. The Supreme Court of the State of New York decided, that until he had gone to the place of general rendezvous, and had been regularly enrolled, and mustered into the national militia, he was not amenable to the action of a court-martial composed of officers of the United States. n31

n30 19 Johnson, 7.

n31 And see Houston v. Moore, 5 Wheaton, 1.

By the sixtieth article of war, the military jurisdiction is so extended as to cover those persons not mustered into the service, but necessarily connected with the army. It provides that:

"All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and articles of war."

That the question of jurisdiction might not be doubtful, it was thought necessary to provide by law of Congress that spies should be subject to **[***73]** trial by court-

martial. As the law stood for eighty-five years, spies were described as "persons not citizens of, or owing allegiance to, the United States, who shall be found lurking," &c. Not until after the Great Rebellion began, was this law so amended as to allow the punishment by court-martial of citizens of the United States who should be found lurking about the lines of our army to betray it to the enemy.

It is evident, therefore, that by no loose and general construction of the law can citizens be held amenable to military tribunals, whose jurisdiction extends only to persons mustered into the military service, and such other classes of persons as are, by express provisions of law, made subject to the rules and articles of war. But even within their proper jurisdiction, military courts are, in many important particulars, subordinate to the civil courts. This is acknowledged by the leading authorities on the subject, n32 and also by precedents, to some of which I refer:

1. A Lieutenant Frye, serving in the West Indies, in 1743, on a British man-of-war, was ordered by his superior officer to assist in arresting another officer. The lieutenant demanded, what he had, **[***74]** according to the customs of the naval service, a right to demand, a written order before he would obey the command. For this he was put under arrest, tried by a naval court-martial, and sentenced to fifteen years' imprisonment. In 1746 he brought an action before a civil court against the president of the court-martial, and damages of # 1000 were awarded him for his illegal detention and sentence; and the judge informed him that he might also bring his action against any member of the court-martial. Rear Admiral Mayne and Captain Rentone, who were members of the court that tried him, were at the time, when damages were awarded to Lieutenant Frye, sitting on a naval court-martial. The lieutenant proceeded against them, and they were arrested by a writ from the Common Pleas.The order of arrest was served upon them one afternoon, just as the court-martial adjourned. Its members, fifteen in number, immediately reassembled and passed resolutions declaring it a great insult to the dignity of the naval service that any person, however high in civil authority, should order the arrest of a naval officer for any of his official acts. Lord Chief Justice Willes immediately ordered the arrest **[***75]** of all the members of the court who signed the resolutions, and they were arrested. They appealed to the king, who was very indignant at the arrest. The judge, however, persevered in his determination to maintain the supremacy of civil law, and after two months' examination and investigation of the cause, all the members of the court-martial signed an humble and submissive letter of apology, begging leave to withdraw their resolutions, in order to put an end to further proceedings. When the Lord Chief Justice had heard the letter read in open court, he directed that it be recorded in the Remembrance Office, "to the end," as he said, "that the present and future ages may know that whosoever set themselves up in opposition to the law, or think themselves above the law, will in the end find themselves mistaken." n33

2. In Wilson v. McKenzie n34 it was proved that a mutiny of very threatening aspect had broken out; and that the lives of the captain and his officers were threatened by the mutineers. Among the persons arrested was the plaintiff, Wilson, an enlisted sailor, who being supposed to be in the conspiracy, was knocked down by the captain, ironed, and held in confinement **[***76]** for a number of days. When the cruise was ended, Wilson

brought suit against the captain for illegal arrest and imprisonment. The cause was tried before the Supreme Court of New York; Chief Justice Nelson delivered the judgment of the court, giving judgment in favor of Wilson.

n32 O'Brien's Military Law, pp. 222-225.

n33 McArthur on Courts-Martial, vol. i, pp. 268-271. See also London Gazette for 1745-6, Library of Congress.

n34 7 Hill, 95.

A clear and complete statement of the relation between civil and military courts may be found in Dynes v. Hoover, n35 in this court:

"If a court-martial has no jurisdiction over the subject-matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction and give him redress."

"The courts of common law will examine whether courts-martial have exceeded the jurisdiction given them, though it is said, 'not, however, after the sentence has been ratified and carried into execution.'"

n35 20 Howard, 82. **[***77]**

It is clear, then, that the Supreme Court of the United States may inquire into the question of jurisdiction of a military court; may take cognizance of extraordinary punishment inflicted by such a court not warranted by law; and may issue writs of prohibition or give such other redress as the case may require. It is also clear that the Constitution and laws of the United States have carefully provided for the protection of individual liberty and the right of accused persons to a speedy trial before a tribunal established and regulated by law.

To maintain the legality of the sentence here, opposite counsel are compelled not only to ignore the Constitution, but to declare it suspended -- its voice lost in war -- to hold that from the 5th of October, 1864, to the 9th of May, 1865, martial law alone existed in Indiana; that it silenced not only the civil courts, but all the laws of the land, and even the Constitution itself; and that during this silence the executor of martial law could lay his hand upon every citizen; could not only suspend the writ of habeas corpus, but could create a court which should have the exclusive jurisdiction over the citizen to try him, sentence him, **[***78]** and put him to death.

Sir Matthew Hale, in his History of the Common Law, n36 says:

"Touching the business of martial law, these things are to be observed, viz.:

"First. That in truth and reality it is not a law, but something indulged rather than allowed as a law; the necessity of government, order, and discipline in an army, is that only which can give those laws a countenance: quod enim necessitas cogit defendit.

"Secondly. This indulged law was only to extend to members of the army, or to those of the opposed army, and never was so much indulged as intended to be executed or exercised upon others, for others who were not listed under the army had no color or reason to be bound by military constitutions applicable only to the army, whereof they were not parts, but they were to be ordered and governed according to the laws to which they were subject, though it were a time of war.

"Thirdly. That the exercises of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. This is declared in the Petition **[***79]** of Right (3 Car. I), whereby such commission and martial law were repealed and declared to be contrary to law."

n36 Runnington's edition, London, 1820, pp. 42-3; and see 1 Blackstone's Dom. 413-14.

In order to trace the history and exhibit the character of martial law, reference may be made to several leading precedents in English and American history.

1. The Earl of Lancaster. In the year 1322, the Earl of Lancaster and the Earl of Hereford rebeelled against the authority of Edward II. They collected an army so large that Edward was compelled to raise forty thousand men to withstand them. The rebellious earls posted their forces on the Trent, and the armies of the king confronted them. They fought at Boroughbridge; the insurgent forces were overthrown; Hereford was slain and Lancaster taken in arms at the head of his army, and amid the noise of battle was tried by a court-martial, sentenced to death, and executed. When Edward III came into power, eight years later, on a formal petition presented to Parliament by Lancaster's son, setting forth the facts, the case was examined and a law was enacted reversing the attainder, and declaring: "1. That in time of peace no man **[***80]** ought to be adjudged to death for treason or any other offence without being arraigned and held to answer. 2. That regularly when the king's courts are open it is a time of peace in judgment of law; and 3. That no man ought to be sentenced to death, by the record of the king, without his legal trial per pares." n37

n37 Hale's Pleas of the Crown, pp. 499, 500; Hume, vol. 1, p. 159.

So carefully was the line drawn between civil and martial law five hundred years ago.

2. Sir Thomas Darnell. He was arrested in 1625 by order of the king, for refusing to pay a tax which he regarded as illegal. He was arrested and imprisoned. A writ of habeas corpus was prayed for, but answer was returned by the court that he had been arrested by special order of the king, and that was held to be a sufficient answer to the petition. Then the great cause came up to be tried in Parliament, whether the order of the king was sufficient to override the writ of habeas corpus, and after a long and stormy debate, in which the ablest minds in England were engaged, the Petition of Right, of 1628, received the sanction of the king. In that statute it was decreed that the king should never again suspend **[***81]** the writ of habeas corpus; that he should never again try a subject by military commission; and since that day no king of England has presumed to usurp that high prerogative, which belongs to Parliament alone.

3. The Bill of Rights of 1688.The house of Stuart had been expelled and William had succeeded to the British throne. Great disturbances had arisen in the realm in consequence of the change of dynasty. The king's person was unsafe in London. He informed the Lords and Commons of the great dangers that threatened the kingdom, and reminded them that he had no right to declare martial law, to suspend the writ of habeas corpus, or to seize and imprison his subjects on suspicion of treason or intended outbreak against the peace of the realm. He laid the case before them and asked their advice and assistance. In answer, Parliament passed the celebrated habeas corpus act. Since that day, no king of England has dared to suspend the writ. It is only done by Parliament.

4. Governor Wall. In the year 1782, Joseph Wall, governor of the British colony at Goree, in Africa, had under his command about five hundred British soldiers. Suspecting a mutiny about to break out in the garrison, **[***82]** he assembled them on the parade-ground, held a hasty consultation with his officers, and immediately ordered Benjamin Armstrong, a private, and supposed ringleader, to be seized, stripped, tied to the wheel of an artillery-carriage, and with a rope one inch in diameter, to receive eight hundred lashes. The order was carried into execution, and Armstrong died of his injuries. Twenty years afterward Governor Wall was brought before the most august civil tribunal of England to answer for the murder of Armstrong. Sir Archibald McDonald, Lord Chief Baron of the Court of Exchequer, Sir Soulden Lawrence, of the King's Bench, Sir Giles Rooke, of the Common Pleas, constituted the court. Wall's counsel claimed that he had the power of life and death in his hands in time of mutiny; that the necessity of the case au thorized him to suspend the usual forms of law; that as governor and military commander-in-chief of the forces at Goree, he was the sole judge of the necessities of the case.After a patient hearing before that high court, he was found guilty of murder, was sentenced and executed. n38

n38 28 State Trials, p. 51; see also Hough's Military Law, pp. 537-540.

I now ask attention **[***83]** to precedents in our own colonial history.

5. On the 12th of June, 1775, General Gage, the commander of the British forces, declared martial law in Boston. The battles of Concord and Lexington had been fought two months before. The colonial army was besieging the city and its British garrison. It was but five days before the battle of Bunker Hill. Parliament had, in the previous February, declared the colonies in a state of rebellion. Yet, by the common consent of English jurists, General Gage violated the laws of England, and laid himself liable to its penalty, when he declared martial law. This position is sustained in the opinion of Woodbury, J., in Luther v. Borden. n39

n39 7 Howard, p. 65. See also Annual Register for 1775, p. 133.

6. On the 7th of November, 1775, Lord Dunmore declared martial law throughout the commonwealth of Virginia. This was long after the battle of Bunker Hill, and when war was flaming throughout the colonies; yet he was denounced by the Virginia Assembly for having assumed a power which the king himself dared not exercise, as it "annuls the law of the land, and introduces the most execrable of all systems, martial law." Woodbury, J., **[***84]** n40 declares the act of Lord Dunmore unwarranted by British law.

n40 In his dissenting opinion.

7. The practice of our Revolutionary fathers on this subject is instructive. Their conduct throughout the great struggle for independence was equally marked by respect for civil law, and jealousy of martial law.n41 Though Washington was clothed with almost dictatorial powers, he did not presume to override the civil law, or disregard the orders of the courts, except by express authority of Congress or the States. In his file of general orders, covering a period of five years, there are but four instances in which civilians appear to have been tried by a military court, and all these trials were expressly authorized by resolutions of Congress. In the autumn of 1777, the gloomiest period of the war, a powerful hostile army landed at Chesapeake Bay, for the purpose of invading Maryland and Pennsylvania. It was feared that the disloyal inhabitants along his line of march would give such aid and information to the British commander as to imperil the safety of our cause. Congress resolved "That the executive authorities of Pennsylvania and Maryland be requested to cause all persons **[***85]** within their respective States, notoriously disaffected, to be forthwith apprehended, disarmed, and secured till such time as the respective States think they can be released without injury to the common cause." The governor authorized the arrests, and many disloyal citizens were taken into custody by Washington's officers, who refused to answer the writ of habeas corpus which a civil court issued for the release of the prisoners. Very soon afterwards the Pennsylvania legislature passed a law indemnifying the governor and the military authorities, and

allowing a similar course to be pursued thereafter on recommendation of Congress or the commanding officer of the army.But this law gave authority only to arrest and hold -- not to try; and the act was to remain in force only till the end of the next session of the General Assembly. So careful were our fathers to recognize the supremacy of civil law, and to resist all pretensions of the authority of martial law!

n41 See argument of Mr. Field. Supra, p. 37-8. -- REP.

8. Shay's Rebellion in 1787. That rebellion, which was before the Constitution was adopted, was mentioned by Hamilton in the Federalist as a proof that we needed **[***86]** a strong central government to preserve our liberties.During all that disturbance there was no declaration of martial law, and the habeas corpus was only suspended for a limited time and with very careful restrictions. Governor Bowdoin's order to General Lincoln, on the 19th of January, 1787, was in these words: "Consider yourself in all your military offensive operations constantly as under the direction of the civil officer, save where any armed force shall appear to oppose you marching to execute these orders."

9. I refer too to a case under the Constitution, the Rebellion of 1793, in Western Pennsylvania. President Washington did not march with his troops until the judge of the United States District Court had certified that the marshal was unable to execute his warrants. Though the parties were tried for treason, all the arrests were made by the authority of the civil officers. The orders of the Secretary of War stated that "the object of the expedition was to assist the marshal of the district to make prisoners." Every movement was made under the direction of the civil authorities. So anxious was Washington on this subject that he issued orders declaring that "the army **[***87]** should not consider themselves as judges or executioners of the laws, but only as employed to support the proper authorities in the execution of the laws."

10. I call the attention of the court also to the case of General Jackson, in 1815, at New Orleans. In 1815, at New Orleans, General Jackson took upon himself the command of every person in the city, suspended the functions of all the civil authorities, and made his own will for a time the only rule of conduct. It was believed to be absolutely necessary. Judges, officers of the city corporation, and members of the State legislature insisted on it as the only way to save the citizens and property of the place from the unspeakable outrages committed at Badajos and St. Sebastian by the very same troops then marching to the attack. Jackson used the power thus taken by him moderately, sparingly, benignly, and only for the purpose of preventing mutiny in his camp. A single mutineer was restrained by a short confinement, and another was sent four miles up the river. But after he had saved the city, and the danger was all over, he stood before the court to be tried by the law; his conduct was decided to be illegal, and he paid **[***88]** the penalty without a murmur. The Supreme Court of Louisiana, in Johnson v. Duncan, n42 decided that everything done during the siege in pursuance of martial rule, but in conflict with the law of the land, was void and of none effect, without reference to the circumstances which

made it necessary. In 1842, a bill was introduced into Congress to reimburse General Jackson for the fine. The debate was able and thorough. Mr. Buchanan, then a member of Congress, spoke in its favor, and no one will doubt his willingness to put the conduct of Jackson on the most favorable ground possible. n43 Yet he did not attempt to justify, but only sought to palliate and excuse the conduct of Jackson. All the leading members took the same ground.

n42 See 3 Martin's Louisiana Rep., O.S., 520.

n43 Benton's Abridgment of Debates, vol. 14, page 628.

11. I may fortify my argument by the authority of two great British jurists, and call attention to the trial of the Rev. John Smith, missionary at Demerara, in British Guiana. In the year 1823, a rebellion broke out in Demerara, extending over some fifty plantations. The governor of the district immediately declared martial law. A number of **[***89]** the insurgents were killed, and the rebellion was crushed. It was alleged that the Rev. John Smith, a missionary, sent out by the London Missionary Society, had been an aider and abettor of the rebellion. A court-martial was appointed, and in order to give it the semblance of civil law, the governor-general appointed the chief justice of the district as a staff officer, and then detailed him as president of the court to try the accused. All the other members of the court were military men, and he was made a military officer for the special occasion. Missionary Smith was tried, found guilty, and sentenced to be hung. The proceedings came to the notice of Parliament, and were made the subject of inquiry and debate. Smith died in prison before the day of execution; but the trial gave rise to one of the ablest debates of the century, in which the principles involved in the cause now before this court were fully discussed.Lord Brougham and Sir James Mackintosh were among the speakers. In the course of his speech Lord Brougham said:

"No such thing as martial law is recognized in Great Britain, and courts founded on proclamations of martial law are wholly unknown. Suppose I am ready **[***90]** to admit that, on the pressure of a great necessity, such as invasion or rebellion, when there is no time for the slow and cumbrous proceedings of the civil law, a proclamation may justifiably be issued for excluding the ordinary tribunals, and directing that offences should be tried by a military court, such a proceeding might be justified by necessity, but it could rest on that alone. Created by necessity, necessity must limit its continuance.It would be the worst of all conceivable grievances, it would be a calamity unspeakable, if the whole law and constitution of England were suspended one hour longer than the most imperious necessity demanded. I know that the proclamation of martial law renders every man liable to be treated as a soldier. But the instant the necessity ceases, that instant the state of soldiership ought to cease, and the rights, with the relations of civil life, to be restored."

Sir James Mackintosh says: n44

"The only principle on which the law of England tolerates what is called 'martial law,' is necessity. Its introduction can be justified only by necessity; its continuance requires precisely the same justification of necessity; and if it survives the **[***91]** necessity, in which alone it rests, for a single minute, it becomes instantly a mere exercise of lawless violence. When foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community."

n44 Mackintosh's Miscellaneous Works, p. 734, London edition, 1851.

The next paragraph lays down the chief condition that can justify martial law, and also marks the boundary between martial and civil law:

"While the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society, but no longer; every moment beyond is usurpation. As soon as the laws can act, every other mode of punishing supposed crimes is itself an enormous crime. If argument be not enough on this subject -- if, indeed, the mere statement be not the evidence of its own truth -- I appeal to the highest and most venerable authority known to our law."

He proceeds to quote Sir Matthew Hale on Martial **[***92]** Law, and cites the case of the Earl of Lancaster, to which I have already referred, and then declares:

"No other doctrine has ever been maintained in this country since the solemn parliamentary condemnation of the usurpations of Charles I, which he was himself compelled to sanction in the Petition of Right. In none of the revolutions or rebellions which have since occurred has martial law been exercised, hewever much, in some of them, the necessity might seem to exist. Even in those most deplorable of all commotions which tore Ireland in pieces in the last years of the eighteenth century, in the midst of ferocious revolt and cruel punishment, at the very moment of legalizing these martial jurisdictions in 1799, the very Irish statute, which was passed for that purpose, did homage to the ancient and fundamental principles of the law in the very act of departing from them. The Irish statute (39 George III, chap. 3), after reciting 'that martial law had been successfully exercised to the restoration of peace, so far as to permit the course of the common law partially to take place, but that the rebellion continued to rage in considerable parts of the kingdom, whereby it has become **[***93]** necessary for Parliament to interpose,' goes on to enable the Lord Lieutenant 'to punish rebels by courts-martial.' This statute is the most positive declaration, that where the common law can be exercised in some parts of the country, martial law cannot be established in others, though rebellion actually prevails in those others, without an extraordinary interposition of the supreme legislative authority itself."

After presenting arguments to show that a declaration of martial law was not necessary, the learned jurist continues:

"For six weeks, then, before the court-martial was assembled, and for twelve weeks before that court pronounced sentence of death on Mr. Smith, all hostility had ceased, no necessity for their existence can be pretended, and every act which they did was an open and deliberate defiance of the law of England Where, then, are we to look for any color of law in these proceedings? Do they derive it from the Dutch law? I have diligently examined the Roman law, which is the foundation of that system, and the writings of those most eminent jurists who have contributed so much to the reputation of Holland. I can find in them no trace of any such principle as **[***94]** martial law. Military law, indeed, is clearly defined; and provision is made for the punishment, by military judges, of the purely military offences of soldiers. But to any power of extending military jurisdiction over those who are not soldiers, there is not an allusion."

Many more such precedents as I have already cited might be added to the list; but it is unnecessary. They all teach the same lesson. They enable us to trace, from its far-off source, the progress and development of Anglo-Saxon liberty; its conflicts with irresponsible power; its victories, dearly bought, but always won -- victories which have crowned with immortal honors the institutions of England, and left their indelible impress upon the Anglo-Saxon mind. These principles our fathers brought with them to the New World, and guarded with vigilance and devotion. During the late Rebellion, the Republic did not forget them. So completely have they been impressed on the minds of American lawyers, so thoroughly ingrained into the fibre of American character, that notwithstanding the citizens of eleven States went off into rebellion, broke their oaths of allegiance to the Constitution, and levied war against **[***95]** their country, yet with all their crimes upon them, there was still in the minds of those men, during all the struggle, so deep an impression on this great subject, that, even during their rebellion, the courts of the Southern States adjudicated causes, like the one now before you, in favor of the civil law, and against courts-martial established under military authority for the trial of citizens. In Texas, Mississippi, Virginia, and other insurgent States, by the order of the rebel President, the writ of habeas corpus was supended, martial law was declared, and provost marshals were appointed to administer military authority. But when civilians, arrested by military authority, petitioned for release by writ of habeas corpus, in every case, save one, the writ was granted, and it was decided that there could be no suspension of the writ or declaration of martial law by the executive, or by any other than the supreme legislative authority.

The military commission, under our government, is of recent origin. It was instituted, as has been frequently said, by General Scott, in Mexico, to enable him, in the absence of any civil authority, to punish Mexican and American citizens for **[***96]** offences not provided for in the rules and articles of war. The purpose and character of a military commission may be seen from his celebrated order, No. 20, published at Tampico. It was no tribunal with authority to punish, but merely a committee appointed to examine an offender, and advise the commanding general what punishment to inflict. It is a rude substitute for a court of justice, in the absence of civil law. Even our own military

authorities, who have given so much prominence to these commissions, do not claim for them the character of tribunals established by law. In his "Digest of Opinions" for 1866, n45 the Judge Advocate General says:

"Military commissions have grown out of the necessities of the service, but their powers have not been defined nor their mode of proceeding regulated by any statute law."

n45 Pages 131, 133.

Again:

"In a military department the military commission is a substitute for the ordinary State or United States Court, when the latter is closed by the exigencies of war or is without the jurisdiction of the offence committed."

The plea set up by the Attorney-General for this military tribunal is that of the necessity of this case. **[***97]** But there was in fact no necessity. From the beginning of the Rebellion to its close, Congress, by its legislation, kept pace with the necessities of the nation. In sixteen carefully considered laws, the national legislature undertook to provide for every contingency, and arm the executive at every point with the solemn sanction of law. Observe how the case of the petitioner was covered by the provisions of law.

The first charge against him was "conspiracy against the government of the United States." In the act approved July 31st, 1861, that crime was defined, and placed within the jurisdiction of the District and Circuit Courts of the United States.

Charge 2. "Affording aid and comfort to the rebels against the authority of the United States." In the act approved July 17th, 1862, this crime is set forth in the very words of the charge, and it is provided that "on conviction before any court of the United States, having jurisdiction thereof, the offender shall be punished by a fine not exceeding ten thousand dollars, and by imprisonment not less than six months, nor exceeding five years."

Charge 3. "Inciting insurrection." In Brightly's Digest, n46 there is compiled from **[***98]** ten separate acts, a chapter of sixty-four sections on insurrection, setting forth in the fullest manner possible, every mode by which citizens may aid in insurrection, and providing for their trial and punishment by the regularly ordained courts of the United States.

n46 Vol. 2, pp. 191-202.

Charge 4. "Disloyal practices." The meaning of this charge can only be found in the

specifications under it, which consists in discouraging enlistments and making preparations to resist a draft designed to increase the army of the United States.These offences are fully defined in the thirty-third section of the act of March 3d, 1863, "for enrolling and calling out the national forces," and in the twelfth section of the act of February 24th, 1864, amendatory thereof. The provost marshal is authorized to arrest such offenders, but he must deliver them over for trial to the civil authorities. Their trial and punishment are expressly placed in the jurisdiction of the District and Circuit Courts of the United States.

Charge 5. "Violation of the laws of war;" which, according to the specifications, consisted of an attempt, through a secret organization, to give aid and comfort to rebels.This **[***99]** crime is amply provided for in the laws referred to in relation to the second charge.

But Congress did far more than to provide for a case like this. Throughout the eleven rebellious States, it clothed the military department with supreme power and authority. State constitutions and laws, the decrees and edicts of courts, were all superseded by the laws of war. Even in States not in rebellion, but where treason had a foothold, and hostile collisions were likely to occur, Congress authorized the suspension of the writ of habeas corpus, and directed the army to keep the peace. But Congress went further still, and authorized the President, during the Rebellion, whenever, in his judgment, the public safety should require it, to suspend the privilege of the writ in any State or Territory of the United States, and order the arrest of any persons whom he might, believe dangerous to the safety of the Republic, and hold them till the civil authorities could examine into the nature of their crimes.But this act of March 3d, 1863, gave no authority try the person by any military tribunal, and it commanded judges of the Circuit and District Courts of the United States, whenever the grand **[***100]** jury had adjourned its sessions, and found no indictment against such persons, to order their immediate discharge from arrest. All these capacious powers were conferred upon the military department but there is no law on the statute book, in which the tribunal that tried the petitioner can find the least recognition.

What have our Representatives in Congress thought on this subject?

Near the close of the Thirty-Eighth Congress, when the miscellaneous appropriation bill, which authorized the disbursement of several millions of dollars for the civil expenditures of the government, was under discussion, the House of Representatives, having observed with alarm the growing tendency to break down the barriers of law, and desiring to protect the rights of citizens as well as to preserve the Union added to the appropriation bill the following section:

"And be it further enacted, That no person shall be tried by court-martial or military commission in any State or Territory where the courts of the United States are open, except persons actually mastered or commissioned or appointed in the military or naval service of the United States, or rebel enemies charged with being spies."

It **[***101]** was debated at length in the Senate, and almost every Senator acknowledged its justice, yet, as the nation was then in the very midst of the war, it was feared that the Executive might thereby be crippled, and the section was stricken out. The bill came back to the House; conferences were held upon it, and finally, in the last hour of the session, the House deliberately determined that, important as the bill was to the interests of the country, they preferred it should not become a law if that section were stricken out.

The bill failed; and the record of its failure is an emphatic declaration that the House of Representatives have never consented to the establishment of any tribunals except those authorized by the Constitution of the United States and the laws of Congress.

A point is suggested by the opposing counsel, that if the mititary tribunal had no jurisdiction, the petitioners may be held as prisoners captured in war, and handed over by the military to the civil authorities, to be tried for their crimes under the acts of Congress and before the courts of the United States. The answer to this is that the petitioners were never enlisted, commissioned, or mustered into the **[***102]** service of the Confederacy; nor had they been within the rebel lines, or within any theatre of active military operations; nor had they been in any way recognized by the rebel authorities as in their service. They could not have been exchanged as prisoners of war; not, if all the charges against them were true, could they be brought under the legal definition of spies. The suggestion that they should be handed over to the civil authorities for trial is precisely what they petitioned for, and what, according to the laws of Congress, should have been done.

Mr. Black, on the same side:

Had the commissioners jurisdiction? Were they invested with legal authority to try the petitioner and put him to death for the offence of which he was accused?This is the main question in the controversy, and the main one upon which the court divided. We answer, that they were not; and, therefore, that the whole proceeding from beginning to end was null and void.

On the other hand, it is necessary for those who oppose us to assert, and they do assert, that the commissioners had complete legal jurisdiction both of the subject-matter and of the party, so that their judgment upon the law and the **[***103]** facts is absolutely conclusive and binding, not subject to correction nor open to inquiry in any court whatever. Of these two opposite views, the court must adopt one or the other. There is no middle ground on which to stand.

The men whose acts we complain of erected themselves, it will be remembered, into a tribunal for the trial and punishment of citizens who were connected in no way whatever with the army or navy. And this they did in the midst of a community whose social and legal organization had never been disturbed by any war or insurrection, where the courts were wide open, where judicial process was executed every day without interruption, and where all the civil authorities, both state and national, were in the full exercise of their

functions.

It is unimportant whether the petitioner was intended to be charged with treason or conspiracy, or with some offence of which the law takes no notice. Either or any way, the men who undertook to try him had no jurisdiction of the subject-matter.

Nor had they jurisdiction of the party. The case, not having been one of impeachment, or a case arising in the land or naval forces, is either nothing at all or else it is a simple **[***104]** crime against the United States, committed by private individuals not in the public service, civil or military. Persons standing in that relation to the government are answer able for the offences which they may commit only to the civil courts of the country. So says the Constitution, as we read it; and the act of Congress of March 3d, 1863, which was passed with reference to persons in the exact situation of this man, declares that they shall be delivered up for trial to the proper civil authorities.

There being no jurisdiction of the subject-matter or of the party, you are bound to relieve the petitioner. It is as much the duty of a judge to protect the innocent as it is to punish the guilty.

We submit that a person not in the military or naval service cannot be punished at all until he has had a fair, open, public trial before an impartial jury, in an ordained and established court, to which the jurisdiction has been given by law to try him for that specific offence.

Our proposition ought to be received as true without any argument to support it; because, if that, or something precisely equivalent to it, be not a part of our, then the country is not a free country. Nevertheless, **[***105]** we take upon ourselves the burden of showing affirmatively not only that it is true, but that it is immovably fixed in the very framework of the government, so that it is impossible to detach it without destroying the whole political structure under which we live.

In the first place, the self-evident truth will not be denied that the trial and punishment of an offender against the government is the exercise of judicial authority. That is a kind of authority which would be lost by being diffused among the masses of the people. A judge would be no judge if everybody else were a judge as well as he. Therefore, in every society, however rude or however perfect its organization, the judicial authority is always committed to the hands of particular persons, who are trusted to use it wisely and well; and their authority is exclusive; they cannot share it with others to whom it has not been committed. Where, then, is the judicial power in this country? Who are the depositaries of it here? The Federal Constitution answers that question in very plain words, by declaring that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as **[***106]** Congress may from time to time ordain and establish." Congress has, from time to time, ordained and established certain inferior courts; and, in them, together with the one Supreme Court to which they are subordinate, is vested all the judicial power, properly so called, which the United States can lawfully exercise. At the time the General Government was created, the States and the people

bestowed upon that government a certain portion of the judicial power which otherwise would have remained in their own hands, but they gave it on a solemn trust, and coupled the grant of it with this express condition, that it should never be used in any way but one; that is, by means of ordained and established courts. Any person, therefore, who undertakes to exercise judicial power in any other way, not only violates the law of the land, but he tramples upon the most important part of that Constitution which holds these States together.

We all know that it was the intention of the men who founded this Republic to put the life, liberty, and property of every person in it under the protection of a regular and permanent judiciary, separate, apart, distinct, from all other branches of the government, **[***107]** whose sole and exclusive business it should be to distribute justice among the people according to the wants and needs of each individual. It was to consist of courts, always open to the complaint of the injured, and always ready to hear criminal accusations when founded upon probable cause; surrounded with all the machinery necessary for the investigation of truth, and clothed with sufficient power to carry their decrees into execution. In these courts it was expected that judges would sit who would be upright, honest, and sober men, learned in the laws of their country, and lovers of justice from the habitual practice of that virtue; independent, because their salaries could not be reduced, and free from party passion, because their tenure of office was for life. Although this would place them above the clamors of the mere mob and beyond the reach of executive influence, it was not intended that they should be wholly irresponsible. For any wilful or corrupt violation of their duty, they are liable to be impeached; and they cannot escape the control of an enlightened public opinion, for they must sit with open doors, listen to full discussion, and give satisfactory reasons for **[***108]** the judgments they pronounce. In ordinary tranquil times the citizen might feel himself safe under a judicial system so organized.

But our wise forefathers knew that tranquallity was not to be always anticipated in a republic; the spirit of a free people is often turbulent. They expected that strife would rise between classes and sections, and even civil war might come, and they supposed, that in such times, judges themselves might not be safely trusted in criminal cases -- especially in prosections for political offences; there the whole power of the executive is arrayed against the accused party. All history proves that public officers of any government when they are engaged in a severe struggle to retain their places, become bitter and ferocious, and hate those who oppose them, even in the most legitimate way, with a rancor which they never exhibit towards actual crime. This kind of malignity vents itself in prosecutions for political offences, sedition, conspiracy, libel, and treason, and the charges are generally founded upon the information of spies and delators, who make merchandise of their oaths, and trade in the blood of their fellow men. During the civil commotions **[***109]** in England, which lasted from the beginning of the reign of Charles I to the Revolution of 1688, the best men, and the purest patriots that ever lived, fell by the hand of the publie executioner. Judges were made the instruments for inflicting the most merciless sentences on men, the latchet of whose shoes the ministers that prosecuted them were not worthy to stoop down and unloose. Nothing has occurred, indeed, in the history of this country to justify the doubt of judicial integrity which our

forefathers seem to have felt. On the contrary, the highest compliment that has ever been paid to the American bench, is embodied in this simple fact, that if the executive officers of this government have ever desired to take away the life or the liberty of a citizen contrary to law, they have not come into the courts to get it done, they have gone outside of the courts, and stepped over the Constitution, and created their own tribunals. But the framers of the Constitution could act only upon the experience of that country whose history they knew most about, and there they saw the ferocity of Jeffreys and Scroggs, the timidity of Guilford, and the venality of such men as Saunders and Wright. **[***110]** It seems necessary, therefore, not only to make the judiciary as perfect as possible, but to give the citizen yet another shield against his government. To that end they could think of no better provision than a public trial before an impartial jury.

We do not assert that the jury trial is an infallible mode of ascertaining truth. Like everything human, it has its imperfections. We only say that it is the best protection for innocence and the surest mode of punishing guilt that has yet been discovered. It has borne the test of a longer experience, and borne it better than any other legal institution that ever existed among men. England owes more of her freedom, her grandeur, and her prosperity to that, than to all other causes put together. It has had the approbation not only of those who lived under it, but of great thinkers who looked at it calmly from a distance, and judged it impartially: Montesquieu and De Tocqueville speak of it with an admiration as rapturous as Coke and Blackstone.Within the present century, the most enlightened states of continental Europe have transplanted it into their countries; and no people ever adopted it once and were afterwards willing to **[***111]** part with it. It was only in 1830 that an interference with it in Belgium provoked a successful insurrection which permanently divided one kingdom into two. In the same year, the Revolution of the Barricades gave the right of trial by jury to every Frenchman.

Those colonists of this country who came from the British Islands brought this institution with them, and they regarded it as the most precious part of their inheritance. The immigrants from other places where trial by jury did not exist became equally attached to it as soon as they understood what it was. There was no subject upon which all the inhabitants of the country were more perfectly unanimous than they were in their determination to maintain this great right unimpaired. An attempt was made to set it aside and substitute military trials in place, by Lord Dunmore, in Virginia, and General Gage, in Massachusetts, accompanied with the excuse which has been repeated so often in late days, namely, that rebellion had made it necessary; but it excited intense popular anger, and every colony, from New Hampshire to Georgia, made common cause with the two whose rights had been especially invaded. Subsequently the Continental **[***112]** Congress thundered it into the ear of the world, as an unendurable outrage, sufficient to justify universal insurrection against the authority of the government which had allowed it to be done.

If the men who fought out our Revolutionary contest, when they came to frame a government for themselves and their posterity, had failed to insert a provision making the trial by jury perpetual and universal, they would have proved themselves recreant to the principles of that liberty of which they professed to be the special champions. But they

were guilty of no such thing. They not only took care of the trial by jury, but they regulated every step to be taken in a criminal trial. They knew very well that no people could be free under a government which had the power to punish without restraint. Hamilton expressed, in the Federalist, the universal sentiment of his time, when he said, that the arbitrary power of conviction and punishment for pretended offences, had been the great engine of despotism in all ages and all countries. The existence of such a power is incompatible with freedom.

But our fathers were not absurd enough to put unlimited power in the hands of the ruler and take **[***113]** away the protection of law from the rights of individuals. It was not thus that they meant "to secure the blessings of liberty to themselves and their posterity." They determined that not one drop of the blood which had been shed on the other side of the Atlantic, during seven centuries of contest with arbitrary power, should sink into the ground; but the fruits of every popular victory should be garnered up in this new government. Of all the great rights already won they threw not an atom away. They went over Magna Charta, the Petition of Right, the Bill of Rights, and the rules of the common law, and whatever was found there to favor individual liberty they carefully inserted in their own system, improved by clearer expression, strengthened by heavier sanctions, and extended by a more universal application. They put all those provisions into the organic law, so that neither tyranny in the executive, nor party rage in the legislature, could change them without destroying the government itself.

Look at the particulars and see how carefully everything connected with the administration of punitive justice is guarded.

1. No ex post facto law shall be passed. No man shall be **[***114]** answerable criminally for any act which was not defined and made punishable as a crime by some law in force at the time when the act was done.

2. For an act which is criminal he cannot be arrested without a judicial warrant founded on proof of probable cause. He shall not be kidnapped and shut up on the mere report of some base spy who gathers the materials of a false accusation by crawling into his house and listening at the keyhole of his chamber door.

3. He shall not be compelled to testify against himself. He may be examined before he is committed, and tell his own story if he pleases; but the rack shall be put out of sight, and even his conscience shall not be tortured; nor shall his unpublished papers be used against him, as was done most wrongfully in the case of Algernon Sydney.

4. He shall be entitled to a speedy trial; not kept in prison for an indefinite time without the opportunity of vindicating his innocence.

5. He shall be informed of the accusation, its nature, and grounds. The public accuser must put the charge into the form of a legal indictment, so that the party can meet it full in the face.

6.Even to the indictment he need not answer unless a grand **[***115]** jury, after hearing the evidence, shall say upon their oaths that they believe it to be true.

7. Then comes the trial, and it must be before a regular court, of competent jurisdiction, ordained and established for the State and district in which the crime was committed; and this shall not be evaded by a legislative change in the district after the crime is alleged to be done.

8. His guilt or innocence shall be determined by an impartial jury. These English words are to be understood in their English sense, and they mean that the jurors shall be fairly selected by a sworn officer from among the peers of the party, residing withing the local jurisdiction of the court. When they are called into the box he can purge the panel of all dishonesty, prejudice, personal enmity, and ignorance, by a certain number of peremptory challenges, and as many more challenges as he can sustain by showing reasonable cause.

9. The trial shall be public and open, that no underhand advantage may be taken. The party shall be confronted with the witnesses against him, have compulsory process for his own witnesses, and be entitled to the assistance of counsel in his defence.

10. After the evidence **[***116]** is heard and discussed, unless the jury shall, upon their oaths, unanimously agree to surrender him up into the hands of the court as a guilty man, not a hair of his head can be touched by way of punishment.

11. After a verdict of guilty he is still protected. No cruel or unusual punishment shall be inflicted, nor any punishment at all, except what is annexed by the law to his offence. It cannot be doubted for a moment that if a person convicted of an offence not capital were to be hung on the order of a judge, such judge would be guilty of murder as plainly as if he should come down from the bench, turn up the sleeves of his gown, and let out the prisoner's blood with his own hand.

12. After all is over, the law continues to spread its guardianship around him. Whether he is acquitted or condemned he shall never again be molested for that offence. No man shall be twice put in jeopardy of life or limb for the same cause.

These rules apply to all criminal prosecutions. But in addition to these, certain special regulations were required for treason, -- the one great political charge under which more innocent men have fallen than any other. A tyrannical government calls everybody **[***117]** a traitor who shows the least unwillingness to be a slave.In the absence of a constitutional provision it was justly feared that statutes might be passed which would put the lives of the most patriotic citizens at the mercy of minions that skulk about under the pay of an executive. Therefore a definition of treason was given in the fundamental law, and the legislative authority could not enlarge it to serve the purpose of partisan malice. The nature and amount of evidence required to prove the crime was also prescribed, so that prejudice and enmity might have no share in the conviction. And lastly, the punishment was so limited that the property of the party could not be confiscated and used to reward the agents of his prosecutors, or strip his family of their

subsistence.

If these provisions exist in full force, unchangeable and irrepealable, then we are not hereditary bondsmen. Every citizen may safely pursue his lawful calling in the open day; and at night, if he is conscious of innocence, he may lie down in security, and sleep the sound sleep of a freeman.

They are in force, and they will remain in force. We have not surrendered them, and we never will. The great race **[***118]** to which we belong has not degenerated.

But how am I to prove the existence of these rights? I do not propose to do it by a long chain of legal argumentsation, nor by the production of numerous books with the leaves turned down and the pages marked. If it depended upon judicial precedents, I think I could produce as many as might be necessary. If I claimed this freedom, under any kind of prescription, I could prove a good long possession in ourselves and those under whom we claim it. I might begin with Tacitus, and show how the contest arose in the forests of Germany more than two thousand years ago; how the rough virtues and sound common sense of that people established the right of trial by jury, and thus started on a carceer which has made their posterity the foremost race that ever lived in all the tide of time. The Saxons carried it to England, and were ever ready to defend it with their blood. It was crushed out by the Danish invastion; and all that they suffered of tyranny and oppression, during the period of their subjugation, resulted from the want of trial by jury. If that had been conceded to them, the reaction would not have taken place which drove back the Danes **[***119]** to their frozen homes in the North. But those ruffian seakings could not understand that, and the reaction came. Alfred, the greatest of revolutionary heroes and the wisest monarch that ever sat on a throne, made the first use of his power, after the Saxons restored it, to re-establish their ancient laws. He had promised them that he would, and he was true to them because they had been true to him. But it was not easily done; the courts were opposed to it, for it limited their power -- a kind of power that everybody covets -- the power to punish without regard to law. He was obliged to hang forty-four judges in one year for refusing to give his subjects a trial by jury. When the historian says that he hung them, it is not meant that he put them to death without a trial. He had them impeached before the grand council of the nation, the Wittenagemote, the parliament of that time. During the subsequent period of Saxon domination, no man on English soil was powerful enough to refuse a legal trial to the meanest peasant. If any minister or any king, in war or in peace, had dared to punish a freeman by a tribunal of his own appointment, he would have roused the wrath of the whole **[***120]** population; all orders of society would have resisted it; lord and vassal, kniht and squire, priest and penitent, bocman and socman, master and thrall, copyholder and villein, would have risen in one mass and burnt the offender to death in his castle, or followed him in his flight and torn him to atoms. It was again trampled down by the Norman conquerors; but the evils resulting from the want of it united all classes in the effort which compelled King John to restore it by the Great Charter. Everybody is familiar with the struggles which the English people, during many generations, made for their rights with the Plantagenets, the Tudors, and the Stuarts, and which ended finally in the Revolution of 1688, when the liberties of England were placed upon an impregnable basis by the Bill of

Rights.

Many times the attempt was made to stretch the royal authority far enough to justify military trials; but it never had more than temporary success. Five hundred years ago Edward II closed up a great rebellion by taking the life of its leader, the Earl of Lancaster, after trying him before a military court. Eight years later that same king, together with his lords and commons in Parliament **[***121]** assembled, acknowledged with shame and sorrow that the execution of Lancaster was a mere murder, becuase the courts were open, and he might have had a legal trial. Queen Elizabeth, for sundry reasons affecting the safety of the state, ordered that certain offenders not of her army should be tried according to the law martial. But she heard the storm of popular vengeance rising, and, haughty, imperious, self-willed as she was, she yielded the point; for she knew that upon that subject the English people would never consent to be trifled with. Strafford, as Lord Lieutenant of Ireland, tried the Viscount Stormont before a military commission, and executed him. When impeached, he pleaded in vain that Ireland was in a state of insurrection, that Stormont was a traitor, and the army would be undone if it could not defend itself without appealing to the civil courts. The Parliament was deaf; the king himself could not save him; he was condemned to suffer death as a traitor and a murderer. Charles I issued commissions to divers officers for the trial of his enemies according to the course of military law. If rebellion ever was an excuse for such an act, he could surely have pleaded **[***122]** it; for there was scarcely a spot in his kingdom, from sea to sea, where the royal authority was not disputed by somebody. Yet the Parliament demanded, in their petition of right, and the king was obliged to concede, that all his commissions were illegal. James II claimed the right to suspend the operation of the penal laws -- a power which the courts denied -- but the experience of his predecessors taught him that he could not suspend any man's right to a trial. He could easily have convicted the seven bishops of any offence he saw fit to charge them with, if he could have selected their judges from among the mercenary creatures to whom he had given commands in his army. But this he dared not do. He was obliged to send the bishops to a jury, and endure the mortification of seeing them acquitted. He, too, might have had rebellion for an excuse, if rebellion be an excuse. The conspiracy was already ripe which, a few months afterwards, made him an exile and an outcast; he had reason to believe that the Prince of Orange was making his preparations, on the other side of the Channel, to invade the kingdom, where thousands burned to join him; nay, he pronounced the bishops guilty **[***123]** of rebellion by the very act for which he arrested them. He had raised an army to meet the rebellion, and he was on Hounslow Heath reviewing the troops organized for that purpose, when he heard the great shout of joy that went up from Westminster Hall, was echoed back from Temple Bar, spread down the city and over the Thames, and rose from every vessel on the river -- the simultaneous shout of two hundred thousand men for the triumph of justice and law.

The truth is, that no authority exists anywhere in the world for the doctrine of the Attorney-General. No judge or jurist, no statesman or parliamentary orator, on this or the other side of the water, sustains him. Every elementary writer is against him. All military authors who profess to know the duties of their profession admit themselves to be under, not above the laws. No book can be found in any library to justify the assertion that

military tribunals may try a citizen at a place where the courts are open. When I say no book, I mean, of course, no book of acknowledged authority. I do not deny that hireling clergymen have often been found to dishonor the pulpit by trying to prove the divine right of kings and other rulers **[***124]** to govern as they please.Court sycophants and party hacks have many times written pamphlets, and perhaps large volumes to show that those whom they serve should be allowed to work out their bloody will upon the people. No abuse of power is too flagrant to find its defenders.

But this case does not depend on authority. It is rather a question of fact than of law.

I prove my right to a trial by jury just as I would prove my title to an estate, if I held in my hand a solemn deed conveying it to me, coupled with undeniable evidence of long and undisturbed possession under and according to the deed. There is the charter by which we claim to hold it. It is called the Constitution of the United States. It is signed with the sacred name of George Washington, and with thirty-nine other names, only less illustrious than his. They represented every independent State then upon this continent, and each State afterwards ratified their work by a separate convention of its own people. Every State that subsequently came in acknowledged that this was the great standard by which their rights were to be measured. Every man that has ever held office in the country, from that time to this, has **[***125]** taken an oath that he would support and sustain it through good report and through evil. The Attorney-General himself became a party to the instrument when he laid his hand upon the holy gospels, and swore that he would give to me and every other citizen the full benefit of all it contains.

What does it contain? This among other things:

"The trial of all crimes except in cases of impeachment shall be by jury."

Again:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

This is not all; another article declares that,

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district **[***126]** wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for the witnesses in his favor; ant to have the assistance of counsel for his defence."

Is there any ambiguity there? If that does not signify that a jury trial shall be the exclusive and only means of ascertaining guilt in criminal cases, then I demand to know what words, or what collocation of words in the English language would have that effect? Does this mean that a fair, open, speedy, public trial by an impartial jury shall be given only to those persons against whom no special grudge is felt by the Attorney-General, or the judge-advocate, or the head of a department? Shall this inestimable privilege be extended only to men whom the administration does not care to convict? Is it confined to vulgar criminals, who commit ordinary crimes against society, and shall it be denied to men who are accused of such offences as those for which Sydney and Russell were beheaded, and Alice Lisle was hung, and Elizabeth Gaunt was burnt alive, and **[***127]** John Bunyan was imprisoned fourteen years, and Baxter was whipped at the cart's tail, and Prynn had his cars cut off? No; the words of the Constitution are all-embracing, "as broad and general as the casing air." The trial of ALL crimes shall be by jury. ALL persons accused shall enjoy that privilege -- and NO person shall be held to answer in any other way.

That would be sufficient without more. But there is another consideration which gives it tenfold power. It is a universal rule of construction, that general words in any instrument, though they may be weakened by enumeration, are always strengthened by exceptions.Here is no attempt to enumerate the particular cases in which men charged with criminal offences shall be entitled to a jury trial. It is simply declared that all shall have it. But that is coupled with a statement of two specific exceptions: cases of impeachment; and cases arising in the land or naval forces. These exceptions strengthen the application of the general rule to all other cases. Where the lawgiver himself has declared when and in what circumstances you may depart from the general rule, you shall not presume to leave that onward path for other reasons, **[***128]** and make different exceptions. To exceptions the maxim is always applicable, that expressio unius exclusio est alterius.

But we shall be answered that the judgment under consideration was pronounced in time of war, and it is, therefore, at least, morally excusable. There may, or there may not, be something in that. I admit that the merits or demerits of any particular act, whether it involve a violation of the Constitution or not, depend upon the motives that prompted it, the time, the occasion, and all the attending circumstances. When the people of this country come to decide upon the acts of their rulers, they will take all these things into consideration. But that presents the political aspect of the case, with which we have nothing to do here. I would only say, in order to prevent misapprehension, that I think it is precisely in a time of war and civil commotion that we should double the guards upon the Constitution. In peaceable and quiet times, our legal rights are in little danger of being overborne; but when the wave of power lashes itself into violence and rage, and goes surging up against the barriers which were made to confine it, then we need the whole strength **[***129]** of an unbroken Constitution to save us from destruction.

There has been and will be another quasi political argument, -- necessity. If the law was violated because it could not be obeyed, that might be an excuse. But no absolute

compulsion is pretended here. These commissioners acted, at most, under what they regarded as a moral necessity. The choice was left them to obey the law or disobey it. The disobedience was only necessary as means to an end which they thought desirable; and now they assert that though these means are unlawful and wrong, they are made right, because without them the object could not be accomplished; in other words, the end justifies the means. There you have a rule of conduct denounced by all law, human and divine, as being pernicious in policy and false in morals.

Nothing that the worst men ever propounded has produced so much oppression, misgovernment, and suffering, as this pretence of state necessity. A great authority calls it the tyrant's plea; and the common honesty of all mankind has branded it with infamy.

Of course, it is mere absurdity to say that the petitioner was necessarily deprived of his right to a fair and legal trial. But concede **[***130]** for the argument's sake that a trial by jury was wholly impossible; admit that there was an absolute, overwhelming, imperious necessity operating so as literally to compel every act which the commissioners did, would that give their sentence of death the validity and force of a legal judgment pronounced by an ordained and established court? The question answers itself. This trial was a violation of law, and no necessity could be more than a mere excuse for those who committed it. If the commissioners were on trial for murder or conspiracy to murder, they might plead necessity if the fact were true, just as they would plead insanity or anything else to show that their guilt was not wilful. But we are now considering the legal effect of their decision, and that depends on their legal authority to make it. They had no such authority; they usurped a jurisdiction which the law not only did not give them, but expressly forbade them to exercise, and it follows that their act is void, whatever may have been the real or supposed excuse for it.

If these commissioners, instead of aiming at the life and liberty of the petitioner, had attempted to deprive him of his property by a sentence **[***131]** of confiscation, would any court in Christendom declare that such a sentence divested the title? Or would a person claiming under the sentence make his right any better by showing that the illegal assumption of jurisdiction was accompanied by some excuse which might save the commissioners from a criminal prosecution?

That a necessity for violating the law is nothing more than a mere excuse to the perpetrator, and does not in any legal sense change the quality of the act itself in its operation upon other parties, is a proposition too plain on original principles to need the aid of authority. I do not see how any man is to stand up and dispute it. But there is decisive authority upon the point. n47

n47 See Johnson v. Duncan, in the Supreme Court of Louisiana, already referred to by General Garfield, supra, p. 52; the case of General Jackson's fine.

The counsel on the other side will not assert that there was war at Indianapolis in 1864,

for they have read Coke's Institute, and the opinion of Mr. Justice Grier, in the Prize Cases, and they know it to be a settled rule that war cannot be said to exist where the civil courts are open. They will not set up the plea of necessity, **[***132]** for they are well aware that it would not be true in point of fact. They will hardly take the ground that any kind of necessity could give legal validity to that which the law forbids.

This, therefore, must be their position: that although there was no war at the place where this commission sat, and so actual necessity for it, yet if there was a war anywhere else, to which the United States were a party, the technical effect of such war was to take the jurisdiction away from the civil courts and transfer it to army officers. Nothing else is left them. They may not state their proposition precisely as I state it; that is too plain a way of putting it. But, in substance, it is their doctrine. What else can they say? They will admit that the Constitution is not altogether without a meaning; that at a time of universal peace it imposes some kind of obligation upon those who swear to support it. If no war existed they would not deny the exclusive jurisdiction of the civil courts in criminal cases. How then did the military get jurisdiction in Indiana?

They must answer the question by saying that military jurisdiction comes from the mere existence of war; and it comes in Indiana **[***133]** only as the legal result of a war which is going on in Mississippi, Tennessee, or South Carolina. The Constitution is repealed, or its operation suspended in one state because there is war in another. The courts are open, the organization of society is intact, the judges are on the bench, and their process is not impeded; but their jurisdiction is gone. Why? For no reason, if not because war exists, and the silent, legal, technical operation of that fact is to deprive all American citizens of their right to a fair trial.

That class of jurists and statesmen who hold that the trial by jury is lost to the citizen during the existence of war, must carry out their doctrine theoretically and practically to its ultimate consequences. The right of trial by jury being gone, all other rights are gone with it; therefore a man may be arrested without an accusation and kept in prison during the pleasure of his captors; his papers may be searched without a warrant; his property may be confiscated behind his back, and he has no earthly means of redress. Nay, an attempt to get a just remedy is construed as a new crime. He dare not even complain, for the right of free speech is gone with the **[***134]** rest of his rights. If you sanction that doctrine, what is to be the consequence?I do not speak of what is past and gone; but in case of a future war what results will follow from your decision indorsing the Attorney-General's views? They are very obvious. At the instant when the war begins, our whole system of legal government will tumble into ruin, and if we are left in the enjoyment of any privileges at all we will owe it not to the Constitution and laws, but to the mercy or policy of those persons who may then happen to control the organized physical force of the country.

This puts us in a most precarious condition; we must have war often, do what we may to avoid it. The President or the Congress can provoke it, and they can keep it going even after the actual conflict of arms is over. They could make war a chronic condition of the country, and the slavery of the people perpetual. Nay, we are at the mercy of any foreign

potentate who may envy us the possession of those liberties which we boast of so much; he can shatter our Constitution without striking a single blow or bringing a gun to bear upon us. A simple declaration of hostilities is more terrible to us than an army **[***135]** with banners.

To me the argument set up by the other side seems a delusion simply. In a time of war, more than at any other time, Public Liberty is in the hands of the public officers. And she is there in double trust; first, as they are citizens, and therefore bound to defend her, by the common obligation of all citizens; and next, as they are her special guardians. The opposing argument, when turned into its true sense, means this, and this only: that when the Constitution is attacked upon one side, its official guardians may assail to upon the other; when rebellion strikes it in the face, they may take advantage of the blindness produced by the blow, to stab it in the back.

The Convention when it framed the Constitution, and the people when they adopted it, could have had no thought like that. If they had supposed that it would operate only while perfect peace continued, they certainly would have given us some other rule to go by in time of war; they would not have left us to wander about in a wilderness of anarchy, without a lamp to our feet, or a guide to our path. Another thing proves their actual intent still more strikingly. They required that every man in any kind **[***136]** of public employment, state or national, civil or military, should swear, without reserve or qualification, that he would support the Constitution. Surely our ancestors had too much regard for the moral and religious welfare of their posterity, to impose upon them an oath like that, if they intended and expected it to be broken half the time.

These statesmen who settled our institutions, had no such notions in their minds. Washington deserved the lofty praise bestowed upon him by the president of Congress when he resigned his commission, -- that he had always regarded the rights of the civil authority through all changes and through all disasters. When his duty as President afterwards required him to arm the public force to suppress a rebellion in Western Pennsylvania, he never thought that the Constitution was abolished, by virtue of that fact, in New Jersey, or Maryland, or Virginia.

Opposite counsel must be conscious that when they deny the binding obligation of the Constitution they must put some other system of law in its place. They do so; and argue that, while the Constitution, and the acts of Congress, and Magna Charta, and the common law, and all the rules of natural **[***137]** justice remain under foot, they will try American citizens according to what they call the laws of war.

But what do they mean by this? Do they mean that code of public law which defines the duties of two belligerent parties to one another, and regulates the intercourse of neutrals with both? If yes, then it is simply a recurrence to the law of nations, which has nothing to do with the subject. Do they mean that portion of our municipal code which defines our duties to the government in war as well as in peace? Then they are speaking of the Constitution and laws, which declare in plain words that the government owes every citizen a fair legal trial, as much as the citizen owes obedience to the government. When

they appeal to international law, it is silent; and when they interrogate the law of the land, the answer is a contradiction of their whole theory.

The Attorney-General conceives that all persons whom he and his associates choose to denounce for giving aid to the Rebellion, are to be treated as being themselves a part of the Rebellion, -- they are public enemies, and therefore they may be punished without being found guilty by a competent court or a jury. This convenient **[***138]** rule would outlaw every citizen the moment he is charged with a political offence. But political offenders are precisely the class of persons who most need the protection of a court and jury, for the prosecutions against them are most likely to be unfounded both in fact and in law. Whether innocent or guilty, to accuse is to convict them before the men who generally sit in military courts. But this court decided in the Prize Cases that all who live in the enemy's territory are public enemies, without regard to their personal sentiments or conduct; and the converse of the proposition is equally true, -- that all who reside inside of our own territory are to be treated as under the protection of the law.If they help the enemy they are criminals, but they cannot be punished without legal conviction.

You have heard much, and you will hear more, concerning the natural and inherent right of the government to defend itself without regard to law. This is fallacious. In a despotism the autocrat is unrestricted in the means he may use for the defence of his authority against the opposition of his own subjects or others; and that is what makes him a despot. But in a limited monarchy the **[***139]** prince must confine himself to a legal defence of his government. If he goes beyond that, and commits aggressions on the rights of the people, he breaks the social compact, releases his subjects from all their obligations to him, renders himself liable to be dragged to the block or driven into exile. A violation of law on pretence of saving such a government as ours is not self-preservation, but suicide.

Salus populi suprema lex. This is true; but it is the safety of the people, not the safety of the ruler, which is the supreme law. The maxim is revolutionary and expresses simply the right to resist tyranny without regard to prescribed forms. It can never be used to stretch the powers of government against the people.

But this government of ours has power to defend itself without violating its own laws; it does not carry the seeds of destruction in its own bosom. It is clothed from head to foot in a panoply of defensive armor. What are the perils which may threaten its existence? I am not able at this moment to think of more than these, which I am about to mention: foreign invasion, domestic insurrection, mutiny in the army and navy, corruption in the civil administration, **[***140]** and last, but not least, criminal violations of its laws committed by individuals among the body of the people. Have we not a legal mode of defence against all these? Military force repels invasion and suppresses insurrection; you preserve discipline in the army and navy by means of courts-martial; you preserve the purity of the civil administration by impeaching dishonest magistrates; and crimes are prevented and punished by the regular judicial authorities. You are not compelled to use these weapons against your enemies, merely because they and they only are justified by

the law; you ought to use them because they are more efficient than any other, and less liable to be abused.

There is another view of the subject which settles all controversy about it. No human being in this country can exercise any kind of public authority which is not conferred by law; and under the United States it must be given by the express words of a written statute. Whatever is not so given is withheld, and the exercise of it is positively prohibited. Courts-martial in the army and navy are authorized; they are legal institutions; their jurisdiction is limited, and their whole code of procedure is **[***141]** regulated by act of Congress. Upon the civil courts all the jurisdiction they have or can have is bestowed by law, and if one of them goes beyond what is written its action is ultra vires and void. But a military commission is not a court-martial, and it is not a civil court. It is not governed by the law which is made for either, and it has no law of its own. Its terrible authority is undefined, and its exercise is without any legal control. Undelegated power is always unlimited. The field that lies outside of the Constitution and laws has no boundary. So these commissions have no legal origin and no legal name by which they are known among the children of men; no law applies to them; and they exercise all power for the paradoxical reason that none belongs to them rightfully.

How is a military commission organized? What shall be the number and rank of its members? What offences come within its jurisdiction? What is its code of procedure?How shall witnesses be compelled to attend it? Is it perjury for a witness to swear falsely? What is the function of the judge-advocate? Does he tell the members how they must find, or does he only persuade them to convict? Is he the agent **[***142]** of the government, to command them what evidence they shall admit and what sentence they shall pronounce; or does he always carry his point, right or wrong, by the mere force of eloquence and ingenuity? What is the nature of their punishments? May they confiscate property and levy fines as well as imprison and kill? In addition to strangling their victim, may they also deny him the last consolations of religion, and refuse his family the melancholy privilege of giving him a decent grave?

To none of these questions can the Attorney-General or any one make a reply, for there is no law on the subject.

The power exercised through these military commissions is not only unregulated by law but it is incapable of being so regulated. It asserts the right of the executive government, without the intervention of the judiciary, to capture, imprison, and kill any person to whom that government or its paid dependents may choose to impute an offence. This, in its very essence, is despotic and lawless. It is never claimed or tolerated except by those governments which deny the restraints of all law. It operates in different ways; the instruments which it uses are not always the same; it **[***143]** hides its hideous features under many disguises; it assumes every variety of form. But in all its mutations of outward appearance it is still identical in principle, object, and origin. It is always the same great engine of despotism which Hamilton described it to be.

We cannot help but see that military commissions, if suffered to go on, will be used for

pernicious purposes. I have made no allusion to their history in the last five years. But what can be the meaning of an effort to maintain them among us? Certainly not to punish actual guilt. All the ends of true justice are attained by the prompt, speedy, impartial trial which the courts are bound to give. Is there any danger that crime will be winked upon by the judges? Does any body pretend that courts and juries have less ability to decide upon facts and law than the men who sit in military tribunals? What just purpose, then, can they serve? None.

But while they are powerless to do good, they may become omnipotent to trample upon innocence, to gag the truth, to silence patriotism, and crush the liberties of the country. They would be organized to convict, and the conviction would follow the accusation as surely as **[***144]** night follows the day. A government, of course, will accuse none before such a commission except those whom it predetermines to destroy. The accuser can choose the judges, and will select those who are known to be ignorant, unprincipled, and the most ready to do whatever may please the power which gives them pay and promotion. The willing witness could be found as easily as the superserviceable judge. The treacherous spy and the base informer would stock such a market with abundant perjury; for the authorities that employ them will be bound to protect as well as reward them. A corrupt and tyrannical government, with such an engine at its command, would shock the world with the enormity of its crimes.

ON THE SIDE OF THE UNITED STATES. REPLY.

Mr. Butler:

What are the exact facts set forth in the record, and what the exact question raised by it?

The facts of the case are all in the relator's petition and the exhibits thereto attached, and must, for the purposes of this hearing, be taken to be indisputably true; at least as against him. He is estopped to deny his own showing. Now every specification upon which the petitioner was tried by the military commission concludes **[***145]** with this averment: "This, on or about," &c., -- the different time and place as applied to the different parties -- "at or near Indianapolis, Indiana," or wherever else it may be, "a State within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy."

It may be said that these specifications are only the averments of the government against the relator. But they, in fact, are a part of the exhibits of the relator, upon which he seeks relief; are an integral part of the case presented by him, and cannot be controlled by the pretence set up on the other side, that the court should take judicial notice of the contrary. Judicial cognizance of a fact, by the court, as a matter of public notoriety, or of history, is only a mode of proof of the fact; but no proof can be heard, in behalf of the relator, in contradiction of the record.

Therefore, what we at the bar must discuss, and what the court must decide, is, what law

is applicable to a theatre of military operations, within the lines of an army, in a State which has been and constantly is threatened with invasion. **[***146]**

Yet a large portion of the argument on the other side has proceeded on an assumption which is itself a denial of the facts stated upon the record. The fact that military operations were being carried on in Indiana, at the places where these occurrences are said to have taken place, is a question that opposite counsel desire to argue, and desire farther that the court should take judicial notice that the fact was not as stated by the record.

Is the question, then, before this court, one of law or of fact? The matter becomes exceedingly important. We do freely agree, that if at the time of these occurrences there were no military operations in Indiana, if there was no army there, if there was no necessity of armed forces there, if there was no need of a military commission there, if there was nothing there on which the war power of the United States could attach itself, then this commission had no jurisdiction to deal with the relator, and the question proposed may as well at once be answered in the negative. What, then, is the state of facts brought here by the record? For, whatever question may have divided the learned judges in the court below, we here at the bar are divided **[***147]** toto coelo upon a vital question of fact. If the facts are to be assumed as the record presents them, then much of the argument of the other side has been misapplied.

The facts of record should have been questioned, if at all, in the court below. If the fact, stated in the record, of war on the theatre of these events -- which in our judgment is a fact conclusive upon the jurisdiction of the military commission -- is not admitted, then it is of the greatest importance to the cause that it be ascertained. If that fact was questioned below, some measures should have been taken to ascertain it, before the certificate of division of opinion was sent up. Otherwise the Circuit Court, in defiance of settled practice, and also of the act of 1802, has sent up a case in which material facts are not stated, and there is no jurisdiction under the act to hear. n48 Certainly we at the bar seem to be arguing upon different cases; the one side on the assumption that the acts of Milligan and his trial took place in the midst of a community whose social and legal organization had never been disturbed by any war at all, the other on the assumption that they took place in a theatre of military **[***148]** operations, within the lines of the army, in a State which had been and then was threatened with invasion.

n48 See remarks of Mr. Stanbery, supra, p. 12.

But the very form of question submitted, "whether upon the facts stated in the petition and exhibits, the military commission had jurisdiction to try the several relators in manner and form as set forth;" -- not upon any other facts of which the court or anybody else will take notice, or which can be brought to the court in any other way than upon the petition and exhibits, -- is conclusive as to the facts or case upon which the argument arises. The question, we therefore repeat -- and we pray the court to keep it always in

mind -- is whether upon the facts stated in the petition and exhibit, the commission had jurisdiction; and the great and determining fact stated, and without which we have no standing in court, is that these acts of Milligan and his felonious associates, took place in the theatre of military operations, within the lines of the army, in a State which had been and then was constantly threatened with invasion. Certainly the learned judges in the court below, being on the ground, were bound to take notice **[***149]** of the facts which then existed in Indiana, and if they were not as alleged in the petition and exhibits, ought to have spread them as they truly were upon the record. Then they would have certified the question to be, whether under that state of facts so known by them, and spread upon the record, the military commission had jurisdiction, and not as they have certified, that the question was whether they had jurisdiction on the state of facts set forth in the relator's petition and exhibits.

The strength of the opposing argument is, that this court is bound to know that the courts of justice in Indiana were open at the time when these occurrences are alleged to have happened. Where is the proper allegation to this effect upon the record, upon which this court is to judge? If the court takes judicial notice that the courts were open, must it not also take judicial notice how, and by whose protection, and by whose permission they were so open? that they were open because the strong arm of the military upheld them; because by that power these Sons of Liberty and Knights of the American Circle, who would have driven them away, were arrested, staid, and punished. If judicial notice **[***150]** is to be taken of the one fact, judicial notice must be taken of the other also; -- of the fact, namely, that if the soldiers of the United States, by their arms, had not held the State from intestine domestic foes within, and the attacks of traitors leagued with such without; had not kept the ten thousand rebel prisoners of war confined in the neighborhood from being released by these knights and men of the Order of the Sons of Liberty; there would have been no courts in Indiana, no place in which the Circuit Judge of the United States could sit in peace to administer the law.

If, however, this court will take notice that justice could only be administered in Indiana because of the immediate protection of the bayonet, and therefore by the permission of the commander of her armed forces, to which the safety of the State, its citizens, courts, and homes were committed, then the court will have taken notice of the precise state of facts as to the existence of warlike operations in Indiana, which is spread upon the record, and we are content with the necessary inferences.

As respects precedents. I admit that there is a dearth of precedents bearing on the exact point raised here. Why **[***151]** is this? It is because the facts are unprecedented; because the war out of which they grew is unprecedented also; because the clemency that did not at once strike down armed traitors, who in peaceful communities were seeking to overturn all authority, is equally unprecedented; because the necessity which called forth this exertion of the reserved powers of the government is unpredecented, as well as all the rest. Let opposing counsel show the instance in an enlightened age, in a civilized and Christian country, where almost one-half its citizens undertook, without cause, to overthrow the government, and where coward sympathizers, not daring to join them, plotted in the security given by the protecting arms of the other half to aid such rebellion

and treason, and we will perhaps show a precedent for hanging such traitors by military commissions.

This is the value of this case: whenever we are thrown into a war again; whenever, hereafter, we have to defend the life of the nation from dangers which invade it, we shall have set precedents how a nation may preserve itself from self-destruction. In the conduct of the war, and in dealing with the troubles which preceded it, we have been **[***152]** obliged to learn up to these questions; to approach the result step by step.

Opposite counsel (Mr. Black) has admitted that there were dangers which might threaten the life of the nation, and in that case it would be the duty of the nation, and it would be its right, to defend itself. He classed those dangers thus: first, foreign invasion; second, domestic insurrection; third, mutiny in the army and navy; fourth, corruption in civil administration; and last, crimes committed by individuals; and he says further, there were within the Constitution powers sufficient to enable the country to defend itself from each and all these dangers. But there is yet another, a more perilous danger, one from which this country came nearer ruin than it ever came by any or by all others. That danger is imbecility of administration; such an administration as should say that there is no constitutional right in a State to go out of the Union, but that there is no power in the Constitution to coerce a State or her people, if she choose to go out. It is in getting rid of that danger, unenumerated, that we have had to use military power, military orders, martial law, and military commissions.

The same **[***153]** counsel was pleased to put certain questions, difficult as he thinks to be answered, as to the method of proceeding before military commissions; but no suggestion is made upon the record or upon the briefs, that all the proceedings were not regular according to the custom and usages of war. They have all the indicia of regularity. There being then nothing alleged why the proceedings are not regular, we are brought back to the main question.

A portion of the argument on the other side has proceeded upon the mistake, that a military commission is a court, either under, by virtue of, or without the Constitution. It is not a court, and that question was decided not long ago.A military commission, whatever it may be, derives its power and authority wholly from martial law, and by that law, and by military authority only, are its proceedings to be adjudged and reviewed. In Dynes v. Hoover, n49 this was decided by this tribunal in regard to a court-martial. The conclusion was sustained in Ex parte Vallandigham. n50

n49 20 Howard, 781.

n50 1 Wallace, 243.

The last quoted case is like the present. Vallandigham was tried by a military commission, and he invoked the aid of the **[***154]** court to get away from it. Why

did not this court then decide, as opposing counsel assert the law to be, that under no possible circumstances can a military commission have any right, power, authority, or jurisdiction? No such decision was made.It was decided that a military commission "is not a court within the meaning of the 14th section of the act of 1789:" that this court has no power to issue a writ of certiorari, or to review or pronounce any opinion upon the proceedings of a military commission; that affirmative words in the Constitution, giving this court original jurisdiction in certain cases must be construed negatively as to all others. Mr. Justice Wayne, in delivering the opinion of the court, says:

In Ex parte Metzger n51 it was "determined that a writ of certiorari could not be allowed to examine a commitment by a district judge, under the treaty between the United States and France, for the reason that the judge exercised a special authority, and that no provision had been made for the revision of his judgment. So does a court of military commission exercise a special authority. In the case before us, it was urged that the decision in Metzger's case had been made **[***155]** upon the ground that the proceeding of the district judge was not judicial in its character, but that the proceedings of the military commission were so; and further, it was said that the ruling in that case had been overruled by a majority of the judges in Raine's case. There is a misapprehension of the report of the latter case, and as to the judicial character of the proceedings of the military commission, we cite what was said by this court in the case of The United States v. Ferreira. n52

"The powers conferred by Congress upon the district judge and the secretary are judicial in their nature, for judgment and discretion must be exercised by both of them; but it is not judicial in either case, in the sense in which judicial power is granted to the courts of the United States. Nor can it be said that the authority to be exercised by a military commission is judicial in that sense. It involves discretion to examine, to decide, and sentence, but there is no original jurisdiction in the Supreme Court to issue a writ of habeas corpus ad subjiciendum, to review or reverse its proceedings, or the writ of certiorari to revise the proceedings of a military commission."

n51 5 Howard, 176.

n52 13 Id. 48. **[***156]**

Under such language there is an end of this case.

We have already stated that military commissions obtain their jurisdiction from martial law. What, then, is martial law? We have also already defined it. n53 But our definition has not been observed. Counsel treat it as if we would set up the absolutely unregulated, arbitrary, and unjust caprice of a commanding and despotic officer. Let us restate and analyze it. "Martial law is the will of the commanding officer of an armed force or of a geographical military department, expressed in time of war, within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged

by the orders of his military or supreme executive chief." This definition is substantially taken from the despatches of the Duke of Wellington. When he was called upon to answer a complaint in Parliament for this exercise of military jurisdiction and martial law in Spain, he thus defined it. n54 On another occasion, when speaking of Viscount Torrington's administration as military governor of Ceylon, he said thus:

"The general who declared martial law, and commanded that it should be carried into execution, was **[***157]** bound to lay down distinctly the rules, and regulations, and limits according to which his will was to be carried out. Now he had, in another country, carried on martial law; that was to say, he had governed a large proportion of the population of a country, by his own will. But, then, what did he do? He declared that the country should be governed according to its own national laws, and he carried into execution that will. He governed the country strictly by the laws of the country; and he governed it with such moderation, he must say, that political servants and judges, who at first had fled or had been expelled, afterwards consented to act under his direction. The judges sat in the courts of law, conducting their judicial business and administering the law under his direction."

n53 Supra, p. 14.

n54 Hansard's Parliamentary Debates, 3d Series, vol. 14, p. 879; and ses, also, Opinions of the Attorneys-General, vol. 8, p. 366.

It is the will of the commanding officer. Being to be exercised upon the instant, it can have no other source. The commanding officer of an armed force, is another element of the definition.

Martial law must have another distinguishing quality. **[***158]** It must be the will of the commander, exercised under the limitations mentioned in time of war, and that is a portion of the definition which is fatal to the authorities read by my brother Garfield, as I shall show.

When is it to be exercised? "When necessity demands and prudence dictates." That is to say, in carrying on war, when in the judgment of him to whom the country has intrusted its welfare -- whose single word, as commander of the army, can devote to death thousands of its bravest and best sons -- we give to him, when necessity demands, the discretion to govern, outside of the ordinary forms and constitutional limits of law, the wicked and disloyal within the military lines.

In time of war, to save the country's life, you send forth your brothers, your sons, and put them under the command, under the arbitrary will of a general to dispose of their persons and lives as he pleases; but if, for the same purpose, he touches a Milligan, a Son of Liberty, the Constitution is invoked in his behalf -- and we are told that the fabric of civil government is about to fall! We submit that if he is intrusted with the power, the will, the

authority to act in the one case, he ought to **[***159]** have sufficient discretion to deal with the other; and that the country will not be so much endangered from the use of both, as it would be if he used the first and not the last.

Martial law is known to our laws; it is constitutional, and was derived from our mother country. De Lolme says: n55

"In general, it may be laid down as a maxim, that, where the sovereign looks to his army for the security of his person and authority, the same military laws by which this army is kept together, must be extended over the whole nation; not in regard to military duties and exercises, but certainly in regard to all that relates to the respect due to the sovereign and to his orders."

"The martial law, concerning these tender points, must be universal. The jealous regulations, concerning mutiny and contempt of orders, cannot be severely enforced on that part of the nation which secures the subjection of the rest, and enforced, too, through the whole scale of military subordination, from the soldier to the officer, up to the very head of the military system, while the more numerous and inferior part of the people are left to enjoy an unrestrained freedom; -- that secret disposition which prompts **[***160]** mankind to resist and counteract their superiors, cannot be surrounded by such formidable checks on one side, and be left to be indulged to a degree of licentiousness and wantonness on the other."

n55 De Lolme, Stephens' ed. of 1838, p. 972.

Passing from one of the most learned commentators upon England's Constitution, to one who may be said to have lived our Constitution; who came into life almost as the Constitution came into life; whose father was the second chief executive officer of the nation; conversant with public affairs and executing constitutional law in every department of the government from earliest youth, wielding himself chief executive power, and admitted to be one of the ablest constitutional lawyers of his time -- what principles do we find asserted?

Mr. John Quincy Adams, speaking of the effect of war upon the municipal institutions of a country, said: n56

"Slavery was abolished in Columbia, first, by the Spanish General Morillo, and, secondly, by the American General Bolivar. It was abolished by virtue of a military command given at the head of the army, and the abolition continues to be law to this day. It was abolished by the laws of war, and not **[***161]** by municipal enactments; the power was exercised by military commanders, under instructions, of course, from their respective governments. And here I recur again to the examples of General Jackson. What are you now about in Congress? You are about passing a grant to refund to General Jackson the amount of a certain fine imposed upon him by a judge, under the laws of the

State of Louisiana. You are going to refund him the money, with interest; and this you are going to do because the imposition of the fine was unjust. Because General Jackson was acting under the laws of war, and because the moment you place a military commander in a district which is the theatre of war, the laws of war apply to that district."

. . . . "I might furnish a thousand proofs to show that the pretensions of gentlemen to the sanctity of their municipal institutions under a state of actual invasion and of actual war, whether servile, civil, or foreign, is wholly unfounded, and that the laws of war do, in all such cases, take the precedence."

"I lay this down as the law of nations. I say that the military authority takes for the time the place of all municipal institutions, and slavery among the rest; **[***162]** and that, under that state of things, so far from its being true that the States where slavery exists have the exclusive management of the subject, not only the President of the United States, but the commander of the army has power to order the universal emancipation of the slaves. I have given here more in detail a principle, which I have asserted on this floor before now, and of which I have no more doubt, than that you, sir, occupy that chair. I give it in its development, in order that any gentleman, from any part of the Union, may, if he thinks proper, deny the truth of the position, and may maintain his denial; not by indignation, not by passion and fury, but by sound and sober reasoning from the laws of nations and laws of war. And if my position can be answered and refuted, I shall receive the refutation with pleasure; I shall be glad to listen to reason, aside, as I say, from indignation and passion. And if, by force of reasoning, my understanding can be convinced, I here pledge myself to recant what I have asserted."

n56 A.D. 1842. Records and Speeches, p. 34.

The case of General Jackson's fine was the test case of martial law in this country. What were the **[***163]** facts? On the 15th of December, 1814, General Jackson declared martial law within his camp, extending four miles above and four miles below the city. The press murmured, but did not speak out until after there came unofficial news of peace. Then it was said that the declaration of peace, ipso facto, dissolved martial law; that the General had no right to maintain martial law any longer; and murmurs loudly increased. But, the General said, that he had not received any official news of the establishment of peace; and, until it came officially, he should not cease his military operations for safety of the city. Thereupon what happened? One Louallier was arrested by the military, for alleged seditious language, and Judge Hall interposed with his writ of habeas corpus. This was on the 5th of March, 1815. The battle of New Orleans, which substantially removed all danger, was fought on the 8th of January. General Jackson sent his aide-de-camp and arrested Judge Hall. The cry then as now was that the necessity for martial law had ceased; why hold Judge Hall, after the news of peace had come? Why not turn him over to the civil authorities? What next took place? Peace was declared **[***164]** in an official manner; the proclamation of martial law was withdrawn; Judge Hall took his seat on the bench, and his first act was to issue an

attachment of contempt for General Jackson, who was accordingly brought before him. When General Jackson offered an explanation of his conduct, the Judge refused to receive it, and fined him $1000. The fine was paid in submission to the law.Years afterwards, Congress proceeded not to excuse, not to explain away that act of General Jackson, declaring martial law, but to justify it.I am surprised to hear it said that nobody justified General Jackson. Whether General Jackson was to be excused or to be justified was the whole question at issue between the parties in Congress. A bill was brought in "to indemnify Major-General Andrew Jackson for damages sustained in the discharge of his official duty:" Some who were in the Senate of that day, said: "We will not justify, we will excuse, this action in General Jackson; we move, therefore, to change the title of the bill into a 'bill for the relief of General Jackson.'" But Mr. R. J. Walker, speaking for General Jackson, made a minority report, in which he put the whole question upon the ground of **[***165]** justification. n57

n57 Benton's Condensed Debates, vol. 14, p. 641.

He said:

"That General Jackson, and those united with him in the defence of New Orleans, fully believed this emergency to exist, is beyond all doubt or controversy. If, then, this was the state of the case, it was the duty of General Jackson to have made the arrest; and the act was not merely excusable but justifiable. It was demanded by a great and overruling necessity. . . This great law of necessity -- of defence of self, of home, and of country -- never was designed to be abrogated by any statute, or by any constitution. This was the law which justified the arrest and detention of the prisoner; and, however the act may now be assailed, it has long since received the cordial approbation of the American people. That General Jackson never desired to elevate the military above the civil authority is proved by his conduct during the trial, and after the imposition of this fine."

"The title of the bill is in strict conformity with the facts of the case, and, in the opinion of the undersigned, should be retained. The country demands that his money shall be returned as an act of justice. It was a penalty **[***166]** incurred for saving the country, and the country requires that it shall be restored."

The fine was returned with interest.

The case of Johnson v. Duncan, in the Supreme Court of Louisiana, and cited on the other side, was decided by judges sitting under the excitement of the collision between the military and the judges. As an authority it is of no value. The case of Luther v. Borden, in which Mr. Justice Woodbury's dissenting opinion, strange to say, has been cited by my brother Garfield against the opinion of the court, decides that martial law did obtain in Rhode Island and sustains General Jackson.

The court say:

"If the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one, who from the information before them, they **[***167]** had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed."

We have put in our definition of martial law the words, "in time of war," tempore belli. That portion of the definition answers every question, as to when this law may obtain.

Now what was the Earl of Lancaster's case, quoted and so much relied on by the other side? The earl raised a rebellion; and was condemned and executed by sentence of a court-martial, after the rebellion had been subdued. Thereupon his brother brought a writ of error, by leave of the king, before the king himself in Parliament, for the purpose of reversing the judgment and obtaining his lands, and among the errors assigned, was this:

"Yet the said Earl Thomas, &c., was taken in time of peace, and brought before the king himself; and the said our lord and father the king, &c., remembered that the same Thomas was guilty of the seditions and other felonies in the aforesaid contained; without this, that he arraigned him therefor, or put him to answer as is the custom according to the law, &c., and thus, **[***168]** without arraignment and answer, the same Thomas, of error and contrary to the law of the land, was in time of peace adjudged to death, notwithstanding that it is notorious and manifest that the whole time in which the said misdeeds and crimes contained in the said record and proceedings were charged against the said earl, and also the time in which he was taken, and in which our said lord and father the king remembered him to be guilty, &c., and in which he was adjudged to death, was a time of peace, and the more especially as throughout the whole time, aforesaid, the Chancery and other courts of pleas of our lord the king were open, and in which right was done to every man, as it used to be; nor did the same lord the king in that time ever side with standard unfurled; the said lord and father the king, &c., in such time of peace ought not against the same earl, thus to have remembered nor to have adjudged him to death, without arraignment and answer."

So that the whole record turned upon the question whether the rebellion being ended, peace having come, the Earl of Lancaster was liable to be adjudged by military commission in time of peace, and it was held that that was against **[***169]** common right.

The Petition of Right is referred to; but it was not, as is supposed, because of the ship-money and the trial of Hampden and others, that this great petition was passed. It was because King Charles had quartered in the town of Plymouth, and in the County of

Devon, certain soldiers in time of peace, upon the inhabitants thereof; and had issued his commission that those counties should be governed by "martial law," while the soldiers, in time of peace, were quartered there, and therefore came the Petition cited; and it was adjudged that military commissions, issued in time of peace, should never have place in the law of England; and all the people to that, even to this day, heartily agree. n58

n58 Hale's Pleas of the Crown, 42.

Governor Wall's case shows truly that martial law did not protect him for his action under it; but if there ever was a judicial murder, a case where a man, without cause and without right, was put to death, this was the case. Lord Chief Justice Campbell, speaking of it, says: n59

"The prosecution brought great popularity to the Attorney General and the government of which he was the organ, upon the supposition that it presented a striking **[***170]** display of the stern impartiality of British jurisprudence; but after a calm review of the evidence, I fear it will rather be considered by posterity as an instance of the triumph of vulgar prejudice over humanity and justice."

n59 Lives of the Chief Justices; Life of Ellenborough.

Another case cited is that of the Rev. John Smith, of Demerara, who was tried and convicted by a court-martial, for inciting negroes to mutiny in Demerara, six weeks after a rebellion was wholly quelled, and when there seems to have been no necessity for such proceedings, nor any reason that they should be carried on. The excuse of the governor was, that the planters were so infuriated against Mr. Smith that he thought that trying him by court-martial would secure him better justice. I agree that this was no excuse, that no necessity here existed. Brougham and Mackintosh brought all their eloquence to overturn martial law. Their words have been cited; but the other side forgot to state that upon a division of the House of Commons, Brougham and Mackintosh were in a minority of forty-six. So that after a deliberate argument of many days, the great final tribunal of English justice decided that **[***171]** Mr. John Smith's case was rightly tried under martial law.The case is an authority not for, but against, the side which it is cited to support.

It is said that in 1865, Congress refused to pass an act which would throw any discredit on military commissions, or limit their action wherever a rebel or a traitor, secret or open, was to be found upon whom their jurisdiction should operate. If such tribunals for certain purposes were not lawful in the judgment of the House of Representatives; if military commissions had no place in the laws of the land, why the necessity of action by Congress to repeal them?

Reference has been made by opposing counsel to what they consider the views of General Washington; and an argument has been attempted to be drawn from this. Now, the first military commission upon this continent of which there is any record sat by command of Washington himself. Its proceedings were published by order of Congress, and are well known. I refer to Andre's case. That was not a "court-martial;" there was no order to adjudicate; no finding; no sentence; only a report of facts to General Washington, and then Washington issued the order, in virtue of his authority as **[***172]** commander-in-chief, which condemned Andre to death.

But we do not stop there. This may be said to have been the exceptional case of a spy.To give, then, another illustration of what Washington thought of the rights of military commanders in the field, attention may be directed to the trial of Joshua Hett Smith. Smith was the man at whose house Arnold and Andre met. He was taken and tried by a military court for treasonable practices. The civil courts were open at Tarrytown, at that time; the British Constitution as adopted by our colonial fathers extended over him, but still Washington tried Smith by a military court. In Chandler's Criminal Trials, n60 Smith gives an account of his interview, when he was first brought before Washington, which I cite in order that the court may understand how the Father of his Country regarded the extent of his powers as military commander. Smith says:

"After as much time had elapsed as I supposed was thought necessary to give me rest from my march, I was conducted into a room, where were standing General Washington in the centre, and on each side General Knox and the Marquis de La Fayette, with Washington's two aides-de-camp, Colonels Harrison **[***173]** and Hamilton.Provoked at the usage I received, I addressed General Washington, and demanded to know for what cause I was brought before him in so ignominious a manner? The General answered, sternly, that I stood before him charged with the blackest treason against the citizens of the United States; that he was authorized, from the evidence in his possession, and from the authority vested in him by Congress, to hang me immediately as a traitor, and that nothing could save me but a candid confession who in the army, or among the citizens at large, were my accomplices in the horrid and nefarious designs I had meditated for the last ten days past."

n60 Vol. 2, p. 248.

What now, may I ask, is to be thought of the argument of my opposing brethren, who assert that in civil courts the Constitution does not allow any pressure to be brought upon a man to make him confess, at the same time that they eulogize the military conduct of Washington?

But what redress, it is asked, shall any citizen have if this power -- so great, so terrible, and so quick in its effects -- is abused? The same and only remedy that he can have whenever power is abused. If that power, under martial law, is **[***174]** used for personal objects of aggrandizement, or revenge; of imprisoning, one hour, any citizen,

except when necessity under fair judgment demands, he ought to have an appeal to the courts of the country after peace, for redress of grievance.

It has been said that martial law, and its execution by trials by military commission, is fatal to liberty and the pursuit of happiness; but we are only asking for the exercise of military power, when necessity demands and prudence dictates. If the civil law fails to preserve rights, and to insure safety and tranquillity to the country; if there is no intervention of military power to right wrongs and punish crime, an outraged community will improvise some tribunal for themselves, whose execution shall be as swift and whose punishments shall be as terrible as any exhibition of military power; some tribunal wholly unregulated and which is responsible to no one. We are not without such examples on this continent.

The prochamation of 24th September, 1862, n61 by which the President suspended the privilege of the writ of habeas corpus, and which proclamation was in full force during these proceedings, was within the power of the President, independently **[***175]** of the subsequent act of Congress, to make. Brown v. The United States n62 seems full on this point. It says:

"When the legislative authority, to whom the right to declare war is confined, has declared war in its most unlimited manner, the executive authority, to whom the execution of the war is confided, is bound to carry it into effect. He has a discretion vested in him, as to the manner and extent, but he cannot lawfully transcend the rules of warfare established among civilized nations.He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims. The sovereignty, as to declaring war and limiting its effects, rests with the legislature. The sovereignty as to its execution rests with the President."

n61 See supra, pp. 15-16.

n62 8 Cranch, 153.

However, the subsequent act of Congress n63 did ratify what the President did; so that every way the view taken of his powers in the case just quoted stands firm.

n63 See supra, p. 4.

And the wisdom of this view appears nowhere more than in the present case. The court, of course, can have no knowledge how extensive was this "Order of Sons of Liberty;" how extensive **[***176]** was the organization of these American Knights in Indiana. It was a secret Order. Its vast extent was not known generally. But the Executive might have known; and if I might step out of the record, I could say that I am aware that he did

know, that this Order professed to have one hundred thousand men enrolled in it in the States of Indiana, Ohio, and Illinois, so that no jury could be found to pass upon any case, and that any courthouse wherein it had been attempted to try any of the conspirators, would have been destroyed. The President has judged that in this exigency a military tribunal alone could safely act.

We have thus far grounded our case on the great law of nations and of war. Has the Constitution any restraining clause on the power thus derived?

It is argued that the fourth, fifth, and sixth articles to the amendments to the Constitution are limitations of the war-making power; that they were made for a state of war as well as a state of peace, and aimed at the military authority as well as the civil. We have anticipated and partially answered this argument. n64 As we observed, by the Constitution, as originally adopted, there was no limitation put upon the war-making **[***177]** powers. It only undertook to limit one incident of the war-making power, -- the habeas corpus; and if limit it can be called, observe the way in which that writ is guarded. It is provided that the writ of habeas corpus, in time of peace, shall not be suspended; it shall only be suspended when, "in case of rebellion or invasion, the public safety requires;" that is, in time of war. It seems to have been taken for granted by the Constitution that the writ is to be suspended in time of war because very different rules must then govern. The language of the Constitution is, that it "shall not be suspended except," -- showing that it was supposed that the war-making power would find it necessary to suspend the habeas corpus; and yet no other guard was thrown around it.

n64 See supra, pp. 20-21.

By the subsequent amendments there was, as we conceive, but one limitation put upon the war-making power, and that was in regard to the quartering of soldiers in private houses.

In no discussion upon these articles of amendment was there, in any State of the Union, a discussion upon the question, what should be their effect in time of war? Yet every one knew, and must have known, that **[***178]** each article would be inoperative in some cases in time of war. If in some cases, why not in all cases where necessity demands it, and where prudence dictates?

There is, in truth, no other way of construing constitutional provisions, than by the maxim, Singula singulis reddenda. Each provision of the Constitution must be taken to refer to the proper time, as to peace or war, in which it operates, as well as to the proper subject of its provisions.

For instance, the Constitution provides that "no person" shall be deprived of liberty without due process of law. And yet, as we know, whole generations of people in this land -- as many as four millions of them at one time -- people described in the

Constitution by this same word, "persons," have been till lately deprived of liberty ever since the adoption of the Constitution, without any process of law whatever.

The Constitution provides, also, that no "person's" right to bear arms shall be infringed; yet these same people, described elsewhere in the Constitution as "persons," have been deprived of their arms whenever they had them.

If you are going to stand on that letter of the Constitution which is set up by the opposite side **[***179]** in the matter before us, how are we to explain such features in the Constitution, in various provisions in which slaves are called persons, with nothing in the language used to distinguish them from persons who were free.

Mr. Black has said, that the very time when a constitutional provision is wanted, is the time of war, and that in time of war, of civil war especially, and the commotions just before and just after it, the constitutional provisions should be most rigidly enforced. We agree to that; but we assert that, in peace, when there is no commotion, the constitutional provisions should be most rigidly enforced as well. Constitutional provisions, within their application, should be always most rigidly enforced. We do not ask anything outside of or beyond the Constitution. We insist only that the Constitution be interpreted so as to save the nation, and not to let it perish.

We quote again the solemnly expressed opinion of Mr. Adams, in 1836, in another of his speeches:

"In the authority given to Congress by the Constitution of the United States to declare war, all the powers, incident to war, are by necessary implication conferred upon the government of the United States. **[***180]** Now, the powers incidental to was are derived, not from any internal, municipal source, but from the laws and usages of nations. There are, then, in the authority of Congress and the Executive, two classes of powers, altogether different in their nature, and often incompatible with each other, -- the war power and the peace power. The peace power is limited by regulation and restraints, by provisions prescribed within the Constitution itself. The war power is limited only by the law and usages of nations. The power is tremendous. It is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, property, and life."

It is much insisted on, that the determining question as to the exercise of martial law, is whether the civil courts are in session; but civil courts were in session in this city during the whole of the Rebellion, and yet this city has been nearly the whole time under the martial law. There was martial law in this city, when, in 1864, the rebel chief, Jubal Early, was assaulting it, and when, if this court had been sitting here, it would have been disturbed by the enemy's cannon. Yet courts -- ordinary courts -- **[***181]** were in session. It does not follow, because the ordinary police machinery is in motion for the repression of ordinary crimes, because the rights between party and party are determined without the active interference of the military in cases where their safety and rights are not involved, that, therefore, martial law must have lost its power.

This exercise of civil power is, however, wholly permissive, and is subordinated to the military power. And whether it is to be exercised or not, is a matter within the discretion of the commander. That is laid down by Wellington, n65 and the same thing is to be found in nearly every instance of the exercise of martial law. The commanders of armies, in such exercise, have been glad, if by possibility they could do so, to have the courts carry on the ordinary operations of justice. But they rarely permit to them jurisdiction over crimes affecting the well-being of the army or the safety of the state.

n65 See supra, p. 91-2.

The determining test is, in the phrase of the old law-books, that "the King's courts are open." But the King's Court, using that phrase for the highest court in the land, should not be open under the permission **[***182]** of martial law. In a constitutional government like ours, the Supreme Court should sit within its own jurisdiction, as one of the three great co-ordinate powers of the government, supreme, untrammelled, uncontrolled, unawed, unswayed, and its decrees should be executed by its own high fiat. The Supreme Court has no superior, and, therefore, it is beneath the office of a judge of that court, inconsistent with the dignity of the tribunal whose robes he wears, that he should sit in any district of country where martial law is the supreme law of the state, and where armed guards protect public tranquillity; where the bayonet has the place of the constable's baton; where the press is restrained by military power, and where a general order construes a statute. On the contrary, we submit that all crimes and misdemeanors, of however high a character, which have occurred during the progress and as a part of the war, however great the criminals, either civil or military, should be tried upon the scene of the offence, and within the theatre of military operations; that justice should be meted out in such cases, by military commissions, through the strong arm of the military law which the offenders **[***183]** have invoked, and to which they have appealed to settle their rights.

We do not desire to exalt the martial above the civil law, or to substitute the necessarily despotic rule of the one, for the mild and healthy restraints of the other. Far otherwise. We demand only, that when the law is silent; when justice is overthrown; when the life of the nation is threatened by foreign foes that league, and wait, and watch without, to unite with domestic foes within, who had seized almost half the territory, and more than half the resources of the government, at the beginning; when the capital is imperilled; when the traitor within plots to bring into its peaceful communities the braver rebel who fights without; when the judge is deposed; when the juries are dispersed; when the sheriff, the executive officer of law, is powerless; when the bayonet is called in as the final arbiter; when on its armed forces the government must rely for all it has of power, authority, and dignity; when the citizen has to look to the same source for everything he has of right in the present, or hope in the future, -- then we ask that martial law may prevail, so that the civil law may again live, to the end that **[***184]** this may be a "government of laws and not of men."

At the close of the last term the CHIEF JUSTICE announced the order of the court in this and in two other similar cases (those of Bowles and Horsey) as follows:

1. That on the facts stated in said petition and exhibits a writ of hebeas corpus ought to be issued, according to the prayer of the said petitioner.

2. That on the facts stated in the said petition and exhibits the said Milligan ought to be discharged from custody as in said petition is prayed, according to the act of Congress passed March 3d, 1863, entitled, "An act relating to habeas corpus and regulating judicial proceedings in certain cases."

3. That on the facts stated in said petition and exhibits, the military commission mentioned therein had no jurisdiction legally to try and sentence said Milligan in the manner and form as in said petition and exhibits are stated.

At the opening of the present term, opinions were delivered.

OPINIONBY: DAVIS

OPINION: **[*107]** **[**291]** Mr. Justice DAVIS delivered the opinion of the court.

On the 10th day of May, 1865, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of **[***185]** Indiana, to be discharged from an alleged unlawful imprisonment. The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been in the military or naval service of the United States. On the 5th day of October, 1864, while at home, he was arrested by order of General Alvin P. Hovey, commanding the military district of Indiana; and has ever since been kept in close confinement.

On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, tried on certain charges and specifications; found guilty, and sentenced to be hanged; and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

On the 2d day of January, 1865, after the proceedings of the military commission were at an end, the Circuit Court of the United States for Indiana met at Indianapolis and empanelled a grand jury, who were charged to inquire **[*108]** whether the laws of the United States had been violated; and, if so, to make presentments. The court adjourned on the 27th day of January, having, **[***186]** prior thereto, discharged from further service the grand jury, who did not find any bill of indictment or make any presentment against Milligan for any offence whatever; and, in fact, since his imprisonment, no bill of indictment has been found or presentment made against him by any grand jury of the United States.

Milligan insists that said military commission had no jurisdiction to try him upon the charges preferred, or upon any charges whatever; because he was a citizen of the United States and the State of Indians, and had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

The prayer of the petition was, that under the act of Congress, approved March 3d, 1863, entitled, "An act relating to habeas corpus and regulating judicial proceedings in certain cases," he may be brought before the court, and either turned over to the proper civil tribunal to be proceeded against according to the law of the land or discharged from custody altogether.

With the petition were filed the order for the commission, **[***187]** the charges and specifications, the findings of the court, with the order of the War Department reciting that the sentence was approved by the President of the United States, and directing that it be carried into execution without delay. The petition was presented and filed in open court by the counsel for Milligan; at the same time the District Attorney of the United States for Indiana appeared, and, by the agreement of counsel, the application was submitted to the court. The opinions of the judges of the Circuit Court were opposed on three questions, which are certified to the Supreme Court:

1st. "On the facts stated in said petition and exhibits, ought a writ of habeas corpus to be issued?"

[*109] 2d. "On the facts stated in said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody as in said petition prayed?"

3d. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?"

The importance of the main question presented by this record cannot be overstated; for it **[***188]** involves the very framework of the government **[**292]** and the fundamental principles of American liberty.

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.

But, we are met with a preliminary objection. It is insisted that the Circuit Court of

Indiana had no authority to certify these questions; and that we are without jurisdiction to hear and determine them.

HN1 The sixth section of the "Act to amend the judicial system of the United States," approved April 29, 1802, declares "that whenever any question shall occur before a Circuit Court upon which the opinions of the judges **[***189]** shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court at their next session to be held thereafter; and shall by the said court be finally decision: And the decision of the **[*110]** Supreme Court and their order in the premises shall be remitted to the Circuit Court and be there entered of record, and shall have effect according to the nature of the said judgment and order: Provided, That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

It is under this provision of law, that HN2 a Circuit Court has authority to certify any question to the Supreme Court for adjudication. The inquiry, therefore, is, whether the case of Milligan is brought within its terms.

It was admitted at the bar that the Circuit Court had jurisdiction to entertain the application for the writ of habeas corpus and to hear and determine it; and it could not be denied; for the power is expressly given **[***190]** in the 14th section of the Judiciary Act of 1789, as well as in the later act of 1863. Chief Justice Marshall, in Bollman's case, n66 construed this branch of the Judiciary Act to authorize the courts as well as the judges to issue the writ for the purpose of inquiring into the cause of the commitment; and this construction has never been departed from. But, it is maintained with earnestness and ability, that a certificate of division of opinion can occur only in a cause; and, that the proceeding by a party, moving for a writ of habeas corpus, does not become a cause until after the writ has been issued and a return mane.

n66 4 Cranch, 75.

Independently of the provisions of the act of Congress of March 3, 1863, relating to habeas corpus, on which the petitioner bases his claim for relief, and which we will presently consider, can this position be sustained?

It is true, that HN3 it is usual for a court, on application for a writ of habeas corpus, to issue the writ, and, on the return, to dispose of the case; but the court can elect to waive the issuing of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged. **[***191]** One of the very points on which the case of Tobias Watkins, reported in 3 Peters, n67 turned, was, **[*111]** whether, if the writ was issued, the petitioner would be remanded upon the case which he had made.

n67 Page 193.

The Chief Justice, in delivering the opinion of the court, said: HN4 "The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded if the court is satisfied that the prisoner would be remanded to prison."

The judges of the Circuit Court of Indiana were, therefore, warranted by an express decision of this court in refusing the writ, if satisfied that the prisoner on his own showing was rightfully detained.

But it is contended, if they differed about the lawfulness of the imprisonment, and could render no judgment, the prisoner is remediless; and cannot have the disputed question certified under the act of 1802. His remedy is complete by writ of error or appeal, if the court renders a final judgment refusing to discharge him; but if he should be so unfortunate as to be placed in the predicament of having the court divided on the question whether he should live or **[***192]** die, he is hopeless and without remedy. He wishes the vital question settled, not by a single judge at his chambers, but by the highest tribunal known to the Constitution; and yet the privilege is denied him; because the Circuit Court consists of two judges instead of one.

Such a result was not in the contemplation of the legislature of 1802; and the language used by it cannot be construed to mean any such thing. The clause under consideration was introduced to further the ends of justice, by obtaining a speedy settlement of important questions where the judges might be opposed in opinion.

The act of 1802 to changed the judicial system that the Circuit Court, instead of three, was composed of two judges; and, without this provision or a kindred one, if the judges differed, the difference would remain, the question be unsettled, and justice denied. The decisions of this court upon the provisions of this section have been numerous. In United States v. Daniel, n68 the court, in holding that a division **[*112]** of the judges on a motion for a new trial could not be certified, say: "That the question must be one which arises in a cause depending before the court relative to a **[***193]** proceeding belonging to the cause." Testing Milligan's case by this rule of law, is it not apparent that it is rightfully here; and that we are compelled to answer the questions on which the judges below were opposed in opinion? If, in the sense of the law, the proceeding for the writ of habeas corpus was the "cause" of the party applying for it, then it is evident that the "cause" was pending before the court, and that the questions certified arose out of it, belonged to it, and were matters of right and not of discretion.

n68 6 Wheaton, 542.

[293]** But it is argued, that the proceeding does not ripen into a cause, until there are two parties to it.

This we deny. It was the cause of Milligan when the petition was presented to the Circuit Court. It would have been the cause of both parties, if the court had issued the writ and brought those who held Milligan in custody before it. Webster defines the word "cause" thus: "A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right" -- and he says, "this is a legal, scriptural, and popular use of the word, coinciding nearly with case, from **[***194]** cado, and action, from ago, to urge and drive."

In any legal sense, action, suit, and cause, are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence; and the proceeding which he set in operation for that purpose was his "cause" or "suit." It was the only one by which he could recover his liberty. He was powerless to do more; he could neither instruct the judges nor control their action, and should not suffer, because, without fault of his, they were unable to render a judgment. But, the true meaning to the term "suit" has been given by this court. One of the questions in Weston v. City Council of Charleston, n69 was, whether a writ of prohibition was a suit; and Chief Justice Marshall says: "The **[*113]** term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him." Certainly, Milligan pursued the only remedy which the law afforded him.

n69 2 Peters, 449.

Again, in Cohens v. Virginia, n70 he says: "In law language a suit is the prosecution of some demand in a court of justice." Also, "To commence a suit is **[***195]** to demand something by the institution of process in a court of justice; and to prosecute the suit is to continue that demand." When Milligan demanded his release by the proceeding relating to habeas corpus, he commenced a suit; and he has since prosecuted it in all the ways known to the law. One of the questions in Holmes v. Jennison et al. n71 was, whether under the 25th section of the Judiciary Act a proceeding for a writ of habeas corpus was a "suit." Chief Justice Taney held, that, HN5 "if a party is unlawfully imprisoned, the writ of habeas corpus is his appropriate legal remedy. It is his suit in court to recover his liberty." There was much diversity of opinion on another ground of jurisdiction; but that, in the sense of the 25th section of the Judiciary Act, the proceeding by habeas corpus was a suit, was not controverted by any except Baldwin, Justice, and he thought that "suit" and "cause" as used in the section, mean the same thing.

n70 6 Wheaton, 264.

n71 14 Peters, 540.

The court do not say, that a return must be made, and the parties appear and begin to try the case before it is a suit. HN6 When the petition is filed and the writ prayed for, it is a suit, -- the **[***196]** suit of the party making the application. If it is a suit under the 25th section of the Judiciary Act when the proceedings are begun, it is, by all the analogies of the law, equally a suit under the 6th section of the act of 1802.

But it is argued, that there must be two parties to the suit, because the point is to be stated upon the request of "either party or their counsel."

Such a literal and technical construction would defeat the very purpose the legislature had in view, which was to enable **[*114]** any party to bring the case here, when the point in controversy was a matter of right and not of discretion; and the words "either party," in order to prevent a failure of justice, must be construed as words of enlargement, and not of restriction. Although this case is here ex parte, it was not considered by the court below without notice having been given to the party supposed to have an interest in the detention of the prisoner. The statements of the record show that this is not only a fair, but conclusive inference. When the counsel for Milligan presented to the court the petition for the writ of habeas corpus, Mr. Hanna, the District Attorney for Indiana, also appeared; **[***197]** and, by agreement, the application was submitted to the court, who took the case under advisement, and on the next day announced their inability to agree, and made the certificate. It is clear that Mr. Hanna did not represent the petitioner, and why is his appearance entered? It admits of no other solution than this, -- that he was informed of the application, and appeared on behalf of the government to contest it. The government was the prosecutor of Milligan, who claimed that his imprisonment was illegal; and sought, in the only was he could, to recover his liberty. The case was a grave one; and the court, unquestionably, directed that the law officer of the government should be informed of it. He very properly appeared, and, as the facts were uncontroverted and the difficulty was in the application of the law, there was no useful purpose to be obtained in issuing the writ. The cause was, therefore, submitted to the court for their consideration and determination.

But Milligan claimed his discharge from custody by virtue of the act of Congress "relating to habeas corpus, and regulating judicial proceedings in certain cases," approved March 3d, 1863. Did that act confer jurisdiction **[***198]** on the Circuit Court of Indiana to hear this case?

HN7 In interpreting a law, the motives which must have operated with the legislature in passing it are proper to be considered. This law was passed in a time of great national peril, when our heritage of free government was in danger. **[*115]** An armed rebellion against the national authority, of greater proportions than history affords an example of, was raging; and the public safety required that the privilege of the writ of habeas corpus should be suspended. The President had practically suspended it, and detained suspected persons in custody without trial; but his authority to do this was questioned. It was claimed that Congress alone could exercise this power; and that the legislature, and not

the President, should judge of the political considerations on which the right to suspend it rested. The privilege of this great writ had never before been withheld from the citizen; and as the exigence of the times demanded immediate action, it was of the highest importance that the lawfulness of the suspernsion should be fully established. It was under these circumstances, which were such as to arrest the attention of the country, **[***199] [**294]** that this law was passed. The President was authorized by it to suspend the privilege of the writ of habeas corpus, whenever, in his judgment, the public safety required; and he did, by proclamation, bearing date the 15th of September, 1863, reciting, among other things, the authority of this statute, suspend it. The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.

It is proper, therefore, to inquire under what circumstances the courts could rightfully refuse to grant this writ, and when the citizen was at liberty to invoke its aid.

The second and third sections of the law are explicit on these points. The language used is plain and direct, and the meaning of the Congress cannot be mistaken. The public safety demanded, if the President thought proper to arrest a suspected person, that he should not be required to give the cause of his detention on return to a writ of habeas corpus. But it was not contemplated that such person should be detained in custody beyond a certain fixed period, unless certain judicial proceedings, known to the common law, were commenced **[***200]** against him. The Secretaries of State and War were directed to furnish to the judges of the courts of the **[*116]** United States, a list of the names of all parties, not prisoners of war, resident in their respective jurisdictions, who then were or afterwards should be held in custody by the authority of the President, and who were citizens of states in which the administration of the laws in the Federal tribunals was unimpaired. After the list was furnished, if a grand jury of the district convened and adjourned, and did not indict or present one of the persons thus named, he was entitled to his discharge; and it was the duty of the judge of the court to order him brought before him to be discharged, if he desired it. The refusal or omission to furnish the list could not operate to the injury of any one who was not indicted or presented by the grand jury; for, if twenty days had elapsed from the time of his arrest and the termination of the session of the grand jury, he was equally entitled to his discharge as if the list were furnished; and any credible person, on petition verified by affidavit, could obtain the judge's order for that purpose.

Milligan, in his application **[***201]** to be released from imprisonment, averred the existence of every fact necessary under the terms of this law to give the Circuit Court of Indiana jurisdiction. If he was detained in custody by the order of the President, otherwise than as a prisoner of war; if he was a citizen of Indiana and had never been in the military or naval service, and the grand jury of the district had met, after he had been arrested, for a period of twenty days, and adjourned without taking any proceedings against him, then the court had the right to entertain his petition and determine the lawfulness of his imprisonment. Because the word "court" is not found in the body of the second section, it was argued at the bar, that the application should have been made to a judge of the court, and not to the court itself; but this is not so, for power is expressly conferred in the last

proviso of the section on the court equally with a judge of it to discharge from imprisonment. It was the manifest design of Congress to secure a certain remedy by which any one, deprived of liberty, could obtain it, if there was a judicial failure to find cause of offence against him. HN8 Courts are **[*117]** not, always, in session, **[***202]** and can adjourn on the discharge of the grand jury; and before those, who are in confinement, could take proper steps to procure their liberation. To provide for this contingency, authority was given to the judges out of court to grant relief to any party, who could show, that, under the law, he should be no longer restrained of his liberty.

It was insisted that Milligan's case was defective, because it did not state that the list was furnished to the judges; and, therefore, it was impossible to say under which section of the act it was presented.

It is not easy to see how this omission could affect the question of jurisdiction. Milligan could not know that the list was furnished, unless the judges volunteered to tell him; for the law did not require that any record should be made of it or anybody but the judges informed of it. Why aver the fact when the truth of the matter was apparent to the court without an averment? How can Milligan be harmed by the absence of the averment, when he states that he was under arrest for more than sixty days before the court and grand jury, which should have considered his case, met at Indianapolis? It is apparent, therefore, that under the **[***203]** Habeas Corpus Act of 1863 the Circuit Court of Indiana had complete jurisdiction to adjudicate upon this case, and, if the judges could not agree on questions vital to the progress of the cause, they had the authority (as we have shown in a previous part of this opinion), and it was their duty to certify those questions of disagreement to this court for final decision. It was argued that a final decision on the questions presented ought not to be made, because the parties who were directly concerned in the arrest and detention of Milligan, were not before the court; and their rights might be prejudiced by the answer which should be given to those questions. But this court cannot know what return will be made to the writ of habeas corpus when issued; and it is very clear that no one is concluded upon any question that may be raised to that return. In the sense of the law of 1802 which authorized a certificate of division, a final decision **[*118]** means final upon the points certified; final upon the court below, so that it is estopped from any adverse ruling in all the subsequent proceedings of the cause.

But it is said that this case is ended, as the presumption is, that Milligan **[***204]** was hanged in pursuance of the order of the President.

Although we have no judicial information on the subject, yet the inference is that he is alive; for otherwise learned counsel would not appear for him and urge this court to decide his case. It can never be in this country of written constitution and laws, with a judicial department to interpret them, that any chief magistrate would be so far forgetful of his duty, as to order the execution of a man who denied the jurisdiction that tried and convicted him; after his case was before Federal judges with power to decide it, who, being unable to agree on the grave questions involved, had, according to known law, sent it to the Supreme Court of **[**295]** the United States for decision. But even the

suggestion is injurious to the Executive, and we dismiss it from further consideration. There is, therefore, nothing to hinder this court from an investigation of the merits of this controversy.

The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one **[***205]** of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole **[*119]** people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at **[***206]** the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct, to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, "That the trial of all crimes, except in case of impeachment, shall be by jury;" and in the fourth, fifth, and sixth articles of the amendments. The fourth **[***207]** proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue "without proof of probable cause supported by oath or affirmation." The fifth declares "that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived **[*120]** of life, liberty, or property, without due process of law." And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining **[***208]** witnesses in his favor, and to have the assistance of counsel for his defence." These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and but for the belief that it would be so amended as to embrace them, it would never have been ratified.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rules and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history **[***209]** of the world had taught them that what was done in the past might be attempted in the future. HN9 The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, **[*121]** and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? and if so, what are they?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because HN10 the Constitution **[***210]** expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established **[**296]** by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

But it is said that the jurisdiction is complete under the "laws and usages of war."

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operace; they 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. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offerce whatever of a citizen in civil life, in nowise **[*122]** connected **[***211]** with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a state, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that **[***212]** Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offences, and was never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country **[*123]** have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no **[***213]** one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right -- one of the most valuable in a free country -- is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. *HN11* The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;" and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment

or presentment in the fifth.

The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, HN12 in pursuance **[***214]** of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the aythority of the government is undisputed, **[*124]** there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion -- if the passions of men are aroused and the restraints of law weakened, if not disregarded -- these safeguards need, and should receive, **[***215]** the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military **[**297]** departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, **[***216]** as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power" -- the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure **[*125]** together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human **[***217]** liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew -- the history of the world told them -- the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habcas corpus.

It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just **[***218]** authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested **[*126]** in answer to a writ of habeas corpus. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension **[***219]** to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal states should be placed within the limits of certain military districts

and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to **[***220]** establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with **[*127]** it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such ad effectually closes the courts and deposes the civil administration.

It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows, from what has been said on this subject, **[***221]** that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substituted for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, **[**298]** it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the nule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authroity was never disputed, and justice was always administered. And so in the case **[***222]** of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be "mere lawless violence."

[*128] We are not without precedents in English and American history illustrating our views of this question; but it is hardly necessary to make particular reference to them.

From the first year of the reign of Edward the Third, when the Parliament of England reversed the attainder of the Earl of Lancaster, because he could have been tried by the courts of the realm, and declared, "that in time of peace no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer; and that regularly when the king's courts are open it is a time of peace in judgment of law," down to the present day, martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive

of the liberty of the subject.

During the present century, an instructive debate on this question occurred in Parliament, occasioned by the trial and conviction by court-martial, at Demerara, of the Rev. John Smith, a missionary to the negroes, on the alleged ground **[***223]** of aiding and abetting a formidable rebellion in that colony. Those eminent statesmen, Lord Brougham and Sir James Mackintosh, participated in that debate; and denounced the trial as illegal; because it did not appear that the courts of law in Demerara could not try offences, and that "when the laws can act, every other mode of punishing supposed crimes is itself an enormous crime."

So sensitive were our Revolutionary fathers on this subject, although Boston was almost in a state of siege, when General Gage issued his proclamation of martial law, they spoke of it as an "attempt to supersede the course of the common law, and instead thereof to publish and order the use of martial law." The Virginia Assembly, also, denounced a similar measure on the part of Governor Dunmore "as an assumed power, which the king himself cannot exercise; because it annuls the law of the land and introduces the most execrable of all systems, martial law."

In some parts of the country, during the war of 1812, our officers made arbitarary arrests and, by military tribunals, tried citizens who were not in the military service. These arrests **[*129]** and trials, when brought to the notice of the courts, **[***224]** were uniformly condemned as illegal. The cases of Smith v. Shaw and McConnell v. Hampden (reported in 12 Johnson n72), are illustrations, which we cite, not only for the principles they determine, but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench.

n72 Pages 257 and 234.

It is contended, that Luther v. Borden, decided by this court, is an authority for the claim of martial law advanced in this case. The decision is misapprehended. That case grew out of the attempt in Rhode Island to supersede the old colonial government by a revolutionary proceeding. Rholde Island, until that period, had no other form of local government then the charter granted by King Charles II, in 1663; and as that limited the right of suffrage, and did not provide for its own amendment, many citizens became dissatisfied, because the legislature would not afford the relief in their power; and without the authority of law, formed a new and independent constitution, and proceeded to assert its authority by force of arms. The old government resisted this; and as the rebellion was formidable, called out the militia to subdue **[***225]** it, and passed an act declaring martial law. Borden, in the military service of the old government, broke open the house of Luther, who supported the new, in order to arrest him. Luther brought suit against Borden; and the question was, whether, under the constitution and laws of the state, Borden was justified. This court held that a state "may use its military power to put down an armed insurrection too strong to be controlled by the civil authority;" and, if the

legislature of Rhode Island thought the peril so great as to require the use of its military forces and the declaration of martial law, there was no ground on which this court could question its authority; and as Borden acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the state judiciary, he was justified in breaking **[*130]** into and entering Luther's house. This is the extent of the decision. There was no question in issue about the power of declaring martial law under the Federal Constitution, and the court did not consider it necessary even to inquire "to what extent nor under what circumstances that power may by exercised **[***226]** by a state."

We do not deem it important to examine further the adjudged cases; and shall, therefore, conclude without any additional reference to authorities.

To the third question, then, on which the judges below were opposed in opinion, an answer in the negative must be returned.

It is proper to say, although Milligan's trial and conviction by a military commission was illegal, yet, if guilty of the crimes imputed to him, and his guilt had been ascertained by an established court and impartial jury, he deserved severe punishment. Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government, and have not the excuse even of prejudice of section to plead in their favor, is wicked; but that resistance becomes an enormous crime when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States. Conspiracies like these, at such **[**299]** a juncture, are extremely perilous; and those concerned in them are dangerous **[***227]** enemies to their country, and should receive the heaviest penalties of the law, as an example to deter others from similar criminal conduct. It is said the severity of the laws caused them; but Congress was obliged to enact severe laws to meet the crisis; and as our highest civil duty is to serve our country when in danger, the late war has proved that rigorous laws, when necessary, will be cheerfully obeyed by a patriotic people, struggling to preserve the rich blessings of a free government.

The two remaining questions in this case must be answered in the affirmative. The suspension of the privilege of the **[*131]** writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.

If the military trial of Milligan was contrary to law, then he was entitled, on the facts stated in his petition, to be discharged from custody by the terms of the act of Congress of March 3d, 1863. The provisions of this law having been considered in a previous part of this opinion, we will not restate the views there presented. Milligan **[***228]** avers he was a citizen of Indiana, not in the military or naval service, and was detained in close confinement, by order of the President, from the 5th day of October, 1864, until the 2d day of January, 1865, when the Circuit Court for the District of Indiana, with a grand

jury, convened in session at Indianapolis; and afterwards, on the 27th day of the same month, adjourned without finding an indictment or presentment against him. If these averments were true (and their truth is conceded for the purposes of this case), the court was required to liberate him on taking certain oaths prescribed by the law, and entering into recognizance for his good behavior.

But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he **[***229]** was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

This case, as well as the kindred cases of Bowles and Horsey, were disposed of at the last term, and the proper orders were entered of record. There is, therefore, no additional entry required.

DISSENTBY: CHASE

DISSENT: **[*132]** The CHIEF JUSTICE delivered the following opinion.

Four members of the court, concurring with their brethren in the order heretofore made in this cause, but unable to concur in some important particulars with the opinion which has just been read, think it their duty to make a separate statement of their views of the whole case.

We do not doubt that the Circuit Court for the District of Indiana had jurisdiction of the petition of Milligan for the writ of habeas corpus.

Whether this court has jurisdiction upon the certificate of division admits of more question. The construction of the act authorizing such certificates, which has hitherto prevailed here, denies jurisdiction in cases where the certificate **[***230]** brings up the whole cause before the court. But none of the adjudicated cases are exactly in point, and we are willing to resolve whatever doubt may exist in favor of the earliest possible answers to questions involving life and liberty. We agree, therefore, that this court may properly answer questions certified in such a case as that before us.

The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the

liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice.

The trial and sentence of Milligan were by military commission convened in Indiana during the fall of 1864. The action of the commission had been under consideration by President Lincoln for some time, when he himself became the victim of an abhorred conspiracy. **[***231]** It was approved by his successor in May, 1865, and the sentence was ordered to be carried into execution. The proceedings, therefore, had the fullest sanction of the executive department of the government.

[*133] This sanction requires the most respectful and the most careful consideration of this court. The sentence which it supports must not be set aside except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress.

We must inquire, then, what constitutional or statutory provisions have relation to this military proceeding.

The act of Congress of March 3d, 1863, comprises all the legislation which seems to require consideration in this connection. The constitutionality of this act has not been questioned and is not doubted.

The first section authorized the suspension, during the Rebellion, of the writ of habeas corpus throughout the United States by the President. The two next sections limited this authority in important respects.

The second section required that lists of all persons, being citizens of states in which the administration of the laws had continued unimpaired in the Federal courts, **[***232]** who were then held or might thereafter be held as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war, should be furnished to the judges of the Circuit and District Courts. The lists transmitted to the judges were to contain the names of all persons, **[**300]** residing within their respective jurisdictions, charged with violation of national law. And it was required, in cases where the grand jury in attendance upon any of these courts should terminate its session without proceeding by indictment or otherwise against any prisoner named in the list, that the judge of the court should forthwith make an order that such prisoner desiring a discharge, should be brought before him or the court to be discharged, on entering into recognizance, if required, to keep the peace and for good behavior, or to appear, as the court might direct, to be further dealt with according to law. Every officer of the United States having custody of such prisoners was required to obey and execute the judge's order, under penalty, for refusal or delay, of fine and imprisonment.

The third section provided, in case lists of persons other **[*134]** than **[***233]** prisoners of war then held in confinement, or thereafter arrested, should not be furnished within twenty days after the passage of the act, or, in cases of subsequent arrest, within twenty days after the time of arrest, that any citizen, after the termination of a session of

the grand jury without indictment or presentment, might, by petition alleging the facts and verified by oath, obtain the judge's order of discharge in favor of any person so imprisoned, on the terms and conditions prescribed in the second section.

It was made the duty of the District Attorney of the United States to attend examinations on petitions for discharge.

It was under this act that Milligan petitioned the Circuit Court for the District of Indiana for discharge from imprisonment.

The holding of the Circuit and District Courts of the United States in Indiana had been uninterrupted.The administration of the laws in the Federal courts had remained unimpaired. Milligan was imprisoned under the authority of the President, and was not a prisoner of war. No list of prisoners had been furnished to the judges, either of the District or Circuit Courts, as required by the law. A grand jury had attended the **[***234]** Circuit Courts of the Indiana district, while Milligan was there imprisoned, and had closed its session without finding any indictment or presentment or otherwise proceeding against the prisoner.

His case was thus brought within the precise letter and intent of the act of Congress, unless it can be said that milligan was not imprisoned by authority of the President; and nothing of this sort was claimed in argument on the part of the government.

It is clear upon this statement that the Circuit Court was bound to hear Milligan's petition for the writ of habeas corpus, called in the act an order to bring the prisoner before the judge or the court, and to issue the writ, or, in the language of the act, to make the order.

The first question, therefore -- Ought the writ to issue? -- must be answered in the affirmative.

[*135] And it is equally clear that he was entitled to the discharge prayed for.

It must be borne in mind that the prayer of the petition was not for an absolute discharge, but to be delivered from military custody and imprisonment, and if found probably guilty of any offence, to be turned over to the proper tribunal for inquiry and punishment; or, if not found **[***235]** thus probably guilty, to be discharged altogether.

And the express terms of the act of Congress required this action of the court. The prisoner must be discharged on giving such recognizance as the court should require, not only for good behavior, but for appearance, as directed by the court, to answer and be further dealt with according to law.

The first section of the act authorized the suspension of the writ of habeas corpus generally throughout the United States. The second and third sections limited this suspension, in certain cases, within states where the administration of justice by the Federal courts remained unimpaired. In these cases the writ was still to issue, and under it

the prisoner was entitled to his discharge by a circuit or district judge or court, unless held to bail for appearance to answer charges. No other judge or court could make an order of discharge under the writ. Except under the circumstances pointed out by the act, neither circuit nor district judge or court could make such an order. But under those circumstances the writ must be issued, and the relief from imprisonment directed by the act must be afforded. The commands of the act were positive, **[***236]** and left no discretion to court or judge.

An affirmative answer must, therefore, be given to the second question, namely: Ought Milligan to be discharged according to the prayer of the petition?

That the third question, namely: Had the military commission in Indiana, under the facts stated, jurisdiction to try and sentence Milligan? must be answered negatively is an unavoidable inference from affirmative answers to the other two

[*136] The military commission could not have jurisdiction to try and sentence Milligan, if he could not be detained in prison under his original arrest or under sentence, after the close of a session of the grand jury without indictment or other proceeding against him.

Indeed, the act seems to have been framed on purpose to secure the trial of all offences of citizens by civil tribunals, in states where these tribunals were not interrupted in the regular exercise of their functions.

Under it, in such states, the privilege of the writ might be suspended. Any person regarded as dangerous to the public safety might be arrested and detained until after the session of a grand jury. Until after such session no person arrested could have the benefit **[***237]** of the writ; and even then no such person could be discharged except on such terms, as to future appearance, as the court might impose. These provisions obviously contemplate no other trial or sentence than that of a civil court, and we could not assert the legality of a trial and sentence by a military commission, under the circumstances specified in the act and described in the petition, without disregarding the plain directions of Congress.

We agree, therefore, that the first two questions certified must receive affirmative answers, and the last a negative. We do not doubt that the positive provisions of the act of Congress require such answers. We do not think it necessary to look beyond these provisions. In **[**301]** them we find sufficient and controlling reasons for our conclusions.

But the opinion which has just been read goes further; and as we understand it, asserts not only that the military commission held in Indiana was not authorized by Congress, but that it was not in the power of Congress to authorize it; from which it may be thought to follow, that Congress has no power to indemnify the officers who composed the commission against liability in civil courts **[***238]** for acting as members of it.

We cannot agree to this.

We agree in the proposition that no department of the **[*137]** government of the United States -- neither President, nor Congress, nor the Courts -- possesses any power not given by the Constitution.

We assent, fully, to all that is said, in the opinion, of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty. And we concur, also, in what is said of the writ of habeas corpus, and of its suspension, with two reservations: (1.) That, in our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain; and (2.) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention.

We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana.

We do not think it necessary to discuss at large the grounds of our conclusions. We will briefly indicate some of them.

The Constitution itself provides for military government as well as **[***239]** for civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former.

What, then, is that proper sphere? Congress has power to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; and to provide for governing such part of the militia as may be in the service of the United States.

It is not denied that the power to make rules for the government of the army and navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time.

Nor, in our judgment, does the fifth, or any other amendment, abridge that power. "Cases arising in the land and naval forces, or in the militia in actual service in time of war **[*138]** or public danger," are expressly excepted from 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 it is admitted that the exception applies to the other **[***240]** amendments as well as to the fifth.

Now, we understand this exception to have the same import and effect as if the powers of Congress in relation to the government of the army and navy and the militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation. The states, most jealous of encroachments upon the liberties of the citizen, when proposing additional safeguards in the form of amendments, excluded specifically from their effect cases arising in the government of the land and naval forces.

Thus Massachusetts proposed that "no person shall be tried for any crime by which he would incur an infamous punishment or loss of life until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land forces." The exception in similar amendments, proposed by New York, Maryland, and Virginia, was in the same or equivalent terms. The amendments proposed by the states were considered by the first Congress, and such as were approved in substance were put in form, and proposed by that body to the states. Among those thus proposed, and subsequently ratified, was that which now stands **[***241]** as the fifth amendment of the Constitution. We cannot doubt that this amendment was intended to have the same force and effect as the amendment proposed by the states. We cannot agree to a construction which will impose on the exception in the fifth amendment a sense other than that obviously indicated by action of the state conventions.

We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment. It is not necessary to attempt any precise definition of the boundaries of this power.But may it not be said that government **[*139]** includes protection and defence as well as the regulation of internal administration? And is it impossible to imagine cases in which citizens conspiring or attempting the destruction or great injury of the national forces may be subjected by Congress to military trial and punishment in the just exercise of this undoubted constitutional power? Congress is but the agent of the nation, and does not the security of individuals against the abuse of this, as of every other power, depend on the intelligence and virtue of the people, on their **[***242]** zeal for public and private liberty, upon official responsibility secured by law, and upon the frequency of elections, rather than upon doubtful constructions of legislative powers?

But we do not put our opinion, that Congress might authorize such a military commission as was held in Indiana, upon the power to provide for the government of the national forces.

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns.That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and **[**302]** auxiliary powers. Each includes all authorities essential to its due exercise. **[***243]** But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, **[*140]** or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of

soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

We by no means assert that Congress can establish and apply the laws of war where no war had been declared or exists.

Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security **[***244]** of the army or against the public safety.

In Indiana, for example, at the time of the arrest of Milligan and his co-conspirators, it is established by the papers in the record, that the state was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion. It appears, also, that a powerful secret association, composed of citizens and others, existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government.

We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution **[*141]** **[***245]** of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.

In Indiana, the judges and officers of the courts were loyal to the government.But it might have been otherwise. In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.

We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them. With that prohibition we are satisfied, and should have remained silent if the answers to the questions certified had been put on that ground, without denial of the existence of a power which we believe to be constitutional and important to the public safety, -- a denial which, as we have already suggested, seems to draw in question the power of Congress to protect from prosecution the members of military commissions who acted in obedience to their superior officers, and **[***246]** whose action, whether warranted by law or not, was approved by that up-right and patriotic President under

whose administration the Republic was rescued from threatened destruction.

We have thus far said little of martial law, nor do we propose to say much. What we have already said sufficiently indicates our opinion that there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our army or navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress.

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated **[*142]** as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when **[***247]** the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to **[***248]** provide for governing the national forces.

We have no apprehension that this power, under our American system of government, in which all official authority is derived from the people, and exercised under direct responsibility to the people, is more likely to be abused than the power to regulate commerce, or the power to borrow money. And we are unwilling to give our assent by silence to expressions of opinion which seem to us calculated, though **[**303]** not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion and rebellion.

Mr. Justice WAYNE, Mr. Justice SWAYNE, and Mr. Justice MILLER concur with me in these views.