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## AFTERNOON SESSION

The Court reconvened at 2:30 o'clock p. m., at the expiration of the recess.

The Chief Justice. You may proceed.

ARGUMENT ON BEHALF OF THE PETITIONERS  
by  
COLONEL KENNETH C. ROYALL  
(Resumed)

Colonel Royall. May it please the Court, I have tried to cover in one way or another the question of the authority of the President to deprive the petitioners here of their rights in civil courts, and I would like to go back of that long enough to mention two things which I did not get an opportunity to mention.

It was contended by the respondent that the effect of the Colonna case, comparatively recently decided under the Trading With the Enemy Act, was that of depriving enemy aliens of their rights to go into the civil courts.

The fallacy of that argument, as we see it, is that that is a statute which deals solely or primarily with commercial transactions. It does not either by its terms or its obvious purpose seek to deal with the situation involving any proceeding in the nature of habeas corpus or any proceeding involving liberty of a citizen.

I think we have covered that sufficiently in our brief to enable me to pass over it without further comment.

The Chief Justice. Assuming that you are right in your contention that the President can derive no authority under the spy section, Section 82, is it contended that he would have power as Commander-in-Chief in time of war or emergency to suspend the writ in the case of persons situated as these

are?

Colonel Royall. Yes, sir. They base their contention on Article 82 which we have discussed.

The Chief Justice. They merely say that the President has authority, as Commander-in-Chief of the Armies. But suppose these men, not wearing uniforms, came to the country armed, prepared to further the war: would you say that the President could not order them tried?

Colonel Royall. I would say that he could not order them tried by a military commission, unless they were either committing an offense under Article 82--

The Chief Justice. And Article 81?

Colonel Royall. I have not discussed 81--or under what is known as the Law of War.

The Chief Justice. That is the point I want to raise. Here are men who are not entitled by all the recognized laws of war to the privileges of men wearing uniforms and engaged in combat. Assuming they came in bearing arms and were prepared to use them, has the President Constitutional authority to appoint a commission to try and condemn them and, in connection with that, to suspend the writ?

Colonel Royall. We do not think, sir, that he has any Constitutional authority to suspend the writ of habeas corpus in the absence of an express statute. The Congress is the only one that can authorize the suspension of the writ under the first Article and under the 5th Amendment.

We further say that while there seems to be one decision cited by the prosecution which says there is such a thing as the Law of War, there is serious question as to whether

3w there is any such body of law applicable to courts or military tribunals.

There is no common law of crimes in Federal jurisdictions; and this is a sort of common international law. We think there is a serious question as to whether there is any such offense as the violation of the Law of War. But if we concede that there is, we are confronted with exactly the same situation that we are confronted with under Article 82 and also 81, although I have not discussed 81, and that is that the limit of the authority to suspend the writ of habeas corpus and the limit of the authority to provide for trial by a military tribunal is something that is so closely related to the land and naval forces or military forces that the offense has to be committed in the zone of military operations which we have discussed before; and therefore we say that there is exactly the same restriction upon the President as upon the Congress--more so on the President, because he has to have the intervening help of a Congressional enactment. But there is a requirement that it must be in connection with the land and naval forces, and that element is not only lacking, but affirmatively appears to be absent on the stipulation of the parties.

Further on the question of the right of these aliens--and I am having to travel backward a little because this was not covered in the questioning--the argument is made that under the language of the internment statute the President has authority to make this proclamation and to deprive these men of a right in the civil courts.

The language of the internment statute, if taken out of

the statute and looked at without reference to its setting, would seem to indicate that that was true. But a reading of the entire statute shows very clearly that it relates to the internment situation alone and does not intend to give the President any authority to issue a proclamation except in connection with the internment statute and its enforcement.

I am trying to avoid repetition on matters which have been covered by the questioning and to get to matters which have not been so covered.

On the question of the zones of operations, I have adverted to that briefly, but the stipulation on that is the reason I say that I think it affirmatively appears that this was not an offense so closely connected with the military and naval forces as to justify the exercise of the unusual jurisdiction of a military tribunal or to authorize the President to suspend the writ of habeas corpus aside from his inability to do so because of the lack of a statute.

Without reading the entire stipulation, the other parts that might be considered important by the prosecution, we have this (reading):

"Until March 18, 1942, the Eastern Defense Command was known as the Eastern Theater of Operations. On that date an order was issued by the War Department which reads as follows:

"The name of the Eastern Theater of Operations is changed to the Eastern Defense Command."

The meaning of this order of March 18 is explained in the testimony of Colonel Stephen H. Sherrill:

"The entire continental United States is divided

into similar defense commands," and so forth.

That testimony appears on pages 2745 to 2758 of the record.

He states, as I understand it, that the reason they have so transferred from the Theater of Operations to what is known as the Interior Military Department was because of its inherent nature and the fact that supply was an integral and important part of it.

Military commissions are mentioned in the Articles of War which are carried in the Manual for Courts-Martial in several connections. Articles 81 and 82 mention them. Article 15 which appears on page 206 of the Manual for Courts-Martial says (reading):

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

That is a negative recognition of military commissions. It does not affirmatively confer any rights upon them. It does not create a crime. It is not designed to create a crime, and it does not add in any way to the authority of the Executive in connection with military operations.

In connection with that section it clearly appears that, as stated just before the recess, there are Congressional enactments in the form of criminal statutes covering the acts these people might have committed, under the stipulation; and

6w we think it a very cogent circumstance that the Congress, having legislated over the entire field, and the civil courts functioning in this territory, it is unnecessary and contrary to our theory of government to appoint a military commission to do what Congress has clearly indicated should be done by the criminal courts.

A question was asked as to the penalty for espionage. My recollection about that was substantially correct. The penalty for a criminal offense is a maximum of 30 years, except in the case of direct communication with an enemy; and that of course is differentiated from the mandatory death sentence in the case of spies.

Mr. Justice Black. Is there any indication that Article 82 in reference to spying requires that he be considered communicating with the enemy?

Colonel Royall. Yes, sir.

Mr. Justice Black. And the thirty-year penalty to which you refer could be imposed, even though it were not for the purpose of communicating with the enemy?

Colonel Royall. I think it is a question of direct communication. The elements of spying--and it might be that this will be helpful to the Court in considering the arguments and questions before lunch--are stated pretty clearly on page 157 of the Manual for Courts-Martial.

I suppose your page numbers are the same. It is under the 82d Article of War.

Mr. Justice Black. That is correct.

Colonel Royall. And it is discussed also on page 18.

Mr. Justice Jackson. What is the source of the definition of spying?

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Colonel Royall. The source of the definition of spying is the accepted rules as codified by the Second Hague Convention and is carried in a publication known as Rules for Land Warfare, published by the War Department, and as administered by military courts-martial over a period of years. I understand that that is the basis of that definition.

Mr. Justice Jackson. Do you rely on any part of that Treaty as of aid to your clients?

Colonel Royall. No, sir. I do not think it is binding. I do not think it is binding to the effect that it would create a crime if one did not exist. But it is persuasive on the definition of the word "spying," which is a word that must be defined, because it does not contain the necessary elements for its own definition.

Mr. Justice Black. So far as Article 82 is concerned, is there any necessary relationship between the fact that one enters the country and the offense charged here?

Colonel Royall. I do not think so.

Mr. Justice Black. So that so far as that section is concerned, it is the same as though there had been no invasion, as though they had not entered as they did.

Colonel Royall. I think it could exist without that.

Mr. Justice Black. And it exists as to a citizen or a non-citizen?

Colonel Royall. I would think so, sir. I do not know of any distinction.

Mr. Justice Black. And the claim is that it has reference to anyone who is around a plant, lurking around a plant? Does it go that far?

Colonel Royall. No, sir. I think it has got to be an actual military establishment. It becomes espionage when it relates to industrial plants.

Mr. Justice Black. Is that the position of the other side?

Colonel Royall. I do not think so. They talk a lot about total war.

Mr. Justice Jackson. The Hague Convention defines spies. It apparently includes both soldiers and civilians, because it refers to soldiers and civilians carrying out their mission openly, and so forth.

Colonel Royall. Perhaps Mr. Justice Jackson did not understand me. That is what I intended to say to Mr. Justice Black, that it might apply to either.

Mr. Justice Jackson. I got exactly the opposite impression.

Mr. Justice Frankfurter. Assuming that there is some discretion in the Commander-in-Chief in determining whether or not to convocate a military commission, whether or not there is the existence of what you call jurisdictional facts, the fact that so-called spies were landed by enemy war vessel rather than prowling around in the streets of a city might make a difference. From the point of view of the facts and circumstances it may make all the difference in the world if people are landed by U-boats from an enemy country.

Colonel Royall. Of course you have to conceive that he had some element of discretion there; but I do not believe his discretion goes far enough to disregard the absence of an essential element where that absence affirmatively appears on the record.

9w Mr. Justice Black. If there is jurisdiction with reference to one who enters, would there or not be constitutional jurisdiction in reference to one who was a citizen and who was lurking around an industrial establishment. What would that have to do with determining the vital effect of the power to order a commission?

Colonel Royall. I do not think it would have any effect, unless there is a larger discretionary power in the Executive than we are willing to concede. If it is sort of a judgment based on a lot of circumstances without any restrictions as to the exact legal definitions, it might have some significance. But I do not concede that to be the fact.

Mr. Justice Frankfurter. I put to one side the appearance on the face of the record that the circumstances in issue had nothing whatever to do with the conduct of the war. The Attorney General stated that it might be that they had no relation to the conduct of the war. Nevertheless, the President, as Commander-in-Chief, can call a military commission. Putting that to one side, will you please tell me why I am wrong in seeing the practical outcome of the argument you just made and the answer you made to Mr. Justice Jackson that the only way to determine whether or not the President as Commander-in-Chief had a right to convene a military commission is for us to examine the whole proceeding before the military commission on the merits?

Colonel Royall. I do not think you have to do that where there is a stipulation which makes it affirmatively appear that an element is lacking.

Mr. Justice Frankfurter. Would you mind reading exactly

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that portion of the stipulation which, in your view, negatives the existence of this fact?

Colonel Royall. There is, first, the fact as to where they landed, on Amagansett Beach, Long Island, and Ponto Vedra Beach, Florida. Then there is a stipulation on page 7 that that was in the area designated as The Eastern Defense Command. Then there is a stipulation which I read to the Court transferring the Eastern Defense Command from The Theater of Operations. Then there is the testimony, incorporated by reference in the stipulation, pages 2745 to 2758 of the typewritten record, being the testimony of Colonel Sherrill.

Mr. Justice Frankfurter. What is the point of that? What is the substance of it?

Colonel Royall. The substance of it is that it was transferred from The Theater of Operations because it was thought that it more properly belonged in what is referred to as the Interior Military Department.

Mr. Justice Frankfurter. You referred to that, I believe.

Colonel Royall. I think I summarized that correctly; and he referred to some Army publication which defined the functions of the various theaters of operation.

Referring to pages 2745 to 2758, there is nothing there that cannot be disclosed, I am sure. One of his answers is this (reading):

"A Field Service Regulations defines a theater of operations as an area of the theater of war necessary for military operations and the administration and supply incident to military operations."

That is what it was transferred out of.

Mr. Justice Reed. Do I understand that all of the Eastern

llw Seaboard was transferred out?

Colonel Royall. That is correct. He said it was done largely because of the supply situation. Then he said (reading):

"Q It is true that the administration and supply really pertain to the Zone of the Interior, is it not, back of the theater of operations, and that the Zone of the Interior has the job of putting the supplies up to the theater of operations and on the front?

"A That is right."

Then he says that the theater of operations is nearer the fighting than the Interior.

Mr. Justice Frankfurter. Who was the highest military official who made the designation that this was not within the Theater of Operations?

Colonel Royall. I think it was the Secretary of War. It was the War Department.

Mr. Justice Frankfurter. The President defined it to be within the Theater of Operations?

Colonel Royall. It is a long examination. I do want it all before the Court, and I will be glad to read it. (Reading):

"Q What is your official position?

"A I am on duty in the Operations Division, War Department, General Staff, in charge of the North America Theatre Group.

"Q And particularly in charge of the Eastern Defense Command?

"A That is one of the subdivisions of my theatre.

Q I will show you defendant's Exhibit L and invite

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your attention to that portion of it which contains a certain letter, 'Subject: Defense of Continental United States,' the letter being dated March 18, 1942, and ask you if you are familiar with that (handing a document to the witness).

"A I am, yes, sir.

"Q The second paragraph of that letter reads as follows:

"The name of the Eastern Theater of operations is changed to Eastern Defense Command. The Eastern Defense Command will not be a Theater of Operations."

"Will you explain to the Commission just what the reason for that order is and the effect of it?

"A Field Service Regulations defines a theater of operations as an area of the theater of war necessary for military operations and the administration and supply incident to military operations.

"Now--

"Questions by Colonel Dowell:

"Q Will you state the paragraph and page?

"A Paragraph 2, page 1, Field Service Regulations. That is the definition of the theater of operations.

"The order of March 18th, changing the Eastern Theater of Operations to Defense Command, was issued because--

"Q It is the reverse of that, I believe, isn't it?

"A I beg your pardon?

"Q It is the reverse of that, isn't it?

"A I think not.

"Q You said changing the Theater of Operations to

Defense Command?

"That is what I said."

"The Judge Advocate General. That is correct."

"The Attorney General. I think it will be easier to let him continue on with his testimony and then you can cross-examine him."

Questions by the Judge Advocate General:

"Q. You may go ahead."

"A. The term 'Theater of Operations' as pertaining to the eastern part of the United States was changed to that of the Eastern Defense Command on March 18th, because experience had indicated that the supply establishments, training centers, ports, and so on, should operate under the War Department rather than under the Commanding General of the eastern United States. That was the purpose for making the change."

Mr. Justice Frankfurter. Will you read that sentence again?

Colonel Royall (reading):

"A. The term 'Theater of Operations' as pertaining to the eastern part of the United States was changed to that of the Eastern Defense Command on March 18th, because experience had indicated that the supply establishments, training centers, ports, and so on, should operate under the War Department rather than under the Commanding General of the eastern United States. That was the purpose for making the change."

Mr. Justice Frankfurter. Do I infer from that that this is a change made with reference to internal managerial matters? Colonel Royall. That would so indicate. (Continuing

Reading, :;

"Q So far as the tactical situation is concerned, is there any change?

"A Not at all.

"Q In a tactical sense is that still a theater of operations?

"A Yes, I think so. The Theater of Operations, as I say, is a term that includes more than tactical operation; and the purpose for changing the name was to eliminate only those parts which had to do with supply establishments and administration.

"Q Is that the situation with the other defense commands?

"A That is the same.

"Q Is that the situation in Alaska, for example?

"A That is correct. That is a defense command also.

"Q That is at the present time a theater of operations?

"A Well, operations are being carried on there.

"Q The Japanese are right there in possession of some of the Islands?

"A Some of them.

"The Judge Advocate General. That is all.

Questions by the Attorney General:

"Q What is the definition of 'Defense Command'? Is it defined in your book there?

"A I have a definition here, which defines a defense command as a territorial agency designed to coordinate or prepare and to initiate the execution of all plans for the employment of army forces and installations

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in defense against enemy action in that portion of the United States lying within command boundaries.

"I might say that each of the defense commanders has troops, both ground and air, assigned to him for the purpose of carrying out this mission of operations against the enemy.

"... I take it the Eastern Defense Command comes under that definition of Defense Command, does it not?

"A Yes, sir, it does.

"Q Was Amagansett Beach a part of the Theater of Operations?

"A Part of the Eastern Defense Command. We use that terminology, sir.

"Q From a tactical point of view?

"A Tactically, yes, within that area.

"Q Was it tactically a part of the Theater of Operations?

"A I must repeat again, the term 'Theater of Operations' is merely a definition which includes supply and administration installations. We dropped that and adopted the other term. However, tactical operations in the Eastern Defense Command were just as effective at Amagansett Beach as at any other point.

"Q And just as effective after this letter was issued as before it was issued?

"A Yes.

"Q How about Florida?

"A Florida is also part of the Eastern Defense Command.

"Q And from a tactical point of view, there was no

difference in Florida than there was before the letter was issued?

"A None whatsoever, no, sir.

"Q I am referring, of course, to the letter of March 18.

"A I understand. Yes, sir.

"The Attorney General. Cross-examine.

"CROSS-EXAMINATION

"Questions by Colonel Dowell:

"Q Colonel, you have read the definition of a theater of operations from the Field Service Manual?

"A Yes, sir.

"Q Was that term properly applicable to what is now called the Eastern Defense Command?

"A So much of it except for that part which applies to administration and supply, which has been eliminated, and that is the reason for changing the title.

"Q It is true that the administration and supply really pertain to the zone of the interior, is it not, back of the theater of operations, and that the zone of the interior has the job of putting the supplies up to the theater of operations and on the front?

"A That is right.

"Q Now, the theater of Operations is nearer the fighting than is the interior?

"A Yes.

"Q The determination was made that the supply situation in the Eastern Defense Command made that more properly part of the zone of the interior than the Theater of Operations, because of the supply functions involved;

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is that true?

"A That is right--trainin, activities and things  
of that kind.

"Q Of course, if there is any fighting which takes  
place in the Zone of the Interior, that becomes a military  
operation. We understand that. That is true, but would  
that make it a theater of operations?

"A Well, I think so. As soon as fighting took  
place there, yes; immediately that becomes factual.

"Q Wherever fighting was going on?

"A Yes."

Mr. Justice Frankfurter. Is it fair to say that the  
Theater of Operations as used in that testimony is operation  
by the United States rather than operation by the enemy?

Colonel Royall. They say the enemy can make it a theater  
of operations.

Mr. Justice Frankfurter. The enemy can make anything  
a theater of operations?

Colonel Royall. By an attack, yes; I think that is true.

Mr. Justice Frankfurter. Then, from the point of view  
of the President's constitutional power, would you say that  
the scope and content of his power is that which this country,  
for its own purposes, has defined as a Theater of Operation  
rather than the hostile acts of the enemy?

Colonel Royall. I would judge that the definition of the  
War Department would be conclusive in the absence of some  
attack by the enemy.

Mr. Justice Frankfurter. Over night the definition might  
be knocked into a cocked hat; I mean the act of the enemy.

Colonel Royall. The act of the enemy can change anything,

I suppose, into an actual battle front. It could happen on the Mississippi, or in Colorado.

Mr. Justice Jackson. Might it not be defined as a Theater of Operation for one purpose without being a Zone of Operation, as used in the definition of spies in The Hague Convention?

Colonel Royall. Yes; I think that is conceivable.

Mr. Justice Jackson. So that it is a question of searching around for the most technical definition or taking The Hague Convention's term?

Colonel Royall. I think the distinction is in our favor.

Mr. Justice Jackson. You take the broader one?

Colonel Royall. I think Theater of Operations is broader than Zone of Operations. I think Zone of Operations means restriction to actual combat operations. I think it is a narrower definition. But I do not have any criterion to judge that by, because I do not think any court has ever drawn that distinction.

Mr. Justice Roberts. You were going to complete your discussion of the stipulation.

Colonel Royall. The only other thing in the stipulation that I have in mind is that the whole United States is divided into similar defense commands. Every part of it is. Therefore the designation of it as a Defense Command has no significance at all. That does not prove that it is a Zone of Operations. If it does, then every part of the United States is of course potentially, in the event of attack, a Zone of Operations.

Mr. Justice Frankfurter. You agree with that, do you not?

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Colonel Royall. Essentially it could be; yes, sir. But I do not believe that until that event has happened any proclamation or any Congressional action can deprive the people of that area of the right to the civil courts.

Mr. Justice Frankfurter. The determination of whether or not that event happened lays a vast variety of modes of attack open to the enemy. You do not have to have the landing of a tank force or an air force or a whole division. Whatever may be the instrument that furthers the military purposes of the enemy, roughly speaking, may become a means by which he is operating. Do you agree to that?

Colonel Royall. No, sir; I do not concede that. I think that is too broad. That is not a military operation. It may have some effect upon the military results, but a military operation means a battlefield. That is the primary meaning of it. It may be enlarged a little, but it cannot be enlarged to cover our whole industrial output. Persuading a man to quit work in a plant may affect military operations; but I do not concede that such a man can be tried by a military commission.

Mr. Justice Frankfurter. Suppose a person in the military service of the enemy deposits a chemical in the Glenn Martin plant, whereby the whole thing explodes: Would you say that that enemy at that point was, within the lawful constitutional judgment of the President, so engaged in a military operation as to be triable before a military commission?

Colonel Royall. I would draw the line perhaps more narrowly than would someone else, but I would probably say

that the limit of definition is narrower. In that particular instance all I would say is that that is much more directly connected than are the facts of this case; but even then I would not say that that was a zone of military operations.

Mr. Justice Frankfurter. If a German division marched on the Glenn Martin plant, that would be a zone of military operations?

Colonel Royall. There is no doubt about that.

Mr. Justice Frankfurter. What kind of a distinction do you have in mind?

Colonel Royall. The distinction is one of military operations and industrial interference.

Mr. Justice Frankfurter. May I suggest to you that that makes the distinction turn on the antiquity of the mode?

Colonel Royall. I can see that point of view; and that is the total war theory.

Mr. Justice Frankfurter. I have not used those words.

Colonel Royall. No; you have not, sir. But the total war theory is that anything that affects the war effort is a part of the war. There has got to be some limit on that, or we have very few constitutional guarantees left when we go to war.

Mr. Justice Frankfurter. How about destroying all the grounded military planes?

Colonel Royall. Somewhere between those two cases the line should be drawn, in our judgment.

Mr. Justice Jackson. The British soldiers who burned Washington may have committed crimes which should have been punished under the law of the District of Columbia at the

law time, but they might also have been subject to military operations at the same time. I do not get your assumption that because these things might have been prosecuted in the civil courts, where the same set of acts also bring the parties within the jurisdiction of military operations necessary to resist their efforts, they might not be dealt with in a military tribunal.

Colonel Royall. I did not mean to make that assumption. I do not take that position, because it certainly is true that a violation of military law may also be a violation of the criminal law, and the jurisdictions are not exclusive. I do not urge it for that purpose.

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Mr. Justice Jackson. Then, all we have is the question whether your people were subject to military law, and the question of the jurisdiction of civil courts has no part in this?

Colonel Royall. It has this part in it: It is persuasive. It is persuasive of the meaning of the zone of military operations. Here Congress has solemnly and carefully legislated for acts which it never had to legislate for, if military operations include everything that might affect the war, and it is persuasive that Congress drew a distinction between the penalty during war and the penalty in peacetime for sabotage and for various types of espionage. That is not conclusive. I do not mean to convey that impression. But it is persuasive. There must be some body of law which is not military, and congressional action is persuasive on where that line could be drawn.

Mr. Justice Frankfurter. Could Congress authorize a military commission for precisely the actions charged in this proceeding?

Colonel Royall. I do not think so, because they are met by the constitutional inhibition that I have previously mentioned.

Mr. Justice Frankfurter. Do you say that as to that which Congress can turn over to the military commission, the Commander-in-Chief can determine on his own?

Colonel Royall. No, I would say that Congress could authorize him to determine it on his own account, but until it has done so, he has not that right, because the Constitution gives that right to Congress. Article 1 relates to the legislative power.

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May I, not seeking to avoid any further inquiry, advert to another feature of the case, which seems to us to be particularly clear and to remove from the realm of controversy upon constitutional grounds questions about the power of the President?

A military commission is dealt with in the Articles of War. It is dealt with in Articles 81 and 82, and I have read to you Article 15.

Article 38, which appears on page 211--and, of course, you will recall that these Articles of War are congressional enactments--reads as follows:

"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, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States."

That is the first thing. The second thing is this:

"Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed."

It is our contention that if we concede that the President had a right to appoint a commission, and if we concede that these men have committed offenses which might be tried by a commission, yet the order in this case is invalid and the commission illegal, because there has been an express violation of that congressional enactment. That violation has occurred in three general ways.

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In the first place, the order of the President itself is absolutely inconsistent with three provisions of the Articles of War.

In the second place, while the article of war gives the President the right to prescribe rules, he has sought to delegate a portion of that right to the military commission, contrary to the provision of the statute.

In the third place, the military commission, assuming to act under that delegation, has itself prescribed rules which are contrary to law.

The first of those positions is the clearest to us. I call your attention again to the language:

"Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed."

In our brief we discuss three violations of that provision. The first relates to the vote by which a death sentence can be imposed, the second relates to the requirement of a formal preliminary investigation before trial can be had, and the third relates to the method of review.

The respondent has contended that Article 38 does not mean that all the provisions of the Articles of War shall apply to military commissions; the respondent contends that it merely means that those provisions shall apply to military commissions where military commissions are mentioned. The difficulty with that is that none of the articles expressly mentions military commissions, except Article 46-1/2, which in itself would be a sufficient mandate from Congress without Section 38.

Therefore, if the view taken by the prosecution is correct, that proviso would have no meaning at all; it must apply to

something. In other words, the language

"That nothing contrary to or inconsistent with these articles shall be so prescribed"

must refer to something, and we say it refers to the Articles of War and the procedure outlined therein.

We seem not to be the only ones who had that opinion, because the President in his own Order said:

"Under the Constitution and Statutes of the United States, and more particularly the Thirty-Eighth Article of War."

The prosecution must have thought that that was true besides the President's thinking so, because they had the Attorney General designated as a trial judge advocate. We think so, because the language is perfectly clear that the procedure must follow the Manual of Courts-Martial and that no procedure can be prescribed for the Military Commission that does not follow the Articles of War and as construed in the Manual for Courts-Martial.

The Chief Justice. You have not told us precisely the way in which this Commission and the rules under which it proceeds departed from that.

Colonel Royall. I am starting to do that now, sir, but I wanted, first, to make clear that in our opinion Article 38 did mean that the procedure had to comply with these articles.

Article 43, page 212 of the Manual, says:

"No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members

of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken."

In other words, under the Articles of War, which we refer to in Article 38, there must be a unanimous vote for the death sentence, or a three-fourths vote for a sentence of imprisonment for more than ten years. The President's Order says:

"The concurrence of at least two-thirds of the Members of the Commission present shall be necessary for a conviction,"

which is thoroughly inconsistent with the Forty-Third Article of War.

The Chief Justice. Under that provision, the Commission could condemn the men to imprisonment.

Colonel Royall. Well, it happens that with seven members, two-thirds and three-fourths do not work out the same. I shall have to go back to fractions.

The Chief Justice. But regardless of that, if they did not impose the death sentence, it would be valid.

Colonel Royall. No, sir. Three-fourths is required for ten years' imprisonment, and the President's Order says two-thirds. That may be the same thing for seven, but I do not think it is; I think there is one difference.

Mr. Justice Jackson. You have to have a fraction in either case, and I do not know how you could have a fraction of an officer.

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The Chief Justice. You could not unless you dismembered him.

Colonel Royall. I was under the impression that it took five in one case and six in the other, and I think perhaps I am right about it. I thought perhaps the Chief Justice had computed it and I was wrong.

Mr. Justice Jackson. You raise the question at this stage of the proceeding, in any event. Suppose you have a unanimous decision against you, no matter what the rule is that is applicable.

Colonel Royall. I think that is a fair inquiry, but I believe there are two good answers to it.

Mr. Justice Jackson. Then, you are twice as well off as I thought you were.

Colonel Royall. One of them is--and this has arisen in this study of constitutional provisions--that where there has been less than a unanimous verdict, and the question has arisen, the courts have said in those instances--in some instances; I do not know whether in all--that although there was a unanimous verdict, it did not cure it, because it was impossible to tell as a practical effect how the result arose, from the fact that the commission knew or the jury knew, in that case, that two-thirds was enough, and the natural human tendency was to join in when it was useless to protest. That has been pointed out, and it is one answer. It is a very practical answer. Whether or not it is fundamentally sound, I do not know, but I rather think it is.

The other answer is this: that by this method of procedure--and we have this statement in our brief; I do not think it can

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be successfully denied--this matter is to be transmitted directly to the President. The defendants will never know what the finding of the Commission is, how the Commission voted, or anything else; therefore, we would not know any more about it if we waited than we do today. It is not a question of knowledge; it is a question of the ability to assert our rights, and knowledge is prerequisite to it. The point is that we are worse off under the requirement for two-thirds than if a unanimous vote were required.

Mr. Justice Jackson. But you would not know the difference if you could not find out.

Colonel Royall. Whether we knew the difference or not, it would be a difference, and that is a substantial right that has been violated. The only thing knowledge has to do with it is the time when the right must be asserted, and we would never know whether we could assert it or not.

The Chief Justice. Would you know in the ordinary case of a court-martial? I do not quite follow you on whether you would know in an ordinary court-martial.

Colonel Royall. No, sir. In an ordinary court-martial it is customary. I think it is in the Manual. I always speak a little dubiously when I refer to the Manual for Courts-Martial, but it is certainly the practice to advise defense counsel of, at least, the result before the review. That is not the plan here.

The Chief Justice. You find something in the Order of the President which cuts off or estops that practice?

Colonel Royall. Yes.

Now, the second matter of express violation is Article 70,

which appears on pages 219 and 220. Without reading it in detail, for it is rather lengthy, it provides for formal investigation before charges are preferred or filed.

Mr. Justice Roberts. That is, of a person subject to military law?

Colonel Royall. Yes.

Mr. Justice Roberts. These men are not subject to military law; military law applies to the armed forces?

Colonel Royall. Military law applies to the armed forces, but Article 38, if it has any meaning at all, as far as that proviso is concerned, adopts for military commissions the procedure which is prescribed for court-martial. Otherwise that language has no meaning at all. I do not recall the language about military law in there.

Mr. Justice Roberts. Yes. I was wrong about it.

Colonel Royall. We are not concerned particularly about the charges, because they were preferred by a person subject to military law; but this is tantamount to either a grand jury investigation or an investigation by a committing officer.

Mr. Justice Jackson. Is there not a difference between a court-martial and a military commission? Under a court-martial, are not these provisions we have had cited primarily for the protection of our own men in the armed services, to see that they do not get an unfair deal and that they have what we consider, under military circumstances, due process of law? A military commission is for determining a matter of this kind, and it seems to me that your position is somewhat inconsistent when you say that these men are not subject to military trial at all and then contend, on the other hand, that they are

subject to the regulations of court-martial.

Colonel Royall. There is no inconsistency there. If they are not subject to military trial at all, the case ends there.

Mr. Justice Jackson. Yes.

Colonel Royall. But if they are subject to military trial, it does not follow--

Mr. Justice Jackson. That you are entitled to a regular court-martial.

Colonel Royall. The point is that there is no inconsistency in the position because it is all based on the assumption and must be based on the assumption, which we do not want to espouse, that you will decide the other questions against us.

What you say, Mr. Justice Jackson, might apply as an argument in favor of making a difference between soldiers and aliens; but the unfortunate part is--or fortunate for us--that the statute is rather explicit on it and says that nothing contrary to or inconsistent with these articles shall be prescribed for military commissions. So, Congress might have made that distinction, but it has not done so. That language means nothing at all unless it means that the rules for martial law apply to military commissions.

Mr. Justice Frankfurter. I am not saying that there is not force in your argument, but I wonder if there is that compulsion about it that you indicate might be read to be distributed insofar as you deal with courts-martial, nothing inconsistent with courts-martial and the Articles of War shall be permitted. Inasmuch as Article 43 explicitly deals with courts-martial, and we are here not dealing with a court-martial but with a commission, there is not any head-on collision.

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You might argue persuasively, but there is not that compulsion.

Colonel Royall. I think there is, for this reason: that there are no provisions in the Articles of War dealing specifically with the procedure of military commissions.

Mr. Justice Frankfurter. From which one may draw the inference that the President is not restricted, in the case of commissions, to the provisions for courts-martial.

Colonel Royall. Then you would have to say that this language has no meaning.

Mr. Justice Frankfurter. Yes, it has, because if he sets up a court-martial, you could not apply any of the facts to Article 43.

Colonel Royall. But Article 43 relates to all of them.

Mr. Justice Frankfurter. Courts-martial, general or special.

Colonel Royall. And military commissions. Article 38 relates to all of them.

Mr. Justice Frankfurter. Yes, Article 38 does; but, as I say, there is no inconsistency in dealing with a matter.

Colonel Royall. Well, I still think that the inference is that unless the language there is designed not to refer to military commissions, it has no meaning.

Mr. Justice Reed. If you are correct in that, there would be no occasion to mention military commissions at all; they would simply follow the court-martial regulations.

Colonel Royall. No, no; there are some things on which you could have a provision which would not be absolutely contradictory of the Articles of War. I do not know well enough to discuss what the possibilities are, but that could arise.

However, passing that provision, Article 70, which deals

with preliminary investigation, we come to Article 46. In that there is an even more explicit contradiction.

The Chief Justice. The proviso is:

"That nothing contrary to or inconsistent with these articles shall be so prescribed."

Would you include the regulation of courts-martial, courts of inquiry, and military commissions?

Colonel Royall. Yes.

Mr. Justice Frankfurter. Is there anything in the Articles of War that explicitly prescribes that unanimity is required in the case of a commission?

Colonel Royall. No.

Mr. Justice Frankfurter. Therefore, since there is no provision that unanimity is required, is there any inconsistency between that provision of the President's Order and anything in the Articles of War, apart from that?

Colonel Royall. Apart from Article 38, no, sir.

Mr. Justice Frankfurter. Therefore, inasmuch as there is nothing which deals with commissions, except the right to set up commissions, and there is nothing in the Articles of War which defines the punishment that commissions may impose or the mode of proof required, where is there inconsistency?

Colonel Royall. Only in the construction of Article 38 which I adopt. That is what it narrows itself down to. I think perhaps I overstated something a moment ago. I believe there are one or two of these articles that do have some relation to military commissions.

Mr. Justice Roberts. They mention it in passing but without prescribing anything.

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Mr. Justice Byrnes. Does it not seem to contemplate a difference? Article 15 provides that the provisions of those articles shall not be construed as depriving military commissions of concurrent jurisdiction in respect to offenses that by the statute or the law of war may be triable by military commissions. Would not that seem to contemplate that nothing contained in these articles applying to general courts-martial should apply to military commissions and the execution of the power of the President to provide or prescribe regulations?

Colonel Bayall. I do not think, sir, that that follows, for this reason: that is not a method of procedure. Article 38 deals with procedure. This is jurisdiction. I think you will find that Articles 29 and 27, on pages 208 and 209, do refer to certain matters of procedure before military commissions which would further militate against the position I am taking. However, I still think that the implication is that military commissions have to act in conformity with the Manual for Courts-Martial.

Mr. Justice Roberts. Article 46 does refer to that.

Colonel Bayall. I was coming to that. The last one of the conflicts is Article 46. There, it seems to me, we have not only a direct and explicit contradiction but one which is most material. Article 46 says:

"Under such regulations as may be prescribed by the President every record or trial by general court-martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the

Judge Advocate General. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being."

There is an explicit direction to refer it to the Judge Advocate General or to a staff judge advocate before the matter is determined by the reviewing authority.

Article 50-1/2 in the second paragraph says:

"Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of Article 46, Article 48, or Article 51 is submitted to the President, such record shall be examined by the board of review."

Then it sets out and prescribes specifically what the board of review shall do, and that includes a review of the legal sufficiency of the matter; in other words, it is a method of appeal.

Notwithstanding that fact, the President's Order expressly provides that

"The record of the trial including any judgment or sentence shall be transmitted directly to me for my action thereon."

That, we say, is in direct violation of Article 46 and in direct violation of Article 50-1/2, which refers to Article 46.

Not only is that true, but the President has designated in his Order as the prosecuting officer the very person who under Articles 46 and 50-1/2 would have to review it, thereby making, as a practical matter, compliance impossible if he

should in his discretion refer it to a reviewing authority. If he did so, it would not cure the defect, because it deprives us of a right of appeal or a right of review, and this Order expressly deprives us of it.

Mr. Justice Frankfurter. Article 48 refers to Article 46. Presumably Article 46 calls for confirmation not by the President at all but deals with a court-martial. Article 48 says:

"In addition to the approval required by Article 46, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution."

So, that means that Article 46 excludes or deals only with situations where the President does not come into play at all. Am I right or wrong about that?

Colonel Royall. I think you are wrong; but let me see, first, if I understand correctly what you say. Article 48 provides for an additional review; it does not dispense with the necessity of Article 46.

Mr. Justice Frankfurter. No, my point is that in addition to the approval required by Article 46, confirmation by the President is implied; therefore, Article 46 does exclude confirmations by the President.

Colonel Royall. I do not think so, sir.

Mr. Justice Frankfurter. May I suggest that you read it again?

Colonel Royall. Article 46 provides for confirmation in every case, as we construe it.

Mr. Justice Frankfurter. Yes, but by whom? It provides

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for a confirmation when the President shall authorize appropriate regulations whereby a court-martial is to be "received by a reviewing or confirming authority" and "shall be referred by him." What is the "him"?

Colonel Royall. By the reviewing or confirming authority. Mr. Justice Frankfurter. Therefore, the President is out, so far as Article 46 is concerned?

Colonel Royall. No.

Mr. Justice Frankfurter. The President may make regulations providing for review by himself? That does not seem to me to be sensible. Then I go back to Article 48:

"In addition to the approval required by Article 46, confirmation by the President is required \* \* \*

That would mean that if the President is to confirm by Article 46, he is also required to confirm by Article 48, in addition.

Colonel Royall. I think this is true: I think Article 46 requires confirmation in all cases.

Mr. Justice Frankfurter. Must every court-martial go to the President of the United States?

Colonel Royall. No, only those under Article 48.

Mr. Justice Frankfurter. All right. Then, Article 46 deals with those that do not go.

Colonel Royall. I do not think so. I think that Article 46 deals with all, and Article 48 says which of them shall require approval by the President.

Mr. Justice Frankfurter. But if they already require

616 approval by Article 46, why do you again require approval by Article 48?

Colonel Royall. It is merely making specific which ones he has to approve. If Article 48 applies, and that refers to Article 46 also, that does not dispense with the necessity of sending it to a reviewing authority.

Mr. Justice Frankfurter. Does the scheme of the legislation make it such that we are here dealing merely with court-martial where you have intermediate tribunals?

Colonel Royall. It says in Article 48 that

"(d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution, subject to the provisions of Article 50-1/2."

That also refers to Article 50-1/2.

I think that is correct. I have it on better authority than I am--from Colonel Dowell.

Whichever it is, it has to comply with Article 50-1/2, and Article 50-1/2 requires a method of review, and the President's Order dispenses with the necessity of that method of review.

Mr. Justice Jackson. If you had a review, and the reviewing authority set aside the finding or the sentence, could the President reinstate it?

Colonel Royall. I do not think so.

Mr. Justice Jackson. You think that he would be bound by it?

Colonel Royall. Yes, though I am not certain about it.

I now understand that he could reinstate it.

Mr. Justice Jackson. If he could reinstate it, then the reviewing authority is merely advisory to him?

Colonel Royall. Article 50-1/2 provides for two types of review. One is review of the legal questions involved. We are deprived of that entirely.

Mr. Justice Frankfurter. In Article 48 do you possibly come under subdivision d, the requirement for review and confirmation by the President, which you read? It could not be anything else except d.

Colonel Royall. It does not seem so.

Mr. Justice Frankfurter. Suppose you read subdivision d.

Colonel Royall. Yes, we came under it.

Mr. Justice Frankfurter. Why?

Colonel Royall. Because it says:

"Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies."

Mr. Justice Frankfurter. "In time of war?"

Colonel Royall. "In time of war," but "in such excepted cases"--which is our case--"a sentence of death may be carried into execution, subject to the provisions of Article 50-1/2 \* \* \*

Mr. Justice Frankfurter. Read the rest of it.

Colonel Royall. "--upon confirmation by the commanding general of the army in the field or by the commanding general of the territorial department or division."

Mr. Justice Frankfurter. Do you not see that this case could not possibly get that kind of confirmation and could not

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possibly come under that?

Colonel Royall. Well, it could, yes. If it is in a military zone, it could, and that is a prerequisite.

Mr. Justice Frankfurter. Who is the commanding general of the army in the field where this took place?

Colonel Royall. I do not know the names of the generals. I have not got that far along. There is, of course, a general who commands this area, but I do not know who he is.

Mr. Justice Frankfurter. As I say, study may shed light on it, but I am just raising the question whether the whole matter of confirming and reviewing does not relate to offenders, offenses, and circumstances other than those in this case.

Colonel Royall. If Article 48 does not apply to this case, then I say that it would put back under Article 46.

Mr. Justice Reed. If you are under Article 46, and the case is immediately sent to the President, why cannot the President send it to the reviewing officer?

Colonel Royall. He could do that in his discretion, but this gives us a right of review as a matter of right, and we could not know whether he exercised his discretion until too late to do us any good.

Mr. Justice Reed. If Article 46 applies, you would assume he would follow it. It ought to be referred by him before he acts thereon.

Colonel Royall. He says here that "The record \* \* \* shall be transmitted directly to me \* \* \*

Mr. Justice Reed. Yes, and then under Article 46, having been transmitted by him, it

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"shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General."

You say that he cannot refer it to the Judge Advocate General because the Judge Advocate General is a prosecuting officer.

Colonel Royall. That is right.

The Chief Justice. In other words, the detention would not be unlawful until every attempt had been made to carry into effect the conviction without resorting to this method of review. Of course, your writ is addressed to the unlawful detention. All your other points are out of the case. Then you say the detention was unlawful until the President ordered the carrying into execution of the sentence without the review prescribed in Article 46.

Colonel Royall. The answer is twofold. Article 50-1/2, which I was just preparing to read, says:

"Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of Article 46, Article 48, or Article 51 is submitted to the President, such record shall be examined by the board of review."

They examine it before it gets to the President. We think it is of material import to deprive a man of his right of appeal. This deprives him of his right of appeal.

Mr. Justice Reed. He is not deprived of his right of appeal if this is a void statute until someone who is asked to hear the appeal fails to do it. He cannot do it at this stage

of the proceedings on any theory because we have not any conviction.

Colonel Royall. No, but the Order has already been issued dispensing with the right of review.

Mr. Justice Reed. But you say that that is voidable.

Colonel Royall. That is right. If the Order is void, then the whole detention is unlawful.

Mr. Justice Reed. Then it has accomplished nothing in the state in which it stands.

Colonel Royall. The Order would not be void in part; it would be void entirely, it seems to me.

Mr. Justice Reed. Do you mean the Order for the trial?

Colonel Royall. The Order of the President.

Mr. Justice Reed. The Order directing trial?

Colonel Royall. Yes, it would be void.

Mr. Justice Reed. Because he prescribes an unlawful means of appeal?

Colonel Royall. That is right.

Mr. Justice Reed. If that is void in his Order, why would it destroy the rest of the Order directing trial by a commission subject to the applicable rules of law?

Colonel Royall. Well, sir, because I do not think that that is capable of segregation; that is an inherent part of the whole procedure. I do not think you could take a part of this Order and change it unless the other part remained in effect, unless they are clearly separable. That, of course, is a matter that arises frequently in the case of statutes. I believe that that is such an integral part of this Order that, if we are correct about it, the Order itself is void--not merely the matter of review, but the entire Order.

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In addition to that, we make the point, which I won't argue at any length, because it is covered in the brief, with reference to the rules of evidence prescribed by the President and proof which would convince a reasonable man and which the President of the Commission thinks would convince a reasonable man. We have discussed that, and I won't go into that any further.

Then we have the Commission itself delegated to make rules, when the statute gives that power to the President (Article 38). Of course, we understand that any court has an inherent right to make rules in the absence of a specific statute to the contrary, and it is conceivable that a military commission might have that authority unless a statute said it did not.

This statute says the President shall prescribe the rules, and we contend that he had no right to delegate something that was expressly committed to him. Not only did he delegate it, but he delegated it to the Commission to make rules as the action requires; not rules in advance of the hearing--the record shows that they were not made in advance of the hearing--but rules made during the hearing. That could change the requirement from two strikes to three strikes after we got at the bat.

The Chief Justice. Does it appear what those changes were?

Colonel Royall. Yes, sir. I say "changes." Rules were made.

The Chief Justice. I mean change of procedure.

Colonel Royall. Change of procedure from what would be

2b the ordinary procedure.

One of them arose early in the hearing, when we asked for the right of peremptory challenge of one member of the Commission, which is prescribed by Article 18, and that was denied us.

The other is a matter which differs very materially from the common law rule of evidence by admitting confessions of one of these defendants, not alone on the charge of conspiracy but on all the substantive charges, confessions made in the absence of the other defendants and after they were in apprehension or apprehended.

That was a very material factor in the proof of this case, as the record will show.

The Chief Justice. Was there a rule governing the introduction of confessions before this modification, as you say?

Colonel Royall. There was no rule at all made until that situation arose during the trial.

Mr. Justice Roberts. That was a ruling rather than a rule, was it not? It was not a rule.

Colonel Royall. Probably not.

Mr. Justice Roberts. It was a ruling on evidence.

Colonel Royall. It was probably a rule on evidence. However, of course, the matter of the challenge was in every respect a rule.

Mr. Justice Jackson. Was your objection to the confession upon the ground that it was not admissible as against the other parties or on some ground that the confession was not voluntary?

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Colonel Royall. We did object to one or two on the ground that it was not voluntary, but the objection I am speaking of is the objection on the ground that it was not admissible as against the other parties.

Mr. Justice Jackson. You claim it bound only the party who made it?

Colonel Royall. That is right, sir, except possibly on the question of conspiracy; and that was the essential part of the proof in this case.

Now, those, may it please the Court, are our contentions. I did not deal with some of them exactly in the order that I had planned, but that is immaterial, of course. We tried in our briefs to cover these various contentions as best we could.

The Milligan case, I am sure, is familiar learning to every member of this Court. It is the basis of our position here. We think that both the majority and minority opinions fully sustain our view.

The distinction between the Milligan case and ours, if one exists, must be on the ground that Milligan was a citizen or on the ground that the conditions of war have changed since the Milligan case. Those are the distinctions that the Attorney General makes, and possibly there are some more.

We think that the Milligan case, which has been law for seventy-five years, is still law today and that these petitioners are entitled to trial before a criminal court, just as the court in the Milligan case granted.

I won't say anything more about that, but I do mention it because I may want to deal with it in reply to the Attorney General.