

REPLY ARGUMENT ON BEHALF OF THE PETITIONERS
by
COLONEL KENNETH G. ROYALL

Colonel Royall. May it please the Court, it departs a little from the orderly procedure, but since this question is freshly before the Court, may I start by discussing Articles 66 and 50-1/2?

The Chief Justice. You mean, as to their meaning?

Colonel Royall. It seems to me they are rather clear as to their meaning. The only reason that I would discuss them further is that some questions were asked me yesterday by Mr. Justice Frankfurter and I sensed that I did not fully persuade him.

As to the meaning, it seems to me it is merely necessary to say that Article 66 is applicable both to cases which would go to the President if he were the appointing authority and cases that would go to another officer if he were the appointing authority.

The Manual for Courts-Martial, which is the best construction of this article, definitely holds that the appointing authority and the reviewing authority or the confirming authority (as the case may be) and if there were no Article 66 at all, would have been the same. The Manual, in which the two cases and the confirmation authority would go to the President. That is the construction of the Manual.

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different demands presented by the various "line managers" in one
area, which relates to the assignment pattern in the
various areas. This creates a problem in addition to the problem
of finding an authority of the same authority other than the Presi-
dent of the Board. In my judgment, therefore, I understand it
is necessary to amend Article 1.

and the other two were not mentioned. The first was the "Gardener's Guide" by J. C. Hare, published in 1848. The second was the "Gardener's Calendar" by W. H. Hare, published in 1850. Both of these books were written by John C. Hare, a well-known author and editor of agricultural publications. The "Gardener's Guide" contained information on various topics such as soil improvement, plant propagation, and pest control. The "Gardener's Calendar" provided a monthly calendar for gardeners, along with tips and advice for growing vegetables, flowers, and fruits. Both books were widely used by gardeners in the mid-19th century.

AFTERNOON SESSION

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

The Chief Justice. You may proceed.

REPLY ARGUMENT ON BEHALF OF THE PETITIONERS -Resumed.
by
COLONEL KENNETH C. ROYALL.

Colonel Royall. If I correctly understood the question asked me by Mr. Justice Reed, the answer is that the President having appointed this Commission, and having stated in his Proclamation itself that the record is to come before him for any action--and that point is unnecessary but merely fortifies the other--it is well established in all military procedure, and so provided expressly in the Courts-Martial Manual, which is the best criterion we have for the interpretation of these articles as applicable to any commission to which they do apply--the answer is that the record must be sent to the appointing authority. That is Manual 86, page 72. The reviewing authority is the one to whom the record is sent. So, those two add up to the fact that the officer appointing the court is the person to whom the record comes for consideration and review.

Mr. Justice Reed. What is Manual 86?

Colonel Royall. Courts-Martial Manual 86, interpreting these very provisions. It is section 86, page 72, of the Courts-Martial Manual. I assume that your pages are the same as these. That is rather express, and I do not think there is any serious doubt about that meaning.

Mr. Justice Reed. That is section 86, on page 72?

Colonel Royall. Yes. I can read the language that is material.

Mr. Justice Reed. * * * and will transmit the record of trial * * *."

Mr. Justice Roberts. What is a summary court? That is not a court-martial?

Colonel Royall. No. No, it is section 87, on page 73, which is "Reviewing Authority."

Mr. Justice Reed. That would require, as in the argument you made yesterday, that all the things that are applicable to a court-martial are also applicable to a military commission?

Colonel Royall. No, sir; that would not require that, for this reason: that Articles 46 and 50-1/2 are expressly applicable to military commissions and courts-martial and refer to confirming authority. We have got to find out what "confirming authority" means. It cannot mean one thing for a court-martial and one for a military commission when it is provided for in the same section.

Mr. Justice Reed. But Article 46 reads:

" * * * 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."

Colonel Royall. Article 46 provides, then, that the sentence of a court-martial shall not be carried into execution unless it has been approved by the officer appointing the court.

Mr. Justice Reed. That is limited to a court-martial?

Colonel Bayall. Yes, but it says up above:

"Under such regulations as may be prescribed"--
We do not rely on the last sentence--

" * * * every record of trial by general court-martial or military commission received by a reviewing or confirming authority * * *

We have got to find out what "reviewing or confirming authority" means.

Mr. Justice Read. The question I asked was whether there must necessarily be a reviewing or confirming authority for a military commission.

Colonel Bayall. Well, apparently so. It says,
" * * * received by a reviewing or confirming authority * * *."

That certainly implies it. But whether or not it does, if this comes before the President for action, it must be either for confirmation or some other action, and, therefore, he is bound to be, at least, the confirming authority, and it is in the alternative. Therefore, if it comes before him in any capacity for action, it must fall within that limitation, if the statute does not so mean, and it apparently does.

Mr. Justice Read. But in relation to Article 50-1/2, it requires confirmation where "there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of Article 46." I do not know whether that is applicable here or not.

Colonel Bayall. Of course, on the Courts-Martial Manual's construction of those sections, I should think it would be, and where it applies to both commissions and courts-martial, the construction would have to be the same, unless there was

a difference in the wording of the statute.

But be that as it may, as I said before, the clear implication, it seems to us, of Article 46 is that it does require a confirming authority, and Article 87, to which I called your attention, and to which Colonel Royall now calls my attention again, provides that the confirming or reviewing authority is the commanding officer who appoints the court. Therefore, a review by the confirming authority under Article 50-1/2 would mean the same as it does under Article 46.

Therefore, both by the implications of Article 46 and the fact that in this very Order which we are challenging the President has constituted himself the authority to act, it seems to us inescapable that it does require a review before it reaches him.

Mr. Justice Jackson. As I understood you to say yesterday, you agreed that no matter what any reviewing authority subordinate to the President might determine, the President could reinstate the sentence again and make the findings his own. I presume that as Commander-in-Chief he could hear the trial, if he were so disposed.

Colonel Royall. My recollection is that I said that was true subject to errors in law, and it requires a review of the legal questions under Article 50-1/2. He might physically be able to do so, but I do not think he could legally act contrary to a specific finding of law. As to that, though, I am not certain.

Mr. Justice Jackson. Do you think a subordinate could bind the Commander-in-Chief?

Colonel Royall. I am not certain.

Mr. Justice Jackson. Is not this whole matter of review a matter of relieving the President of passing on all the cases which require, theoretically, a possible review by the Commander-in-Chief, and is it different from his setting up a commission to advise him as to whether or not a pardon should issue? His power is as Commander-in-Chief. He might want to be advised by a reviewing board in some cases and not in others.

Colonel Royall. I do not think that question arises, for this reason: You could say the same thing of a court. It does not have to follow the law.

Mr. Justice Jackson. That has been said of courts.

Colonel Royall. I was not referring to any particular court.

Mr. Justice Jackson. Purely academic?

Colonel Royall. Purely academic. But, at the same time, a person is entitled to a hearing on the questions of law. Now, these provisions of Articles 46 and 50-1/2 require a consideration of the legal questions, and, therefore, I think it has substantial value to an accused; but whether or not it has a substantial value, Congress has enacted it as a requirement, and it has to be complied with, we contend, and it has not been complied with here.

We say in answer to the question which the Chief Justice proposed yesterday, and which he suggested again upon the Court's rising today, whether or not we are premature in this, that it is a question which we shall decide in our belief. I think Mr. Justice Jackson makes that suggestion today, also. I think there are three questions to be decided this morning.

but I have three today.

The first one is that this is a provision which is fundamental in the creation of the court. I think we have an analogous situation if a legislature creates a court and expressly says that there shall be no review, and does it as an integral part of the court's creation. I do not believe the statute would be valid or severable. I may be wrong, but I do not think it would.

The Chief Justice. Courts acted without review for a good many centuries.

Colonel Royal. Yes, sir, I am sure they did, but I do not know of any criminal court under the American system. There are none that I know of. There may be some.

The other thing is a very practical question which has also its legal aspects. Suppose this Order had said in so many words that upon the finding of the Military Commission the President, unless he desired to do otherwise, could order any man upon whom the death sentence was imposed shot within an hour. If that were spelled out in this Order, it would not take much argument to convince anyone that that would be an invalid provision.

This Order does not say that. Maybe it is stretching it to say it implies it, though we say in our brief--and I do not think it is deniable--that there is no intention of giving us the benefit of advice as to what is happening, so that we could have any means of acting or knowing whether we should act. In any event, it leaves it to the discretion of the President, without any limitation or restriction, to act, just as I said he could act if it said so in words of one syllable.

Finally--and I think this is a very important point on the question raised here now--the President has made it impossible to comply with Article 50-1/2. He has done so by appointing the Judge Advocate General as the prosecuting officer here, and the statute says that the record of trial shall be referred to the staff judge advocate or the Judge Advocate General. That term is so well known or has such a definite meaning in military procedure, I understand, that it can be argued that it means a judge advocate for some lesser unit than the entire Army, and that staff judge advocate for the President, if the term were applicable, would mean the Judge Advocate General, and therefore the President, by appointing the Judge Advocate General the prosecuting officer, has made it impossible for him at any time to comply with this provision.

Mr. Justice Reed. Suppose the Judge Advocate General were disqualified for any reason. Could someone else act in his stead as acting judge advocate general?

Colonel Royall. I do not know, sir. It does not say that; it does not so provide. It says "The Judge Advocate General." But if he is disqualified in this case, he is disqualified by the very act which creates the Commission, and in the absence of some disqualification for which the President is not responsible, he could act.

Mr. Justice Black. Eliminating the consideration as to the quality of his review, why could he not act?

Colonel Royall. Well, because I assume it is fundamental that a man cannot act in two capacities in a judicial inquiry.

Mr. Justice Black. That goes to the quality of the review?

Colonel Royall. Well, sir, I should think it would go further: I should think it would go to his qualification to act at all. He would act, in a sense, as judge and prosecutor. That has happened in practice, but it has not been approved by the courts.

Mr. Justice Black. Then, your argument is not that it is impossible for him to serve, but that in placing him there it deprives your clients of the type of review which the act contemplates?

Colonel Royall. That would be certainly true. I think that is certainly a somewhat safer position and as strong a position as we need to take, even if it does not absolutely disqualify him.

May it please the Court, I now wish to reply to certain other matters that have been discussed by the Attorney General. I should like to state briefly what they are, so that if I do have to stop for questions--which, of course, is entirely satisfactory--it will not seem as though these are mere after-thoughts. I want to discuss the facts a little, first, because I felt a little precluded from discussing the facts heretofore, not knowing just where the element of confidence came in this case. I have been somewhat relieved of certain restrictions that I had.

In the second place, I want to discuss this question of invasion and waging war, which seems to be one that certain members of the Court indicate is fundamental. I want to discuss specifically the laws of war and spying, in view of what the Attorney General has said. I have already discussed the procedural questions as far as I desire to discuss them.

I believe I will add one thing, so that I shall not have to come back.

I am not going to argue more about Article 38, because I dealt with that pretty thoroughly yesterday, but I do call your attention to one feature of it.

The language is inconsistent with or contrary to, or maybe I have got it backwards: contrary to or inconsistent with; these words do not mean exactly the same thing. It is our contention that they are broad enough to mean that in material matters the military commission--even if they do not literally mean all matters; if you take the view of the Attorney General, it must mean that in material matters, such as unanimity of decision or preliminary inquiry before charges--that in material matters it must mean that all the provisions of the Courts-Martial Manual apply.

On the matter of facts, there are only certain facts which have been stipulated as appearing in the record. The record is voluminous. I will still be cautious about the facts I discuss, but since the Attorney General has gone into them in some little detail and has gone a little beyond the stipulation --I do not mean to leave any false impression with the Court, but he has covered matters not expressly covered in the stipulation--I desire to mention one or two things.

All of these men to some extent disclaim any intention of ever committing any hostile act. I know that that is the sort of statement that must be weighed by any court that considers it; but in the case of one of the petitioners, the evidence disclosed that he had been terribly mistreated in Germany, and that is corroborated by everybody and every word

of evidence in the record, and that is indication that the reason why he was coming to this country was a reasonable inference.

In the case of the boy Haupt, let me state a few facts. He was 21 years old when he left home. He got into a little trouble about a girl. That has happened to other boys 21 years old. He went to Mexico on a trip. This evidence is not contradicted. He had been in America since he was 5 years old. He had attended American schools. He was an American boy in every sense of the word. His parents were here; his relatives, or most of those whom he knew about, were in America.

He wandered around in Mexico. Running out of money, he got aid from the German Consul. He went to Japan. He stayed there a little while. He still didn't like the conditions. He then went to Germany. America was not at war. He landed in Germany on the day war was declared and was immediately viewed with suspicion by everybody. He said--and the circumstances certainly seem to corroborate him--that he wanted to get back home but could not.

He was a boy just entering his 22nd year. He testified that at no time did he take any oath of allegiance to Germany or join the German Army or Nazi Party or renounce any right to his American citizenship.

Mr. Justice Douglas. What relevancy does this have?

Colonel Royston. It is material on the question of the right to institute this action as to whether he is an alien or a citizen. It has been discussed quite fully by the Attorney General yesterday and by myself on the writ.

Mr. Justice Douglas. Are you trying to establish that he

is a citizen?

Colonel Royall. Yes, sir. His parents were naturalized, and he was a citizen before he left here.

Mr. Justice Douglas. Is there such a thing as an enemy citizen?

Colonel Royall. Yes, there is. There is such a thing as an enemy citizen. The Attorney General apparently seeks to draw a distinction between enemy citizens and non-enemy citizens. We do not admit that he was either an enemy or an alien. We think these facts tend to show that he was neither.

He stated that at all times he intended to return to the United States. The only evidence that he had ever joined the German Army or renounced his American citizenship is the merest hearsay, which this Court would not consider, whether the Commission admitted it or not.

He came back to America, went immediately home, applied for a job, and registered for the draft. He went back to his parents. We say that it having been admitted that he was a citizen before he went to Germany and he having stayed in Germany only a short period from the time he got there, and then the war being declared so that he could not get home, on this stipulation there is nothing to justify the inference that he is not still a citizen.

The question has been asked, Why did he not report this thing immediately he got back? That has been pretty satisfactorily answered--

The Chief Justice. You are not saying that there was not enough evidence to go to the jury?

Colonel Royall. I am not certain that there was evidence

enough to go to the jury. I doubt seriously that there was enough evidence to rebut the presumption--

The Chief Justice (interposing). I am not talking about citizenship. You said a few moments ago that a citizen might be an enemy.

Colonel Royall. Yes.

The Chief Justice. On the question whether he was an enemy, irrespective of his citizenship, would you say you would not argue that there was not evidence enough to go to the jury?

Colonel Royall. I could not say that there was not evidence enough to go to the jury on the question of being an enemy.

The Chief Justice. Assuming all the other elements of military trials, would that cast jurisdiction of a military court?

Colonel Royall. It is our contention that neither the fact that he was an alien nor the fact that he was an enemy would cast jurisdiction of this Court.

The Chief Justice. That goes to the question whether there is power to try by commission enemies in certain circumstances?

Colonel Royall. That would be true, sir, if he were an enemy; but I want to make this further observation, may it please the Chief Justice, if I may.

The Chief Justice. Yes.

Colonel Royall. We do not think that on a jurisdictional question this Court can deny jurisdiction, because there is evidence from which a jury might find these facts.

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The Chief Justice. Of course, every trial involves a determination, in some manner, of the matter of jurisdiction. If there is a right to have a military trial, and the fact whether the individual tried is or is not an enemy determines whether the court may act, is it not unavoidable that it may determine that question?

Colonel Royall. I do not think so, sir. That may be the law, but there is certainly no case to the contrary in those cases, one of which was cited by the Attorney General, where the question of internment--right to internment--comes up.

Let us consider the example which was suggested in a question asked this morning. Here is a man walking along the street. A military court picks him up and says he is a soldier. Let us assume that one man swore that he had enlisted and ninety-nine men swore that he had not. Would he be deprived of going into the civil courts to determine whether a military court could try him? I do not think so, and I think while the question may not be only absolutely the weight of evidence, there must be some substantial, and at least to some extent convincing, evidence in order to deprive this Court of the right to make inquiry into it.

Mr. Justice Frankfurter. On that argument, Colonel Royall, would it not follow that this Court would be under a duty to read this whole record, on the basis of the argument you have just made, namely, that there is an absence of what you call substantiality?

Colonel Royall. I should think that would have to be true unless the stipulation of the parties has indicated otherwise or unless it should hereafter indicate otherwise.

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I do not think the Court can take something I say is in the record or that the Attorney General says is in the record unless there is a stipulation which controls it.

Mr. Justice Jackson. If a question of fact has to be decided as to whether these people were refugees, as I might call them, or invaders, obviously it will be decided by the people who face them across the table, who see them and have a chance to hear their stories at first hand and on cross-examination. Every appellate court has always held that questions of veracity--and that is what this would get down to--ought to be determined by the tribunals before whom the witnesses themselves are produced. We should not be asked to review information of that kind on the whole record, nor could we very well anticipate that if your clients made a convincing story that they escaped cruelties in Germany the Military Commission would not give consideration to that either in fixing the sentence or in the finding of guilt.

Colonel Moyall. What Mr. Justice Jackson says would ordinarily preclude any further discussion of this matter. The only answer to that is a practical one. Time being substantially of the essence, whether the Court ought to be asked to do that or not, it looks like it is inevitable in this case that it should.

Mr. Justice Jackson. I am not complaining about the time. It is a fact that you cannot determine veracity by a cold record. No appellate court, so far as I know--none with which I am familiar--attempts to review the question of veracity. That is for the jury or the trial commission; and if the veracity of your clients is at issue, you should certainly

15 attempt to decide it.

Colonel Royall. However, the further answer is that from the admitted facts, facts undenied in this record, in the case of the petitioner Haupt, there is no substantial evidence that he is not a citizen and no substantial evidence that he is an alien.

Mr. Justice Frankfurter. In order to be sure that I fully understand the implications of your argument, will you be good enough to answer this question? Assuming--and I understand that you do not so contend--that the claim of the Government regarding the purpose of these men in coming here were to be accepted by you--in other words, if I may use the language of Justice Jackson, assume them to be invaders and not refugees--suppose you were agreed on that--would you then admit that this Military Commission had appropriate jurisdiction and that its conduct is not subject to review on habeas corpus?

Colonel Royall. No, we would not.

Mr. Justice Frankfurter. Your position is the opposite, is it not?

Colonel Royall. It is. We would not admit that. I think I have not made that clear. We do not admit--in fact, we contend just the contrary--that the fact that he was an alien or an enemy, or the fact that he was both, did not confer, as we see it, jurisdiction upon a military commission. But I am merely bringing up the question of citizenship because the Attorney General has argued so strenuously that there should be a distinction between a citizen and an alien.

Mr. Justice Frankfurter. I know that you covered this

ground yesterday, and if I may say so, very well. In order to focus further discussion on it, is the essential reason why you so contend that in the circumstances of their landing and in all the other circumstances that which they did, in relation to the total geography, was not an action in the sphere of war?

Colonel Royall. That is substantially what our contention is. Skipping something that I was going to say first, I will come to that.

Mr. Justice Frankfurter. I did not mean to cut you off.

Colonel Royall. No, sir; it is just as convenient to discuss this now.

We say that these people were not engaged in waging war against the United States in the sense that that would make the place where they were acting a theater of military operations. We further say that this action in appointing this Military Commission could not be construed as an act of the Commander-in-Chief in repelling an invasion. It may not be conclusive, but it is persuasive that these men came ashore without any personal arms. They brought explosives, but the evidence disclosed that for these explosives to be effective required a considerable course of conduct. These explosives were buried on the seashore. Nothing was done by any of these petitioners to make them effective. No location was ever selected for their use. No specific plan was made for their use.

These petitioners merely came ashore with the means by which, after time and preparation, they could commit sabotage, and they buried those means and left them. They were not apprehended on the beach and not apprehended in the theater of operations but were apprehended a week or ten days later in

Chicago and New York, considerably removed--in some instances a thousand miles removed--from where they had landed.

They were not taken in charge by the military authorities to repel invasion but were arrested by the civil authorities and asked to sign, and agreed to sign, civil waivers, which appear in our record and are attached to our petition, providing for their arraignment before a district court, providing for their removal to another district for trial.

It seems to me that if we say that taking these men away from the civil authorities and putting them under the custody of the Army is an act of the Commander-in-Chief, we are not advancing a reason but merely an excuse, and none too good an excuse.

It may not be material, but it is a fact that the coastal line where these men landed, while it had a patrol, did not have an armed patrol. The Coast Guard was totally unarmed. None of these men carried any species of weapon.

To say that that is a battlefield, when unarmed men land from a submarine and other unarmed men are patrolling the coast, is, it seems to me, to stray pretty far from realities and actualities.

Mr. Justice Douglas. To what point is this argument addressed? That no crime was committed here?

Colonel Keyall. No, sir, it is not. The argument is addressed to this, sir: We advanced the argument yesterday that in order for a military commission to have jurisdiction, an act must be committed in the theater of operations.

Since Mr. Justice Douglas was not here, I shall go back to that briefly. I was going to mention it anyhow. The only

authority for any action in the trial of these men by military commission, in denying them the ordinary civil process--the only constitutional way in which it could be done--is under the provisions of the Constitution, we contend, relating to the land and naval forces; otherwise you cannot have a court-martial; otherwise you cannot have a military commission, either by congressional enactment or otherwise, or by executive proclamation. That is pretty well established, we think. Therefore, we have to see what they mean by "in connection with land and naval forces."

Ex Parte Milligan contains three definitions of what is meant. Incidentally, *Ex Parte Milligan*, in answer to some question that was asked, deals expressly with the law of war. It was advanced by the Government in that case.

Unless they show that this was in connection with land and naval forces, the crime cannot be tried before a military commission. That is the reason why it is material to know what sort of zone they landed in or whether this was a part of a military action by the Executive.

It was mentioned yesterday that capture on land and water might enlarge the powers of the Legislature or the Executive, but that clearly applies to and is in connection with prizes; it applies to the capture of material goods. I think the decisions under it rather clearly indicate that, although now and then that article is brought in in a list of citations in cases involving other matters.

Coming back, then, to the question whether they were in any sense waging war or invading, we say the facts do not disclose that in any true and real sense they were acting in the theater

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of operations or that the action of the President was justified as a military action.

Mr. Justice Reed. If they came within the theater of war for the purpose of committing sabotage--if that was the fact--would you say they were subject to a military commission?

Colonel Royall. No, sir; we would not concede so unless you overruled Ex Parte Milligan. We would not say so if the civil courts were functioning in the area.

Mr. Justice Reed. Even though it was a theater of war?

The Chief Justice. Was there a theater of war in the case of Ex Parte Milligan?

Colonel Royall. No, there was not, but I think the principle of that case--

Mr. Justice Reed. So, even if it was a theater of war, the purpose of sabotage is distinct from--

Colonel Royall. Perhaps I did not get your question clearly. If they were in the theater of war and were at that time committing some act?

Mr. Justice Reed. If they were in a theater of war and had as a project or purpose the committing of an act of sabotage.

Colonel Royall. If the purpose was to commit an act of sabotage outside a theater of war, I would say no.

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Mr. Justice Reed. What if it were in the theater of war?

Colonel Royall. Then, of course, I think there would be authority for a military commission, if we assume that it came within the charge of spying or within the 81st Article of War.

Mr. Justice Reed. I eliminate the spying, but put in the sabotage.

Colonel Royall. No, I do not think that sabotage is covered by any enactment. I am coming to the law of war. The question that would be the determining question there would be whether the laws of war cover that.

Mr. Justice Reed. You are not taking the laws of war into consideration in what you are saying?

Colonel Royall. Yes, I am taking those into consideration. I am going to discuss those in a moment, but I do not think that they cover the facts that you state or cover the facts of this case, either.

Now, it is indicated to me by the President's proclamation that apparently the Executive had the thought that it required some action to make these men subject to a military commission, because he not only appointed a commission; he issued a proclamation that they had to be tried by a commission. If he had that right without a proclamation, it seems hardly appropriate that he should have added it in this proclamation. It is evidence that that proclamation was ex post facto, if that term can be applied to a Presidential proclamation. It was applied after the men were apprehended, and most of them were apprehended in the interior of the country.

There is one other fact that I am going to discuss, and that is the matter of spying. I am going to discuss spying,

Article 81, which was not discussed yesterday to any degree, and the provisions of the laws of war, which were gone into in some detail by the Attorney General.

The definition of "spying" is contained on page 157 of the Court Martial Manual, and that accords with the definition in the Rules of Land Warfare, I think, in all essential particulars. I just give you that additional reference as a matter of convenience. It requires an intent to communicate military information to the enemy. This record does not disclose, we say, any intent to communicate that.

Mr. Justice Black. Do the charges say that there was an intent?

Colonel Royall. They do.

Mr. Justice Black. So if jurisdiction be judged by the charges themselves, you would say that it shows that they were spying within that definition?

Colonel Royall. You may recall an answer that was made to that yesterday. I did say that the charges were defective because they failed to allege that they had endeavored to obtain any information.

Mr. Justice Black. But for that exception it would come within the definition?

Colonel Royall. That is correct, but there is no evidence, except in the case of one petitioner, the petitioner Kerling, of any intention to communicate any fact to the enemy. He had an address in Portugal, which may leave the inference that he wanted to communicate. None of the others did. All of the evidence shows that none of the others did. He was the leader. They did not know he had it. They had never been

advised he had it. They had a means of communicating between themselves as to where they were located.

The charge grasps that fact and says, "for the purpose of communicating with each other and with the German Reich," but we do not think that, in any true or proper sense, that is spying. As far as the other petitioners are concerned, that is the only evidence of any kind of any intent to communicate information to the enemy.

Furthermore, there is not the slightest evidence that they endeavored to obtain information as the definition requires, and that is a defect both in the proof and in the charge itself, and, of course, the answer here as to all these charges is that they were not in the sense of operations.

Under Article 81 you must show an effort to relieve the enemy. They seek to supply that by saying the possible use of explosives is relieving the enemy. I do not believe "relieving the enemy" is used in that sense. I find no decision that seems to indicate that that was the purpose. We think that that is an unreal meaning, and without that meaning that charge is totally lacking in proof of an essential element.

Now, referring to the Rules of Land Warfare, they read to you today the definition of "armed prisoners." In the first place, they were not armed. It merely says they are not entitled to be treated as prisoners of war, which is a far cry from saying that they could be tried for that offense.

Mr. Justice Reed. Are you going to discuss unauthorized belligerents?

Colonel Royall. Section 351 of the Rules of Land Warfare reads as follows:

"Men and bodies of men, who, without being lawful belligerents as defined in paragraph 9, nevertheless commit hostile acts of any kind, are not entitled to the privileges of combatants."

The whole question turns there on the question of hostile acts. Frankly, I think our argument on that would be considerably weaker than it would on any other point. I would not be frank to the Court if I did not say that there was some reasonable contention that landing with explosives might constitute a hostile act.

However, as to the laws of war, we do not concede that there is any such crime as the laws of war, as we argued yesterday. We do not concede that Congress has made it an offense and that anybody but Congress can make it an offense. We do not concede in our relations with Germany that the Hague tribunal is binding. We do not concede that anyone can create an offense in the absence of express Congressional enactment. The Constitution recognizes that.

Mr. Justice Roberts. What do the Articles of War mean when they refer to the law of war?

Colonel Royal. The Articles of War refer to them, but they do not explicitly provide that they should be offenses. The language of the 19th Article of War is the strongest provision to that end, and it says this:

"The provisions of these Articles"--and so forth--"shall not be construed as depriving military commissions, * * * of concurrent jurisdiction in respect of offenses or offenses that by statute or by the law of war be

triable by such military commissions"

Now, we do not believe an inferential inference of that kind can create a criminal offense, and that is the most explicit statutory provision that we find.

Mr. Justice Roberts. It says that a commission may find an offense against the law of war. It does not say that the law of war is.

Colonel Royal. But that would have to mean if it were a punishable offense.

Mr. Justice Roberts. A law of war.

Colonel Royal. There are some offenses under the law of war--

Mr. Justice Roberts. I thought you said you did not admit that there were any.

Colonel Royal. Which are covered by statutes.

Mr. Justice Reed. What would you say of an enemy saboteur who was in the field or in the area of battle, behind the lines, who destroyed a bridge? Would he have to be tried by the civil courts?

Colonel Royal. If he actually destroyed a bridge as a part of military operations he would probably come within Article 81.

Mr. Justice Byrnes. Suppose that had not been defined as a theater of operations.

Colonel Royal. Well, then he would be violating the express Congressional statute against sabotage, which is punishable by thirty years imprisonment.

Mr. Justice Byrnes. He would have a right to trial by

Jury?

Colonel Royall. He would have a right to trial by jury.

Mr. Justice Frankfurter. Nothing that is done outside of what you call the zone of operations, except by men in our own armed forces, is triable by military tribunals? That is your position?

Colonel Royall. That is our position, because the Constitution says "land and naval forces," and you cannot go beyond it by any Congressional enactment.

Mr. Justice Jackson. Where is this war if it is not along the Atlantic Seaboard?

Colonel Royall. I have heard it is across the water.

Mr. Justice Jackson. Your position, then, is that this side of the Atlantic, where all these ships have been sunk, is not a theater of operations?

Colonel Royall. The coast is not a theater of operations.

Mr. Justice Byrnes. If a person should invade territory which has not been declared to be a theater of operations, your contention is it would not apply?

Colonel Royall. No. I think I admitted yesterday, and I do not see how we can deny it, that an actual combat occurring in a particular place, no matter what anyone had proclaimed or defined it to be, would make it a theater of operations.

Mr. Justice Byrnes. Take the case of landing of war vessels or the approach of war vessels, and sending marines ashore, for example. Notwithstanding the fact that the Atlantic Seaboard has not been declared to be a theater of operations, you would say that that would not apply?

Colonel Royall. It would depend on the purpose for which

they were sent ashore. If they were sent as those men were, merely with explosives, which was not any more than the means by which a crime could be committed, it would not make it a theater of operations.

Mr. Justice Byrnes. Suppose they were armed with guns, with which harm could be done. What is the difference?

Colonel Royall. The difference is that if they were armed with guns and had an immediate ability to inflict injury on someone or to engage in combat, that would be one thing, but gathering the supplies by which they might do so in the future would not make it a theater of active operations.

Mr. Justice Byrnes. Gathering the supplies does not mean that they would have to wait for the future.

Colonel Royall. They could not have done anything anywhere near the time when they landed because it required preparation, time, and everything else, before they could be used. They had to be assembled. That was described in some detail.

Mr. Justice Black. As I gathered your answer, your contention would rest on the distinction whether they intended to destroy cargo or destroy human beings?

Colonel Royall. No, that is not the distinction. If they were to destroy property of military operations in the sense of an engagement, or a military engagement, that would be one thing but mere sabotage is not a military operation, as we contend.

Mr. Justice Reed. Then, it would not come under Article 81?

Colonel Royall. I say, if they invaded the coast with a

view to using those explosives immediately in connection with a military campaign or operation, I think it would. Of course, Article 81 is broad enough by its language to cover a very wide range, but it must be construed in connection with the constitutional provisions.

Mr. Justice Black. I still don't quite get your distinction there. What about the planes that fly over foreign countries and drop bombs and destroy property far removed from the scene of battle?

Colonel Royall. If it was a military plane, that is generally accepted as a means of fighting or of combat.

Mr. Justice Black. A submarine is, too.

Colonel Royall. A submarine is, but these submarines in this case did not do anything but transport.

Mr. Justice Black. But all the plane does is transport a bomb.

Colonel Royall. Yes, but the submarines just transported men. A plane would be an instrument by which bombs immediately would be put into operation. The submarine transported men so that in the future they could put something into operation.

Mr. Justice Black. Your distinction is one of time?

Colonel Royall. Well, there has got to be a line drawn somewhere on everything, and the question is this. If you take the theory that everything that was done that might aid the enemy makes it a theater of operations, you reduce the thing to an absurdity. If that were true, a strike in a variant could be tried by a military commission sitting in judgment over the strikers, if there was any pretense that they did it in violation of any law with any ulterior intent.

Mr. Justice Jackson. You are leaving out the very vital fact in your assumption of the strike that these men came from Germany and came on a submarine, after having gone to a school of sabotage. You are comparing two things that are not at all comparable, are you not?

Colonel Royall. I did not make any comparison, may I please Mr. Justice Jackson.

Mr. Justice Jackson. You said they would both be tried under the same--

Colonel Royall. No, sir. I said that unless you drew the line somewhere-

Mr. Justice Jackson. It might be drawn between the two things?

Colonel Royall. Of course, it can be drawn between two places. I am not saying they are the same. There is no contention in that regard. The question arises, Where would you draw the line? Mr. Justice Black raised the question. I said I would draw it at a place between the airplane and the men who landed to commit sabotage. It has got to be drawn somewhere.

Mr. Justice Frankfurter. And you draw the line as you indicated because you say, by following your argument, that this is essentially a procedural problem, namely, what agency, what tribunal, and under what safeguards a charge of guilty should be determined, and you say that there are specific provisions in our Constitution, as well as implications from our form of government, which assure the ordinary criminal trial except as to action immediately taking place in active war areas where there is shooting going on or by agencies that

themselves bring the shooting to the non-shooting country. Is that about a fair statement?

Colonel Royall. That is substantially what our contention is, and we say this in support of that, and I come to the Milligan case. That is exactly what the Milligan case holds, as we contend. In the Milligan case the charges were--

Mr. Justice Reed. Before you reach that, would you say a saboteur who was about to light a fuse behind the lines, close enough to be in the theater of war, could be tried by a military commission?

Colonel Royall. I think under Article 81 that would be true.

Mr. Justice Reed. In the absence of a statute, you do not admit any law of war that permits the Army to try people who are waging war without uniform, guerrilla warfare behind the lines?

Colonel Royall. I do not in the absence of a statute, because the Constitution says that Congress shall define and punish such offenders.

The Chief Justice. So that parachutists landing immediately in the vicinity of our armies, armed and prepared to fight, could not be punished summarily by military tribunals?

Colonel Royall. I think you could say that if it was in the zone of military operations.

The Chief Justice. Then there is a law of war, because you do not refer me to any Article of War.

Colonel Royall. Article 81, sir.

The Chief Justice. Article 81 covers that?

Colonel Royall. Yes, sir.

Mr. Justice Reed. May I say that covers it?

Colonel Royall. Because it says "relieves the enemy."

Mr. Justice Reed. Do you not relieve the enemy when you do anything to help the enemy? It says, "with arms, ammunition, supplies, money, or other thing."

Colonel Royall. That is right.

The Chief Justice. He must be relieved by things, not by acts.

Colonel Royall. Yes, sir. Well, sir, I suppose if a man were given arms, he would be relieving by things and acts, if he acted. If he did not, he would be relieving by things.

The Chief Justice. He would not be giving arms to the enemy.

Colonel Royall. It does not say "give them." It says "relieve." If they were made immediately available for their benefit, I would say it was relieving.

The Chief Justice. Would blowing up by dynamite be relieving?

Colonel Royall. Yes, but Article 81 would not cover blowing up by dynamite unless it was in the theater of operations, because if Article 81 were so construed it would be unconstitutional. That is our argument. Article 81 must be construed in line with the constitutional provisions.

Mr. Justice Reed. Then, in the area of operations, neither Article 81 nor sabotage, to be heard by a military commission, would be constitutional?

Colonel Royall. Well, nothing in violation of Articles 81 or 82.

Mr. Justice Reed. Or of the law of war?

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Colonel Royall. No, sir. I say there is no law of war in absence of a statute.

The Chief Justice. How can there be one with a statute, if the Constitution prohibits such a law?

Colonel Royall. The Constitution does not prohibit a statute which creates a law of war in the zone of military operations.

The Chief Justice. The Constitution does not say anything about zone of war.

Colonel Royall. No, sir, but it says that writs of habeas corpus and the other constitutional guarantees can be dispensed with only in connection with the land and naval forces, and we say that that does not mean anything that affects the land and naval forces, but merely those that affect it directly in the zone of operations. It does not apply to the labor strikes, although it may affect the land and naval forces.

Mr. Justice Black. Do I understand, to get your position clear, that a civilian cannot be tried at all in what you say is the zone of operations?

Colonel Royall. I think he can.

Mr. Justice Black. By a military commission?

Colonel Royall. If he is in the zone of operations.

Mr. Justice Black. Suppose he is not in the zone of operations. He is a civilian. Does your position rest on the ground that he cannot be tried before a military commission for any offense whatever?

Colonel Royall. It is not the place of trial--I do not think that--it is the place of committing the alleged act.

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Mr. Justice Black. Suppose civilians deliberately blocked army troops in a place where there was no zone of operations.

Colonel Royall. I do not believe they would be triable.

Mr. Justice Black. Your position is that they would have to be tried by the civil courts?

Colonel Royall. That again raises another element, and I might want to revise that, because there might be more than one way of acting in connection with the land and naval forces.

If you directly blocked one of the land or naval forces, that would be approaching it from a little different angle.

Mr. Justice Black. That has been recognized traditionally as a military offense, even if committed by civilians.

Colonel Royall. I think I would have to revise my opinion, because that would be operating directly on the land and naval forces themselves, and therefore the area would not be material there.

Mr. Justice Black. So that there are certain offenses, even with the position you take, that can be committed by civilians, even though not in the zone of operations, and can be tried as a military operation?

Colonel Royall. Yes, sir, I am sure of that.

Mr. Justice Black. Why could not spying be one of those? That is the question I raise.

Colonel Royall. I do not think that it could. Spying would have to be spying of some military emplacement or fortification.

Mr. Justice Black. Is there any offense of any kind in connection with the military which has a deeper root and a more ancient history than spying?

Colonel Royall. No, sir, but now there is a third element. This "land and naval forces" has several meanings.

In the first place, the primary meaning is the regulation of the forces themselves, which has not got any connection with where they are at all.

Another meaning is doing something directly to the forces, like around a post. Some civilian might commit some offense around a post directly on and concerned with the military forces. That would be triable by a military tribunal.

He might spy around the military emplacements, and be tried by military tribunal.

All three of those must be analyzed, with some slight difference; but where he does not do anything directly to the military or naval forces, but does something merely that may affect the conduct of the war, then he has got to do it in the theater of military operations.

Mr. Justice Black. Am I wrong in my recollection? Spying very generally refers to activities throughout a country where men get information which might be valuable, by working for certain industries, and things of that kind, and do it secretly?

Colonel Royall. I do not think that is spying. I think that is espionage.

Mr. Justice Black. You do not think that is spying?

Colonel Royall. I do not think that is spying. The term "spying" has been used rather loosely, both colloquially and in some of the statutes. There is military spying, the one that is punishable by a mandatory death sentence, and espionage, which is sometimes called spying, and which is what

you have in mind--that is, reporting on industries, reporting on the resources of a country, and there are varying degrees of that. Most of them are punishable by a maximum sentence of thirty years.

Mr. Justice Black. That is, acting in one country to get information for another country which either is or might be an enemy, to reveal information which should not be revealed?

Colonel Royall. That is espionage.

Mr. Justice Black. Is not a man who engages in that secretly generally known under the military law as a spy?

Colonel Royall. I do not think so, sir, unless it has some connection with a military emplacement or military establishment.

Mr. Justice Black. It might have something to do with military information to be given to the military forces of another nation.

Colonel Royall. I do not think that would be sufficient, because anything that we have or do--how many automobiles we make--might be of value to Germany; but I do not think that anybody who gave those figures would be punished by death.

Mr. Justice Roberts. What is your authority for distinguishing espionage from spying?

Colonel Royall. Well, we have not cited many of them in the brief, but there is considerable authority on that.

Mr. Justice Roberts. I have Webster's Dictionary before me, and it says, "Espionage. To spy; the process of spying."

Colonel Royall. Well, Webster's Dictionary probably uses it in the sense that the man on the street uses it and not in the sense that the military courts use it.

Mr. Justice Reed. I have the Court-Martial Manual before me. On page 157, the second paragraph, it says:

"The principal characteristics of this offense is a clandestine dissimulation of the true object sought, which object is an endeavor to obtain information with the intention of communicating it to the hostile party."

Colonel Royall. Yes, sir; that is part of the definition. I do not think that militates against our position at all. I still think that there are well defined differences between espionage and spying. Espionage is the crime of giving information which might be of military value.

Mr. Justice Black. Colonel Royall, I would like to ask you one other question.

Colonel Royall. Yes, sir.

Mr. Justice Black. Let us take this case as though you had filed this petition for a writ before any evidence was offered and we had nothing but the charges. As I understand it, it is your position that the charge does embrace being a spy--that is, with the one exception?

Colonel Royall. With one exception, yes, sir. It leaves out endeavoring to obtain information.

Mr. Justice Black. What is your position as to why that does not give the Commission jurisdiction, a jurisdiction which once having fastened on to the case, carries through, so that the Commission itself can, without judicial review, finally determine the guilt or innocence of the accused over which it has jurisdiction?

Colonel Royall. Of course, one qualification is the one

You stated--that it has not made the charge. It has not charged that.

Mr. Justice Black. I understand that.

Colonel Royall. The other one is this, sir. I think that question does not arise here. I am not prepared to say whether that will be correct or not. It does not arise here, because the evidence is before you, and there is nothing to show the other elements.

Mr. Justice Black. But do we have any right to do anything except pass on jurisdiction?

Colonel Royall. Yes, sir, I think you would, sir. I think if the case has been concluded and the evidence has been concluded--

Mr. Justice Roberts. Have not the authorities said over and over again that we cannot revise the judgments of military commissions and that we cannot examine the errors that they have committed?

Colonel Royall. That is entirely correct, but if a civilian was picked up on the street and tried by a military tribunal and the trial was concluded, and he was tried as a soldier, and there was not a syllable of evidence that he had any connection with the military forces, I would say it had no jurisdiction and that the Court could inquire that far into the facts.

Mr. Justice Black. Have there not been enough cases that say that if the charge shows it, it has jurisdiction? We realize that under the Constitution military commissions have jurisdiction, and the courts must then act on the assumption that the military commissions had done their duty under the

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Constitution, and the Court has no right to consider the weight of the evidence or even whether there was any evidence at all?

Colonel Royall. No, sir, I do not think that is so. There is no evidence to sustain the charges.

Mr. Justice Black. Is there any case that you can refer to this Court where the Court has looked into the evidence to determine what you say?

Colonel Royall. As to jurisdiction?

Mr. Justice Black. No. It gets down to guilt or innocence.

Colonel Royall. No, sir, I do not think so.

Mr. Justice Black. Of course, in a case where a man is accused of murder, there may not have been a murder committed by him.

Colonel Royall. I do not think that that is analogous, for this reason. Courts of general jurisdiction have jurisdiction to try all offenses committed in the realm. This is a special kind of jurisdiction.

Mr. Justice Black. The one you say the Constitution grants in certain cases?

Colonel Royall. Yes, grants in certain cases, but it is an exception to the rule, and whether or not you could have inquired into it when the charges alone were brought does not arise here. All the evidence is in. It has been stipulated that that is available.

Mr. Justice Black. Does that change our situation? What we pass on is jurisdiction. That is not determined by whether or not the Court makes a mistake in determining the proof of the evidence.

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Colonel Royall. No, sir. I realize that you cannot try it originally, but I say that in this case, where there is no evidence of facts essential to confer jurisdiction on a special kind of tribunal, you cannot take jurisdiction; that it is a jurisdictional fact which you must determine.

The only other thing that I want to discuss is the Milligan case, briefly. This is on the question of spying. Congress has two separate statutes, one on espionage and an entirely separate statute on spying, which is a clear Congressional declaration, so to speak, which is borne out by texts that they are not the same thing.

Mr. Justice Black. Do you cite those in your brief?

Colonel Royall. We cite those in our brief. I do not believe we cite the spy statute. That is 1343.

Mr. Justice Black. You do not set them out?

Colonel Royall. I do not believe we do, sir. This brief was finished in the morning.

Mr. Justice Black. I wanted to send for it if you could refer to it in the United States Code.

Colonel Royall. Section 1343 is the spying statute, Title 50.

Mr. Justice Black. That is the same as Article 82, is it not?

Colonel Royall. The language is identical.

We referred to the espionage statute. I will find it in a minute. Sections 31 to 42, Title 50, of the U. S. Code are on sabotage. Sections 101 to 106 are on espionage.

Mr. Justice Black. Of what title?

Colonel Royall. Of Title 50. I may have them backwards.

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They are cited in there, but we did not set them out.

Before I conclude, and this is the only thing I want to say anything about that amounts to a detailed argument, I want to refer to this Milligan case, if I might. I have been trying to do that. Someone asked if they charged anything about the laws of war.

I quote from the opinion, page 6:

"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, resisting the draft, at a period of war and armed rebellion against the authority of the United States, at or near Indianapolis, within the military lines of the Army of the United States and the theater of military operations, and which had been and was constantly threatened to be invaded by the enemy."

Now, those are the charges in the Milligan case. In the Milligan case the entire Court held that a military commission could not try the case. Five Justices held that that was true, because Congress neither did nor could provide for that trial. Four Justices held that it was true because Congress could but did not provide for the trial.

The Chief Justice. Did not the majority say that those

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men should not have been tried by that kind of tribunal in the particular circumstances of the case?

Colonel Royall. The minority so stated. The majority said that Congress could not make a provision for them.

The Chief Justice. Did the majority say it did not?

Colonel Royall. It said both. All of them said it had not so provided, and five of them said it could not provide.

The Chief Justice. Did not the majority go a little further than that and say that under the Constitution they were entitled to be discharged?

Colonel Royall. Oh, yes, sir; all of them said they were entitled to be discharged.

The Chief Justice. By virtue of the Constitution?

Colonel Royall. By virtue of the Constitution, but five of them said that Congress could not have done otherwise.

Now, I am not going to read very much of it. It is a very long case, as you know. Here is what the majority said, I read from page 57 of my brief:

"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 this country was conferred on them; because the Constitution expressly vests it 'in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish.'"

The Chief Justice. Is trial by a military commission a part of the judicial power?

Colonel Royall. Well, sir, it is an exception to the

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Judicial power.

The Chief Justice. It derives its force, then, not from a judicial act?

Colonel Royal. No, sir. I think it derives its force from the "land and naval forces" provision of the Constitution.

Now, resuming what they said:

"And it is not pretended that the commission was a court ordained and established 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."

The minority, which, of course, is a view more favorable to the respondent in this case, went further than at any other time when it said this. This is the furthest and most extreme statement, I think, they made in favor of the statute:

"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 and public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the Army or against the public safety."

In other words, the minority opinion said that only Congress could determine that question.

Ex Parte Milligan says:

"The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Attorney General Gregory, in discussing Ex Parte Milligan, in 31 Opinions of Attorney General, at page 361, says:

"Milligan was a citizen of the United States. But the provisions of the Constitution upon which the decision was based are not limited to citizens; they apply to citizens and aliens alike."

That we conceive to be the law in this case.

Suggestion was made by the Attorney General in his opening remarks that we are fighting a war here. We realize that. We also realize that the Constitution is not made for peace alone, that it is made for war as well as peace. It is not merely for fair weather. The real test of its power and authority, the real test of its strength to protect the minority, arises only when it has to be construed in times of stress. Thank you.

The Chief Justice. The Court stands adjourned until 12 Noon tomorrow.

(Whereupon, at 3:55 o'clock p.m., the arguments were concluded and the Court adjourned until 12 o'clock Noon, Friday, July 31, 1942.)