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EX PARTE QUIRIN *ET AL* — THE NAZI SABOTEUR CASE

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On October 29, 1942, the United States Supreme Court filed its long-awaited opinion in the case of the Nazi saboteurs. The Court decided in a brief *per curiam* opinion on July 31 that the saboteurs could constitutionally be tried by a military commission, and that the commission was properly set up and had followed correct procedure. The military trial was promptly completed and on August 8 the President announced that six of the saboteurs had been executed and two imprisoned. We now learn from the able opinion of Chief Justice Stone the Court's reasons for handling as it did one of the most dramatic incidents in recent Supreme Court history.

The facts in this case were not disputed. By stipulation of counsel the Court had before it the following story. At four o'clock in the morning of June 13, 1942, four men, wearing the fatigue uniforms of the German Marine Infantry, were landed from a German submarine on the beach at Amagansett near the tip of Long Island, 125 miles east of New York City. They changed to civilian dress and then buried in the sand their uniforms and a supply of explosives, incendiaries, fuses, detonators, timing devices, and acids. They carried with them some $90,000 in American currency and an elaborate list of American factories, railroad centers, bridges, power plants, water supply systems, and the like. The four men proceeded to New York City. On June 17 four other men landed under almost identical circumstances at Ponte Vedra Beach, near Jacksonville, Florida. They buried a similar supply of explosives, incendiaries, fuses, and timing devices. They went, without being discovered, to Jacksonville, and from there some went to Chicago.

The eight men all had been born in Germany, all had lived for some time in the United States, and all had returned to Germany between 1933 and 1941. Six of the men (Quirin, Neubauer, Heinck, Thiel, Kerling, Dasch) were German citizens. Burger had been naturalized in the United States but had forfeited his American citizenship by induction into the German Army in 1941. Haupt claimed American citizenship based on the naturalization of his parents when he was five years old. He denied any acts or conduct which would forfeit his American citizenship.

The eight men had been trained in a special school for sabotage near Berlin to effect the destruction of factories, power plants, railway and communication systems, bridges, and other key war facilities. They were trained to use secret writing in order to communicate with Germany and with each

other. They had instructions from an officer of the German High Command to destroy war industries and facilities in this country. They, or in some cases their families in Germany, were to be paid a salary for their services. The F.B.I. recovered in all about $175,000 from the two groups—American currency which was to be used for expenses and for bribes. They stated that they had been ordered to wear their German uniforms when landing.

On June 27, Mr. J. Edgar Hoover announced the arrest in New York and Chicago of the eight men, and their detention by the F.B.I. This was the first news of the affair.

On July 2, President Roosevelt issued two proclamations. The first denied to enemies who enter the United States to commit sabotage, espionage, or other hostile acts, any right of access to the courts of the United States, and directed them to be tried by military tribunals in accordance with the law of war.[1] The second created a Military Commission of eight Army officers, headed by Major General Frank R. McCoy, to try the eight saboteurs (mentioned by name), ordered the Attorney General and the Judge Advocate General to conduct the prosecution, and designated Colonel Cassius M. Dowell and Colonel Kenneth Royall as defense counsel. The Commission was authorized to make its own rules, to receive evidence which would have "probative value to a reasonable man," to convict or sentence by a two-thirds vote, and to transmit its findings to the President for final action.[2]

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[1]The essential part of the proclamation reads:

"Whereas the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage or other hostile or warlike acts, should be promptly tried in accordance with the law of war;

"Now, therefore, I, Franklin D. Roosevelt, President of the United States of America and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution and the statutes of the United States, do hereby proclaim that all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war, and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its states, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe."

[2]"The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence. The record of the trial, including any judgment or sentence, shall be transmitted directly to me for my action thereon."—Franklin D. Roosevelt.

The prisoners were turned over to the military authorities by the Attorney General and, on July 3, the Government brought four charges against them. The first was a broad charge of violating the law of war by passing through our lines in civilian dress in order to commit sabotage, espionage, and other hostile acts;[3] there were two charges of attempted "spying", and "relieving, corresponding with or aiding the enemy" under Articles of War 81 and 82;[4] and a final charge of conspiracy to do all these things.

Trial before the Military Commission began on July 8 in the Department of Justice Building in Washington behind an almost impenetrable veil of secrecy. The daily "communiques" finally and reluctantly released to the press by General McCoy were sterile of any information beyond the terse statements that the Commission met, examined witnesses, and adjourned. The entire record of the trial, containing as it does important military information, has been impounded for the duration of the war. At the outset of the trial defense counsel challenged the constitutionality of the President's Proclamation and the jurisdiction of the Military Commission, and stated that they waived no constitutional rights of the accused by proceeding. All of the defendants and numerous witnesses testified. Dasch and Burger aided the government, the former to such an extent that special counsel was appointed to look after his interests. The trial proceeded until July 27, when the defense rested its case.

The country was startled on July 27 by an announcement that the Supreme Court of the United States would convene in special session on July 29 to allow the submission of petitions for writs of habeas corpus in behalf of the prisoners. The ensuing proceedings proved to be as confusing on the procedural side as they were dramatic from every other point of view. The

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[3]The charge grounded on the law of war read as follows:

"Specifications 1. In that, during the month of June 1942, Edward John Kerling (and others) being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States, along the Atlantic Coast, and went behind such lines and defenses in civilian dress within zones of military operations and elsewhere, for the purpose of committing acts of sabotage, espionage, and other hostile acts, and, in particular, to destroy certain war industries, war utilities, and war materials within the United States.

"Specification 2. In that, during the month of June 1942, Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, appeared, contrary to the law of war, behind the military and naval defenses and lines of the United States, within the zones of military operations and elsewhere, for the purpose of committing or attempting to commit sabotage, espionage, and other hostile acts, without being in the uniform of the armed forces of the German Reich, and planned and attempted to destroy and sabotage war industries, war utilities, and war materials within the United States, and assembled together within the United States explosives, money, and other supplies in order to accomplish said purposes."

[4]41 STAT. 804, 10 U. S. C. 1553-4 (1920).

day before the Supreme Court convened (July 28) defense counsel asked the District Court for the District of Columbia for leave to file petitions for habeas corpus in that court. These applications were denied that evening. When the Supreme Court met on July 29, two applications were made to it: first, for permission to file a petition for habeas corpus in the Supreme Court; second, for permission to file a petition for certiorari to review the adverse order of the District Court of the preceding day. The first application called for an exercise of the original jurisdiction of the Court. The second application called for direct review on certiorari of the District Court's order, thereby by-passing the Circuit Court of Appeals for the District of Columbia. Lawyers and justices alike seemed worried about the Court's jurisdiction to proceed in either of these two ways. Anxiety with regard to the Court's power to issue habeas corpus as an exercise of original jurisdiction seems well grounded. It is true that the Judiciary Act of 1789 had given the Supreme Court power to issue habeas corpus,[5] and the present Judicial Code explicitly authorizes it.[6] But the Court has held repeatedly that it may issue habeas corpus only in the cases in which it otherwise has original jurisdiction (cases affecting ambassadors, other public ministers, or consuls, and those in which a state is a party), or as a means of reviewing through its appellate jurisdiction the decision of an inferior officer or court.[7] Review by the Supreme Court of what the Military Commission was doing was rather clearly not an exercise of the Court's appellate jurisdiction. The Court finally allowed argument to proceed on the constitutional issues raised by the petition for habeas corpus, while defense counsel hurried to plug any gaps in the Court's jurisdiction by perfecting an appeal from the District Court to the Circuit Court of Appeals for the District, and filing with the Supreme Court a petition for certiorari to that court before judgment. This was actually accomplished only a few minutes before the Court met on July 31 to announce its decision. By stipulation of counsel, the record, briefs, and arguments in the habeas corpus proceedings were treated as the record, briefs, and arguments upon the writ of certiorari. At the very last minute the Supreme Court granted certiorari to the Circuit Court of Appeals for the District before that court had rendered judgment,[8] decided on the merits

[5]Act of Sept. 24, 1798, Sec. 14. 1 STAT. 73.

[6]The present Judicial Code provides: "The Supreme Court and the district courts shall have power to issue writs of habeas corpus." 28 U. S. C. 451 (1940).

[7]*Ex parte* Watkins, 7 Pet. 568, 8 L. ed. 786 (U. S. 1833); *Ex parte* Barry, 2 How. 65, 11 L. cd. 181 (U. S. 1844); *Ex parte* Hung Hang, 108 U. S. 552, 2 Sup. Ct. 863 (1883).

[8]This procedure is authorized by the Judicial Code. 43 STAT. 938 (1925), 28 U. S. C. 347a (1940).

that the order of the District Court denying permission to petition for habeas corpus be affirmed, and denied the petitioners application for leave to file petitions for habeas corpus in the Supreme Court. Thus the Court's jurisdiction caught up with the Court just at the finish line.

The proceedings in the Supreme Court occupied two days. Mr. Justice Murphy, on temporary leave in the Army, did not sit. Major Lauson H. Stone, the son of Chief Justice Stone, under orders, had assisted defense counsel in the presentation of the case before the Military Commission. He was not connected with the proceeding before the Supreme Court, however, and counsel for both sides urged the Chief Justice not to disqualify himself on this account. The case involved only seven of the eight prisoners. Dasch, who had substantially aided the prosecution, did not join in the petition for habeas corpus. On July 31 the Court handed down, through the Chief Justice, a brief *per curiam* opinion. It stated in a few sentences that the accused were being tried on charges which the President could validly order tried before a military commission, that the military commission was lawfully constituted, and that no cause had been shown for discharge by habeas corpus. The orders of the District Court were affirmed, and motions for leave to file petitions for habeas corpus were denied. The Chief Justice stated that a full opinion would be prepared "which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the Clerk." This opinion was filed on October 29, 1942, under the title *Ex parte* Quirin *et al.*[9] As soon as the Court had handed down its decision on July 31, the Military Commission resumed its sessions. On August 3, it sent its verdict, together with the complete record, to the President. On August 8, the President announced that six of the prisoners had been electrocuted, one, Burger, sentenced to life imprisonment, and one, Dasch, sentenced to thirty years.

The Supreme Court's problem was not complicated by any dispute over the facts. The facts set out above were stipulated by the Government and defense counsel. The prisoners did not deny them, but claimed that they had done these things without unlawful or hostile intent solely as a means of escaping from Germany. They emphasized that they had committed no unlawful overt acts and had perfected no plans. The truth or falsity of these statements obviously had nothing to do with the question of which authority, military or civil, was to try the prisoners. There were, in short, no disputed "jurisdictional" facts.

The twenty-two page opinion written by Chief Justice Stone established three main points, thereby rejecting the three major contentions made on

[9]Decided October 29, 1942.

behalf of the petitioners.[10] The first point established was that the Military Commission had jurisdiction to try the charges against the petitioners. The supporting argument fell into three divisions. First, the President had power to establish the Commission. The Constitution grants war powers. It authorizes Congress to declare war and gives to the President, both as chief executive and as Commander-in-Chief, full authority to wage the war which Congress declares and to execute all laws passed for the conduct of the armed forces. By the Articles of War, Congress has explicitly provided for trial by military commissions of offenses against the law of war not customarily tried by courts martial.[11] The law of war has been recognized and applied by American Courts from the beginning.[12] The President has invoked the law of war as Commander-in-Chief. "By his order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander-in-Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war." But it is unnecessary to decide "to what extent the President as Commander-in-Chief has constitutional power to create military commissions without the support of Congressional legislation" since Congress has clearly authorized the trial of offenses against the law of war before such commissions. Second, the offenses charged against the prisoners *are* offenses against the law of war. Offenses against the law of war do not have to be embodied in the form of explicit statutes any more than does the crime of piracy, which is nowhere specifically defined.[13] Congress had its choice either of crystallizing "in permanent form and in minute detail every offense against the law of war" or of adopting the system of common law of war applied over many years by military tribunals. It chose the latter course. The law of war has always distinguished between armed forces and peaceful populations of belligerent nations and between lawful and unlawful combatants. Lawful combatants are liable to capture and detention as prisoners of war.

[10]The Court was aided by briefs from both sides, which, in view of the speed of the whole proceeding, were extraordinarily comprehensive and able. Readers of the QUARTERLY will note with interest that Professor George T. Washington and Dean Robert S. Stevens of the Cornell Law Faculty were both on the Government's brief.

[11]Articles of War 12, 15, 38, 46, 81, 82. These are found in 41 STAT. 789, 790, 794, 796, 804 (1920), 10 U. S. C. 1483, 1486, 1509, 1517, 1553, 1554 (1940).

[12]The Court here cites sixteen cases ranging from Talbot v. Janson, 3 Dall. 133, 1 L. ed. 540 (U. S. 1795), to Juragua Iron Co. v. United States, 212 U. S. 297, 29 Sup. Ct. 385 (1909).

[13]35 STAT. 1145 (1909), 18 U. S. C. 481 (1940) provides: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." The validity of an almost identical earlier statute was upheld in an opinion by Mr. Justice Story in United States v. Smith, 5 Wheat. 153, 5 L. ed. 57 (U. S. 1820).

Unlawful combatants are also thus liable, but in addition are subject "to trial and punishment by military tribunals for acts which render their belligerency unlawful." These distinctions were recognized before the adoption of the Constitution and during the Mexican and Civil Wars. By the long-established practice of this government "those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission." This is precisely what these defendants are charged with doing in the first charge brought against them. It is not necessary that the hostile acts alleged should be committed against our armed forces. "Modern warfare is directed at the destruction of enemy war supplies and the implements for their production and transportation quite as much as at the armed forces." Nor does it make any difference that the prisoners *did* nothing. "The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification." Third, the Commission had jurisdiction regardless of the alleged citizenship of any of the petitioners. Offenses against the law of war are not the exclusive crimes of aliens. They may be committed by an American citizen. Defense counsel had presented a special argument on behalf of one of the defendants, Haupt, based on his American citizenship which he had acquired at the age of five through the naturalization of his father. The fact of citizenship is held to be entirely irrelevant. The Court declared that a citizen could, by his acts, become an enemy belligerent and that "citizenship does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."

The second main point established by the Court is that the constitutional guarantees of grand jury indictment and jury trial do not apply to the petitioners' trial before a military tribunal for offenses against the law of war. The argument here is largely historical. Jury trial was no part of the procedure of a military tribunal at common law. The clauses of the Constitution requiring jury trial were not intended to make it such. These clauses were designed to protect trial by jury as then known and applied, not to apply it to new situations. The Court has steadily followed this principle as is shown in the cases holding jury trial not necessary in the trial of petty offenses[14] and criminal contempts[15] because the common law had not required

[14]Schick v. United States, 195 U. S. 65, 24 Sup. Ct. 826 (1904); District of Columbia v. Clawans, 300 U. S. 617, 57 Sup. Ct. 14 (1937).

[15]*Ex parte* Terry, 128 U. S. 289, 302-4, 9 Sup. Ct. 77 (1888); Savin, Petitioner,

it in these cases. The Fifth Amendment, which guarantees grand jury indictment, expressly excepts from its operation "cases arising in the land or naval forces,"[16] and these cases are held to be excepted by implication from the jury trial guarantee of the Sixth Amendment. Defense counsel had argued that the specific exception from the grand jury and jury trial requirements of all "cases arising in the land and naval forces" meant that there could be no other exception. This view, said Chief Justice Stone, "misconceives both the scope of the Amendment and the purpose of the exception." "Cases arising in the land and naval forces" are cases involving offenses of whatever nature committed by our soldiers and sailors, offenses which, if committed by civilians, would in most cases be triable by jury. These cases are tried by courts martial not because of the nature of the offenses but because of the membership in our armed forces of those who commit them. The exception has no bearing on the applicability or inapplicability of the jury trial requirement to offenses against the law of war. "We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death."

The Court then turned to the *Milligan* case[17] and disposed of it in thirty lines. The *Milligan* case had been the great bulwark of the defense. Attorney General Biddle in oral argument assured the Court "you could decide this case without touching a hair of the Milligan case, but if it were not for the Milligan case, this case would not be here."[18] He was undoubtedly correct. For seventy-five years the *Milligan* case has been cited as protecting the right of the civilian to a jury trial in time of war except in the immediate theater of military action. It will be recalled that during the Civil War, Lambdin P. Milligan was charged with seditious and treasonable activities in Indiana where he lived, was arrested by the Union military authorities,

131 U. S. 267, 277, 9 Sup. Ct. 699 (1889); *In re* Debs, 158 U. S. 564, 594-96, 15 Sup. Ct. 900 (1895); United States v. Shipp, 203 U. S. 563, 572, 27 Sup. Ct. 165 (1906); Blackmer v. United States, 284 U. S. 421, 440, 52 Sup. Ct. 252 (1932); Nye v. United States, 313 U. S. 33, 48, 61 Sup. Ct. 810 (1941).

[16]The Amendment reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; . . . ."

[17]*Ex parte* Milligan, 4 Wall. 2, 18 L. ed. 281 (1866). Those wishing to make a close study of this interesting case should consult EX PARTE IN THE MATTER OF LAMBDIN P. MILLIGAN, edited by Samuel Klaus, New York, 1929. This contains the record, arguments, and opinions in the case, the proceedings of the military commission which tried Milligan, and a valuable sixty-page introduction by the editor.

[18]The New York Times, July 31, 1942, p. 4, col. 2.

and was tried for his crime by a military commission set up for the purpose by President Lincoln without the sanction of any statute. He was convicted and sentenced to be hanged. He took his case to the Supreme Court in an attack upon the constitutionality of his trial. In 1866 the Supreme Court held that he had been unconstitutionally denied a jury trial in a civil court and set him free. Nine justices held that his trial before the military commission was invalid since the Congressional legislation then in force forbade a military trial of a civilian resident. "That body [Congress]" said Chief Justice Chase, "did not see fit to authorize trials by military commission, but by the strongest implication prohibited them." Five members of the Court, speaking through Mr. Justice Davis, then went on to state that Congress itself could not validly authorize the trial of civilian residents by military commissions except in the actual areas in which existing military operations had resulted in the closing of the civil courts. Four justices disagreed with this sweeping rule. The Government's position was that the doctrine of the *Milligan* case, properly construed, is inapplicable to the Nazi saboteurs, but that if it should be held applicable then it ought to be overruled.

The Court followed the first and easier course and declared that "The Court's opinion in the Milligan case is inapplicable to the case presented by the present record." It mentioned the fact that Milligan was for twenty years a citizen and resident of Indiana, that he had never been a resident of a rebellious state, and he was not an enemy belligerent and had not had contact with armed enemy forces, and was for these reasons not subject to the law of war. It concluded "We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it." Having satisfied itself that the Government's first charge against the petitioners, alleging offenses against the law of war was "not merely colorable or without foundation," the Court declined to examine the other three charges.

The third point established by the Court was that the President's order setting up the Military Commission and determining its procedure was valid, and that the Commission itself had followed lawful procedure. The brief of defense counsel on this point had been long and detailed and had charged that the President's order violated specific Articles of War enacted by Congress, and that the Commission's procedure also had violated statutory requirements. The Court did not consider the issues involved on their merits. Chief Justice Stone stated that the Court was unanimous in holding that no valid claim for habeas corpus could be based on the provisions of the Articles of War, but that the Court was divided on the grounds for this decision. Four justices "are of opinion that Congress did not intend the

Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders." The other four justices took the view that "the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or shown to have been employed by the Commission." In short, the Articles of War either did not govern the President in setting up the Commission, or, if they did govern him, he had not violated them. This concluded the Court's opinion.

The outcome of the case and the decision of the Supreme Court met with general approval. There was, however, some criticism of the Court for taking the case at all and for dealing so thoroughly with the constitutional issues raised. Even some of our liberals explained that while we ought, of course, to be scrupulous to administer impartial justice according to our traditional American rule of law, we ought not in the midst of a total war to waste time, money, and manpower by this ludicrous judicial ritual in the case of a group of enemy criminals who should have been shot at sunrise without more to-do. I believe this view fails to take stock of several significant things about the Court's handling of the case and about the principles embodied in the opinion. These merit brief comment.

In the first place, the prisoners did get through to the Supreme Court and had their questions answered by that tribunal. That, in itself, is an important fact. The President's Proclamation had specifically denied the prisoners access to the civil courts. The position of the Attorney General was that the President could lawfully have ordered the prisoners shot as soon as they were arrested, that trial before the Military Commission was given as an act of grace and not of necessity, and that as belligerents the prisoners had no right of access to any court.[19] But when the special session of the Supreme Court opened, Chief Justice Stone asked Mr. Biddle: "Does the Attorney General challenge the jurisdiction of the Court?" and Mr. Biddle replied: "I do not."[20] Chief Justice Stone touched on this general point in his opinion. He referred to the Government's contention that because they were enemy aliens and because of the President's Proclamation, no court could give the prisoners a hearing, and said: "But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally

[19]"These petitioners, as enemies who crossed our borders after the declaration of war, have no legal right to ask this Court, by habeas corpus or otherwise, to inquire into the lawfulness of their detention." Brief for Respondent, p. 13.

[20]The New York Times, July 30, 1942, p. 4, col. 1.

enacted forbid their trial by military commission." There is little in the history of this case to encourage unlawful belligerents arrested in this country to seek access to the civil courts. But what the Court did and held appears to boil down to this: the Court will look at the question of the detention of anybody under circumstances so unusual or suspicious as to raise the question whether he may possibly be entitled to a civil trial. It is an important protection to civil liberty that the Court, in its discretion, is willing to take this initial look. It may decide to look no further, or, as in this case, it may consider the prisoner's contention on its merits. It is important and gratifying that the Court actually took the case.

It is interesting, in the second place, that the facts essential to the jurisdiction of the Military Commission, according to the view announced by the Court, were not in dispute. There was no controversy over what the prisoners actually had done. The case, therefore, leaves more or less open the important question of how to proceed should these "jurisdictional" facts be disputed. Let us assume the arrest in the interior of the country of citizens or aliens charged by military authorities with acts of sabotage or other hostile acts, and the holding of these persons for trial by military commission in the face of their denial of misconduct and of confusing evidence as to what actually occurred. Here the jurisdiction of the Military Commission would appear to depend upon the truth of hotly disputed charges. Is the commission to be allowed to assume the existence of the facts necessary to its own jurisdiction? If so, there would appear to exist the possibility of the arbitrary denial of constitutional rights. While this problem did not arise in the case of the Nazi saboteurs, the Court's opinion contains one phrase which indicates that Chief Justice Stone was aware of the sticky problem which he was avoiding. In declaring that the Government's first charge against the prisoners stated an offense against the law of war, he went on to say, "and the admitted facts affirmatively show that the charge is not merely colorable or without foundation." This may mean that in a case where jurisdiction is claimed for a military commission on the basis of disputed jurisdictional facts, the Court will insist that the Government produce something substantial and convincing to support its allegations. It would not be permitted to assert military jurisdiction groundlessly. This is a desirable outside restraint which might prevent the graver abuses resulting from possible arbitrary and irresponsible action by the military authorities.

A third point of interest was the Court's rather summary ruling that the citizenship of the defendant Haupt was irrelevant to the question of the jurisdiction of the Military Commission to try him. He was charged with violating the law of war, and that offense may be committed by a citizen

as well as by an enemy alien. Nor is his claim of the right of jury trial strengthened by his citizenship. The civil rights guaranteed in the First Ten Amendments and in other clauses of the Constitution are not reserved for American citizens alone but extend to all persons subject to the jurisdiction of our government.

Fourth, the Court's decision, so far from impeding the management of the war, dealt generously with the military authorities. The law of war was recognized and broadly interpreted. The Court showed no interest in the procedural technicalities embodied in the Articles of War enacted by Congress and alleged by defense counsel to govern the President in setting up the Military Commission. Half the Court thought the technical requirements were irrelevant, the other half thought they had not been violated anyway. There was no disposition to discuss them. Finally the ghost of Lambdin P. Milligan was laid. The Court held in substance that the *Milligan* case is *sui generis*. It arose out of facts not duplicated in the present case and not likely ever to be duplicated. Its doctrine is confined to those facts and has no relevance to the situation of prisoners whose status has nothing in common with the situation in which Milligan was placed. The case was not overruled; it was merely denied any general applicability outside its own unique facts.

What the case boils down to is this: The Supreme Court stopped the military authorities and required them, as it were, to show their credentials. When this had been done to the Court's satisfaction they were allowed to proceed. This does not mean that in every case in which military justice is being administered the Court will insist on making a similar scrutiny. But it is a wholesome and desirable safeguard to civil liberty in time of war to have the Supreme Court reserve, and occasionally act upon, the right thus to examine the authority of the military in those cases in which in the Court's judgment the public interest and welfare will be served by so doing.