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CONSTITUTIONAL LAW-SABOTEURS AND THE JURISDICTION OF MILITARY COMMISSIONS

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CONSTITUTIONAL LAW—SABOTEURS AND THE JURISDICTION OF MILITARY COMMISSIONS—The jurisdiction of military tribunals in the United States has troubled political and legal writers since the days of the Revolution. Decided cases are not numerous. The boundaries separating military and civil jurisdiction are not precise. Observations of the plight of oppressed peoples in other lands as well as the conception of total war and the course of action necessary for survival warrant a re-examination and reappraisal of our constitutional guarantees, which were in part based upon and reflect a fear of tyrannical military rule. A pronouncement of the Supreme Court of the United States in this field is, therefore, of great interest at this time. The purpose of this comment is to analyze the recent saboteur decision, *Ex parte Quirin*,[1] in

[1] (U. S. 1942) 63 S. Ct. 2. See also 29 VA. L. REV. 317 (1942).

an attempt to ascertain what was actually decided and the possible effects of the opinion of the Court upon related questions.

I.

In June, 1942, Richard Quirin, Herbert Haupt, Edward Kerling, Ernest Burger, Heinrich Heinck, Werner Thiel, and Herman Neubauer were arrested, some in New York and others in Chicago, by agents of the Federal Bureau of Investigation. All of these men had been born in Germany and had lived in the United States at some time during their lives. All had returned to Germany between 1933 and 1941. With the except of Haupt, all were citizens of the German Reich.[2] After war was declared between the United States and the German Reich these men attended a school near Berlin, Germany, for training in the destruction of power lines, aluminum plants, bridges, railway and communication systems, and other key war facilities. They were also instructed in methods of secret writing. During this course of training they were paid by the German government, which, upon the conclusion of the training, contracted to pay them for acting in its behalf and directed them to destroy war industries and facilities in the United States. They were transported to this country by submarines which eluded our Army, Coast Guard, and Navy patrols and landed the men under the cover of darkness on Long Island, New York, and Ponte Vedra Beach, Florida.[3] While landing, the men wore the uniforms or parts of uniforms of the German Marine Infantry. Each group brought ashore boxes of explosives, incendiaries, fuses, detonators and timing devices and buried them, together with their uniforms, in the sand near the points of landing. One group proceeded to New York City; the other to Jacksonville, Florida, and thence to various points in the United States. Within two weeks they were apprehended while in civilian clothing and in possession of substantial sums in United States currency.

On July 2, 1942, the President, both as President and as Commander in Chief of the Army and Navy, issued an order[4] appointing a Military Commission and directing it to try the men for offenses

[2] Counsel for petitioners raised a question of fact as to the citizenship of Haupt, contending that he became an American citizen by virtue of the naturalization of his parents during his minority and that he had not lost his citizenship. The government argued that on attaining his majority he elected to maintain German allegiance and citizenship or in any case that he had by his conduct renounced or abandoned his United States citizenship. The Court found it unnecessary to resolve these contentions. See page 496, infra.

[3] The military and naval character of these areas is described in a footnote in the principal case, 63 S. Ct. at 8, note 1.

[4] 7 FED. REG. 5103 (1942)

against the law of war and the Articles of War. On the same day the President proclaimed 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 . . . 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. . . ."[5]

The men were delivered into the custody of the Provost Marshal of the Military District of Washington and the following charges, supported by specifications, were preferred against them: (1) violation of the law of war; (2) violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy; (3) violation of Article 82, defining the offense of spying; and (4) conspiracy to commit the offenses alleged in the foregoing charges.

The commission took evidence and the case was closed except for arguments of counsel, whereupon applications were presented to the United States District Court for the District of Columbia for leave to file petitions for habeas corpus. That court entered orders denying the motions. Motions for leave to file petitions for habeas corpus were then presented directly in the Supreme Court, which on July 29-30, in its first special sessions held since April 13, 1920, heard the arguments on the applications.[6] Although the jurisdiction of the Supreme Court was

[5] Proclamation 2561, 7 FED. REG. 5101 (1942).

[6] The course pursued by counsel for petitioners in filing motions for leave to file petitions for habeas corpus instead of filing the petitions themselves is unusual, at least in the district court, and is probably explained by the desire for a speedy disposition of the cases. It would seem that the effect of this procedure was to advance the hearing on the merits. See Walker v. Johnston, 312 U. S. 275, 61 S. Ct. 574 (1941); Ex parte Baez, 177 U. S. 378, 20 S. Ct. 673 (1900).

A more serious question is whether the denial of the motions by the district court constituted an appealable judicial determination of a case or controversy in view of the fact that in the district courts the right to file the petition is absolute. 7 LONGSDORF, CYCLOPEDIA FEDERAL PROCEDURE, §3671 (1928). Chief Justice Stone, in the majority opinion, stated that "Presentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions" is reviewable on appeal. Principal case, 63 S. Ct. at 9.

not contested and the Court deferred passing on its jurisdiction until after argument, counsel for petitioners, on the second day of argument, perfected an appeal from the order of the District Court to the Court of Appeals for the District of Columbia. Petitions for writs of certiorari before judgment of the Court of Appeals were presented to the Supreme Court pursuant to statute[7] and were granted in the per curiam order of July 31, 1942,[8] which order denied petitioners' applications for leave to file petitions for habeas corpus and affirmed the orders of the District Court. In a unanimous opinion written by Chief Justice Stone, filed October 29, 1942,[9] the Court held:

(1) That charge I (violation of the law of war) alleged an offense which the President was authorized to order tried by a military commission.

(2) That the President's order convening the commission was a lawful order and the commission was lawfully constituted.

(3) That petitioners were held in lawful custody and did not show cause for their discharge.

The sole question presented to the Court was whether it was "within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they"[10] were charged. In sustaining the military jurisdiction the Court reasoned that Congress, acting within its constitutional powers, had provided for the trial of offenses against the law of war by military commission; that the President, by his proclamation, had invoked that law; that the acts alleged in specification 1 of charge I[11] constituted an offense against the law of war; and, finally, that such an offense was constitutionally triable by a military commission without a jury, notwithstanding the alleged citizenship of one of the petitioners.

2.

At the outset the Court was faced with the proposition that the petitioners had no standing to contest their detention and trial by a military

[7] 28 U. S. C. (1940), §347 (a).

[8] Ex parte Quirin, (U. S. 1942) 63 S. Ct. 1.

[9] Ex parte Quirin, (U. S. 1942) 63 S. Ct. 2.

[10] Principal case, 63 S. Ct. at 11.

[11] Specification 1 stated that the petitioners "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."

commission. This, the Government argued, was so for two reasons: first, because of the terms of the President's proclamation; and second, because petitioners were "enemies of the United States who have invaded the country to destroy the nation under whose Constitution they claim protection" [12] and such enemies, by an "ancient and accepted common law rule" have no access to the civil courts except, in the case of resident enemy aliens, by sufferance of the sovereign. It was argued for the petitioners, on the other hand, that in so far as the proclamation assumed to deny petitioners the right to maintain the habeas corpus proceeding it was unconstitutional, since only Congress can authorize the suspension of the writ of habeas corpus and it had not done so. The Court rejected the government's argument, saying,

> "... But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." [13]

Since the Court did not expressly deny the applicability of the proclamation (and it seems that petitioners fall squarely within its terms), the inescapable inference is that the President cannot constitutionally deny such persons access to the courts. This is important as bearing upon a much-argued point, namely, the power of the President to suspend the writ of habeas corpus.[14] The Constitution declares that "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." [15] The section in which this clause is found is concerned primarily with limitations on the power of Congress. However, it has been judicially rec-

[12] Argument of the case, 11 U. S. L. WEEK 3038: 3 (1942).

[13] Principal case, 63 S. Ct. at 9.

[14] See Ex parte Bollman, 4 Cranch (8 U. S.) 75 at 102 (1807); Ex parte Merryman, 17 F. Cas. 144, No. 9487 (1861); Ex parte Field, 9 F. Cas. 1, No. 4761 (1862); Ex parte Benedict, 3 F. Cas. 159, No. 1292 (1862); McCall v. McDowell, 14 F. Cas. 1235, No. 8673 (1867); Ex parte Milligan, 4 Wall. (71 U. S.) 2 (1866); In re Kemp, 16 Wis. 359 at 377 (1863); Griffin v. Wilcox, 21 Ind. 370 at 383 (1863); United States v. Porter, 27 F. Cas. 599, No. 16074a (1861); 8 OP. ATTY. GEN. 365 at 372 (1857); 10 OP. ATTY. GEN. 74 (1861); Grant, "Suspension of the Habeas Corpus in Strikes," 3 VA. L. REV. 249 (1916); Carroll, "Freedom of Speech and of the Press during the Civil War," 9 VA. L. REV. 516 (1923). See also 3 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES, 2d ed., § 1057 (1929). As to the effect of a proclamation of martial law, see Fairman, "The Law of Martial Rule and the National Emergency," 55 HARV. L. REV. 1253 (1942); WINTHROP, MILITARY LAW AND PRECEDENTS 828 et seq. (Reprint, 1920).

[15] U. S. Constitution, Art. 1, § 9, cl. 2.

ognized that Congress can suspend the writ in the interest of public safety on the theory that the quoted clause is a grant of power.[16] Moreover, Congress can delegate this power to the President.[17] Whether the President is empowered of his own authority to suspend the writ has never been squarely passed upon. *Ex parte Bollman*[18] and *Ex parte Merryman*[19] assumed he could not. It is significant that Congress in 1863 considered it necessary specifically to authorize the suspension of the writ by President Lincoln.[20] The decision in the principal case substantiates the general belief that the power lies exclusively with Congress. It is arguable that the Court's position on this point is not *obiter dictum* but was essential to the decision, since the Court did undertake to decide the case despite the President's proclamation.[21] The force of such a contention is considerably weakened, however, by the fact that the writ did not ultimately issue. This might mean either that the Court felt it had no power to issue the writ because of the proclamation or that its issuance was not justified on the merits of the petition. The opinion is clearly based on the latter ground. The Court did not address itself to the problem of suspension. Indeed, it carefully avoided any extended examination of the relationship between the war powers of Congress and the President, e.g. the Court found it unnecessary to consider the extent to which the President could create military

[16] Ex parte Milligan, 4 Wall. (71 U. S.) 2 (1866), and other cases cited in note 14, supra.

[17] Id.

[18] 4 Cranch (8 U. S.) 75 (1807).

[19] 17 F. Cas. 144, No. 9487 (1861).

[20] Act of March 3, 1863, 12 Stat. L. 755. See the comments on this legislation in KLAUS, THE MILLIGAN CASE 8 et seq. (1929). Attorney General Biddle, arguing for the government in the principal case, drew attention to the Act of July 6, 1798, now 50 U. S. C. (1940), § 21, which authorizes the President in time of war "to direct the conduct to be observed, on the part of the United States toward the aliens who become so liable [enemy aliens]; the manner and degree of the restraint to which they shall be subject . . . and to establish any other regulations which are found necessary in the premises and for the public safety." He contended this act had been buttressed by the President's proclamation and order. 11 U. S. L. WEEK 3038: 3 (1942). The applicability of this act to the facts of the principal case is difficult to see, for the act is concerned with the apprehension, restraint and removal of enemy aliens. Ex parte Graber, (D. C. Ala. 1918) 247 F. 882. It can hardly be taken as authorizing the suspension of the writ of habeas corpus. Chief Justice Stone makes no reference to it.

[21] The only cases bearing on the question of the operation and effect of a suspension of the writ involve constructions of the Act of March 3, 1863, 12 Stat. L. 755, and consequently are not applicable to the principal case. These decisions indicate that the suspension of the privilege of the writ does not deprive the courts of the right to issue it but merely furnishes a legal ground for a refusal to obey it. Ex parte Milligan, 4 Wall. (71 U. S.) 2 (1866). It is to be noted in this connection that the President's proclamation did not in terms prohibit the courts from issuing the writ but was directed to potential seekers of the writ.

commissions without Congressional legislation or the power of Congress to restrict the President's authority to deal with enemy belligerents.

In denying the government's second argument and holding that even enemy belligerents who offend the law of war may not be denied a hearing on the constitutionality of their detention, the decision calls to mind the oft-quoted words of Justice Davis in *Ex parte Milligan:*[22]

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

Petitioners did not challenge the power of Congress to provide, as it did in the Articles of War,[23] for the trial by military commission of offenses against the law of war.[24] The constitutional provisions giving

[22] 4 Wall. (71 U. S.) 2 at 120-121 (1866). Compare the following language in United States ex rel. Wessels v. McDonald, (D. C. N. Y. 1920) 265 F. 754 at 764, appeal dismissed sub nom. Wessels v. McDonald, 256 U. S. 705, 41 S. Ct. 535 (1920): "Whatever may be the right of an alien to protection of the law in this country, he surrenders this right to constitutional protection when he joins the armed forces of an alien enemy, assuming his duties as a spy."

[23] 10 U. S. C. (1940), §§ 1471-1593. Article 12 provides that "General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals . . . ."

Article 15 declares that "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals."

Article 81 provides that "Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct."

Article 82 provides that "Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death."

One distinction between courts-martial and military commissions, as those terms are used in the Articles of War, is that the former try offenses against the Articles of War, whereas the latter try offenses against the rules of warfare as established by international law. See WINTHROP, MILITARY LAW AND PRECEDENTS 831 (Reprint, 1920); McKinney, "Spies and Traitors," 12 ILL. L. REV. 591 at 597 (1918); Ex parte Vallandigham, 1 Wall. (68 U.S.) 243 at 249 (1863). Examples of the use of military commissions are cited in the principal case, 63 S. Ct. at 12-13, notes 9 and 10.

[24] Colonel Royall, one of the counsel appointed for petitioners, admitted on oral argument the validity of Article 82 (quoted note 23, supra), 11 U. S. L. WEEK 3039: 1 (1942).

Congress the power to define and publish offenses against the law of nations[25] and to make rules for the government and regulation of the land and naval forces,[26] together with the "necessary and proper" clause,[27] adequately authorize such legislation.[28] The objection that there was no law of war in the absence of a specific statute and that Congress had failed to define and enumerate offenses against the law of war the Court found without merit, holding that by article 15[29] of the Articles of War, Congress had "incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war . . . and which may constitutionally be included within that jurisdiction."[30]

That the acts alleged in specification 1 of charge I constituted an offense against the law of war the Court had no doubt. Drawing upon the practice of our own military authorities and the Rules of Land Warfare promulgated for their guidance, the practice of other governments, the opinions of authorities on international law, and the Hague Convention of 1907 (to which the United States was a signatory), the Court concluded that

> ". . . The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."[31]

Petitioners, then, were unlawful belligerents because of (1) the absence (or discarding) of their uniforms, (2) their surreptitious entry through military lines, (3) their purpose of committing hostile acts.

[25] U. S. Constitution, Art. 1, § 8, cl. 10.

[26] Id., cl. 14.

[27] Id., cl. 18.

[28] See Tarble's Case, 13 Wall. (80 U. S.) 397 at 408 (1872); Dynes v. Hoover, 20 How. (20 U. S.) 65 at 78 (1858); United States ex rel. Wessels v. McDonald, (D. C. N. Y. 1920) 265 F. 754, appeal dismissed sub nom. Wessels v McDonald, 256 U. S. 705, 41 S. Ct. 535 (1920); Carter v. Woodring, 67 App. D.C. 393, 92 F. (2d) 544, cert. denied 302 U. S. 752, 58 S. Ct. 283 (1937).

[29] Quoted in note 23, supra.

[30] The opinion continued, "Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course." Principal case, 63 S. Ct. at 12.

[31] Principal case, 63 S. Ct. at 13.

The alleged citizenship of one of the petitioners,[32] the fact that they were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the armed forces of the United States,[33] the fact that they had not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations[34]—these, the Chief Justice said, were of no significance.

Having based the decision on charge I, the Court expressly refrained from determining whether the specifications under charges II and III alleged violations of Articles 81 and 82,[35] of if they did, whether those articles were constitutional. The constitutionality of these articles, as applied in particular instances, has been questioned.[36] Professor Morgan, in an excellent article,[37] takes the position that their operation cannot constitutionally be extended to cover civilians under all conditions. He concludes that the word "whosoever" in Article 81 includes those civilians "whose offenses occur in the theatre of war, in the theatre of operations or in any place over which the military forces have actual control and jurisdiction."[38] Similarly, he would interpret the word "elsewhere" in Article 82 as meaning "in the zone of operations . . . or in or about any other place which is under the actual control or

[32] "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." Principal case, 63 S. Ct. at 15.

[33] "Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other." Principal case, 63 S. Ct. at 15. Compare the language in United States ex rel. Wessels v. McDonald, (D. C. N. Y. 1920) 265 F. 754, appeal dismissed sub nom. Wessels v. McDonald, 256 U. S. 605, 41 S. Ct. 535 (1920).

[34] "The offense was complete when with that [hostile] purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform . . . ." Principal case, 63 S. Ct. 16.

[35] Quoted in note 23, supra.

[36] See Morgan, "Court-Martial Jurisdiction over Non-Military Persons under the Articles of War," 4 MINN. L. REV. 79 (1920); Warren, "Spies and the Power of Congress to Subject Certain Classes of Civilians to Trial by Military Tribunal," 53 AM. L. REV. 195 (1919); WINTHROP, MILITARY LAW AND PRECEDENTS (Reprint, 1920); UNITED STATES ARMY, MANUAL FOR COURTS-MARTIAL (1928); McKinney, "Spies and Traitors," 12 ILL. L. REV. 591 (1918); Underhill, "Jurisdiction of Military Tribunals in United States over Civilians," 12 CAL. L. REV. 75, 159 (1924); 31 OP. ATTY. GEN. 356 (1918) (Waberski case); United States ex rel. Wessels v. McDonald, (D. C. N. Y. 1920) 265 F. 754, appeal dismissed sub nom. Wessels v. McDonald, 256 U. S. 705, 41 S. Ct. (1920).

[37] Morgan, "Court-Martial Jurisdiction over Non-Military Persons under the Articles of War," 4 MINN. L. REV. 79 (1920).

[38] Id. at 107.

dominion of the military forces."[39] By such interpretations, he argues, the cases may be regarded as "arising in the land or naval forces" and thus not required by the Constitution to be tried by a jury.[40] The Court in the principal case did not find it necessary to construe this phrase. However, by adopting Professor Morgan's interpretations and thus bringing the cases in question within the constitutional language, all violations of these articles might, as he foresaw, be tried by court-martial or military commission, since the modern methods of warfare may well place the whole of the United States within the field of active operations even though the actual fighting takes place on foreign soil. *United States ex rel. Wessels v. McDonald*,[41] decided in 1920, is authority for such a proposition.[42] It is submitted that *Ex parte Quirin* sheds little light on these problems. It should be noted, however, that in so far as violations under Articles 81 and 82 also constitute offenses against the law of war, the doctrine of the principal case will be invoked. As a result, they may never be tested.

Petitioners strongly contended that even if the offenses with which they were charged did constitute violations of the law of war, they were entitled to an indictment by a grand jury and a trial by jury under the Constitution. Article III, section 2, clause 3 provides that "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed...." The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces...." And the Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed..." The Court might have based its decision that petitioners were not entitled to a jury trial on several possible theories. One was advanced in the *Milligan* case, where it was claimed that the provisions of the Constitution under consideration are peacetime provisions and are not limitations on the war powers of Congress or the President. This is an extreme view and is

[39] Id. at 116.

[40] See infra, pp. 498-499.

[41] (D. C. N. Y. 1920) 265 F. 754, appeal dismissed sub nom. Wessels v. McDonald, 256 U. S. 705, 41 S. Ct. 535 (1920).

[42] But see Ex parte Milligan, 4 Wall. (71 U. S.) 2 (1866). To the writer's knowledge, it has never been suggested that the Milligan case is authority for the proposition that Articles 81 and 82 are unconstitutional, except for the contention of Attorney General Biddle in the principal case that the essence of the Milligan decision was territorial limitation, so that even a spy would have to be tried in a civil court if caught outside the zone of purely military operations. 11 U. S. L. WEEK 3038: 3 (1942).

palpably inconsistent with the determination of the Court in the principal case affording petitioners access to the courts to inquire into the constitutionality of their detention. It was met by Justice Davis in the *Milligan* case in these words:

> "... No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its [the Constitution's] provisions can be suspended during any of the great exigencies of government." [43]

The proposition has also been asserted that military spying, at least, is not a "crime" in the constitutional sense, and that ascertainment of the fact of such spying and its punishment are not a "criminal prosecution," hence the constitutional provisions are not applicable. This, it is said, is true because what a spy does is not prohibited by international law but is in fact fully allowed, although at the same time the rules of warfare give belligerents the right to treat such acts as "illegitimate" in the sense that severe punishment is permitted as a matter of necessity. Whatever the merits of this theory, its application to the facts of the principal case is questionable since the acts alleged do not fall within the accepted definition of spying. They are classified among forms of combat not sanctioned at all by the law of war. [44]

The Court alluded to neither of the aforementioned propositions, but based its decision upon an historical interpretation of the Constitution and the undesirable practical results obtaining from a different construction. The Chief Justice reasoned that presentment or indictment by a grand jury and trial by jury were procedures unknown to military tribunals at the time of the adoption of the Constitution; that such tribunals are not courts within the meaning of the judiciary article; [45] that the object of that article was to preserve the right of trial by jury in those cases in which it had been recognized by the common law and not to extend it to cases not so recognized; that the Fifth and Sixth Amendments, "while guaranteeing the continuance of certain incidents of trial by jury which Article III, section 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article"; [46] and, therefore, that these constitutional provisions do not

[43] 4 Wall. (71 U. S.) 2 at 121 (1866).

[44] See McKinney, "Spies and Traitors," 12 ILL. L. REV. 591 (1918).

[45] U. S. Constitution, art. 3, § 2; Ex parte Vallandigham, 1 Wall. (68 U. S.) 243(1863), cited by the Court on this point, held that the Supreme Court of the United States has no power to review by certiorari the proceedings of a military commission ordered by a general officer of the United States Army, commanding a military department. See Stein, "Judicial Review of Determinations of Federal Military Tribunals," 11 BROOKLYN L. REV. 30 (1941).

[46] Principal case, 63 S. Ct. at 16.

require a jury trial of offenses against the law of war cognizable by military commissions. The argument is historically sound. Its logic is irresistible. Although this argument completely disposed of petitioners' case, [47] the Court took pains to express its opinion of petitioners' additional argument that the Fifth Amendment, by the language of its exceptions ("cases arising in the land or naval forces"), impliedly extended its guaranty to all other cases. First reiterating the established proposition that the cases expressly excepted by the Fifth Amendment are deemed excepted by implication from the Sixth Amendment,[48] the Court, assuming without deciding that petitioners did not fall within these exceptions,[49] denied the validity of the contention on two grounds. The first was a logical extension of the Court's main argument. Said the Chief Justice, "No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms." [50] In the second place, the Court felt the petitioners' construction misconceived the purpose of the exception, which was " to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts." [51] Pushed to its logical conclusions, petitioners' construction would deprive persons in our own armed forces of a jury trial while granting it to aliens and citizens who violated the law of war—clearly an incongruous result. Moreover, as a matter of history, alien spies have always been tried by military tribunals without a jury. Doubtless underlying these legal arguments by the Court was the feeling, only hinted at in the opinion, that to construe these constitutional provisions otherwise, and in effect require our government in its defense against persons such as petitioners to resort to

[47] It was also argued that the President's order prescribing the procedure to be followed by the commission and the procedure actually used conflicted with the Articles of War, and consequently that any conviction would be unlawful. The Court rejected the argument, but there was an equal division of opinion as to the appropriate grounds. In the words of the Chief Justice, "Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that—even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to 'commissions'—the particular articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the Commission, in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President." Principal case, 63 S. Ct. at 20.

[48] Ex parte Milligan, 4 Wall. (71 U. S.) 2 (1866).

[49] See pp. 496-497, supra.

[50] Principal case, 63 S. Ct. at 17.

[51] Id at 18.

the slow and cumbersome processes of the criminal courts, might handicap the United States in its conduct of the war and place it in a disadvantageous position in respect to the enemy nations using the summary methods sanctioned by international law.

3.

In considering the significance of the decision in the principal case, it is well first to examine its relation to the famous case of *Ex parte Milligan*,[52] long regarded as one of the great bulwarks of American civil liberties. That case arose during the Civil War. Milligan was a citizen of Indiana, in which no hostile military operations were then being conducted. He did not reside in any of the rebellious states but had lived in Indiana for some twenty years. He was not connected with the armed forces of either side and was not a prisoner of war. After his arrest by military authorities, he was tried by a military commission organized under the commander of the Military District of Indiana, convicted, and sentenced to be hanged. The charges, supported by specifications, preferred against him were: (1) conspiracy against the government of the United States; (2) affording aid and comfort to rebels against the authority of the United States; (3) inciting insurrection; (4) disloyal practices; and (5) violation of the law of war.[53] The Supreme Court of the United States unanimously ordered his discharge,[54] saying that the civil courts were open and undisturbed in the execution of their functions (which was conceded in the principal case) and that Milligan was entitled to a jury trial.[55] There was, however, a divergence of views among the members of the Court. The majority held that neither the President nor Congress had the authority to establish military tribunals under the conditions then existing in Indiana. The minority conceded the authority of Congress but put the decision on the ground that Congress had not exercised its authority and

[52] 4 Wall. (71 U. S.) 2 (1866).

[53] In respect to charge 5 it should be noted that in the petition for the writ of habeas corpus, Milligan stated that "it was, has been, and still is wholly out of his power to have acquired belligerent rights and placed himself in such relation to the government as to have enabled him to violate the laws of war . . . ." Ex parte Milligan, 4 Wall. (71 U. S.) 2 at 8 (1866).

[54] The opposite result has been reached in England. In re Marais, [1902] A. C. 109, noted in 15 HARV. L. REV. 850 (1902).

[55] President Lincoln had proclaimed martial law throughout the country in September, 1862. In KLAUS, THE MILLIGAN CASE 56 (1929), it is said "His [the President's] conduct indicates that he still believed that proclamation to be in force at the time of the military trial and later." No reference to this proclamation was made in the opinions of the Court, although Justice Davis, speaking for the majority, said, "It is claimed that martial law covers with its broad mantle the proceedings of this military commission." Ex parte Milligan, 4 Wall. (71 U. S.) 2 at 124 (1866).

that, therefore, the President had no power to establish a military commission in an area not invaded and where the civil courts were functioning without interruption.

An extensive discussion of the decision and dictum in the case would not serve the purpose of this paper.[56] Suffice to say, it is distinguishable on its facts from the principal case, and the Court so considered it. Petitioners pointed to the following language of Justice Davis:

> "It can serve no useful purpose to inquire what those laws and usages [of war] are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in no wise connected with the military service." [57]

In reply, Chief Justice Stone said,

> ". . . We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established." [58]

Thus the doctrine of the *Milligan* case has not been weakened. On the contrary, its cardinal principle—that suspension of any of the provisions of the Constitution, in war as in peace, can rightly occur only by virtue of express limitations set forth in it—is completely harmonious with the tenor of *Ex parte Quirin*. One case deals with belligerency, the other with nonbelligerency. In neither is the presence or absence of citizenship determinative. The result in each is reassuring rather than surprising. Together they furnish precedent with which to solve the greater part of future questions.

The chief contribution of the principal case, which is expressly confined to its facts, is its historical approach. Whether future acts of sabotage, espionage and the like, although statutory crimes and punish-

[56] See the thorough treatment in KLAUS, THE MILLIGAN CASE (1929).

[57] 4 Wall. (71 U. S.) 2 at 121-122 (1866).

[58] Principal case, 63 S. Ct. at 19.

able as such by the criminal courts,[59] are triable by military tribunals will depend largely upon the application of the historical test adopted in the principal case. For it seems clear that hostile and warlike acts, whether committed by citizen or alien, may constitutionally be tried by military tribunals if they are offenses against the law of war and *historically* were tried by such tribunals. Likewise, the historical test will be employed to determine belligerency and the acts which fall within the category of unlawful belligerent acts. The principal case supports the supremacy of military tribunals only in their proper sphere as established by the practice and custom of our government and international law.

In the writer's opinion, the most significant feature of *Ex parte Quirin* is its actual existence. The picture of the highest court in the country convening specially to hear and pass upon the lawfulness of the trial of avowed enemies of the nation presents a sharp contrast to the practices prevalent in the land whence they came.

George T. Schilling

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[59] E. g., the Espionage Act, 50 U. S. C. (1940), § 31. See the bill recently introduced in the Senate providing for the punishment of certain hostile acts against the United States by death. S. 2856, 77th Cong., 2d sess. (1942). As to the exclusive and concurrent jurisdiction of the civil and military courts, see the cases cited in 6 C. J. S. 445 (1937).