SUPREME COURT OF THE UNITED STATES.

Nos. — Original and Nos. 1, 2, 3, 4, 5, 6 and 7—JULY SPECIAL TERM, 1942.

Ex parte Richard Quirin,
Ex parte Herbert Hans Haupt,
Ex parte Edward John Kerling,
Ex parte Ernest Peter Burger,
Ex parte Heinrich Harm Heinck,
Ex parte Werner Thiel,
Ex parte Herman Otto Neubauer.

Motions for leave to file petitions for writs of habeas corpus.

The United States of America, *ex rel.* Richard Quirin, Petitioner,
1 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Herbert Hans Haupt, Petitioner,
2 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Edward John Kerling, Petitioner,
3 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Ernest Peter Burger, Petitioner,
4 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Heinrich Harm Heinck, Petitioner,
5 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Werner Thiel, Petitioner,
6 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Herman Otto Neubauer, Petitioner,
7 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

On writs of certiorari to the United States Court of Appeals for the District of Columbia.

[October 23, 1942.]

Memorandum by Mr. Justice JACKSON.

I agree with the opinion in so far as it finds these prisoners properly to be in military custody and that the President might

lawfully try them before a military commission, but I do not participate in considering whether the President's Order corresponds with the provisions of the Articles of War enacted by Congress.

The prisoners admit that while engaged in the enemy's service they were landed on our shores by enemy submarines, and were especially trained, equipped and under German military instruction to execute enemy schemes of destruction among us. Their presence under such circumstances was indistinguishable in point of law from invasion.

When these facts appear I do not see how they have standing to proceed further in our civil courts. Beyond this I am unable to find that they have in any law that it is my function to apply any rights to assert here. Certainly the majestic generalities of the Bill of Rights designed to safeguard our own free society are not to be made available to enemy military forces while attempting to invade or invest it.

But these prisoners claim "rights" from the "Articles of War" as enacted by Congress with which, they ask us to hold, the President's Order for their trial fails to comply. I think these Articles of War have no application to the President's Order or to these prisoners, but the Court thinks otherwise, holds they apply to both, and comes out construing Article 38 in connection with other Articles so as to permit the nullification of safeguards which I am not prepared to say were not intended to be conferred upon our own inhabitants when subject to trial by military commission. This whole business of reviewing the President's Order as being governed by this Act of Congress seems to me unauthorized and possibly mischievous.

I see no indication that Congress has intended to confine the President's discretion in dealing with captured invaders or intended to confer any rights on them.

The Constitution authorizes Congress to prescribe rules for the government and regulation of the land and naval forces,[1] which it makes subject to military law.[2] Congress has discharged that duty by enacting Articles of War whose purpose is declared to "govern the Armies of the United States."[3] Their obvious purpose is to codify military law and to safeguard courts martial, as sum-

1 Constitution, Art. I, § 8, cl. 14.

2 Constitution, Amendment V.

3 See enacting clause of the Articles of War, 41 Stat. 787, 10 U. S. C. § 1471.

mary instruments of discipline, against ill considered, arbitrary, or unfair action.

A few of these Articles of War are also made applicable to "military commissions."[4] On this these petitioners hang their argument that this military commission is illegal if its procedures do not in all respects conform to the Articles of War. But this is to construe as a shelter for enemy invaders a protection against military government obviously intended for our own civilian population.

In course of time prisoners of war have found in "laws of war" some measure of protection against the once general practice of indiscriminate slaughter or sale into slavery. These laws of war are administered by military tribunals which are not dependent for their existence upon either statute or constitution, but derive their being from the necessities and practices of warfare.[5] Thus, before the adoption of the Constitution, General Washington utilized what we know today as a military commission to punish Major Andre for acting as a spy.[6] During the Mexican war, and in the absence of statutory authorization, a variety of crimes committed in territory occupied by the United States military forces were punished by "military commissions." Other strictly war courts known as "Councils of war" were employed to deal with offenses such as that of waging guerilla warfare.[7] During the Civil War military commissions were again employed without statutory authority,[8] and indeed certain offenses against the laws of war were punished by military commissions despite express statutory provision that they be tried by courts-martial.[9] Military commissions received statutory recognition for the first time in this country when, by an act of March 3, 1863, it was provided that violent crimes by military persons in time of war, and spying, might be punished by commission, as well as by

4 See Articles 15, 23, 24, 25, 26, 27, 38, 46, 80-82, 114, 115.

5 2 Winthrop, Military Laws and Precedents (2d ed.) 1296 *et seq.;* Davis, Military Law (1915) 308.

6 *Ibid.*, note 1, and authorities there cited. This has been regarded as an instance of disregard of applicable statutory law providing for punishment by court-martial and an application of the common law of trial by military commission. Morgan, Court-Martial Jurisdiction, 4 Minnesota Law Review 79, 107, n. 101.

7 See authorities cited *supra,* note 5.

8 2 Winthrop, *op. cit. supra,* 1309-1312.

9 *Ibid.*, note 19,

courts-martial.[10] It is plain from the nature of those times, and also from later statutes,[11] that it was the purpose of Congress to free rather than fetter the President in his conduct of the war.

Not until 1916, 127 years after the adoption of the Constitution, did any statute of Congress make any provision for the manner in which a "military commission" should be conducted.[12] For many years criticism had been levelled at the existing Articles of War, which derived with but little changes from early English statutes, on the ground that they were fit only for the discipline of professional armies comprised of men of a stamp very different from our own.[13] The problem had grown more acute with the approach of war and the consequent expansion of our armed forces. Congressional materials afford not the slightest clue that Congress intended the new legislation to govern the grim business of dealing with belligerent and enemy invading forces. That it was not is made emphatic by an express provision that the Articles of War were not intended to close the system of military tribunals,[14] and by certain provisions which made them obviously inapplicable to ~~that purpose~~.[15]

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[10] § 30, 12 Stat. 731, 736; *Id.*, § 38.

[11] Winthrop, *op. cit. supra,* 1300.

[12] Act of August 19, 1916, c. 418, Sec. 1342, 39 Stat. 619, 650 *et seq.*

[13] See statements collected in 52 Cong. Rec. 4302; Hearings on Revision of the Articles of War before a Subcommittee of the House Committee on Military Affairs, June 29-30, 1916; cf. Letter of Judge Advocate General to the Secretary of War set forth in Sen. Rept. No. 229, 63d Cong., 2d Sess., pp. 28 *et seq.*

[14] Article 15 read as follows: "*Not exclusive.* The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals."

[15] "No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him." (Article 24.) In its present form this article reads as follows: "No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him."

"The record of the proceedings of a court of inquiry may be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence

Publicity given to severe punishment meted out in some instances during the last World War to men in our own Army gave strong impetus to demands for amelioration of the Articles of War in their application to such men.[16] This demand was met by compromise legislation drafted by the War Department, and enacted in 1920, which did not differ for present purposes in any material manner from the 1916 statute.[17]

Apart from the armed forces subject to court martial, citizens and inhabitants of the United States may be subject to temporary government by the military, when and where martial law is lawfully declared. It is being enforced at the moment in Hawaii, and events might require it elsewhere.[18] Occupied territory is often governed in the same way. Under martial law civil courts afford little protection to citizens where they are subject to trial by military commissions.[19] It is obvious from their context that the sole purpose of Congress in enacting the Articles of War was to throw about those of our citizens and inhabitants subject temporarily to martial or military law as much as possible of the protection of our traditional procedures and liberties.[20]

If this were a military commission invoked as a substitute for courts and juries in the administration of justice to our own inhabitants, it would to me present a quite different question, both of power and of statutory construction. I should be less disturbed by the excess of judicial consideration being extended to

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in any proceeding before a court of inquiry or a military board: *Provided*, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer.'' (Article 27.)

16 Hearings on the Establishment of Military Justice before the Subcommittee of the Senate Committee on Military Affairs, 1919, pp. 51 *et seq.*

17 41 Stat. 787, 10 U. S. C. § 1471 *et seq.*

18 See Fairman, Law of Martial Rule, 55 Harvard Law Review, 1253, 1289; *et seq.*; Anthony, Martial Law in Hawaii, 30 California Law Review, 371; King, The Legality of Marial Law in Hawaii, 30 California Law Review, 599.

19 The case of an American citizen charged before a military commission with ''subversive activity'' found the courts closed to him, the judge refusing relief with the statement: ''The court . . . believes that a writ should issue as a matter of law. But it would be in clear defiance of an order of the military governor to issue the writ. I feel the court is under duress and is not able to carry out the function of the court as is its duty. For that reason alone, the court declines to issue the writ.'' Honolulu Star-Bulletin, Feb. 20, 1942, p. 3; Fairman, *supra*, note 6, p. 1298.

20 *E. g.*, Article 24 (prohibition of degrading or incriminating questions); Article 40 (prohibition of second trial for same offense); Article 41 (prohibition of ''cruel and unusual punishments . . . including flogging, branding . . .'')).

these prisoners if I did not feel that the opinion anticipates questions which might under such circumstances arise and creates a precedent weakening the protection Congress has sought to give our own people when under temporary martial law. I am not ready to say that in a case concerning persons not identified with enemy forces I would construe Article 38 in connection with other Articles so as to nullify safeguards expressly stated in the Act, as has been done in this case, where I think they are completely inapplicable.

I think that the Court's decision of the question whether it complied with the Articles of War is uncalled for. The history and the language of the Articles are to me plain demonstration that they are completely inapplicable to this case, and it is abundantly clear to me that it was well within the war powers of the President as Commander in Chief[21] to create a non-statutory Presidential military tribunal of the sort here in question. That he called it a "commission" rather than a "council," or that he made specific reference to Article 38 as well as to his general constitutional and statutory powers, is of course not material.[22] The relation of its task to the prosecution of the war should make us loath to intimate in any way either that his action was subject to judicial review or intended to be confined by Congressional enactment.

The seizure and trial of these prisoners is not in pursuit of the functions of internal government of the country. They are prisoners of the President by virtue of his status as the constitutional head of the military establishment and their own status as enemy forces captured while conducting a military operation within and against this country. The custody and treatment of such prisoners of war is an exclusively military responsibility. It is to be discharged, of course, in the light of any obligation undertaken by our country under treaties or conventions or under customs and usages so generally accepted as to constitute the "laws of warfare." The proper treatment due them may require fact-finding and trial of disputed matters. Whether one was a lawful combatant or an unlawful enemy, whether his rank has been misrepresented to obtain treatment accorded a higher rank, whether one is responsible for uprisings among prisoners or

[21] Constitution, Art. II, § 2, cl. 1.

[22] 2 Winthrop, *op. cit. supra*, 1296.

breaches of discipline, or has attempted escape, and countless other questions, call for examination, decision, and disciplinary action. Such a question was whether these particular prisoners by casting aside their uniforms and identifying insignia had forfeited standing as lawful enemies and should be treated as war criminals. It was a military question for military decision. Whether there was a duty to submit the matter for trial, it was certainly proper to do so, to answer possible questions of identification, fulfill all possible international obligations, hear any plea of mitigating circumstances, and to gain any information of military importance that their trial might yield.

For such purposes the right of the Commander in Chief to delegate the inquiry to members of his staff selected to form a "military commission" and to lay down for it procedures adapted in his opinion to the task in hand is not to be denied. Military commissions in this sense were commonly used before there was any statute to authorize them, and for that matter were used by General Washington before there was a Constitution. The right to convene such an advisory committee of his staff as a "military commission" for the discharge of his duty towards prisoners of war is one that follows from his position as Commander in Chief.

There are the soundest reasons why the courts should refrain from reviewing in any way orders of the President respecting prisoners of war. Their handling is a part of the work of waging war. It is so related to questions of national safety and of policy toward other nations that this case, like others dealing with political and foreign policy questions, is not an appropriate one for judicial intervention.[23] We cannot grant to prisoners of war individual rights against our military authorities which our enemies would never reciprocate toward captured Americans. It may very well come about if our enemies disregard the accepted standards of civilized treatment of prisoners that reprisal against those in our hands would be the only weapon in the hands of the President to obtain humane treatment for our men who sustain the misfortune of capture. Once it appears that one is a legitimate prisoner of war, no court should question or review any Order the President may consider will serve the interests of this nation, whatever its effect on the life or liberty of those individuals whose service of our enemies forfeits claim to our judicial consideration.

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[23] Williams *v.* Suffolk Insurance Co., 13 Pet. 415; Luther *v.* Borden, 7 How. 1; Kennett *v.* Chambers, 14 How. 38; Oetjen *v.* Central Leather Co., 246 U. S. 297; United States *v.* Curtiss-Wright Corp., 299 U. S. 304; United States *v.* Pink, 315 U. S. 203.

If advancing views not accepted by a single one of my respected seniors in service on this Court seems to betoken over-self-confidence, I may say in extenuation that the field they are entering is as novel to experienced judges as to new ones. If any court of any jurisdiction to which we pay the respect of citation has ever before admitted prisoners of war to standing to sue their military custodians, the opinion does not cite it. If any judicial body ever before construed procedural or substantive provisions of domestic law to be available as a shield for enemy military forces in the act of invasion, the opinion does not cite it. I think we are exceeding our powers in reviewing the legality of the President's Order and that experience shows the judicial system is ill-adapted to deal with matters in which we must present a united front to a foreign foe.[24] The fact that the Court comes out right by sustaining the President in this instance does not justify the entertainment of the prisoners' complaint against his procedure;

[24] Judicial handling of cases which relate to foreign relations demonstrates that courts are not organized to deal with such questions.

In the spring of 1941, Italian and German officers and seamen disabled their ships in American ports. They acted under orders from representatives of their respective governments. As the United States was not at war with those powers, jurisdiction to vindicate our law resided only in civil courts. The circumstances required prosecution in several districts and before several different judges. All defendants had violated the same sabotage law by identical methods and under similar orders.

Diplomatic relations with both countries were in a state of tension. American citizens were in those countries and some of them were in prison or threatened with imprisonment. It was not unlikely that some of them could be saved or repatriated only by a process of exchange. The President, the Secretary of State, and the Attorney General considered that our foreign policy would be strengthened by substantial sentences, but which would not discriminate between nationals of the two countries or between those of the same country as to defendants of equal rank. Discriminations would embarrass already strained relations.

The Attorney General instructed United States Attorneys to advise the district courts in which the cases were pending of these considerations in a communication which follows:

"You are requested to advise the United States District Court of the following considerations and recommendations as to sentences of officers and seamen convicted in your district of sabotage.

"The Department of Justice sought to indict only individuals actually participating in acts of sabotage and officers in responsible positions on the sabotaged ships. Our action against German or Italian seamen has not proceeded upon any theory of constructive guilt because of mere membership in the crews or presence upon the ships. Hence, each convicted defendant is found personally guilty of a serious violation of a law enacted many years ago and which is well known to the shipping world.

"We do recognize, of course, that the guilt of these individuals is included in a larger offense against American sovereignty by the foreign governments involved. We must also recognize that such larger offense is not justiciable in our courts. In the absence of amends, or offers through diplomatic channels

it only obscures the mischief of which the process in our own hands and in those of nearly one hundred District Courts is capable.

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to amend, the vindication of our laws must rest upon the penalties exacted of those who did act within our jurisdiction.

"This Department does not consider that any orders to violate our law issued by officers or governments not subject to the jurisdiction of our courts, should be accepted in mitigation of sentence.

"Any theory that foreign nationals in this country are still subject to the control of foreign governments, and that such nationals may violate our law with impunity on orders from abroad, we hope will be emphatically rejected.

"While these offenses are individual, the group of cases pending in different districts are substantially uniform. If the effect of sentences should be to discriminate between Italian nationals and German nationals or between nationals of any one government in similar stations of authority, it would be pretty certain to be misunderstood in countries not familiar with our separation of executive from judicial power.

"It is probably impracticable for the several judges before whom these cases are pending to confer, and hence, in an effort to avoid any unintended discriminations resulting from different actions in the several districts, this Department respectfully desires to make recommendations as to sentences in these cases. It is our recommendation that the responsible officers in each group be sentenced to imprisonment for a period of seven years and that the seamen be sentenced for a period of five years. We do not consider fines to be appropriate.

"Please assure Judge ——— that we have no thought of encroaching upon the discretion committed by law to his own judgment, but we are confident that he would desire to be informed of all of the considerations involved in these cases and to have before him the recommendations of the Government in a difficult international situation."

However not one court followed these recommendations, and the sentences imposed were as follows:

GERMAN

5	Officers and seamen	3 years

ITALIAN

1	Seaman	1 hour
11	Seamen	3 months
63	Seamen	6 months
26	Seamen	8 months
2	Seamen	1 year
28	Seamen	1 year & 1 day
44	Seamen*	18 months
19	Seamen*	2 years
59	Seamen*	2 years & 6 mos.
45	Seamen*	3 years
5	Seamen*	3 years & 6 mos.
6	Seamen*	4 years
2	Officers	5 years

* Note: These include officers as well as crew members.

The President could remove these judicial discriminations only by use of the pardoning or commuting power. He could not increase sentences. If he removed all of the discriminations by this method, it would result in a sentence for this whole group of saboteurs of one hour! That is the judicial process at work on matters of foreign affairs, and it is a sharp admonition to us that nothing of this character should be drawn into the judicial system that is not necessary to the proper administration of our own internal laws.

The embarrassments of these disparate sentences were obscured by a rapid succession of more serious events.

I press this view because in the long run it seems to me that we have no more important duty than to keep clear and separate the lines of responsibility and duty of the judicial and of the executive-military arms of government. Merger of the two is the end of liberty as we in this country have known it. If we are uncompromisingly to discountenance military intervention in civil justice, we would do well to refuse to meddle with military measures dealing with captured unlawful enemy belligerents.