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Myron C. Cramer

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MILITARY COMMISSIONS TRIAL OF THE EIGHT SABOTEURS*

GENERAL MYRON C. CRAMER

When your President asked me to talk about something and gave me the choice of subjects, I really didn't know just what to select. I much would have preferred that he would have told me what he would like to have me talk about, but being this is a lawyers' meeting and being that we have been through the trial of the eight saboteurs in Washington, I thought that probably you ladies and gentlemen would be interested in the legal aspects of that trial. Now, I have got to say at the outset that so far as the facts are concerned, the record of the trial has been ordered sealed by the President until the close of the war and those connected with the trial have been told not to disclose any of the facts concerning it. However, to all intents and purposes, I might say what you have read in the papers is the gist of the whole trial, where these eight men, who were trained in a sabotor school in Germany, came over to this country in two submarines, four of whom landed on Long Island and the others in Florida, with \$180,000 altogether in United States money, a lot of ammunition, secret paraphernalia for secret writing, and instructions on how to bomb bridges and munition plants and that sort of thing. They were speedily caught. They were tried. We even went through habeas corpus proceedings in the Supreme Court of the United States. And six of them were electrocuted and the other two sentenced to long prison terms, the terms being reduced by the President, all in the short time of two months and one day.

Our Commander-in-Chief has assured the American people that there will be no "blackout" of Democracy in this great country of ours. Our Anglo-American institutions that have been developed over a period of a thousand years are now held in the balance. Never in recorded history has civilization, as we know it, faced such a crisis. Lights go out in many parts of the world. The freedoms fought for and established by free men are being challenged on all sides. Democracy and totalitarianism are gripped in mighty battle and totalitarianism must be destroyed. Constitutional Government must find within itself the powers necessary to its own preservation. In this total war, the rule of law rather than the rule of men, must be preserved. This contrast in philosophy of Government and in the rights of man is the world issue today.

In a critical period of war and national danger, it is the duty of the military establishment to protect and defend the nation. But this duty is exercised, under our form of Government, as a constitutional function. The war power, as Mr. Chief Justice Hughes once said, includes all that is necessary "to wage war successfully". It was by an exercise of the war power that the President brought the case of the eight saboteurs to trial before a Military Commission. These agents of the Nazi Government were apprehended, in the guise of civilians, after they had secretly entered our lines. This was a violation of the law of war, and the Commander-in-Chief brought them before a tribunal competent to try such an offense.

*Address of the Judge Advocate General of the Army, given before the annual meeting of the Washington State Bar Association and Association of Superior Court Judges, September 25, 1942.

Military Commissions are primarily war courts. They may sit in conquered territory over which we have established military Government, as in the Rhineland after the armistice; or, in domestic territory over which, because of war conditions, we have taken military control, as in Hawaii. They may also sit and try cases for violations of the law of war in domestic territory over which martial rule has not been established and where the courts and other civil functions of the Government are being carried on normally. The last was the situation existing at the time of the recent trial of the eight saboteurs in Washington.

In our history, one of the first instances of a trial by the military for an offense against the Law of War was the celebrated case of Major John Andre, Adjutant General of the British Army, in 1780. You will recall that this British officer had conspired with Benedict Arnold for the surrender of the post at West Point and, when captured while returning to his own lines in civilian clothes, made the somewhat novel defense that as he had a safe conduct passport from the traitor, Arnold, he should have been allowed to go free (Winthrop, *Military Law and Precedents*, 24 Ed., p. 666). The tribunal by which Major Andre was tried and found guilty was convened as a "Board" and was directed "to report a precise state of the case" with an "opinion of the light in which he (Andre) ought to be considered and the punishment that ought to be inflicted" (Winthrop, p. 518).

During the same year, Joshua Hett Smith was tried before a special court-martial, under a Resolution of Congress, for complicity in the Arnold conspiracy. A general court-martial, however, was convened by General Andrew Jackson in New Orleans during 1815 for the trial of Louis Louaillier, as a spy, and various other war crimes were tried before courts-martial during that same period.

As a part of his scheme of military Government in Mexico, General Winfield Scott set up two types of courts, in addition to courts-martial, for the trial of offenses. The first was a court for the trial of crimes such as murder, robbery, rape, etc., charged to have been committed by civilians in Mexico and was called a "Military Commission". The second type of court was denominated a "Council of War" and was established for the trial of offenses against the laws of war (Winthrop, p. 832). It will be noted that, although the offenses over which the first Military Commission had jurisdiction were those over which normally the civil courts have jurisdiction, the offenders over whom such jurisdiction extended were persons outside our armed forces.

With the advent of the Civil War, the two types of court used by General Scott were combined into one called thereafter a Military Commission and which received its first legislative recognition, by Congress, when it passed the act of March 3, 1863 (12 Stat. 736). Section 30 of this act provided that in time of war, insurrections or rebellion, murder, robbery, arson, rape, larceny, etc., shall be punishable by a general court-martial or Military Commission, when committed by persons in the military service and subject to the Articles of War. Section 38 of the same act provided that all persons, which includes all persons within as well as without the military service of the United States, who in time of war or rebellion are found lurking or acting as spies in or about military establishments or elsewhere shall be tried

by a general court-martial or a Military Commission. Several thousand such courts functioned during the Civil War, and the conspirators in the assassination of President Lincoln were tried by a Military Commission in 1865. Although Military Commissions have been referred to in statutes since that time, and although they are mentioned a number of times in our present Articles of War, there has been little attempt by the Congress to define definitely their jurisdiction or outline their procedure. In only three instances is jurisdiction of specific offenses directly conferred on Military Commissions by statute. These are the offenses of dealing in captured or abandoned property, relieving the enemy, and spying, found in Articles of War 80, 81 and 82, respectively. All three of these are war offenses and the last two confer jurisdiction by general court-martial to try any person, whether or not he is a member of our armed forces.

In addition to those cases in which jurisdiction is directly conferred, legislative recognition of the jurisdiction to try all offenses against the law of war is found in Article of War 15, which provides, among other things, that the Articles of War shall not be construed as depriving Military Commissions of jurisdiction over offenders or offenses that, by the law of war, are triable by such tribunals. The Congress, by these enactments, has made provision for the trial of offenders against the law of war, but has left to the discretion of the President, as Commander-in-Chief of the Army, the authority to convene such tribunals under such orders and regulations as will best serve the exigencies of the Military situation. Although Articles of War 81 and 82 confer concurrent jurisdiction for the offenders named therein on Courts-martial and Military Commissions, customarily persons in the military service have been tried by courts-martial, while those not in the military service have been tried by Military Commissions.

Laws of War are defined by Oppenheim in his treatise on "International Law" (6th ed. Vol. II, p. 179), as "the rules of the Law of nations respecting warfare".

In his work "The Law of War" (p. 73), Risley said:

" * * * the Rules of War are pervaded by one grand animating principle—to obtain justice as speedily as possible at the least possible cost of suffering and loss to the enemy, or to neutrals, as the result of belligerent operations."

Many learned writers have discussed this subject, but suffice it to say, that as a result of centuries of experience, civilized nations have recognized that war is a temporary and abnormal condition, having for its purpose the settlement of specific disputes. It has been found that the long range ends of belligerents are best served by conducting their military operations within the limits of a fairly well defined sphere of action. The rules, evolved from custom, in accordance with which nations have confined their operations within that sphere of action are the laws of war, and acts of warfare outside that sphere are offenses against the law of war.

The first re-codification of the laws of war was contained in Leiber's "Instructions for The Government of the Armies of the United States in the Field" promulgated in War Department General Orders 100, 1863, and said by Spaight in his "War Rights on Land" (p. 14) to be "not only the first but the best book of regulations on the subject ever

issued by an individual nation on its own initiative." The various international conventions have modified these instructions somewhat, but the Articles of the Hague and Geneva Conventions and the Rules of Land Warfare, by which our forces are governed today, are substantially the same as those originally promulgated in General Orders 100.

Trials of persons not in the military service by military tribunals outside the immediate field of battle have been few, and the body of case law with respect to such trials is small. Eliminating those cases growing out of martial law in connection with domestic disturbances, not amounting to war, very few court decisions on the jurisdiction and power of military tribunals remain. Of these, the leading case is *ex parte Milligan*, 4 Wall., 2, decided in 1866. Let us compare the facts and holding in that case with the recent saboteur cases of *United States ex rel Burger, et al v. Brigadier General Cox*. The facts of the Milligan case are simple: Lampdin P. Milligan had been a citizen of Indiana for twenty years before he was taken into custody by the military authorities. He had not been a resident of one of the states in secession during the period of the Civil War or a member of the military forces of the Union. He was charged with conspiracy against the United States, affording aid and comfort to rebels against the authority of the United States, inciting insurrection, disloyal practices and violation of the laws of war. He was tried before a Military Commission, found guilty and was sentenced to be hanged. The sentence was duly approved and ordered executed.

There was then in force the act of March 3, 1863 (12 Stat. 755) which authorized the President to suspend the privilege of the writ of habeas corpus, and required the Secretary of War and the Secretary of State to furnish to the judges of the Federal district and circuit courts a list of the names of citizens of loyal states, held by authority of the President or either of such Secretaries as state or political prisoners, or otherwise than as prisoners of war, who resided in the respective jurisdiction of such judges or who may be deemed by such Secretaries to have violated any law of the United States in any of said jurisdictions. The act also provided that when after the furnishing of the name of such a person, a grand jury had convened and had terminated its session without finding an indictment, presentment or other proceedings, the prisoner should be discharged after taking the oath of allegiance to the United States and swearing to support the Constitution thereof, and to not thereafter in any way, encourage or give aid and comfort to the rebellion or its supporters.

Milligan's name had never been furnished to the judges as directed by the act, but a grand jury had convened months subsequent to his arrest and had terminated its session without finding an indictment, presentment or other proceeding against him.

On these facts, Milligan presented his petition for a writ of habeas corpus to the Federal Circuit Court, wherein he prayed that he either be turned over to the civil authorities or be discharged completely. The case came to the Supreme Court of the United States on a certificate of division of the Circuit Court judges. The court was unanimous in holding that the writ should be granted and that Milligan should be discharged under the terms of the statute involved. But the majority of the court, in an opinion written by Mr. Justice Davis, went further

and discussed the jurisdiction of Military Commissions in general and the constitutional limitations on the powers of Congress with respect thereto. Chief Justice Chase wrote the opinion for the minority, dissenting from some of the broad conclusions reached in the majority opinion. To attempt a summary of the majority opinion in that case, which covers twenty-five pages in the report, would be tedious. I have attempted, however, to abstract the legal basis on which the opinion seems to turn and to analyze its significance.

Reference by the court to the extent of the jurisdiction of military tribunals and the applicable constitutional guaranties, when considered separately, would seem to indicate that the jurisdiction of military tribunals over persons not in the military service is practically non-existent. On page 120 of the decision, the court said:

"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."

and at page 123:

"* * * this right (trial by jury) * * * is preserved to everyone accused of crime who is not attached to the Army, or Navy, or Militia in actual service."

The effect of the foregoing language, however, is qualified by other language, as follows:

"All other persons, (not in the military or naval forces) citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury." (p. 123)

and again:

"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 * * * 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." (p. 121)

It would appear from this statement that the broad implications of the language first quoted were not intended to apply, with respect to offenses against the law of war, to those who are not citizens, nor in a place where the courts are not open. Although the opinion is consistent in the view that trials of citizens, generally, by military tribunals may not be had when the courts are open and functioning in their normal course of business without assistance from the military, it does proceed to circumscribe the class of citizens to whom this is applicable.

On page 116, the court said:

"If he was detained in custody by order of the President, otherwise than as a prisoner of war; if he was a citizen of Indiana and had never been in the military or naval service * * * then the court had the right to entertain his petition and determine the lawfulness of his imprisonment."

From this language it is manifest that the court would have had no right to entertain the petition of a prisoner of war and determine the

lawfulness of his imprisonment. In dealing with the contention that Milligan was a prisoner of war, the court said, at page 131:

"It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there and had not been, during the late troubles, a resident of any of the states in rebellion * * * he was not engaged in legal acts of hostility against the Government, and only such persons, when captured, are prisoners of war."

By stating that Milligan was not a prisoner of war because he had not been a resident of any of the states in rebellion during the war, the court implied the contrary—that he might be so considered if he had resided in any of the states in rebellion.

I believe that the majority holding in the Milligan case may be summarized as follows:

No person who is a citizen of the United States who has not during war resided in enemy territory, who is not in the military service and who may not be considered a prisoner of war, may be tried by a military tribunal or denied the right to a jury trial for any crime or for any offense against the laws of war, in the United States, when the courts are open and functioning in their normal course of business without the aid or support of the military.

Since the Milligan case, no case has come before the Supreme Court involving the wartime jurisdiction of military tribunals. In the case of *United States ex rel Wessels v. McDonald* (265 Fed. 754), the Federal Court for the Southern District of New York, in 1920, refused to follow the Milligan case and held that jurisdiction existed in military tribunals for the trial of a German citizen apprehended in New York, who was charged with being a spy. That case was taken to the Supreme Court of the United States, but was dismissed by stipulation before it was argued (256 U. S. 705 (1921)).

When, therefore, the eight saboteurs were apprehended by the Federal Bureau of Investigation, consideration was given to whether they should be brought to trial before a Military Commission. The first question, naturally, was whether the facts fell within the interdiction of the Milligan case. As might be expected, there was no complete unanimity of opinion on this subject, but it was finally determined that trial by Military Commission was the proper course.

On July 2, 1942, the President issued a proclamation denying access to the civil courts, except under regulations prescribed by the Attorney General and approved by the Secretary of War, to 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 the United States through coastal or boundary defenses and are charged with committing, or attempting or preparing to commit sabotage, espionage, hostile or war-like acts or violations of the laws of war.

On the same day, the President, as Commander-in-Chief of the army, issued an order convening a Military Commission for the trial of the eight alleged saboteurs. The same order, in accordance with military practice, named counsel for the prosecution and for the accused. Subsequently, separate counsel was named for one of the accused.

From the outset, it was expected by the prosecution staff that counsel for the accused would seek a writ of habeas corpus in the civil courts, and, as six days intervened between the issuance of the order appointing the commission and the date set for the trial to begin, it was considered quite possible that a petition for the writ would be filed before the trial began. As you know, this was not done, and the trial was begun as scheduled.

The argument of preliminary questions and the taking of testimony occupied sixteen days—an average of two days for each accused. After both sides had rested, counsel for seven of the defendants filed a motion directly to the Supreme Court of the United States for leave to file a petition for a writ of habeas corpus. In the gravest times of war, our highest court convened quickly during midsummer in extraordinary session to hear and weigh the arguments of counsel for petitioners and Government, in a manner characteristic of its spirit and traditions. On the evening of the day before that set for a hearing on the motion before the Supreme Court, counsel for the seven accused presented a similar motion to a judge of the United States District Court for the District of Columbia, by whom it was refused *instanter*.

Counsel for the petitioners first took the position that jurisdiction for the issuance of the writ existed in the court as an aid to its appellate jurisdiction to review the action of the District Court. During the course of the two-day argument, however, the petitioners, after having informed the Supreme Court of their intention in this regard, perfected an appeal to the Circuit Court of Appeals for the District of Columbia from the order of the judge of the District Court, and then filed a petition in the Supreme Court for certiorari before judgment in the Circuit Court of Appeals. An interesting sidelight on this phase of the case is the fact that the petition for certiorari was actually filed in the Supreme Court at 11:59 a. m., on July 31, 1942. The court convened one minute later, granted the certiorari and announced its decision. The original motion in the Supreme Court was abandoned by the petitioners, with the consent of the court, and the decision of the court affirmed the order of the Judge of the District Court. Thus, the cause which included the presentation of a motion for leave to file a petition for the writ in the District Court, an appeal to the Circuit Court of Appeals, a petition for the writ of certiorari, argument and final decision—was disposed of by the civil courts within the brief space of approximately sixty-four hours.

Before attempting to analyze the issues of the saboteur cases in the Supreme Court, I should like to state briefly the contentions of each side and distinguish between the facts of these cases and those of the Milligan case.

In the saboteur cases the Government contended that all seven petitioners (one defendant not having sought the writ) were German nationals, and hence enemy aliens, who had entered into a theatre of operations in the United States by penetrating the lines of the armed forces of the United States, during a time of war, while in the uniform of the German Reich; who brought with them a large amount of money, certain explosives and the knowledge of means of secret communications; who thereafter assumed civilian guise for the purpose of spying, giving aid to the enemy and committing hostile acts against

the armed forces of the United States; and that as a result of these alleged facts, the petitioners having violated the law of war and acts of Congress had no right to the issuance of the writ of habeas corpus.

Six petitioners admitted all the factual contentions of the respondent except allegations as to the purpose of entry and the existence of a theatre of operations at the place of entry. These six contended that they were entitled to the writ of habeas corpus on the following grounds: The President's proclamation of July 2, 1942, was invalid; the order appointing the commission was unconstitutional and contrary to statute; the commission had no jurisdiction of the offenses charged, or of the persons of the petitioners, and had in many ways acted contrary to law in its proceedings in violation of claimed "constitutional" rights of the petitioners; and finally that any offenses which they might have committed were cognizable by civil courts by which courts they were entitled to trial. The seventh petitioner, in addition to the contentions of the other six, contended that he was not an enemy alien, but a citizen of the United States.

The Government urged that there were at least three factors by which these saboteur cases could be distinguished from the Milligan case. One difference, admitted by all parties, was that the petitioners all resided in enemy territory during the present war and entered the United States on a war vessel of the enemy power. Milligan had never resided elsewhere than in Indiana for the duration of the Civil War and there was no evidence that he had been in direct contact with the states in rebellion.

Secondly, six of the petitioners were admittedly non-citizens and enemy aliens, whereas Milligan was a citizen of the United States and of the loyal State of Indiana—presumably natural born. The seventh petitioner had become a citizen of the United States by derivation, that is, by naturalization of his father, prior to our entry into the war. There was evidence, however, and the Government so contended, that his subsequent actions constituted a forfeiture of citizenship under our nationality laws.

A third distinguishing factor was the contention of the Government that the eastern seaboard of the United States was a theatre of operations. The existence of such a theatre of operations was vigorously denied by the petitioners. The court in the Milligan case expressly took judicial notice that there was no theatre of operations in Indiana where Milligan was arrested and tried.

In addition to the question of whether the Milligan case is a precedent for these cases, there were at least ten other possible issues presented to the court. Categorically, these were:

1. Are invading alien enemies entitled to access to the courts in the absence of denial of such right by Executive action?
2. May the President deny alien enemies, within the terms of his proclamation, access to the courts?
3. May the President deny citizens, within the terms of his proclamation, access to the courts?
4. Does a citizen enemy have any more rights than an alien enemy?
5. Are the petitioners within the terms of the President's proclamation?

6. Is the eastern seaboard of the United States a "theatre of operations"?

7. Are the offenses charged within the jurisdiction of a Military Commission?

8. Does a Military Commission have jurisdiction over the persons of the petitioners?

9. Was this Military Commission legally constituted?

10. Were any rights of the accused invaded by the proceedings of the Military Commission and if so, are such invasions reviewable on habeas corpus? In particular, the petitioners charged that their rights were violated by two rules prescribed by the President, one, authorizing a conviction or sentence by concurrence of two-thirds of the members of the Commission; and the other, authorizing the Commission to receive any evidence which would have probative value to a reasonable man.

The actual holdings of the court in its decision were:

1. The charges alleged offenses which the President could order tried before a Military Commission.

2. The Military Commission was lawfully constituted.

3. The petitioners were held in lawful custody for trial before the Military Commission and did not show cause for being discharged by writ of habeas corpus.

The court announced that its formal opinion would be handed down later. To date this has not been done.

Of all the issues raised, only the three relating to the jurisdiction of the offenses and persons of petitioners and the lawfulness of the constitution of the Commission, can unequivocally be answered in the affirmative by the decision rendered.

Whatever the opinion of the Supreme Court may state, its decision has already dissipated whatever doubt may have existed as to the legal power of the Commander-in-Chief to deal summarily with those who dare cross and come behind our lines for hostile purposes. The enemy must be dealt with as speedily and effectively on the home front as on the battle front. Under our form of Government, the rules of law, even in the gravest of times, must and do remain intact. Even an enemy shall be done justice, but the exigencies of war demand that the administration of that justice be swift as well as fair. So has held our highest court in the case of the eight saboteurs.

For these cherished principles, this nation has been always ready to fight. The question is again—Whether we and our posterity shall live as free men or perish as slaves. But, of what avail, all our labors and sacrifices, if our purpose were not, and if out of this struggle came not, equal justice for all under the law? Throughout the centuries, the lawyer has proved himself the vigilant champion of the rights of man. The lawyer's duty has never been more pressing than today. We all fight that the lamp of freedom may ever burn. In your daily efforts you must toil and sacrifice that democracy may live, that its principles may never die. In war, as in peace, law in this nation is never passive. Preserve and extol its virtues. The battle is difficult; but this country has never failed in any task to which it has set its hand, and no more worthy task has it ever had. The spirit of a free people does not die or surrender. This war must and will be won so that constitutional government and the rule of law, rather than the rule of man, shall not perish. (Applause)