

Ex Parte Merryman and Ex Parte Quirin— A Comparative Activity

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For use in conjunction with “Ex parte Merryman and Debates on Civil Liberties During the Civil War,” by Bruce A. Ragsdale, available at <http://www.fjc.gov/history/home.nsf>. A unit in the Teaching Judicial History Project, developed by the Federal Judicial Center in partnership with the American Bar Association’s Division for Public Education.

Activity Objectives

Through an examination and comparison of the *Merryman* proceedings and the case of German saboteurs captured in the United States during World War II, students will gain a deeper understanding of the challenge of balancing civil liberties and national security during war. The activity will focus on debates on the suspension of habeas corpus and on the protections of due process as they apply to individuals accused of threatening national security or conducting war against the United States.

Essential Questions

- Do national security threats preceding the arrest of Merryman and of the German saboteurs meet the constitutional criteria for suspension of the writ of habeas corpus?
- Why weren’t Merryman or the German saboteurs indicted on criminal charges and tried in a federal court?
- Would national security have been endangered if the executive branch had asked Congress for a suspension of habeas corpus before the arrest of Merryman, or before the arrest of the German saboteurs?

Legal Issues Raised by the *Merryman* and *Quirin* Cases

The cases present questions about the determination of legal status as enemy belligerents and about access to the constitutional right to habeas corpus and Fifth and Sixth Amendment protections of defendants in the civilian courts.

Estimated Time Frame

Two to three 50-minute class periods.

Recommended Prep Work

Review with students the function of the writ of habeas corpus and the conditions under which the Constitution permits suspension of access to the writ. In addition to the introductory discussion in “*Ex parte Merryman: A Short Narrative*” (p. 1)

(“*Ex parte Merryman* and Debates on Civil Liberties During the Civil War,” by Bruce A. Ragsdale, available online at <http://www.fjc.gov/history/home.nsf/>), a good resource is the article on habeas corpus by David Fellman in *The Oxford Companion to the Supreme Court of the United States*, 2d ed., Kermit L. Hall, editor in chief (New York: Oxford University Press, 2005), pp. 415–16.

Prepare copies for student review of the documents identified on the worksheets.

Description of the Activity

Activity Overview

Through a variation of the “jigsaw” strategy, which gives every student the opportunity to learn key information that they then share with other students, this activity explores debates on the suspension of the writ of habeas corpus. In this way, every student is empowered as an expert.

Group Work and Discussion

Tell students that they are going to examine two federal court cases that will help answer the following question: “When should the writ of habeas corpus be suspended and who should have the authority to suspend it?”

Divide the class so that half are responsible for examining the *Merryman* case and the other half for the *Quirin* case. Distribute a copy of the appropriate worksheets to each student. Subdivide each half into five groups and assign each group responsibility for answering the questions in one of the five categories: (1) profiles of the defendants; (2) perceived threats to national security; (3) actions of the government; (4) legal questions before the courts; and (5) responses of the courts and the executive branch.

Provide time for each group to complete their assignments (probably one class period).

As a whole class, discuss each category of questions in turn. Have students responsible for category #1 for each case come together at the front of the class to exchange information and respond to any questions from the class. At the close of the presentation, make two columns on the board or overhead with the words “similarities” and “differences” at the top. Ask students what similarities and differences they see in these two cases. Record these responses, leaving room for responses relating to subsequent presentations. Repeat this process until each pair of groups has reported.

Debrief and Wrap-up

Review, discuss, and clarify the similarities and differences in these two cases that the students have identified.

Close by returning to the question of when the privilege of the writ of habeas corpus should be suspended and who should have authority to suspend it.

Assessment

Select questions from each of the categories to develop a quiz to assess individual learning.

Take notes on student contributions in each of the paired-group presentations.

Have students write essays on the essential question at the conclusion of the discussion.

Alternative Modalities and Enrichment Activities

- Develop scripts and enact scenes from the Military Commission trial.
- If students are familiar with the *Merryman* case, two or three small groups of students could be assigned to respond to one set of questions on the *Quirin* case. These groups could compare notes and develop a consensus report. Then, as each group reports to the whole class, an open discussion could bring out the similarities and differences between the two cases.

Involving a Judge

Invite a judge to discuss how the current courts would determine the legality of a suspension of the privilege to the writ of habeas corpus. What kind of questions might a judge ask about the petitioners or defendants, and what would a judge ask about the government's plans for suspension of the writ?

Standards Addressed

U.S. History Standards (Grades 5–12)

Era 5—Civil War and Reconstruction (1850–1877)

Standard 2B: Evaluate the Union's reasons for curbing wartime civil liberties.

Standards in Historical Thinking

Standard 2: Historical Comprehension

- C. Identify the central question(s) the historical narrative addresses.
- D. Differentiate between historical facts and historical interpretations.

Standard 3: Historical Analysis and Interpretation

- A. Compare and contrast differing sets of ideas, values, etc.
- B. Consider multiple perspectives.
- C. Analyze cause-and-effect relationships and multiple causation, including the importance of the individual, the influence of ideas.

Standard 5: Historical Issues-Analysis and Decision-Making

- A. Identify issues and problems in the past and analyze the interests, values, perspectives, and points of view of those involved in the situation.

Glossary

ask leave	to ask permission
certiorari	a writ issued by a higher court to obtain records on a case from a lower court so that the case can be reviewed
ex parte	made or undertaken on behalf of only one of the parties involved in a court case
gravamen	most serious part of an accusation or charge made against an accused person (in <i>Ex parte Quirin</i> opinion)
per curiam	Literally, “by the court.” Per curiam decisions are attributed to the Court as a whole, rather than to a particular justice. In the <i>Quirin</i> case, “per curiam” relates to the fact that the Court issued its judgment prior to preparing a full opinion (that is, providing the arguments behind its decision). The full opinion, authored by Chief Justice Harlan Stone, was issued on October 29, 1942, three months after the July 31 per curiam judgment in the case.

Worksheet

The Merryman Case

Resources

- *Ex parte Merryman*: A Short Narrative (pp. 1–9)
- Constitutional and statutory authorities—Introduction, U.S. Constitution, Art. I, Sec. 9; and Judiciary Act of 1789, Sec. 14 (pp. 44–45)
- President Abraham Lincoln, message to Congress in special session, July 4, 1861 (excerpt) (pp. 37–38)
- Petition for a writ of habeas corpus, John Merryman, May 25, 1861 (pp. 32–33)
- *Ex parte Merryman*, opinion of Chief Justice Roger Taney (excerpts) (pp. 33–35)
- Biographies—John Merryman (1824–1881) (pp. 26–27)

(Note: Page numbers refer to the PDF version of “*Ex parte Merryman* and Debates on Civil Liberties During the Civil War,” by Bruce A. Ragsdale, available online at <http://www.fjc.gov/history/home.nsf>.)

Questions

Each of your answers should be supported by evidence with reference to the resource material you read.

1. Profile of the defendant: Who was arrested? Where did he reside and what did he do there? Was he a citizen of the United States? Did he serve in any official capacities? What were his political activities? Where and how had he been involved in military training?
2. Perceived threat to national security: How had Merryman responded to the secession crisis and the outbreak of hostilities? Where was he arrested, and where had the alleged actions against the United States taken place? What was the evidence that Merryman was engaged in hostilities against the United States? Would the alleged actions of Merryman be characterized as criminal or military?
3. Actions of the government: Who arrested Merryman and why? Why had the arresting authorities not obtained a warrant? Where was Merryman detained? What did the government allege that he did? Did the government try to indict Merryman in a civilian court? Did the government indicate how long they intended to detain Merryman?

4. Legal questions before the court: Which part of the Constitution mentions habeas corpus? Under what circumstances does the Constitution say this right can be suspended? What branch of government had authority to authorize the suspension of the writ of habeas corpus? What court had authority to consider Merryman's petition? What did Merryman's petition for the writ argue? How had the military commanders responded to the court's orders?
5. Response of the court and the executive branch: What did Chief Justice Taney decide in response to Merryman's petition? How did the President respond? What happened to Merryman? Did Congress or the judiciary ever support the President's actions? Did this case set a precedent for future suspensions of habeas corpus? What orders did Taney issue in his Merryman opinion?

Worksheet

The *Quirin* Case

Resources

- George John Dasch and the Nazi Saboteurs, Federal Bureau of Investigation—Famous Cases (available online at <http://www.fbi.gov/libref/historic/famcases/nazi/nazi.htm>). (*Note:* This gives general background information but does not mention the petition for habeas corpus which is explained in the Supreme Court opinion.)
- *Ex parte Quirin*, 317 U.S. 1 (1942).

Questions

Each of your answers should be supported by evidence with reference to the resource material you read.

1. Profiles of the defendants: Who was arrested? Where did they reside, and what did they do there? Were they citizens of the United States? What were their political activities? Where and how had they been involved in military training?
2. Perceived threat to national security: How had the arrested reacted to the outbreak of World War II? Where were the individuals when they were arrested, and where had the alleged actions against the United States taken place? What was the evidence that they had been involved in hostilities against the United States? Would the defendants' alleged actions be characterized as military or criminal?
3. Actions of the government: Who arrested the saboteurs? Where and by whom were they detained? Why did the government not wait to obtain a warrant before arresting the saboteurs? Who was appointed to the military commission and by whom? How did commission proceedings compare to a civilian court trial? What rights of due process were extended to the defendants?
4. Legal questions before the courts: What legal body had jurisdiction to conduct the trial of these suspects? What determined that jurisdiction? In what courts did the defendants file petitions for habeas corpus? What were the main arguments the petitioners made for granting the writ? How did the U.S. government respond to the defendants' petitions for habeas corpus?

5. Response of the courts and the executive branch: What was the decision and sentence of the military commission? What was the Supreme Court's decision on the petitions for habeas corpus?

U.S. Supreme Court decision, *Ex parte Quirin*, 317 U.S. 1 (1942)

Argued July 29 & 30, 1942.

Decided July 31, 1942.

Full opinion filed Oct. 29, 1942.

Per Curiam

In these causes motions for leave to file petitions for habeas corpus were presented to the United States District Court for the District of Columbia, which entered orders denying the motions. Motions for leave to file petitions for habeas corpus were then presented to this Court, and the merits of the applications were fully argued at the Special Term of Court convened on July 29, 1942. . . .

[The Decision]

The Court holds:

(1) That the charges preferred against petitioners on which they are being tried by military commission appointed by the order of the President of July 2, 1942, allege an offense or offenses which the President is authorized to order tried before a military commission. (2) That the military commission was lawfully constituted. (3) That petitioners are held in lawful custody, for trial before the military commission, and have not shown cause for being discharged by writ of habeas corpus. The motions for leave to file petitions for writs of habeas corpus are denied. . . .

Mr. Justice Murphy took no part in the consideration or decision of these cases.

Mr. Chief Justice Stone delivered the opinion of the Court.

[Filing the Writ]

These cases are brought here by petitioners' several applications for leave to file petitions for habeas corpus in this Court...The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942, on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States.

After denial of their applications by the District Court, petitioners asked leave to file petitions for habeas corpus in this Court. In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitu-

tional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942. The applications for leave to file the petitions were presented in open court on that day and were heard on the petitions, the answers to them of respondent, a stipulation of facts by counsel, and the record of the testimony given before the Commission. . . .

[The Petitioners – Background]

The following facts appear from the petitions or are stipulated. Except as noted they are undisputed.

All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship, or in any case that he has by his conduct renounced or abandoned his United States citizenship. For reasons presently to be stated we do not find it necessary to resolve these contentions.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses, and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness, wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned and proceeded in civilian dress

to Jacksonville, Florida, and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school and had received substantial sums in United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States.

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942, appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War, and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. On the same day, by Proclamation, the President declared 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”.

The Proclamation also stated in terms that all such persons were denied access to the courts.

Pursuant to direction of the Attorney General, the Federal Bureau of Investigation surrendered custody of petitioners to respondent, Provost Marshal of the Military District of Washington, who was directed by the Secretary of War to receive and keep them in custody, and who thereafter held petitioners for trial before the Commission.

[The Charges]

On July 3, 1942, the Judge Advocate General’s Department of the Army prepared and lodged with the Commission the following charges against petitioners, supported by specifications:

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.
4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

[The Procedures]

The Commission met on July 8, 1942, and proceeded with the trial, which continued in progress while the causes were pending in this Court. On July 27th, before petitioners' applications to the District Court, all the evidence for the prosecution and the defense had been taken by the Commission and the case had been closed except for arguments of counsel. It is conceded that ever since petitioners' arrest the state and federal courts in Florida, New York, and the District of Columbia, and in the states in which each of the petitioners was arrested or detained, have been open and functioning normally.

While it is the usual procedure on an application for a writ of habeas corpus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner. 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 in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari.

[Petitioners' Arguments]

Petitioners' main contention is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that in consequence they are entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses. In any case it is urged that the President's Order, in prescribing the procedure of the Commission and the method for review of its findings and sentence, and the proceedings of the Commission under the Order, conflict with Articles of War adopted by Congress—particularly Articles 38, 43, 46, 50 1/2 and 70—and are illegal and void.

The Government challenges each of these propositions . . . We pass at once to the consideration of the basis of the Commission's authority.

[The Court's Response]

We are not here concerned with any question of the guilt or innocence of petitioners. Constitutional safeguards for the protection of all who are charged with of-

fenses are not to be disregarded in order to inflict merited punishment on some who are guilty. But the detention and trial of petitioners-ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger-are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

Congress and the President, like the courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its preamble, is to “provide for the common defence”. As a means to that end the Constitution gives to Congress the power to “provide for the common Defence”, Art. I, § 8, cl. 1; “To raise and support Armies”, “To provide and maintain a Navy”, Art. I, § 8, cls. 12, 13; and “To make Rules for the Government and Regulation of the land and naval Forces”, Art. I, § 8, cl. 14. Congress is given authority “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”, Art. I, § 8, cl. 11; and “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”, Art. I, § 8, cl. 10. And finally the Constitution authorizes Congress “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Art. I, § 8, cl. 18.

The Constitution confers on the President the “executive Power”, Art II, § 1, cl. 1, and imposes on him the duty to “take Care that the Laws be faithfully executed”. Art. II, § 3. It makes him the Commander in Chief of the Army and Navy, Art. II, § 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, § 3, cl. 1.

The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.

[Articles of War and the Military Commission]

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in ap-

propriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

[Petitioners as Unlawful Combatants]

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war . . . We are concerned only with the question whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged . . . But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury . . .

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. 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 . . .

Specification 1 [of the First charge] states that petitioners “being enemies of the United States and acting for . . . 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 . . . and

went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States”.

This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners’ contentions . . . The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

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. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations. The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered-or, having so entered, they remained upon-our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other.

[Response to Assertion of Right to Jury Trial in Civil Court]

But petitioners insist that, even if the offenses with which they are charged are offenses against the law of war, their trial is subject to the requirement of the Fifth Amendment 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, and that such

trials by Article III, § 2, and the Sixth Amendment must be by jury in a civil court . . .

We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.

Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the *Milligan* case, that the law of war “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”. Elsewhere in its opinion, the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. 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.

The Court’s opinion is inapplicable to the case presented by the present record. We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission. . . .

[Response to Allegation of the Illegality of the President’s Order]

There remains the contention that the President’s Order of July 2, 1942, so far as it lays down the procedure to be followed on the trial before the Commission and on the review of its findings and sentence, and the procedure in fact followed by the Commission, are in conflict with Articles of War 38, 43, 46, 50 1/2 and 70 . . .

Their contention is that, if Congress has authorized their trial by military commission upon the charges preferred . . . it has by the Articles of War prescribed the procedure by which the trial is to be conducted; and that since the

President has ordered their trial for such offenses by military commission, they are entitled to claim the protection of the procedure [writ of habeas corpus] which Congress has commanded shall be controlling . . .

. . . the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ.