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Military Trial of Saboteurs

CONSTITUTIONAL LAW

MILITARY TRIAL OF SABOTEURS

Seven men, allegedly sent to the United States by the German Reich to sabotage war industries, landed within an American defense zone, proceeded ashore and buried their uniforms and equipment. Several days later they were captured and held in custody by the Provost Marshal of the Military District of Washington for trial before a Military Commission created by the President, on charges of violation of the law of war, certain Articles of War, and conspiracy. Applications for leave to file petitions for habeas corpus were presented in their behalf to the Federal District Court and upon denial, appeals were perfected to the United States Supreme Court. Held, that the charge alleged an offense which the President was authorized to order tried by a military commission, that the commission was lawfully constituted, and that the accused were not entitled to trial by jury in the civil courts. United States ex rel, Quirin v. Cox, 317 U.S. —, 63 Sup. Ct. 1 (1942).

The important question to be determined is the status of the petitioners, that is, whether they are lawful combatants or unlawful combatants.

The right of the President as President and Commander-in-chief of the Army and Navy, under the Constitution and Articles of War,

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31. "Consumption (of wheat) on the farm where grown appears to vary in an amount greater than 20 per cent of average production." . . . "It can hardly be denied that a factor of such volume and variability . . . would have a substantial influence on price and market conditions." Instant case 63 Sup. Ct. at 90, 91.
32. Instant case, 63 Sup. Ct. at 88.
33. It is apparent that this shift from the "direct effect" test to a test of "substantial effect" which may be merely economic leaves the Supreme Court with greater discretionary powers than heretofore exercised by that judiciary. Interestingly enough some of the members of the Supreme Court have evidenced a fear that such a broad interpretation of the commerce clause would result in a breakdown of our federal system of government. See Apex Hosiery Co. v. Leader et al., 310 U.S. 469, 513 (1940); Carter v. Carter Coal Co., 298 U.S. 238, 295 (1936); U.S. v. Butler, 297 U.S. 1, 75 (1936); Schechter Poultry Corp. v. U.S., 295 U.S. 495, 546 (1935); Hammer v. Dagenhart et al., 247 U.S. 251, 276 (1918); U.S. v. E. C. Knight, 156 U.S. 1, 15 (1895). See National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 95, 96 (1937) (dissenting opinion).

to appoint a military commission to try enemy belligerents for offenses against the law of war and Articles of War is evident unless prevented by provisions of the Constitution relating to trial by jury. U.S. Const. Art. I, §8, cls. 1, 10-14, 18; Art. II, §1, cl. 1, §3; 41 Stat. 787-812 (1920), 10 U.S.C. §§1471-1593 (1940).

The law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations, and between lawful and unlawful combatants. Lawful combatants are those who, wearing the insignia of their country, wage war in the open. Annex to Hague Convention, ratified by the U.S. Senate, 36 Stat. 2295 (1909); 2 Oppenheim, International Law (6th ed. 1940) §107. Unlawful combatants are those who, without uniform, secretly pass through the lines of the enemy for the purpose of destruction of life and property, and gathering military information. Unlawful combatants are generally held not to be entitled to the status of prisoners of war, but are triable by a military commission. 41 Stat. 789 (1920), 10 U.S.C. §1483 (Articles of War, 1940); Great Britain War Office, Manual of Military Law (1929) §445; 2 Oppenheim, International Law (6th ed. 1940) §255. Petitioners, under the undisputed facts, clearly come within the definition of unlawful combatants, and are to be treated and dealt with as such.

Our Constitution and statutes are very liberal in guaranteeing trial by jury to persons charged with offenses, and the petitioners sought to take advantage of this fact. Their rights in this respect are to be determined by the construction to be given certain constitutional provisions, particularly Art. III, §2, and the Fifth and Sixth Amendments. It was not the purpose or effect of Art. III, § 2 to enlarge the then existing right to trial by jury. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future. District of Columbia v. Colts, 282 U.S. 63 (1930); Kahn v. Anderson, 255 U.S. 1 (1921). The Fifth and Sixth Amendments guaranteed the continuance of certain instances of trial by jury, but did not enlarge the right guaranteed by Art. III, §2. Callan v. Wilson, 127 U.S. 540 (1888). At the time of the adoption of these provisions, military tribunals were recognized and persons charged with violation of the law of war were tried thereby and without a jury. The trial of Major John André by a military commission appointed by General Washington is an example. Van Doren, Secret History of the American Revolution (1st ed. 1941) 355-358; Sargent, Life and Career of Major André (1st ed. 1861) 347-356.

In the instant case the petitioners were not entitled to a trial by jury; they were, therefore, properly tried before a military commission.