

CLOSING ARGUMENT ON BEHALF OF THE PROSECUTION
by
THE JUDGE ADVOCATE GENERAL

The Judge Advocate General. May it please the President and members of the Commission: After listening to the arguments for the last two days in behalf of the defense, it seems to me that their idea of the proper specification to be brought before this Commission would have been worded somewhat as follows:

"In that, Burger and all the rest of these defendants, with intent to defraud the German Government, did, in Quanta, Germany, in about the month of May, 1942,

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unlawfully pretend to said German Government that they, well knowing the said pretenses were false, and by means thereof, were saboteurs, and by means thereof did fraudulently obtain from the said German Government the sum of \$180,000 in money, four or eight boxes full of explosives, and a free trip across the Atlantic in a submarine."

Before we enter into the discussion of the evidence, counsel went to a considerable degree into the question of punishment and what was necessary to be considered in this case in the way of punishment. They said it was not necessary to punish these defendants as a preventive, because there will be no expeditions of this kind.

However, the Commission will remember the story as told by these defendants, that this was the first of a series of these schools; that others were coming over here later; that they were going to meet in Chicago; that Burger, if I remember correctly, was to start some sort of a commercial artist establishment and put a notice in the Chicago paper every fifteen days for the benefit of those who were to come later--most probably Kappe and his assistants.

Kerling says that Germany does not kill Englishmen for doing these things; they intern them. We have nothing in the evidence to show that. We read in the papers every day right now that the Germans are having military commissions in France to punish saboteurs. We do not know what they are doing to them. We do not have anything here to show that. That is the fault of all this testimony--we have nothing here except the testimony of these defendants as to the facts of the case.

5b Their whole case is based on their own evidence. We have not been able to get the true facts as to that; and, of course, we cannot go into Germany and ask them what they are doing now.

They went into the civil statutes regarding sabotage, and they referred you to these statutes in Title 50, U. S. C., 101 to 105, which contains certain sabotage statutes. I want to go into that a little further--

The President. What is the reference?

The Judge Advocate General. That is Title 50 United States Code Annotated, Sections 101 to 105.

They said, first, that destroying or injuring war material carries only a thirty-year penalty and a \$10,000 fine; but I want to invite the Commission's attention to the fact that that is not an exclusive statute. That includes only people who are here in the United States doing these things. It does not consider the extra crime or offense against the law of war, as it is more properly called, of anybody coming across and through our theater of operations, as these men did. In any event, it does not exclude this Commission from any jurisdiction or any reason why they should be guided by the penalty in that statute.

Section 31 of that book reads:

6

"Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, files over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval

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station, submarine base, coaling station, fort, battery torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section 36 of this title; * * * shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years or both."

Section 38 says:

"Nothing contained in this chapter or Chapter 12 of this title shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial under Chapter 36 of Title 10 and Chapter 21 of Title 34."

I brought that out to show that that is not exclusive and particular as to the jurisdiction of the military commission in this case.

Coming to the 82nd Article of War, quite a bit of emphasis

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was placed upon the question of spying and the proof necessary under "spying."

In that connection, Colonel Dowell, if I remember correctly, called particular attention to the fact that it was necessary to prove:

"(a) That the accused was found at a certain place within our zone of operations, acting clandestinely, or under false pretenses; and (b) that he was obtaining, or endeavoring to obtain, information with intent to communicate the same to the enemy."

That must be read with the prior part of the section, and I am reading from page 157 of the Manual for Courts-Martial:

"The principal characteristic of this offense is a clandestine dissimulation of the true object sought, which object is an endeavor to obtain information with the intention of communicating it to the hostile party. Thus, soldiers not wearing disguise, dispatch writers, whether soldiers or civilians, and persons in aircraft who carry out their missions openly and who have penetrated hostile lines are not to be considered spies, for the reason that, while they may have resorted to concealment, they have practiced no dissimulation.

"It is necessary to prove an intent to communicate information to the hostile party. This intent will very readily be inferred on proof of a deceptive insinuation of the accused among our forces, but this inference may be overcome by very clear evidence that

8b

the person had come within the lines for a comparatively innocent purpose, as to visit his family or that he has assumed a disguise in order to reach his own lines."

But this inference may be overcome by very clear evidence. The intent is presumed, and it must be overcome by evidence, and that evidence must be clear.

Again:

"It is not essential that the accused obtain the information sought or that he communicate it. The offense is complete with the lurking or dissimulation with intent to accomplish these objects."

7

In that connection, there has been some evidence introduced here with reference to the conversation of Kerling and Neubauser, if I remember correctly, on the way up from Florida, to the effect that they were looking at these defense plants on the way up and decided that they were too well guarded to sabotage. That is a communication in itself. We remember where Burger was taken by Daech and shown Hell Gate Bridge, which is communication as to possible sabotage.

Also, as to spying, I would like to read paragraph 88 of the famous General Order 100 of 1863:

"Spies. A spy is a person who secretly, in disguise, or under false pretenses, seeks information with the intention of communicating it to the enemy. A spy is punishable with death by hanging by the neck, whether or not he succeeded in obtaining the information or in conveying it to the enemy."

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In this same connection, under "spying," the question was brought up that this must occur in the theater of operations; and the defense counsel have attempted to show that Long Island and Florida were not in the theater of operations.

I will admit that that contention was made before the decision of the Supreme Court yesterday on the habeas corpus matter. It seems to me that that probably will straighten out the question as to whether this is a theater of operations. However, I fail to understand why counsel has insisted that, in view of the change of name from Theater of Operations to Eastern Defense Command, this is still not a theater of operations.

One counsel has endeavored to distinguish between the zone of the interior and a theater of operations. Of course, we know that in France the zone of the interior was probably back to the United States and the S.O.S. was back of that.

In this country, where we have a theater of operations right on our seacoast, and we have installations like the port of embarkation at Brooklyn, which is on the waterfront within a few miles from where these men came in, the supply establishments and the theater of operations are in the same place. In order to relieve the commanding general in the field of the trouble and the duty and the work of taking care of all these installations in the territory, they have taken the control away from him and put it in the S.O.S.; and, as Colonel Sherrill testified here, the tactical situation is just the same since the date of that order as it was before.

Under Article 31, under communications and the giving of money and things to the enemy, this is provided:

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"Relieving, corresponding with, or aiding the enemy.
Whoever relieves or attempts to relieve the enemy with
arms, ammunition, supplies, money, or other thing * * *."

We have shown here that not only did they come to this
country, but that they gave each other money, which directly
comes under that. The word "relieves" means assists.

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In that connection I want to read from the transcript of the proceedings before the Supreme Court in the habeas corpus matter in connection with this case.

Colonel Royall. Do you think that ought to be done? I will leave it up to you.

The Judge Advocate General. I think that is proper, Colonel Royall.

Colonel Royall. I know you would not do anything that you thought was improper.

The Judge Advocate General. This is on page 241 of the transcript.

The President. Is that page 241 of the record?

The Judge Advocate General. The transcript of the proceedings held before the Supreme Court of the United States, July, special Term, 1942.

The President. Is this in our record?

The Judge Advocate General. No, sir; it is not.

The President. Please read the reference again.

The Judge Advocate General. Page 241 of the transcript of the proceedings before the Supreme Court of the United States, July, Special Term, 1942.

If there is any question about it--

The President. I am not questioning it. I am simply asking for the reference. I would like a statement from you as to just what it is and what you are reading so that we will be sure, if it is not in the record, that we know what is going into the record.

The Judge Advocate General. I was going to read a portion of that transcript. What I am trying to show is that relieving means assisting, by assisting in the way of money,

2*

munitions, or anything of that kind. That is what it means here and what has been proven.

With reference to Charge 1, under the law of war, counsel has said that they do not know what law of war is violated. I would like to refer to Section 84 of General Order 100--

The President. Pardon me, General. I am not sure yet. There was a reference made by you to something that you were going to read into the record. Now do I take it that you are not going to read it into the record?

The Judge Advocate General. I said that if there was any objection I would not go ahead with it.

The President. I did not hear any objection.

Colonel Royall. I did not make any objection, sir. I merely inquired of The Judge Advocate General whether he thought it would be proper to read from argument in another case, and I told him I would leave it entirely to him to decide, because I was confident that he would not do anything improper. That was all that was said about it.

The Judge Advocate General. Of course the testimony is not in evidence here.

Colonel Royall. It is not testimony; it is argument.

The Judge Advocate General. Yes; argument.

The President. Then I understand that you are not going to read it?

The Judge Advocate General. No, sir.

The President. I just wanted to make it plain in the record, because you said you were going to read it, and there was no statement that you were not going to read it.

The Judge Advocate General. I said that if there was any question about it I would not read it.

3*

I am now going to read from Section 51 of General Order 100, applying to the first specification under the Law of War:

"Armed prowlers, by whatever names they may be called, or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of prisoners of war."

Again, Paragraph 552 of the Rules of Land Warfare:

"Armed prowlers"--

The President. What date is that?

The Judge Advocate General. 1940. The foreword is:

"PW 27-10, Rules of Land Warfare, is published for the information and guidance of all concerned.

"By order of the Secretary of War:

"G. C. Marshall,
"Chief of Staff

"Official:

"E. S. Adams,
"Major General,
"The Adjutant General."

It is dated "War Department, Washington, October 1, 1940."

Paragraph 552 reads as follows:

"Armed prowlers, by whatever names they may be called, or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to be treated as prisoners of war."

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Also Section 357, headed "War Crimes Subject to Death Penalty:

"All war crimes are subject to the death penalty, although a lesser penalty may be imposed. The punishment should be deterrent, and in imposing a sentence of imprisonment it is not necessary to take into consideration the end of the war, which does not necessarily limit the imprisonment to be imposed."

The argument has been made that these men did not commit any crime under Charge 1. That is the charge we have here of their entering this country wearing uniforms, from which they changed to civilian clothes. The charge is that--

"being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States, along the Atlantic coast, and went behind such lines"--

The President. This is quoted from the first charge? The Judge Advocate General. From Specification 1 of Charge 1.

These, may it please the Commission, are offenses against the law of war. They are not crimes as such, but they are offenses and made so by the customs of war amongst nations, and penalty has been prescribed, not only by various conventions, but by custom.

These people were stopped before they actually did any sabotage work; but the offense was in not only planning to do this, being schooled to do it, but coming through the lines in the way they did, and getting into civilian clothes.

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They knew what the proposition was when they started. They knew what they were up against. They were told to wear the uniforms so they would be treated as prisoners of war when they got here, if they were caught, and immediately they got by they were to take off their uniforms and come in as spies and saboteurs to do this kind of work.

The whole proposition comes to this, that it is not a question of whether they actually got to the place where they could sabotage something, but they did come through the lines for that purpose; and the only reason they did not do it was because they were caught by the F.B.I. before they could get to the place of the crime.

Reference has been made to Adolf Hess, that he was not punished; that he was put into an internment camp. We all know that Adolf Hess went to England, landed in an airplane in full uniform, and was treated as a prisoner of war. So there is no comparison there as to the amount of punishment.

I want to make my argument as brief as I can.

The defense has taken these defendants up in order, and I shall try to take them up in the same order, just bringing out one or two short points which I think show their intent to go ahead with this proposition.

I will refer again to the fact which I referred to at the end of the prosecution's case, that in consideration of all this evidence, except the corroboration as found by the F.B.I. and the explosives and things of that kind, all the evidence depends upon the statements of these witnesses; and in considering the statements of the witnesses this Commission has to consider those statements as to whether they all may

be true or part may be true or none may be true.

I will read again the same paragraph that I read from Wharton's Criminal Evidence, Section 606, which I read at the end of the prosecution's case:

"It is also well settled that if a confession is made under such circumstances as to authorize its admission in evidence, the accused is entitled to have the entire conversation, excluding any exculpatory or self-serving declarations in connection therewith, also admitted. However, it is for the jury"--

Or for the Commission in this case--

"to say what weight shall be given to the several parts of the statement as they may believe that part which charges the prisoner and reject that part which may tend to inculcate him."

It is with that in view that this Commission should approach this evidence.

The accused have made various statements. Taking Kerling, first, I will just make one or two brief references.

He says in the record, at page 1563:

"At the time of my apprehension we were attempting to get located in a place we could use for a hideout as we had no specific plans at this time as to any sabotage, it being intended that we should get located and then return to get the explosives. This was in accordance with instructions we had received in Germany.

"at the time of my landing I intended to follow my instructions and to sabotage power lines and other facilities that might be suitable, but in the course of my stay

7* I came to the conclusion that our orders were made impossible to fulfill."

He said, further:

"After Thiel and I arrived in New York City, I talked twice to Leinert and told him the purpose of my being here."

Record page 1641:

"In Jacksonville it was agreed that he was to meet Haupt and drive him to Florida in order to dig up the material buried on the beach and take them to the scene of their operations."

These are not the statements of a man who has changed his mind. At least he has got so far in this country as to go through with everything except the actual sabotage; and the fact that circumstances change, that events turn out whereby they are apprehended, does not lessen the offense under the charges.

With reference to the testimony of Helnek, at page 961 of the record he says:

"We went to the Page's apartment for dinner. During the evening it was mentioned that we had come to the United States on a German submarine."

I do not want to go into all this evidence too much, but I am just trying to bring out little incidents to show that none of these men had changed their intentions, so far as the evidence shows on their own statements, until some time after they got into the United States.

Quirin said at page 902 of the record:

"At the time I entered the United States there was

By no doubt in my mind that I was violating the law and I consider myself an agent of Germany. I promised my superiors that I would carry out their instructions and intended to do so when I left there. Had I not been apprehended, I might have carried out those instructions. I feel that my loyalty is to Germany. In case Germany won the war, we would come back to Germany and I would be given a better job, and be well cared for."

I do not need to read further on that.

Neubauer said at page 1752 of the record:

"I admit that I came to the United States with this group for the purpose of committing acts of sabotage, and might have done so if the opportunity arose."

Thiel told Tony Kramer he had come over on a submarine, that he had gone through a course in Germany before he came over, and gave Kramer his money belt, asking him to keep it until he, Thiel, came back.

That is found in the record at page 2270.

On page 1809:

"Thiel said it was a difficult thing for him to decide whether he would carry out the plan, but he thought that there were some things he would do, although he did not want to kill anybody. He also said he supposed as time went on he would probably do some of those things."

Defense counsel has seen fit to take up the case of Haupt a little separately from the others and to try to make out that this young man was just a misled young man of 21 who was more or less out for a good time and trying to get a lot of sympathy. He told us how he got a woman into trouble and ran away to escape that and to escape the draft.

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But if you will refer to the record at page 2014, you will find that Haupt testified that he told Gerda Stuckmann that he was going to Mexico.

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But when Gerda took the stand--pages 2186, 2187, and 2189, she testified that she did not know that Haupt was going or had gone until she went to see his mother after he had left. She further said that he told her on other occasions that he might go to Mexico but did not tell her anything at that particular time. The first she knew of that was when she received a card from him from St. Louis, saying that he was on his way to California.

I have not the page number or reference to it, but if my recollection is correct Mrs. Haupt testified to the fact that Gerda came there after Haupt left, in order to find out. There is evidence of where Haupt is testifying falsely before this Commission.

Then again, to show you what an ideal young man he was about getting into the draft, I refer you to page 1 of his statement of July 3, 1942, Prosecution Exhibit 218, which I think is on page 1658 of the record. Haupt said:

"While talking with Hornsack shortly after meeting him, he asked me if I had registered for the draft, and I told him I had, but had not as yet received a questionnaire. He said that I would probably be drafted right away and ought to do something about it. He said he would take me to a doctor for an examination, and that I should tell the doctor that I had coronary thrombosis, rheumatic pains, swelling of my ankles, pain in my left upper arm, dizzy spells now and then, headaches every week, indigestion, pains in my chest, and pains in my back. According to Hornsack, no doctor in the world could tell whether my heart was bad or not, because a bad heart doesn't act up all the time. He said that I

62

would probably have to be examined by a draft board doctor later on, but it would be a good idea to go to another doctor first in order to establish that I had been receiving treatment."

Then he went to a doctor and got some pills. That is the young man who came back to this country because he wanted to be here, and the first thing he did was to take some pills to do something to evade the draft.

Counsel also appeals for Haupt by saying that his testimony was weakened by the fact that all the other defendants have played the same excuse, namely, that they never intended to do this thing. Somebody has got to be the first one to testify. Whether it was Haupt, Quirin, or any of the rest of them, the testimony of the first one is just as good or is weakened just as much or should not be weakened any more than the rest.

The question comes up whether the defense that they have put up by their own self-serving declarations is something that this Commission is willing to take and believe as true. There would be some possibility of it if one of them had done this, but when all eight of them come in and have the same excuse, namely, that they were not going through with it, did not intend at that time or some other time to do it, it becomes a situation where nobody can ever be convicted when he comes into court on a charge of this kind if he says he did not intend to do it. If that kind of excuse is to be accepted, there is no use prosecuting. If all a man has to say is, "I did not intend to do it," without any substantive evidence, there is no chance that he will be convicted. On the other hand, all the other circumstances show or prove to the con-

03 trary of what they claim, except in the case of Dasch and Burger.

 I am trying to make this as short as I can.

 The President. The Commission hopes that you will take all the time necessary to make your points.

 The Judge Advocate General. Thank you. I might take these men together as a general proposition, because they both seem to be classed together, more or less. They were together.

 The President. What men are you now speaking of, sir?

 The Judge Advocate General. Dasch and Burger. They were together in New York. Their paths in certain ways are similar. Burger was back in Germany from 1933, if I remember rightly. He immediately became a member of the storm troopers, worked there, was employed, and luckily escaped the purge. Then he came back, was a little out of luck, went to school at the University of Berlin, studied geopolitics, and immediately worked himself back into the good graces of the government among the higher officials.

 He became a favorite of Dr. Haushofer, if I remember rightly--I may be wrong--who is head of the geopolitics end of the university and the father of the geopolitics theory of Germany.

 From then until 1952 Burger was in Germany except for the time, he said, when he was in an internment camp. Being placed in an internment camp, by the way, counsel has represented, subjected him to horrible persecution, suffering, and tortures. Throughout Burger's testimony I cannot find where he has said anything about suffering, being beaten up, or anything of that kind. He has testified that he was in an internment camp for 17 months, and the worst that I can find

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is that he testified that his wife had been mistreated. She was told that he was in Austria, having committed some crime, and was going to be sent up for 8 years, and that as a result she had a miscarriage.

On the other hand, Dasch goes further. He gets in with these high officials and works his way up to an important job. Then he goes over to Kappe and starts to help Kappe with this school. He works with him before the school gets started, and then works with him during the school. The defense tries to tell you that Dasch was not interested; he did not build Hitler; he did not keep up with his studies, and all that sort of thing. As for Burger, they took him even though they knew he was not a saboteur.

These men were under Kappe, who I presume was not the dumbbell that these defendants would have you believe him to be, because, if you take their story, I cannot conceive it possible that a man with Kappe's ability and the position he had would seek to take an outfit of this kind and send it abroad--an expedition of this kind, constituting simply eight men--as you might say, who had no intention of going through with this at all.

Kappe was smart. He knew his men. He knew where they had been. He knew, apparently, from the testimony, that Burger had been up there on some sort of secret mission. That was when the Gestapo took him. He was up in Poland, making reports. He was connected with the higher authorities in Germany. I do not know whether or not he was a secret agent. I do know that when he came back, he got a good job. He was picked, in spite of that job, by Kappe, and so was Dasch. I would not be

65

surprised if he were still over here in the guise, possibly, of a German agent. He might have been an undercover man there.

Then they come to the point that in New York he changes his mind. He says he could not come here--could not get himself, rather, to come and turn this in to the F. B. I. until such time as he had played pinocle and rested his nerves.

You remember that the first day, when they arrived and met this coast guardman, they then went to the railroad station. Afterward, while waiting, the thought came to his mind then and there, for the first time, should he call up the F. B. I.? The reason why he did not do that, he said, was that he was afraid these other men might see him.

When he was caught by the coast guard, it seems to me, was the first time that thought entered his mind that they were going to be caught, and that the best thing to do was to run to cover. He goes, then, into New York and has his talk with Burger. Then they get together, and that is the reason, probably, why their stories coincide, each corroborating the other.

Then he goes on and plays cards all of Monday night, all day Tuesday, Tuesday night, and comes back Wednesday morning, if I remember rightly, stating that that had steadied his nerves.

If he had been honest in his intentions at that time, as was the testimony of one of the prosecution's witnesses, Mr. Dewey, and turned in on that Sunday night when he called up the F. B. I. in New York, it might have been possible for the Government to have caught this submarine coming into Florida. In spite of the fact that it was on a route some 500 or 700

of

miles longer, it could have been more closely watched, with a much better possibility of apprehending it.

Burger said that when he went to Germany in 1940, I think, he did not take out his citizenship, because he thought that Germany was in the war, and he thought he would be a rat if he did not go back and help his country. Yet after he stayed there, he came back to the United States under false pretenses, as he says, in order to get away from Germany, which is still, it seems to me, being a rat.

The last charge and specification is that of conspiracy. I want to invite the Commission's attention to that fact. If the Commission, by chance should believe the testimony of any one of these defendants, that defendant is still guilty of conspiracy, because all the defendants conspired to come here and commit all the acts charged under Charges I, II, and III. The fact that one man goes into a conspiracy without honestly intending, we will assume, to go through with it or with the sabotage, makes him still guilty of the conspiracy, because he is helping the whole program to be accomplished, getting these other men over, getting them through the lines, getting them their dynamite and other apparatus there, and, if they had not been apprehended, letting them go ahead with the sabotage. The fact that he did not intend to go through with it himself does not excuse him from the conspiracy.

There is one other thing I want to say with regard to this legal or illegal getting out of Germany. I fail to understand the status of either Burger or Dorsch when they wanted to get out legally--Burger, particularly. Burger had been there since 1935. He said he did not want to go until he

07 get an opportunity to go out legally, because he wanted to protect his family. Likewise, Rasch wanted to protect his family. But how much are they going to protect their families by having come over like this and turned in to the United States than if they had gone out illegally, as they call it? Their families are going to be in the same position, if not worse, because of the fact that they discarded the plan when they got over here, as they would be in if these men had got out of Germany by the way thousands have been doing it in the last few years.

It seems to me that the prosecution has proved all the elements of all the specifications and that all these defendants should suffer punishment by death. The only question in that connection is that which has been brought up by counsel, namely, that one or two of these defendants have in some way assisted the prosecution. That is true. Reference has been made to the testimony of possibly pleading guilty in court and getting a sentence and receiving a Presidential pardon later, some saying in six months, some saying in three months; it is immaterial.

That is a question with which I do not think this Commission should concern itself. The question before this Commission is, are these men guilty, or are they not, of the crimes or offenses charged? What they have done to assist the Government may amount to little, or it may amount to a great deal; it all depends on the circumstances, which are not before this Commission, and of which this Commission can know nothing at all, as to just what they did or what they might do. That is a matter of clemency for the appointing authority.

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I respectfully urge the Commission to take into consideration the old maxim of course; that clemency is a matter for the appointing authority and is not a matter for the court. It is for that reason that we do not think that those circumstances that have been brought up should be considered by the Commission in finding its sentence. For that reason, we ask for a finding of guilty under each specification and a sentence of death.