

ARGUMENT ON BEHALF OF THE DEFENSE  
by  
COLONEL KENNETH ROYALL

Colonel Royall. May it please the Commission, the function of an opening statement--and, of course, the method of making that statement is entirely a matter of choice for the prosecuting officer, and what I say is in no sense a criticism--is to set forth fully in the argument the contentions which are to be made by the prosecution. I assume that procedure will be followed in this case. It is not permissible, under any procedure I know, to retain the right to make the principal contentions until after the defense has spoken. If that is done, and I do not assume it will be done in this case, of course we would have an opportunity to reply to that; and I say that merely in order that the Commission may know that in case there is an extended argument, broader in scope than that which the Judge Advocate General has now presented, we may wish an opportunity to argue again in reply thereto.

The counsel who represent seven defendants have a rather unusual situation presented to them. It is our duty under the law to give the contentions as to each of our clients. The circumstances presented in these cases are in some instances radically different. Therefore, it must be our effort, and will be our effort, to state the propositions as fairly for all of

the defendants as we are capable of doing, realizing that in some instances what is said in favor of one may not be favorable to another or may be positively unfavorable.

When that situation arises all we can do is to leave it to the good judgment of the Commission, in which we have implicit confidence, to decide which of the two is the more probable or reasonable contention; and we cannot be in the position of arraying one of our clients against the other. It is not my intent to do that, and I shall seek to avoid it to the extent that it is necessary.

Now, we have presented here a case which is going to require two species of arguments for our defendants. In the first instance, we have got to discuss those elements which are common to all of them. I do not think that that discussion would really be necessary, certainly as to the defendant Burger, because, as we contended at the close of the evidence, and as we will contend here with all the sincerity of which we are capable, his case seems to us certainly to stand alone and requires separate and different consideration, and to some extent that is also true of the defendant Raupt.

As to the other defendants, there are varying steps of circumstances which we will call to your attention, but our first argument will be an argument that would in a sense apply to all eight of the defendants, unless there were some distinguishing features, which, of course, there are.

We also had the problem of dividing this matter up between Colonel Ristine, representing Dasch, and ourselves. With the permission of the Commission, the following course will be adopted. I will first address the Commission, as I say, on

those facts which are common to the whole case, and will then deal specifically with the facts as to five of the defendants, which will be dealt with in this order: Kurling, Heinck, Quirin, Neubauer, and Thiel. I would like to state those over again: Kurling, Heinck, Quirin, Neubauer, and Thiel.

When that has been concluded, Colonel Ristina will address the Commission on behalf of the defendant Beach.

Thereafter I will address the Commission on behalf of Haupt, and finally Burger.

3 Now, may it please the Commission this is a case of great moment from many standpoints. It is, of course, of great moment to the defendants themselves, because they are charged with offenses as to which the penalty might be death or long imprisonment. The matter is one for the determination of this Commission. No other tribunal can possibly determine the facts, the weight to be given the testimony, except this Commission. So long as this Commission is acting validly--and that is the situation in the absence of some specific rule to the contrary--upon this Commission, and upon this Commission alone, rests the right and the responsibility of determining what facts the evidence prove in this case.

I would be avoiding something that is known to everybody if I did not refer to the proceedings before the Supreme Court, to this extent. I know it is unnecessary to say this to the Commission, but I would like to have it in the record. That proceeding did not, and could not, ask that Court to pass upon the weight of the evidence or the facts to be found from the evidence. That question can never be raised on a writ of habeas corpus. Only the jurisdictional fact and only the facts

so far as they do concern jurisdiction were or could be considered by that Court; and even then that Court could not pass upon the weight or credibility of the evidence or the deductions and inferences to be drawn therefrom. Therefore, nothing in the proceedings before the Supreme Court, no matter what their decision might be, in any way infringes upon the right of this Commission to find the facts and determine the facts, if you are held to be a lawful Commission, and we must certainly for the present, and possibly permanently, consider that you are a lawful Commission.

I say this further for the record, as I have said before. The challenge to the jurisdiction of this Commission was in no sense a challenge to its personnel or in no sense implied any doubt as to their ability or wisdom or fairness.

As evidence of that, we told you about it before we started the hearing. We have sought at all times to be entirely frank with this Commission on that feature of the case, and we know that you will give this case just as fair consideration as if that feature of the case had not been challenged. That constitutes statutory features which, in the interest of democratic government, should have been presented to a tribunal; and it is interesting and gratifying to us to note that that seems to be the general opinion--that it should have been passed on, in preservation of our system of government. Whatever the opinion might be--and most of it, of course, is hostile to interfering with this Commission--the opinion seems to be uniform that it is a matter that should have been resorted to.

There is another thing that I desire to say in connection

with this case. The Court-Martial Manual provides, as you all know, without my saying so, that in order to convict an accused of an offense, the court must be satisfied beyond a reasonable doubt that the accused is guilty. It goes on to say that a reasonable doubt is not a fanciful doubt. I do not remember the exact wording of the manual on that, but you, of course, have the manual and can refer to it. After considering all the evidence, if you in your mind feel that there is some question as to the guilt of these people, that question being based on a reasonable view of the evidence, then the accused should be acquitted on that charge.

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There is nothing in the President's order or in the rulings of this Commission which alters that in any degree and, therefore, certainly in the case of some of the defendants and, as to others, in the case of some of the charges, we think that will clearly be applicable, and an acquittal of a few of the defendants should we had on all charges and as to others there should be an acquittal on some charges.

Since we will not have a separate opportunity to present to the Commission the question of punishment, I would like to say this on that point, when you reach that, if you do, as to some of the defendants. Of course as to some defendants as may be convicted of spying, in the military sense--and we are going to talk a good deal about that, because that is a very critical matter, we think--the death sentence is mandatory.

We do not believe, under this testimony and in view of the decisions of the courts, that there is any possibility that the offense of spying has been proved in this case; that is, in a military sense, as distinguished from espionage. Therefore on the other charges the matter of punishment is discretionary with the Commission. On the matter of punishment the Commission, of course, may take into consideration any facts which appear of record, that is, specific facts--you are confined on that question to the facts appearing in the record--and every court on the question of punishment must take into consideration general matters of policy, not in the sense of politics, not in the sense of any particular object to be sought, but in the sense that human knowledge of affairs in general must be considered; and therefore we would be blind if we did not realize that on the question of

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punishment national defense is an element that must be considered. Of course that is true, and we realize that the Commission must consider it. However, that has more features than one.

There are eight Germans, two of them being American citizens originally, and one of them certainly being an American citizen, who have come over here allegedly to commit acts of sabotage, except those as to whom it was clearly proven there was no intent; and we will discuss that matter. But, taking it in the view most favorable to the prosecution, they went to a sabotage school and came over here for that purpose.

The very excellent preventive work which has been done by the Federal Bureau of Investigation and the other facilities makes it improbable, if not impossible, for any similar plan to succeed in the future. Therefore it is not necessary to punish these men as a preventive measure for any probable repetition of this offense.

That is not the only feature of it which, on the question of punishment, is entitled to consideration. I say there will not be any more chance of this in America, but it is common knowledge, from the newspapers, that maybe we will be moving somewhere into the zone of military operations on some other continent, and the chances are that American soldiers will have to face this situation much more frequently than will the enemy agents.

This case will to some extent establish perhaps a criterion for dealing with men who commit these acts. I do not know of any situation up to this time where Americans have had to do so or have sought to do so. We have not gotten

58 along that far in our plans. But we do know that Englishmen have done so; and it was true in the last war, as all of you know better than I do, that the Germans, in their treatment of Englishmen, adopted a much higher standard and a fairer standard than they did as to any other nation. There may be something in the Teutonic origin of the race; I do not know. It may be an inherent feeling of similarity in our heredity. The same thing was true of their treatment of Americans; and history and common knowledge show today that the matters with which Germany is charged, that is, atrocities, do not concern the English people nor the English-speaking people, but concern the Slav races largely and, to a lesser extent, the Latin races of occupied France.

There is in the record, uncontradicted and without objection from the prosecution, this testimony of Harling. If it was not true it could have been proven untrue and, with all the facilities that the prosecution has, it would have been proven untrue if it were not correct. If it were not competent it would have been objected to. It appears in the record unchallenged, and I will read it verbatim (reading):

"Q Did you know of any similar mission that the English had had into Germany or Occupied France?

"A That is nothing unusual. It happens every day.

"Q Both in uniform and in civilian clothes?

"A Mostly in civilian clothes. Just those border raids they are in uniform, but they pick them up every day in Germany.

"Q Did you know the penalty that was inflicted upon Englishmen not in uniform who were apprehended in this mission in Germany?



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"A Yes.

"Q What was done with them?

"A After the war with France was over I was out in France. If they caught an Englishman in uniform in a French family, they took the French family and punished them, mostly by death, for hiding them, and put the Englishman in a concentration camp in a German fortress. The latest I know one case, a German plane landed in Germany on a road near--it was north of Berlin somewhere, on one of these new roads. They landed three of them there, and they were taken away and put in a fortress. They landed in civilian clothes.

"Q The English landed in civilian clothes?

"A Yes. It happens over there every day."

Now, may it please the Commission, that is unchallenged; and if it were not true, in the hysteria of war in England we would hear that it was not true. I think it is legitimate for this Commission to take it into account, when we will probably send ten boys on similar missions for every one that Germany has or can send, realizing the fact that the decision in this case may establish a criterion which will be applicable, ten to one, to our own boys who are going overseas. That is a legitimate consideration in this matter. It is a matter of common knowledge and, as far as that testimony is concerned, it stands unchallenged.

We believe that these men have done nothing, if we take every word and every inference of the prosecution's contentions to be correct, that warrants the infliction of the death penalty. They did not hurt anybody. They did not blow

5- up anything. They did not affect the conduct of the war, except by the fact that they came over here and enabled us to take preventive measures which will help our conduct of the war. But if it be said that their intentions were bad, according to the prosecution, the law has always drawn a distinction between what a man intends to do and what he does. Those of us who appear in civil courts see every day the charge of assault with intent to kill. It happens down in my country, where a certain part of our population is a little more criminal-minded than the other part, and it is not infrequent that our courts are filled on a Monday morning with cases involving assault with intent to kill: frequently secret assaults, way-laying. If any of you have been around army camps in Southern localities--I reckon it is true everywhere, but I speak of the South because I know it--you know that that is true. Here is a man whose case has every element, except accomplishment, much more than those men have here, because they had not gotten far enough along to start the accomplishment. Here is a man who shoots another, and if his marksmanship had been good he would have been electrocuted. That is the only difference between his offense and that of the man who is sent to the gas chamber or is electrocuted, because the first man missed his aim. He generally gets about 18 months or two years, sometimes three or four years.

The law has drawn that distinction for hundreds of years. That is an attempt. As a matter of fact, these men have not gone anywhere near that far. To make the cases analogous you would have to say that a man bought a pistol with intent to kill. He would be fined \$50 in most jurisdictions. The element of criminality is there in that case, but the law makes a

6e distinction, and it makes it for two reasons: in the first place, the law considers not merely the intent of a man, but the result and the accomplishment, in determining what the sentence will be. And that is written into every law, in the Manual for Courts-Martial and in the criminal statutes of every state and of the United States.

In the second place, the law recognizes, in the case of the man who just bought a pistol intending to commit murder, that it takes a great deal more of a criminal heart to actually start the perpetration of an offense than it does to prepare for the perpetration of it.

I do not suppose that any member of this Commission or any member of counsel on either side has ever really wished that somebody was dead. But there are people who have done that, and if they had the opportunity, possibly, in the heat of anger, they might do something about killing him. It is terribly wrong to feel that way about anybody. But 99 out of 100 of those people, when confronted with the actual commission of an offense, would never commit it, because it takes much more hardness, much more criminality, much more depravity, to actually do something of that kind than it takes to plan to do it or prepare to do it.

Let us apply that to this case. Let us apply those doctrines that are so well established in the English law and in the European law and in every law that I know of, that it is unnecessary to cite authority.

What did these men do? Let us take the prosecution's case to the limit.

Let us assume, which we can, certainly, in the case of Burger, that they came over here intending to commit sabotage.

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Suppose they had reached the point in their hearts where they thought that was the thing to do. They did not do it. Whether you believe what they told you in its entirety or not--I know you are not going to believe everything they told you; I am not foolish about that, as to what some of them told you-- there at least is a question in the mind of everybody whether a considerable part of these men ever had the criminality or the depravity to have actually blown up anything. If you assume they did have it, the fact is that they did not do it; and that is the consideration that the law takes into account.

If this were peace time and a man had gotten explosives to blow up Madison Square Garden when it was full of people and it could be proved conclusively that he had bought them for that purpose and had hidden them for that purpose, unless there were a wave of popular indignation I cannot conceive of any court giving him over two or three years, if that is as far as he had proceeded with his plan. Maybe a court would give him five years, but I doubt it. I do not think any court that I know of would give him over two years, if that were a fact.

If a man had just assembled the equipment to blow up a railroad bridge and had not done anything but bought the explosives and buried them miles away from where he was going to commit the offense, a court would not give him anywhere near that long a term.

Let us get the proper perspective on this case. These men may have planned something, but they have not done any terrible thing. They prepared to do some things which, if accomplished, might have been terrible. But they have not done it.

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Let us not let the fact of war absolutely change the character of what they have done. Give it weight, yes; but do not let it destroy our entire perspective of just exactly what has happened. They have done nothing to hurt America, to hurt it in the defense in this war. They may have intended to do it, but they have done nothing that has affected our war effort. As a matter of fact, unwittingly, in the case of those who did intend it, they have probably rendered a real service--unwittingly, I say--to the war effort, by giving us a means of prevention.

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May it please the Commission, those remarks are general, of course, as is perfectly apparent. I want to say just two more things about the matter of punishment. I was asking Major Stone, who had looked up the statutes, in order to be certain, so that I would not make any misstatement about the statutes.

There is a criminal statute about committing sabotage which was enacted by Congress, and while if these men have committed a war offense that statute, if they think that statute is not binding upon this Commission, and I do not want to leave any inference that it is, it ought to be right persuasive as to what the common attitude of the people of America is as to how the gravity of this offense should be considered. It was enacted by Congress with the war fully in view. It prescribed the penalties that would be imposed in these acts. It imposed the maximum penalties in time of peace, and then it imposed the maximum penalties in time of war. That is the maximum. That was done after careful consideration.

I do not think I am guessing anything when I say it must have been done after full consultation with the military department of our Government. I am confident that Congress did not enact it otherwise. I think it is a matter of public record that nobody connected with the military establishment, as far as I have been able to ascertain, asked them to go any further than that in the matter of penalty. It was considered by the authorities, civil and military, and it was prescribed that when a man in time of war actually committed sabotage and blew up a plant, the maximum penalty would be 30 years--the maximum; the next you could give him. These men have not done anywhere

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near that much--not anywhere near that much. Yet Congress, with certainly the tacit approval of the War Department and the military authorities, has recently said that that is as much as they ought to get for actual sabotage. I speak of sabotage, and I say that these men have not even attempted to commit sabotage, because an attempt is distinguished from preparation. It is very seriously doubtful that they have gone far enough to constitute an attempt.

Buying a gun to shoot somebody is not an attempt. It is a violation of law, but it is not an attempt to commit murder. Obtaining a gun from somebody else and burying it in the sand or putting it in your house with intent to murder somebody is not an attempt to commit murder.

These men did not go even to the extent of an attempt. If it had been an attempt, there is no rule better established than that attempt always has a lighter punishment than the actual commission of the offense. When Congress has said that it thinks 30 years is the most anybody ought to get, under the most aggravated circumstances, for actually committing sabotage, certainly nobody ever intended, and the military has never suggested, as far as I know, that they ought to get any more severe penalty than that under any other circumstances, and certainly it was understood that they would get a lesser one for an attempt.

The President. Are you going to make a reference to that particular law?

Colonel Royall. Yes, sir, we can give you that. I am going to talk about espionage later, so I shall give you both citations. There is also a civil statute on espionage which

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is different from military spying. The statute on sabotage-- I think this is correct; Major Stone has gone for the book-- is 50 U. S. Code Chapter 6, Sections 101 to 105. With the permission of the Commission, we shall hand you a copy of the federal statutes with the place marked in them on the espionage and sabotage statutes. Major Stone has gone to get that, sir.

The President. Thank you very much.

Colonel Royall. I want to make it clear that I am not arguing, and I do not want to argue, anything which is not legally sound because, in the first place, I would not intend to do so; and in the second place, it would be useless, with eminent counsel on the other side.

I am not contending, of course, that the civil statute binds you, but I am contending that on the matter of punishment it is legitimate, fair, and, I think, ought to be binding from a moral and practical standpoint of consideration, because of the fact that with the approval, tacit or otherwise, of the military it was recently made a law by Congress.

I think on that question and on the other question, without making the eagle scream, or seeking to do so, we have got to realize that this decision here today, in addition to the affect it may have on our soldiers, is a very important one for America. We are fighting this war to preserve our own system of government. The distinction between the American system of government and any other system of government--the English, of course, being practically the same--is that we provide an orderly procedure, whether it be military or whether it be civil, and that we administer that procedure with equity and justice in times of stress as well as in times of peace

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In other words, we have not a fair-weather government. We have a government that is not just, as we would call it down in North Carolina, a government in Sunday-go-to-meeting clothes. It is supposed to wear a garb that can be worn all the time, under all circumstances and in all cases, giving weight to the considerations, but still preserving our administration of justice on an even keel.

We want to win this war, and we are going to win it, but we do not want to win it by throwing away everything we are fighting for, because we will have a mighty empty victory if we destroy the genuineness and the truth of democratic government and fair administration of law. That applies all the way through this, and it is mighty hard. You know, the real test of a system of government is not when the sun is shining but is when the weather is stormy. Anybody can administer justice when the sun is shining, things are peaceful, and there is no stress or excitement. It takes a man to administer our system of government when that is not the case.

May it please the Commission, I spoke about the spy charge, and throughout this trial I have tried to get Colonel Powell to take a more active part in the presentation than he has done. He is a man of wonderful ability but extreme modesty, and he has insisted that I, because my job was a little more that of a practicing lawyer than of a soldier, should take the major part of the courtroom work. Whatever I have been able to do has been very largely due to the sound advice and splendid counsel and level head that he has got.

This is a matter connected with military spying in a zone

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of operations. If I went into it with the thoroughness with which it ought to be discussed, I would be giving you second-hand information that he gave me. So, under those circumstances, with the approval of the Commission, I should like to ask Colonel Howell to present his views to you at this time on that particular feature of the matter. He has finally agreed to do so.