

“Justice Felix Frankfurter Soliloquy”

After listening as hard as I could to the views expressed by the Chief Justice and Jackson about the Saboteur case problems at the last Conference, and thinking over what they said as intelligently as I could, I could not for the life of me find enough room in the legal differences between them to insert a razor blade. And now comes Jackson’s memorandum expressing what he believes to be views other than those contained in the Chief Justice’s opinion. I have now studied as hard as I could the printed formulations of their views — and I still can’t discover what divides them so far as legal significance is concerned. And so I say to myself that words must be poor and treacherous means of putting out what goes on inside our heads. Being puzzled by what seem to me to be merely verbal differences in expressing intrinsically identic views about the governing legal principles, I thought I would state in my own way what have been my views on the issues in the Saboteur cases ever since my mind came to rest upon them. And perhaps I can do it with least misunderstanding if I put it in form of a dialogue — a dialogue between the saboteurs and myself as to what I, as a judge, should do in acting upon their claims:

Saboteurs: Your Honor, we are here to get a writ of habeas corpus from you.

F.F.: What entitles you to it?

Saboteurs: We are being tried by a Military Commission set up by the President although we were arrested in places where, and at a time when, the civil courts were



open and functioning with full authority and before which, therefore, under the Constitution of the United States we were entitled to be tried with all the safeguards for criminal prosecution in the federal courts.

F.F.: What is the answer of the Provost Marshall to your petition?

Saboteurs: The facts in the case are agreed to in a stipulation before Your Honor.

F.F. *(after reading the stipulation):* You damned scoundrels have a helluvacheek to ask for a writ that would take you out of the hands of the Military Commission and give you the right to be tried, if at all, in a federal district court. You are just low-down, ordinary, enemy spies who, as enemy soldiers, have invaded our country and therefore could immediately have been shot by the military when caught in the action of invasion. Instead you

were humanely ordered to be tried by a military tribunal convoked by the Commander-in-Chief himself, and the verdict of that tribunal is returnable to the Commander-in-Chief himself to be acted upon by himself. To utilize a military commission to establish your guilt or innocence was plainly within the authority of the Commander-in-Chief. I do not have to say more than that Congress specifically has authorized the President to establish such a Commission in the circumstances of your case and the President himself has purported to act under this authority of Congress as expressed by the Articles of War. So I will deny your writ and leave you to your just deserts with the military.

Saboteurs: But, Your Honor, since as you say the President himself professed to act under the Articles of War, we appeal to those Articles of War as the governing procedure, even bowing to your ruling that we are not entitled to be tried by civil courts and may have our lives declared forfeit by this Military Commission. Specifically, we say that since the President has set up this commission under the Articles of War he must conform to them. He has certainly not done so in that the requirements of Articles 46-50 ½ have been and are being disregarded by the McCoy tribunal.

F.F.: There is nothing to that point either. The articles to which you appeal do not restrict the President in relation to a Military Commission set up for the purposes of and in the

circumstances of this case. That amply disposes of your point. In lawyer's language, a proper construction of Articles 46-50 ½ does not cover this case and therefore on the merits you have no rights under it. So I don't have to consider whether, assuming Congress had specifically required the President in establishing such a Commission to give you the procedural safeguards of Articles 46-50 ½, Congress would have gone beyond its job and taken over the business of the President as Commander-in-Chief in the actual conduct of a war. You've done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress after your bodies will be rotting in lime. It is a wise requirement of courts not to get into needless rows with the other branches of the government by talking about things that need not be talked about if a case can be disposed of with intellectual self-respect on grounds that do not raise such rows. I therefore do not propose to be seduced into inquiring what powers the President has or has not got, what limits the Congress may or may not put upon the Commander-in-Chief in time of war, when, as a matter of fact, the ground on which you claim to stand—namely, the proper construction of these Articles of War—exists only in your foolish fancy. That disposes of you scoundrels. Doubtless other judges may spell this out with appropriate documentation and learning. Some judges would certainly express their views much

more politely and charmingly than I have done, some would take a lot of words to say it, and some would take not so many, but it all comes down to what I have told you. In a nutshell, the President has the power, as he said he had, to set up the tribunal which he has set up to try you as invading German belligerents for the offenses for which you are being tried. And for you there are no procedural rights such as you claim because the statute to which you appeal — the Articles of War — don't apply to you. And so you will remain in your present custody and be damned.

Some of the very best lawyers I know are now in the Solomon Island battle, some are seeing service in Australia, some are sub-chasers in the Atlantic, and some are on the various air fronts. It requires no poet's imagination to think of their reflections if the unanimous result reached by us in these cases should be expressed in opinions which would black out the agreement in result and reveal internecine conflict about the manner of stating that result. I know some of these men, very, very intimately. I think I know what they would deem to be the governing cannons of constitutional adjudication in a case like this. And I almost hear their voices were they to read more than a single opinion in this case. They would say something like this but in language hardly becoming a judge's tongue: "What in hell do you fellows think you are doing? Haven't we got enough of a job trying to lick the Japs and Nazis without having you fellows on the Supreme Court dissipate the thoughts and feelings and energies of

the folks at home by stirring up a nice row as to who has what power when all of you agreed that the President had the power to establish this Commission and that the procedure under the Articles of War for courts martial and military commission doesn't apply to this case. Haven't you got any more sense than to get people by the ear on one of the favorite American pastimes-abstract constitutional discussions. Do we have to have another Lincoln-Taney row when everybody is agreed and in this particular case the constitutional questions aren't reached. Just relax and don't be too engrossed in your own interest in verbalistic conflicts because the inroads on energy and national unity that such conflict inevitably produce, is a pastime we had better postpone until peacetime."