

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

January 15, 1946

Dear Chief:

I am relieved by your taking the Yamashita case. Precisely because I am in such thorough agreement with you about the case I venture to make a suggestion or two, moved by the feeling that, if at all possible, there should be only one opinion in support of the Court's decision. To that end I hope the following considerations may appeal to you:

1. The most unqualified recognition of the subordination of the military to Law should, of course, be made along the lines of Fields's passage in Dow v. Johnson, 100 U. S. 158, 169-170.

2. But under our Constitution, all branches of Government are subject to Law. That includes this Court. Accordingly, this Court must observe the bounds of its authority. Nothing is more incumbent on us than to observe the settled limits of our reviewing power by habeas corpus. Needless to say, that writ is basic to the safeguarding of liberty - but liberty is not safeguarded by a misuse of the writ. For myself, I would regard the price of securing an agreement on any opinion too heavy a price to pay, if it involved a recession from what you and I understand to be the limited scope of review on habeas corpus of military detentions. Not only are our cases compelling, but the reasons behind them are.

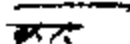
3. There are too many differences of opinion amongst us on the suggestion that Japan has ceased to be a government, and, therefore,

on the bearing of such an assumption on treaty rights. That mode of approaching disposition of the point regarding the applicability of the Geneva Convention is, I believe, sure to stir dissension.

4. It seems to me that both the Geneva Convention point and that concerning the use of affidavits vanish upon a true analysis of these proceedings. Had MacArthur seized Luzon while hostilities elsewhere were still active and proceeded to deal with Yamashita as he was here dealt with, I cannot imagine that anyone would urge the applicability of A.W. 25 or the requirement of notice under the Geneva Convention. Of course these do not apply to the disposition by the commanding general in a combat area of accusations for violations of the articles of War by ^{an enemy} a belligerent officer. Legally speaking, A.W. 25 and the requirement of notice under the Geneva Convention have no more relevance to the circumstances of the proceedings now before us.

To avoid misunderstanding, let me repeat that I now feel about your exposition of the case what I felt at Conference - it measures up to what is worthy of the Chief Justice of the United States in a matter of such magnitude. What I have written above is moved solely by the desire to be of some help, if I can, in evolving an opinion whereby you alone will speak for those who concur in the Court's decision.

Faithfully yours,



The Chief Justice