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Andrew Buttaro

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Ex Parte Quirin: The Nazi Saboteur Case and the Tribunal Precedent

Andrew Buttaro*

I. INTRODUCTION

Late on a moonless night in June 1942, the metal hull of a German submarine scraped the sandy bottom of the Long Island coast.¹ The captain, realizing he could proceed no farther, pivoted the vessel parallel to shore to allow for rapid escape in the event of detection.² A team of four Nazi commandoes emerged from the hatch, and two sailors inflated a rubber boat to ferry them ashore.³ The crew pushed off, trailing a line to guide the sailors' return after the landing.⁴ The raft, heavily laden with explosives and gear, found the beach through a thick fog and the four saboteurs scurried ashore.⁵ The commandoes were instructed to change into civilian dress after disembarkation and bury evidence of their arrival.⁶ Their mission—for which they had undergone weeks of specialized training in Germany—was to surreptitiously enter the United States and destroy industrial targets deemed valuable to the American war effort.⁷

Things went awry from the first step on American soil. A Coast Guard officer patrolling the Amagansett beach noticed the group's frenzied activity in the minutes after landing and approached them to investigate.⁸ The commandoes had been trained to overpower anyone offering resistance, but the group's leader—perhaps in a moment of panic—hastily shoved 260 American dollars into the Guardsman's hands in the hopes of buying his silence. More ominously, he added that it would be best for him to look the other way.⁹ The bewildered Guardsman returned to his post to report the

* Andrew Buttaro is an associate at Locke Lord LLP in Dallas, Texas. He previously served as a law clerk for the Supreme Court of Texas and a member of the legal team of a presidential campaign. He received his law degree and a master's in legal history from the University of Virginia in 2012.

¹ Michael Dobbs, *SABOTEURS: THE NAZI RAID ON AMERICA* 82 (2004); Gary Cohen, *The Keystone Kommandos*, *THE ATLANTIC*, (Feb. 2002), <http://www.theatlantic.com/magazine/archive/2002/02/the-keystone-kommandos/302405/> (“As the vessel approached the Long Island coast, on June 12, the captain switched from diesel to silent electric motors. Just before midnight the men heard a scraping sound: the sub had touched the ocean floor some fifty yards from shore.”).

² Louis Fisher, *NAZI SABOTEURS ON TRIAL* 25–26 (2003).

³ *Id.* at 26; *see also* Aileen Jacobson, *Nazi Saboteurs in the Amagansett Sands*, *N.Y. TIMES*, Sept. 1, 2014 (“The four saboteurs rowed ashore in a rubber dinghy filled with explosives, clothing, cash and a plan to blow up aluminum and magnesium plants, canals, bridges and other structures over the coming two years.”).

⁴ Eugene Rachlis, *THEY CAME TO KILL* 4–5 (1961).

⁵ *Id.* at 6.

⁶ *Id.* at 103; Fisher, *supra* note 2, at 26.

⁷ Rachlis, *supra* note 4, at 20–21; *see also* Dobbs, *supra* note 1, at 15–34 (detailing the training regimen).

⁸ Cohen, *supra* note 1 (“Also on the beach that night, on a six-mile foot patrol, was Coast Guardsman John Cullen, of Bayside, Queens, a twenty-one-year-old former Macy's deliveryman who enlisted in the Coast Guard in 1940 and later became a 'sand pounder,' to keep watch at night for suspicious activity close to shore. For weeks on end Cullen had patrolled, unarmed, without ever encountering another person. But at about 12:30 that morning, through the fog, he saw a dark object in the water some twenty feet away, and three men standing nearby.”).

⁹ Andy Newman, *Terrorists Among Us* (1942); *Detecting the Enemy Wasn't Easy Then, Either*, *N.Y. TIMES*, Jan. 17, 2002

unusual encounter, and the Nazi saboteurs escaped to a rail station and hurriedly boarded a train to Manhattan.¹⁰

Despite evading capture on the beach, the sabotage mission never really got underway. Shortly after arriving in the United States, the group's leader voluntarily approached the Washington headquarters of the Federal Bureau of Investigation (FBI) and confessed to the entire plot.¹¹ Most damagingly, he revealed that a second team of saboteurs had been dispatched to Florida.¹² Within days, the government apprehended the Florida group.¹³ Within weeks, the administration of President Franklin D. Roosevelt and congressional leaders decided to try the putative saboteurs outside of the civil justice system, electing instead on prosecution by military tribunal.¹⁴ Within months, six of the saboteurs were executed and the remaining two were sentenced to lengthy prison sentences.¹⁵

Counsel for the saboteurs challenged the use of the military tribunal from the start, and the Supreme Court was asked to determine its constitutionality. In a unanimous opinion, the justices upheld the government's course of action.¹⁶ Given the need for an expedited decision, the Court initially released only a brief *per curiam* writing, but months later—after the saboteurs were executed—it issued a significantly more expansive opinion.¹⁷ In *Ex parte Quirin*, as the litigation is known, the Court provided the legal justification for its original ruling.¹⁸ While of interest to specialist legal scholars, the opinion attracted relatively little popular and press attention; and given that the executions had effectively decided the issue, it had little practical significance.¹⁹ For the subsequent several decades *Quirin* largely faded from view, cropping up only in the occasional

(“Dasch balked, threatened him and gave him \$260 to get lost.”); Dobbs, *supra* note 1, at 82, 104 (recalling the orders to overpower any opposition).

¹⁰ Fisher, *supra* note 2, at 29 (chronicling the Guardsman's actions after the beach encounter); *see also* Cohen, *supra* note 1 (“Eventually, at just after five in the morning, they stumbled into the tiny train station in Amagansett . . . When the station opened for business, at six-thirty, Dasch bought four tickets to Manhattan.”); Dobbs, *supra* note 1, at 104–05 (discussing the train).

¹¹ Cohen, *supra* note 1 (“On Sunday, June 14, Dasch called the FBI.”).

¹² Fisher, *supra* note 2, at 40–41.

¹³ Fisher, *supra* note 2, at 42.

¹⁴ Dobbs, *supra* note 1, at 204.

¹⁵ Lewis Wood, *Clemency for Two*, N.Y. TIMES, Aug. 9, 1942 (“Six of the eight Nazi saboteurs were executed in the electric chair at the District of Columbia Jail [Aug. 8], while the two others were sentenced to serve at hard labor for life and for thirty years, respectively. The executions started at noon.”).

¹⁶ The *per curiam* opinion is reproduced within *Ex parte Quirin*, 317 U.S. 1, 18–19 (1942).

¹⁷ Dobbs, *supra* note 1, at 269.

¹⁸ *See generally* 317 U.S. 1 (1942). The case is named for Richard Quirin, one of the saboteurs. Quirin was born in Germany in 1908 and moved to the United States in 1927. He worked in maintenance at a General Electric plant in Schenectady, New York, but was laid off during the Depression. He then moved to New York City, where he joined the Friends of the New Germany and found work as a housepainter. Prior to the mission, he returned to Germany as part of a government repatriation program. *See* Cohen, *supra* note 1.

¹⁹ Dobbs, *supra* note 1, at 269; Cass R. Sunstein & Jack L. Goldsmith, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (2002) (“The announcement of the Court's opinion in *Quirin* was reported with little fanfare.”).

law review article or as a footnote in histories of the Second World War.²⁰ And there it may have languished, but for the terrorist attacks of September 11, 2001.²¹

Two months after the attacks, President George W. Bush issued a military order to govern the detention, treatment, and trial of terrorists.²² The Bush pronouncement was closely modeled on Roosevelt's earlier order, which outlined the framework ultimately upheld in *Quirin*.²³ While there is ample discussion in both academic and lay literature of the Bush administration's anti-terror legal structure, the history and context of the *Quirin* decision is often given only cursory mention in these writings.²⁴ This article seeks to rectify this situation by synthesizing scholarly and general studies of the Nazi saboteur case, and underscoring *Quirin*'s importance to the legal framework undergirding the War on Terror. This effort begins by briefly tracing the background history of the Nazi plan to infiltrate the United States and weaken its war machine from the inside. Second, substantial attention is paid to the political and legal decisions that led to the creation of the 1942 military

²⁰ Fisher, *supra* note 2, at 134–38 (providing a useful overview of the relatively few mentions of the case in subsequent legal literature); see also Carl Tobias, *Book Review*, 97 J. CRIM. L. & CRIMINOLOGY 365 (2006) (“*Quirin* languished as a wartime artifact until November 2001, when President George W. Bush invoked the ruling to create military tribunals, as well as to purportedly abrogate federal court jurisdiction and deny federal court access to those prosecuted or held for suspected terrorist behavior.”); see also Jane Mayer, *The Hidden Power*, THE NEW YORKER (July 3, 2006), <http://www.newyorker.com/magazine/2006/07/03/the-hidden-power> (referring to *Ex parte Quirin* as an “arcane 1942 case”).

²¹ John Yoo, Opinion, *How the Presidency Regained Its Balance*, N.Y. TIMES (Sept. 17, 2006), http://www.nytimes.com/2006/09/17/opinion/17yoo.html?ei=50&_r=0 (“Five years after 9/11, President Bush has taken his counterterrorism case to the American people. Thus the administration has . . . formed military tribunals modeled on those of past wars, as when we tried and executed a group of Nazi saboteurs found in the United States.”).

²² Exec. Order No. 57833, 66 Fed. Reg. 222 (Nov. 16, 2001) (“To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”). A military order invokes the president's power as commander-in-chief, while an executive order is predicated on a president's power as the chief executive officer of the United States. See Anne English French, *Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?* 63 OHIO ST. L. J. 1225, 1226–27 n.4 (2002).

²³ See George Lardner, Jr., *Nazi Saboteurs Captured! FDR Orders Secret Tribunal*, WASH. POST MAG. (Jan. 13, 2002), <https://www.washingtonpost.com/archive/lifestyle/magazine/2002/01/13/nazi-saboteurs-captured-fdr-orders-secret-tribunal/f47e7bee-4b40-4079-8a50-aebb5ea89e43/> (calling *Quirin* “the case that President Bush relied on most heavily for his November 13 order empowering him to create military tribunals for accused foreign terrorists and their collaborators”); see also Alberto R. Gonzales, Opinion, *Martial Justice, Full and Fair*, N.Y. TIMES (Nov. 30, 2001), <http://www.nytimes.com/2001/11/30/opinion/martial-justice-full-and-fair.html> (“Like presidents before him, President Bush has invoked his power to establish military commissions to try enemy belligerents who commit war crimes. . . . Nazi saboteurs who came ashore on Long Island during World War II disguised as civilians and intending to attack American war industries were tried before military commissions. The use of such commissions has been consistently upheld by the Supreme Court.”); see also Mayer, *supra* note 20 (quoting former White House counsel Bradford Berenson: “The legal foundation was very strong. F.D.R.’s order establishing military commissions had been upheld by the Supreme Court. This was almost identical.”).

²⁴ See Sunstein & Goldsmith, *supra* note 19, at 261 (noting that Bush's “Military Order was greeted with impassioned criticism in the press, the legal academy, and Congress”); see, e.g., Laurence H. Tribe, Opinion, *Citizens, Combatants and the Constitution*, N.Y. TIMES (June 16, 2002), <http://www.nytimes.com/2002/06/16/opinion/16TRIB.html> (referencing an ongoing “debate” over the treatment of terrorist suspects, and mentioning the saboteur case in passing).

tribunal. Third, the Court's opinion in *Quirin* is closely scrutinized, with issues of present relevance commanding particular attention. Finally, the article concludes with an evaluation of the relationship between *Quirin* and the tribunal structure in place today. The overarching hope of this writing is that by better understanding the original framework of the military tribunal, the contemporary debate regarding the appropriateness of trying terrorist suspects in military courts will be clarified.

II. BACKGROUND HISTORY

A. The Roots and Execution of Operation Pastorius

Nazi plans to engage in anti-American sabotage predated hostilities between Germany and the United States.²⁵ Several years before the invasion of Poland, the German government sponsored a school for covert operations in Brandenburg, a city about thirty-five miles west of Berlin.²⁶ The decision to target the United States emerged in the wake of a botched intelligence operation that proved deeply embarrassing to the German high command.²⁷ William Sebold, a German native, had worked in various American industries throughout the 1920s and 1930s.²⁸ Noting his familiarity with American business and social customs, the Nazi government attempted, in 1939, to recruit him for espionage operations.²⁹ Sebold readily agreed.³⁰ Unfortunately for the Nazi government, Sebold also informed the American consulate that he had been pressured to serve as a spy, and the FBI groomed him to operate as a double agent.³¹ As a result of his counter-espionage, in 1941, thirty-three Nazi spies were arrested and tried in what became known as the “Sebold Affair.”³² Infuriated by this humiliating decapitation of his American intelligence operations, Adolf Hitler demanded that sabotage operations be launched in response.³³ His intelligence chiefs had complied, of course, although some saw little hope of success; as one confided to a colleague, “the whole thing is hopeless.”³⁴ Despite the tepid endorsement, the plan—codenamed “Operation Pastorius”—moved forward.³⁵

²⁵ Fisher, *supra* note 2, at 1.

²⁶ Fisher, *supra* note 2, at 4; *see* Robin Havers, *THE SECOND WORLD WAR* 9 (2002) (“Hitler’s invasion of Poland was the event that precipitated the Second World War.”).

²⁷ Dobbs, *supra* note 1, at 57.

²⁸ Fisher, *supra* note 2, at 3.

²⁹ Fisher, *supra* note 2, at 3.

³⁰ *See generally* Peter Duffy, *DOUBLE AGENT: THE FIRST HERO OF WORLD WAR II AND HOW THE FBI OUTWITTED AND DESTROYED A NAZI SPY RING* (2014).

³¹ *Id.*

³² *Id.* at 5; *see also* Richard Goldstein, *HELLUVA TOWN: THE STORY OF NEW YORK CITY DURING WORLD WAR II* 38 (2010) (explaining that the plot of the 1945 film *The House on 92nd Street* was partly inspired by the Sebold Affair).

³³ Fisher, *supra* note 2, at 4.

³⁴ Fisher, *supra* note 2, at 4.

³⁵ Fisher, *supra* note 2, at 5–6. As Fisher notes, the etymology of this codename is highly ironic. The plan was named after Franz Daniel Pastorius, an early German settler in the American colonies. He arrived in Philadelphia in 1683 as the leader of thirteen German families, and was a central figure in the development of the Germantown settlement in Pennsylvania. Pastorius and his followers were devoted abolitionists and took steps to outlaw slavery in German religious

By April 1942, eight men (culled from a larger group) were receiving explosives and weapons training for planned operations against American railroads, factories, bridges, and other strategic targets.³⁶ After approximately three weeks of instruction, the men vacationed for the early portion of May, returning to the camp for only a few final days of education.³⁷ On May 22, the group left for Paris.³⁸ There, the octet hardly inspired confidence in their Nazi superiors. One of the team, imbibing heavily, boasted to fellow bar patrons that he was a secret agent, and another caused a scene when he refused to pay a prostitute for her services.³⁹ The military planners made their share of mistakes too, as it turned out. The United States currency distributed to the agents was allocated in series, leaving it vulnerable to detection, and part of their spending allowance was disbursed in gold certificates; the Roosevelt administration criminalized the possession of monetary gold in 1933, however, and using such obsolete currency risked unwelcome attention from American officials.⁴⁰

After the stayover in Paris, the group left for the coastal town of Lorient, where it boarded the submarines that would take them to the United States.⁴¹ In Lorient, the saboteurs separated into two units: the first, led by George Dasch, was intended for Long Island; and the second, led by Edward Kerling, was destined for Florida.⁴² Dasch's group was the first to reach the United States, clumsily landing in Amagansett late on June 12 (as described in the Introduction). Although Dasch's group avoided immediate capture, the Coast Guard located evidence from the bumbled landing, including buried explosives, and transferred it to the FBI.⁴³ The second submarine reached Ponte Vedra, a town near Jacksonville, Florida, on the night of June 16.⁴⁴ The Kerling group's arrival was the antithesis of the Long Island debacle. No resistance was encountered, and the Germans were at one point contentedly "swimming and relaxing like vacationers."⁴⁵ One even collected American sand in a jar to keep as a memento.⁴⁶ The Kerling group buried its incriminating materials and dispersed as planned.⁴⁷ But despite the smoother arrival, Kerling's group was doomed by Dasch, who turned himself in to an initially incredulous FBI before the saboteurs could cause any mayhem.⁴⁸ By June 27, the entire group had been arrested and evidence of the Florida landing recovered.⁴⁹

communities. Thus, it is incongruous (to say the least) that he lent his name to a plan designed to win a war for a racially supremacist government. *See also* Dobbs, *supra* note 1, at 53.

³⁶ Fisher, *supra* note 2, at 6; Dobbs, *supra* note 1, at 17.

³⁷ Dobbs, *supra* note 1, at 15–34 (detailing the training regimen).

³⁸ Rachlis, *supra* note 4, at 87–88.

³⁹ Rachlis, *supra* note 4, at 88–89.

⁴⁰ Rachlis, *supra* note 4, at 91.

⁴¹ Rachlis, *supra* note 4, at 89.

⁴² Fisher, *supra* note 2, at 19.

⁴³ Dobbs, *supra* note 1, at 113.

⁴⁴ Dobbs, *supra* note 1, at 129; *see also* Cohen, *supra* note 1 ("Rounding up the second team, which had landed near Jacksonville, Florida, during the night of June 16, was somewhat more difficult.").

⁴⁵ Dobbs, *supra* note 1, at 129–30.

⁴⁶ Dobbs, *supra* note 1, at 129–30.

⁴⁷ Dobbs, *supra* note 1, at 129.

⁴⁸ Cohen, *supra* note 1 ("On the morning of June 18 Dasch packed for Washington. . . . Dasch spoke with FBI special agents over the next five days"); *see also* Joseph T. McCann, *TERRORISM ON AMERICAN SOIL* 82 (2006).

⁴⁹ Fisher, *supra* note 2, at 38.

B. The Turn Toward Military Tribunals

Originally, the FBI had assumed that the saboteurs would be arraigned in district court and tried within the civil system.⁵⁰ Thus, the loquacious Dasch was encouraged to plead guilty before a magistrate, and the FBI strongly intimated that a presidential pardon would be forthcoming in exchange for his cooperation.⁵¹ At the later military trial, Dasch's attorney asked one of the interrogating agents:

Was it stated as a part of that proposal that after his plea of guilty he should be sentenced and that during the trial he should not divulge anything with respect to the agreement that was made, and that after the case had died down and for about, say, three to six months, the FBI would get a Presidential pardon for him?⁵²

The agent admitted: "That, in substance, is true."⁵³ With this understanding, Dasch agreed to plead guilty.⁵⁴ When Dasch spotted his photo plastered on the front of a newspaper being read by a jailhouse guard, however, he believed he had been betrayed by the FBI, and withdrew his plea in order to make a full statement in open court.⁵⁵ This turn of events was one reason that the Roosevelt administration elected to try him by secret military trial, as it would deprive the erratic Dasch of a public audience.⁵⁶

Other pragmatic considerations strongly recommended in favor of a military tribunal as well. First, the government believed a guilty verdict in civil court would likely entail incarceration for only a few years, whereas the military tribunal could administer the death penalty.⁵⁷ Although sabotage carried a maximum penalty of thirty years, the government was doubtful it could prevail on that charge given the suspects' cooperation (and the fact that the plan was aborted before any actual sabotage occurred).⁵⁸ The more attainable—but lesser—charge of conspiracy carried a maximum

⁵⁰ Fisher, *supra* note 2, at 43; *see also* Richard J. Ellis, THE DEVELOPMENT OF THE AMERICAN PRESIDENCY 553–55 (2012) ("FBI agents originally planned to try the saboteurs in civil court.").

⁵¹ Fisher, *supra* note 2, at 43; *see also* Cohen, *supra* note 1 ("During his interrogation, Dasch later said, the FBI had told him to plead guilty and not to mention his betrayal—just to put on 'the biggest act in the world' and 'take the punishment,' for which, after a few months in prison, he would receive a presidential pardon.").

⁵² Trial transcript, RG 153, Records of the Office of the Judge Advocate General (Army), Court-Martial Case Files, CM 334178, 1942 German Saboteur Case.

⁵³ *Id.*

⁵⁴ Fisher, *supra* note 2, at 45–46.

⁵⁵ Fisher, *supra* note 2, at 46; Dobbs, *supra* note 1, at 198 (observing the newspaper featured Dasch's face and the headline reading "Captured Nazi Spy").

⁵⁶ Fisher, *supra* note 2, at 46 (stating that some in Congress also recommended a military trial); *see also* *Spy Aides in City Captured by FBI*, N.Y. TIMES, June 29, 1942 ("Senator O'Mahoney added that in his opinion the case should be subject to military rather than civil prosecution.").

⁵⁷ Francis Biddle, IN BRIEF AUTHORITY 328 (1962); Fisher, *supra* note 2, at 46–47.

⁵⁸ Biddle, *supra* note 57, at 328. The sabotage statute is currently codified at 18 U.S.C. § 2153 (1994) ("Whoever, when the United States is at war, or in times of national emergency as declared by the President or by the Congress, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, or, with reason to believe that his act may injure, interfere with, or obstruct the United States or any

sentence of only two years.⁵⁹ Second, the public was under the impression that J. Edgar Hoover's FBI had immediately detected and thwarted the plot, and there was tremendous pressure—particularly from Hoover himself—to keep this narrative alive.⁶⁰ The administration saw utility in furthering this version of events as well, because the threat of future incursions would likely be reduced if the Nazi government believed an omnipotent and omnipresent FBI stymied the saboteur plot in its infancy.⁶¹ Although the *New York Times* and the *Washington Post* got wind of the reality of the landing at Amagansett, Hoover downplayed the reportage, and the press was told that there was “no Coast Guard side—for publication” available.⁶² Third, and perhaps most obvious, the United States was in the midst of a global war, and many were simply more concerned with national security than procedural safeguards.⁶³ Army Major General George V. Strong of the military intelligence division summarily indicated as much in a memo to Secretary of War Henry Stimson.⁶⁴ “The exigencies of the present situation appear to demand drastic action without too much deference to the technical rights which might be accorded, under the Constitution,” wrote Strong on June 28, proposing a military commission.⁶⁵ Roosevelt was even thought to see symbolic value in trying the saboteurs by tribunal, as it would underscore the reality that six months after Pearl Harbor, the country was at war.⁶⁶

associate nation in preparing for or carrying on the war or defense activities, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any war material, war premises, or war utilities, shall be fined under this title or imprisoned not more than thirty years, or both.”).

⁵⁹ See 18 U.S.C. § 88 (current version at 18 U.S.C. § 371) (reading, in the 1944 historical and revision notes, “This section consolidates said sections 88 and 294 of title 18, U.S.C., 1940 ed. . . . The punishment provision is completely rewritten to increase the penalty from 2 years to 5 years”); see also Fisher, *supra* note 2, at 46–47; Dobbs, *supra* note 1, at 200; Biddle, *supra* note 57, at 328 (expressing the author's doubts that the government could have prevailed on the sabotage charge, as “the preparations and landings were not close enough to the planned act of sabotage to constitute attempt”).

⁶⁰ Newman, *supra* note 9 (“Attorney General Francis Biddle wanted the men tried in secret, in part to preserve the impression—both in America and in Germany—that the F.B.I. director, J. Edgar Hoover, and his men were master spy-catchers.”); see Lardner, *supra* note 23 (“Secretary of War Henry Stimson hit the roof, too, but not happily. Military intelligence had wanted to watch and wait until August when two more teams of saboteurs were expected to come ashore. Hoover's grandstanding ruined that plan. ‘I have never seen Stimson so furious,’ recalls Washington attorney Lloyd N. Cutler, then a junior lawyer on the prosecution team. ‘Hoover grabbed all the glory and made the announcement without telling Stimson.’”); see also Dobbs, *supra* note 1, at 196.

⁶¹ See Lardner, *supra* note 23 (“Secrecy was essential . . . lest the Germans realize how porous the U.S. coastline was”).

⁶² *Saboteurs Face Military Justice; Inquiry Widens*, N.Y. TIMES, June 30, 1942.

⁶³ This is hardly a novel occurrence, as the longevity of the ancient maxim *Inter arma enim silent leges*—“In times of war, the law falls silent”—indicates. See BLACK'S LAW DICTIONARY 728 (5th ed. 1979) (“It applies as between the state and its external enemies; and also in cases of civil disturbance where extrajudicial force may supersede the ordinary process of law.”); see also, generally, WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224–25 (1998).

⁶⁴ Lardner, *supra* note 23.

⁶⁵ Lardner, *supra* note 23.

⁶⁶ Boris I. Bittker, *The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction*. Faculty Scholarship Series. Paper 2315. (“According to gossip in the corridors of the Justice Department, the White House hoped that the drama of a military trial would help to convince the public that we were really at war, and to end the civilian complacency that prevailed even in 1942, six months after the debacle at Pearl Harbor.”).

On July 2, less than a week after the men had been arrested, Roosevelt issued Proclamation 2561 (“Denying Certain Enemies Access to the Courts of the United States”) to create a military tribunal that would try the men.⁶⁷ In the preface, the order stipulated that the “safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage, or other hostile or warlike acts, should be promptly tried in accordance with the law of war.”⁶⁸ The last three words were crucial. If the “Articles of War” were cited, then the statutory framework specified by Congress for courts-martial would govern.⁶⁹ The “law of war,” however, was a more amorphous collection of international norms. In its lack of formal definition, it resembled a sort of a global military common law.

Roosevelt made clear that he was not asserting inherent authority as president in constructing this tribunal structure, claiming instead that he was acting pursuant to both constitutional and statutory (*i.e.*, congressional) mandates.⁷⁰ The order also forbade the men from seeking relief in any civil court. This legal assertion was backed up by a more bare-knuckled political warning, as Roosevelt personally warned Attorney General Francis Biddle that he would not “hand [the saboteurs] over to any United States marshal armed with a writ of habeas corpus. Understand?”⁷¹ Biddle got the message. A separate executive order, promulgated that same day, appointed seven high-ranking military officials to serve as the tribunal’s decision makers.⁷²

There were other significant departures from traditional courts-martial as well. Crucially, the order freed the tribunal from rigorous procedural constraints.⁷³ Although offenses against both the “law of war and the Articles of War” could be tried, the latter’s procedural safeguards did not necessarily govern.⁷⁴ Instead, the commission would “have power to and shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it.”⁷⁵ In other words, the tribunal could use the Articles of War procedures when convenient, and construct rules on the fly when preferable. The order also required only a two-thirds vote for sentencing (the Articles of War required unanimity) and vested “final reviewing authority” in Roosevelt himself.⁷⁶ In designing the forum, Roosevelt’s overriding concerns appeared to be expediency and executive control.

⁶⁷ 7 Fed. Reg. 5101 (1942).

⁶⁸ *Id.*

⁶⁹ Dobbs, *supra* note 1, at 203–04 (“Courts-martial were subject to the Articles of War, a military code dating back to 1775”).

⁷⁰ Dobbs, *supra* note 1, at 203–04.

⁷¹ Biddle, *supra* note 57, at 331; *see also* Lardner, *supra* note 23.

⁷² 7 Fed. Reg. 5103 (1942).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*; *see also* Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 65 (1980) (“The President also directed that, after the proceedings, the trial record should be transmitted to him for appropriate action, thus ensuring there would be no appeal except to the mercy of the Commander-in-Chief.”).

C. The Tribunal Proceeding

The trial itself took place in a lecture hall on the fifth floor of the Department of Justice building.⁷⁷ The windows were covered with black curtains, and the public and press were excluded.⁷⁸ On July 7, the day before the proceeding began, the tribunal adopted a perfunctory three-and-a-half page overview outlining the rules of procedure. The statement banned peremptory challenges, allowed only one challenge for cause, and reiterated Roosevelt's proviso that the Articles of War need not govern the tribunal's operation.⁷⁹ Pursuant to Roosevelt's July 2 military order, Attorney General Biddle and Judge Advocate General of the Army Myron Cramer were to serve as the prosecution, and Cassius Dowell and Kenneth Royall, both army colonels, were to serve as defense counsel.⁸⁰ On July 7, Colonel Carl Ristine was appointed to represent Dasch, leaving Dowell and Royall to defend the other seven.⁸¹

The commission was challenged before it could even swear itself in.⁸² Defense counsel Royall, quickly seizing the initiative, argued that the presidential order creating the tribunal was "invalid and unconstitutional."⁸³ Leaning heavily on the landmark precedent of *Ex parte Milligan* (1866), he argued that because the civil courts in the District of Columbia were currently in operation, the tribunal was an extralegal presidential creation.⁸⁴ As a secondary matter, he contested the tribunal's departure from the procedures outlined in the Articles of War. Biddle dismissively responded that he could not imagine that a tribunal "composed of high officers of the Army, under a commission signed by the Commander-in-Chief, would listen to argument on the question of its power under

⁷⁷ Rachlis, *supra* note 4, at 182–83; *see also* Lardner, *supra* note 23 ("On the fifth floor of Justice, reporters assigned to the trial would keep watch from the press room where they could speculate in print on the comings and goings of unnamed witnesses. They weren't allowed inside.").

⁷⁸ Rachlis, *supra* note 4, at 182–83, 185; *see also* Fisher, *supra* note 2, at 53.

⁷⁹ "Rules Established by the Military Commission Appointed by Order of the President of July 2, 1942," *quoted in* Fisher, *supra* note 2, at 54–55.

⁸⁰ Rachlis, *supra* note 4, at 176; Lardner, *supra* note 23.

⁸¹ David Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 67 (1996).

⁸² Dobbs, *supra* note 1, at 211 ("General McCoy had hardly begun to swear in the officers of the court when Royall rose to challenge the authority of the military commission.").

⁸³ Dobbs, *supra* note 1, at 211, 219. Royall "had the more effective courtroom manner," but "also had the weaker case."

⁸⁴ Jonathan Mahler, *THE CHALLENGE: HAMDAN V. RUMSFELD AND THE FIGHT OVER PRESIDENTIAL POWER* 72 (2010) ("Royall built his defense of the Nazi saboteurs on the back of *Milligan*"); *Ex parte Milligan*, 71 U.S. 2 (1866); *see also* Kermit L. Hall, *THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS*, 189–90 (2001). Because of the centrality of *Milligan* to the saboteur case, it is worth briefly recounting its factual background and holding. In late 1864, the Union Army arrested Lambdin P. Milligan and other vocal antiwar Democrats, charging them with conspiracy to raid federal arsenals and prisoner-of-war camps. Doubtful that an Indiana jury would be willing to convict, army officials elected to try the prisoners by military commission. Milligan challenged his capital sentence, and the Supreme Court unanimously held that the military court lacked jurisdiction and therefore the prisoners should be released. Despite the consensus regarding the result, the justices split as to the rationale. Justice David Davis wrote for the Court: "The Constitution is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." In other words, neither the executive nor the legislative branch could authorize trial by military tribunal when the civilian courts were open. Justice Salmon Chase, in a concurrence, disputed this last point, averring that Congress could institute trial by military tribunal regardless of the status of the civilian courts.

that authority to try these defendants.”⁸⁵ Such frank acknowledgement of *realpolitik* proved to be a recurring feature of Biddle’s advocacy.

Royall had intimated several times that he might test the constitutionality of the tribunal in civil court, and on July 21, he made good on his threat.⁸⁶ As counsel for the accused, Royall felt compelled to pursue all available avenues of relief for his clients.⁸⁷ He also wished to avoid incurring the wrath of the Roosevelt administration, however, and attempted to meet with the president to clear his proposed course of action.⁸⁸ Roosevelt refused to discuss the issue, but told an aide to instruct Royall to do what the lawyer thought proper.⁸⁹ Hearing nothing more from the president, and with the trial on its twelfth day, Royall decided to act.⁹⁰ That afternoon, he informed the tribunal that he had made preparations to secure a writ of habeas corpus to test the constitutionality and validity of the executive’s proclamation and order.⁹¹ Knowing that an issue of this magnitude would need to be resolved by the Supreme Court, Royall contacted the justices—who were recessed for summer—and asked them to convene in a special session.⁹² They agreed to do so, and scheduled oral arguments for July 29.⁹³

With the special session confirmed, Royall then filed a petition for a writ of habeas corpus for the seven men he represented before a district court.⁹⁴ This would provide a predicate needed by the higher court in order for it to adjudicate the case.⁹⁵ On the night of July 28, the federal district judge issued a brief ruling denying the request, holding that the defendants, as subjects of a nation at war with the United States, were “not privileged to seek any remedy or maintain any proceeding in the courts of the United States.”⁹⁶ Despite Royall’s urging, *Milligan* was held to be not “controlling in the circumstances of this petitioner.”⁹⁷ The next day, the Supreme Court heard oral arguments regarding the denial of the writ and the constitutionality of the tribunal.⁹⁸

⁸⁵ Mahler, *supra* note 84.

⁸⁶ Fisher, *supra* note 2, at 64–66.

⁸⁷ Fisher, *supra* note 2, at 64; Dobbs, *supra* note 1, at 207.

⁸⁸ Fisher, *supra* note 2, at 65.

⁸⁹ Danelski, *supra* note 81, at 68.

⁹⁰ Fisher, *supra* note 2, at 66.

⁹¹ Dobbs, *supra* note 1, at 235.

⁹² Dobbs, *supra* note 1, at 235–36.

⁹³ Danelski, *supra* note 81, at 68.

⁹⁴ Dobbs, *supra* note 1, at 237.

⁹⁵ Dobbs, *supra* note 1, at 237, 239–40. Unusually, the case was appealed directly to the Supreme Court from the district court; the D.C. Circuit was initially bypassed, and only appealed to once oral arguments before the Supreme Court were underway. *Id.*; see Jennifer Elsea & Louis Fisher, SUSPECTED TERRORISTS AND WHAT TO DO WITH THEM 122 (2006); see also Danelski, *supra* note 81, at 68. The attorneys relied on a fast-track option available for matters deemed imperative to the public interest. See Petition for Writ of Certiorari, *Ex parte Quirin 2* (citing then-Rule 39 as authorizing the expedited procedure). The rule still exists, but is codified elsewhere. See SUP. CT. R. 11 (“A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.”). For more on *Quirin*’s “procedural niceties” related to jurisdiction, see Fisher, *supra* note 2, at 108.

⁹⁶ *Ex parte Quirin*, 47 F. Supp. 431 (D.D.C. 1942).

⁹⁷ *Id.*

⁹⁸ Dobbs, *supra* note 1, at 238; Fisher, *supra* note 2, at 68.

III. THE SUPREME COURT INTERVENES

A. Battle of the Briefs

The Supreme Court received briefs on July 29, the same day as oral argument. As the compressed schedule left the justices with little time to prepare, Chief Justice Harlan Fiske Stone waived the then-existing rule limiting each side to one hour of oral argument.⁹⁹ Instead, both parties were given as much time as needed to discuss the issues.¹⁰⁰ The decision to hold the special session was not popular, with much of the public complaining that the process had already been delayed enough.¹⁰¹ The *New York Times* reported “all sides hope” that the Court “would make short work of the move.”¹⁰² The *Los Angeles Times* objected to the irregular summoning of the justices, calling it “totally un-called-for” to convene the special session.¹⁰³ The Court “should never have been dragged into this wartime military matter.”¹⁰⁴ Despite these rumblings of discontent, the proceedings went forward.

The defense submitted a 72-page brief attacking the military tribunal being utilized to try the saboteurs.¹⁰⁵ In a wide-ranging and occasionally repetitive writing, Royall and Dowell made three main arguments. First, they argued that the “law of war” was analogous to the common law, and no principle “is better settled than the principle that there is no common law crime against the United States government.”¹⁰⁶ Crimes must be specified by an act of Congress, and the executive was thus usurping the role of the legislature and infringing upon separation of powers.¹⁰⁷ In other words, the president lacked any inherent authority that would support the proclamation. Second, Royall and Dowell questioned the constitutionality of the presidential order in light of the Constitution’s Ex Post Facto Clause.¹⁰⁸ The clause expressly prohibits punishment for an act that was not outlawed at the time of its commission, and a corollary of this provision is that Congress cannot increase the penalty for a crime committed in the past.¹⁰⁹ Because Roosevelt’s proclamation was issued

⁹⁹ The Supreme Court’s time allowances for oral argument have changed. See SUP. CT. R. 28 (“Unless the Court directs otherwise, each side is allowed one-half hour for argument. Counsel is not required to use all the allotted time.”).

¹⁰⁰ Fisher, *supra* note 2, at 88.

¹⁰¹ Sunstein & Goldsmith, *supra* note 19, at 266 (2002) (“Congress and the public were outraged by the Court’s intervention.”).

¹⁰² Lewis Wood, *Supreme Court is Called in Unprecedented Session to Hear Plea of Nazi Spies*, N.Y. TIMES, July 28, 1942.

¹⁰³ *The Saboteurs Seek Civil Court Relief*, L.A. TIMES, July 29, 1942.

¹⁰⁴ *Id.*

¹⁰⁵ Fisher, *supra* note 2, at 89.

¹⁰⁶ Brief in Support of Petitions for Writ of Habeas Corpus at 28–29, *quoted in* Philip B. Kurland & Gerhard Casper, 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 293, 333–34 (1975).

¹⁰⁷ *Id.* at 334, 343.

¹⁰⁸ *Id.* at 343–44.

¹⁰⁹ See U.S. CONST. art. 1, § 9, cl. 2 (“No Bill of Attainder or ex post facto Law shall be passed.”); *see also, e.g., Calder v. Bull*, 3 U.S. 386, 390 (1798) (“I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.”).

after the saboteurs' acts had been committed, it was, "therefore, ex post facto as to them."¹¹⁰ If the Constitution proscribed Congress from applying ex post facto penalties, they reasoned, how could it permit the executive to do so? Third, the brief argued that the prohibition on judicial review was unconstitutional.¹¹¹ Roosevelt's order had allowed for judicial review only if jointly authorized by the attorney general and the secretary of war.¹¹² This "unusual feature" of the proclamation essentially permitted executive officers to waive a constitutional right, Royall and Dowell protested.¹¹³

The prosecution, in a mammoth 93-page brief of its own, offered a strikingly different perspective.¹¹⁴ Biddle and Cramer denied at the outset that the saboteurs had any right to access an American court of law. "The great bulwarks of our civil liberties—and the writ of habeas corpus is one of the most important—was never intended to apply in favor of armed invaders sent here by the enemy in time of war."¹¹⁵ Next, the prosecutors carefully distinguished *Milligan* from the current situation, finding that by "no stretch of interpretation" could the Civil War-era ruling apply to the seven defendants.¹¹⁶ In the 1860s, defendant Milligan was not an armed subject of a belligerent nation, and he did not enter into a theater of operations.¹¹⁷ In the present case, however, the defendants arrived on American soil wearing the uniforms of a hostile power, and "as agents of the German Government crossed our lines secretly in enemy warships for the purpose of committing hostile acts."¹¹⁸

Interestingly, the prosecutors offered an argument later used by advocates of tribunals for suspected terrorists: The nature of war had changed, and the law must adapt to the necessities of the modern battlefield. Whereas invasions at time of *Milligan* "gave their slow fore-warning months in advance," war had become swifter and civilian and military lines were blurred.¹¹⁹ "Wars today are fought on the total front on the battlefields of joined armies, on the battlefields of production, and on the battlefields of transportation and morale, by bombing, the sinking of ships, sabotage, spying, and propaganda."¹²⁰ In order to comply with his constitutional oath, the president has "the clear duty to meet force with force and to exercise his military authority to provide a speedy, certain and adequate answer, long prescribed by the law of war, to this attack on the safety of the United States by invading belligerent enemies."¹²¹ The prosecution also defended the departure from the Articles of

¹¹⁰ Brief in Support of Petitions for Writ of Habeas Corpus at 38, *quoted in* Kurland & Casper, *supra* note 106, at 343.

¹¹¹ Kurland & Casper, *supra* note 106, at 344–45.

¹¹² Kurland & Casper, *supra* note 106, at 344–45.

¹¹³ Kurland & Casper, *supra* note 106, at 344.

¹¹⁴ Fisher, *supra* note 2, at 91.

¹¹⁵ Brief for the Respondent at 8, *quoted in* Kurland & Casper, *supra* note 106, at 409. The "bulwark" language was almost certainly borrowed from William Blackstone. *See* BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 438 (praising habeas corpus as "the BULWARK of the British Constitution"); *see also* THE FEDERALIST No. 84 (Alexander Hamilton) ("[Blackstone] is everywhere peculiarly emphatical in his encomiums on the habeas corpus act, which in one place he calls 'the BULWARK of the British Constitution.'").

¹¹⁶ Brief for the Respondent at 10, *quoted in* Kurland & Casper, *supra* note 106, at 411.

¹¹⁷ Kurland & Casper, *supra* note 106; *see also* *Ex parte Milligan*, 71 U.S. 2 (1866).

¹¹⁸ Brief for the Respondent at 10, *quoted in* Kurland & Casper, *supra* note 106, at 411.

¹¹⁹ Kurland & Casper, *supra* note 106, at 411.

¹²⁰ Kurland & Casper, *supra* note 106, at 411. Interestingly, the prosecution's statement—that modern warfare had taken on an unprecedented rapidity and totality—could readily describe the Civil War as well.

¹²¹ Kurland & Casper, *supra* note 106, at 411.

War, arguing that belligerents were not entitled to the same rights as members of the United States military.¹²² Some of these privileges “should not be granted to belligerent enemies who, in time of war, enter this country in order to destroy it by acts of war.”¹²³

Biddle and Cramer reached back into medieval legal history in order to support their claim that habeas requirements were inapplicable in this case. Quoting from *Halsbury’s Laws of England*, they argued that the writ of habeas corpus was designed to secure “the liberty of the subject,” and that it functioned as a mechanism by which the king could question the causes proffered for the detention of any of his subjects.¹²⁴ Considering its provenance, then, it was almost obvious that the writ would not apply to citizens of a country “with which we are at war, or who are subject to its orders.”¹²⁵ While conceding that this once categorical legal standard had been relaxed somewhat in modern times, there was nonetheless no compulsion to apply the writ to a non-subject enemy who unlawfully entered the United States with hostile intent.¹²⁶ Lastly, the prosecution argued that the president had plenary authority over the means of trying the invaders. “The President’s power over enemies who enter this country in time of war, as armed invaders intending to commit hostile acts, must be absolute,” they argued.¹²⁷

B. Oral Argument Regarding the Tribunals and Milligan

The Supreme Court commenced argument at noon on July 29.¹²⁸ On the first day, only seven of the justices were present, as Justice Frank Murphy recused himself on the grounds that his status as a reserve officer disqualified him from sitting in the case.¹²⁹ Traveling to the nation’s capital from his home in Oregon, Justice William Douglas missed the first day’s arguments, but was present by the second day.¹³⁰ Like the briefs, oral argument was complex and scattershot—understandably, given the compressed schedule and the loosened time constraints—but the key issues of the propriety of the tribunal and the import of *Milligan* were highlighted.

The first major issue addressed was the most fundamental: Was the tribunal, as constructed by Roosevelt, constitutional? Chief Justice Stone asked Royall if “the President, either with or without the authority of Congress, may declare martial law and enforce martial law?”¹³¹ Royall

¹²² Kurland & Casper, *supra* note 106, at 411.

¹²³ Kurland & Casper, *supra* note 106, at 411.

¹²⁴ Brief for the Respondent at 14, *quoted in* Kurland & Casper, *supra* note 106, at 415.

¹²⁵ Kurland & Casper, *supra* note 106, at 416. This history informed the Court’s reasoning in *Boumediene*, with Justice Antonin Scalia adopting a similar view to the *Quirin* prosecutors.

¹²⁶ Kurland & Casper, *supra* note 106, at 416–17.

¹²⁷ Kurland & Casper, *supra* note 106, at 423. The Court declined to endorse this expansive view in its full opinion.

¹²⁸ Wood, *Supreme Court Is Called in Unprecedented Session to Hear Plea of Nazi Spies*, *supra* note 102.

¹²⁹ See Rachlis, *supra* note 4, at 253 (noting that despite Murphy’s recusal, “this did not prevent him . . . from placing a chair behind the heavy red curtains and eavesdropping on the entire proceedings”); see Danelski, *supra* note 81, at 69. Murphy recused himself at the behest of Frankfurter, which was a bit hypocritical, as Danelski notes: “Apparently it did not occur to Frankfurter that he himself had reason for disqualification, for exactly a month earlier he had advised Stimson that the petitioners should be tried by a military commission comprised entirely of military officers.”

¹³⁰ Fisher, *supra* note 2, at 95; Dobbs, *supra* note 1, at 238; Danelski, *supra* note 81, at 69.

¹³¹ Kurland & Casper, *supra* note 106, at 513.

conceded the president's authority on that point, and stated that where martial law was "properly and constitutionally declared" military courts would rightly adjudicate cases.¹³² Stone thought that Roosevelt's proclamation might have declared martial law because it referred to the sabotage mission as "an invasion or predatory incursion."¹³³ Royall disagreed, stating that martial law "ordinarily is a territorial matter" and not "dependent upon the character or conduct of the individual."¹³⁴ Pressed, Royall admitted that the United States military could have shot the saboteurs as they landed, "because they were apparently invading our country," but finessed this point by arguing that once they were apprehended, they were entitled to civil due process protections.¹³⁵ Justice Robert Jackson seized upon that comment and threw counsel a lifeline, observing, "That is like the case of a criminal whom you might shoot at in order to stop the commission of a crime; but when he has committed it, he has a right to trial."¹³⁶ Royall found the analogy apropos and pivoted to state the central propositions of the defense:

First, the petitioners, including the aliens, are entitled to maintain this present proceeding. Second, the President's Proclamation, which assumes to deny the right of the petitioners to maintain this proceeding, is unconstitutional and invalid. Third, the President's Order, which assumes to appoint the alleged Military Commission, is unconstitutional and invalid. Fourth, the President's Order, relating to the alleged Military Commission, is contrary to statute and, therefore, illegal and invalid. Fifth, the petitioners are entitled to be tried by the civil courts for any offenses which they may have committed.¹³⁷

Justice James Byrnes posed a hypothetical: If instead of the eight saboteurs, Hitler and seven of his generals landed on the banks of the Potomac on a sabotage mission, would they be "entitled to every right you have discussed in the application for a writ of habeas corpus" and would it be necessary to convene a grand jury to indict them?¹³⁸ Royall answered in the affirmative.¹³⁹ Justice Stanley Reed then asked if that meant that the civil courts must try every captured spy.¹⁴⁰ Royall demurred, recalling "there is a specific statute which deals with spies," adding that he thought the statute valid.¹⁴¹ Justice Felix Frankfurter clarified matters by noting: "What you are saying is that that which Congress can take out of the constitutional provisions by statute, the President as Commander-in-

¹³² Kurland & Casper, *supra* note 106, at 513.

¹³³ Kurland & Casper, *supra* note 106, at 513–14.

¹³⁴ Kurland & Casper, *supra* note 106, at 514.

¹³⁵ Kurland & Casper, *supra* note 106, at 515–16.

¹³⁶ Kurland & Casper, *supra* note 106, at 516.

¹³⁷ Kurland & Casper, *supra* note 106, at 516.

¹³⁸ Kurland & Casper, *supra* note 106, at 520.

¹³⁹ Kurland & Casper, *supra* note 106, at 520.

¹⁴⁰ Kurland & Casper, *supra* note 106, at 521.

¹⁴¹ Kurland & Casper, *supra* note 106, at 521.

Chief cannot take out of civil statute by military proclamation?”¹⁴² Royall, perhaps grateful for this articulation, signaled his agreement.¹⁴³

The second significant issue raised in oral arguments was the applicability of the *Milligan* precedent. Royall, unsurprisingly, claimed that both opinions in that case “fully sustain our view.”¹⁴⁴ While accepting that the holding could be limited to American citizens, he nonetheless maintained that his clients were entitled to trial before a criminal court.¹⁴⁵ Biddle later replied that alien enemies had no such privilege “under these circumstances, both because of the President’s proclamation and because of the statutes governing the case,” but also because of “the very ancient and accepted common law rule that such enemies have no rights in the courts of the sovereign with which they are enemies.”¹⁴⁶ Biddle further argued that nothing in *Milligan* affected the saboteurs except “a certain dictum . . . which seemed to me profoundly wrong.”¹⁴⁷ He contextualized the case, recalling that President Abraham Lincoln had violated an 1863 congressional statute that required him to notify courts of persons detained without the writ of habeas corpus, and suggested that the decision really turned on that more limited ground.¹⁴⁸ Thus, the issue in *Milligan* was the failure to follow a statutory command.¹⁴⁹ The case assuredly did not mandate a general right to a jury trial when civil courts were in operation, Biddle argued.¹⁵⁰

C. The Court’s Opinion and the Tribunal Precedent

Given the presidential push for expediency, the Court was forced to quickly dispose of the case. At noon on July 31, the Court released its per curiam decision in a special session lasting only four minutes, noting it was acting “in advance of the preparation of a full opinion which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the Clerk.”¹⁵¹ In its brief per curiam, the Court upheld the legality of the military commission, determined that the defendants were lawfully held, and denied the petition to release the men by writ of habeas corpus.¹⁵² Whatever the legal reasoning of the eventual full opinion, the per curiam decision meant that the fate of the saboteurs was all but sealed.¹⁵³

¹⁴² Kurland & Casper, *supra* note 106, at 522.

¹⁴³ Kurland & Casper, *supra* note 106, at 522.

¹⁴⁴ Kurland & Casper, *supra* note 106, at 564.

¹⁴⁵ Kurland & Casper, *supra* note 106, at 564–65.

¹⁴⁶ Kurland & Casper, *supra* note 106, at 565.

¹⁴⁷ Kurland & Casper, *supra* note 106, at 571.

¹⁴⁸ Kurland & Casper, *supra* note 106, at 575.

¹⁴⁹ Kurland & Casper, *supra* note 106, at 575. It is worth noting that *Milligan* had been criticized as overbroad, although it was never overruled. *See also* Dobbs, *supra* note 1, at 234.

¹⁵⁰ Kurland & Casper, *supra* note 131, at 616.

¹⁵¹ *Quirin*, 64 S.Ct. at 1–2 (noting that the Court’s per curiam is also reproduced in a footnote in *Ex parte Quirin*, 317 U.S. 1, 18–19 (1942)); *see also* Lewis Wood, *Ruling Unanimous*, N.Y. TIMES, Aug. 1, 1942 (“Roosevelt’s power to order trial of the eight Nazi saboteurs before the military commission instead of in the civil courts was unanimously sustained by the Supreme Court today in a session lasting only four minutes.”).

¹⁵² *Quirin*, 64 S.Ct. at 1–2.

¹⁵³ *See* Lardner, *supra* note 23. After the commission reached its decision, it sent the verdict, along with 3,000 pages of trial transcript, on a military plane to Roosevelt in Hyde Park, New York.

On August 3, the tribunal—legitimated by the Supreme Court’s ruling—found all eight men guilty and sentenced them to death. After reviewing the trial record, Roosevelt spared two saboteurs from electrocution: Dasch, whose confession unraveled the whole plot, was sentenced to thirty years, and a second member of his group was sentenced to life.¹⁵⁴ Roosevelt hoped that this show of clemency would encourage any subsequent saboteurs to surrender in exchange for leniency.¹⁵⁵ Fourteen other people had been arrested for providing assistance to the saboteurs, and they would ultimately be tried in civil court.¹⁵⁶ On the morning of August 8, the six saboteurs were executed.¹⁵⁷

Despite that finality—or more likely, because of it—the Supreme Court found writing the full opinion to be a daunting task.¹⁵⁸ Recalling the period years later in his memoirs, Douglas said it was “unfortunate the court took the case.”¹⁵⁹ Although it was “easy to agree on the original per curiam, we almost fell apart when it came time to write out the views.”¹⁶⁰ Hoping to break the standoff, Justice Felix Frankfurter wrote a remarkable memo entitled “F.F.’s soliloquy” attacking the saboteurs as “damned scoundrels” and encouraging his brethren to stay united.¹⁶¹ The memo featured an imaginary—and somewhat bizarre—scene in which an exasperated Frankfurter addressed the saboteur defendants with equal parts legalese and invective: “You’ve done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress,” the Roosevelt confidant wrote.¹⁶² “[T]he ground on which you stand—namely the proper construction of these Articles of War—exists only in your foolish fancy.”¹⁶³ Soon, Frankfurter seethed, “your bodies will be rotting in lime.”¹⁶⁴

Perhaps in part due to Frankfurter’s impassioned prodding, the Court managed to cobble together a modicum of consensus by October 29.¹⁶⁵ The opinion made clear at the outset that it was not addressing “any question of guilt or innocence” of the petitioners—a fortunate avoidance, given

¹⁵⁴ *Six German Spies Put to Death in District Chair*, WASH. POST, Aug. 9, 1942.

¹⁵⁵ *2 Surviving Nazis Remain in Capitol*, N.Y. TIMES, Aug. 10, 1942, at 3.

¹⁵⁶ *14 Are Arrested as Accomplices of German Saboteurs*, THE EVENING INDEP., July 13, 1942; Dobbs, *supra* note 1, at 267.

¹⁵⁷ *14 Are Arrested as Accomplices of German Saboteurs*, *supra* note 156.

¹⁵⁸ See also Belknap, *supra* note 76, at 65 (“Stone’s purpose was not to elucidate the law, but rather to justify as best he could a dubious decision”). Stone later called the more than six weeks he spent writing the opinion “a mortification of the flesh.” Letter from Harlan Fiske Stone to Roger Nelson (Sept. 20, 1942) (on file in Box 22 of the Harlan Fisk Stone Papers, Manuscript Div., Library of Congress), quoted in Andrew Kent, *Judicial Review for Enemy Fighters: The Court’s Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 156 (2013).

¹⁵⁹ William Douglas, THE COURT YEARS: 1939–1975 (1981), at 138–39.

¹⁶⁰ *Id.* Douglas regretted how the opinion-writing process unfolded throughout his career, calling it “extremely undesirable” to announce a decision without having written the opinion “because once the search for grounds . . . is made, sometimes those grounds crumble.” See also Dobbs, *supra* note 1, at 269.

¹⁶¹ G. Edward White, *Felix Frankfurter’s ‘Soliloquy’ in Ex parte Quirin*, 5 GREEN BAG 2d 423, 433–35, 438 (2002).

¹⁶² *Id.* at 434; see also, generally, Bruce Allen Murphy, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982) (chronicling the close connection between Frankfurter and the Roosevelt White House).

¹⁶³ White, *supra* note 161, at 440. Frankfurter came to regret the decision, calling it “not a happy precedent” by the next decade. See also Memorandum Re: *Rosenberg v. United States*, Nos. 111 and 687, October Term 1952, June 4, 1953, at 8, Frankfurter Papers, Harvard Law School, Part I, Reel 70, LC, quoted in Danelski, *supra* note 81, at 80.

¹⁶⁴ White, *supra* note 161, at 435.

¹⁶⁵ Lardner, *supra* note 23 (“In the end, thanks largely to Frankfurter’s pleas, the court came out with a unanimous opinion that papered over the division”).

that six of the petitioners had already been electrocuted.¹⁶⁶ The opinion started with constitutional basics, noting that all three branches of government only possess that power bestowed upon them by the Constitution.¹⁶⁷ In issuing his military order, Roosevelt was properly exercising authority “conferred upon him by Congress” as well as that granted by the Constitution.¹⁶⁸ The Court declined to consider whether the president, relying on his own constitutional interpretation, could contravene congressional statutes. “It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.”¹⁶⁹ Thus, the justices declined to adopt the most expansive position advocated by Biddle. Then, in the crux of the opinion—and the portion relied upon by Bush administration lawyers sixty years later—the Court drew a distinction between lawful and unlawful combatants. Due to its importance, the portion will be extracted at length:

[T]he law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are *lawful and unlawful combatants*. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. *Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.* The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.¹⁷⁰

In holding that *Milligan* was not controlling, the Court carefully distinguished that decision from the present case.¹⁷¹ Defendant Milligan, as an American citizen of longstanding residence in Indiana, was neither a lawful belligerent nor an unlawful one—he was simply *not a belligerent*, and therefore “not subject to the law of war.”¹⁷² Finally, the Court declined to clarify with “meticulous

¹⁶⁶ *Quirin*, 317 U.S. at 25.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 36 (emphases added).

¹⁷¹ Lardner, *supra* note 23 (noting the Court “cut back sharply on the sweep of *Milligan*, saying that even though the civil courts were open and even though one of the German soldiers (Haupt) was a U.S. citizen, the defendants could nonetheless be properly tried and sentenced to death by a military tribunal”).

¹⁷² *Quirin*, 317 U.S. at 48.

care” the ultimate reach of the tribunals.¹⁷³ Regardless of the precise parameters, it was clear that the saboteurs were “plainly within these boundaries.”¹⁷⁴

D. Popular Reaction to the Court’s Decision

The Supreme Court’s judgment was greeted with near universal acclaim in the United States.¹⁷⁵ Indeed, when the capture of the saboteurs was first publicized, most of the popular press and wider public called for rapid punishment. “Demands immediately arose among members of Congress for swift justice to the saboteurs—for the death penalty if the law permits it,” reported the *Washington Post*.¹⁷⁶ Opinion polls revealed that Americans favored execution by a ten-to-one margin.¹⁷⁷ “Nothing less than the death penalty will satisfy patriotic Americans,” declared *LIFE* magazine, which featured a photo of a group of armed Pennsylvanians volunteering to serve as a firing squad.¹⁷⁸ Roosevelt’s subsequent order mandating trial by military tribunal was “met with general satisfaction in Washington,” and “calmed the fears of many who realized the delays and technicalities incident to civil trials,” reported the *New York Times*.¹⁷⁹ Support for the process persisted through the course of the legal proceedings. Speaking of the initial per curiam opinion issued by the Court, a satisfied *New York Times* editorialized that “the country drew a long breath of relief yesterday at the Supreme Court’s unanimous decision.”¹⁸⁰ Approving of the secretive measures taken to preserve the confidentiality of the tribunal’s work, *The Nation* sympathetically noted that a public trial would be “obviously rich in information that can be of value to the enemy, particularly to other saboteurs still on the loose.”¹⁸¹

Public opinion only shifted when the Supreme Court became involved (as was briefly noted in a previous section), and Americans became concerned that a final resolution would be delayed. When the justices announced that they would convene in special session to rule on the legality of the commission, the defense counsel’s appeal to the civil courts “did not meet popular approval in Washington,” reported the *New York Times*.¹⁸² “On the contrary, there is great dissatisfaction here with the length to which the [military trial] had already proceeded.”¹⁸³ More colorfully, the *Detroit Free Press* pronounced, “Realism calls for a stone wall and a firing squad, and not a lot of holier-than-thou eyewash about extending the protection of civil rights to a group that came among us to

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Sunstein & Goldsmith, *supra* note 19, at 261 (2002) (“Roosevelt’s creation of the Commission, and the subsequent secret trial of the Nazi saboteurs, received widespread praise.”).

¹⁷⁶ Felix Cotton, *Death Penalty Asked for Eight Captured Spies*, WASH. POST, June 29, 1942.

¹⁷⁷ *Week in Review*, N.Y. TIMES, Aug. 2, 1942.

¹⁷⁸ *The Eight Nazi Saboteurs Should Be Put to Death*, LIFE MAG., July 13, 1942, at 32–33.

¹⁷⁹ Lewis Wood, *Army Court to Try 8 Nazi Saboteurs*, N.Y. TIMES, July 3, 1942.

¹⁸⁰ Editorial, *Motions Denied*, N.Y. TIMES, Aug. 1, 1942.

¹⁸¹ *The Shape of Things*, THE NATION, July 18, 1942. The public seemed to share this view. See Dobbs, *supra* note 1, at 218 (explaining that 69 percent of respondents said the tribunal proceedings “should be kept secret,” while only 27 percent felt that reporters should be permitted to attend).

¹⁸² Wood, *Supreme Court Is Called in Unprecedented Session to Hear Plea of Nazi Spies*, *supra* note 102.

¹⁸³ *Id.*

blast, burn, and kill.”¹⁸⁴ This mainstream endorsement of rapid retribution is striking to the modern reader. Jack Goldsmith, the former head of Bush’s Office of Legal Counsel, cites this popular faith in the government—and support for harsh measures against the Nazi saboteurs—as evidence of a “lost legal culture.”¹⁸⁵

Given this background, then, it is hardly surprising that the Supreme Court’s decision received a warm reception. Indeed, it is difficult to know what other conclusion the Court could have reached given the societal consensus. “Americans can have the satisfaction of knowing that even in a time of great national peril we did not stoop to the practices of our enemies,” applauded the *Washington Post*.¹⁸⁶ The *New York Times* was similarly patriotic and self-congratulatory in defending the Supreme Court’s interlude. “We had to try them because a fair trial for any person accused of crime, however apparent his guilt, is one of things we defend in this war,” wrote the paper.¹⁸⁷ The *New Republic* was even more effusive. “It is good to know that even in wartime and even toward the enemy we do not abandon our basic protection of individual rights,” gushed the magazine.¹⁸⁸ The *Quirin* decision told the world that Americans “have invoked the rule of law even in the case of enemy saboteurs.”¹⁸⁹

Though largely drowned out by this groundswell of support, there was a susurrus of dissent. There was no need for summary execution, and there was “similarly no need to make a farce out of justice, when everyone knew at the very start of the trial what the outcome would be,” wrote Norman Cousins in the *Saturday Review of Literature*.¹⁹⁰ “If the saboteurs actually had a chance, it would be different, but they didn’t; we knew it, and they knew it.”¹⁹¹ The legal scholar Edward Corwin voiced similar misgivings in a book published five years later, in which he described the Court’s *Quirin* opinion as “little more than a ceremonious detour to a predetermined end.”¹⁹² A former law clerk to Justice Hugo Black was even more scathing, later writing that the Court had simply “allowed itself to be stampeded,” and “if the judges are to run a court of law and not a butcher shop, the reasons for killing a man should be expressed before he is dead.”¹⁹³ These views were hardly representative, however, and the harshest criticisms emerged long after the decision was rendered. At the time, the vast majority of Americans considered the Court’s decision not just correct, but ennobling.

¹⁸⁴ Quoted in Jack Goldsmith, *THE TERROR PRESIDENCY*, 51–52 (2007).

¹⁸⁵ *Id.* at 49.

¹⁸⁶ *Justice Is Done*, WASH. POST, Aug. 9, 1942, at 6.

¹⁸⁷ *Motions Denied*, N.Y. TIMES, Aug. 9, 1942, at 8.

¹⁸⁸ *The Saboteurs and the Court*, THE NEW REPUBLIC, Aug. 10, 1942, at 159.

¹⁸⁹ *Id.*

¹⁹⁰ *The Saboteurs*, SATURDAY REV. OF LITERATURE, Aug. 8, 1942, at 8.

¹⁹¹ *Id.*

¹⁹² Edward S. Corwin, *TOTAL WAR AND THE CONSTITUTION* 118 (1947).

¹⁹³ John P. Frank, *MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE* 250 (1958).

IV. *QUIRIN* RECONSIDERED IN THE AGE OF TERROR

At the dawn of the twenty-first century, the *Quirin* decision seemed destined to remain in relative oblivion, a legal relic that was the consummate product of its time. After the attacks of September 11, 2001, however, the United States was a country shaken and transformed.¹⁹⁴ White House officials grasped desperately for precedents in what was, in some ways, an unprecedented situation. This section begins by examining President George W. Bush's military order authorizing military tribunals, its subsequent revisions, and its similarities to the order issued by Roosevelt. Second, the *Hamdi* case is examined, and portions of the opinion addressing and construing *Quirin* are analyzed.¹⁹⁵ Third, the landmark *Hamdan* decision is similarly parsed, with the saboteur case again receiving attention.¹⁹⁶ Fourth, the controversial *Boumediene* decision is evaluated.¹⁹⁷ Although the last case does not feature a particularly novel debate on the contemporary meaning of *Quirin*, it is the most recent significant decision on the Guantanamo issue and starkly demonstrates how fraught the tribunal issue has become.

A. *President Bush's Military Order*

Within months of the attacks, the Bush administration had decided to try those who aided and abetted the 9/11 strike by military commission. The Bush order issued on November 13, 2001, closely resembled the one promulgated by Roosevelt in 1942.¹⁹⁸ Like its predecessor, the Bush proclamation required only two-thirds of the commission to agree in order to secure conviction.¹⁹⁹ Similarly, evidence could be admitted that would have "probative value to a reasonable person," a standard borrowed from Roosevelt's order.²⁰⁰ Both presidents nonetheless instructed the tribunal to conduct a "full and fair trial," and each prohibited judicial review (although Bush did not allow the attorney general and secretary of war to jointly override this restriction, as Roosevelt did).²⁰¹

The government's reliance on the *Quirin* precedent extended beyond the order itself. Besides the quoted legal language above, Vice President Dick Cheney emphasized the connection of the two events when he approvingly recalled that the German saboteurs had been "executed in relatively rapid order."²⁰² The Bush administration was not the first to invoke the example of the saboteurs when confronted by terrorism. In the George H.W. Bush administration, Attorney General William

¹⁹⁴ Thomas H. Kean, et. al., THE 9/11 COMMISSION REPORT, EXECUTIVE SUMMARY, http://www.9-11commission.gov/report/911Report_Exec.htm ("At 8:46 on the morning of September 11, 2001, the United States became a nation transformed.")

¹⁹⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁹⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁹⁷ *Boumediene v. Bush*, 553 U.S. 723 (2008).

¹⁹⁸ Exec. Order No. 57833, *supra* note 22; see also Michael Stokes Paulsen & Luke Paulsen, THE CONSTITUTION 313 (2015).

¹⁹⁹ Exec. Order No. 57833, *supra* note 22.

²⁰⁰ Exec. Order No. 57833, *supra* note 22.

²⁰¹ Exec. Order No. 57833, *supra* note 22. The Bush order also excluded United States citizens, seemingly deferring to *Milligan's* command that citizens be tried in civil courts when they are open and in operation.

²⁰² *Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, N.Y. TIMES, Nov. 15, 2001.

Barr proposed trying the terrorists responsible for exploding a Pan Am jet over Lockerbie, Scotland by military tribunal, noting that the case of the Nazi saboteurs furnished the “most apt precedent.”²⁰³

The Bush administration favored tribunals after September 11 for many of the same reasons that Roosevelt had in the wake of Pearl Harbor: There was a sense that unlawful combatants were not deserving of the same constitutional rights and privileges as citizens. “Foreign terrorists who commit war crimes against the United States, in my judgment, are not entitled to and do not deserve the protection of the American Constitution,” argued Attorney General John Ashcroft (echoing Biddle’s language), “particularly when there could be very serious and important reasons related to not bringing them back to the United States for justice.”²⁰⁴ A secondary concern was a fear that a trial of a high profile terrorist would devolve into a farcical, media-driven spectacle. Stewart Baker, a former general counsel to the National Security Agency, said at the time, “I don’t think anyone wants to see Osama bin Laden brought before a court here to be defended by Johnnie Cochran.”²⁰⁵

Although it was the initial administration statement on the tribunals, Bush’s military order was subsequently revised. On March 21, 2002, the Department of Defense issued Military Commission Order No. 1.²⁰⁶ In a news conference held the day of its unveiling, Pentagon General Counsel William Haynes II expressly cited the *Quirin* decision for legal backing.²⁰⁷ In 1942, he noted, the Supreme Court had “found that the president’s order in that case was constitutional and properly applied.”²⁰⁸ The Pentagon’s order retained many of the core features of Bush’s November proclamation, although there were some adaptations. Most notable was the decision to require a unanimous vote of seven commissioned military members on the tribunal in order to administer the death penalty.²⁰⁹ This was a departure from the policy of Roosevelt (and Bush, originally), requiring only a two-thirds majority.²¹⁰

B. Hamdi Reaches the Supreme Court

Unlike the rapidity with which the Nazi saboteur case reached the Supreme Court, the Bush administration’s war policies were not evaluated by the nation’s highest judicial body until 2004.²¹¹ *Hamdi v. Rumsfeld* stemmed from a petition by Yaser Esam Hamdi, a Louisiana native captured in a prison rebellion in Afghanistan, subsequently imprisoned at Guantanamo Bay, and ultimately transferred to a naval brig in Charleston, South Carolina. On June 28, 2004, eight justices rejected

²⁰³ William P. Barr & Andrew G. McBride, Opinion, *Military Justice for al Qaeda*, WASH. POST, Nov. 18, 2001.

²⁰⁴ *White House Push on Security Steps Bypasses Congress*, N.Y. TIMES, Nov. 15, 2001.

²⁰⁵ *Assurances Offered About Military Courts*, N.Y. TIMES, Nov. 26, 2001.

²⁰⁶ Military Commission Order No. 1 (March 21, 2002).

²⁰⁷ Louis Fisher, *Military Tribunals: The Quirin Precedent*, CRS Report for Congress, Mar. 26, 2002, at 2.

²⁰⁸ *Id.*

²⁰⁹ Military Commission Order No. 1, *supra* note 206.

²¹⁰ Fisher, CRS Report for Congress, *supra* note 207.

²¹¹ See generally *Hamdi*, 542 U.S. at 507. Another War on Terror case, *Rasul v. Bush*, was argued eight days before *Hamdi* and both opinions were issued on June 28, 2004. *Rasul* only references *Quirin*, once, however, so it is not included in this section’s analysis. See *Rasul v. Bush*, 542 U.S. 466, 474–75 (U.S. 2004) (“The Court has, for example, entertained the habeas petitions of . . . admitted enemy aliens convicted of war crimes during a declared war and held in the United States”).

the government's assertion that the executive branch had the unimpeachable right to hold Hamdi free from judicial review. Although only Justice Clarence Thomas departed from this holding, the other eight justices could not agree on the reasoning. Writing for a plurality, Justice Sandra Day O'Connor noted:

We necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. . . . We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflicts, it most assuredly envisions a role of all three branches when individual liberties are at stake.²¹²

The plurality further held that an enemy combatant "must receive notice of the factual basis for the classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker."²¹³

The Court's various writings all acknowledged the *Quirin* decision. The plurality described it thusly: "It both postdates and clarifies *Milligan*, providing us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances."²¹⁴ Justice O'Connor noted that one of the saboteurs, Herbert Haupt, had contended that he was an American citizen and thus could not be classified as an "enemy combatant."²¹⁵ The *Quirin* court disagreed, holding that "citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war."²¹⁶ O'Connor found nothing in the saboteur decision indicating that citizenship, if proved, would have spared Haupt from military justice.

Justices Antonin Scalia and John Paul Stevens, in their concurrence and dissent, sardonically described *Quirin* as "not this Court's finest hour."²¹⁷ They noted that only three paragraphs of the decision dealt with the particular circumstances of Haupt's citizenship argument, so the present Court's reliance on such dicta was misplaced. Their opinion doubted whether the saboteur decision properly interpreted *Milligan*, but even if it did, "*Quirin* would still not justify denial of the writ here," because whereas the saboteurs were "admitted enemy invaders," petitioner Hamdi "insists that he is not a belligerent."²¹⁸ In light of subsequent writings—most conspicuously, the jarring dissent in *Boumediene*—Scalia's position here may be surprising. The key to understanding his philosophy

²¹² *Hamdi*, 542 U.S. at 535–36.

²¹³ *Id.* at 533.

²¹⁴ *Id.* at 523.

²¹⁵ *Id.*

²¹⁶ *Id.* at 519.

²¹⁷ 542 U.S. at 561 (Scalia, J., concurring & dissenting)

²¹⁸ *Hamdi*, 542 U.S. at 571.

on the combatant issue is to recognize the centrality of citizenship in his analysis.²¹⁹ For Scalia, citizens cannot be classified as enemy combatants and tried by military tribunals unless Congress has suspended the writ of habeas corpus.²²⁰

C. Hamdan and the Expansion of Detainee Rights

The next major detainee case to be heard by the Supreme Court was *Hamdan v. Rumsfeld*, in which the military commissions operating at Guantanamo Bay were found to violate both the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions.²²¹ The case centered on Salim Hamdan, a Yemeni chauffeur for Osama bin Laden who was captured by Afghani militia and transferred to Guantanamo Bay.²²² In July 2004, he was charged with conspiracy to commit terrorist acts and was slated for trial under a military commission pursuant to Military Commission Order No. 1 (the revised order issued on March 21, 2002 and discussed above).²²³ In the wake of *Hamdi*, the government had instituted Combatant Status Review Tribunals tasked with judging whether individuals were correctly labeled enemy combatants.²²⁴ Hamdan challenged his designation in that forum, and after his designation was upheld, sought relief in the civil courts. Eventually, his petition reached the Supreme Court.²²⁵

The Court's opinion, written by Justice Stevens, first considered the issue of jurisdiction. The government asserted that the Detainee Treatment Act of 2005 and prior precedent, *Schlesinger v. Councilman* (1975), precluded the Court from considering Hamdan's petition.²²⁶ The Court distinguished *Councilman* as applying only to members of the United States military facing court-martial, and instead, cited *Quirin* for the proposition that the Court was entitled to consider the constitutionality of military tribunals. The Court refused to decide whether laws barring all habeas corpus petitions would be constitutional, noting that the Detainee Treatment Act did not assert this authority.

The *Quirin* decision received extensive consideration by Stevens, largely because of its centrality to the government's argument. Given the circumstances, Stevens found the invocation of *Quirin* "both appropriate and unsurprising. Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available."²²⁷ The

²¹⁹ Jerome A. Barron, *Citizenship Matters: The Enemy Combatant Cases*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 33, 56 (2005) ("Citizenship for Justices Scalia and Stevens is a term signifying a status from which constitutional rights flow.").

²²⁰ *Id.* at 57 ("Justice Scalia asserted that, for the government constitutionally to detain Hamdi, suspension of the writ of habeas corpus is the constitutionally provided alternative.").

²²¹ See generally *Hamdan*, 548 U.S. at 557.

²²² Linda Greenhouse, *Supreme Court Blocks Guantanamo Trials*, N.Y. TIMES, June 29, 2006; see also Charles Lane, *High Court Rejects Detainee Tribunals*, WASH. POST, June 30, 2006.

²²³ Military Commission Order No. 1, *supra* note 206.

²²⁴ See Department of Defense (DOD) Fact Sheet, Combatant Status Review Tribunals, <http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf>.

²²⁵ Jonathan Mahler, *The Bush Administration v. Salim Hamdan*, N.Y. TIMES, Jan. 8, 2006.

²²⁶ *Schlesinger v. Councilman*, 420 U.S. 738 (1975).

²²⁷ *Hamdan*, 548 U.S. at 597.

government had also relied on the saboteur case, *a fortiori*, because “no more robust model of executive power exists” and the saboteur case “represents the high-water mark of military power to try enemy combatants for war crimes,” noted Stevens.²²⁸ Citing a classic treatise of military law penned by Colonel William Winthrop (an author widely considered the William Blackstone of military law), the Court distinguished the saboteur case from that of the Yemeni national.²²⁹ “If anything, *Quirin* supports Hamdan’s argument that conspiracy is not a violation of the law of war.”²³⁰

With the jurisdiction issue dispatched, Stevens applied Common Article 3 of the Geneva Conventions to the Guantanamo detainees. This provision requires humane treatment of captured combatants and prohibits trials except by “a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.”²³¹ Stevens returned to *Quirin* near the end of his opinion, positing that military commissions have historically been “tribunals of necessity” under wartime conditions.²³² “Exigency lent the commission its legitimacy,” he wrote, “but did not further justify the wholesale jettisoning of procedural protections.”²³³

Once again, Justice Scalia countered this interpretation of the relevant precedents. Scalia’s opinion found the Detainee Treatment Act plainly controlling, and construed the 2005 law to strip the federal courts of jurisdiction.²³⁴ The Court resisted this interpretation, yet “it cannot cite a *single case* in the history of Anglo-American law (before today) in which a jurisdiction-stripping provision was denied immediate effect in pending cases.”²³⁵ Scalia objected to Stevens’s finding that *Quirin* tilted in favor of petitioner Hamdan, saying that such reliance suffered from a “fundamental defect,” as it “ignores the [Detainee Treatment Act], which creates an avenue for the consideration of petitioner’s claims that did not exist at the time of *Quirin*.”²³⁶ In summary, while the saboteurs had no hope for habeas review in the 1942 military tribunal, Hamdan had the benefit of a congressionally enacted habeas review framework. Thus, in the instant case, “*Quirin* is no longer governing precedent.”²³⁷

²²⁸ *Id.*

²²⁹ See, e.g., Joshua E. Kastenberg, *THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP* (2009). In briefing, Dowell and Royall referred to Winthrop as one of the “eminent authorities.” See Brief in Support of Petitions for Writ of Habeas Corpus at 22, *quoted in* Kurland & Casper, *supra* note 106, at 327.

²³⁰ *Hamdan*, 548 U.S. at 607.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 656 (Scalia, J., dissenting). The Detainee Treatment Act provides: “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense as Guantanamo Bay, Cuba.” Section 1005(e)(1), 119 Stat. 2742.

²³⁵ *Hamdan*, 548 U.S. at 660–61.

²³⁶ *Id.*

²³⁷ *Id.*

D. Boumediene and the Current State of the Law

The most decisive—and divisive—decision came three years later. In December 2007, the Supreme Court heard oral arguments in the momentous case of *Boumediene v. Bush*.²³⁸ The case arose from a habeas petition submitted by Lakhdar Boumediene, a citizen of Bosnia and Herzegovina being held at Guantanamo.²³⁹ The case, consolidated with *Al Odah v. United States*, challenged the legality of the plaintiff's detention and the constitutionality of the Military Commission Act of 2006, which had been drafted in the wake of *Hamdan*.²⁴⁰ The decision proved noteworthy both because of its expansive holding and the impassioned rhetoric it inspired in the justices.²⁴¹

A five-to-four opinion authored by Justice Anthony Kennedy held the Military Commission Act unconstitutional and granted the Guantanamo prisoners the right to habeas corpus.²⁴² Because the United States exercised “de facto” sovereignty over Guantanamo, Justice Kennedy reasoned, enemy combatants imprisoned there were entitled to habeas protections outlined in Article I, Section 9 of the Constitution (known as the Suspension Clause).²⁴³ Kennedy's opinion only discussed *Quirin* tangentially. He squared his opinion with that precedent by arguing, “habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here.”²⁴⁴ Finding that the saboteur proceeding was more limited in scope and afforded more protections to the saboteurs than the Military Commission Act, Kennedy deemed *Quirin* inapposite.²⁴⁵

The case featured two forceful dissents, including one from Chief Justice John Roberts. “Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants,” he declared.²⁴⁶ Given that the Court was replacing legislatively crafted review mechanisms with more amorphous, court-enacted procedures, he accused his brethren of judicial aggrandizement.²⁴⁷ In short, the review process constructed by Congress provided constitutionally adequate habeas protections.²⁴⁸

Justice Scalia, true to form, was even more vehement in dissent.²⁴⁹ “Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies

²³⁸ See generally *Boumediene*, 553 U.S. at 723.

²³⁹ *Id.* at 734; Steven Erlanger, *Ex-Detainee Describes His 7 Years at Guantánamo*, N.Y. TIMES, May 26, 2009.

²⁴⁰ *Boumediene*, 553 U.S. at 732; Douglas A. Hass, *Crafting Military Commissions Post-Hamdan: The Military Commissions Act of 2006*, 82 IND. L. J. 1101 (2007) (“In June 2006, the Supreme Court invalidated President Bush's military commission rules in *Hamdan v. Rumsfeld*. . . . Congress responded with the Military Commissions Act of 2006, new legislation to establish military commissions.”).

²⁴¹ Linda Greenhouse, *Justices, 5–4, Back Detainee Appeals for Guantánamo*, N.Y. TIMES, June 13, 2008 (“Of the two dissenting opinions, Justice Antonin Scalia's was the more apocalyptic”).

²⁴² *Boumediene*, 553 U.S. at 733.

²⁴³ *Id.* at 755.

²⁴⁴ *Id.* at 786.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 801 (Roberts, C.J., dissenting).

²⁴⁷ 553 U.S. at 801.

²⁴⁸ *Boumediene*, 553 U.S. at 802–03.

²⁴⁹ See, e.g., Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 6, 2013 (quoting Scalia: “My tone is sometimes sharp. But I think sharpness is sometimes needed to demonstrate how much of a departure I believe the thing

detained abroad by our military forces in the course of an ongoing war,” he wrote.²⁵⁰ Contrary to the Court’s interpretation, the “writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court’s intervention in this military matter is entirely *ultra vires*.”²⁵¹ In a self-confessed unusual approach, Scalia began not with the legal deficiencies he saw in the majority’s reasoning, but the practical consequences of the decision. Reminding his colleagues that the country was at war with radical Islamists, Scalia bluntly stated that the decision “will almost certainly cause more Americans to be killed.”²⁵² The executive branch deliberately relied on *Eisentrager* and other precedents in placing detainees in Guantanamo; in the absence of this case law, the government would likely have held enemy combatants in Afghanistan in conditions that “might well have been worse for the detainees themselves.”²⁵³ Scalia also emphasized that determining the dangerousness of enemy combatants detained at Guantanamo was extraordinarily difficult, if not impossible, and observed that some detainees released by the military returned to terrorist activity.²⁵⁴

Even more galling for Scalia, the Court was wading into an area far removed from its traditional expertise. The handling of enemy prisoners should be entrusted to the executive branch, not the judiciary. “What drives today’s decision is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy,” wrote Scalia, expanding on Roberts’s criticism.²⁵⁵ In a blistering conclusion, Scalia argued that the majority improperly extended the reach of habeas corpus, misconstrued controlling law to break “a chain of precedent as old as the common law that prohibit judicial inquiry into detentions of aliens abroad absent statutory authorization,” and impossibly burdened military commanders in the field with indeterminate evidentiary requirements.²⁵⁶ “The Nation will live to regret what the Court has done today,” Scalia forebodingly concluded.²⁵⁷

V. CONCLUSION

As these recent cases indicate, *Quirin* was not the last word on the military tribunal issue. Indeed, it was not even the last word on military tribunals related to Nazi sabotage. In a repeat mission in late 1944, two trained Nazi agents landed by U-boat in Maine and proceeded to New York to engage in intelligence operations (namely, transmitting information back to Germany by shortwave radio).²⁵⁸ This second operation was as ineffective as the first, and the FBI quickly

is. Especially in my dissents.”). Scalia has even inspired a book collecting his memorable separate writings. See Kevin A. Ring, *SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT’S WITTIEST, MOST OUTSPOKEN JUSTICE* (2004).

²⁵⁰ *Boumediene*, 553 U.S. at 826–27 (Scalia, J., dissenting).

²⁵¹ *Id.* at 827.

²⁵² *Id.* at 828.

²⁵³ *Id.*; see also *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding that United States courts lacked jurisdiction over German war criminals held in a U.S.-administered prison in Germany).

²⁵⁴ *Boumediene*, 553 U.S. at 829.

²⁵⁵ *Id.* at 842.

²⁵⁶ *Id.* at 850.

²⁵⁷ *Id.*; Scott Sayare, *After Guantánamo, Starting Anew, in Quiet Anger*, N.Y. TIMES, May 25, 2012.

²⁵⁸ Fisher, *supra* note 2, at 139.

rounded up the duo.²⁵⁹ In prosecuting the Nazi agents, however, the government slightly modified its earlier approach. Although Biddle was eager to reprise his role as tribunal prosecutor, Stimson—privately deriding the attorney general as a publicity-hungry “little man”—urged Roosevelt to adopt a more hands-off posture.²⁶⁰ Roosevelt agreed, and his military order granted the War Department wide latitude, allowing commanding generals “to appoint military commissions for the trial of such persons.”²⁶¹ The trial, which took place in New York City, resulted in sentences of death by hanging.²⁶² Unlike in 1942, the trial was not much of a spectacle. The 1944 proceeding did not feature executive branch leaders as prosecutors, and final reviewing authority was not vested in the president. Despite these differences, however, one obvious similarity remained: in both cases, the saboteurs were tried by military tribunal.

The *Quirin* case has enjoyed an unanticipated rebirth in the post-9/11 world, playing a significant role in the ongoing debate as to whether suspected terrorists should be tried by military tribunal. Legal issues emanating from the War on Terror are contentious, as may be expected considering the stakes. President Barack Obama has repeatedly pledged to shut down the detention facility at Guantanamo Bay, obliquely referencing the issue in his inaugural address and making express calls and repeated efforts to close the prison since then.²⁶³ Yet seven years later, in the twilight of Obama’s presidency, enemy combatants remain imprisoned in Guantanamo.²⁶⁴ Although the Obama administration’s efforts to shutter the prison are often described as falling victim to Republican opposition, the reality is that support for detaining suspected terrorists at Guantanamo is bipartisan and enduring.²⁶⁵ Whether one views Guantanamo as a constitutional travesty or wartime

²⁵⁹ Fisher, *supra* note 2, at 139–40.

²⁶⁰ Fisher, *supra* note 2, at 141.

²⁶¹ Fisher, *supra* note 2, at 143.

²⁶² *Spy Trials Open Today*, N.Y. TIMES, Jan. 19, 1945. Roosevelt died before the sentences could be carried out, and with the war in Europe declared over in May 1945, President Harry S. Truman commuted the sentences to life in prison. See Fisher, *supra* note 2, at 144; *Truman Commutes to Life Terms Death Sentences of Two Spies*, N.Y. TIMES, June 24, 1945.

²⁶³ Scott Shane & Mark Landler, *Obama Clears Way for Guantanamo Trials*, N.Y. TIMES, Mar. 7, 2011; Barack Obama, Inaugural Address, Jan. 21, 2009 (“As for our common defense, we reject as false the choice between our safety and our ideals. Those ideals light the world, and we will not give them up for expedience sake.”).

²⁶⁴ Maya Rhodan, *Plan to Close Guantanamo Bay Prison in the Works*, TIME MAG., July 22, 2015; see also Mirina Koren, *Five Years After Obama Vowed to Shut It Down, Guantanamo Bay Remains Open*, NAT. J., Jan. 22, 2014.

²⁶⁵ See, e.g., David M. Herszenhorn, *Senate Passes Military Bill That Bans Transfers of Guantánamo Detainees*, N.Y. TIMES, Nov. 10, 2015 (“The Senate on Tuesday approved an annual military policy bill, and the White House spokesman said President Obama would sign it despite provisions that will make it extremely difficult for him to fulfill his promise of closing the terrorist detention center at Guantánamo Bay, Cuba. The military measure, which passed in a 91-to-3 vote, includes provisions that ban the transfer of prisoners to United States soil, which has long been a core component of the administration’s plan to shut the prison.”); see David Jackson, *Obama Faces Challenges in Closing Gitmo*, USA TODAY, Dec. 30, 2014 (describing congressional opposition to closing Guantanamo); see also Peter Finn & Anne E. Kornblut, *Guantanamo Bay: How the White House Lost the Fight to Close It*, WASH. POST, Apr. 23, 2011 (detailing bipartisan opposition in both the House and the Senate to Obama administration plans to close down Guantanamo); Patricia Zengerle, *House Votes to Block Obama Plan to Close Guantanamo*, REUTERS, June 14, 2013; David M. Herszenhorn, *Funds to Close Guantánamo Denied*, N.Y. TIMES, May 20, 2009 (“The Senate voted overwhelmingly on Wednesday to cut from a war spending bill the \$80 million requested by President Obama to close the detention center at Guantánamo Bay, Cuba, and to bar the transfer of detainees to the United States and its territories.”).

necessity, it is clear that it is probably here to stay. The same can be said for the larger jurisprudential issues surrounding it.

This writing has attempted to contextualize this argument by focusing on the Nazi saboteur case. By recounting the circumstances that led to the decision, one can see both its commonalities and its differences with issues presented by the War on Terror. Similarly, by closely analyzing *Quirin* and showing how it has been interpreted, disputed, and reimagined in the contemporary Guantanamo cases, the reader can see how the Supreme Court handles—and perhaps manipulates—a crucial precedent. In some ways, the saboteur case is particularly relevant to the present situation. Then and now, the United States is at war, detains dangerous individuals intent on killing Americans, and faces real risks in prosecuting suspected enemies in the traditional court system. On the other hand, the *Quirin* decision may be an unstable foundation for War on Terror jurisprudence. When Justice Scalia observes that the case was not “this Court’s finest hour,” he is acknowledging the reality, however muted in 1942, that the justices were ratifying a foregone conclusion.²⁶⁶ There is considerable credence to that view. The public clamor for harsh punishment of the Nazi saboteurs—vividly reflected in the press accounts of the time—may have rendered any contrary decision of the Court a political nullity, and Roosevelt’s comments to his attorney general suggested that there was not even a decision for the Court to make. It is an old cliché that “hard cases make bad precedents,” but as *Quirin* shows, easy cases may make troublesome precedents just as readily.²⁶⁷

While it is impossible to predict how the nation’s highest court and its political leaders will handle the related issues of enemy combatants and military tribunals in the coming years, these issues will remain for at least the near future—and perhaps longer. Particularly if there is another large-scale attack and anti-terror efforts are redoubled, Scalia’s dissent in *Boumediene* could prove more prophetic than despairing. Regardless of how this debate unfolds, one thing is all but certain: The *Quirin* decision will be featured prominently, and only by understanding the history of the saboteur case will an observer be able to determine if the precedent is being properly applied.

²⁶⁶ *Hamdi*, 542 U.S. at 561.

²⁶⁷ See, e.g., *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., concurring) (“Great cases like hard cases make bad law.”).

Date (1942)	Event
June 12	Saboteurs Land in the United States
June 27	FBI Announces Capture
July 2	President Roosevelt Orders Trial by Military Tribunal
July 8	Military Trial Begins
July 29	Supreme Court Special Session Convenes to Hear Petition for Writ of Habeas Corpus
July 31	Supreme Court Issues Per Curiam Denying Writ of Habeas Corpus
August 3	Military Tribunal Issues Verdict
August 7	President Roosevelt Completes Review of Verdict
August 8	Six of the Eight Saboteurs Executed
October 29	Supreme Court Issues Full <i>Quirin</i> Opinion