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Military Tribunals: The *Quirin* Precedent

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Summary

On November 13, 2001, President George W. Bush issued a military order to provide for the detention, treatment, and trial of those who assisted the terrorist attacks on the two World Trade Center buildings in New York City and the Pentagon on September 11. In creating a military commission (tribunal) to try the terrorists, President Bush modeled his tribunal in large part on a proclamation and military order issued by President Franklin D. Roosevelt in 1942, after the capture of eight German saboteurs.

This report describes the procedures used by the World War II military tribunal to try the eight Germans, the habeas corpus petition to the Supreme Court, and the resulting convictions and executions. Why was the tribunal created, and why were its deliberations kept secret? How have scholars evaluated the Court's decision in *Ex parte Quirin* (1942)? The decision was unanimous, but archival records reveal division and disagreement among the Justices.

Also covered in this report is a second effort by Germany two years later to send saboteurs to the United States. The two men captured in this operation were tried by a military tribunal, but under conditions and procedures that substantially reduced the roles of the President and the Attorney General. Those changes resulted from disputes within the Administration, especially between the War Department and the Justice Department. There are thus two precedents from *Quirin*: one from 1942, the other from 1944-45.

On March 21, 2002, the Department of Defense issued rules implementing the Bush military order for tribunals. At the news briefing, DOD General Counsel William J. Haynes II cited the 1942 decision in *Quirin* for legal support. The Supreme Court, he said, "found that the president's order in that case was constitutional and properly applied."

For a legal analysis of military commissions in a broad context, see CRS Report RL31191, *Terrorism and the Law of War: Trying Terrorism as War Criminals before Military Commissions*, by Jennifer Elsea.

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Military Tribunals: The *Quirin* Precedent

On November 13, 2001, President George W. Bush issued a military order to provide for the detention, treatment, and trial of those who assisted the terrorist attacks on the two World Trade Center buildings in New York City and the Pentagon on September 11. In creating a military commission (tribunal) to try the terrorists, President Bush modeled his tribunal in large part on a proclamation and military order issued by President Franklin D. Roosevelt in 1942, after the capture of eight German saboteurs.

Once the military tribunal began to try the eight Germans, their defense counsel went to civil court to test the constitutionality of President Roosevelt's action, even though his proclamation denied judicial remedies to those charged with sabotage. In *Ex parte Quirin* (1942), the Supreme Court upheld the jurisdiction of the military tribunal. This report describes the issues raised during the military trial, the appeal to civil court, and evaluations of *Quirin*. Why was the tribunal created, and why were its deliberations kept secret?

This report also covers a second effort by Germany two years later to send saboteurs to the United States. The two men captured in this operation were tried by a military tribunal, but under conditions and procedures that substantially reduced the roles of the President and the Attorney General. Those changes resulted from disputes within the Administration, especially between the War Department and the Justice Department. There are thus two precedents from *Quirin*: one from 1942, the other from 1944-45.

The Eight Germans in 1942

After receiving training in Germany, the eight saboteurs came to the United States in two submarines, one landing off the coast of Long Island and the second near Jacksonville, Florida. Because one of the leaders decided to turn himself in, the FBI was able to arrest all eight within two weeks. Initially the government intended to try the men in civil court, but several factors convinced the Administration to create a secret military tribunal.

School for Saboteurs

In April 1942, at a camp near Brandenburg (about 35 miles west of Berlin), eight Germans received instruction on the use of explosives, fuses, and detonators, all to be used against railroads, factories, bridges, and other strategic targets in the United States. The school was under the direction of Lt. Walter Kappe. After about three weeks of instruction, the men vacationed from May 1 to May 12, returning to the camp for a few days of additional instruction and some visits to aluminum plants,

railroad yards, and canal locks around Berlin. On May 22, the men boarded an express train for Paris, spent a few days there, and then traveled by train to Lorient, on the French coast, to board two submarines for the journey to the United States.¹

The first group, headed by Edward John Kerling, included Werner Thiel, Hermann Neubauer, and Herbert Hans Haupt. Their sub left on May 27, destined for Florida. The second group, headed by George John Dasch, included Ernest Peter Burger, Heinrich Harm Heinck, and Richard Quirin. They left a day later, for Long Island.

Dasch's group reached America first, on the evening of June 12. Shortly after midnight the men came on deck and got in a rubber boat, with four boxes of explosives. They reached the beach at Amagansett, Long Island, but almost immediately encountered John C. Cullen, a Coast Guardsman. Dasch attempted to bribe him with \$300 (later counted as \$260), after which Cullen returned to the Coast Guard station to report what happened and turn in the money.² During that time, the four men were able to bury the four boxes and also some articles of German uniforms. They caught a train to Jamaica, Queens, and then another train to New York City. When the Coast Guard returned to the beach, they were able to locate the buried items and transfer them to the FBI.

The second submarine reached Ponte Vedra, near Jacksonville, Florida, on the evening of June 16. Kerling and his men reached the shore after midnight without incident and buried the four boxes of explosives without being seen. After a night in Jacksonville, Thiel and Haupt caught a train to Cincinnati. Haupt went on to Chicago. Kerling and Neubauer took the train to Cincinnati also, but Kerling (with Thiel) proceeded to New York City and Neubauer went to Chicago.

By the time the second group arrived in Florida, Dasch had already decided to turn himself in to the FBI. On the evening of June 14, he called the New York office of the FBI and told an agent that he had just arrived from Germany and planned to go to Washington, D.C., within a few days to talk to the FBI headquarters. The agent prepared a memo to summarize the phone call, but there is no evidence that the memo ever reached Washington, D.C.³ When Dasch arrived in Washington, he called the FBI and they came to his hotel, placed him under protective custody, and returned to the Justice Department to begin taking his statement.

With Dasch's assistance, the FBI was able to apprehend the three members of his group in New York City. Burger, aware of Dasch's plans, was waiting at the hotel to be arrested. With little difficulty, the FBI was also able to take into custody Heinck and Quirin by June 20. Locating the other four men was not as easy, but the

¹ For a good general treatment, see Eugene Rachlis: *They Came to Kill: The Story of Eight Nazi Saboteurs in America* (New York: Random House, 1961).

² Trial transcript, "RG 153, Records of the Office of the Judge Advocate General (Army), Court-Martial Case Files, CM 334178, 1942 German Saboteur Case," National Archives, College Park, Md., at 106, 111 (hereafter "Military Trial"). Copies of this 2,967-page transcript are available in other collections.

³ *Id.* at 2582-87.

FBI arrested Kerling and Thiel in New York City on June 23, and Haupt and Neubauer in Chicago on June 27.⁴ With Kerling's assistance, the FBI found the four boxes buried on the beach in Florida.

Deciding on a Military Tribunal

During the interrogation of the eight Germans, FBI agents assumed that the men would be arraigned before a district judge and tried in civil court. The agents encouraged Dasch to go before a judge and plead guilty. For reasons discussed in this section, Dasch changed his mind and wanted to go into court to tell the full story, including how he turned himself in. That appears to be one reason that the Administration decided on a secret military trial. Also, penalties in civil court would amount to only a few years, while the military tribunal could decide on the death penalty.

Dasch had been told by FBI agents that if he agreed to plead guilty they would set in motion the wheels for a presidential pardon. At the military trial, Dasch's attorney asked one of the FBI 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 F.B.I. would get a Presidential pardon for him?" The agent replied: "That, in substance, is true."⁵ The FBI also suggested to Dasch that if he were to appear in open court and testify about his cooperation with the government, it might endanger his family in Germany.⁶

On Saturday afternoon, June 27, the FBI told Dasch that he would be indicted and tried before a federal court. In his testimony, Dasch said he agreed to plead guilty with the understanding that everything would be kept quiet. Yet from his cell door the following morning he looked through the slit and saw an agent reading the Sunday newspaper. Dasch's photo was "in front."⁷ Believing he had been betrayed, Dasch withdrew his offer to plead guilty. He now wanted to go into court and make a full explanation, even if it put his family at risk.⁸

This turn of events helped convince the Administration to choose a secret military trial and prohibit any appeal to civil courts. The public had the impression that FBI organizational skills had quickly uncovered the plot. FBI Director J. Edward Hoover, having received great credit for discovering the saboteurs, did not want it known that one of them had turned himself in and helped apprehend the others. Also, the government did not want to broadcast how easily German U-boats had reached American shores undetected. By sending a message that the executive branch had the

⁴ Id. at 476.

⁵ Id. at 541.

⁶ Id. at 541, 548.

⁷ Id. at 2546.

⁸ Id. at 677.

capacity to intercept enemy saboteurs, the United States might discourage future attempts by Germany.

There was a second reason for a military trial: the discovery that the statute on sabotage carried a maximum thirty-year penalty. The government wasn't even sure it would prevail on that charge. The men had not actually committed any act of sabotage. In his memoirs, Attorney General Francis Biddle concluded that an indictment for attempted sabotage probably would not have been sustained in a civil court "on the ground that the preparations and landings were not close enough to the planned act of sabotage to constitute attempt." He pointed out that if a man bought a pistol, with the intent to murder someone, "that is not an attempt at murder."⁹ The federal law on conspiracy to commit crimes was available, but the maximum penalty was only three years.¹⁰

The Judge Advocate General of the Army, Maj. Gen. Myron C. Cramer, had reached the same conclusion. In a memorandum of June 28, he said that a district court "would be unable to impose an adequate sentence." It could impose a sentence of two years and a fine of \$10,000 for conspiracy to commit a crime, and could also punish the Germans for violating immigration laws by entering the country clandestinely, and punish them for violating the customs laws by bringing in the articles they carried to shore. However, the "maximum permissible punishment for these offenses would be less than it is desirable to impose."¹¹

Late Sunday afternoon, on June 28, Secretary of War Henry L. Stimson received a phone call from Attorney General Biddle, setting up a meeting the next day to decide whether to prosecute the saboteurs in civil court or military court.¹² At about noon on Monday, Biddle told Stimson the result of conferences that Biddle had been having with Cramer. To Stimson's surprise, Biddle, "instead of straining every nerve to retain civil jurisdiction of these saboteurs, was quite ready to turn them over to a military court." Biddle suggested that instead of a court martial the government should appoint a special military commission, with Stimson serving as chairman. Stimson thought it would not be "seemly" for him to both appoint the commission and chair it. He also thought it would be wise to select a civilian to chair the commission. The person he had in mind, Robert Patterson, preferred that the court be wholly military.¹³ Some of these negotiations were leaked to the press. A *New York Times* story on June 30 reported that Biddle indicated that the eight Germans might be

⁹ Francis Biddle, *In Brief Authority* 328 (1962).

¹⁰ *Id.*

¹¹ Memorandum for the Assistant Chief of Staff, G-2, June 28, 1942, by Maj. Gen. Myron C. Cramer, at 4; in "German Saboteurs" file, RG 107, Office of the Secretary of War, Stimson "Safe Files," National Archives, College Park, Md.

¹² Diary of Henry L. Stimson, June 28, 1942, Roll 7, at 128-29, Manuscript Room, Library of Congress (hereafter "Stimson Diary").

¹³ *Id.* at 131.

prosecuted by the War Department, and acknowledged that he had been consulting with Stimson and Cramer.¹⁴

By June 30, journalists learned that the basic decision of proceeding by military trial had been made.¹⁵ Stimson spent that day selecting people to serve on the commission.¹⁶ On July 1, the word was all but out. Newspaper stories stated that Roosevelt would appoint a seven-member military commission to try the eight men and that Biddle would share prosecutorial duties with Cramer.¹⁷ Stimson saw little reason why an Attorney General should commit the time and energy to a case “of such little national importance.” Stimson thought that Biddle had more important duties in heading the Justice Department, and could find people with the requisite competence and experience to conduct the prosecution. However, Stimson perceived that Biddle “seemed to have the bug of publicity in his mind.”¹⁸

Roosevelt’s Proclamation and Order

On July 2, less than a week after the eight men had been apprehended, President Roosevelt issued Proclamation 2561 to create a military tribunal. The proclamation carried this title: “Denying Certain Enemies Access to the Courts of the United States.”¹⁹ The initial paragraph begins by stating 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.”

Reference to the “law of war” was important. Had Roosevelt cited the “Articles of War,” he would have triggered the statutory procedures established by Congress for courts-martial. The category “law of war,” undefined by statute, represents a collection of principles and customs developed in the field of international law.²⁰ The military tribunal would thus have greater latitude in selecting the principles and procedures that it found compatible with the overall theme of Roosevelt’s proclamation.

¹⁴ “Saboteurs Face Military Justice; Inquiry Widens,” New York Times, June 30, 1942, at 1.

¹⁵ “Army to Try 8 Saboteurs Landed by Sub,” Washington Post, June 30, 1942, at 1.

¹⁶ Stimson Diary, June 30, 1942, at 133.

¹⁷ “Death to Be Sought for 8 Saboteurs,” Washington Post, July 2, 1942, at 12.

¹⁸ Stimson Diary, July 1, 1942, at 136.

¹⁹ 7 Fed. Reg. 5101 (1942).

²⁰ In 10 U.S.C. § 821 (1994), Congress takes notice of the law of war in this manner: “The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”

The second paragraph of the proclamation describes Roosevelt acting as “President of the United States of America and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution and statutes of the United States.” Thus, he did not claim inherent or exclusive constitutional authority. He was acting under a mix of constitutional authority accorded to the President and statutory authority granted him by Congress. The document goes on to proclaim that “all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.”

The second paragraph contained a controversial provision that denied the eight men access to civil court: “such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.” Roosevelt felt strongly about denying judicial review to the saboteurs. He told Biddle: “I won’t give them up. . . . I won’t hand them over to any United States marshal armed with a writ of habeas corpus. Understand?”²¹

On the same day, July 2, Roosevelt issued a military order appointing the members of the military commission, the prosecutors, and the defense counsel.²² Acting under the 38th Article of War, he appointed Maj. Gen. Frank R. McCoy to serve as President of the commission, and appointed three Major Generals and three Brigadier Generals to complete the seven-man commission. The military order directed Biddle and Cramer to conduct the prosecution, and assigned Col. Cassius M. Dowell and Col. Kenneth Royall to serve as defense counsel. On July 7, Col. Carl L. Ristine was appointed to represent Dasch, leaving Dowell and Royall to defend the other seven.

In directing the commission to meet on July 8, “or as soon thereafter as is practicable,” the order referred to the trying of offenses against both the “law of war and the Articles of War.” However, the order clearly liberated the commission from some of the restrictions established by Congress in the Articles of War. 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.” The power to “make such rules” freed the commission from procedures enacted by Congress and the *Manual for Courts-Martial*. The commission could admit evidence “as would, in the opinion of the President of the Commission, have probative value to a reasonable man.” The meaning of the

²¹ Biddle, In Brief Authority, at 331.

²² 7 Fed. Reg. 5103 (1942).

reasonable-man test would be worked out over the course of the trial as the commission issued its rulings.

The military order departed from the Articles of War with regard to the votes needed for sentencing. The order states that the concurrence of “at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence.” Two-thirds of the commission could convict and sentence the men to death. Under a court martial, a death penalty required a unanimous vote.

Finally, Roosevelt’s order required the record of the trial, including any judgment or sentence, to be transmitted “directly to me for my action thereon.” This, too, marked a shift from military trials. Under Articles of War 46 and 50 ½, any conviction or sentence by a military court was subject to review within the military system, including the Judge Advocate General’s office. The July 2 order vested the “final reviewing authority” in President Roosevelt.

The Military Trial

The trial took place on the west wing of the fifth floor of the Justice Department building, in Room 5235, used in the past as a lecture hall. To preserve secrecy, the windows were covered with heavy black curtains, and the glass doors at each end of the corridor were blacked over. The public and the press were excluded. When the tribunal adopted rules on July 7, they stated: “Sessions shall not be open to the public.”²³ The tribunal announced the next day: “The sessions will be closed, necessarily so, due to the nature of the testimony, which involves the security of the United States and the lives of its soldiers, sailors and citizens.”²⁴

With the permission of General McCoy, Biddle and Cramer drafted a statement on “the reasons for employing a military commission and the reasons for secrecy” in the trial of the eight Germans. It was “of the utmost importance that no information be permitted to reach the enemy on any of these matters,” followed by seven items, the first of which read: “How the saboteurs were so swiftly apprehended.”²⁵ The Biddle-Cramer statement further notes: “We do not propose to tell our enemies the answers to the questions which are puzzling them.” Certainly one of the “puzzles” in the minds of Nazi authorities was how the American government could round up the eight men so quickly. The reason was obvious to top officials—Dasch—and Biddle didn’t want to let that out.

Each day the tribunal issued a brief communiqué of what happened in the morning and the afternoon. On July 11, the tribunal allowed eleven reporters to enter

²³ “Rules Established by the Military Commission Appointed by Order of the President of July 2, 1942, at 1; Papers of Frank Ross McCoy, Box 79, Manuscript Room, Library of Congress (hereafter “McCoy Papers”).

²⁴ July 8, 1942, Statement, Court Room, Department of Justice; McCoy Papers.

²⁵ Untitled, undated three-page statement, at 3; McCoy Papers. The same language appears in “Proposed Statement for Elmer Davis”; *id.*

Room 5235 for fifteen minutes to snap photographs, take notes, and get a sense of who sat where. Brig. Gen. Albert L. Cox, provost marshal of the military district of Washington, D.C., pointed to the prisoners and identified them. The reporters had an opportunity to ask him a few questions and to examine the evidence piled on a table.²⁶

Rules of Procedure

As President of the military commission, General McCoy issued rulings in response to various questions raised by the two sides. Few rules had been agreed to in advance. On July 7, the day before the trial began, the tribunal adopted a three-and-a-half-page, double-spaced statement of rules. Primarily this document dealt with the sessions not being open to the public, the taking of oaths of secrecy, the identification of counsel for the defendants and for the prosecution, and the keeping of a record. Only eight lines referred to rules of procedure: peremptory challenges would not be allowed, there would be one challenge for cause, and this concluding language: “In general, wherever applicable to a trial by Military Commission, the procedure of the Commission shall be governed by the Articles of War, but the Commission shall determine the application of such Articles to any particular question.”²⁷ The commission could thus discard procedures from the Articles of War or the *Manual for Courts-Martial* whenever it wanted to. As General Cramer told the commission at one point: “Of course, if the Commission please, the Commission has discretion to do anything it pleases; there is no dispute about that.”²⁸

Articles of War/Law of War

The government charged the eight Germans with four crimes: one against the “law of war,” two against the Articles of War (81st and 82nd), and one involving conspiracy. The prosecutors thus combined a mix of offenses that were nonstatutory (law of war) and statutory (Articles of War). The distinction here was fundamental. In American law, the creation of criminal offenses is reserved to the legislative branch, not to the President. The Constitution reserves to Congress the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences on Land and Water.”²⁹ The ability to charge individuals with violations of the “law of war” shifted the balance of power from Congress to the Executive.

Charge I (“Violation of the Law of War”) consisted of two specifications, drawing from general principles of international law. The first specification charged that Kerling and his seven colleagues, “being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation,” had “secretly and covertly passed, in civilian dress, contrary to the law of war,” through U.S. military

²⁶ “Spy Court Session Viewed by Press,” New York Times, July 12, 1942, at 1; “Spies Fidget as Reporters Visit Military Courtroom,” Washington Post, July 12, 1942, at 1.

²⁷ “Rules Established by the Military Commission Appointed by Order of the President of July 2, 1942,” at 3-4; McCoy Papers.

²⁸ Military Trial, at 991.

²⁹ U.S. const., art. I, § 8, cl. 10.

and naval lines and defenses. They went behind those lines and defenses “within zones of military operations and elsewhere,” for the purpose of committing acts of sabotage, espionage, “and other hostile acts” to destroy certain war industries, war utilities, and war materials within the United States.

Specification 2 of Charge I repeated much of the language in the first specification, but added that the eight men “assembled together within the United States explosives, money, and other supplies in order to accomplish said purposes.” Moreover, where specification 1 referred to “committing acts,” specification 2 spoke of “committing or *attempting* to commit” them.

The next two charges drew from the Articles of War enacted by Congress. Charge II (“Violation of the 81st Article of War”) goes beyond sabotage efforts to the communicating of intelligence with each other and to enemies of the United States. Charge III (“Violation of the 82nd Article of War”) focused on spying and attempting to communicate information to Germany. Charge IV (“Conspiracy to Commit All of the Above Acts”) claimed that the eight men “did plot, plan, and conspire with each other, with the German Reich, and with other enemies of the United States, to commit each and every one of the above-enumerated charges and specifications.”

Challenges During the Trial

Even before the commission could swear itself in, defense counsel Royall took the floor to state that Roosevelt’s order creating the commission “is invalid and unconstitutional.” Drawing upon the principles established by the Supreme Court in *Ex parte Milligan* (1866), he said that the civil courts in the District of Columbia were open and operating. He questioned the jurisdiction of any court except a civil court. Moreover, he charged that Roosevelt’s order “violates in several specific particulars congressional enactments as reflected in the Articles of War.”³⁰

Attorney General Biddle, responding to Royall’s quick initiative, said that he could not conceive that a military commission “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 that authority to try these defendants.” Although the proclamation prohibited judicial review, Biddle nevertheless spoke about the role to be played by civil courts. He first said that “the question of law involved is a question, of course, to be determined by the civil courts should it be presented to the civil courts.” Having implied that some questions might be addressed by civil courts, he then seemed to close that door: “this is not a trial of offenses of law of the civil courts but is a trial of the offenses of the law of war, which is not cognizable to the civil courts.”³¹

Attorneys customarily challenge jurors not only for cause but make “peremptory strikes” that can eliminate a potential juror without stating a reason. After Royall found no challenge for cause, his co-counsel Dowell stood up and asked for one

³⁰ Military Trial, at 5.

³¹ *Id.*

peremptory challenge, as allowed under the 18th Article of War for a court martial. Biddle countered that it was up to the commission to decide whether to grant or refuse any peremptory challenges. Cramer agreed that the defense had no right to a peremptory challenge, but said he had no objection “as a matter of procedure.” The President of the commission, General McCoy, ruled that the commission would not entertain a peremptory challenge from either side.³²

It is somewhat surprising that this issue of peremptory challenges was raised at the trial on July 8. The tribunal had adopted some rules the previous day, including this provision: “(a) No peremptory challenge shall be allowed. (b) Challenge of members of the Commission for cause may be permitted. The Commission, by a two-thirds vote of those voting—the challenged member not voting—may pass on any challenge.”³³ Was Dowell unaware of this rule, or did he simply want to go on record to challenge the tribunal and thus lay the ground for an appeal to civil court?

After the commission was sworn in, it proceeded to swear in the counsels. Biddle and Cramer were asked whether they would faithfully and impartially perform their duties and “not divulge the findings or sentence of this Military Commission to any but the proper authority until they shall be duly disclosed.”³⁴ The phrase “the proper authority” allowed them to talk to President Roosevelt and other high officials. Royall expressed some misgivings about the oath put to him. He told the commission that “it is possible that some limited disclosure would have to be made if someone sought to assert the civil rights of these defendants; and we conceive it our duty not to take an oath that would prevent us from so doing.”³⁵ He had in mind not only the possibility that he would personally go to civil court, but might have to designate someone from the private sector to do that. He asked for and received the same language used for Biddle and Cramer.³⁶

Charges I and III claimed that the eight Germans were “within zones of military operations,” “behind the military and naval defense and lines of the United States,” or “about the fortifications, posts, and encampments” of U.S. military forces. Royall and Ristine denied that the men were in those locations. As to encountering the Coast Guardsman at Amagansett, Royall argued that Cullen was not armed and therefore the patrol was not a zone of military operation.³⁷

Interlude in Civil Court

Colonel Royall had several times indicated to the commission that he might go to civil court to test the constitutionality of Roosevelt’s proclamation and order. On

³² Id. at 14-18.

³³ “Rules Established by the Military Commission Appointed by Order of the President of July 2, 1942,” at 3; McCoy Papers.

³⁴ Military Trial, at 19.

³⁵ Id. at 20.

³⁶ Id. at 20-21.

³⁷ Id. at 119.

the afternoon of July 21, after the defendants had been removed from the courtroom, Royall told the commission what he planned to do. From the *Manual for Courts-Martial*, he read that an officer acting as counsel for the accused had an obligation to perform “such duties as usually devolve upon the counsel for a defendant before civil courts in a criminal case.” It was incumbent upon the counsel to guard the accused’s interests “by all honorable and legitimate means known to the law.”³⁸ Did this mean that Royall had an obligation to take the case to civil court?

Royall had wrestled with this issue before the trial began. On July 6, he and co-defense counsel Colonel Dowell wrote to President Roosevelt that “there is a serious legal doubt as to the constitutionality and validity of the Proclamation and as to the constitutionality and validity of the Order.” They said it was their opinion that the defendants should have an opportunity to institute “an appropriate proceeding” to test the constitutionality and validity of the proclamation and order. Could Royall and Dowell, as military officers, act in a manner contrary to the wishes of the Commander-in-Chief? They told Roosevelt: “In view of the fact that our appointment is made on the same Order which appoints the Military Commission, the question arises as to whether we are authorized to institute the proceeding suggested above.” They requested that he issue to them or to someone else the appropriate authority. They closed by noting that they had advised Biddle, Cramer, the commission, and Stimson of their intention to present the matter to the President.

They also requested a meeting with Roosevelt, but he refused.³⁹ Instead of responding by letter, he asked one of his aides, Marvin McIntyre, to call Royall and Dowell and advise them to act in accordance with their own judgment. They incorporated that understanding in a letter written to Roosevelt on July 7, stating that it was their conclusion that they had the necessary authority and also the duty to “try to arrange for civil counsel to institute the proceedings necessary to determine the constitutionality and validity of the Proclamation and Order of July 2.” If those arrangements could not be made, they would institute those proceedings “ourselves at the appropriate time.” Unless ordered otherwise by Roosevelt, “we will act accordingly.”⁴⁰ They heard nothing more from Roosevelt.

By the time the trial reached its twelfth day, Royall decided it was time to act. He first advised the commission that he had been unable to secure civilian counsel. Second, he announced that he had prepared papers for an application for a writ of habeas corpus to test the constitutionality and validity of the proclamation and order.⁴¹ Dowell, telling the commission that he had been a soldier for over forty years and was accustomed to taking the orders of the Commander-in-Chief, said he could not support Royall’s decision. It was Dowell’s judgment that the proclamation closed the

³⁸ Id. at 2099.

³⁹ Stimson Diary, July 6, 1942, at 144.

⁴⁰ Military Trial, at 2102.

⁴¹ Id. at 2104.

doors of civil courts to the defendants.⁴² Despite those statements, Dowell worked with Royall on the appeal to the Supreme Court.

Ristine, saying he was there to represent his client, Dasch, told the commission that he did not construe the President's proclamation and order "as authorizing me to file in any other tribunal any application for a writ of habeas corpus or other proceeding, and therefore I stand on that interpretation of my orders."⁴³ It was his impression that any effort to pursue a petition for a writ of habeas corpus would be done by outside counsel or civilian lawyers. As to Royall taking the case to district court, the commission announced that it "does not care to pass on that question."⁴⁴

Royall began contacting Justices of the Supreme Court to see if they were willing to meet in special session in the middle of the summer to take up the question. He first met with Hugo Black at the Justice's home in Alexandria, Va., and on July 23 met with Black at Justice Owen Roberts' farm outside Philadelphia. Dowell, Biddle, and Cramer joined them. After Roberts talked with Chief Justice Harlan Fiske Stone by phone, it was agreed that the Court would hear oral argument on Wednesday, July 29.⁴⁵

Although the Court had agreed to hear the case, there had been no action yet by a lower court. Royall then filed a petition for a writ of habeas corpus for the seven defendants he represented. On July 28, at 8 p.m., District Judge James W. Morris issued a brief statement denying permission, stating that the defendants came within a category—subjects, citizens, or residents of a nation at war with the United States—that under Roosevelt's proclamation "are not privileged to seek any remedy or maintain any proceeding in the courts of the United States." He did not consider *Ex parte Milligan* "controlling in the circumstances of this petitioner."⁴⁶

Oral argument before the Supreme Court began at noon on July 29 and continued for nine hours over a two-day period. A per curiam decision on July 31 upheld the jurisdiction of the military tribunal. A full decision, explaining the legal basis for the per curiam, would not appear until October 29. These details are treated in the next section.

Wind-up of the Military Trial

The July 31 per curiam gave the military commission the authority it needed to complete the trial. During the remaining days of the trial, each defendant took the stand and testified that he had no plans to conduct sabotage in the United States. Some conceded that they intended to commit sabotage during training in Germany,

⁴² Id. at 2108-10.

⁴³ Id. at 2110.

⁴⁴ Id. at 2114.

⁴⁵ David J. Danelski, "The Saboteurs' Case," 1 Journal of Supreme Court History 61, 68 (1996).

⁴⁶ *Ex parte Quirin*, 47 F.Supp. 431 (D.D.C. 1942).

but had changed their minds on the submarine coming over or after reaching America. Dasch and Burger made those arguments with some credibility, the others less so.

In the closing days of the trial, Royall introduced into evidence a confidential letter from the Adjutant General, stating that the Eastern Theatre of Operations had been changed to Eastern Defense Command, which “will not be a Theatre of Operations.” Through this letter he argued that the eight men had not conducted themselves as spies because they were not in a theatre of operations. Biddle and Cramer countered with other exhibits and brought in a witness to explain that the change in designation had to do with supplies, and that in a tactical sense the Eastern Defense Command was still a theatre of operations.⁴⁷ This presentation seemed to largely neutralize Royall’s argument.

In his opening argument for the prosecution, Cramer stated that the evidence supported a finding of guilt and a sentence of death in each case. As Royall began his argument, he acknowledged the difficulty in having to defend seven men, all with different circumstances, so that “what is said in favor of one may not be favorable to another or may be positively unfavorable.” He said he shouldn’t have been in a position of “arraying one of our clients against the other,” and yet the cases of Burger and Haupt seemed to him to require “separate and different consideration.”⁴⁸ Although the per curiam of the Supreme Court had not yet been released, Royall emphasized that no other court “can possibly determine the facts, the weight to be given the testimony,” except the tribunal. None of the parties before the Supreme Court expected it to “pass upon the weight of the evidence or the facts to be found from the evidence.”⁴⁹ The writ of habeas corpus raised only the question of jurisdiction, not issues of facts and evidence.

Royall did not think the charge of spying had been proved. He also cautioned the tribunal to act in a manner that would protect Americans brought up before foreign tribunals. The United States was moving into the zone of military operations on other continents, “and the chances are that American soldiers will have to face this situation much more frequently than will the enemy agents.” The decision reached by the tribunal “may establish a criterion which will be applicable, ten to one, to our own boys who are going overseas.”⁵⁰

He also pointed out that Congress had enacted a statute on sabotage “with the war fully in view.” It proposed a maximum penalty in time of peace and a maximum penalty in time of war. The maximum for the latter was thirty years. “These men,” he said, “have not done anywhere near that much.” They had not attempted to commit sabotage, “because an attempt is distinguished from preparation.” Although

⁴⁷ Military Trial, at 2708, 2746-51.

⁴⁸ Id. at 2770.

⁴⁹ Id. at 2772.

⁵⁰ Id. at 2775-77.

Royall agreed that the statute did not bind the tribunal, he said it was a legitimate and fair guide for the tribunals's deliberation and decision.⁵¹

Regarding Charge III about spying, Dowell insisted that the tribunal was bound by the regulation that explained Article of War 82. Certain elements of spying had to be satisfied. The accused must be found at a certain place within a zone of operations, must act clandestinely, or under false pretenses. He must obtain, or endeavor to obtain, information with intent to communicate the information to the enemy. The language "he was obtaining," Dowell said, was not satisfied by getting ready to obtain. "Endeavoring to obtain" meant a serious attempt.⁵² None of those specifications appeared in Charge III.

After the noon recess, Royall announced that the Supreme Court had held that the commission had jurisdiction to try the eight men. He then focused on Charge II, involving Article of War 81: assisting the enemy with arms, ammunition, supplies, money, "and other things," or knowingly harboring or protecting or holding correspondence with or giving intelligence to the enemy. He said there was no evidence that the men gave money to the enemy and no evidence that they gave any intelligence to the enemy or communicated with the enemy. The buried explosives did not assist the enemy because they were not immediately usable, Royall said. They had to be assembled and moved somewhere.⁵³ Regarding Charge I on violating the "Law of War," he objected that he had not been given the opportunity of knowing "just what law of war is charged to have been violated."⁵⁴

As for Dasch's guilt, Ristine argued that when Dasch left the secret matches on a table in the submarine, he "absolutely deprived himself, if he had ever had any intention of writing back to Kappe, of the only means by which they had agreed upon for communication."⁵⁵ Dasch, he said, didn't pay attention to instructions at the school and could not have implemented the sabotage plan. To stay in touch with Kappe, Dasch was supposed to give the name of someone in the United States that Kerling could reach if he lost touch with Dasch. Kappe suggested that Dasch give his brother's address. Dasch did, but gave a fictitious address.

The trial moved to its final day on Saturday, August 1. Royall argued that none of the seven men he represented were guilty "of an offense which requires the most severe punishment."⁵⁶ Cramer emphasized the need to punish the men as a preventive measure. They had described their effort as "the first of a series of these schools; that others were coming over here later."⁵⁷ As for the thirty-year maximum punishment for sabotage, Cramer said that the statute was not exclusive. The commission could

⁵¹ Id. at 2782-83.

⁵² Id. at 2791.

⁵³ Id. at 2808-11.

⁵⁴ Id. at 2809.

⁵⁵ Id. at 2827.

⁵⁶ Id. at 2926.

⁵⁷ Id. at 2930.

consider a heavier punishment under the law of war. Regarding the assistance that some of them may have given to the FBI, that was “a matter of clemency” for the President to decide.⁵⁸ Biddle argued that espionage did not require the defendants to actually obtain information or communicate it. It was enough, he said, that they communicated among themselves.⁵⁹

On August 3, the tribunal decided that all eight men were guilty and deserved the death penalty. President Roosevelt looked through the 3,000 pages of trial proceedings the following day. Albert L. Cox, serving as jailor and custodian of the men, learned from Cramer on August 4 that Roosevelt would order the electrocution of six of the prisoners.⁶⁰ Cox needed advance notice because he had to make changes in the transformer, which was located on the street. The six men were electrocuted on the morning of August 8. Dasch received a sentence of thirty years and Burger was given life. The Administration reasoned that mercy for the two would help encourage members of an espionage, sabotage, of fifth-column group to turn against their colleagues and receive leniency.⁶¹

Initially, fourteen people were arrested for providing assistance to the saboteurs: eight in Chicago, six in New York City. All of these were tried in civil court, with some of the cases reaching the Supreme Court.⁶² In addition to these fourteen, William Wernecke was imprisoned for five years and fined \$10,000 for draft evasion. He had given Haupt advice for evading the draft, either by faking his medical exam or by joining a “church” and falsely claiming to be a conscientious objector.⁶³ Finally, Pastor Emil Ludwig Krepper was sentenced to twelve years in prison. His was one of the names written with secret ink on the handkerchiefs given to Dasch and Kerling.⁶⁴

Action by the Supreme Court

After the district court turned down Royall’s petition for a writ of habeas corpus, there followed two days of oral argument on July 29 and 30 and the Court’s holding on July 31 that the military tribunal was properly constituted. In acting as quickly as

⁵⁸ Id. at 2952.

⁵⁹ Id. at 2954.

⁶⁰ Albert L. Cox, “The Saboteur Story,” Records of the Columbia Historical Society of Washington, D.C., 1957-1959, at 25.

⁶¹ “2 Surviving Nazis Remain in Capitol,” New York Times, August 10, 1942, at 3.

⁶² E.g., United States v. Haupt, 136 F.2d 661 (7th Cir. 1943); United States v. Haupt, 152 F.2d 771 (7th Cir. 1946); Haupt v. United States, 330 U.S. 631 (1947); Cramer v. United States, 325 U.S. 1 (1945).

⁶³ “Wernecke Guilty in Draft Case,” New York Times, June 5, 1943, at 11. The Supreme Court denied his petition for a writ of certiorari; Wernecke v. United States, 321 U.S. 771 (1944).

⁶⁴ “Ex-Pastor Guilty in Sabotage Trial,” New York Times, February 22, 1945, at 8; “Krepper Guilty as Spy,” New York Times, March 15, 1945, at 25.

it did, the Court could only manage a short per curiam. It would be almost three months before Chief Justice Stone and his colleagues issued a decision explaining the legal and constitutional reasons for the per curiam.

Briefing the Case

The briefs submitted to the Court by the defendants and the government are dated July 29, the same day that oral argument began. Instead of the Court receiving briefs in advance and being prepared for questioning, the Justices would have to depend on oral argument to refine the issues. Because of the highly compressed schedule, Chief Justice Stone waived the Court's rule at that time limiting each side to one hour. He said the defense and prosecution would be given whatever time they thought they needed.

In their petition for a writ of certiorari, Colonels Dowell and Royall asked the Court to bring up the case pending in the appellate court "before judgment is given in that court."⁶⁵ Judgment hadn't been given in that court because Royall had no time to file the papers. The incompleteness of the process is captured in this sentence, still to be filled out: "On July __, 1942, notices of appeal from the said orders were duly filed by the petitioners in the Court of Appeals for the District of Columbia."⁶⁶ This issue of jurisdiction would preoccupy the Justices at the start of oral argument.

The much longer 72-page brief in support of petitions for a writ of habeas corpus contains the major issues identified by Dowell and Royall. The two basic questions: (1) "May the Petitioners (six of whom are alien enemies) maintain this proceeding for Writ of Habeas Corpus?" and (2) "If so, are the Petitioners unlawfully restrained of their liberty?"⁶⁷ Nothing in the four charges, they argued, justified Roosevelt's appointment of the tribunal. With regard to Charges II and III, claiming a violation of the Articles of War 81 and 82, Dowell and Royall said that the defendants had not committed any act in a zone of military operations, and that no proof existed of an effort to obtain military information. Regarding Charge 1 (the law of war), they could find nothing "in the unpublished Rules of Land Warfare any such offense as is described in the specifications of the first Charge." Moreover, they considered the law of war as a species of international law analogous to common law, concluding that no principle "is better settled than the principle that there is no common law crime against the United States Government." Crimes, they said, must be covered by a statute enacted by Congress. In short, the executive branch was attempting to usurp powers granted to Congress under the Constitution. To the extent a crime existed under the law of war, it would include the offenses of sabotage and espionage that are treated in the statutes enacted by Congress and are "triable by the civil courts."

⁶⁵ "Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia," reprinted in volume 39 of *Landmark Briefs and Arguments of the Supreme Court of the United States*, at 296, Philip B. Kurland and Gerhard Casper, ed. (Arlington, Va.: University Publications of America, Inc., 1975) (hereafter "Landmark Briefs").

⁶⁶ *Id.* at 299.

⁶⁷ "Brief in Support of Petitions for Writ of Habeas Corpus," *id.* at 307.

Charge IV, on conspiracy, was also covered by a congressional statute and “is not triable by a military commission.”⁶⁸

If the alleged criminal acts were not committed in the zone of military operations, civil courts were functioning “both in the localities in which the offenses were charged to have been committed and in the District of Columbia where the alleged offenses are being tried.”⁶⁹ The brief denied that the tribunal could be justified on the ground of martial law, which was “a matter of fact and not a matter of Proclamation.” No proclamation declaring martial law would be valid “unless the facts themselves support it.”⁷⁰ Nothing in the President’s proclamation or military order indicated a state of martial law. Nothing in the facts presented to the Court “justify martial law in the territory in question.”⁷¹

Returning to the issue of interbranch conflict, Dowell and Royall contended that the President had no authority to issue his proclamation “in the absence of a statute giving him this authority.”⁷² No “inherent” authority existed within the Presidency to justify the proclamation, they said, because the sole constitutional authority to define the “law of war” and to say what constitutes a criminal offense lay with Congress.

Dowell and Royall flagged another issue: the Ex Post Facto Clause. The Constitution expressly prohibits Congress from passing an ex post facto law, which is a law that inflicts punishment on a person for an act which, at the time committed, was not illegal. Similarly, Congress cannot increase the penalty for a crime committed in the past. Increased penalties apply only to future transgressions. Dowell and Royall pointed out that Roosevelt’s proclamation had been issued after the commission of the acts charged against the defendants. The proclamation “is, therefore, ex post facto as to them.”⁷³ Without the proclamation, the maximum penalty for sabotage in time of war could not exceed thirty years. In the case of espionage, the death penalty was not mandatory. Yet Roosevelt’s proclamation allowed the death penalty if two-thirds of the tribunal so voted, even though Article of War 43 required a unanimous vote for a death sentence. Dowell and Royall further argued that Congress on July 2 could not have passed legislation increasing the penalty for the acts already committed. If the Constitution prohibited Congress from so acting, how could the President act?

Another “unusual feature” of Roosevelt’s proclamation was its prohibition on judicial review unless the Attorney General, with the approval of the Secretary of War, allowed an exception.⁷⁴ How could the President, they asked, authorize an executive officer to waive a constitutional right? Other conflicts between Roosevelt’s

⁶⁸ Id. at 333-34.

⁶⁹ Id. at 335.

⁷⁰ Id. at 340.

⁷¹ Id. at 341.

⁷² Id. at 342.

⁷³ Id. at 343.

⁷⁴ Id. at 344-45.

actions and the Articles of War were covered during oral argument, discussed in the next section.

Biddle and Cramer, responding to the petition for a writ of certiorari, insisted in their brief that the defendants had “no capacity to sue in this Court or in any other court” because they were enemies of the United States.⁷⁵ Continuing, the Court had no jurisdiction to disturb the right of the Provost Marshal (Albert Cox) to hold the defendants in lawful custody “by virtue of the laws of war and the lawful orders of his superiors.”⁷⁶

Next, Biddle and Cramer submitted a longer brief of 93 pages to rebut the defendants’ case. They argued that the seven Germans were not entitled to have access to U.S. courts for the purpose of obtaining writs of habeas corpus: “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.”⁷⁷

As for *Ex parte Milligan*, by “no stretch of interpretation” could that decision be applied to the seven defendants.⁷⁸ Milligan did not wear the uniform of an armed force at war with the United States, he was continuously a resident of Indiana, and did not cross through military lines and enter into a theatre of operations. The defendants, however, arrived on American shores in uniform, were residents of Germany, and “as agents of the German Government crossed our lines secretly in enemy warships for the purpose of committing hostile acts.”⁷⁹

Moreover, the charges against Milligan came at a time when invasions “gave their slow forewarning months in advance.” Modern warfare, in contrast, was swift and sudden. The theatres of operation of 1864 were not the theatres of operation of 1942: “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.”⁸⁰ President Roosevelt, under his constitutional oath to protect and defend the United States against enemies, “had 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.”⁸¹

Biddle and Cramer noted that the Constitution, in the Fifth Amendment, did not apply the constitutional guaranty of presentment or indictment by a grand jury to

⁷⁵ “Respondent’s Answer to Petitions,” *id.* at 393.

⁷⁶ *Id.*

⁷⁷ “Brief for Respondent,” *id.* at 409.

⁷⁸ *Id.* at 411.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 412.

“cases arising in the land or naval forces.” Thus, U.S. soldiers charged with military offenses had no right to insist on the protections of grand juries and civil trials. “It would be fantastic to extend such privileges to invading soldiers of the enemy.”⁸²

Having discussed the independent authority of the President to create military tribunals, Biddle and Cramer pointed out that Congress, by statute, had provided that these tribunals need not follow the procedures established for courts-martial. Belligerent enemies were therefore not entitled to some of the rights afforded by statute to member of U.S. forces, such as the right of peremptory challenges or the rule that requires a unanimous decision for a death sentence. Such rights and 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.”⁸³

Biddle and Cramer quoted from *Halsbury’s Laws of England* to demonstrate that the writ of habeas corpus was a process for securing “the liberty of the subject,” and that it was a prerogative writ by which the King had a right to inquire into the causes for which “any of his subjects” were deprived of their liberty.⁸⁴ The writ thus applies to *subjects of the nation*, not to subjects of a country “with which we are at war, or who are subject to its orders.” Biddle and Cramer acknowledged that the broad policy announced by Halsbury “has been relaxed in modern times in a very limited class of cases, to permit enemy nationals to have access to the courts in cases of civil litigation for the enforcement of pecuniary claims whenever the enemy nationals can be said to have been residing in the country with the license of the sovereign authority.”⁸⁵ But this access to the courts is granted only to enemy nationals who lawfully reside in the United States, they said, not to an enemy who unlawfully enters the country after war begins and with a hostile purpose.

Biddle and Cramer underscored their position that the judgment of trying the saboteurs lay solely with the President, and that neither Congress nor the judiciary could interfere with his decisions: “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.”⁸⁶ By the time the Court issued its full decision on October 29, it declined to endorse this expansive theory of presidential power.

As to the alleged citizenship of Burger and Haupt, Biddle and Cramer argued that they had forfeited any claim to American citizenship by invading the United States as belligerent enemies. By actively aiding an enemy nation, their status had changed from U.S. citizen to enemy of the United States.⁸⁷

⁸² Id. at 413.

⁸³ Id.

⁸⁴ Id. at 415.

⁸⁵ Id. at 416-17.

⁸⁶ Id. at 423.

⁸⁷ Id.

Nine Hours of Oral Argument

Without waiting for an appeal from the district court to the appellate court (the D.C. Circuit), the Supreme Court began oral argument at noon on July 29. All of the Justices participated except Frank Murphy, who thought his status as an officer in the military reserves made it inappropriate for him to sit on the case. He was on military maneuvers when the emergency session was called, but returned to listen to the oral argument. William O. Douglas, returning from his home in Oregon, reached Washington in time for the second day of oral argument.

1. Disqualification? As a first order of business, Chief Justice Stone confronted the fact that his son, Lauson, was part of the defense team. If that involvement provided grounds for Stone not to participate in the case, he announced he would “at once” disqualify himself. Biddle assured him that his son, although a part of the defense at the military tribunal, “did not in any way participate in these habeas corpus proceedings” and urged Stone to sit in the case. Stone asked the defense whether they concurred with Biddle’s statement. Royall answered: “We do.”⁸⁸

Stone was not the only Justice who might have been disqualified. Felix Frankfurter, accustomed to dropping over at the Administration to share his ideas on various matters of public policy, had already advised Secretary of War Stimson to try the Nazi saboteurs by a military commission. On the evening of June 29, over dinner, he told Stimson that the commission should be composed entirely of soldiers.⁸⁹

Justice James F. Byrnes had been serving as a de facto member of the Roosevelt Administration for the previous seven months, working closely with Roosevelt and Biddle on the war effort. Biddle wrote a series of “Dear Jimmie” letters to Byrnes in late 1941 and early 1942, asking his advice on draft executive orders, a draft of the Second War Powers bill, and other Administration proposals.⁹⁰ For some bills, Biddle asked Byrnes to “arrange for its introduction.”⁹¹ In his memoirs, Byrnes describes how in his capacity as Justice he called legislative leaders to secure their support for bills desired by the Administration and offered advice on various executive orders.⁹² In late September, Roosevelt asked Byrnes to leave the Court and join the Administration full-time. Byrnes resigned on October 3 to direct the Office of Economic Stabilization, before the Court could issue its full opinion in *Ex parte Quirin*.

⁸⁸ Id. at 496-97.

⁸⁹ Stimson Diary, June 29, 1942, at 131.

⁹⁰ Letters from Attorney General Francis Biddle to Justice James F. Byrnes, December 23, 1941 (one letter on a census bill and another on Daylight Saving), December 29, 1941, December 30, 1941, January 1, 1942, and January 10, 1942; Special Collections, Papers of James F. Byrnes, Clemson University, S.C..

⁹¹ Letter from Biddle to Byrnes, December 23, 1941, regarding a Daylight Saving Bill; Special Collections, Papers of James F. Byrnes, Clemson University, S.C.

⁹² James F. Byrnes, *All In One Lifetime* 148-54 (New York: Harper & Bros. 1958).

2. Jurisdictional Issues. Chief Justice Stone, perhaps offended by language in Roosevelt’s proclamation that denied the eight Germans access to civil courts, asked Biddle directly: “Does the Attorney General challenge the jurisdiction of this Court?” Biddle replied: “I do not, Mr. Chief Justice.”⁹³ The question was direct, but the answer was not. As Biddle later explained, he did not challenge the Court’s jurisdiction on the specific ground of exercising its appellate jurisdiction to entertain a writ of habeas corpus. He conceded that point. But he would make clear later that he did challenge the Court’s jurisdiction on other questions involved in the case, such as the President’s exclusive authority to decide the manner of trying the defendants.⁹⁴ On that point Biddle did not waver. Basically, he consented to the Court reviewing the petition for a writ of habeas corpus, so long as it rejected it.

A separate jurisdictional issue concerned the Court’s authority to take a case from the district court without first waiting for judgment from the appellate court, the D.C. Circuit. Justice Frankfurter pressed the point, asking both Royall and Biddle to state on what grounds the Court could take the case directly from Judge Morris. Royall had little success in citing legal grounds. Finally, Frankfurter asked Royall why he had not appealed Judge Morris’s decision to the D.C. Circuit. Reminding the Court that Morris had acted at 8 p.m. the previous evening, Royall acknowledged that the appeal “might have been perfected if we had had a little additional element of time.”⁹⁵ Royall suggested that the court agree to continue with the oral argument and he would take whatever procedural steps were necessary to get the paperwork to the D.C. Circuit.

3. Constitutionality of Tribunal. With that issue set to the side, Royall and the Justices focused on the disputes that needed attention. He agreed with the Justices that the Court wasn’t being asked to determine the guilt or innocence of the defendants.⁹⁶ The sole issue was whether the Court would uphold or strike down the jurisdiction of the military tribunal. If its jurisdiction were denied, the defendants could take their case to a civil court.

The Court then explored whether the country was in a state of martial law. Chief Justice Stone asked Royall: “Under the Constitution, the President, either with or without the authority of Congress, may declare martial law and enforce martial law?” Royall agreed that the President had that power, and under martial law “properly and constitutionally declared . . . some form of military court would try it.”⁹⁷ Stone thought that Roosevelt’s proclamation might have declared martial law because it referred to the eight Germans as taking part “of an invasion or predatory incursion.”

⁹³ Landmark Briefs, at 498.

⁹⁴ Id. at 583, 603, 604, 615, 635, 636.

⁹⁵ Id. at 500.

⁹⁶ Id. at 511.

⁹⁷ Id. at 513.

Royall disagreed, stating that martial law “ordinarily is a territorial matter and not a matter dependent upon the character or conduct of the individual.”⁹⁸

Colonel Royall admitted that it would have been permissible to shoot the eight men as they landed, “because they were apparently invading our country,” but once they entered the country they could not be shot or tried before a military tribunal. Justice Robert H. Jackson pursued that point: “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.”⁹⁹ Agreeing with that analogy, Royall finally had an opportunity to state his central propositions:

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.¹⁰⁰

Justice Byrnes asked about the status of the eight men who entered the country and changed from their uniforms to civilian clothes. If Hitler and seven generals landed from a submarine on the banks of the Potomac River in Washington, D.C. and discarded their uniforms, would they be entitled “to every right you have discussed in the application for a writ of habeas corpus and to require an indictment by a grand jury under the Constitution?” Royall conceded that his argument “would have to carry that fact, and does.”¹⁰¹ Justice Stanley Reed interjected: “Does that mean that every spy is entitled to be heard by the civil courts?” Royall answered in the negative “because there is a specific statute which deals with spies,” later adding that he thought the statute was valid.¹⁰² Frankfurter crystallized the point: “What you are saying is that that which Congress can take out of the constitutional provisions by statute, the President as Commander-in-Chief cannot take out of civil statute by military proclamation?” Royall replied: “That is correct.”¹⁰³

⁹⁸ Id. at 514.

⁹⁹ Id. at 515-16.

¹⁰⁰ Id. at 516.

¹⁰¹ Id. at 520.

¹⁰² Id. at 521.

¹⁰³ Id. at 522.

Oral argument clarified another point. Stone asked whether the Court could correct errors of a military court, assuming that it had authority to act. Royall answered: “You cannot do that, sir. In other words, habeas corpus, of course, is not a method of reviewing the facts.”¹⁰⁴ He was not bringing the case to the Court to determine guilt, innocence, or procedural errors. The sole issue was whether the military commission had jurisdiction to hear and decide the case.

4. Presidential Authority. Chief Justice Stone pressed this hypothetical: “Assuming they came in bearing arms and were prepared to use them, has the President constitutional authority to appoint a commission to try and condemn them and, in connection with that, to suspend the writ?” Royall denied that the President had any constitutional authority to suspend the writ in the absence of an express statute. Congress “is the only one that can authorize the suspension of the writ under the first Article and under the Fifth Amendment.”¹⁰⁵

Royall also challenged the validity of the first charge because it relied on the “law of war,” which he called “a sort of common international law.” He told the Court “there is a serious question as to whether there is any such offense as the violation of the Law of War.”¹⁰⁶ Instead of trying to divine the meaning and intent of the Law of War, nowhere specifically written down, the better course was to rely on the statutory Articles of War and other enactments of Congress.¹⁰⁷ Frankfurter wondered whether there might be “some discretion” in the Commander-in-Chief clause to create a military commission. Royall conceded that this grant of presidential power included “some element of discretion,” but not the power to create military commissions when civil courts are open and operating.¹⁰⁸

5. Conflict with Congressional Statutes. Royall insisted that Congress possessed the constitutional authority to legislate on military courts and military tribunals, and that any action by the President contrary to statutory standards would be invalid. He read this language from the 38th Article of War:

The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States. Provided, that nothing contrary to or consistent with these Articles shall be so prescribed.¹⁰⁹

¹⁰⁴ Id. at 528.

¹⁰⁵ Id. at 535.

¹⁰⁶ Id. at 536.

¹⁰⁷ Id. at 537-38.

¹⁰⁸ Id. at 539-40.

¹⁰⁹ Id. at 550.

Royall charged that Roosevelt's proclamation and military order violated the Articles. Instead of complying with Article 38, which directed the *President* to prescribe the rules of procedure, Roosevelt transferred that function to the military commission. Moreover, the commission issued few rules in advance. The rules adopted on July 7 dealt primarily with the sessions not being open to the public, the taking of oaths of secrecy, the identification of counsel for the defendants and the prosecution, and the keeping of a record. Only eight lines referred to rules of procedure: peremptory challenges would not be allowed, there would be one challenge for cause, and this concluding language: "In general, wherever applicable to a trial by Military Commission, the procedure of the Commission shall be governed by the Articles of War, but the Commission shall determine the application of such Articles to any particular question."¹¹⁰ For the most part, then, Royall asserted, the commission made the rules as the trial went along.

Another inconsistency: the Articles required unanimity for a death penalty, but Roosevelt's proclamation allowed a two-thirds majority. Royall insisted that the 38th Article had to govern, because Roosevelt had specifically cited it in his military order appointing the commission members and the defense and prosecution counsel. Royall also pointed to the review procedure in Article 46. Before the President could act, the trial record of a general court martial or a military commission had to be first referred to a staff judge advocate or the Judge Advocate General for review. Also, Article 50 ½ provided for examination by a board of review. Yet Roosevelt's proclamation required the trial record of the military commission to come directly to him as the final reviewing authority. This inconsistency was compounded by another change. Instead of having the Judge Advocate General function in an independent capacity to review the adequacy of a military trial, Roosevelt had placed him in the role of prosecutor with the Attorney General.¹¹¹

6. Ex parte Milligan. Royall and Biddle squared off on the application of *Ex parte Milligan* (1866). Royall told the Justices that both the majority and minority opinions in that case "fully sustain our view." He acknowledged that the reach of *Milligan* could be limited to U.S. citizens, but insisted that his defendants were entitled to trial before a criminal court.¹¹² In rebuttal, Biddle said that alien enemies had no rights to sue or to enter U.S. courts "under these circumstances, both because of the President's proclamation and because of the statutes governing the case, and also because of the very ancient and accepted common law rule that such enemies have nor rights in the courts of the sovereign with which they are enemies." The issue, Biddle said, was not whether the defendants were U.S. citizens or aliens. Royall conceded that Burger had lost his citizenship by joining the Nazi Army, while Biddle maintained that Haupt had forfeited his citizenship as well. To Biddle, the

¹¹⁰ "Rules Established by the Military Commission Appointed by Order of the President of July 2, 1942," at 3-4; McCoy Papers.

¹¹¹ Landmark Briefs, at 557-61.

¹¹² Id. at 564-65.

essential issue was not U.S. citizenship but the status of the defendants as enemies of the United States.¹¹³

Biddle said that nothing in *Milligan* affected the saboteurs except “a certain dictum . . . which seemed to me profoundly wrong.”¹¹⁴ He argued that the case should be limited to its particular circumstances. A congressional statute of 1863, requiring the President to notify courts of persons held under suspension of the writ of habeas corpus, had not been followed. It was on that ground, Biddle said, that *Milligan*’s petition for a writ of habeas corpus should have been granted.¹¹⁵ In that sense, *Milligan* was a matter of not following a statute and did not represent a general right of citizens to a civil trial when the courts were open and operating.

7. The Rights of Aliens. On the second day, Biddle opened up an issue that had only been tangentially explored: which branch of government decides the rights of aliens? He made it clear that the Constitution gave aliens no right of access to U.S. courts. To the extent that such rights existed, they came from statutes enacted by Congress.¹¹⁶ He cited two: the Alien Act of 1798, and a statute in 1917.¹¹⁷ Could a President’s proclamation overturn the policy that Congress had established by statute? Biddle seemed to regard a proclamation as merely confirming congressional policy, not acting against it. He said that “there is nothing in the statute which permits them to come into court without the proclamation.”¹¹⁸ Justice Reed checked his understanding: “Without the proclamation.” Biddle continued: “Therefore, I think that at common law and under the statutes to which I have referred they have no right; but to close any possibility, the President signed a proclamation.” Thus, Roosevelt’s proclamation merely confirmed what Congress had established by law. Stone pressed for clarification: “Assume that your opponents are right in saying that there is no jurisdiction in a military court to try the case of these people on its merits. Would a proclamation change that?” Biddle: “Oh, I think not.”¹¹⁹

As the discussion continued, Biddle could sense that he might have answered Stone “a little too quickly.” In the two paragraphs below, Biddle starts by claiming that the war power is exercised jointly by Congress and the President, but toward the end he argues that in some instances a President as Commander-in-Chief could act in ways that even Congress could not control:

I think it is conceivable, as I just pointed out in the opening of this argument, that the powers of waging war, of raising armies, of making regulations governing the armies, and the powers of the President as Executive and Commander-in-

¹¹³ Id. at 565.

¹¹⁴ Id. at 573.

¹¹⁵ Id. at 575.

¹¹⁶ Id. at 606.

¹¹⁷ Id. at 594-95, 606.

¹¹⁸ Id. at 607.

¹¹⁹ Id.

Chief—these powers in the Constitution express all the powers of the Executive and of the Legislature.

It is conceivable that if there were no statute, or even if the statute, as in the *Milligan* case, provided that these men under certain circumstances could not be tried by a military tribunal, the President, in the exercise of his great authority as the Commander-in-Chief during the war and in the protection of the people of the United States, might issue such proclamations which no Congress could set aside, because it might be considered that those proclamations were a proper expression of his executive power; but, as said yesterday—¹²⁰

At that point, Chief Justice Stone interrupted: “We do not have to come to that?” Biddle agreed: “You do not have to come to that.”¹²¹ Even so, Biddle later pressed that point: “It seems to me, clearly, that the President is acting in concert with the statute laid down by Congress. But . . . I argue that the Commander-in-Chief, in time of war and to repel an invasion, is not bound by a statute.”¹²² Justice Roberts inquired: “That is to say that the Articles of War bind him sometimes and sometimes they do not?” Biddle conducted a partial retreat: “No. I do not say that, Mr. Justice Roberts. I say that it is perfectly clear that in this case there is no conflict.” Roberts double-checked his understanding: “You mean, his action does not conflict with the Act of Congress?” Biddle: “Yes, sir.” Roberts accepted that argument as “perfectly understandable,” but said he had understood Biddle to say that if the President “acted in conflict with the Acts of Congress it still was all right.” Biddle tried again:

I do not think I went quite as far as that. I think we could imagine situations where the President could act, in repelling an invasion, irrespective of an Act of Congress. He must have some constitutional power that Congress cannot interfere with, as Commander-in-Chief. I think it is unnecessary for me to argue it here, first, because he has acted clearly under the Articles of War, and secondly, whether or not that procedure is followed is not for this Court to go into.¹²³

As to any possible conflict between Roosevelt’s action and the Articles of War, Biddle said that Article 46 “is the only case whether there is a doubt.”¹²⁴ Royall, entering the argument at that point, identified difficulties not only with Article 46 but with Articles 38, 48, and 50 ½.¹²⁵ The Justices engaged in extensive discussion with Biddle and Royall on the Articles and how they applied to the President. One of the few concrete points was made by Royall, who resisted any thought that the “Law of War” could create offenses punishable in the courts, whether military or civil. No one, he said, “can create an offense in the absence of express Congressional

¹²⁰ *Id.*

¹²¹ *Id.* at 608.

¹²² *Id.* at 636.

¹²³ *Id.*

¹²⁴ *Id.* at 637.

¹²⁵ *Id.* at 637-38.

enactment. The Constitution requires that.” On the same point: “I say there is no Law of War in absence of a statute.”¹²⁶

After oral argument on July 30, the Justices met in conference to discuss the best course of action.¹²⁷ Many of the issues raised during those two days of oral argument would have to be revisited over the next three months as Chief Justice Stone worked on a draft opinion to explain the Court’s reasons.

The Per Curiam

At noon on July 31, Chief Justice Stone read a short per curiam opinion that upheld the military tribunal. Defense lawyers carried the papers from the D.C. Circuit to the Supreme Court only a few minutes before Stone spoke. Through these actions the Court was able to act on “writs of certiorari to the United States Court of Appeals for the District of Columbia.” In granting cert, the Court denied motions for leave to file petitions for writs of habeas corpus and affirmed the decision of the district court. In announcing its decision, the Court said 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.” In its terse ruling, the Court held that the military commission was lawfully constituted, that the defendants were held in lawful custody, and had not shown cause for being discharged by writ of habeas corpus.¹²⁸

Writing the Full Opinion

Having disposed of the issue with two days of oral argument and a brief per curiam, it was the responsibility of Chief Justice Stone to produce the “full opinion.” The complexity of that task was heightened on August 8 with the executions of six of the saboteurs. Clearly nothing in Stone’s opinion for the Court could now cast doubt on the per curiam. Stone did not want the Court’s reputation damaged by concurrences and dissents. Particularly in this case, it was crucial to hold the Court together.

Initial Draft

Stone drafted the opinion from his summer home in Franconia, N.H. Writing to his law clerk, Bennett Boskey, on August 1, he expressed concern at the version he saw in the *New York Times*, which included reference to Articles of War 46 and 50 ½. He thought he had omitted that paragraph. (He had.) Stone knew that the full opinion “must deal with them and will have a sour look” if the men had been executed “without the kind of review required by 50 ½.” He expressed frustration with the

¹²⁶ Id. at 652, 658.

¹²⁷ Frankfurter’s “Notes taken at conference,” July 30, 1942; Felix Frankfurter Papers, Part III, Reel 43 (hereafter “Frankfurter Papers”), Manuscript Room, Library of Congress.

¹²⁸ Ex parte Quirin, 63 S.Ct. 1-2 (1942). The per curiam is also reproduced in a footnote in Ex parte Quirin, 317 U.S. 1, 18-19 (1942).

analyses performed by the government and the defendants: “Both briefs have done their best to create a sort of a legal chaos.”¹²⁹

Stone continued to write to Boskey, asking for legal documents to flesh out the draft. He wanted materials to show that the eight Germans were “unlawful belligerents in the International Law and Law of War sense, which would bring them within the jurisdiction Military Tribunals, which the Commander in Chief under the Constitution & Article XV of the Articles of War may set up for their trial independently of the 5 & 6 amendments, as such their case is distinguished from that of Milligan who was not a beligerant [sic] or waging war because not associated with the armed forces of the enemy and acting under their direction.”¹³⁰ That thought would later appear in the October 29 decision.

Stone wrote to Frankfurter on September 10, revealing that he found it “very difficult to support the Government’s construction of the articles [of war].” He said it “seem almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed and it is too late for them to raise the question if in fact the articles as they construe them have been violated.” Only after the war, he said, would the facts be known, because the trial transcript and other documents would be released to the public. By that time, Dasch and Burger could raise the question successfully, which “would not place the present Court in a very happy light.”¹³¹

Articles 46 and 50 ½

By mid-September, Stone’s initial draft had circulated to the other Justices and he was back in Washington responding to their comments. Writing to Frankfurter on September 16, he said he planned to put out a memorandum opinion “which will present to the Court alternative views, one of which will have to be followed.” He would accompany that opinion with another memo “which will indicate the embarrassments to which the Court will be exposed whichever procedure is adopted.” Stone shared with Frankfurter his concerns about the legislative construction of the review procedures set forth in Article of War 46.¹³²

In a memo for the Court on September 25, Stone explored the meaning of Articles of War 38, 43, 46, and 50 ½. Their construction, he said, raised a question of “some delicacy and difficulty.” In presenting the case at conference, immediately following oral argument on July 30, he said he had expressed “doubts as to the construction of those Articles and stated that if it were necessary to decide the point I should not be able to decide without further investigation; that in my opinion it would be unnecessary to decide it, and in fact would be improper to do so since there were no facts disclosed on the record of the habeas corpus proceedings which drew

¹²⁹ Letter from Harlan Fiske Stone to Bennett Boskey, August 1, 1942; Papers of Harlan Fiske Stone (hereafter “Stone Papers”), Box 69, Manuscript Room, Library of Congress.

¹³⁰ Letter from Stone to Boskey, August 9, 1942; Stone Papers.

¹³¹ Letter from Stone to Frankfurter, September 10, 1942; Frankfurter Papers.

¹³² Letter from Stone to Frankfurter, September 16, 1942; Stone Papers.

in question the construction of the Articles.” Stone reasoned that Roosevelt had not foreclosed review by the Judge Advocate General or by a staff judge advocate. In preparing the per curiam, he included one paragraph stating that the Court did not pass upon the construction of Articles 46 and 50 ½ in the absence of a decision by the military commission or action of the President requiring their construction.¹³³ The Court struck that paragraph from the per curiam.

Stone was now “in doubt as to how the Court intended the opinion to be written—whether (a) it should decline to pass upon the Articles in question on the ground that their construction was not before us or, in the alternative, (b) it should construe the Articles contrary to the contention of the petitioners.” He said that the first ground “was and is a perfectly tenable legal ground of decision, wholly consistent with the per curiam.” Still, he noted this “embarrassment”: “the announcement that we have left the construction of Articles 46 and 50-1/2 undecided is now made for the first time after six of the petitioners have been executed and when it is too late to raise the question in their behalf.” There were many facts the Court did not know. It didn’t know if the decision of the military tribunal was unanimous, and it did not know what method of review the President had adopted. If the two survivors renewed their applications for habeas corpus, “their petitions would necessarily lack any factual basis for the construction of the Articles in question.” Even if the Court knew the facts, “the knowledge would not alter the record on which we acted and on which our opinion must be written.”¹³⁴

Stone worried about the Court’s reputation: “whenever the facts do become known, as they ultimately will, the survivors, if still in prison, will be in a position to raise the question. If the decision should be in their favor it would leave the present Court in the unenviable position of having stood by and allowed six to go to their death without making it plain to all concerned—including the President—that it had left undecided a question on which counsel strongly relied to secure petitioners’ liberty.”¹³⁵

The second alternative—construing the statutes against petitioners’ contentions—also carried risks. To Stone, the Court might be deciding “a proposition of law which is not free from doubt upon a record which does not raise it.” In short, the Court would be rendering an advisory opinion. He saw no justification for writing a “legal essay” on the meaning of Articles 46 and 50 ½. In order to present the issues fully to the Justices, he prepared a memo opinion with alternative endings designated Memorandum A and Memorandum B. The first declined to pass upon the construction of the Articles; the second supplied a construction. He acknowledged that Memorandum B troubled him because he could find no basis in the record to write an opinion on the subject, and he was “reluctant” to see the Court write an advisory opinion.¹³⁶

¹³³ “Memorandum re Saboteur Cases,” September 25, 1942, at 1; Stone Papers.

¹³⁴ *Id.* at 1-2.

¹³⁵ *Id.* at 2.

¹³⁶ *Id.*

The Court decided to avoid the pitfalls of Memorandum B. The full decision released on October 29 concluded that the secrecy surrounding the trial made it impossible for the Court to judge whether Roosevelt's proclamation and order violated or were in conflict with the Articles of War.¹³⁷

Keeping a United Front

Institutionally, it was important for the Court to issue a unanimous opinion and avoid any concurrences that might raise doubts about the *per curiam*, the full opinion, or the execution of six saboteurs. Stone did what he could to stick to fundamental points and discourage his colleagues from offering supplemental views.

Nevertheless, Robert Jackson worked on several drafts of a concurrence. An early version, typewritten in double space, begins: "I concur in the opinion in so far as it finds these prisoners properly to be in military custody and that the President might lawfully set up a military commission for their trial. I think our functions end with that finding." After striking out a few sentences, he concluded that the eight Germans, by "casting aside their uniforms and concealing their identity," lost "those rights which they might otherwise have claimed under the laws of war."¹³⁸

In his concurrence, Jackson now moved into territory that Stone had indicated during oral argument was ill-advised: speculation about a form of presidential power that could not be controlled either by Congress or the courts. Jackson wrote: "We should not only be slow to find that Congress unwittingly had done such a thing, but even if it had clearly done so we would have a serious question of the validity of any such effort to restrict the Commander in Chief in the discharge of his Constitutional functions."¹³⁹

Hugo Black asked his law clerk, John P. Frank, to comment on Jackson's argument that there was "serious question" as to whether Congress could ever restrict the President in his capacity as Commander in Chief. To Frank, that position was "completely and outrageously wrong." It was what Biddle, during oral argument, "was trying to get out of this Court—an expression of complete executive authority." Frank did not agree that the President's position as Commander in Chief "gives him authority to over-ride express acts of Congress," and worried that any deference by the Court to presidential powers in military affairs would likely strengthen executive power in the domestic field, including control over farm prices.¹⁴⁰

In a memo to Stone on October 2, Black expressed his uneasiness about two points: the vague realm of the law of war, and excessive scope given to military tribunals. While he acknowledged that Congress had the constitutional authority to

¹³⁷ Ex parte Quirin, 317 U.S. 1, 46-47 (1942).

¹³⁸ Undated draft, at 1; Papers of Robert H. Jackson, Box 124, Manuscript Room, Library of Congress.

¹³⁹ Id.

¹⁴⁰ "Ex parte Quirin: The Jackson Memo," undated memo from Frank to Black; Papers of Hugh Lafayette Black, Box 269, Manuscript Room, Library of Congress.

declare “all violations of the Laws of War to be crimes against the United States,” he seriously questioned whether it could constitutionally confer jurisdiction to try “*all* such violations before military tribunals.” He didn’t want to say that “every violation of every rule of the Laws of War” between nations would subject every person living in the United States to the jurisdiction of military tribunals. He was comfortable only with declaring that the eight German saboteurs could be tried by a military tribunal “because of the circumstances and purposes of their entry into this country as a part of the enemy’s war forces.”¹⁴¹

Stone tried to limit the reach of the Court’s decision. He didn’t want to include the material from Jackson or have it stand as a separate concurrence. On October 23, he proposed language that the Court would later adopt in its essentials: “We hold therefore that the President did not vary the procedure of the Commission in any respect from that which Congress has either expressly or impliedly directed. Since his action does not conflict with any laws of Congress, it would be gratuitous for us to inquire whether Congress could restrict the authority of the Commander in Chief to discipline enemy belligerents, or to consider the role of the courts if he were to ignore such restriction.”¹⁴²

The more Jackson worked on his concurrence, the longer it got. Possibly reacting to criticism that his separate statement fractured the unity of the Court, he changed the initial sentence from “I concur in the opinion” to “I agree with the opinion.”¹⁴³ The drafts moved from typewritten versions to pageproofs. As late as October 23, he titled the pageproofs a “memorandum” rather than a concurrence.¹⁴⁴ Still, whatever he called it, a separate statement is a separate statement. Constantly nudged by his colleagues, Jackson withdrew the memo. Douglas later said that it was “unfortunate the court took the case.” While it was “easy to agree on the original per curiam, we almost fell apart when it came time to write out the views.”¹⁴⁵

“F.F.’s Soliloquy”

At some point in October, when it looked like the Court might fragment with separate statements, Frankfurter wrote a peculiar document he called “F.F.’s Soliloquy.” He sent it to his colleagues with this note attached: “Dear Brethren: This goes to you with affection and respect. F.F.”¹⁴⁶ It might have been Frankfurter’s attempt to inject some humor, but it also seems designed to insert a backbone in any

¹⁴¹ Memo from Black to Stone, October 2, 1942; Black Papers.

¹⁴² “Memorandum for the Conference,” October 23, signed H.F.S.; Papers of Robert H. Jackson, Box 124, (hereafter “Jackson Papers”), Manuscript Room, Library of Congress.

¹⁴³ Undated draft, attached to a printer’s version of the opening page, showing the parties to the case; Jackson Papers.

¹⁴⁴ Papers of William O. Douglas, Box 77, Manuscript Room, Library of Congress.

¹⁴⁵ William O. Douglas, *The Court Years, 1939-1975*, at 138-39 (New York: Vintage Books, 1981).

¹⁴⁶ Presumably Frankfurter sent the document to each Justice. I am relying on the copy in the Jackson Papers.

colleague who threatened to backslide. The memo is especially bizarre because it represents a conversation between Frankfurter and the saboteurs, six of whom were dead. In that sense, “soliloquy” was indeed the proper word, because Frankfurter was engaging in a monologue, not a dialogue. Moreover, the memo abandons any pretense of judicial objectivity and balance. To Frankfurter, Roosevelt had the undoubted power to create the commission and all else was needless talk injurious to the country.

The memo begins by expressing discomfort about what Frankfurter heard in a recent conference: “After listening as hard as I could to the views expressed by the Chief Justice and Jackson about the *Saboteur* case problems at the last Conference, and thinking over what they said as intelligently as I could, I could not for the life of me find enough room in the legal differences between them to insert a razor blade.” And now he was in receipt of Jackson’s memo (a potential concurrence) “expressing what he believes to be views other than those contained in the Chief Justice’s opinion.” Frankfurter concluded that mere verbal differences were being used to express “intrinsically identic [sic] views about the governing legal principles.”

Frankfurter then invents a dialogue in which he asks the saboteurs what entitled them to a writ of habeas corpus. After hearing their argument, he calls them “damned scoundrels” who had a “helluvacheek” asking for a writ. They were “just low-down, ordinary, enemy spies who, as enemy soldiers, have invaded our country and therefore could immediately have been shot by the military when caught in the act of invasion.” He tells them he would deny their writ “and leave you to your just deserts with the military.” Dismissing other legal arguments, he scolds them that they had done “enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress after your bodies will be rotting in lime.” His parting words to the saboteurs: “you will remain in your present custody and be damned.”

In the closing paragraph, Frankfurter lays bare his feelings: a sense of patriotism in wartime that places national unity above constitutional concerns. Some of the “very best lawyers” he knew were in the battles underway in the Solomon Islands, in service in Australia, chasing enemy submarines in the Atlantic, or performing their duty in military aircraft. What would they think, in putting their lives on the line, if a unanimous opinion of the Court was clouded by “internecine conflict about the manner of stating that result?” If the Court issued not only the decision for the majority but also concurrences, they would say: “What in hell do you fellows think you are doing? Haven’t we got enough of a job trying to lick the Japs and the Nazis without having you fellows on the Supreme Court dissipate the thoughts and feelings and energies of the folks at home by stirring up a nice row as to who has what power when all of you are agreed that the President has the power to establish this Commission . . . ?” They would rebuke the Court for getting engrossed “in your own interest in verbalistic conflicts because the inroads on energy and national unity that such conflict inevitably produce, is a pastime we had better postpone until peacetime.”

The October 29 Decision

By the time the Court released the full opinion on October 29, it acknowledged that oral argument on July 29 and 30 proceeded while the defendants “perfected their appeals” from the district court to the D.C. Circuit.¹⁴⁷ It chose not to address certain questions, such as whether Haupt lost his U.S. citizenship because he “elected to maintain German allegiance and citizenship.”¹⁴⁸ It also made clear that it was not concerned “with any question of guilt or innocence of petitioners.”¹⁴⁹

The Court began with some fundamentals: “Congress and the President, like the courts, possess no power not derived from the Constitution.”¹⁵⁰ It then itemized the war powers conferred upon Congress and the President and the Articles of War enacted by Congress, including the Articles that recognize military tribunals to punish offenses “against the law of war not ordinarily tried by court martial.”¹⁵¹ By taking that approach, the Court decided that President Roosevelt had exercised authority “conferred upon him by Congress” as well as whatever authority the Constitution granted the President.¹⁵²

Could the President act independently under his interpretation of inherent or implied power, even to the extent of acting contrary to congressional policy as expressed in statute? The Court found no reason to decide that: “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.”¹⁵³

The Court distinguished between “lawful combatants” (uniformed soldiers) and “unlawful combatants” (enemies who enter the country in civilian dress). The former, when captured, are detained as prisoners of war. The latter are subject to trial and punishment by military tribunals.¹⁵⁴ Although the Court declined to address Haupt’s status as U.S. citizen, it made clear that U.S. citizenship of an enemy belligerent “does not relieve him from the consequences for a belligerency which is unlawful because in violation of the law of war.”¹⁵⁵

Turning to *Milligan*, the Court distinguished that decision from the Nazi saboteurs. Milligan was a U.S. citizen who resided in Indiana for twenty years, did not reside in any of the rebellious states, and was not an enemy belligerent entitled to

¹⁴⁷ Ex parte Quirin, 317 U.S. 1, 19 (1942).

¹⁴⁸ Id. at 20.

¹⁴⁹ Id. at 25.

¹⁵⁰ Id.

¹⁵¹ Id. at 27.

¹⁵² Id. at 28.

¹⁵³ Id. at 29.

¹⁵⁴ Id. at 30-31.

¹⁵⁵ Id. at 37.

POW status or subject to the penalties imposed on unlawful belligerents.¹⁵⁶ He was a “non-belligerent, not subject to the law of war.”¹⁵⁷ The Court declined to define with “meticulous care” the “ultimate boundaries” of military tribunals to try persons charged with violating the law of war. It was enough for the Court to say that the defendants were “plainly within these boundaries.”¹⁵⁸

Was the President’s proclamation and order in conflict with Articles of War 38, 43, 46, 50 ½, and 70? The Court held that the secrecy surrounding the trial and proceedings before the tribunal “will preclude a later opportunity to test the lawfulness of the detention.”¹⁵⁹

Other questions were left unaddressed. “We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents.”¹⁶⁰ The Court was unanimous in deciding that the Articles in question “could not at any stage of the proceedings afford any basis for issuing the writ.”¹⁶¹ Although unanimous on that conclusion, the Court was divided on the legal reasons: “a majority of the full Court are not agreed on the appropriate grounds for decision.” Some Justices believed that Congress did not intend the Articles of War to govern a presidential military tribunal convened to try enemy invaders. Others concluded that the military tribunal was governed by the Articles of War, but that the Articles in question did not foreclose the option selected by President Roosevelt.¹⁶²

Evaluations of *Quirin*

The Court received great credit for meeting in special session to consider the legal rights of the Nazi saboteurs. The haste with which the Court moved, however, left doubts in the minds of some whether justice had been served. A repeat German sabotage effort late in 1944 led again to trial by military tribunal, but this time the Administration made a number of changes organizationally and procedurally.

Popular Press

An editorial in the *Washington Post* said that “Americans can have the satisfaction of knowing that even in a time of great national peril we did not stoop to

¹⁵⁶ Id. at 45.

¹⁵⁷ Id.

¹⁵⁸ Id. at 46.

¹⁵⁹ Id. at 47.

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² Id.

the practices of our enemies.”¹⁶³ After the Court completed two days of oral argument, a *Post* editorial discovered an “element of the sublime in the action of the Chief Justice in calling this extraordinary session of the court.”¹⁶⁴ The *New York Times* predicted that the full opinion, “which will be made public later on, will go into our constitutional history besides the *Milligan* decision, delivered in 1866.”¹⁶⁵ For those who wondered why the men were tried instead of being placed against a wall and shot, the *Times* took the high ground: “We had to try them because a fair trial for any person accused of crime, however apparent his guilt, is one of the things we defend in this war.”¹⁶⁶ The *New Republic* wrote: “It is good to know that even in wartime and even toward the enemy we do not abandon our basic protection of individual rights.” With this decision Americans could broadcast to the world “that they have invoked the rule of law even in the case of enemy saboteurs.”¹⁶⁷

Norman Cousins of the *Saturday Review of Literature* voiced skepticism about the trial. Just as there was no need for a summary execution, so was there “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. If the saboteurs *actually had a chance*, it would be different, but they didn’t; we knew it, and they knew it.”¹⁶⁸ A similar position came from constitutional scholar Edward S. Corwin, who viewed the Court’s October 29 opinion as “little more than a ceremonious detour to a predetermined end.”¹⁶⁹

Frederick Bernays Wiener

Justice Frankfurter was sufficiently troubled by the decision to ask Frederick Bernays Wiener, an expert on military justice, to express his views on *Quirin*. Wiener prepared three analyses: the first on November 5, 1942, the next on January 13, 1943, and the final on August 1, 1943. Each letter found serious problems with the Court’s work.

In the first letter, he credits the Court for taking “the narrowest—and soundest—ground” in holding that the eight saboteurs were “war criminals (or unlawful belligerents) as that term is understood in international law,” and that “under established American precedents extending back through the Revolution, violators of the laws of war were not entitled, as a matter of constitutional right, to a jury trial.”¹⁷⁰ He thought the decision was helpful in clarifying certain aspects of *Milligan* and for

¹⁶³ “Justice Is Done,” *Washington Post*, August 9, 1942, at 6.

¹⁶⁴ “Habeas Corpus,” *Washington Post*, July 31, 1942, at 12.

¹⁶⁵ “Motions Denied,” *New York Times*, August 1, 1942, at 10.

¹⁶⁶ “They That Take the Sword,” *New York Times*, August 9, 1942, at 8.

¹⁶⁷ “The Saboteurs and the Court,” *The New Republic*, August 10, 1942, at 159.

¹⁶⁸ “The Saboteurs,” *Saturday Review of Literature*, August 8, 1942, at 8 (emphasis in original).

¹⁶⁹ Edward S. Corwin, *Total War and the Constitution* 118 (New York: Alfred A. Knopf, 1947).

¹⁷⁰ “Observations on *Ex parte Quirin*,” signed “F.B.W.,” at 1; Frankfurter Papers.

“putting citizenship in its proper perspective in relationship to war offense.” Still, he criticized the Court for creating a “good deal of confusion as to the proper scope of the Articles of War insofar as they relate to military commissions.” Weaknesses in the decision flowed “in large measure” from the Administration’s disregard for “almost every precedent in the books” when it established the military tribunal.¹⁷¹

Before turning to these defects, Wiener compliments the Court for confronting some of the “extravagant dicta” in the majority’s opinion in *Milligan*. He also thought the Court was on target in treating Haupt’s citizenship as irrelevant in deciding the tribunal’s jurisdiction to try him for a violation of the law of war.¹⁷² Yet Wiener “parted company” with the Court because of what he considered its careless or uninformed handling of the Articles of War. The Court said that Article 15 saved the concurrent jurisdiction of military commissions.¹⁷³ Wiener argued that the legislative history of AW 15 demonstrated that it was intended as a *restriction* on military commissions, which had extended their authority to offenses punishable by courts-martial. During the Civil War, military commissions had repeatedly and improperly assumed jurisdiction over offenses better handled by courts-martial.¹⁷⁴

Wiener emphasized that Congress may limit the jurisdiction of military tribunals by statute, and it seemed to him “perfectly plain that the Articles of War are applicable to military commissions to the extent that they in terms purport to apply to such tribunals.” The fact that President Roosevelt appointed the commission did not give it a free charter. If the President appointed a general court-martial, it would still be subject to the provisions of the Articles of War. Presidential immunity did not make a tribunal “immune from judicial scrutiny.”¹⁷⁵ Passages from the *Digest of Judge Advocate General’s Opinions* showed that military tribunals are subject to restrictions just like courts-martial: “the rules which apply in these particulars to general courts-martial have almost uniformly been applied to military commissions.”¹⁷⁶

An especially potent section of Wiener’s critique centered on Article of War 46, requiring the trial record of a general court-martial or military commission to be referred to the staff judge advocate or the Judge Advocate General. It seemed “too plain for argument” that AW 46 required “legal review of a record of trial by military commission before action thereon by the reviewing authority; that the President’s power to prescribe rules of procedure did not permit him to waive or override this requirement; that he did in fact do so; and that he disabled his principal legal advisers by assigning to them the task of prosecution.”¹⁷⁷

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ Ex parte Quirin, 317 U.S. 1, 28 (1942).

¹⁷⁴ “Observations on Ex parte Quirin,” at 3-4.

¹⁷⁵ Id. at 4.

¹⁷⁶ Id. at 5.

¹⁷⁷ Id. at 8.

Were President Roosevelt's actions justified under his powers as Commander in Chief, or by invoking implied or inherent executive authority? Not to Wiener: "I do not think any form of language, or any talk about the President's inherent powers as Commander in Chief, is sufficient to justify that portion of the precept, which, in my considered judgment, was palpably illegal."¹⁷⁸ Having identified these legal and constitutional violations, Wiener nevertheless concludes that "not even this flagrant disregard of AW 46 was sufficient to justify issuance of the writ" of habeas corpus. The issue before the Court was whether the saboteurs were in lawful custody, not whether they could be sentenced "without benefit of the advice of staff judge advocate." Royall had conceded in oral argument that the Court was not asked to correct procedural errors. Wiener makes the same point: "Errors in procedure, and the question of petitioner's guilt or innocence, are beyond the scope of inquiry on habeas corpus to a military tribunal."¹⁷⁹

Wiener identified other problems. Military commissions were normally appointed by War Department Special Orders, not by presidential proclamation or military order. He cited only one precedent of using the Judge Advocate General of the Army as prosecutor, and it was one "that no self-respecting military lawyer will look straight in the eye: the trial of the Lincoln conspirators." Even in that precedent, "the Attorney General did not assume to assist the prosecution."¹⁸⁰

In conclusion, Wiener thought the saboteurs could have been "perfectly well" tried either by commissions appointed by the Commanding Generals of New York and Florida, or by a military commission operating under the limitations of a general court-martial. The trial record, he said, should have been reviewed by the Judge Advocate General before being sent to the President.¹⁸¹ Under Roosevelt's proclamation and military order, that was not possible. When the second group of German saboteurs arrived in November 1944 and were apprehended, they were tried along the lines suggested here by Wiener.

Two months later, in a second letter to Frankfurter, Wiener reported that he had "been digging a little deeper into the AW 46 matter, and while in a sense it is tied up with AW 50 ½, it is necessary to discriminate between the various portions of AW 50 ½." As to AW 46, a commanding general "may disregard his staff JA's advice, but he is bound to have it before him before he acts."¹⁸² Under AW 50 ½, the President may also disregard his staff Judge Advocate but "there is this exception, that in presidential cases the President's approval is final—there is no one to review after him as there is in the case of subordinate commanders."¹⁸³ To Wiener, the conclusion seemed "inescapable that AW 46 and ¶ 2 of AW 50 ½ read together require that the record of trial by a military commission appointed by the President must go to the B/R

¹⁷⁸ Id.

¹⁷⁹ Id. at 9.

¹⁸⁰ Id.

¹⁸¹ Id. at 9-10.

¹⁸² Letter from Wiener to Frankfurter, January 13, 1943, at 1; Frankfurter Papers.

¹⁸³ Id. at 2.

[Board of Review] and the JAG.” There was no basis to contend that a presidential military commission is subject to procedures that vary from ordinary military commissions “except where the statute makes it so.” The Constitution vested authority in Congress, not the President, to “define and punish . . . Offenses against the Law of Nations.” Both AW 46 and ¶ 2 of AW 50 ½ “imposed such limitations” on the President.¹⁸⁴

Writing a third time, on August 1, 1943, Wiener reiterated his position that the eight Germans, coming into U.S. territory in civilian clothes as unlawful belligerents, had no constitutional right to a jury trial. What of the Administration’s argument (accepted by the Court) that AW 15 provided an affirmative direction by Congress that offenses against the law of war should be tried by military commissions? To Wiener, the legislative history of AW 15 (which first appeared in 1916) made it “at least doubtful whether Congress had any affirmative legislation in mind.” Brig. Gen. Enoch H. Crowder, Judge Advocate General of the Army from 1911 to 1923, explained to Congress in 1916 that AW 15 was included to clarify two points: that it was not the intent in legislating on courts-martial to exclude trials by military commissions, and that military commanders “in the field in time of war” had the option of using either one:

A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them [a number of persons included in AW 2 who are also subject to trial by military commission] in the designation “persons subject to military law” and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced. * * *

It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient.¹⁸⁵

Wiener omitted from the second paragraph Crowder’s concluding sentence: “Both classes of courts have the same procedure.”¹⁸⁶ Congress did not intend military tribunals to invent their own rules and regulations. When Congress created the Judge Advocate General in 1862, it directed his office to receive, “for revision, the records and proceedings of all courts-martial and military commissions.”¹⁸⁷ The review procedure was identical for both. However, Roosevelt’s proclamation authorized the military tribunal to depart from those procedural safeguards whenever it decided it was appropriate or necessary.

¹⁸⁴ Id. at 3.

¹⁸⁵ Letter from Wiener to Frankfurter, August 1, 1943, at 1-2, citing S. Rept. No. 130, 64th Cong., 1st Sess. 40 (1916); material in brackets added by Wiener; Frankfurter Papers.

¹⁸⁶ S. Rept. No. 130, 64th Cong., 1st Sess. 40 (1916).

¹⁸⁷ 12 Stat. 598, § 5 (1862).

These letters from Wiener must have had an impact on Frankfurter. In 1953, when the Court was considering whether to sit in summer session to hear the espionage case of Ethel and Julius Rosenberg, one of the Justices recalled that the Court had sat in summer session in 1942 to hear the sabotage case. Frankfurter wrote: “We then discussed whether, as in *Ex parte Quirin*, 317 U.S. 1, we might not announce our judgment shortly after the argument, and file opinions later, in the fall. Jackson opposed this suggestion also, and I added that the *Quirin* experience was not a happy precedent.”¹⁸⁸ In an interview on June 9, 1962, Justice Douglas made a similar comment: “The experience with *Ex parte Quirin* indicated, I think, to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds, the examination of the grounds that had been advanced is made, sometimes those grounds crumble.”¹⁸⁹

Other Scholarly Comment

The articles that first appeared in law journals were generally brief descriptions of *Quirin*, offering little in the way of analysis, judgment, or evaluation.¹⁹⁰ Somewhat more perceptive were two articles written by Robert E. Cushman in 1942, although he wrote quickly and without access to many of the facts that would become public within a few years.¹⁹¹ Other short treatments were published during the first year, offering little more than description.¹⁹² An article in the *Harvard Law Review* did note that as a result of “certain powers vested exclusively in Congress by the Constitution, it would seem that Congress has the basic power to create military commissions.”¹⁹³

Of potentially greater interest are the articles written by participants. General Cramer wrote about his experience in handling the prosecution with Biddle. However, his article was written before the full opinion was released on October 29, and revealed little other than the bare facts that had already been made public. Yet he offered this compliment: “In the gravest times of war, our highest court convened quickly during midsummer in extraordinary session to hear and weigh the arguments

¹⁸⁸ “Memorandum Re: *Rosenberg v. United States*, Nos. 111 and 687, October Term 1952,” June 4, 1953, at 8; Frankfurter Papers, Part I, Reel 70.

¹⁸⁹ Conversation between Justice William O. Douglas and Professor Walter F. Murphy, June 9, 1962, at 204-05; Seeley G. Mudd Manuscript Library, Princeton University.

¹⁹⁰ E.g., “Notes: Jurisdiction of Military Tribunals,” 37 Ill. L. Rev. 265 (Nov.-Dec. 1942); George T. Schilling, “Saboteurs and the Jurisdiction of Military Commissions,” 41 Mich. L. Rev. 481 (Dec. 1942).

¹⁹¹ Robert E. Cushman, “*Ex parte Quirin et al.*—The Nazi Saboteur Case,” 28 Corn. L. Q. 54 (Nov. 1942); Robert E. Cushman, “The Case of the Nazi Saboteurs,” 36 Am. Pol. Sci. Rev. 1082 (Dec. 1942).

¹⁹² Charles Cheney Hyde, “Aspects of the Saboteur Cases,” 37 Am. J. Int’l L. 88 (Jan. 1943).

¹⁹³ Note, “Federal Military Commissions: Procedure and ‘Wartime Base’ of Jurisdiction,” 56 Harv. L. Rev. 631, 639 (Jan. 1943).

of counsel for petitioners and Government, in a manner characteristic of its spirit and traditions.”¹⁹⁴

An article by Col. F. Granville Munson, who assisted Cramer during the trial, was also limited to matters of public record and written in advance of the full opinion. He did make this distinction between courts-martial and military tribunals: “A court-martial has no authority to make rules for the conduct of its proceedings. Its procedure is rather rigidly prescribed in the *Manual for Courts-Martial* (1928) which, by Executive order of November 29, 1927, is prescribed for the government of all concerned.”¹⁹⁵ He also points out that a general court-martial must have as one of its members a “law member” (an officer of the Judge Advocate General’s Department, if available), who would rule on the admissibility of evidence. The military tribunal of the saboteurs lacked a law member.¹⁹⁶ In “several important particulars” (such as peremptory challenges) the rules followed by the tribunal “were at variance with the statutory provisions for general courts-martial.”¹⁹⁷

A more extensive treatment, written after the full opinion, is by Cyrus Bernstein. He highlights the *ex post facto* issue in Roosevelt’s proclamation, which increased the maximum penalty of sabotage from thirty years to death: “Congress could not have passed an *ex post facto* law of that tenor; Congress could not have authorized the President to issue such a proclamation.”¹⁹⁸ Bernstein also points to a conflict of interest for Biddle. The proclamation authorized the Attorney General, with the approval of the Secretary of War, to make exceptions to the prohibition against remedies or proceedings in the civil courts, and yet Biddle also served as prosecutor.¹⁹⁹ Similarly, Bernstein notes that Cramer’s participation with the prosecution eliminated the customary JAG review of a military commission’s decision.²⁰⁰

By far the most error-ridden account appears in Biddle’s memoirs. He writes that the four Germans at Amagansett threatened the Coast Guardsman “with revolvers.”²⁰¹ Nothing in the public record supports that claim. He says that Dasch “forced \$350” into the Guardsman’s hand.²⁰² The figure is either \$300 (Dasch’s intent) or \$260 (what Cullen actually received). Biddle identifies defense counsel Col.

¹⁹⁴ General Myron C. Cramer, “Military Commissions: Trial of the Eight Saboteurs,” 17 Wash. L. Rev. and State Bar J. 247, 253 (Nov. 1942).

¹⁹⁵ F. Granville Munson, “The Arguments in the Saboteur Trial,” 91 U. Pa. L. Rev. 239, 240 (Nov. 1942).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 240-41.

¹⁹⁸ Cyrus Bernstein, “The Saboteur Trial: A Case History,” 11 G.W. L. Rev. 131, 157 (Feb. 1943).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 158-59.

²⁰¹ Francis Biddle, *In Brief Authority* 326 (Garden City, N.Y.: Doubleday & Co. 1962).

²⁰² *Id.*

Dowell as “McDowell.”²⁰³ Biddle describes an event of July 28, after which he and Royall flew to Philadelphia to urge the Court to call a special session.²⁰⁴ The trip to Judge Roberts’ farm took place on July 23. In a remarkable error, Biddle says that *Ex parte Milligan* was decided “in 1876.”²⁰⁵ That is not an unfortunate typo, because Biddle has *Milligan* being issued “a decade after the Civil War.”²⁰⁶

Alpheus Thomas Mason, in his book on Chief Justice Stone and in an article in a law review, explains Stone’s dilemma in drafting an opinion that would do the least damage to the judiciary. The Court could do little other than uphold the jurisdiction of the military tribunal, being “somewhat in the position of a private on sentry duty accosting a commanding general without his pass.”²⁰⁷ Stone was well aware that the judiciary was “in danger of becoming part of an executive juggernaut.”²⁰⁸

Recent studies of *Quirin* have been quite critical of the Court. To Michal Belknap, Stone went to “such lengths to justify Roosevelt’s proclamation” that he preserved the “form” of judicial review while “gutt[ing] it of substance.”²⁰⁹ So long as Justices marched to the beat of war drums, the Court “remained an unreliable guardian of the Bill of Rights.”²¹⁰ In a separate article, Belknap describes Frankfurter in his “Soliloquy” essay as a “judge openly hostile to the accused and manifestly unwilling to afford them procedural safeguards.”²¹¹ David J. Danelski regards the full opinion in *Quirin* as “a rush to judgment, an agonizing effort to justify a *fait accompli*.”²¹² The opinion represented a victory for the executive branch, but for the Court “an institutional defeat.”²¹³ The lesson for the Court is to “be wary of departing from its established rules and practices, even in times of national crisis, for at such times the Court is especially susceptible to co-optation by the executive.”²¹⁴

²⁰³ Id. at 331.

²⁰⁴ Id. at 337.

²⁰⁵ Id. at 328.

²⁰⁶ Id.

²⁰⁷ Alpheus Thomas Mason, “Inter Arma Silent Leges: Chief Justice Stone’s Views,” 69 Harv. L. Rev. 806, 830 (1956).

²⁰⁸ Id. at 831. These views also appear in Alpheus Thomas Mason, Harlan Fiske Stone: Pillar of the Law 665-66 (New York: The Viking Press, 1956).

²⁰⁹ Michal R. Belknap, “The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case,” 89 Mil. L. Rev. 59, 83 (1980).

²¹⁰ Id. at 95.

²¹¹ Michal Belknap, “Frankfurter and the Nazi Saboteurs,” Yearbook 1982: Sup. Ct. Hist. Soc., at 66.

²¹² David J. Danelski, “The Saboteurs’ Case,” 1 J. Sup. Ct. Hist. 61 (1996).

²¹³ Id. at 80.

²¹⁴ Id.

The Two Saboteurs in 1944-45

Germany made a second attempt to bring saboteurs to the United States by submarine. After being trained in sabotage and espionage in Berlin, the Hague, and Dresden, William Colepaugh and Erich Gimpel left Kiel, Germany, on U-boat 1230. Colepaugh, age 26, was a Connecticut-born U.S. citizen. Gimpel, 35, was a native of Germany. On November 29, the sub entered Frenchman's Bay on the coast of Maine, where the two men came ashore in a rubber boat.²¹⁵

Making their way to Bangor, Maine, they took a train to Portland and another train to Boston. After one night in Boston they continued on to New York City. Unlike the eight saboteurs in 1942, Colepaugh and Gimpel brought no explosives with them. Their primary mission: purchase a short-wave radio and transmit intelligence back to Germany. Similar to the 1942 saboteurs, they were taught to use secret ink to send messages to mail drops in Lisbon and Madrid.²¹⁶ Similarly as well, they bought American clothing, lived well on the U.S. dollars they carried with them, had a falling out, and were picked up by the FBI. Both were apprehended in New York City, Colepaugh on December 26 and Gimpel four days later.

Initially, it appeared that Colepaugh and Gimpel would be tried in the same manner as the eight Nazi agents in 1942: by a military tribunal sitting on the fifth floor of the Justice Department in Washington, D.C.²¹⁷ Attorney General Biddle was again prepared to conduct the prosecution, along with Judge Advocate General Cramer. However, Secretary of War Stimson, who saw no sense in Biddle and Cramer acting as prosecutors in 1942, this time forcefully intervened to block their participation.

Writing to President Roosevelt on January 7, 1945, Stimson argued that a repeat of the 1942 procedure "is likely to have unfortunate results." He wanted the trial conducted in a normal manner, "without any extraordinary action or notice taken of the case by officials on the highest levels." He offered several reasons for opposing Biddle's plan. First, Stimson believed that a trial of Colepaugh and Gimpel by a military tribunal appointed by the President, with Biddle and Cramer as prosecutors, "would certainly be attended by headlines and worldwide publicity. This would almost certainly lead to charges in Germany that innocent Germans were being tried and condemned by an extraordinary legal proceeding." Second, such a trial "would be likely to lead to German maltreatment of American prisoners of war in their hands." Third, the effect on U.S. fighting troops and on the public would be adverse, because they "would wonder why so much time and such important personnel were devoted to the trial of two obscure persons charged with an ordinary war offense, at a time when millions of Americans are daily risking their lives." For these reasons,

²¹⁵ "German Agents, Landed by U-Boat, Seized Here by FBI," New York Times, January 2, 1945, at 1.

²¹⁶ "Preliminary Report on the Interrogation of German Saboteurs Erich Gimpel and William C. Colepaugh," at 4; RG 319, Records of the Army Staff, Box 275, Gimpel file, National Archives, College Park, Md.

²¹⁷ "Army to Try Spies, Roosevelt Hints," New York Times, January 3, 1945, at 1; "Boy Hero Arrives," New York Times, January 4, 1945, at 21.

the men should be tried either by court martial or military commission, with the appointment authority placed in the Army Commander in Boston or in New York.²¹⁸

With Biddle busy building support for his appointment as prosecutor, Stimson took care to develop his own list of backers. His prediction of what the Germans would do to American POWs, he told Roosevelt, came from “high military authorities.” Moreover, he informed Roosevelt that Elmer Davis of the Office of War Information concurred in these views “regarding the public relation aspect and also as to the use that the Germans would make of the case.”²¹⁹ Biddle, on the other hand, insisted that the commission be appointed by the President.²²⁰ Stimson, in a reply to Biddle, wanted the appointment lodged in “the appropriate Army commander.”²²¹

In his diary, Stimson expresses contempt for Biddle’s grandstanding. He records that at a Cabinet meeting he told Roosevelt that he “wouldn’t favor any high ranking officers as members of the tribunal and did not propose to have the Judge Advocate General personally try it.” If Biddle appeared in person at a trial held in Washington, “it would inevitably turn it into a dramatic performance which would be played up by the press.” Stimson, indicating that Roosevelt apparently agreed with him “fully,” noted that Biddle continued to press his position. After returning from the meeting, Stimson spoke to a colleague in the War Department about Biddle’s attitude: “It is a petty thing. That little man is such a small little man and so anxious for publicity that he is trying to make an enormous show out of this performance—the trial of two miserable spies. The President was all on my side but he may be pulled over.”²²²

In a diary entry for January 8, Stimson seems a little more confident that he would prevail. He said that two of Roosevelt’s aides, Judge Sam Rosenman and Press Secretary Steve Early, were both on his side.²²³ Stimson’s instincts were correct. On January 12, President Roosevelt released a military order to try Colepaugh and Gimpel. Unlike his military order of July 2, 1942, he did not name the members of the tribunal or the counsel for the prosecution and defense. Instead, he empowered the commanding generals, under the supervision of the Secretary of War, “to appoint military commissions for the trial of such persons.” Moreover, the trial record would not go directly to the President, as in 1942. The review would be processed with the Judge Advocate General’s office: “The record of the trial,

²¹⁸ Letter of January 7, 1945, from Stimson to Roosevelt, at 1-2; RG 107, Records of the Office of the Secretary of War, “German Saboteur” file in Stimson’s “Safe File,” National Archives, College Park, Md (hereafter “Stimson’s Safe File”).

²¹⁹ *Id.*

²²⁰ Letter of January 8, 1945, from Biddle to Stimson; Stimson’s Safe File.

²²¹ Letter of January 8, 1945, from Stimson to Biddle, Stimson’s Safe File.

²²² Stimson Diary, January 5, 1945, at 18-19, Roll 9, Manuscript Room, Library of Congress.

²²³ *Id.*, January 8, 1945, at 23.

including any judgment or sentence, shall be promptly reviewed under the procedures established in Article 50 ½ of the Articles of War.”²²⁴

Appointments to the seven-man tribunal were made by Maj. Gen. Thomas A. Terry, commander of the Second Service Command. He also selected the officers to serve as prosecutors and defense counsel. In addition to the military personnel, two members from the Justice Department assisted with the prosecution.²²⁵ Biddle would have no role as prosecutor, and Cramer would be limited to his review function within the JAG office. The trial took place not in Washington, D.C., but at Governor’s Island, New York City.²²⁶

On February 14, 1945, the tribunal sentenced Colepaugh and Gimpel to die by hanging. They were found guilty of three counts: violation of the law of war by passing through military lines, violation of the 82nd Article of War for spying, and conspiracy. The tribunal deliberated for three hours. The verdicts and sentencing went to General Terry, as the appointing officer, and from there to the Judge Advocate General’s office.²²⁷

President Roosevelt died on April 12, before the executions could be carried out. On May 8, President Harry Truman announced the end of the war in Europe. The following month, he commuted the death sentences for the two men to life imprisonment.²²⁸ In 1955, Gimpel was released from prison and deported to Germany.²²⁹ Colepaugh, without success, initiated a habeas corpus action from prison, arguing that he should not have been tried by a military tribunal.²³⁰ He was paroled in 1960.²³¹

²²⁴ Military Order, 10 Fed. Reg. 548 (1945).

²²⁵ “2 Spy Suspects Given to Army for Trial,” *New York Times*, January 19, 1945, at 14.

²²⁶ “Spy Trials Open Today,” *New York Times*, February 6, 1945, at 5.

²²⁷ “2 Spies Sentenced to Die by Hanging,” *New York Times*, February 15, 1945, at 1.

²²⁸ “Truman Commutes to Life Terms Death Sentences of Two Spies,” *New York Times*, June 24, 1945, at 1.

²²⁹ “‘44 Nazi Spy Landed in U-Boat Is Deported to West Germany,” *New York Times*, August 13, 1955, at 15.

²³⁰ *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957).

²³¹ “An American was the Nazi spy next door,” *USA Today*, February 28, 2002, at 2A.

Conclusions

Thus, the Administration had learned several lessons from the 1942 experience, which were applied in 1945 (see below). Military tribunals should not be prosecuted by the Attorney General and the Judge Advocate General, the President should not be the appointing official, and he should not receive the trial record directly from the tribunal. Instead, review of the trial record should be performed by trained and experienced experts within the Office of Judge Advocate General.

The Roosevelt Administration tried the eight Germans in a secret military trial primarily for two reasons: to conceal the fact that Dasch had turned himself in, and to mete out heavier penalties. Secretary of War Stimson objected to the participation of Attorney General Biddle and Judge Advocate General Cramer as prosecutors. Stimson also disliked the drama of a trial held in the Justice Department. When the need for a military tribunal resurfaced in 1945, Stimson was this time successful in preventing Biddle and Cramer serving as prosecutors and keeping Cramer in his statutory role as a reviewing officer within JAG.

Other objections were raised to the 1942 procedure, such as having the trial record go directly to President Roosevelt. In 1945, the trial record went first to General Terry and from there to JAG. Instead of having the appointment of the tribunal members and counsel done by the President, as in 1942, those duties were vested in General Terry.

Particularly in recent decades, the Supreme Court has been criticized for assembling in the summer of 1942 to decide a case without receiving briefs in advance and without knowledge about how the secret trial was conducted or how it would turn out. The Justices knew that information unavailable to them would be released within a few years, putting the Court's reputation at risk. The compressed schedule, including taking a case directly from a district court without action by the D.C. Circuit, and issuing a decision one day after oral argument, gave the appearance of a rush to judgment.

Further, the Court has been criticized for issuing a brief per curiam and then taking almost three months to release the full opinion that contained the legal reasoning. Drafting of the full decision was done under the shadow of six executions. Nothing in the full decision could imply that there had, in any way, been a miscarriage of justice. The customary airing of individual views through concurrences and dissents could not be allowed. The multiple problems of *Quirin* would later be exposed by Frederick Bernays Wiener and other scholars.

Appendix²³²

Article of War 46:

Under such regulations as may be prescribed by the President every record of trial by general-court martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

Article of War 50 ½:

The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; . . . When in a case in which the order of execution has been withheld under the provisions of this paragraph, the board of review holds the record of trial legally insufficient to support the findings or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the board of review, such findings and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, and the record shall be transmitted through the proper channels to the convening authority for a rehearing or such other action as may be proper. In the event that the Judge Advocate General shall not concur in the holding of the board of review, the Judge Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part.

²³² From a Manual for Courts-Martial, effective April 1, 1928, at 213-16 (Washington, D.C.: Government Printing Office, 1936).

When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing.