



# A NOTE ON THE SABOTEURS' CASE & THE COMMANDER IN CHIEF

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PROFESSORS DAVID J. BARRON of Harvard Law School and Martin S. Lederman of Georgetown University Law Center have rendered a notable public service with their extensive two-part account in recent issues of the *Harvard Law Review* of the complex and at times thorny relationship between the powers of the Commander in Chief and the powers of Congress.<sup>1</sup> Spanning the entire life of the Republic, the Barron-Lederman attention to detail and their summaries of the reasons contemporaneously advanced for actions taken or actions not taken should be helpful to scholars and practitioners and public officials – and even the press – for years to come (including right now).

About four pages of their discussion are devoted to the Saboteurs' Case, *Ex Parte Quirin*.<sup>2</sup> As Supreme Court litigation, this case

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<sup>1</sup> *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine and Original Understanding*, 121 Harv.L.Rev 689 (2008), and *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 Harv.L.Rev 944 (2008).

<sup>2</sup> 317 U.S. 1 (1942); see 121 Harv.L.Rev at 1051-1055.

and the Presidential measures producing it were a kind of centerpiece of the Roosevelt Administration's views on the scope of the President's wartime powers. The authors take note of the fact that the main thrust of the Government's brief was that nothing in the Articles of War which Congress had adopted was infringed by the procedures established for the military commission the President had convened. They go on to point out that nevertheless in oral argument Attorney General Biddle, as an alternative ground, suggested that in a case such as this Congress could not constitutionally tread on the Commander in Chief's prerogatives.

As is well known, the Court unanimously held in a single opinion by Chief Justice Stone that the Presidentially-convened military commission had jurisdiction, and that no violation of the Articles of War was occurring. The authors so state. They then refer to an introductory sentence, in a paragraph toward the end of the opinion, which reads: "We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents." The authors somewhat mysteriously call this sentence a "cryptic suggestion that there was some question of Congress's power" and attribute it to "tumult within the Court after the oral argument." This leads them to summarize a series of draft but never-issued opinions by Justice Jackson in which such constitutional nuances were adverted to.

It is of course no longer fresh news that the Court's final opinion in *Ex Parte Quirin* saw the light of day after considerable discussion and internal writing among the Justices.<sup>3</sup> As a general rule, much

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<sup>3</sup> The Barron-Lederman article derives its examination of the Jackson drafts from the papers of Justice Douglas in the Library of Congress. One of the Jackson drafts has also been reproduced and discussed in an article by Professor Jack Goldsmith, *Justice Jackson's Unpublished Opinion in Ex Parte Quirin*, 9 Green Bag 2d 223 (2006). I was Chief Justice Stone's senior law clerk at the time of *Ex Parte Quirin*, and some years ago I wrote an account expressing my personal misgivings that Alpheus T. Mason, who was Stone's official biographer, had proceeded with what seemed to me Mason's too-early publishing (in 1956, at a time when four of the participating Justices – Black, Douglas, Reed and Frankfurter – were still active Justices sitting on the Court) in unstinted detail Stone's internal papers relating to *Ex Parte Quirin*. *A Justice's Papers: Chief Justice Stone's Biographer and The*

## *A Note on the Saboteurs' Case*

fascination – and some instructiveness – is to be found in the never-issued drafts of majority opinions, and never-issued concurrences and dissents, reposing in the files of Supreme Court Justices – files that become available sometimes much later and sometimes much sooner, depending usually on the wishes of the particular Justice. But as we all know, the law is what turns up in the opinions as actually announced, representing where the Justices' views have finally come to rest.

In any event, an understanding of what emerged from *Ex Parte Quirin* may be helped by reading the full paragraph of which Professors Barron and Lederman have quoted the first sentence. It says:<sup>4</sup>

We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents. For the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ. But a majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that – even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to “commissions” – the particular

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*Saboteurs' Case*, 14 *The Supreme Court Historical Society Quarterly* No. 3, page 10 (1993), reproduced in my *Some Joys of Lawyering*, 33 (Green Bag Press 2007). Among other things, I quoted from a 1956 letter Justice Frankfurter had sent to Paul Freund, including the following: “The *Quirin* opinion was the result of an uncommonly extensive interchange on paper of views among the various Justices. Stone’s correspondence – selectively printed – is only a part of it. There is considerable correspondence between Jackson and me, between Roberts and me, between Reed and others, etc., etc. There were circulations by some of us which are both pertinent and illuminating to the final outcome.” See also William O. Douglas, *The Court Years 1939-1975*, 138-139 (1980).

<sup>4</sup> 317 U.S. at 47-48.

*Bennett Boskey*

Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the Commission, in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.

It will be recalled that only eight Justices participated in *Ex Parte Quirin* (Justice Murphy had recused himself). Some of them thought the Articles of War were not intended to apply to this Presidentially-convened military commission. Others thought that even if applicable to this military commission the Articles of War were not being infringed. Thus by virtue of statutory interpretation the possibly difficult constitutional issue at the heart of the Barron-Lederman article was not reached by the Supreme Court during the Administration of Franklin Delano Roosevelt. The Court's decision not to deal with this issue was neither cryptic nor casual. It was deliberate, and conformed to the time-honored tradition of avoiding constitutional questions clearly not necessary to resolving the case before it.

