

# *From the Bag*

## Felix Frankfurter's "Soliloquy" in *Ex parte Quirin*

NAZI SABOTAGE & CONSTITUTIONAL CONUNDRUMS

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OCCASIONALLY Supreme Court Justices find themselves confronted with cases that present an awkward combination of relatively novel constitutional issues, potentially momentous short-run consequences, and considerable pressure for a quick decision. Such cases – the *Steel Seizure* case, the *Pentagon Papers* case, and *Bush v. Gore* are examples – are, on the whole, loathed by members of the Court, and the fact that they are entertained at all, given the Court's largely discretionary docket, signals that the justices involved have concluded that their resolution amounts to a necessary response to a perceived domestic or international emergency.

*Ex parte Quirin*, decided by the Court in 1942, was such a case. In *Quirin* the Supreme

Court ratified President Franklin Roosevelt's decision to try eight Nazi-sponsored saboteurs, who had been arrested by the FBI in June of that year, before a specially constituted military commission rather than in the civilian courts. That commission had been created by an executive order by Roosevelt on July 2. The order was accompanied by a Presidential proclamation that closed the civilian courts to

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 the United States ... and are charged with committing or attempting or preparing to commit sabotage ... or violations of the law of war.<sup>1</sup>

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<sup>1</sup> *Ex parte Quirin*, 317 U.S. 1, 22-23 (1942).

A Note on Sources: This essay draws upon several secondary works on the *Quirin* case, and quotes some documents in archives that are also quoted in those works.

Details of the Nazi saboteurs' abortive mission in May and June 1942 can be found in David Danelski, "The Saboteurs' Case," 1 J. S. Ct. Hist. 61 (1996); George Lardner, Jr., "Nazi Saboteurs

Roosevelt's order and proclamation, which had been drafted with the saboteurs in mind, were unsuccessfully challenged on constitutional grounds in *Quirin*, a decision that on its face provides the strongest legal basis for the military tribunals proposed by the Bush administration in November 2001. The *Quirin* case also featured the extraordinary memorandum by Justice Felix Frankfurter reproduced below. To understand the constitutional, and institutional, context in which Frankfurter's memorandum in *Quirin* appeared, it is necessary to review some of the factors which combined to place the Court in a conspicuously awkward position.

On June 27, 1942, the FBI announced that it had arrested eight men who had secretly entered the United States for the purpose of committing sabotage. All the men had previ-

ously lived in the United States, but were living in Germany at the time the U.S. entered World War II. Six were German citizens and two held dual American and German citizenship. Evidence at their trial would reveal that German military intelligence had recruited them for a secret mission in late 1941, trained them in sabotage, and provided them with money, explosives, secret instructions written in invisible ink on handkerchiefs, and false American identities. In late May 1942, the men left Nazi-occupied France in two U-boats, and were deposited in mid-June off beaches near Amagansett, Long Island, and Ponte Vedra, Florida. Both groups had been instructed to change into civilian clothes and to travel to New York or Chicago, where they were to buy additional clothing, make prearranged contacts with Nazi sympathizers in

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Captured!" *Washington Post Magazine* (Jan. 13, 2002); and Gary Cohen, "The Keystone Kommandos," *Atlantic Monthly* (Feb. 2002). Those accounts rely in part on Eugene Rachlis, *They Came to Kill* (1961), an undocumented account of the mission that relies heavily on the transcript of the saboteurs' trial, and on George J. Dasch, *Eight Spies Against America* (1959), a memoir by one of the saboteurs whose death sentence was commuted and who was deported to Germany in 1948. Although some of the above sources appear to accept Dasch's account of the mission, in which he describes himself as intending to betray it from the outset, there is no corroborating evidence that such was Dasch's intent.

Details of the process by which the Roosevelt administration created a military commission to try the saboteurs after they had been taken into custody in late June 1942 can be found in Michal R. Belknap, "The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case," 89 *Military L. Rev.* 59 (1980), and Danelski, "The Saboteurs' Case." I quote from documents in the Franklin D. Roosevelt Papers and the Oscar Cox Papers in the Franklin D. Roosevelt Library, Hyde Park, N.Y., and from Secretary of War Henry L. Stimson's Diary in the Library of Congress for the period between June 29 and July 9, 1942. Those documents are cited in the Belknap and Danelski articles.

The Court's internal deliberations in connection with its issuance of a July 31 per curiam order, and an October 29 opinion in *Ex parte Quirin*, are discussed in Belknap, "The Supreme Court Goes to War," and Danelski, "The Saboteurs' Case." Both sources quote liberally from internal Court documents in the Hugo Black, Felix Frankfurter, Robert Jackson, and Harlan Fiske Stone Papers in the Library of Congress, especially ones in the Stone Papers. I have quoted from some of those documents as well. I also quote from a draft paragraph Stone wanted to include in the per curiam order, but deleted after four justices expressed opposition to it. That version of the per curiam order is in the Stanley Reed Papers, University of Kentucky Library, Lexington, Ky., and also appears in the Danelski article.

Frankfurter's "Soliloquy" memorandum, featured in this essay, can be found in the Hugo Black, William O. Douglas, Felix Frankfurter, and Robert Jackson Papers at the Library of Congress, in the Frank Murphy Papers at the University of Michigan Library in Ann Arbor, Mich., and in the Stanley Reed Papers at the University of Kentucky Library. It does not appear, to the best of my knowledge, in the Harlan Fiske Stone Papers.

Citations to some additional secondary sources appear in subsequent notes.

America, and seek to blend into the population. They were then to rendezvous in Cincinnati on July 4, where they would be given more specific sabotage tasks.

None of the saboteurs ever reached Cincinnati. Thanks to a combination of luck and the cooperation of two members of the Long Island group, the FBI managed to detain them all by June 27. The leader of the Long Island group, George John Dasch, knew more about the scope of the mission than most of the others, and almost immediately after landing sought to provide information about the mission to American authorities. Five days after landing, Dasch finally convinced an initially incredulous FBI that the mission was authentic, and was placed in protective custody while the FBI sought to round up his fellow saboteurs. On July 3 Dasch was formally arrested and detained with the others, and on July 4 the eight men were secretly transported to Washington, D.C., to be tried before the military commission created by Roosevelt on July 2.

Dasch subsequently claimed that he had intended to undermine the sabotage mission from its outset. It is much more likely that he suddenly resolved to betray his colleagues after being spotted, as the first of his party to make a landing on Amagansett beach shortly after midnight on June 13, by John Cullen, a Coast Guard patrolman. Cullen, who was unarmed (as was Dasch at the time of their inadvertent meeting), had been surveying the Atlantic coast. On encountering Cullen, Dasch first claimed he was a fisherman, but after another member of the Long Island party approached, speaking German, Dasch offered Cullen money to "forget what he had seen." Concerned for his safety, Cullen took the money (about \$260) and retreated to the Coast Guard station. By the time he roused his colleagues, and they initiated a search in the darkness, Dasch and the other Long Island saboteurs had made their way to the

Amagansett railroad station, where, despite their wet, dirty appearance, they boarded an early morning train for Jamaica, Queens, without incident. Eventually the four saboteurs were able to buy new clothes, change trains, and lodge themselves, in groups of two, in hotels in Manhattan.

Dasch was paired with Ernst Peter Burger, and the two men agreed that despite their escape from Amagansett they would eventually be apprehended, and could probably save their lives only by disclosing the details of the mission, and the whereabouts of the other saboteurs, to the FBI. Dasch took the lead in approaching the FBI, first contacting its office in Manhattan the day after he arrived there. But it was only after Dasch traveled to Washington four days later, demanded an interview with J. Edgar Hoover, and produced large amounts of money and his secret instructions, that he was able to convince the FBI that the sabotage plot was genuine. The FBI eventually decoded the secret writing in Dasch's handkerchief, which led them to the American contacts that Nazi intelligence had established for the two groups of saboteurs. When the saboteurs eventually approached those contacts, they were arrested. The FBI's June 27 announcement of the arrests implied that the Bureau had infiltrated Nazi sympathizers in America, but Dasch's fortuitous encounter with Cullen, and his subsequent decision to try to save his own skin, had been decisive.

By July 6 all the saboteurs had been transported to Washington, and their trial before the military commission created by Roosevelt had begun. By August 3 the commission had found all eight men guilty of violations of the Articles of War (aiding enemies of the United States and spying), conspiracy to commit those offenses, and violations of the international "law of war," the most prominent of which was entering American territory in civilian dress for the purpose of committing hostile acts. Under military law all those offenses carried the death

penalty, and all eight were sentenced to death. Roosevelt's order creating the commission had provided that review of its decisions would be solely by the President of the United States, and the commission, after formally convicting and sentencing the saboteurs, presented its report to the President with a recommendation that Dasch and Burger have their sentences commuted to life imprisonment. On August 8 the White House announced that Roosevelt had commuted Burger's sentence to life, and Dasch's to thirty years, and that the other six saboteurs had, that day, been electrocuted.



The Supreme Court's disposition of *Ex parte Quirin*, the saboteurs' challenge to the jurisdiction of the military commission trying them, took place between July 29 and July 31, in the midst of the saboteurs' trial. But the stage for *Quirin* had already been set between June 27, when the FBI disclosed the arrest of the saboteurs, and July 2, when Roosevelt released the order creating the commission and the accompanying proclamation. *Quirin* began to take shape when the FBI informed the President that the saboteurs (one of whom, a member of the Long Island group, was a German citizen named Richard Quirin) were in custody.

Roosevelt received that news on June 27, and three days later sent a memorandum to Attorney General Francis Biddle, in which he recommended that the two Americans among the saboteurs be tried for "high treason." "[I]t seems to me," Roosevelt added, "[that] they are

just as guilty as it is possible to be," and "that the death penalty is almost obligatory." As for the six other German saboteurs, Roosevelt thought that they were in violation of the laws of war for crossing behind enemy lines in civilian dress to commit hostile acts. In their cases, as well, he concluded, "[t]he death penalty is called for by usage."<sup>2</sup>

Meanwhile Biddle had received a memo from Oscar Cox, the Assistant Solicitor General of the United States, which had urged that the saboteurs be tried for offenses under the law of war rather than for statutory federal crimes. Since the most the U.S. government could prove was that the saboteurs had conspired to attempt hostile acts – they had been arrested before they could even make the attempt – Cox, and Biddle, feared that under civilian criminal law the sentences for the alien saboteurs might be very light, as little as two years. Moreover, treason charges against the two American citizens would require either a confession in open court or the testimony of two witnesses to the same treasonous act, and the only available witnesses to their conduct were the other saboteurs. Finally, trying Dasch in open court would reveal the ease with which the saboteurs had been able to land on American shores, and the extent to which American law enforcement authorities had relied on Dasch's information, rather than their own diligence, in apprehending the saboteurs. Accordingly, Biddle wrote a memorandum to Roosevelt on June 30 recommending that the saboteurs be tried in secret by a military commission, and that they be charged with violations of the law of war.<sup>3</sup>

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<sup>2</sup> Franklin D. Roosevelt, Memorandum for the Attorney General, June 30, 1942, Franklin D. Roosevelt Papers, Franklin D. Roosevelt Presidential Library, Hyde Park, N.Y. The memorandum is quoted in Belknap, "The Supreme Court Goes to War," supra note 1, at 63, and Danelski, "The Saboteurs' Case," supra note 1, at 65.

<sup>3</sup> Oscar Cox, Memorandum for the Attorney General, June 29, 1942; [Francis Biddle], Memorandum for the President, June 30, 1942, both in the FDR Papers, supra note 2. The Cox and Biddle memoranda are quoted in Belknap, "The Supreme Court Goes to War," supra note 1, at 64, and Danelski, "The Saboteurs' Case," supra note 1, at 66.

In response, Roosevelt issued the July 2 proclamation closing civil courts to persons who fit the saboteurs' description, and executed the order creating the military commission that would try them. Several features of Roosevelt's response illustrated his strong desire to move quickly and decisively against the saboteurs. The members of the commission, all of whom were U.S. Army generals, were chosen by Roosevelt's Secretary of War, Henry Stimson. Biddle himself was named to prosecute the saboteurs. A conviction could be secured on the votes of only five of the seven members of the commission, and evidence could be admitted if it had "probative value to a reasonable man," which would allow some hearsay evidence.

Roosevelt also named defense counsel for the saboteurs, all of whom were Army colonels. Cassius Dowell was a career lawyer in the Army's Judge Advocate General Corps, Kenneth Royall was the recent head of the military contracts section of the War Department, and Carl Ristine (who was to represent Dasch separately), was a career member of the Army's Inspector General's Office. When Royall received the news of his and Dowell's appointment, he asked that Roosevelt appoint civilian lawyers in their stead, since he felt that in their representation they might need to challenge orders issued by their Commander-in-Chief. Roosevelt did not give Royall or Dowell the option of withdrawing. He also provided, in his order creating the commission, that any appeal from its decisions would be solely to the President of the United States. This review procedure, designed to avoid any delays in carrying out sentencing, was atypical for military commissions: Articles 46 and 50-1/2 of the Articles of War, enacted by Congress, had provided that decisions of

military commissions, in cases where the execution of those decisions required presidential approval, should be forwarded to a board of review constituted by the Judge Advocate General's Office.

Royall's request to be replaced by civilian counsel had been based on the assumption that Roosevelt's July 2 order and proclamation might be vulnerable to constitutional challenges. Shortly after his request was denied, Royall formally asked Roosevelt for authority to make such a challenge, and Roosevelt, after consulting Biddle, merely instructed his secretary to inform Royall and Dowell that they should use their best judgment as lawyers. Royall and Dowell then indicated that they were prepared to file a habeas corpus petition on behalf of the saboteurs.

Roosevelt reportedly expressed anger at this news, indicating to Biddle that he would not "give [the saboteurs] up ... to any United States marshal armed with a writ of habeas corpus."<sup>4</sup> Biddle, however, had assumed from the outset that a constitutional challenge to Roosevelt's July 2 proclamation and order would be forthcoming, and that the Supreme Court of the United States would eventually pass on it. He insisted on personally prosecuting the saboteurs with that challenge in mind, to the surprise of War Secretary Stimson, who had felt it was beneath the Attorney General's dignity to "appear in a case of such little national importance."<sup>5</sup>

Biddle did not see the trial of the saboteurs as a minor event. He wanted the episode to send a dual message: The United States could swiftly dispose of its enemies in wartime, but at the same time it would accord them the full range of legal protections. In order that both those goals be achieved, not only did Roosevelt's military commission, rather than

<sup>4</sup> Biddle quoted Roosevelt's comment in his autobiography, *In Brief Authority* 331 (1962).

<sup>5</sup> Stimson recorded his reaction to Biddle's leading the prosecution in a July 1, 1942 entry in his diary, *supra* note 1. The entry is quoted in Danelski, "The Saboteurs' Case," *supra* note 1, at 67.

civilian courts, need to try the saboteurs, but the commission's constitutional authority needed to be upheld by the Supreme Court of the United States. *Ex parte Quirin* came into being because an expedited constitutional challenge to the commission suited all the parties in the case.

Thus both sides cooperated in shepherding *Ex parte Quirin* to the Supreme Court while the saboteurs' trial was taking place. As the trial began, in a closed courtroom, on July 6, Royall and Dowell began efforts to perfect their challenges to the legality of the commission. They initially explored asking for some form of direct, expedited review by the Supreme Court, and to that end contacted two sitting justices who were in the Washington area over the summer, Hugo Black, a resident of Alexandria, Virginia, and Owen Roberts, who had come to Washington to attend a funeral. Black initially declined to help facilitate any expedited appeal to the Court, but eventually, after Roberts intervened, a meeting between Roberts, Black, Biddle, and Royall, at Roberts's farm in the Philadelphia area, was scheduled for July 23. After that meeting Black and Roberts telephoned Chief Justice Harlan Fiske Stone, who was vacationing in New Hampshire, and Stone agreed to call the Court into special session. That session, which got under way despite some difficulties in perfecting the Court's jurisdiction over the saboteurs' case, began on July 29, and ended with the Court's issuing a July 31 per curiam order (endorsed by only eight justices because Frank Murphy, who

had enlisted in an Army reserve unit after Pearl Harbor, had recused himself) declining to issue a writ of habeas corpus on the saboteurs' behalf.<sup>6</sup> The order upheld the commission's jurisdiction over the saboteurs and paved the way for their August 3 death sentences. Both of the goals outlined by Francis Biddle had seemingly been accomplished.



The Court's per curiam order had been noticeably terse. The Court had concluded, first, that the charges against the saboteurs included offenses that could be tried before a military commission; second, that the commission was "lawfully constituted"; and, third, that the saboteurs were being held "in lawful custody" for trial before the commission.<sup>7</sup> By the second conclusion the Court meant that Roosevelt was constitutionally authorized to create the military commission in the form he had chosen, and by the third conclusion it meant that the commission had constitutional authority to try the saboteurs even though civil courts were open at the time, and thus the saboteurs were not entitled to a writ of habeas corpus.

As the White House announced the execution of six of the saboteurs and Roosevelt's commutation of the death sentences of Dasch and Burger, the justices returned to their summer recess. In announcing the July 31 per curiam order, Stone had noted that the Court would subsequently render a full opinion.

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<sup>6</sup> The text of the Court's order was reprinted in the *New York Times*, August 1, 1942, page 1, column 1. The *Times* version of the order contained a paragraph, which will subsequently be discussed, that the Court had resolved to omit. Compare the Court's official version of the order, accompanying the full opinion in *Ex parte Quirin*, 317 U.S. at 18-19.

For a discussion of the difficulties counsel for the saboteurs had in perfecting expedited habeas corpus review to the Court, and evidence of the cooperation of the Justices in facilitating that effort, see Boris I. Bittker, "The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment By the Court of Appeals," 14 Const. Comment. 431 (1997). For a contemporary assessment of the procedural posture of the *Quirin* case, and some analysis of the full opinion in *Quirin*, see Robert E. Cushman, "Ex parte Quirin et al – The Nazi Saboteur Case," 28 Cornell L. Q. 54 (1942).

<sup>7</sup> 317 U.S. at 18-19.

Frankfurter's self-described "soliloquy" was to play an important role in the form that opinion eventually took.

As Stone and his fellow justices began to confront the constitutional ramifications of the episode that generated *Quirin*, they realized that the exigencies of the case had inadvertently produced some potentially far-reaching constitutional puzzles. *Quirin* came to the Court at a time when its separation of powers jurisprudence, in both the foreign relations and domestic realms, was in a state of flux. In the late 1930s and early 1940s the Court had begun to take an increasingly deferential posture toward the exercise of executive power in foreign affairs, insulating executive agreements with foreign nations from Congressional scrutiny and treating their provisions as trumping state laws affecting property owned by foreign nationals. In the domestic arena, however, the Court, in the same time frame, had initially invalidated executive delegations of power to administrative agencies if those delegations were not made pursuant to clear Congressional standards, and had maintained that posture of close scrutiny into the 1940s, despite sustaining some New Deal legislation that anticipated partnerships between the executive and federal agencies. The touchstone of constitutionality for the Court, as this line of cases began to develop, seemed to be whether Congress had sufficiently confined executive or administrative discretion by providing intelligible baselines against which administrators could implement policies.

*Quirin* involved an executive order in an area – the armed forces of the United States – in which Presidential powers were clearly established. But the trial of the saboteurs was in a domestic forum, the charges were based on events that had taken place on American soil, and two of the saboteurs were American citizens. Congress had passed a body of legislation – the Articles of War – establishing a series of rules for the treatment of members of

the United States armed forces, including the creation of military courts-martial, and military tribunals, to try offenses related to service in the armed forces. But the saboteurs were not members of any American military force. More specifically, two of the Articles of War, Articles 46 and 50-1/2, provided that before an officer who had authorized the creation of a court-martial or military commission could formally ratify that tribunal's decision, he was required to submit it to the Judge Advocate General's Office for review. On their face these Articles appeared to apply to Roosevelt, who had created the saboteurs' commission, but his order doing so had made himself the sole reviewing authority. Nonetheless it was not clear that the procedures contemplated by the Articles of War applied to executive orders affecting persons such as the saboteurs.

The last issue was affected by the role of the international "law of war" in *Ex parte Quirin*. Roosevelt's belief that the German nationals among the saboteurs were subject to the death penalty had been based on an assumption that the law of war, a set of international customs and practices analogous to customary international law, would be applied by United States military courts and tribunals in the same manner that U.S. federal courts applied customary international law principles in cases involving disputes between U.S. citizens and foreign nationals. If the commission Roosevelt had established was trying persons accused of violations of the law of war, and those persons were either foreign nationals or Americans acting in the service of a belligerent foreign nation, arguably the procedures Congress had outlined in the Articles of War, designed to govern the conduct of members of the United States armed forces, did not apply to the commission at all. This argument seemed reinforced by the President's considerable powers, in his capacity of commander-in-chief, to protect the United States against belligerent enemies.

But if the Articles of War did not apply to

the commission Roosevelt had created to try the saboteurs, there did not seem to be any constitutional limitations on the President's power to create a special military tribunal to try acts that were violations of the international law of war. In *Quirin*, six of the violators were enemy aliens, but two were United States citizens. An earlier case, *Ex parte Milligan*,<sup>8</sup> had held that an American citizen who was alleged to have conspired with Confederate forces to undermine the Union war effort in his state could not be subjected to a military trial while civilian courts were open in that state.

In short, the Court's per curiam order in *Quirin* appeared, on closer scrutiny, to raise some quite thorny issues. When Stone, who had assigned the *Quirin* opinion to himself, embarked upon the task of providing justifications for the order's conclusions in September, before the Court resumed sitting, he found his task a formidable one.

The order's first conclusion, although not without its difficulties, gave Stone his least amount of discomfort. Article 15 of the Articles of War anticipated that military commissions, as well as military courts-martial, could be created to try offenses enumerated under the Articles. To be sure, it was not clear that Congress had contemplated the use of such commissions to try foreign nationals, or Americans not serving in the military, for offenses based on the international law of war as well as violations of the Articles of War themselves. But if military commissions could not try such persons, then enemy belligerents who committed hostile acts on American soil would have to be afforded the more expansive procedural safeguards of U.S. civilian courts, an option not necessarily available to members of the U.S. armed forces. In the end, none of Stone's fellow justices was prepared to deny that U.S. military commissions could properly try agents of enemy nations for going behind

American lines in civilian dress to commit hostile acts.

Stone then sought to build upon that commonsensical proposition to buttress the per curiam order's third conclusion, that the commission Roosevelt had created to try the saboteurs was constitutionally legitimate despite civilian courts' being open at the time of his order. To distinguish the *Milligan* case, Stone underscored the Court's earlier finding that individuals who, in times of war, went behind American lines in civilian dress to commit hostile acts were in violation of the law of war and thus "unlawful belligerents." He pointed to a provision of the Fifth Amendment that exempted, from its general requirement that persons accused of crimes be indicted by a grand jury, "cases arising in the land or naval forces ... when in actual service in time of War or public danger." That exception, he suggested, also implicitly applied to the Sixth Amendment's jury trial requirement, since military courts did not have juries. Although the exception might have originally been designed for cases where members of the U.S. armed forces were defendants, the inequity of affording American servicemen fewer constitutional protections than enemy belligerents suggested that it could be read as having greater breadth. Stone was able to persuade the other justices that, at a minimum, it applied to enemy belligerents who had invaded American territory with the intent to commit hostile acts.

Stone had the greatest amount of difficulty finding a justification for the per curiam order's second conclusion, that the commission had been "lawfully constituted" by a Presidential proclamation and an order that survived constitutional scrutiny. Here arose some of the awkward conundrums that *Quirin* posed for American constitutional jurisprudence in the 1930s and 1940s. Roosevelt's proclamation troubled some justices in its effort to preclude

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<sup>8</sup> 71 U.S. 2 (1866).

habeas corpus review, its announcement of increased penalties for criminal offenses after those offenses had been committed, and its lack of Congressional authorization. Other justices felt that the President's war powers, in an emergency, permitted a variety of summary actions that were essentially unreviewable by courts.

Roosevelt's order proved equally troublesome. If Roosevelt was bound to conform to the general procedures of the Articles of War, he had not provided adequate review of the decisions of the saboteurs' commission. If he was not bound, he might be thought to have the power, as Justice Black wrote to Stone, "to subject every person in the United States to trial by military tribunals for every violation of every rule of war which has been or may hereafter be adopted between nations among themselves."<sup>9</sup> Counsel for the saboteurs had suggested that under both interpretations of Roosevelt's powers, the order was an unconstitutional exercise of executive authority.

After considering several possible justifications for the proclamation and order, Stone decided to circulate a memorandum containing two alternative drafts for that portion of the *Quirin* opinion.<sup>10</sup> The first draft ("Alternative A") suggested that even if the President was bound by the Articles of War, the Court, in issuing its per curiam order, could not have assumed, before the commission had rendered its verdict and its decision had been submitted to Roosevelt, that he would fail to submit that decision to review by the Judge Advocate General. This option raised the difficulty that the Court was in effect saying that Roosevelt had ignored procedures that Congress required him to follow, six saboteurs had been executed despite that failure, and it would seem that the

two saboteurs who had not been executed could immediately petition for relief from their sentences. In his memorandum Stone described this eventuality as an "embarrassment" to the Court.

The second draft portion ("Alternative B") concluded that the Articles of War did not apply to the saboteurs because they were "unlawful belligerents" being tried for violations of the international law of war. The implications of that argument were also troublesome. As Black had pointed out, the argument suggested that a President might have the power to subject American citizens to trials by military commissions for a variety of unspecified "law of war" offenses. Moreover, by concluding that the President was not bound by Congressional legislation in cases involving "unlawful belligerents," Alternative B appeared to be resolving an issue that was not before the Court. This feature of Alternative B had troubled Stone from the outset; in the memorandum to his colleagues he suggested that Alternative B seemed to be "deciding a proposition of law which is not free from doubt upon a record which does not raise it."<sup>11</sup>

Stone had originally attempted to deal with these dilemmas by inserting a paragraph in the July 31 per curiam order that read:

[E]ven if petitioners are correct in their contention that Articles of War 46 and 50-1/2 require the President, before his action on the judgment or sentence of the Commission, to submit the record to [the Judge Advocate General] and even if that question be reviewable by the courts, nothing in the President's order of July 2, 1942, forecloses his compliance with such requirement and the Court will not assume in advance that the President would fail to conform his action to the statutory requirements.

<sup>9</sup> Black to Stone, Oct. 2, 1942, Hugo L. Black Papers, Library of Congress. The letter is quoted in Danelski, "The Saboteurs' Case," supra note 1, at 76.

<sup>10</sup> Stone, Memorandum to the Court, Sept. 25, 1942, Harlan Fiske Stone Papers, Library of Congress. The memorandum is quoted in Belknap, "The Supreme Court Goes to War," supra note 1, at 78.

<sup>11</sup> Id.

The language of this paragraph assumed that Roosevelt was constitutionally obligated to follow the procedures of the Articles of War even where the proceeding involved charges against belligerents in wartime. Four justices – Byrnes, Douglas, Frankfurter, and Jackson – objected to that assumption, and Stone had withdrawn the paragraph, although it inadvertently appeared in the text of the Court's order reported in the *New York Times* on August 1. Now, as the Court's 1942 Term opened in October, Stone decided that the justices were no closer to reaching consensus on the President's constitutional obligations, and that the only thing he could do was to present his colleagues, as he put it in an earlier letter to Frankfurter, with "all tenable and pseudo-tenable bases for decision."<sup>12</sup>

After receiving Stone's memorandum with the Alternative A and Alternative B drafts, the other justices seemed unable to find a way to endorse either, and as the Court's 1942 Term opened in October two additional developments occurred that threatened to make *Quirin* an even more awkward case. James Byrnes was easily persuaded to resign from the Court in order to head a newly created wartime department of economic stabilization. His departure reduced the number of justices participating in the *Quirin* opinion from eight to seven, opening up the possibility of a closely divided decision, the last outcome anyone wanted in the midst of a war with the nation that had sponsored the saboteurs. And then, sometime after October 16,<sup>13</sup> Jackson circulated a memorandum in which he announced his conclusion that the Court had exceeded its powers by reviewing

Roosevelt's order at all. "[E]xperience shows," Jackson wrote, "the judicial system is ill-adapted to deal with matters in which we must present a united front to a foreign foe." Allowing judicial review of such actions would only invite "nearly one hundred District Courts" to commit "mischief."

Jackson's memorandum seemed to indicate that, even if the four justices who were inclined to endorse Alternative A could persuade some of their colleagues to join them, there would still be at least one justice whose views made it impossible for him to endorse that position. The appearance of Jackson's memorandum stimulated Frankfurter, who was inclined to agree with Jackson but shared Stone's view that the Court should at all costs present a unanimous front in *Quirin*, to issue his "Soliloquy" memorandum on October 23.



The "Soliloquy" memorandum appeared at a time when Frankfurter's relations with some of his fellow justices had become strained. In May 1942, Black, Douglas, and Murphy, three members of the eight-man majority who had joined Frankfurter's opinion for the Court in *Minersville School District v. Gobitis*,<sup>14</sup> the 1940 compulsory flag salute case, signaled in *Jones v. Opelika*,<sup>15</sup> another First Amendment case, that they now believed *Gobitis* had been wrongly decided. Frankfurter took this very unusual action as directed at him personally, writing in his private papers that the comment by Black and the others "was the first intimation that the *Gobitis* case would be raised," and that "*Gobitis*

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<sup>12</sup> Stone to Frankfurter, Sept. 16, 1942, Stone Papers. The letter is quoted in Danelski, "The Saboteurs' Case," supra note 1, at 75.

<sup>13</sup> The memorandum is dated October 22 in the Hugo Black Papers and October 23 in the Robert Jackson Papers, both in the Library of Congress. Professor David Danelski, in "The Saboteurs' Case," supra note 1, at 76, states that Jackson circulated the memorandum on October 16, but cites no internal document in support of that proposition.

<sup>14</sup> 310 U.S. 586 (1940).

<sup>15</sup> 316 U.S. 584, 623-24 (1942).

was not challenged in the argument and its relevance ... never discussed ... in [the c]onference [on *Jones v. Opelika*]!"<sup>16</sup> Frankfurter kept a diary for the 1942 Term, in which he described his approach to contested constitutional issues as comparable to "an independent scholar at Cambridge," "eschew[ing] all combinations or machinations, active or tacit playing of politics on the Court." He "vote[d] in each case as my poor lights guided me," whereas many of his colleagues, in contrast, "schem[ed]," "play[ed] politics," and "hunt[ed] in packs."<sup>17</sup>

Frankfurter's deteriorating relations with some of his colleagues had thus inflated his self-image as an impartial, apolitical judge. But that self-image clashed, in *Quirin*, with Frankfurter's fervent support of the war effort and his deep antipathy toward the saboteurs. As a first-generation Jewish immigrant, he despised the Nazis and regarded himself as a patriot and a passionate supporter of American democratic ideals. He was also devoted to Roosevelt, to whom he had been a longtime advisor and who had nominated him to the Court. At the same time, even before becoming a justice, he had regularly maintained that members of the Supreme Court should be above politics, and, above all, should be perceived as being such even when they were confronted with issues of great political significance. Thus in *Quirin* he sought to achieve two potentially conflicting goals: swift and drastic punishment for the Nazi-sponsored saboteurs, and the avoidance of any public constitutional clashes that might produce open ideological divisions within the Court.

Frankfurter's "Soliloquy" in *Quirin* can be seen as an effort to respond to both of the levels on which the case engaged him. It can also be seen as part of a more extended sequence of incidents in which the saboteurs' case provoked charged responses in him – responses that suggested that his joint goals of punishing the saboteurs and promoting the image of the Court as above politics were coexisting uneasily.

The first incident in the sequence came during the interval in late June and early July 1942, when the Roosevelt administration had learned that the saboteurs had been taken into custody by the FBI, and was considering how to try them, and under what charges. On June 29 Frankfurter had dinner with Secretary of War Stimson, who had given Frankfurter his first public-sector legal job (with the U.S. Attorney's Office in New York). At the dinner Stimson told Frankfurter that the Roosevelt administration was thinking of creating a special military commission to try the saboteurs, and that Stimson himself had been asked to head that commission. Stimson told Frankfurter that he was going to decline, and Frankfurter expressed the view that it would be preferable to have the commission composed entirely of military officers, not only to ensure swift and secret proceedings, but also to underscore the extent to which the acts of the saboteurs could be seen as comparable to an actual military invasion of American soil.<sup>18</sup>

That incident demonstrated Frankfurter's strong interest in bringing the saboteurs to prompt and decisive justice. However, when the justices first reassembled to hear *Quirin* in

<sup>16</sup> Frankfurter made this comment on the draft opinion in *Jones v. Opelika* when it was circulated to him on May 30, 1942. The *Opelika* draft opinion with Frankfurter's comments, deposited in the Frankfurter Papers at the Library of Congress, is quoted by H.N. Hirsch in *The Enigma of Felix Frankfurter* 240 (1981).

<sup>17</sup> The comments are from entries Frankfurter made in a diary in 1943. Excerpts from that diary are reproduced in Joseph Lash, ed., *From the Diaries of Felix Frankfurter* (1975). The comments appear, respectively, on pages 179, 175, and 176 of Lash.

<sup>18</sup> Stimson Diary, Library of Congress, June 29, 1942, quoted in Danelski, "The Saboteurs' Case," *supra* note 1, at 66.

July 1942, Frankfurter took pains to counter any impression that members of the Court were invested in that outcome. When Justice Murphy, fresh from active service with his Army reserve unit, appeared, in uniform, at an informal conference of the justices prior to the opening of the *Quirin* arguments, Frankfurter objected to Murphy's participation in *Quirin* because of the impressions Murphy's military status might engender. Murphy reluctantly agreed to recuse himself, and in an exchange with Murphy later that summer, Frankfurter indicated that he had simply been seeking to remind Murphy of how others might perceive his participation. “[H]ad the roles been reversed,” Frankfurter wrote Murphy, “I should have expected the same from you.” He added that “[i]f candid truth is to be withheld among Brethren of the Supreme Court I would indeed despair of the world.”<sup>19</sup> But Frankfurter had withheld from Murphy, and his other colleagues, the “candid truth” that government officials had consulted with him about the appropriate forum for trying the saboteurs. He might not have thought that his private contacts with Stimson would raise the same perceptual difficulties for the Court as Murphy's public participation in oral argument, but he elected not even to disclose them to his fellow justices.

The “Soliloquy” memorandum represented another example of Frankfurter's seeking to accommodate his passionate distaste for the saboteurs with the detached, apolitical images he sought to forge for himself and the Court. At one level, the soliloquy's “dialogue” presents “F.F.”, the “judge … acting upon [the saboteurs'] claims,” as strikingly intemperate in his reaction to the saboteurs. He calls the saboteurs “damned scoundrels” with “a helluvacheek”: “low-down, ordinary, enemy spies”

who “have invaded our country and therefore could immediately have been shot by the military when caught in the act of invasion.” In his view, the saboteurs are fortunate to be “humanely ordered to be tried by a military tribunal.” After concluding that “for you there are no procedural rights,” “F.F.” ends the dialogue by telling the saboteurs, “you will remain in your present company and be damned.”

Alongside these characterizations of the saboteurs, Frankfurter's “Soliloquy” introduces a set of characterizations of their arguments. Here the tone is quite different: the saboteurs are seeking to draw him and his colleagues into internecine and intrabranch conflicts that are bound to involve the Court in political skirmishing, and he is going to stay above the fray. “You've done enough mischief already,” “F.F.” tells the saboteurs, “without leaving the seeds of a bitter conflict involving the President, the courts and Congress … It is a wise requirement of courts not to get into needless rows with the other branches of the government by talking about things that need not be talked about if a case can be disposed of with intellectual self-respect on grounds that do not raise such rows.” So “F.F.” (and the Court in *Quirin*) does “not have to say more than that Congress specifically has authorized the President to establish such a Commission in the circumstances of your case,” and that “the President himself has purported to act under th[e] authority of Congress as expressed in the Articles of War,” and that “a proper construction of Articles 46 – 50 1/2 does not cover this case and therefore on the merits you have no rights under it.” But none of those propositions went beyond the Court's original per curiam order. All, in fact, stated conclusions without providing justifications for them.

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<sup>19</sup> Frankfurter to Murphy, August 14, 1942, Eugene Gressman Papers, Bentley Historical Library, University of Michigan, Ann Arbor, Mich., quoted in Danelski, “The Saboteurs' Case,” *supra* note 1, at 69.

In the place of these "arguments" Frankfurter included further denunciations of the saboteurs and further imprecations to his fellow justices not to become involved in sticky constitutional issues that might generate divisiveness among themselves. "[Y]our bodies will be rotting in lime," "F.F." told the saboteurs. "I ... do not propose to be seduced into inquiring what powers the President has or has not got" or "what limits the Congress may or may not put upon the Commander-in-Chief in time of war." "In a nutshell, the President has the power, as he said he had, to set up the tribunal ... to try you as invading German belligerents for the offenses for which you are being tried." "That disposes of you scoundrels."

In case any of his fellow justices missed the institutional messages in "F.F.'s dialogue with the saboteurs, Frankfurter repeated them, and his view of the proper disposition of *Quirin*, in a final imaginary conversation in his "Soliloquy." The conversation was between "[s]ome of the very best lawyers I know," now in active military service, seeking "to lick the Japs and the Nazis," and his fellow justices. In the conversation, the lawyers – who "are now in the Solomon Island battle," or on "sub-chasers in the Atlantic," or "on the various air fronts" – rail against the possibility that *Quirin* might "stir[] 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 and that the procedure under the Articles of War for courts martial and military commissions doesn't apply to this case." "[E]verybody is agreed," the fighting lawyers tell the justices, "and in this particular case the constitutional questions aren't reached." "Just relax and don't be too engrossed in ... verbalistic conflicts."

Of course "all" of the justices, and "everybody," were *not* agreed that the Articles of War did not apply to the saboteurs' case, or that the case could be decided without reaching any

constitutional questions. But Frankfurter's "Soliloquy" memorandum seems to have been a catalyst for the Court to reach an accommodation in *Quirin*. Jackson agreed not to issue a concurring opinion; Roberts, Black, and Stone resolved to present the Court's opinion "in as brief a form as possible"; Stone's draft specifically avoided passing on the question whether "Congress may restrict the power of the Commander-in-Chief to deal with enemy belligerents," stating that the precise point was not argued by the saboteurs; and neither Memorandum A nor Memorandum B was included in the *Quirin* opinion. Instead Stone produced a paragraph that read

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 [of War] in question could not at any stage of the proceedings afford any basis for issuing [a] writ [of habeas corpus to the saboteurs]. ... Some members of the Court are of [the] 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 made available to 'commissions' – the particular 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.<sup>20</sup>

The other six justices now taking part in *Quirin* endorsed that paragraph, and the opinion was announced on October 29, six days after Frankfurter's "Soliloquy" memorandum had appeared.

<sup>20</sup> 317 U.S. at 47-48.



Despite his role in preventing divisions on the Court over *Quirin* from surfacing, the case remained on Frankfurter's mind. Shortly after the *Quirin* opinion was issued he asked a former student of his whose specialty was military law, Frederick Bernays Weiner, to analyze its significance. Weiner concluded that after *Quirin* it was now possible for military tribunals to try "persons dangerous to our institutions," even if they were American citizens and even if they were not members of an invading military force, for offenses against the international law of war committed on American territory. Weiner thus took the Court's effort to limit the scope of *Ex parte Milligan* to have been successful. But he also wrote Frankfurter that the best reading of Articles 46 and 50-1/2 of the Articles of War was that they did apply to Roosevelt's order creating the saboteurs' commission, and thus Roosevelt, like other military "reviewing authorities," should have been required to refer the decision of the commission he created to the Judge Advocate General's Office before acting on it. When reviewing authorities failed to make such a referral, Weiner noted, courts, in responding to habeas corpus challenges by persons affected by the failure, could issue conditional orders releasing those persons if the referral had not been made by a certain date.<sup>21</sup>

It is not clear whether Frankfurter revised his view that the Articles of War did not apply to the saboteurs' commission in light of Weiner's comments. But two other incidents

involving the *Quirin* case in the 1950s suggest that he remained uneasy about it. In May 1953, the Court was confronted with the possibility of another special summer proceeding to decide a contentious case, in this instance a stay of the scheduled June execution of Julius and Ethel Rosenberg for espionage. As the justices debated whether to grant the Rosenbergs' petition for certiorari and issue the stay, Frankfurter, who supported that action, responded to a suggestion that the Court might, if time constraints required it to resolve the issues raised by the certiorari petition over the summer, issue a per curiam order disposing of those issues, with full opinions to come in the fall, as it had done in *Quirin*. In a memorandum describing the conference in which the Rosenbergs' petition was considered, Frankfurter recorded himself as stating that the *Quirin* process was "not a happy precedent."<sup>22</sup> Since his "Soliloquy" memorandum in *Quirin* had encouraged his colleagues to issue an opinion that did not go much beyond a terse, arguably conclusory per curiam order they had issued after a special summer session, his comment suggests he may have had some retrospective doubts about it.

Then, in February 1956, Frankfurter was once again reminded about *Ex parte Quirin*. The occasion was the forthcoming publication of a draft chapter from Alpheus Mason's authorized biography of Stone, for which Mason had been granted unlimited access to Stone's judicial papers. The chapter centered around the *Quirin* case, and quoted from internal Court memoranda in the Stone

<sup>21</sup> Weiner's analysis of *Quirin* was presented to Frankfurter in the form of three letters, written to Frankfurter on November 2, 1942, January 13, 1943, and August 1, 1943. Danelski, who found the letters in the Felix Frankfurter Papers at Harvard Law School, Cambridge, Mass., quotes from them in "The Saboteurs' Case," *supra* note 1, at 79-80.

<sup>22</sup> The June 4, 1953 memorandum in which Frankfurter recorded his and other justices' comments at the Court's May 23, 1953 conference on the Rosenbergs' petition for certiorari is in the Felix Frankfurter Papers, Harvard Law School Library, Cambridge, Mass. I quote from that memorandum in *The American Judicial Tradition* 392-93 (2d ed. 1988). It is also quoted in Danelski, "The Saboteurs' Case," *supra* note 1, at 80.

Papers, including letters from Frankfurter to Stone about the *Quirin* opinion and Stone's memorandum with the "Alternative A" and "Alternative B" drafts. In September 1955, Mason had signaled to Bennett Boskey, a law clerk for Stone in the 1941 and 1942 Terms, that he was considering publishing the *Quirin* chapter as a law review article, and invited Boskey to make comments on a draft of the chapter. In doing so Boskey noticed the use of internal Court documents in Mason's draft. He confirmed with Stone's son that Mason had been given unrestricted access to Stone's papers, and then suggested to Mason that although he could see no barrier to Mason's quoting from the documents, Mason should inform the four justices who participated in *Quirin* still active on the Court – Black, Douglas, Frankfurter, and Reed – that he contemplated doing so.

Mason did have a conversation with Frankfurter, who, despite his misgivings, stopped short of advising Mason not to quote from internal Court documents. When he talked to Frankfurter, Mason had already submitted the draft of the *Quirin* chapter to the Harvard Law Review, who accepted it for publications in its March 1956 issue. In early February, Frankfurter somehow received a draft of Mason's forthcoming article, and immediately contacted the Review to express his dismay about Mason's quotations from internal Court documents in the Stone Papers. Paul Bator, the President of the Review, responded, in a February 16 letter to Frankfurter, that although "we have perhaps gone beyond the bounds of discretion and good taste in accepting the Mason article,"

Mason had indicated that both Boskey, on behalf of the Stone family, and Frankfurter himself had "concurred in the publication of the quotations from your letters."

Bator added that he had shown the draft of Mason's article to Paul Freund of the Harvard Law faculty. Freund, Bator said, had concluded that of the internal Court documents quoted by Mason, Stone's "A & 'B' memorandum" was the most potentially delicate, but that the memorandum did "not engage in personalities of any kind [and] ... in general was 'innocuous.'"<sup>23</sup> After receiving Bator's response, Frankfurter wrote him a conciliatory letter ("What's done is done. I was brought up by Mr. Stimson not to waste time over spilt milk..."),<sup>24</sup> but also wrote Freund as follows:

[I]s it quite innocuous to allow people to make use of the fact that the Court was considering a mode of disposition [in *Quirin*] that the Chief Justice himself felt "embarrassing," considering that lives had been taken before an embarrassing explanation was contemplated? ... But my objection to the Mason performance ... is that the *Quirin* opinion was the result of an uncommonly extensive interchange on paper of views among the various justices. ... There is considerable correspondence between Jackson and me, between Roberts and me. ... There were circulations by some of us which are both pertinent and illuminating to the final outcome. It is far less than what I call scholarship to print such an essentially mutilated account of the course of events that begot [the opinion in] *Ex parte Quirin*.<sup>25</sup>

Frankfurter's response to Mason's article about *Quirin* was of a piece with his initial response to the case. On the one hand he

<sup>23</sup> Paul M. Bator to Frankfurter, February 16, 1956, quoted in Bennett Boskey, "A Justice's Papers: Chief Justice Stone's Biographer and the Saboteurs' Case," 14 S. Ct. Hist. Soc. Q. 10, 14 (1993).

<sup>24</sup> Frankfurter to Bator, February 20, 1956, quoted in id. at 14-15. Boskey's article contains further details on Frankfurter's reaction to the draft of Mason's article, which was published as "Inter Arma Silent Leges: Chief Justice Stone's Views," 69 Harv. L. Rev. 806 (1956). Frankfurter himself made his letters to Bator and Freund available to Boskey.

<sup>25</sup> Frankfurter to Paul A. Freund, February 20, 1956, quoted in Boskey, "A Justice's Papers," at 15.

objected to Mason's publishing *any* of the internal Court documents connected with *Quirin*, feeling that they might show the justices who decided the case in an "embarrassing" light. On the other hand, he felt that if Mason were going to publish some of the documents, "scholarship" would be served by publishing *all* of the "pertinent and illuminating ... circulations" that were precipitated by *Quirin*. Although his "Soliloquy" memorandum had found its way into the papers of all the other justices who eventually decided *Quirin*, it was not in the Stone Papers. One wonders whether Frankfurter, who doubtless thought his "Soliloquy" to be a "pertinent and illuminating" document in the decisionmaking process, would have wanted Mason to have included it as well.



The "F.F." who castigated the saboteurs in the "Soliloquy" memorandum, and at the same time suggested that his brethren eschew the

temptation to address potentially contentious constitutional issues in the *Quirin* opinion, revealed himself to be a judge passionately engaged in promoting a particular outcome in a case, and strongly desirous of providing a cursory justification for that outcome, all the while associating that justification with the preservation of the Supreme Court's image of being above or outside contentious political issues. Although Frankfurter genuinely believed that both of those goals were appropriate in the saboteurs' case, simultaneous pursuit of the goals comes close to the edge of hypocrisy, obfuscation, or self-delusion, and reminders of *Quirin* may have made Frankfurter uneasy. In the end, the "Soliloquy" memorandum, placed in the context of *Quirin*'s external and internal history, serves as a reminder that there are some cases the Court cannot avoid taking, but cannot comfortably resolve, and sometimes the discomfort that situation presents can produce some extraordinary, and highly revealing, judicial documents.



## F.F.'s Soliloquy

Felix Frankfurter

This memorandum was circulated by Justice Frankfurter on October 23, 1942, six days before the Court filed its opinion. The title is Frankfurter's own. The text is from the William O. Douglas Papers, Box 77, Manuscript Division, Library of Congress. We have supplied missing letters within brackets.

—The Editors

AFTER LISTENING AS HARD as I could to the views expressed by the Chief Justice and Jackson about the Saboteur case problems at the last Conference, and thinking over what they said as intelligently as I could, I could not for the life of me find enough room in

the legal differences between them to insert a razor blade. And now comes Jackson's memorandum expressing what he believes to be views other than those contained in the Chief Justice's opinion. I have now studied as hard as I could the printed formulations of

their views – and I still can't discover what divides them so far as legal significance is concerned. And so I say to myself that words must be poor and treacherous means of putting out what goes on inside our heads. Being puzzled by what seem to me to be merely verbal differences in expressing intrinsically identic views about the governing legal principles, I thought I would state in my own way what have been my views on the issues in the *Saboteur* cases ever since my mind came to rest upon them. And perhaps I can do it with least misunderstanding if I put it in the form of a dialogue – a dialogue between the saboteurs and myself as to what I, as a judge, should do in acting upon their claims:

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

F.F.: What entitles you to it?

S: We are being tried by a Military Commission set up by the President although we were arrested in places where, and at a time when, the civil courts were open and functioning with full authority and before which, therefore, under the Constitution of the United States we were entitled to be tried with all the safeguards for criminal prosecutions in the federal courts.

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

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

F.F. (after reading the stipulation): You damned scoundrels have a helluvacheek to ask for a writ that would take you out of the hands of the Military Commission and give you the right to be tried, if at all, in a federal district court. You are just low-down, ordinary, enemy spies who, as enemy soldiers, have invaded our country and therefore could immediately have been shot by the military when caught in the act of invasion. Instead you were humanely ordered to be tried by a military tribunal convoked by the Commander-in-Chief himself[f], and the verdict of that tribunal is returnable to the Commander-in-Chief himself to be acted

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

S: But, Your Honor, since as you say the President himself professed to act under the Articles of War, we appeal to those Articles of War as the governing procedure, even bowing to your ruling that we are not entitled to be tried by civil courts and may have our lives declared forfeit by this Military Commission. Specifically, we say that since the President has set up this Commission under the Articles of War he must conform to them. He has certainly not done so in that the requirements of Articles 46 – 50 1/2 have been and are being disregarded by the McCoy tribunal.

F.F.: There is nothing to that point either. The Articles to which you appeal do not restrict the President in relation to a Military Commission set up for the purposes of and in the circumstances of this case. That amply disposes of your point. In lawyer's language, a proper construction of Articles 46 – 50 1/2 does not cover this case and therefore on the merits you have no rights under it. So I don't have to consider whether, assuming Congress had specifically required the President in establishing such a Commission to give you the procedural safeguards of Articles 46 – 50 1/2, Congress would have gone beyond its job and taken over the business of the President as Commander-in-Chief in the actual conduct of a war. You've done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress after your bodies will be rotting in lime. It is a wise requirement of courts not to get into needless rows with the other branches of the government by talking about things that need not be talked about if a case can be disposed of with intellectual self-respect on grounds that do not raise such rows. I

therefore do not propose to be seduced into inquiring what powers the President has or has not got, what limits the Congress may or may not put upon the Commander-in-Chief in time of war, when, as a matter of fact, the ground on which you claim to stand – namely, the proper construction of these Articles of War – exists only in your foolish fancy. That disposes of you scoundrels. Doubtless other judges may spell this out with appropriate documentation and learning. Some judges would certainly express their views much more politely and charmingly than I have done, some would take a lot of words to say it, and some would take not so many, but it all comes down to what I have told you. In a nutshell, the President has the power, as he said he had, to set up the tribunal which he has set up to try you as invading German belligerents for the offenses for which you are being tried. And for you there are no procedural rights such as you claim because the statute to which you appeal – the Articles of War – don't apply to you. And so you will remain in your present custody and be damned.

Some of the very best lawyers I know are now in the Solomon Island battle, some are seeing service in Australia, some are sub-chasers in the Atlantic, and some are on the various air fronts. It requires no poet's imagination to think of their reflections if the unanimous result reached by us in these cases should be expressed in opinions which would black out the agreement in result and reveal internecine conflict about the manner

of stating that result. I know some of these men very, very intimately. I think I know what they would deem to be the governing canons of constitutional adjudication in a case like this. And I almost hear their voices were they to read more than a single opinion in this case. They would say something like this but in language hardly becoming a judge's tongue: "What in hell do you fellows think you are doing? Haven't we got enough of a job trying to lick the Japs and 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 had the power to establish this Commission and that the procedure under the Articles of War for courts martial and military commissions doesn't apply to this case. Haven't you got any more sense than to get people by the ear on one of the favorite American pastimes – abstract constitutional discussions. Do we have to have another Lincoln-Taney row when everybody is agreed and in this particular case the constitutional questions aren't reached. Just relax and don't be too engrossed in your own interest in verbalistic conflicts because the inroads on energy and national unity that such conflict inevitably produce, is a pastime we had better postpone until peacetime." 