



Justice Jackson's Unpublished Opinion in *Ex parte Quirin*

Jack Goldsmith

IN *EX PARTE QUIRIN*, a unanimous Supreme Court, writing through Chief Justice Harlan F. Stone, upheld the constitutionality of the military commission that tried eight Nazis who had entered the United States to commit acts of sabotage in mid-June of 1942.¹ The unanimous opinion in *Quirin* masked disagreement among the Justices during their deliberations about the case in the summer and fall of 1942. Justice Robert H. Jackson went so far as to circulate a draft opinion to the Court – an opinion reproduced below² – that expressed his disagreement with several aspects of the Court's opinion.

Jackson ultimately withdrew his separate

opinion and joined the opinion of the Court. The draft opinion nonetheless provides a window into Jackson's thinking on fundamental questions of constitutional war powers one year after he joined the Court from the Executive branch, two years before his famous dissent in *Korematsu*,³ and a decade before his famous concurrence in *Youngstown*.⁴ And the opinion is of more than historical interest. For it analyzes many of the same issues that are being debated today in the war on terrorism – most notably in the battle over the legality of military commissions currently before the U.S. Supreme Court in *Hamdan v. Rumsfeld*.⁵

The background to *Quirin* has been de-

Jack Goldsmith is the Henry L. Shattuck Professor of Law at Harvard Law School. He thanks Marty Lederman for alerting him to the separation-of-powers issues raised in the several drafts of Jackson's unpublished opinion in Quirin, and for fruitful conversations about that opinion and this essay. He also thanks Louis Fisher and John Manning for thoughtful comments, and Zina Gelman and Kathryn Hutchinson for outstanding research assistance.

1 317 U.S. 1, 21, 48 (1942).

2 See *infra* at 232–41. Jackson's opinion went through many versions, some of which were circulated to the Court. The one reproduced below was the final version of the draft opinion, dated October 23, 1942.

3 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

4 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

5 126 S. Ct. 622 (cert. granted Nov. 7, 2005) (No. 05–184).

scribed in this journal and elsewhere.⁶ A few days after the saboteurs were captured, President Roosevelt issued an order establishing a military commission that soon began to try them, in secret, for law-of-war violations and related crimes. In the midst of the trial, the defendants' counsel sought Supreme Court review of the legality of the commission. The Supreme Court met in special session and heard oral arguments for two days. Following brief deliberations, the Court issued a *per curiam* opinion on July 31, 1942. The opinion held that the President was authorized to try the saboteurs before a military commission and that the military commission was lawfully constituted, and it denied the saboteurs' motions for leave to file *habeas corpus* petitions.⁷ The trial ended three days later, and the commission sentenced all the defendants to death. A few days after that, on August 8, 1942, Roosevelt announced that he had approved the military commission's judgment, that he had commuted the sentence of two cooperating defendants, and that the remaining six defendants had been executed.

The Court's July 31 *per curiam* opinion was, by its own terms, announced "in advance of the preparation of a full opinion which necessarily will require a considerable period of time for its preparation."⁸ The full opinion

would be issued on October 29, 1942. During the intervening three months, the Court was sharply divided about some of the legal grounds for disposing of the case.



The Court had relatively little difficulty disposing of the saboteurs' main contention that the President lacked statutory or constitutional authority to order them to be tried by military commission. The Executive branch had argued, based largely on nineteenth-century practice, that the President had inherent authority, under the Commander-in-Chief Clause, to create such commissions. The Court was divided on this issue (an issue that would be touched on in Jackson's separate draft opinion), but in the end it was able to skirt the question because all the Justices agreed that Congress had authorized the President to create military commissions.⁹ In 1920 Congress had enacted the Articles of War to provide for court-martial trials of U.S. military and related personnel. Article 15 of the Articles of War stated that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions ... of concurrent jurisdiction in respect of offenders or offenses that by

6 See G. Edward White, *Felix Frankfurter's "Soliloquy" in Ex parte Quirin: Nazi Sabotage & Constitutional Conundrums*, 5 *Green Bag* 2d 423 (2002); see also Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (2003); Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 *Const. Comment.* 261 (2002); David Danelski, *The Saboteurs' Case*, 1996 *J. S. Ct. Hist.* 61; Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 *Mil. L. Rev.* 59 (1980); Robert E. Cushman, *Ex Parte Quirin et al. - The Nazi Saboteur Case*, 28 *Cornell L.Q.* 54 (1942).

7 The *per curiam* opinion is reproduced in an unnumbered note at *Quirin*, 317 U.S. at 18–19.

8 *Id.* at 18 n.

9 *Id.* at 29 ("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. For here Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged.").

statute or by the law of war may be triable by such military commissions.”¹⁰ The Court interpreted this provision to authorize the President to create military commissions to try law-of-war violations.¹¹ And the Court had little trouble concluding that “the offense of unlawful belligerency” – specifically, the entering into U.S. territory by enemy soldiers out of uniform with the intent to commit acts of sabotage – was a law-of-war violation triable by military commission.¹²

The Court also had relatively little difficulty distinguishing *Ex parte Milligan*, the Civil War decision that invalidated Lincoln’s use of a military commission to try a civilian from Indiana on the ground that “in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service.”¹³ The Government had worried about this precedent, and a good deal of the oral argument in the Supreme Court concerned its applicability in the case.¹⁴ But in the end the Court concluded that the Nazi saboteurs, unlike *Milligan*, were “enemy belligerents” and were thus “subject to the law of war” and triable by military commission.¹⁵

While the Court thus had relatively little trouble reaching consensus on the basis of authority for military commissions, it was from the time of oral argument until the is-

suance of the final opinion sharply divided on the seemingly less-significant issue of proper procedures for the commission. Article 46 required military-commission trial records to be reviewed by a staff judge advocate or the Judge Advocate General, and Article 50½ required examination of the record by a board of review. Roosevelt’s Order establishing the military commission seemed to ignore these requirements and to provide instead that the President would have immediate and final review of any military-commission judgment. This aspect of Roosevelt’s Order raised the statutory question whether the Order complied with the Articles of War, as well as two delicate constitutional questions: whether Congress could place limitations on the President’s use of military commissions during wartime, and whether the courts could review the President’s compliance with the Articles.

These issues had divided the Justices during their brief deliberations prior to issuance of the July 31 *per curiam* opinion. Stone had originally tried to dodge the issue by including the following paragraph in the *per curiam*:

[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

10 *Id.* at 27 (quoting Article 15 of the Articles of War) (internal quotation marks omitted).

11 *Id.* at 27–29. The Court may have been wrong on this issue. As Jackson’s draft opinion suggests, the best interpretation of Article 15 at the time may have been that it was meant to preserve a pre-existing common-law authority in the President to establish military commissions, and was not an authorization *per se*. See Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 *Green Bag 2d* 249, 252–53 (2002); Goldsmith & Sunstein, *supra* note 6, at 275.

12 See *Quirin*, 317 U.S. at 35–37.

13 71 U.S. 2, 121–22 (1866).

14 See Fisher, *supra* note 6, at 48, 92, 103–06.

15 317 U.S. at 45.

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.¹⁶

But Stone excluded this paragraph from the *per curiam* when some of the eight participating Justices objected that the paragraph assumed that the President was obligated to follow the Articles of War in proceedings against enemy combatants.¹⁷

When drafting the full opinion, Stone became vexed about how to resolve the question of the applicability of Articles 46 and 50½. He was so vexed, in fact, that he circulated two alternative analyses – “Memorandum A” and “Memorandum B” – to the Court, neither of which he professed to like.¹⁸ “Memorandum A” basically reiterated the view from the passage removed from the draft *per curiam* opinion: the Court would decline to pass on the Articles of War issue because, at the time the decision was handed down in August, there was nothing in the record to suggest any prejudicial procedural error in the trial, or that the President would subsequently fail to submit the decision to review by the Judge Advocate General.¹⁹ Memorandum B closely analyzed the language, structure, and legislative history of the Articles, especially Article 38, which authorized the President to prescribe procedures for military commissions, “[p]rovided that nothing contrary to ... these articles

shall be so prescribed.” It concluded that the Articles were not meant to restrict the President, in his discretion, from establishing his own procedural rules for military commissions.

As Stone told the Court, both versions raised problems. Memorandum A had an artificial quality to it because it seemed obvious in retrospect that the President had in fact *not* followed the review procedures prescribed in the Articles following the close of trial. Memorandum A thus raised the possibility that the President had violated the Articles of War and executed six of the saboteurs despite that violation; it also raised the possibility that the two saboteurs whose sentences were commuted could successfully seek *habeas corpus* relief. Memorandum B, by contrast, was not free from legal doubt (at least for Stone) and would require the Court to rule on matters (such as what Roosevelt did on review after the *per curiam* opinion was issued and the trial ended) that were technically not in the record before the Court.²⁰



By the time Jackson circulated his draft opinion, the Court (at least according to Jackson’s unpublished opinion) appeared to be leaning toward some version of Memorandum B.²¹ Jackson had essentially two objections to that analysis. The first was

16 Quoted in White, *supra* note 6, at 431.

17 *Id.* at 432. White reports that those four Justices were Byrnes, Douglas, Frankfurter, and Jackson. *Id.* Murphy had recused himself.

18 See Memorandum to the Court from Chief Justice Stone, in *Ex parte Quirin* (Sept. 25, 1942), Box 69, Harlan Fiske Stone Papers, Manuscript Division, Library of Congress.

19 White, *supra* note 6, at 431.

20 See *id.*; Fisher, *supra* note 6, at 112–13.

21 See Jackson draft op. at 2, *infra* at 233 (“I think these Articles of War have no application to the President’s Order or to these prisoners, but the Court thinks otherwise, holds they apply to both, and comes out construing Article 38 in connection with other Articles so as to permit the nullification of safeguards which I am not prepared to say were not intended to be conferred upon our own inhabitants when subject to trial by military commission.”).

that he thought it erroneously interpreted the Articles of War. Relying on the history of military commissions and the purposes of the Articles, Jackson argued that the safeguards in the Articles had no applicability to enemy combatants. "I see no indication that Congress has intended to confine the President's discretion in dealing with captured invaders or intended to confer any rights on them," Jackson reasoned.²² The real objects of Congress's protection in the Articles, Jackson maintained, were U.S. military officials and U.S. civilians during times of military government. Jackson worried in particular that the Court's construction of the Articles of War would weaken the rights of U.S. civilians during military government by intimating that the President could establish military commissions to try such civilians without the safeguards of the Articles.²³

Jackson's second concern focused on presidential power. Jackson thought, not implausibly in light of the nineteenth-century history of military commissions, that "it was well within the war powers of the President as Commander in Chief to create a non-statutory Presidential military tribunal of the sort here in question."²⁴ In other words, he thought the President had *inherent* authority to create military commissions. But Jackson would go further and suggest that the President's powers in this context were *exclusive* and could not be regulated by Congress. He stated:

The seizure and trial of these prisoners is not in pursuit of the functions of internal government of the country. They

are prisoners of the President by virtue of his status as the constitutional head of the military establishment and their own status as enemy forces captured while conducting a military operation within and against this country. The custody and treatment of such prisoners of war is an exclusively military responsibility.²⁵

Jackson immediately added that this responsibility "is to be discharged, of course, in the light of any obligation undertaken by our country under treaties or conventions or under customs and usages so generally accepted as to constitute the 'laws of warfare,'" and that the "proper treatment" due to such prisoners "may require fact-finding and trial of disputed matters."²⁶ For many reasons (some of which are canvassed below), it is doubtful that Jackson viewed these as judicially enforceable legal obligations on the President. In the same paragraph Jackson stated that the question whether the saboteurs had "forfeited standing as lawful enemies and should be treated as war criminals" was "a military question for military decision," and added: "Whether there was a duty to submit the matter for trial, it was certainly proper to do so, to answer possible questions of identification, fulfill all possible international obligations, hear any plea of mitigating circumstances, and to gain any information of military importance that their trial might yield."²⁷

This is a remarkable analysis. It hints at an exclusive Commander-in-Chief power without any citation of authority.²⁸ And it

22 *Id.*

23 *Id.* at 2, 6, *infra* at 233, 237.

24 *Id.* at 6, *infra* at 237.

25 *Id.*

26 *Id.*

27 *Id.* at 7, *infra* at 238.

28 Attorney General Francis Biddle had briefly stated this view at oral argument but did not press it. See Fisher, *supra* note 6, at 106–07.

does so in seeming contrast with Jackson's reading of the Commander-in-Chief power a decade later in *Youngstown*, where Jackson read Congress's war powers generously, and suggested that Congress might even be able to regulate certain aspects of the President's "command functions."²⁹



There are many possible explanations for the contrast between the two opinions on this score. At the time of *Quirin*, Jackson had been on the Court only a year, following three years of close service to President Roosevelt – whom Jackson admired intensely – as Solicitor General and Attorney General. *Youngstown* concerned the actions of a much different (and, for Jackson, a less admired) President in a much different context. And of course Jackson's opinion in *Youngstown* reflected a ten-year "interval of detached reflection" from his role as Executive-branch lawyer.³⁰

But there are also significant substantive differences between the types of presidential power exercised in *Quirin* and *Youngstown* that make it possible to reconcile Jackson's views in the two cases. Jackson's analysis in *Youngstown* was premised on the idea that

Truman's seizure of the steel mills, though done during wartime, was an exercise of presidential power over an *internal* matter against *civilians* in a war that the President himself had begun in the absence of prior congressional authorization. In this situation, Jackson viewed presidential power in the face of a congressional restriction to be significantly diminished.³¹ But he did not view the military-commission issue in *Quirin* in this way. World War II was a declared and authorized war, and Roosevelt's seizure and trial of the saboteurs were actions against *enemies*, not civilians, that were "not [taken] in pursuit of the functions of internal government of the country."³²

One might view Jackson's distinction between internal and external functions of government – so reminiscent of *Curtiss-Wright*³³ – as artificial and difficult to maintain, especially since the capture and trial of the saboteurs took place inside the United States. But though Jackson used geographical metaphors, he really had in mind a difference in the *object* of presidential action. As Jackson noted in his *Youngstown* concurrence:

I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments

29 *Youngstown*, 343 U.S. at 643–44 (Jackson, J., concurring).

30 See *id.* at 634 ("That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction.").

31 See *id.* at 642 ("But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the *internal affairs of the country* by his own commitment of the Nation's armed forces to some foreign venture.") (emphasis added); *id.* at 644 ("That military powers of the Commander-in-Chief were not to supersede representative government of *internal affairs* seems obvious from the Constitution and from elementary American history.") (emphasis added); *id.* (noting "the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy") (emphasis added).

32 Jackson draft op. at 6, *infra* at 237 (emphasis added).

33 *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320–21 (1936).

of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence.³⁴

This distinction reconciles Jackson's differing attitudes toward presidential power in *Quirin* (where he viewed military commissions as an example of the Commander in Chief's exercise of an instrument of national force)³⁵ and *Youngstown* (where he saw the unilateral seizure of domestic property as an interference in an economic struggle between industry and labor).

Jackson's analysis of the separation of powers between the Executive and Congress was dense and somewhat ambiguous. His analysis of the separation of powers between the Judiciary and the Executive was much clearer. For Jackson, the "whole business of reviewing the President's Order as being governed by [the Articles of War]" was "unauthorized and possibly mischievous." Jackson captured this point when he stated, in the first paragraph of the draft opinion: "I do not participate in considering whether the President's Order corresponds with the provisions of the Articles of War enacted by Congress." And he later gave a list of "sound[] reasons why the courts should refrain from reviewing in any way orders of the President respecting prisoners of war" – most notably, because foreign relations and military

matters were beyond the judicial ken, and because "our enemies would never reciprocate" a grant of individual rights to prisoners of war against military authorities. Jackson added that he thought the Court was "exceeding [its] powers in reviewing the legality of the President's Order and that experience shows the judicial system is ill-adapted to deal with matters in which we must present a united front to a foreign foe."³⁶

Jackson's analysis of the judicial role in *Quirin* has obvious similarities to his famous dissent, two years later, in *Korematsu*. Jackson believed that the military action against *Korematsu* and the other non-combatant Japanese-American civilian internees was unconstitutional. And he thought it a serious mistake for the Court to uphold as constitutionally valid a military order that he viewed as extra-legal and based on military necessity. "[I]f we cannot confine military expedients by the Constitution," Jackson reasoned, "neither would I distort the Constitution to approve all that the military may deem expedient." But – and here lies the parallel with his draft opinion in *Quirin* – Jackson also made clear that he did not believe that courts "should have attempted to interfere with the Army in carrying out its task."³⁷

Jackson's *Korematsu* dissent has been much criticized.³⁸ His unpublished opinion in *Quirin* might show the *Korematsu* dissent in a more favorable light. As Dennis Hutchinson has correctly noted, Jackson

34 343 U.S. at 645 (Jackson, J., concurring).

35 Jackson believed that military commissions "are not dependent for their existence upon either statute or constitution, but derive their being from the necessities and practices of warfare," and he also emphasized "the relation of [the military commission's] task to the prosecution of the war." Jackson draft op. at 3, 6, *infra* at 234, 237.

36 *Id.* at 2, 7, 8, *infra* at 233, 238, 239 (emphasis added).

37 *Korematsu v. United States*, 323 U.S. 214, 244, 248 (1944) (Jackson, J., dissenting).

38 See, e.g., Charles Fairman, *Robert H. Jackson: 1892–1954 – Associate Justice of the Supreme Court*, 55 Colum. L. Rev. 445, 453 n.30 (1955); Eugene V. Rostow, *The Japanese American Cases – A Disaster*, 54 Yale L.J. 489, 510–11 (1945).

“began in *Quirin* with the fixed presumption that the Court has no business reviewing military judgments in time of war, and he never deviated from that position.”³⁹ Jackson clearly stated the basis for this presumption in the closing paragraph of his draft opinion in *Quirin*:

[I]n the long run it seems to me that we have no more important duty than to keep clear and separate the lines of responsibility and duty of the judicial and of the executive-military arms of government. Merger of the two is the end of liberty as we in this country have known it. If we are uncompromisingly to discountenance military intervention in civil justice, we would do well to refuse to meddle with military measures dealing with captured unlawful enemy belligerents.⁴⁰

Whatever one thinks of this analysis, and of its assumption that the duties and responsibilities of the judicial and military-executive arms of government can be strictly separated, it suggests that Jackson was principled in thinking about its application. For he was disinclined to assert judicial review of military matters not only in cases (like *Korematsu*) where he believed the underlying Executive-branch actions were unlawful, but also in cases (like *Quirin*) where he believed the underlying Executive-branch actions were lawful.



In the end, Jackson withdrew his draft opinion in *Quirin* – a practice he would repeat many times in the future.⁴¹ He probably did so under the influence of Frankfurter’s famous and odd “soliloquy” memorandum to the Court which, as G.E. White has recounted in these pages, essentially urged the Justices not to splinter over relatively unimportant procedural matters in the midst of a total war.⁴² The Court never reached consensus on the merits of the Articles of War issue, but it did dispose of the issue in the penultimate paragraph of the decision:

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 Articles in ques-

39 Dennis J. Hutchinson, “*The Achilles Heel*” of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 Sup. Ct. Rev. 455, 488. Hutchinson does a terrific job of tracing the seeds of Jackson’s *Korematsu* dissent from his unpublished opinion in *Quirin* through his unpublished opinions in *Endo* and *Hirabayashi*.

40 Jackson draft op. at 10, *infra* at 241.

41 As Hutchinson has noted: “Jackson often drafted opinions that he later withdrew if the Court changed tack or if he was persuaded that his separate views were a personal indulgence at the expense of institutional clarity or authority. The unpublished drafts, of which more than a dozen survive in archives, seem to be written more to convince the author than his colleagues.” Hutchinson, *supra* note 39, at 456–57 (footnote omitted).

42 See White, *supra* note 6.

tion, 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.⁴³

In other words, some Justices agreed with Jackson's interpretation of the Articles, some agreed with Stone's views in Memorandum B, but all agreed that the Articles were not violated, making it unnecessary to decide whether Congress could restrict the President's power to deal with unlawful enemy combatants. And Jackson, by joining the opinion in full, acted contrary to the argument in his draft opinion that the Court should not review the President's military commission Order, especially for compliance with the Articles of War.

The Court in *Quirin* ducked most of the

difficult issues raised in Jackson's unpublished opinion. Many of these same issues are once again presented to the Court this term in *Hamdan*, where the petitioner argues that using a military commission to try an alleged member of al Qaeda is inconsistent with both the Uniform Code of Military Justice (the successor to the Articles of War) and international law, and where the Government argues that the President has inherent authority to establish military commissions independent of congressional authorization, that the commission's departures from the procedural requirements of the UCMJ are consistent with the UCMJ and legally valid, and that courts cannot enforce the requirements of the laws of war against the Commander in Chief.⁴⁴ It remains to be seen whether, and how, the Court finally resolves issues first broached in Justice Jackson's unpublished draft opinion in *Quirin*.



43 317 U.S. at 47–48.

44 See Brief for Petitioner, *Hamdan v. Rumsfeld*, No. 05–184 (U.S. Jan. 6, 2006); Brief for Respondents, *Hamdan v. Rumsfeld*, No. 05–184 (U.S. Feb. 23, 2006).