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Quirin Revisited

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QUIRIN REVISITED

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INTRODUCTION

Six decades ago, the U.S. Supreme Court decided *Ex parte Quirin*,[1] in which the Justices determined that President Franklin Delano Roosevelt possessed the requisite constitutional authority to institute and use a military commission. That military commission contemporaneously tried, found guilty, and recommended sentences, which the Chief Executive promptly imposed on, eight Nazi saboteurs. Before the commission ruled, the Supreme Court rejected the defendants' petitions for writs of habeas corpus.

On November 13, 2001, President George W. Bush promulgated an Executive Order (Bush Order) that authorized the establishment and application of military commissions as well as purported to eliminate whatever jurisdiction federal courts might have by statute and to deny federal court access to individuals prosecuted or detained for terrorism.[2] The Bush administration substantially premised that the Order and jurisdiction-stripping proviso on *Ex parte Quirin*. It has also invoked the opinion when adopting related measures that implicate the war on terrorism and when litigating major terrorism cases.

We recently argued that the jurisdiction-stripping provision of the Bush Order exceeded the president's lawful authority,[3] a result necessitated by the U.S. Constitution[4] and by the U.S. Supreme Court decision in *Youngstown Sheet & Tube Co. v. Sawyer*.[5] Our previous work explicitly left unaddressed, as beyond its scope, any evaluation of

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1. 317 U.S. 1 (1942). The Court issued this full opinion three months after a brief per curiam order. *See id.* at 18.

2. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 921 (2001), *reprinted in* 10 U.S.C.A. § 801 (West Supp. 2002) [hereinafter Bush Order].

3. *See* A. Christopher Bryant & Carl Tobias, Youngstown *Revisited*, 29 HASTINGS CONST. L.Q. 373 (2002).

4. *See* U.S. CONST. arts. I & III.

5. 343 U.S. 579 (1952). *See generally* Bryant & Tobias, *supra* note 3.

what issues might be cognizable in a habeas corpus proceeding to review ongoing detention or a final judgment imposed under the Bush Order.[6]

The government will almost certainly assert that a federal court entertaining a petition for a writ of federal habeas corpus filed by, or on behalf of, someone whom the Bush Order covers, may only determine whether a military commission has valid jurisdiction over the person. This idea was foreshadowed when White House Counsel Alberto R. Gonzales observed that the Bush administration would submit to a federal habeas corpus proceeding, only insofar as the petitioner challenged the lawfulness of the commission's jurisdiction.[7] The White House Counsel and additional upper-echelon governmental officials base the limitation, the Bush Order, and similar antiterrorism initiatives on *Ex parte Quirin*.

We believe, however, that the ruling may not support such a circumscribed view of the jurisdiction that a federal habeas corpus court would exercise today. Rather, *Quirin* must be understood vis-à-vis its historical context, which includes the strikingly underdeveloped nature of federal habeas corpus at that time. Since 1942, the Justices have dramatically enlarged federal habeas corpus proceedings' scope. Before this date, the fact of adjudication by a competent tribunal alone would sustain the writ's denial, yet federal habeas corpus courts now frequently resolve substantive challenges to the manner in which admittedly lawful tribunals conducted proceedings. One instructive example is that a few years before *Quirin*, a trial court's failure to provide counsel for an indigent criminal defendant would only rarely have supported a petition for the writ. By sharp contrast, modern federal habeas corpus courts frequently grant relief to petitioners afforded lawyers whom judges later find rendered ineffective assistance. We suggest that *Quirin*'s correct interpretation emphasizes the Supreme Court's decision to exercise jurisdiction and to resolve the case on the merits—perhaps most significantly the Fifth and Sixth Amendment claims.

In short, the profound growth of federal habeas corpus over the last sixty years, the opinion's unusual facts, and the quite narrow holding in the *Quirin* Court's ultimate determination must guide contemporary application of the precedent. Thus, our research finds that federal courts have power not only to assess military commissions' validity in the abstract but also to review whether their treatment of particular defendants satisfied the Constitution.

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6. Bryant & Tobias, *supra* note 3, at 377 n.10. *See generally* Bush Order, *supra* note 2.

7. *See* Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

Part I of this Article evaluates the Bush Order that created the tribunals and ostensibly nullified federal court jurisdiction, while briefly explaining why the President lacks constitutional authority to preclude this jurisdiction and canvassing his administration's reliance on *Quirin*. Part II then scrutinizes the decision and ascertains that the ruling should be confined to its peculiar facts. Part III next details federal habeas corpus's evolution since the 1940s. Finally, Part IV asserts that *Quirin* must be modernized to conform with twenty-first century habeas corpus law and concludes by surveying the types of issues that might be cognizable in a habeas corpus court, even though an anachronistic, unduly rigid and insupportably overbroad construction of *Quirin* may appear to prohibit their merits disposition.

I. THE BUSH ORDER AND *QUIRIN*

The November 2001 Bush Order, which authorized the establishment and use of military commissions, while purportedly abolishing federal court jurisdiction, deserves rather brief treatment here because certain applicable issues have received extended discussion elsewhere.[8] However, some exploration is warranted, as that analysis should improve understanding of the Bush administration's dependence on the *Quirin* case and its relevance to the Bush Order's constitutionality and application, especially in the context of federal habeas corpus proceedings.

On November 13, 2001, President Bush promulgated an Executive Order that authorized the creation and deployment of military commissions as well as ostensibly abrogated federal court jurisdiction over tribunal proceedings; the Bush administration in essence grounded that Order and its attempt to preclude federal court jurisdiction on the *Quirin* opinion, Article II delegated powers, and Congress's September 2001 Authorization for Use of Military Force Joint Resolution.[9] Numerous observers have found that the President does not have the authority to eliminate federal court jurisdiction, a conclusion dictated by Articles I and III and by the Supreme Court's *Youngstown* holding,

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8. *See* Bryant & Tobias, *supra* note 3. *See generally* Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1412-35 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Symposium, Youngstown *at Fifty: A Symposium*, 19 CONST. COMMENT. 1 (2002).

9. *See* Bush Order, *supra* note 2; *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

although military tribunals may be legitimate in certain situations, such as extraterritorial prosecutions that result from declared wars.[10]

Most relevant for the questions that this Article addresses, the Chief Executive, Cabinet members and a significant number of other top-ranking public figures have employed the *Quirin* decision to substantiate related actions in the war on terrorism and to pursue and defend crucial terrorism litigation. The country's elected leaders have proffered the ruling in a highly generalized manner. When President Bush justified the Order, he alluded to the opinion by mentioning how the Roosevelt administration had implemented an analogous World War II initiative; President Bush stated that "[n]on-US citizens who plan and/or commit mass murder are . . . unlawful combatants" and they might receive trials before military commissions, if those proceedings would foster the "national-security interest."[11] On November 14, 2001, Vice President Richard Cheney similarly cited the *Quirin* decision and the application of military tribunals as the major precedents for establishing military commissions, while he remarked that the entities should try the individuals responsible for the terrorist attacks who do not "deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process."[12]

The same day, at a press conference, Attorney General John D. Ashcroft subscribed practically verbatim to the notions that the Vice-President had expressed by recounting tribunals' "very substantial history," Supreme Court recognition (most importantly in *Quirin*) that the entities are valid, and his personal opinion that "foreign terrorists

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10. *See, e.g.*, Bryant & Tobias, *supra* note 3; Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649 (2002); Gonzales, *supra* note 7. We do not address the geographic scope of federal habeas corpus jurisdiction in this Article; we leave for another day such questions as those raised in *A. F. Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003) (holding that the privilege of litigation did not extend to aliens in military custody outside of U.S. territory).

11. Wayne Washington, *Fighting Terror Legal Considerations: FDR Move Cited in Tribunals*, BOSTON GLOBE, Dec. 2, 2001, at A1; *see* Mike Allen, *Bush Defends Order for Military Tribunals*, WASH. POST, Nov. 20, 2001, at A14. President Bush subsequently justified tribunals by urging Americans to remember that those who would be tried "are killers. They don't share the same values that we share." President's Exchange with Reporters in Alexandria, Virginia, 38 WEEKLY COMP. PRES. DOC. 469 (Mar. 25, 2002).

12. *See* Vice President Richard Cheney, Remarks to the U.S. Chamber of Commerce (Nov. 14, 2001), *available at* http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011114-1.html; *see also* Interview by Vice President Richard Cheney with Gloria Borger, 60 Minutes II (Nov. 14, 2001), *available at* http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011114.html. *See generally* Michal Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 434 (2002).

who commit war crimes against the United States . . . are not entitled to and do not deserve the protections of the American Constitution."[13] Three weeks later, the Attorney General correspondingly proffered testimony to the Senate Judiciary Committee: the "*Quirin* case upheld the use of commissions in the United States against enemy belligerents," while the Justices exercised "habeas corpus jurisdiction to decide" on the tribunal's legitimacy and "whether the belligerents were actually eligible for trial under the commission."[14] In a June 10, 2002 Department of Justice (DOJ) briefing, Deputy Attorney General Larry Thompson observed that the U.S. government had detained José Padilla "under the laws of war as an enemy combatant," and the Deputy Attorney General relied on the *Quirin* precedent as "clear Supreme Court [authority] for such a detention."[15]

DOJ Assistant Attorneys General, who are discharging lead responsibility to pursue the war on terrorism, have invoked the World War II determination. The Assistant Attorney General for the Criminal Division, Michael Chertoff, when defending the Bush Order's promulgation before the Senate Judiciary Committee, supplied numerous arguments: the language used was "virtually identical" to that in the Roosevelt Proclamation and Order; commission application has enjoyed a long history, which the Assistant Attorney General traced; the Supreme Court recognized tribunals' constitutionality with the *Quirin* opinion; and Chertoff's acknowledgement that commission deployment "in the United States would be subject to habeas review by the Federal courts."[16] The Assistant Attorney General for the Office of Legal Policy, Viet D. Dinh, whom some observers consider the "chief architect of Ashcroft's aggressive new approach to law enforcement," has similarly claimed that the venerated American tradition of

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13. Attorney General John Ashcroft & INS Commissioner Ziglar, Announcement of INS Restructuring Plan (Nov. 14, 2001), *available at* http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_14.htm; *see also* John Turlcy, *Military Tribunal Rules Put Our Values to Test*, BALT. SUN, Mar. 25, 2002, at 7A.

14. *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Comm. on the Judiciary*, 107th Cong. 322, 327 (2002) [hereinafter *Preserving Our Freedoms*] (statement of Att'y Gen. John Ashcroft). The Attorney General recounted the venerable history of commissions once again. *Id.*

15. U.S. Dep't of Justice, Press Conference on the Arrest of Abdullah al Mujahir, Also Known as José Padilla (June 10, 2002) (statement of Deputy Att'y Gen. Larry Thompson), transcript *available at* http://usinfo.state.gov/topical/rights/law/02061001.htm; *see infra* text accompanying notes 33-34.

16. *See Preserving Our Freedoms*, *supra* note 14, at 52 (statement of Assistant Att'y Gen. Michael Chertoff); *see also infra* notes 24-25 and accompanying text.

employing military commissions sustained the Bush Order's institution.[17] The Assistant Attorney General emphasized how the Roosevelt administration had applied tribunals during World War II, while Dinh cited *Quirin* for the propositions that the "Supreme Court has unanimously upheld" the entities' validity and the President's authority to convene them.[18]

Officials who head the Department of Defense (DOD) have proffered several analogous concepts which support the Bush Order and the March 21, 2002 DOD regulations that implement it.[19] Secretary of Defense Donald Rumsfeld and Deputy Defense Secretary Paul Wolfowitz tendered a statement for the Senate Armed Services Committee, observing that "[m]ilitary commissions have been used in times of war since the founding of this Nation" and alluding specifically to the Roosevelt administration prosecution of the eight Nazi saboteurs; both officers claimed the "Supreme Court upheld" tribunals' legitimacy in *Quirin*.[20] The Deputy Secretary elaborated by suggesting that the "President does have a lot of authority; [however, the World War II decision] was precisely a case of where the courts reviewed whether that authority was properly exercised" and concluded that it had been.[21] The Department General Counsel, William J. Haynes II, submitted testimony that reinforced the perspectives that Rumsfeld and Wolfowitz enunciated and elaborated: the Bush Order was the same as the Roosevelt Order and was not intended to modify Supreme Court habeas corpus scrutiny.[22] Moreover, the General Counsel invoked the *Quirin* precedent when substantiating the March 2002 department regulations, while he argued that "Presidents have detained enemy combatants in every major conflict

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17. *See* Siobhan Gorman, *The Ashcroft Doctrine*, NAT'L J., Dec. 21, 2002, at 3712, 3713; *see also* Eric Lichtblau with Adam Liptak, *On Terror, Spying and Guns, Ashcroft Expands Reach*, N.Y. TIMES, Mar. 15, 2003, at A1.

18. *See* Viet D. Dinh, *Foreword: Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 405-06 (2002); *see also infra* notes 26-34 and accompanying text (recounting DOJ reliance on *Quirin* in major terrorism litigation).

19. Bush Order, *supra* note 2; Military Commission Order No. 1 (U.S. Dep't of Defense Mar. 21, 2002), *available at* http://www.dtic.mil/whs/directives/corres/mco/mco1.pdf [hereinafter DOD Order]; *see* Turley, *supra* note 13.

20. *See Department of Defense's Implementation of the President's Military Order on Detention Treatment and Trial by Military Commission of Certain Noncitizens in the War on Terrorism: Hearing Before the Senate Comm. on Armed Servs.*, 107th Cong. 9, 11 (2002) [hereinafter Hearing] (statement of Sec'y of Def. Donald Rumsfeld & Deputy Sec'y of Def. Paul Wolfowitz).

21. *Id.* at 68; *see also* Nat Hentoff, *Spinning the Military Tribunals: A Mere Pretense of Legal Process*, VILLAGE VOICE, Apr. 2, 2002, at 27.

22. *See* Hearing, *supra* note 20, at 17 (statement of DOD Gen. Counsel William J. Haynes II); *see also supra* note 19 and accompanying text.

in the Nation's history" and that federal courts have affirmed the power of chief executives to deploy military tribunals.[23]

White House Counsel Gonzales also relied on *Quirin* for the propositions that the Justices have "consistently upheld" military commissions' application, and he clearly recognized that the terms incorporated in the Bush Order were derived from wording of the Roosevelt administration Proclamation and Order, phraseology which the Supreme Court construed as permitting habeas corpus review.[24] The White House Counsel concomitantly asserted that any "habeas corpus proceeding in a federal court" that challenges actions under the Bush Order that authorize trial of non-U.S. citizens by military commissions would be limited to reviewing "the lawfulness of the commission's jurisdiction."[25]

The Justice and Defense Departments have correspondingly placed substantial dependence on the *Quirin* opinion when litigating a significant percentage of the terrorism cases. These include most prominently *Hamdi v. Rumsfeld*, which was pursued in the Eastern District of Virginia and the U.S. Court of Appeals for the Fourth Circuit, as well as *Padilla ex rel. Newman v. Bush*, which is proceeding before the Southern District of New York and the Second Circuit.[26] For example, the brief submitted by the government to assert its position in one *Hamdi* appeal contended: "given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such."[27] Fourth Circuit Chief Judge J. Harvie Wilkinson III, trenchantly reformulated this argument in an appellate court opinion: the United States "thus submits that we may not review at all its designation of an American citizen as an enemy combatant—that

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23. News Release, U.S. Dep't of Def., DOD Responds to ABA Enemy Combatant Report (Oct. 2, 2002) (quoting Letter from William Haynes II, DOD General Counsel, to Neal Sonnett, Chair, ABA Task Force on Enemy Combatants (Sept. 23, 2002)), *available at* http://www.defenselink.mil/news/Oct2002/b10022002_bt497-02.html. The Fourth Circuit recently reaffirmed these ideas in *Hamdi*. *See infra* notes 25–29 and accompanying text; *see also* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1 (2002).

24. *See* Gonzales, *supra* note 6. *See generally* Bryant & Tobias, *supra* note 3, at 394–95 n.85.

25. *See* Gonzales, *supra* note 6. *See generally* Tom Brune, *Military Courts to Vary on Rules*, NEWSDAY, Dec. 1, 2001, at A2. Senators' views similar to the administration's are in the hearings cited *supra* notes 14, 16, 20.

26. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003); Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002); Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002); Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), *adhered to upon reconsideration*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

27. *Hamdi*, 296 F.3d at 283.

its determinations on this score are the first and final word."[28] However, the Fourth Circuit flatly denied as premature the government's request to dismiss the petition and elaborated: "In dismissing, we ourselves would be summarily embracing a sweeping proposition—namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."[29] When the Fourth Circuit remanded the matter, District Judge Robert Doumar asked "what, if any, constitutional protections Hamdi was entitled to," and counsel for the United States "responded that the Constitution applied to the same extent as 'it did to the individual who was alleged to be an American citizen in the *Quirin* case.'"[30] "Upon further questioning by the court," the lawyer conceded that this person "was afforded access to counsel and the opportunity to defend himself before a military tribunal,"[31] while the trial judge found it apparent that the *Quirin* petitioner received a "significantly broader measure of due process than Hamdi has received thus far" in part because he had been confined to the Norfolk Naval Brig without an attorney.[32] The district court that resolved the *Padilla* litigation similarly rejected the government's argument that Padilla should not have access to counsel,[33] but the judge did find "the logic of *Quirin* bears strongly on this case," extensively citing the decision that "recognized the distinction between lawful and unlawful combatants" and that "[u]nlawful combatants are likewise subject to capture *and detention*."[34]

A large number of public officials, especially those who hold cabinet-level, and additional upper-echelon, Bush administration positions, therefore, have invoked the World War II precedent of *Ex parte Quirin*. These figures, namely President Bush and certain top-ranking legal officers, have depended on the ruling for many important propositions in numerous contexts and for ideas which the opinion may not support.

This Article's next Part, thus, considers *Ex parte Quirin*, the World War II decision on which the President and his aides extensively relied when issuing the November 2001 Bush Order and when fighting the war

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28. *See id.*

29. *Id.* The Fourth Circuit did extensively cite to *Quirin* for ideas, such as the following: "And in World War II, the [Supreme] Court stated in no uncertain terms that the President's wartime detention decisions are to be accorded great deference from the courts." *Id.* at 282 (citing *Quirin*, 317 U.S. at 25).

30. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 532 (E.D. Va. 2002).

31. *Id.*

32. *See id.* at 529, 532.

33. *See Padilla*, 233 F. Supp. 2d at 600.

34. *Id.* at 594–95 (emphasis added). *See generally Quirin*, 317 U.S. at 30–31.

on terrorism. We review whether the case supports the notions for which the Bush administration proffers the opinion and determine that *Quirin* cannot sustain most of them. For instance, the President and his assistants at once extend the decision far beyond its circumscribed, *sui generis* facts and narrowly-confined holding to substantiate broad concepts, such as indefinite detention of U.S. citizens and great judicial deference vis-à-vis the Executive, even while those public officials apparently ignore federal habeas corpus's exponential growth over the last sixty years. Perhaps as troubling, a few courts have already subscribed to the administration's interpretation of the precedent.

II. ANALYSIS OF *EX PARTE QUIRIN*

In evaluating *Quirin,* we first assess its unique factual context. We then explore the decision's legal analysis and holding, and we explain why many phenomena should limit the reach of *Quirin*. These include the speed with which the United States prosecuted the saboteurs and the Supreme Court resolved their appeals; the difficulties of rationalizing the full opinion after the government depended on a hastily-assembled, laconic per curiam order to execute six of the petitioners; as well as improper exogenous pressures, most critically from President Roosevelt, and questionable internal ones, principally from Justice Felix Frankfurter. The determination was also narrow, and its author, Chief Justice Harlan Fiske Stone, intentionally wrote a circumscribed opinion, which many observers suggest should be narrowly read.

A. The Facts in Quirin

The unusual facts that underlie *Ex parte Quirin* warrant considerable exploration in this Article because they support a confined reading of the holding. Our recitation of the pertinent facts derives substantially from the factual rendition that the Supreme Court decision articulated and the perspectives enunciated by informative secondary sources, which have carefully and thoroughly scrutinized the relevant particulars.[35]

After the United States had declared war against the German Reich in 1941, Adolph Hitler demanded expeditious action against the nation

35. *See Quirin*, 317 U.S. at 20-22; *see also* Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59 (1980); David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61 (1996). *See generally* LOUIS FISHER, NAZI SABOTEURS ON TRIAL (2003); EUGENE RACHLIS, THEY CAME TO KILL: THE STORY OF EIGHT NAZI SABOTEURS IN AMERICA (1961).

on U.S. soil.[36] The German High Command, therefore, devised a plan that included military and propaganda objectives because the scheme required that the saboteurs destroy bridges, aluminum factories, and railroads as well as train stations and department stores throughout the United States.[37] Over the course of a month in spring 1942, experts instructed the saboteurs on detonators, explosives, invisible writing, and other relevant techniques at a special training installation outside Brandenburg, Germany.[38]

Four of the saboteurs then proceeded to a seaport that was located in Occupied France and boarded a submarine that traveled across the Atlantic Ocean and planted them and a supply of explosives and detonators at Amagansett Beach, Long Island early on the morning of June 13, 1942.[39] They landed, dressed wholly or partly in German Marine Infantry uniforms, which they buried upon reaching shore, and thereafter journeyed to New York City wearing civilian clothes.[40] Four additional saboteurs departed on another submarine from the identical French port. This second group came ashore, dressed in German Marine Infantry caps and transporting similar destructive paraphernalia, at Ponte Vedra Beach, Florida under the cover of darkness on June 17.[41] These individuals buried their caps and the explosive materials, donned civilian dress, proceeded to Jacksonville, and subsequently dispersed to various destinations across the United States.[42]

At least two saboteurs decided that they might be saved through betrayal of their remaining colleagues, and one traveled to Washington, D.C., where he provided the FBI with a thorough confession.[43] By June 27, accordingly, the FBI had placed all eight saboteurs in custody.[44]

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36. *See Quirin*, 317 U.S. at 21; *see also* Danelski, *supra* note 35, at 61. *See generally* FISHER, *supra* note 35, at 4; Cyrus Bernstein, *The Saboteur Trial: A Case History*, 11 GEO. WASH. L. REV. 131, 132 (1943).

37. *See Quirin*, 317 U.S. at 21; Robert E. Cushman, Ex parte Quirin et al.—*The Nazi Saboteur Case*, 28 CORNELL L. Q. 54, 54-55 (1942); Danelski, *supra* note 35, at 61, 63.

38. *Quirin*, 317 U.S. at 21; Danelski, *supra* note 35, at 63. *See generally* FISHER, *supra* note 35, at 1-23.

39. *Quirin*, 317 U.S. at 21; Cushman, *supra* note 37, at 54; Danelski, *supra* note 35, at 63.

40. *See supra* note 39. *See generally* FISHER, *supra* note 35, at 25-32.

41. *Quirin*, 317 U.S. at 21; Cushman, *supra* note 37, at 54; Danelski, *supra* note 35, at 64.

42. *See supra* note 41. *See generally* FISHER, *supra* note 35, at 35-38.

43. *See* Belknap, *supra* note 35, at 62; Bernstein, *supra* note 36, at 136; Danelski, *supra* note 35, at 64-65.

44. *See supra* note 44. The FBI issued misleading press releases that suggested that its diligence led to the arrests. These issuances marked the beginning of "government control on information about" the case and its successful use for

The FBI Director, J. Edgar Hoover, orchestrated a press conference that day to announce their capture, while some members of the media beseeched the government to impose prompt, ruthless retribution.[45]

In a June 30 memorandum, which President Roosevelt prepared for Attorney General Francis Biddle, the President articulated his personal opinions that the individuals being held surely "are just as guilty as it is possible to be" and that "[o]ffenses such as these are probably more serious than any offense in criminal law."[46] The President, therefore, concluded that "[t]he death penalty is called for by usage and by the extreme gravity of the war aim and the very existence of our American Government," urging that the people captured "be tried by court martial."[47] The Attorney General first conferred with the Secretary of War, Henry Stimson, and the Judge Advocate General, Myron Cramer, and then suggested to the Chief Executive that a military commission be assembled to try the saboteurs.[48] Biddle specifically recommended trial by commission because he thought this approach would be rather expeditious, make it easier to prove the charge of violating the law of war, and permit the death penalty's imposition.[49] The Attorney General also harbored concerns related to secrecy, in particular that there not be embarrassing revelations about the facility with which the saboteurs had landed on U.S. shores and the comparatively inept FBI treatment of the matter at the war's outset.[50]

On July 2, Roosevelt promulgated an Executive Order that instituted a military commission, appointed its members, the prosecutors and the defense counsel; established the procedures the tribunal would use to conduct the proceeding; and prescribed review of the trial record

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propaganda purposes. Danelski, *supra* note 35, at 64-65; *accord Preserving Our Freedoms*, *supra* note 14 (statement of Sen. Leahy).

45. Belknap, *supra* note 35, at 62-63; Bernstein, *supra* note 36, at 137; Danelski, *supra* note 35, at 65.

46. *See* Memorandum for the Attorney General, President Roosevelt to Attorney General Biddle (June 30, 1942) (President's Secretary's Files: Departmental File: Justice Department, 1940-1944) (on file with the Franklin D. Roosevelt Presidential Library, Hyde Park, N.Y.).

47. *See id. See generally* Jonathan Turley, Quirin *Revisited: The Dark History of a Military Tribunal*, NAT'L L.J., Oct. 28, 2002, at A17.

48. *See* Memorandum from Attorney General Biddle, to President Roosevelt (June 30, 1942) (President's Official File (OF)5036: Nazi Spies, 1942-1945) (on file with the Franklin D. Roosevelt Presidential Library, Hyde Park, N.Y.) [hereinafter Memorandum].

49. *See* Belknap, *supra* note 35, at 63-64; Danelski, *supra* note 35, at 66; *see also* FISHER, *supra* note 35, at 49-51.

50. Danelski, *supra* note 35, at 66; *see also* Belknap, *supra* note 35, at 66-67; Katyal & Tribe, *supra* note 8, at 1280-81. *See generally supra* notes 43-44 and accompanying text.

and any commission judgment or sentence.[51] The Order deviated from requirements in the Articles of War by authorizing the admission of evidence which had probative value for a reasonable person; conviction and imposition of a death penalty sentence on a two-thirds, rather than a unanimous, vote; and direct transmittal of the record, judgment and sentence to the Chief Executive for review.[52] Biddle informed Roosevelt that the departures prescribed "should save a considerable amount of time," but they would also facilitate the saboteurs' conviction as well as imposition of the death penalty.[53] The same day, the President issued a Proclamation that ostensibly closed the federal courts to "persons who are subjects, citizens or residents of any nation at war with the United States . . . and are charged with committing or attempting or preparing to commit sabotage, espionage . . . or violations of the laws of war."[54] Biddle intimated to the President that this July 2 Proclamation would "produce the same practical results" for the saboteurs as suspending the habeas corpus writ, yet it would avoid suspension's "broad policy questions."[55]

On the next day, the Army Judge Advocate General filed with the military tribunal charges that the eight saboteurs had violated the law of war: Article 81 of the Articles of War, which implicated relieving the enemy; Article 82, which involved spying; as well as conspiracy to commit the abovementioned offenses.[56] Soon thereafter, the commission began the trial, which was held in complete secrecy in a converted FBI assembly room with blacked-out windows in the DOJ building.[57] The proceeding continued for three weeks. The lawyers for the saboteurs, Army Colonels Cassius Dowell and Kenneth Royall, doubted that the Order and Proclamation were constitutional or valid and decided that

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51. Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 2, 1942); *see also* Danelski, *supra* note 35, at 67.

52. Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 2, 1942). *See generally* Danelski, *supra* note 35, at 67.

53. *See* Danelski, *supra* note 35, at 67; Memorandum, *supra* note 48.

54. *See* Proclamation No. 2561, 3 C.F.R. 309 (1938-1943); *see also Quirin*, 317 U.S. at 22-23. *See generally* FISHER, *supra* note 33, at 50-53; *supra* notes 2, 9, and accompanying text.

55. Memorandum, *supra* note 48; *see* U.S. CONST. art. 1, § 9, cl. 2; *Ex parte* Merryman, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9,487); *see also* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 32-42 (1998) (discussing *Merryman*); Belknap, *supra* note 35, at 65 (citing Memorandum, *supra* note 48).

56. *See Quirin*, 317 U.S. at 23; *see also* Bernstein, *supra* note 36, at 141-43; Danelski, *supra* note 35, at 67.

57. Belknap, *supra* note 35, at 66. The government stated that the commission was conducting the trial in secret for security reasons. *See id.*; *Espionage: 7 Generals v. 8 Saboteurs*, TIME, July 20, 1942, at 15.

they would contest both in federal court.[58] However, the defense attorneys, as military officers, were concerned because pursuing the matter in civilian tribunals might be viewed as an act of disobedience toward the Commander in Chief and, thus, they wrote the President and sought authority for the legal challenge on July 6.[59] Biddle counseled Roosevelt against officially denying the request and, therefore, the presidential secretary, Marvin McIntyre, contacted the lawyers and instructed the attorneys to exercise their best judgment.[60] Dowell and Royall then responded that the defense would file habeas corpus proceedings, which provoked an irate reaction from Roosevelt who informed the Attorney General: "I won't hand them over to any United States marshal armed with a writ of habeas corpus."[61]

On July 8, when the tribunal convened, Royall proclaimed that the Order that established the commission was "invalid and unconstitutional" and began to develop a strategy for challenging it.[62] In late July, Biddle and Royall persuaded Justice Hugo Black and Justice Owen Roberts that the Supreme Court should entertain the case, while the jurists convinced Chief Justice Stone to convene a special session of the High Court that would receive the saboteurs' petitions for writs of habeas corpus.[63] On July 28, the defense lawyers filed applications for habeas corpus writs in the U.S. District Court for the District of Columbia, which the district court promptly rejected.[64] The following day, the attorneys filed habeas corpus petitions in the Supreme Court.[65] During oral argument before the Justices, the lawyers appealed the district court's determination to the U.S. Court of Appeals for the District of Columbia Circuit and when that request was denied filed

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58. *See* RACHLIS, *supra* note 35, at 181–82; Belknap, *supra* note 35, at 67; Danelski, *supra* note 35, at 68.

59. *See* Letter from Cassius Dowell & Kenneth Royall to President Roosevelt (July 6, 1942) (President's Secretary's Files: Departmental File: Justice Department, 1940–1944) (on file with the Franklin D. Roosevelt Presidential Library, Hyde Park, N.Y.). *See generally* FISHER, *supra* note 35, at 56–59, 64–65; Belknap, *supra* note 35, at 68 (citing Letter from Dowell & Royall to President Roosevelt, *supra*).

60. *See* FISHER, *supra* note 35, at 65–66; Belknap, *supra* note 35, at 68; Danelski, *supra* note 35, at 68.

61. *See* FRANCIS BIDDLE, IN BRIEF AUTHORITY 331 (1962); *see also* Danelski, *supra* note 35, at 68.

62. *See* Belknap, *supra* note 35, at 68 (citing Transcript of Trial Proceedings, Map Room Papers, Boxes 198-201, at 4 (on file with the Franklin D. Roosevelt Library, Hyde Park, N.Y.)). *See generally* FISHER, *supra* note 35, at 56–57.

63. *See* FISHER, *supra* note 35, at 67–68; RACHLIS, *supra* note 35, at 210–12, 243–46; Danelski, *supra* note 35, at 68.

64. *See Ex parte* Quirin, 47 F. Supp. 431 (D.D.C. 1942); *see also Quirin*, 317 U.S. at 19.

65. *See Quirin*, 317 U.S. at 19; Danelski, *supra* note 35, at 68; *see also* FISHER, *supra* note 35, at 68.

certiorari petitions in the Supreme Court, which the Justices granted on the day that they affirmed the district court action and dismissed the petitions for habeas corpus writs.[66]

Attorneys for the government and for the petitioners labored under enormous temporal restraints; however, they managed to file briefs which comprised more than 180 pages on July 29, the initial day of Supreme Court oral argument.[67] The Court heard those arguments over five and one-half hours on July 29 and for three and one-half hours the following day.[68] Prior to commencement of the initial oral arguments, Chief Justice Stone and all the other Court members except William O. Douglas, who was traveling from Oregon, met in conference for a preliminary discussion of the case.[69] Justice Roberts, whom Stone had asked to preside, informed his colleagues that the Attorney General believed Roosevelt would execute the saboteurs regardless of how the Court decided their appeals.[70] Justice Frankfurter also questioned the propriety of having Justice Frank Murphy hear the matter, because the jurist was serving as a reserve army lieutenant colonel on active duty at the time, while Justice Murphy, who wished to participate, reluctantly concluded that he must withdraw, "lest a breath of criticism be leveled at the Court."[71]

The Justices promptly resolved the case. Less than twenty-four hours after the lawyers had finished their oral arguments, the Supreme Court convened to issue a cursory per curiam order. Chief Justice Stone reviewed the litigation's history, stated the Court would announce the Justices' determination, and explained that the Supreme Court would subsequently file a full-dress opinion that explicated its reasoning.[72] The brief per curiam order found that Roosevelt possessed sufficient constitutional authority to try the petitioners before a military

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66. *See Quirin*, 317 U.S. at 19-20; Danelski, *supra* note 35, at 68. For a descriptive account of the procedural machinations whereby the "Court's jurisdiction caught up with the Court just at the finish line," see Boris I. Bittker, *The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of* Nunc Pro Tunc *Jurisdiction*, 14 CONST. COMMENT. 431 (1997).

67. *See* Danelski, *supra* note 35, at 68. *See generally* FISHER, *supra* note 35, at 87-88.

68. Belknap, *supra* note 35, at 75. For summaries of the arguments proffered by the United States and by the petitioners, see *id.* at 70-75; Danelski, *supra* note 35, at 68-69. *See generally* FISHER, *supra* note 35, at 89-108.

69. Danelski, *supra* note 35, at 69.

70. *See id.* Stone remarked, "[t]hat would be a dreadful thing." *Id.*

71. *See* Belknap, *supra* note 35, at 78 (citing Note to Ed (Kemp) (Sept. 10, 1942) (Frank Murphy MSS, Michigan Historical Collections, Univ. of Mich.)); *see also* SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 256, 404 (1984); ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 654-55 (1956).

72. Belknap, *supra* note 35, at 76-77; Danelski, *supra* note 35, at 71.

commission, the chief executive had lawfully established the tribunal, and the saboteurs had "not shown cause for being discharged by writ of habeas corpus."[73] The Supreme Court, therefore, dismissed the petitioners' applications for habeas corpus writs and affirmed the district court.[74]

The proceeding conducted by the military commission, which had been discontinued while the appeals were being pursued in the Supreme Court, expeditiously resumed.[75] On August 1, the attorneys presented closing arguments, and two days later, the commission found all of the defendants guilty of the charges against them and recommended death sentences. The tribunal submitted the 3,000-page record, which it had compiled directly to the President for his consideration and action. On August 8, the White House announced that Roosevelt had accepted virtually all of the commission's suggestions, although the Chief Executive commuted sentences, which the tribunal proposed for the two saboteurs who had defected.[76] The identical day, the government electrocuted the remaining six petitioners.[77] The President then sealed the record in the case throughout the duration of World War II.[78]

Chief Justice Stone consumed more than six weeks agonizing over the draft of the full opinion for the Court.[79] The jurist posited a basically intuitive rationale to support the decision, yet his law clerks found "little authority" for this justification while Stone could only cite analogous cases at numerous crucial points in the draft and even formulated alternative versions of its last segment.[80] On September 16, after the Chief Justice had finished crafting the opinion, he wrote Frankfurter: "About all I can say for what I have done is that I think [the draft opinion] will present the Court all tenable and pseudo-tenable

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73. *See Quirin*, 317 U.S. at 18–19; *see also* RACHLIS, *supra* note 35, at 272.

74. *See Quirin*, 317 U.S. at 18–19; *see also supra* note 64 and accompanying text.

75. We rely in this paragraph on RACHLIS, *supra* note 35, at 281, and Danelski, *supra* note 35, at 71.

76. Belknap, *supra* note 35, at 77; Danelski, *supra* note 35, at 72.

77. Danelski, *supra* note 35, at 72. Roosevelt reportedly hoped that the military commission would recommend death by hanging. *See* WILLIAM D. HASSETT, OFF THE RECORD WITH FDR, 1942–1945, at 90, 97 (1958).

78. *See* Bernstein, *supra* note 36, at 188–89; *see also* Danelski, *supra* note 35, at 72.

79. We rely in this paragraph on Danelski, *supra* note 35, at 72–75.

80. *See* Danelski, *supra* note 35, at 72 (citing Letter from Chief Justice Harlan Fiske Stone to Bennett Boskey (Aug. 9, 1942) (on file with the Harlan Fiske Stone Papers, Library of Congress)). *See generally infra* notes 129–32, 135, and accompanying text.

bases for decision."[81] Justice Frankfurter stated the iteration satisfied him completely, and he had "nothing to contribute except appreciation."[82] On September 25, Stone circulated the proposed opinion and a memorandum, suggesting that some questions which defense counsel aired in July had not been before the Justices but asserting the issues should be resolved against the saboteurs, lest the Court be "in the unenviable position of having stood by and allowed six men to go to their death without making it plain to all concerned—including the President—that it had left undecided a question on which counsel strongly relied to secure petitioners' liberty."[83]

Several Justices, however, were less sanguine than Frankfurter. Illustrative was the concern expressed by Justice Roberts that the decision might be construed in a manner which would legitimate the Roosevelt administration's effort to nullify federal court jurisdiction and his recommendation that the Justices explicitly find the President lacked this authority.[84] Frankfurter responded with a strong plea for judicial restraint, while he said the Proclamation should not "be read as foreclosing inquiry into what it means as applied to this case and . . . we should rest there and not open up what verily is a Pandora's box."[85] Roberts and the remaining brethren found the proposed resolution acceptable, and Stone incorporated this suggestion in the draft opinion.[86]

Justice Black correspondingly voiced the idea that the draft could be interpreted as an overbroad endorsement of military tribunals' use and, thus, "might go far to destroy the protections declared by the [*Ex parte*] *Milligan* case."[87] Stone, therefore, implemented changes in the opinion

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81. Danelski, *supra* note 35, at 75 (alteration in original) (citing Letter from Chief Justice Stone to Justice Felix Frankfurter (Sept. 16, 1942) (on file with the Harlan Fiske Stone Papers, Library of Congress)).

82. Danelski, *supra* note 35, at 75 (citing Letter from Justice Felix Frankfurter to Chief Justice Harlan Fiske Stone (n.d.) (on file with the Harlan Fiske Stone Papers, Library of Congress)). "[You face and resolve] issues of high moment . . . in a manner worthy of them." *Id.*

83. Belknap, *supra* note 35, at 78 (citing Memorandum from Chief Justice Harlan Fiske Stone, for the Court (Sept. 25, 1942) (on file with the Harlan Fiske Stone Papers, Library of Congress)).

84. Danelski, *supra* note 35, at 75 (citing Suggestions Made By Justice Owen Roberts to Chief Justice Harlan Fiske Stone (n.d.) (on file with the Frankfurter Papers, Harvard Law School)).

85. *Id.* at 75-76 (citing Justice Felix Frankfurter to Chief Justice Harlan Fiske Stone (Oct. 15, 1942) (on file with the Harlan Fiske Stone Papers, Library of Congress)).

86. *Id.* at 76.

87. *Id.* at 76 (citing Justice Hugo Black to Chief Justice Harlan Fiske Stone (Oct. 2, 1942) (on file with the Hugo L. Black Papers, Library of Congress)); *see also infra* notes 124-26 and accompanying text.

that satisfied Black's concerns.[88] Justice Douglas proffered one important proposal requesting the omission of a sentence in the draft that provided: "Even the guilty are entitled to be tried by a tribunal and by laws which the Constitution has prescribed as a means of determining their guilt."[89] The jurist thought that the sentence could be construed as finding it "unlawful for the executive to have disposed of the petitioners summarily without a trial by a tribunal."[90] Douglas argued that the question was not before the Court and the issue should be left unaddressed, while Stone agreed and deleted the objectionable sentence.[91]

Once the Chief Justice had negotiated the modifications above, Stone focused on the application of two provisions in the Articles of War over which the Court's members were evenly split and for which he had drafted alternative versions.[92] Justice Frankfurter favored Memorandum B, stating that the Articles of War did not bind the Chief Executive, and the jurist attempted to persuade several of his colleagues throughout the summer.[93] However, Frankfurter did not convince Justice Stanley Reed, and Frankfurter lost a supporter when Justice James Byrnes resigned from the Supreme Court on October 2.[94] The ensuing half-month witnessed little movement related to the question. Nonetheless, on October 16, Justice Robert H. Jackson circulated a memorandum that resembled a concurrence, a development that particularly disturbed Stone, Frankfurter and Black, who had earlier agreed that securing unanimity was imperative.[95] Jackson believed the Court exceeded its powers "in reviewing the legality of the President's order[, while] experience shows the judicial system is ill-adapted to deal with matters in which we must present a united front to a foreign foe."[96]

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88. *See* Danelski, *supra* note 35, at 76.

89. *Id.* at 76 (citing Letter from Justice William O. Douglas to Chief Justice Harlan Fiske Stone (Oct. 17, 1942) (on file with the William O. Douglas Papers, Library of Congress)).

90. *See id.*

91. *See id.* (citing Memorandum from Chief Justice Harlan Fiske Stone, for the Conference (Oct. 17, 1942) (on file with the Harlan Fiske Stone Papers, Library of Congress)); *see also* Belknap, *supra* note 35, at 78.

92. *See* Danelski *supra* note 35, at 76; *supra* note 80; *infra* notes 129–32 and accompanying text.

93. Danelski, *supra* note 35, at 76 (citing Memorandum by Justice Felix Frankfurter to Justices Owen Roberts, Stanley Reed, & James Byrnes (Aug. 1942) (on file with the Frankfurter Papers, Harvard Law School)).

94. *Id.* (citing Letter from Justice Stanley Reed to Justice Felix Frankfurter (undated, received Sept. 13, 1942) (on file with the Frankfurter Papers, Harvard Law School)).

95. *See id.* (citing Memorandum from Justice Robert H. Jackson (Oct. 23, 1942) (on file with the Robert H. Jackson Papers, Library of Congress)).

96. *Id.*; *see also* Belknap, *supra* note 35, at 79.

The release of Jackson's memorandum seemingly doomed aspirations to reach a unanimous determination; however, Frankfurter responded by circulating a document titled *F.F.'s Soliloquy*.[97] This imaginary dialogue with the saboteurs castigated them for having the temerity to pursue habeas corpus writs and for sowing the "seeds of a bitter conflict involving the President, the courts and Congress."[98] The document concomitantly admonished the brethren through an impassioned patriotic appeal against igniting an ethereal constitutional debate when the nation was at total war.[99]

Shortly after Justice Jackson had read the *Soliloquy*, he decided not to publish a concurring opinion.[100] Justice Roberts similarly responded that he would support some type of compromise: "a sort of Northern Pacific formulation in as brief a form as possible as Black suggests."[101] The Chief Justice continued with "patient negotiations"[102] and subsequently brokered an amicable resolution in which his colleagues "agreed to disagree without adopting either Memorandum A or B," while Stone announced the Court's decision on October 29, 1942.[103]

In sum, review of the factual background which underlies *Ex parte Quirin* reveals those facts were *sui generis*. Perhaps most important, the factual scenario reflected the exceptional circumstances that pertained near the time at which the United States entered World War II and the fears that the Nazi saboteurs provoked in U.S. society. The next Section descriptively and critically analyzes the Supreme Court opinion in *Ex parte Quirin*.

B. The Opinion in Quirin

1. DESCRIPTIVE ANALYSIS

The Supreme Court purposefully resolved the appeal on the narrowest conceivable grounds, so remarking in specific terms, as well

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97. Felix Frankfurter, *F.F.'s Soliloquy* (Oct. 23, 1942), *reprinted in* 5 GREEN BAG 2D 438 (2002).

98. *See id.* at 439; *see also* Danelski, *supra* note 35, at 77.

99. *See* Frankfurter, *supra* note 97; *see also infra* notes 139–40 and accompanying text.

100. *See* Danelski, *supra* note 35, at 78 (citing Notes Exchanged By Justices Felix Frankfurter & Robert Jackson (Oct. 1942) (on file with the Frankfurter Papers, Harvard Law School)).

101. *Id.* (citing Letter from Justice Owen Roberts to Justice Felix Frankfurter (n.d.) (on file with the Frankfurter Papers, Harvard Law School)).

102. *Id.* (citing Letter from Chief Justice Harlan Fiske Stone to Roger Nelson (Nov. 30, 1942) (on file with the Harlan Fiske Stone Papers, Library of Congress)).

103. *See* Danelski, *supra* note 35, at 78–79. *See generally Quirin*, 317 U.S. 1.

as explicitly declined to address numerous particular factual and legal matters. For example, the Justices neither performed a thoroughgoing review of the substantive claims against, and defenses asserted by, the saboteurs nor of the procedures employed to test them. This scrutiny derived in large measure from the litigants' agreement that searching review exceeded the capacity of the Supreme Court, given the circumstances, such as temporal restraints, under which the matter was argued and decided. Indeed, most of *Quirin*'s facts were stipulated and undisputed,[104] while Chief Justice Stone observed "[w]e are not here concerned with any question of the guilt or innocence of petitioners."[105] The Supreme Court correspondingly declined to resolve specific legal issues. For instance, the Justices left undecided whether presidential authority itself sufficed to establish military tribunals or whether lawmakers "may restrict the power of the Commander in Chief to deal with enemy belligerents," principally because Congress had "authorized trial of offenses against the law of war before such commissions."[106] The Court also stated that it had "no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war"[107] and held only that the defendants' "particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission."[108]

The Justices first considered the government's argument that the Proclamation issued by the Roosevelt administration specifically barred petitioners from seeking relief in the federal courts because the individuals held the status of "enemy aliens" and had participated in the activities we recounted earlier.[109] Despite the Proclamation's express terms, which ostensibly foreclosed judicial scrutiny, the Justices entertained the saboteurs' habeas corpus applications, stating "there is

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104. *See Quirin*, 317 U.S. at 20. We reproduce many *Quirin* facts *supra* Part II.A.

105. *Quirin*, 317 U.S. at 25. For example, the Supreme Court did not resolve the question of whether one saboteur had actually lost his U.S. citizenship. *See id.* at 37–38; *infra* note 119 and accompanying text.

106. *See Quirin*, 317 U.S. at 47, 29; *see also infra* notes 115–20 and accompanying text.

107. *Quirin*, 317 U.S. at 45–46; *see also infra* note 127 and accompanying text.

108. *Quirin*, 317 U.S. at 46; *see also infra* note 128 and accompanying text.

109. *Quirin*, 317 U.S. at 24–25. "Enemy aliens" is the term that the Supreme Court actually employed. *See id.* at 25; *see also supra* notes 36–45 and accompanying text.

certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case."[110]

The Supreme Court admonished that the federal judiciary should not invalidate petitioners' trial and detention—which the president had ordered through exercise of Commander in Chief authority during wartime—absent the clear conviction that they violate the Constitution or statutes.[111] The High Court surveyed the power that Articles I and II of the Constitution delegate to provide for the common defense.[112] The Justices concluded the President possesses broad authority for waging war that Congress has declared and for effectuating all legislation that prescribes war's conduct as well as defines and punishes "offenses against the law of nations."[113] When the Court canvassed the Articles of War, it ascertained Congress had explicitly provided that military commissions "shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases."[114]

The Justices then inquired "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial."[115] The Supreme Court determined, "[b]y universal agreement and practice, the law of war draws a distinction between . . . lawful and unlawful combatants": The former are "subject to capture and detention as prisoners of war by opposing military forces."[116] Unlawful combatants, such as the enemy "who without uniform comes secretly through the lines" to wage war through destruction of life or property, are "offenders against the law of war subject to trial and punishment by military tribunals."[117] The Justices classified the saboteurs in the latter category, ascertaining the first charge's initial specification sufficed to "charge all the petitioners with the offense of unlawful belligerency, trial of which" was within the commission's jurisdiction.[118] The Court observed that the saboteurs were not "any the less belligerents" because some were U.S. citizens or because they had not "actually committed or attempted to commit any

110. *Quirin*, 317 U.S. at 25; *see In re* Yamashita, 327 U.S. 1, 9 (1946) (stating that Congress "has not withdrawn [jurisdiction], and the Executive branch" could not unless the habeas corpus writ were suspended).

111. *See Quirin*, 317 U.S. at 25.

112. *See id.* at 25-29; *see also* U.S. CONST. arts. I-II.

113. *Quirin*, 317 U.S. at 26.

114. *Id.* at 28. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-7, at 670 (3d ed. 2000).

115. *Quirin*, 317 U.S. at 29.

116. *Id.* at 30-31.

117. *Id.* at 31.

118. *See id.* at 36.

act of depredation" or entered an area of active military operations.[119] "The offense was complete when" each individual, who was an enemy belligerent, passed or went behind U.S. "military and naval lines and defenses . . . in civilian dress and with hostile purpose."[120]

The Court next considered the merits of petitioners' substantive arguments that the Fifth Amendment entitled them to "presentment or indictment of a grand jury" and that Article III, Section II and the Sixth Amendment entitled them to trial by jury in a civil court.[121] The Justices said "long-continued and consistent interpretation" meant the constitutional provisos could not "be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts."[122] The Court did assume that certain offenses against the law of war are "constitutionally triable only by a jury,"[123] a holding which it had propounded in *Ex parte Milligan*.[124]

Petitioners emphasized this case for the proposition that the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[125] However, the Justices attempted to distinguish the important opinion because Milligan "was not an enemy belligerent," while they apparently limited the earlier decision to its specific facts and treated the determination as inapplicable to the present case.[126]

Finally, the Court considered it unnecessary to delineate "with meticulous care the ultimate boundaries" of military tribunals' jurisdiction, because petitioners, "*upon the conceded facts*, were plainly within those boundaries."[127] The Justices, therefore, held only that the particular acts committed were an "offense against the law of war which the Constitution authorizes to be tried by military commission."[128]

The Court was "unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for

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119. *Id.* at 38; *see also* TRIBE, *supra* note 114, § 3-5, at 300 n.185.

120. *Quirin*, 317 U.S. at 38.

121. *Id.* at 38–45; *see also* U.S. CONST. art. III, § 2; *Id.* amends. V–VI.

122. *Quirin*, 317 U.S. at 40. *See generally* TRIBE, *supra* note 114, § 3-5, at 299–300.

123. *Quirin*, 317 U.S. at 29.

124. 71 U.S. (4 Wall.) 2 (1866); *see* REHNQUIST, *supra* note 55, at 128–37; Katyal & Tribe, *supra* note 8, at 1286 n.102.

125. *See Quirin*, 317 U.S. at 45 (quoting *Milligan*, 71 U.S. at 121).

126. *See id.* at 45–46. *See generally* RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 47–50 (4th ed. 1996, 2002 Supp.) [hereinafter HART & WECHSLER]; Katyal & Tribe, *supra* note 8, at 1277–87.

127. *See Quirin*, 317 U.S. at 45–46 (emphasis added).

128. *Id.* at 46.

issuing the writ,"[129] yet it lacked a majority who agreed on the "appropriate grounds for decision."[130] Some Justices believed 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."[131] Nonetheless, other Justices thought that the Articles covered this tribunal but the specific ones did "not foreclose the procedure prescribed by the President or that shown to have been employed" by the Commission.[132]

2. CRITICAL ANALYSIS

A number of considerations warrant restricting the opinion in *Quirin*. For example, the decision evidences the alacrity with which the government prosecuted the saboteurs and the Supreme Court ratified the military commission deliberations as well as the complications of rationalizing the Court's determination after the United States had invoked a quickly drafted, terse per curiam order when it executed six of the eight petitioners.[133] More specifically, Chief Justice Stone, who penned the opinion, characterized the attempt to justify the result as a "mortification of the flesh,"[134] while the Supreme Court members could not articulate the reasoning for their conclusion.[135] *Quirin* also evinces the wartime context when, for instance, national security concerns have traditionally undermined, and perhaps eclipsed, civil liberties.[136] At a crucial juncture in the complex, delicate negotiations over a final decision, Justice Jackson even circulated a memorandum which suggested that the Court had exceeded its authority by considering the Roosevelt administration Order.[137]

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129. *Id.* at 47.

130. *Id.*; *see also supra* notes 80, 92-103, and accompanying text.

131. *Quirin*, 317 U.S. at 47.

132. *Id.* at 47-48.

133. *See id.* at 18. *See generally supra* note 1.

134. *See* MASON, *supra* note 71, at 659; Danelski, *supra* note 35, at 72; Turley, *supra* note 47.

135. *See supra* notes 80, 92-103, 129-32, and accompanying text.

136. *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990); REHNQUIST, *supra* note 55; TRIBE, *supra* note 114, § 4-6, at 670; Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 191-93 (1962).

137. "[E]xperience shows the judicial system is ill-adapted to deal with matters in which we must present a united front to a foreign foe." Jackson Memorandum, *supra* note 95. The war power "usually is invoked in haste . . . when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures." Woods v. Cloyd W. Miller Co., 333 U.S. 138, 146 (1948) (Jackson, J., concurring); *see also* Duncan v.

The opinion concomitantly reflects inappropriate pressures from without, exerted most significantly by President Roosevelt, to validate the saboteurs' swift trial, prompt conviction, and severe punishment[138] as well as related machinations within the Court, especially implicating Justice Frankfurter. The jurist's soliloquy included a hypothetical dialogue with the dead saboteurs that excoriated them and admonished his colleagues against precipitating a constitutional crisis when the nation was engaged in total war.[139] Even Frankfurter ultimately acknowledged that *Quirin* was "not a happy precedent."[140] Two decades after the ruling's issuance, Justice William O. Douglas lamented: "Our experience with [*Quirin*] indicated . . . to all of us that is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble."[141] Moreover, as Chief Justice Stone argued, the case was extraordinary and should be limited to its peculiar facts.[142] Numerous commentators have urged that the decision be read narrowly, and prominent observers, namely Professors Neal K. Katyal, Laurence H. Tribe, and Jonathan Turley, have even repudiated it, analogizing *Quirin* to *Korematsu*, the discredited case that permitted internment of Japanese Americans.[143]

In sum, certain aspects of *Quirin* are so salient to the issues that we consider in our article that they warrant emphasis and reiteration. First, the Supreme Court did exercise jurisdiction. This is critical because Roosevelt's Proclamation, which served as the model for the Bush Order, purportedly deprived federal courts of jurisdiction. Second, the Justices addressed, and resolved on the merits, the petitioners'

Kahanamoku, 327 U.S. 304, 357 (1946) (Burton, J., dissenting). *See generally* TRIBE, *supra* note 114, § 4-6, at 670.

138. *See, e.g.*, FISHER, *supra* note 35, at 50-53; Katyal & Tribe, *supra* note 8, at 1291; *supra* notes 46-55.

139. *See* Frankfurter, *supra* note 97, at 439-40; G. Edward White, *Felix Frankfurter's "Soliloquy" in Ex parte* Quirin, 5 GREEN BAG 2D 423 (2002). *See generally* EDWARD SAMUEL CORWIN, TOTAL WAR AND THE CONSTITUTION (1947).

140. *See* Danelski, *supra* note 35, at 80 (quoting Memorandum of Justice Felix Frankfurter (June 4, 1953) (on file with the Frankfurter Papers, Harvard Law School)); White, *supra* note 139, at 436.

141. *See* Danelski, *supra* note 35, at 80 (quoting Transcription of interviews of William O. Douglas, by Walter F. Murphy, pp. 204-05, Seeley G. Mudd Manuscript Library, Princeton Univ.); *see also* Turley, *supra* note 47.

142. *See Quirin*, 317 U.S. at 45-46; *see also supra* notes 105-09, 128-29, and accompanying text. For similar articulations of the precept that the Court should narrowly draft opinions, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952), and *Dames & Moore v. Regan*, 453 U.S. 654, 660-61 (1981).

143. *See* Katyal & Tribe, *supra* note 8, at 1290-91; Turley, *supra* note 47; *see also* Korematsu v. United States, 323 U.S. 214 (1944); Warren, *supra* note 136, at 193 n.33.

substantive claims under the Fifth and Sixth Amendment. Third, the High Court's role in any habeas corpus proceeding was extremely circumscribed at that time and only permitted inquiry regarding the commission's jurisdiction. The next Part of this Article, therefore, evaluates more specifically the precise nature of federal habeas corpus when the Supreme Court issued *Quirin*.

III. FEDERAL HABEAS CORPUS THEN AND NOW

As we demonstrated above, careful scrutiny of the *Quirin* opinion and its historical context limits the present significance of the Bush administration's repeated observation that there the Court inquired into only the lawfulness of the special military commission's *jurisdiction* over the eight Nazi saboteurs.[144] The Court did frame the issue in terms of tribunal jurisdiction over the petitioners and the offenses they allegedly committed; however, it resolved on the merits petitioners' Fifth and Sixth Amendment claims as well as their assertions that the commission procedures violated the Articles of War. Moreover, the parties' extensive stipulation to the underlying facts obviated any need for judicial review of those facts or how they were to be proved.[145] Yet, assuming arguendo that the *Quirin* Court had limited its inquiry to the commission's jurisdiction, in that term's narrowest sense,[146] *Quirin* would not now support similar circumscription of federal judicial review of any detention or punishment imposed pursuant to the Bush Order. Even if the *Quirin* decision mandated such narrow review, that aspect of the ruling must be updated to reflect the dramatic evolution of federal habeas corpus law over the ensuing sixty years. This Part first recovers the law that governed the scope of federal habeas corpus review circa 1942, the year that *Quirin* was decided, and then sketches its substantial expansion over the six decades intervening between the *Quirin* case and the Bush Order.

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144. *See supra* notes 104–43 and accompanying text.

145. *See, e.g.*, *Padilla*, 233 F. Supp. 2d at 607 (observing that the precedential significance of *Quirin* was limited by the parties' factual stipulation).

146. In any event, we acknowledge that the *Quirin* Court did not undertake an extensive review of the substantive allegations against and defenses of the petitioners or of the procedures employed to test those allegations and defenses, in large part pursuant to the parties' agreement that such searching review was beyond the Court's capacity given the context in which the case was argued and decided. *See supra* notes 105–09 and accompanying text.

A. Federal Habeas Corpus Circa 1942

To recover the state of federal habeas corpus jurisprudence in 1942, we review the writ's prior development with considerable specificity. This detail is necessitated by the complex and often inconsistent historiography of federal habeas corpus.[147] Our evaluation ascertains that both the case law and the best scholarly assessment of this jurisprudence suggest federal habeas corpus jurisdiction was extremely narrow when the Court decided *Quirin*.

1. HABEAS CORPUS TO 1879

Centuries before the founding of the United States of America, English common law courts used the writ of habeas corpus *ad subjiciendum*, often denominated the "Great Writ," to review legal challenges to an individual's imprisonment.[148] At both common law, and under the Habeas Corpus Act of 1679, however, the writ was

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147. *See generally* HART & WECHSLER, *supra* note 126, at 1364-68 (discussing the historical debate about the proper scope of the writ in federal court). Leading, and sometimes conflicting, commentaries on habeas corpus history include WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2001); Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1 (1995); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079 (1995); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992); Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965); Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966); Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153; Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982); Herbert Wechsler, *Habeas Corpus and the Supreme Court: Reconsidering the Reach of the Great Writ*, 59 U. COLO. L. REV. 167 (1988); and Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993). Throughout the ensuing discussion, we treat the landmark cases in the text and address the relevant scholarly commentary in the accompanying footnotes.

148. A. Christopher Bryant, *Retroactive Application of "New Rules" and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1, 4 (2002); *see* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 53, at 350 (5th ed. 1994); Michael O'Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493, 1497-98 (1996) (discussing historical development of the writ of habeas corpus). *See generally* William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978). The writ of habeas corpus *ad subjiciendum* was but one of several forms of the writ of habeas corpus available at common law. For a discussion of other forms of the writ, see HART & WECHSLER, *supra* note 126, at 1337 n.1.

unavailable to a petitioner incarcerated under a final judgment of a court exercising competent jurisdiction.[149] Thus, a prisoner adjudicated guilty of a crime and sentenced accordingly could obtain relief through a petition for a writ of habeas corpus only by attacking the *jurisdiction* of the court which rendered the judgment against him. Merely demonstrating that this court committed even a serious legal error when it reached the judgment would not suffice.[150]

The "Great Writ" was recognized early on in colonial America. Before ratification of the U.S. Constitution, courts in the American colonies employed the writ and many adopted the core protections of the 1679 Act.[151] The Constitution acknowledged and protected this practice by providing that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[152] In 1789, the First Federal Congress authorized the federal courts to grant "writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment" when properly petitioned by those "in custody, under or by colour of the authority of the United States."[153]

In due time, the U.S. Supreme Court clarified the scope of habeas corpus review. In 1807, Chief Justice Marshall, in the course of resolving one of the first major habeas corpus cases to reach the Supreme Court, observed that "for the meaning of the term *habeas*

149. DUKER, *supra* note 147, at 225.

150. *See id.*

151. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.2, at 843–44 (3d ed. 1999); DUKER, *supra* note 147, at 115; Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 337–41 (1983).

152. U.S. CONST. art. I, § 9, cl. 2. For opposing views on the meaning of the Suspension Clause, compare DUKER, *supra* note 147, at 126–56 (arguing that the Framers intended the Clause to limit Congress's ability to interfere with the availability of the writ in state courts, but did not seek to limit Congress's power to disallow the writ in federal court), with Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451 (1996) (arguing for a broader interpretation of the Clause that would limit Congress's power to narrow federal habeas corpus), and Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 868 (1994) (arguing that "the Suspension Clause and the Fourteenth Amendment together are best read to mandate federal habeas corpus review of the convictions of state prisoners"); *see also* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555 (2002). Our analysis, which focuses on the dramatic evolution during the last sixty years in judicial interpretation of the federal habcas corpus statutes, takes no position in the ongoing debate concerning the proper scope of the Constitution's Suspension Clause.

153. *See* Judiciary Act of 1789, § 14, 1 Stat. 81-82 (1789); *see also* WRIGHT, *supra* note 148, § 53, at 350–51.

corpus, resort may unquestionably be had to the common law."[154] Finally, in the 1830 case of *Ex parte Watkins*[155] the Chief Justice clarified that, in the U.S. courts as in English ones, the writ would be unavailable for one confined pursuant to the final judgment of a court of competent jurisdiction. Tobias Watkins, who had been the fourth auditor of the U.S. Treasury, was indicted and convicted in the U.S. Circuit Court for the District of Columbia on charges that he had defrauded the Navy Department of approximately three thousand dollars.[156] The circuit court sentenced Watkins to nine months imprisonment and imposed fines on him which were comparable to the amounts allegedly misappropriated.[157] When Watkins was in custody under the sentence of imprisonment, he petitioned the U.S. Supreme Court for a writ of habeas corpus, alleging that the indictment had failed to charge a criminal offense cognizable in the federal circuit court.[158]

Chief Justice Marshall, who wrote for a unanimous Court, refused the writ.[159] Marshall first reaffirmed that English legal history properly informed the Court's efforts to delineate the scope of federal judicial power to issue the writ of habeas corpus.[160] He then applied this lesson by initially noticing that English law denied the writ to persons who were imprisoned pursuant to a criminal conviction imposed by a court of competent jurisdiction and then concluding that the same limitation governed the power of a federal court to grant the writ.[161] After the Chief Justice recognized that the authority to grant the writ included the power to "inquire into the sufficiency of [the] cause" of a prisoner's commitment, he asked rhetorically "but if [that cause] be the judgment of a court of competent jurisdiction . . . is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the

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154. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807).

155. 28 U.S. (3 Pet.) 193 (1830).

156. *Watkins*, 28 U.S. at 195–96.

157. *Ex Parte* Watkins, 32 U.S. (7 Pet.) 568, 571 (1833).

158. *Watkins*, 28 U.S. at 370.

159. *Id.* at 376.

160. *Id.* at 370–71; *see also supra* note 155 and accompanying text.

161. *Watkins*, 28 U.S. at 371; *see* Bator, *supra* note 147, at 466. *But see* Liebman, *supra* note 147, at 2060 (denying that *Watkins* limited habeas corpus review to jurisdictional claims); Peller, *supra* note 147, at 611–12 (same conclusion). For a detailed response to Professors Liebman and Peller on this point, see Forsythe, *supra* note 147, at 1147–61. However one resolves this debate concerning the best reading of *Watkins* between Bator and Forsythe, on the one hand, and Liebman and Peller, on the other, we think it clear that in 1942 the Justices embraced the orthodox understanding of the ruling set forth in the text and reflected in the Bator and Forsythe articles, rather than the revisionist view of the case articulated long after *Quirin* had been decided. *See infra* notes 209–36 and accompanying text.

judgment, and reexamine the charges on which it was rendered."[162] Lest there be any doubt as to how Marshall would answer these questions, he added:

> A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as on other courts. It puts an end to inquiry concerning the fact, by deciding it.[163]

The Chief Justice's application of the "jurisdiction" test to the claims raised by petitioner Watkins reflected his understanding of this test as severely circumscribing the habeas corpus court's role. Indeed, Watkins's counsel had conceded that "the judgment of a court of competent jurisdiction is conclusive" against a petition for the writ but maintained that the writ should issue because the indictment of his client exceeded the circuit court's jurisdiction.[164] Counsel for Watkins

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162. *Watkins*, 28 U.S. at 371. At various points is his opinion for the Court, Chief Justice Marshall emphasized that the federal jurisdictional statutes had not granted the Supreme Court authority to review federal criminal convictions, such as the one resulting in Watkins's imprisonment, by way of a writ of error. *See, e.g., id.* (noting that the judgment of the federal circuit court convicting and sentencing Watkins was "withdrawn by law from the revision of this court"); *id.* at 372 ("We have no power to examine the proceedings [in the federal circuit court] on a writ of error, and it would be strange, if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control."). These passages identify an additional factor which the Court apparently considered in construing the writ—a factor that other commentators have emphasized and then employed to draw conflicting inferences about the proper understanding of federal habeas corpus history. *Compare* Peller, *supra* note 147, at 611-12 (arguing that the *Watkins* Court's denial of the writ should be understood as the Court's attempt to honor the congressional decision not to authorize Supreme Court appellate review in federal criminal cases, rather than as reflecting a narrow view of the proper role of habeas corpus generally), *with* Liebman, *supra* note 147, at 2096 (arguing that during this same period the Supreme Court effectively circumvented Congress's denial of Supreme Court appellate review in federal criminal cases by employing the writ of habeas corpus liberally to "fill[] the breach"). For Professor Liebman's explanation of *Watkins*, see *supra* note 161. We find these dueling deconstructions of dusty habeas corpus precedents intriguing and insightful, in that they undoubtedly uncover an important, though perhaps indeterminate, reason federal habeas corpus developed as it did. We do not, however, think that these critiques diminish the significance of the primary reason Chief Justice Marshall himself identified for limiting federal habeas corpus proceedings to questions involving the committing court's jurisdiction—namely, that the writ was so limited under the law of England from whence it had emerged. *Watkins*, 28 U.S. at 371.

163. *Watkins*, 28 U.S. at 371-72.

164. *Id.* at 371.

specifically insisted that the indictment had failed even to charge an offense "punishable criminally, according to the law of the land."[165] Marshall rejected this argument, however, concluding that the Court could not, "under color of a writ to liberate an individual from unlawful imprisonment," inquire into the legal soundness of indictment.[166] Marshall reasoned that imprisonment under a judgment, even an "erroneous" one, was lawful, "unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject."[167] As the circuit court had "general jurisdiction over criminal cases," the circuit court must determine "whether the offence charged in the indictment be legally punishable or not."[168] Because the circuit court "was competent to decide" this issue, its judgment, even if in error as to this fundamental point, was nevertheless conclusive.[169] Marshall summarized the Court's rationale in sweeping terms:

> The judgment of the circuit court in a criminal case is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. . . . The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied.[170]

After briefly distinguishing the cases on which counsel for Watkins had chiefly relied, Marshall announced that the Justices were "unanimously of the opinion . . . that the writ of *habeas corpus* ought not to be awarded" to Watkins.[171]

To be sure, judges sometimes honored in the breach[172] as well as the observance[173] the rule of *Watkins*—that the scope of a federal habeas

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165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 374.
170. *Id.* at 375.
171. *Id.* at 377. Watkins returned to the U.S. Supreme Court three years later, raising a new challenge to his continuing confinement. Although by then he had completed his sentence of imprisonment, he remained in custody for failure to satisfy the monetary fines assessed against him. *Watkins*, 32 U.S. at 569. Justice Story writing for the majority of the Court concluded that Watkins could not be detained for non-payment, absent an additional court order committing him to custody on this ground. *Id.* at 578-79.
172. *See* DUKER, *supra* note 147, at 229-30 (discussing mid-nineteenth-century Supreme Court cases, including the second *Watkins* decision, 32 U.S. 568, in which the Court failed to invoke the jurisdiction standard).
173. *See id.* at 275 (citing mid-nineteenth-century cases and commentary in accord with the *Watkins*, 28 U.S. (3 Pet.) 193, jurisdictional limit on federal habeas corpus review).

corpus court's inquiry was limited to ascertaining whether a judgment that authorized confinement had been issued by a court of competent jurisdiction. But, the occasional neglect of the jurisdiction rule neither diminished the clarity of the *Watkins* pronouncement on this fundamental principle nor detracted from the fact that "[b]y the mid-nineteenth century, the principle was well established."[174]

This was the state of habeas corpus jurisprudence when, in 1867, the Reconstruction Congress greatly expanded the class of persons entitled to seek the writ from a federal court. Whereas the 1789 Act authorized federal court issuance of the writ only to *federal* prisoners,[175] the 1867 statute vested the federal courts with power to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[176] Although the sweeping breadth of the quoted language produced some confusion immediately after its enactment,[177] the Supreme Court soon concluded that the 1867 Act did not disturb the jurisdiction rule of *Watkins* or otherwise expand the scope of issues cognizable in a federal habeas corpus proceeding.[178] In other words, the 1867 Act clearly extended the federal writ's availability to state as well as federal prisoners. The Supreme Court authoritatively concluded, however, that when the habeas corpus petitioner was held in custody pursuant to a (state or federal) court judgment, the 1867 Act did not broaden the federal habeas corpus court's inquiry beyond reviewing the committing court's jurisdiction.[179]

2. 1879 TO 1937

During the last decades of the nineteenth century and through the first half of the twentieth century, the Court gradually expanded the concept of jurisdiction for the purposes of the *Watkins* rule. Over these many decades, the Court characterized as challenges to the committing

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174. DUKER, *supra* note 147, at 229 (citing cases and commentary to this effect).

175. *See supra* note 153 and accompanying text.

176. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

177. *See* DUKER, *supra* note 147, at 230-34 (discussing the impact of the 1867 Act on the Supreme Court's rhetoric regarding the purposes and availability of the writ).

178. *See generally id.* at 239-48.

179. *See id.* at 243, 247-48. The 1867 Act did, however, significantly liberalize the procedures employed in federal habeas corpus cases, perhaps most significantly by directing the federal habeas corpus court "to determine the facts of the case, by hearing the testimony and arguments." Walker v. Johnson, 312 U.S. 275, 285 (1941) (internal quotation marks omitted) (quoting the 1867 Act); *see also* Alexander Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U. L. REV. 26, 31-33 (1945).

court's jurisdiction an increasing number and variety of constitutional claims, rendering them cognizable in federal habeas corpus.[180] These cases undeniably reflect an evolution in the scope of the inquiry permissible in a federal habeas corpus proceeding, but they also evidence the Court's unflagging commitment throughout this period to the jurisdictional limitation announced in *Watkins*.[181]

The particular cases are myriad,[182] but review here of a select few can illustrate the significance of all. The 1879 ruling in *Ex parte Siebold*,[183] for example, established the proposition that a court lacked jurisdiction to proceed against an individual for an alleged violation of an unconstitutional statute and, therefore, that a conviction under such a statute was void for want of jurisdiction in the trial court.[184] Although *Siebold* basically expanded the scope of federal habeas corpus, the decision also powerfully reaffirmed the *Watkins* rule of jurisdiction. Writing for the majority, Justice Bradley observed that federal courts' habeas corpus jurisdiction was restricted by "the nature and objects of the writ itself, as defined by the common law, from which its name and incidents are derived."[185] Chief among the limitations on the writ was that "[i]t cannot be used as a mere writ of error."[186]

> Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a *habeas corpus*, that the prisoner is detained under a conviction and sentence by a court having *jurisdiction of the cause*, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings . . . a conviction and sentence by a court of *competent jurisdiction* is lawful cause of imprisonment, and no relief can be given by *habeas corpus*.[187]

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180. *See generally* Holtzoff, *supra* note 179.

181. *See id.* at 40–41.

182. *See, e.g.*, DUKER, *supra* note 147, at 241–48 (discussing cases).

183. 100 U.S. 371 (1879).

184. *Id.* at 376–77.

185. *Id.* at 375.

186. *Id.*

187. *Id.* (second and third emphases added). Justice Bradley acknowledged that the situation might be different if the court petitioned for a writ of habeas corpus was authorized to review the judgment of conviction on a "writ of error or appeal," in which case the appellate court might "perhaps, in its discretion, give immediate relief on *habeas corpus*, and thus save the party the delay and expense of a writ of error." *Id.* This concession in no way detracts from the force of Justice Bradley's reaffirmation of the *Watkins* jurisdictional rule, but rather merely reflects that even in the nineteenth

Indeed, Justice Bradley then strained to fit conviction under an unconstitutional statute within the category of errors so fundamental that they deprived a trial court of jurisdiction, rendering its judgment assailable in a subsequent habeas corpus proceeding. He reasoned that a trial court's reliance on an unconstitutional statute "affects the foundation of the whole proceedings."[188] This conclusion flowed from the maxim that "[a]n unconstitutional law is void, and is as no law."[189] Thus, "[a]n offence created by it is not a crime," and "[a] conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment."[190] In the instant case, if the Court agreed with petitioners' assertion that the federal statutes under which they were indicted and convicted were unconstitutional, the federal circuit court that had convicted and sentenced them "acquired no *jurisdiction* of the causes," as "[i]ts authority to indict and try the petitioners arose solely upon these laws."[191]

The Justices wrote the next important chapter in the history of federal habeas corpus with two early twentieth-century cases which implicated allegations that hostile mobs had dominated southern capital trials. In the first, the 1915 case of *Frank v. Mangum*, the Court denied the writ, over a powerful dissenting opinion authored by Justice Holmes, for himself and Justice Hughes.[192] Eight years later in *Moore v. Dempsey*, Justice Holmes, who then wrote for the majority of the Court, distinguished *Frank* and granted the writ, with Justices McReynolds and Sutherland dissenting.[193] Scholars have emphasized the apparent inconsistency in these rulings. Some commentators have struggled to reconcile them,[194] while others have concluded that *Moore* effectively overruled *Frank*.[195]

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century, good judges were unwilling to let empty forms such as an error in pleading triumph over substance.

188. *Id.* at 376.

189. *Id.*

190. *Id.* at 376–77.

191. *Id.* at 377 (emphasis added). Although the Court therefore addressed petitioners' constitutional challenges to the federal criminal statutes under which they were convicted, it ultimately upheld the federal statutes and accordingly denied the writ. *Id.* at 377–99. Even the modest extension of habeas corpus jurisdiction affected by *Siebold* was later repudiated. *See* Bator, *supra* note 147, at 474 n.77 (citing cases).

192. 237 U.S. 309, 345 (1915).

193. 261 U.S. 86 (1923).

194. *See, e.g.*, FREEDMAN, *supra* note 147, at 50; Bator, *supra* note 147, at 488.

195. *See, e.g.*, Peller, *supra* note 147, at 646–48. For a detailed and compelling treatment of the disturbing facts underlying both *Frank* and *Moore*, see FREEDMAN, *supra* note 147, at 52–85. Of course, our focus for present purposes on the doctrinal

For our purposes, this intriguing question is immaterial, because all the Justices reaffirmed the *Watkins* rule of jurisdiction while at the same time gradually broadening the term's compass. In *Frank*, the Holmes dissent and Justice Pitney's opinion for the Court both presumed that the writ should issue if, and only if, the mob's influence had deprived the Georgia court of lawful jurisdiction over the petitioner.[196] Indeed, both opinions acknowledged that a hostile mob could so influence a criminal trial as to rob the trial court of "jurisdiction" for the purposes of the *Watkins* rule, thus entitling a petitioner to federal habeas corpus relief.[197] The disagreement among the Justices turned instead on the different significance the majority and dissent attached to the Georgia Supreme Court decision affirming Frank's conviction and sentence. Justice Pitney, for the Court majority, reasoned that principles of federalism compelled federal court deference to that ultimate ruling by the Georgia Supreme Court, which was itself "free from any suggestion of mob domination, or the like."[198] Justice Holmes, however, refused to accord the Georgia Supreme Court decision conclusive effect, reasoning that once jurisdiction had been lost in the trial court, it "could not be restored by any decision above."[199]

In *Moore*, both the majority opinion by Justice Holmes and the dissent by Justice McReynolds similarly framed the question before the Court as whether the "corrective process" afforded by the state appellate courts sufficed to cleanse any taint upon the petitioners' conviction amidst the highly charged circumstances of their trial.[200] Neither the

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import of these two decisions should not be misunderstood as an insensitivity to the inhumanity of the circumstances out of which each ruling arose.

196. *See Frank*, 237 U.S. at 326–27 (reciting the jurisdiction standard); *id.* at 347 (Holmes, J., dissenting) (concluding that "[t]he loss of jurisdiction [was] not general but particular, and proceed[ed] from the control of a hostile influence").

197. *See Frank*, 237 U.S. at 332–34; *id.* at 347 (Holmes, J., dissenting).

198. *Frank*, 237 U.S. at 333.

199. *Id.* at 348 (Holmes, J., dissenting). Justice Holmes continued:

> And notwithstanding the principle of comity and convenience (for, in our opinion, it is nothing more), that calls for a resort to the local appellate tribunal before coming to the courts of the United States for a writ of *habeas corpus*, when, as here, that resort has been had in vain, the power to secure fundamental rights that had existed at every stage becomes a duty and must be put forth.

Id. at 348–49 (citations omitted). It was this commitment to the duty of a federal court to re-examine afresh allegations of fact that, if true, would rob a state criminal court of jurisdiction that prompted Justice Holmes to write the following, oft-quoted, description of the writ's proper role: "But *habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Id.* at 346.

200. *See Moore*, 261 U.S. at 90–91; *id.* at 93–96 (McReynolds, J., dissenting).

majority nor the dissenting opinion in *Moore* questioned the continuing authority of the well-established rule, recently reaffirmed by all in *Frank*, that the writ did not extend to relieve a prisoner from a conviction and sentence imposed by a court of competent jurisdiction.[201] Thus, although the *Frank* and *Moore* decisions reflected the Justices' willingness to apply the *Watkins* jurisdiction test liberally and consider underlying practicalities (i.e., recognizing that a mob-dominated trial is actually no trial at all), these two landmark decisions simultaneously evidenced the ongoing vitality of the *Watkins* rule.

3. 1938 TO 1947

In the 1938 case of *Johnson v. Zerbst*,[202] the Justices, having already acknowledged the pragmatic realities confronted by a court ruling in the midst of a violent mob, finally recognized the insurmountable obstacles faced by an impoverished lay defendant indicted in federal court. Justice Black's opinion for the Court in *Johnson* is most often, and justly, celebrated for establishing that the Sixth Amendment requires a federal court to appoint counsel, at public expense, for an impecunious criminal defendant, absent the defendant's waiver of this entitlement.[203] Moreover, Black's opinion is frequently cited for its strong statement counseling reluctance to find inadvertent waiver of such fundamental constitutional rights.[204] That opinion is most significant here, however, because in it Justice Black concluded that the trial court's failure to appoint counsel deprived the tribunal of jurisdiction for the purposes of federal habeas corpus.[205] In substantiating the majority's interpretation of the Sixth Amendment, Justice Black recognized "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty."[206]

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201. *See, e.g.*, *id.* at 94-95 (quoting *Frank*, 237 U.S. at 335). Justice McReynolds did not accuse the majority of abandoning the rule of jurisdiction, nor did Justice Holmes, writing for the majority, question the rule. As in *Frank*, the division of opinion in *Moore* concerned the adequacy of the appellate process afforded by the state court and the significance to be accorded the state appellate courts' rejection of the very same claims of mob-domination presented subsequently to the federal court in support of the petition for the writ of habeas corpus. *Compare Frank*, 237 U.S. at 335-36, *with Moore*, 261 U.S. at 96-102 (McReynolds, J., dissenting).

202. 304 U.S. 458 (1938).

203. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 321 n.94 (1990).

204. *See* Barbara Allen Babcock, Johnson v. Zerbst, *in* 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1028 (Leonard W. Levy et al. eds., 1986).

205. *Johnson*, 304 U.S. at 465-68.

206. *Id.* at 462-63.

Justice Black remarked that this disability extended beyond the criminal trial to the process for an appeal, leaving available for the effective vindication of the right to appointed counsel only the habeas corpus writ.[207]

Given the subsequent expansion of federal habeas corpus jurisdiction,[208] these observations alone would easily warrant the writ's issuance. But, Justice Black went further and demonstrated that relief through habeas corpus was not only necessary to make the underlying constitutional right meaningful, but also perfectly consistent with the well-established rule that the writ would be granted for only those errors which affected the jurisdiction of the committing court.[209] Justice Black asserted that the Sixth Amendment's guarantee of counsel in criminal cases constituted "an essential *jurisdictional* prerequisite to a federal court's authority to deprive an accused of his life or liberty":[210]

> If the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment *stands as a jurisdictional bar* to a valid conviction and sentence depriving him of his life or his liberty. A court's *jurisdiction* at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has *jurisdiction* to proceed. The judgment of conviction

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207. *Id.* at 467. Justice Black's recitation of the facts and procedural background of the case included (1) the requirement of the federal rules of criminal appeals that any appeal be commenced five days after the conclusion of proceedings in the trial court; (2) the petitioner's transfer to a federal penitentiary in Atlanta two days after the day on which he was arraigned, tried, convicted, and sentenced; and (3) that upon his arrival at the Atlanta prison, he was, "as [was] the custom . . . placed in isolation and so kept for sixteen days without being permitted to communicate with any one except the officers of the institution." *Id.* at 461-62 (internal quotation marks and citation omitted). In light of these circumstances, it was not surprising that, when the petitioner finally filed an application for an appeal months later, it was denied as untimely. *Id.* Moreover, these circumstances lent added credence to the petitioner's contentions that "after a conviction—he was unable to obtain a lawyer; was ignorant of the proceedings to obtain new trial or appeal and the time limits governing both; and that he did not possess the requisite skill or knowledge properly to conduct an appeal, . . . [and thus] it was—as a practical matter—impossible for him to obtain relief by appeal." *Id.* at 467.

208. *See infra* notes 238-63 and accompanying text.

209. *Johnson*, 304 U.S. at 467-68.

210. *Id.* at 467 (emphasis added).

> pronounced by a court without *jurisdiction* is void, and one imprisoned thereunder may obtain release by *habeas corpus*.[211]

Lest *Johnson* be misunderstood as relaxing the strict limitations on the availability of relief through federal habeas corpus, Justice Black qualified the decision by adding that "[i]t must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus*."[212] Justice Black emphasized that, "[w]hen collaterally attacked, the judgment of a court carrie[d] with it a presumption of regularity," and clarified that the burden of proof rested squarely on the individual seeking the writ to establish "by a preponderance of evidence" that "the trial court did not have *jurisdiction* to proceed to judgment and conviction" because the petitioner had "not competently and intelligently waive[d] his right to counsel."[213] Thus, merely four years prior to *Quirin*, even as the *Johnson* Court significantly expanded federal criminal defendants' constitutional rights, it assiduously labored to preserve the *Watkins* rule that habeas corpus relief would be available for one confined under a judicial judgment only when the court that issued the judgment had lacked jurisdiction.[214]

This was the law's state when three months before *Quirin*, the Court used a terse per curiam opinion for all participating Justices to acknowledge openly for the first time that the writ could, in rare circumstances, lawfully be granted for serious errors not deemed "jurisdictional." *Waley v. Johnston*[215] was an inauspicious case, in which a pro se prisoner serving a sentence at Alcatraz sought leave to proceed in forma pauperis before the Supreme Court; the U.S. government even confessed error in response to his habeas corpus petition alleging that he had been coerced into pleading guilty by an FBI agent's brutal threats.[216] The district court had denied the petition for

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211. *Id.* at 468 (emphasis added) (internal quotation marks and citations omitted).

212. *Id.*

213. *Id.* at 468–69 (emphasis added) (footnote and citation omitted).

214. In *Walker v. Johnston*, 312 U.S. 275, the Court confirmed that properly pled factual questions relating to the voluntariness of a habeas corpus petitioner's waiver of the right to counsel or trial necessitated a hearing prior to disposition, reversing the district court's dismissal in reliance solely on *ex parte* affidavits denying the petitioner's perhaps improbable factual assertions. *Id.* at 286 (citing *Johnson*, 304 U.S. 458).

215. 316 U.S. 101 (1942).

216. *See id.* at 103–04. Specifically, the petitioner alleged that, although "threats of Federal Bureau of Investigation agents to throw [him] out of a window and beat [him] up didn't bother" him, his guilty plea to kidnapping charges "had been induced by the threats of a named Federal Bureau of Investigation agent to publish false statements and manufacture false evidence that the kidnap[p]ed person had been injured, and by such publications and false evidence to incite the public and to cause the State of

the writ, even though the warden's return included no denial of these specific allegations of coercion, and the court of appeals affirmed this denial on the grounds that the petitioner's claims could not be addressed in a habeas corpus proceeding.[217] The Supreme Court, however, accepted the government's confession of error and reversed, concluding that the claim of coercion "was appropriately raised by the *habeas corpus* petition."[218]

> The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime *is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it.* It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.[219]

Given the circumstances of the case, the Supreme Court's disposition in *Waley* is unremarkable. Yet some commentators, seizing upon the emphasized language and reading it in light of later developments, have concluded that *Waley* marked the demise of the *Watkins* rule related to jurisdiction.[220]

Indeed, decisions that the Supreme Court issued over the second half of the twentieth century substantiated this reading of *Waley* as the

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Washington to hang the petitioner and the other defendants." *Id.* at 102 (internal quotation marks omitted).

217. *See id.* at 103-04.

218. *Id.* at 104.

219. *Id.* at 104-05 (emphasis added).

220. *See, e.g.*, WRIGHT, *supra* note 148, at 354 (stating that in *Waley* "the Supreme Court abandoned the overstrained jurisdictional fiction" and that "[d]espite the language about 'exceptional cases' in the passage [quoted in the text accompanying *supra* note 219], it is now clear that habeas corpus in federal court is available whenever [a] state proceeding fails to meet the standards of procedural fairness that the Fourteenth Amendment requires of the states"). Indeed, to his present chagrin, one of this Article's authors recently reiterated this same overstatement of *Waley*'s significance, albeit in the context of an attempt at succinct summary of the writ's evolution on American soil as background for an analysis of a federal 1996 statute. *See* Bryant, *supra* note 148, at 5-6 (asserting that "[i]n 1942, the Court abandoned the fiction that the writ was limited to convictions void for want of jurisdiction"). As we note in the text, though this observation serves adequately when made part of a historical landscape painted with a relatively broad brush, it is, for present purposes, too anticipatory of subsequent Supreme Court decisions to stand as an accurate comment on the state of the law circa 1942.

commencement of the last chapter in the jurisdiction rule.[221] As part of an effort to recover the precise state of habeas corpus law circa 1942, however, a reading that equates *Waley* with the jurisdiction rule's abandonment accords this brief, unsigned, and uncontested opinion considerably more weight than it alone can bear. As we have seen, the limitation of habeas corpus relief to defects which deprived the sentencing court of jurisdiction was rooted in English common law, expressly incorporated into the 1679 Act, acknowledged as part of U.S. law in Chief Justice Marshall's 1830 *Watkins* opinion, and meticulously preserved by innumerable Supreme Court rulings on the proper scope of the writ issued over the more than eleven decades between *Watkins* and *Waley*.[222] Accordingly, we conclude that the rule's interment would have required considerably more elaboration and sparked much greater controversy than appears in the laconic decision which sufficed for the *Waley* Court. The very use of a per curiam opinion shows that the Justices found *Waley* insufficiently significant to warrant a full-dress opinion, let alone to serve as the vehicle for a radical change in habeas corpus law.

Moreover, both post-*Waley* scholarship and Supreme Court rulings evidence that *Waley* was not understood in the early to mid-1940s as announcing a wholesale departure from the jurisdiction rule. First, in 1945 a special assistant to the U.S. Attorney General published an essay on "Collateral Review of Convictions in Federal Courts" in the *Boston University Law Review*.[223] This thorough effort to describe what the author termed "an entirely new and hitherto unknown form of review in criminal cases," which in "recent years . . . ha[d] been rapidly developing in Federal jurisprudence," and had been expanding the scope of the issues that could be raised on habeas corpus, concluded that the "Supreme Court nevertheless continued its adherence to the fundamental principles."[224] These "fundamental principles" included the rule "that if the petitioner [was] incarcerated pursuant to a judgment of conviction for a crime, resort [could] be had to a writ of habeas corpus only if the judgment [was] void because the court was without jurisdiction to render it."[225] The author elaborated that the Court had in the first half of the twentieth century expanded the scope of review available through a petition for the writ of habeas corpus by means of "a far-reaching

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221. *See infra* notes 237–64 and accompanying text.

222. *See supra* notes 155–214 and accompanying text.

223. *See* Holtzoff, *supra* note 179, at 26. The essay treated federal habeas corpus cases challenging criminal convictions in both federal and state courts. *See id.* at 35.

224. *Id.* at 26–27, 40.

225. *Id.* at 40.

enlarg[e]ment of the traditional concepts of jurisdiction and jurisdictional facts."[226] The Court had, however, not departed "from the time-honored principle that lack of jurisdiction is the only question open for consideration on a petition for habeas corpus presented by a person confined pursuant to a judgment in a criminal case."[227] The author's analysis of countless lower federal court cases decided in the late 1930s and early 1940s similarly demonstrated the vitality of the jurisdiction rule as a limit on the writ's scope.[228]

Justice Douglas's opinion for the Court in *Sunal v. Large* confirmed this scholarly assessment two years later.[229] When Justice Douglas explained the Court's denial of habeas corpus relief to two people imprisoned following their convictions in federal court for criminal draft evasion, he addressed in detail the limits on the writ as they had evolved over the previous half century. Frankly recognizing that the Court had carved out "exceptions" to "the general rule . . . that the writ of *habeas corpus* will not be allowed to do service for an appeal,"[230] Justice Douglas found it "plain, however, that the writ is not designed for collateral review of errors of law committed by the trial court . . . *which do not cross the jurisdictional line.*"[231] The *Sunal* petitioners had been improperly denied any opportunity to challenge in their criminal prosecutions the local draft board's classification of them as eligible for military service.[232] Nevertheless, Justice Douglas relied on the above-quoted principle to hold that habeas corpus relief was inappropriate because the trial court's error did not deprive it of

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226. *Id.* at 41.

227. *Id.*

228. *Id.* at 45–46. After an exhaustive, and exhausting, review of federal circuit and district court cases from the period, the author summarized their collective significance as follows:

> While extending the use of habeas corpus as indicated and sanctioned by the cases that have been reviewed, the courts nevertheless continued to recognize and adhere to the principle that errors at trial will not be reviewed and will not vitiate a conviction on habeas corpus, unless the error led to a failure of the trial court to obtain jurisdiction or to a divesting of jurisdiction by subsequent events. The traditional concept of what constitutes jurisdiction has been greatly expanded. In order, however, to render a judgment vulnerable on habeas corpus, the defect must be jurisdictional, as that term is now interpreted. It is not even every denial of constitutional right that renders the conviction subject to collateral attack. It is only such a deprivation of a constitutional right as affects the jurisdiction of the trial court that vitiates the judgment and makes it vulnerable on habeas corpus.

Id.

229. 332 U.S. 174 (1947).

230. *Id.* at 178.

231. *Id.* at 179 (emphasis added).

232. *Id.* at 176.

jurisdiction.[233] Justice Douglas succinctly summarized the Court's rationale for denying the writ of habeas corpus in the following terms: "The courts which tried the defendants had *jurisdiction* over their persons and over the offense. They committed an error of law in excluding the defense which was tendered. That error did not go to the *jurisdiction* of the trial court."[234] To be sure, Justices Frankfurter, Rutledge, and Murphy all dissented on the ground that the majority had applied the habeas corpus precedents with insufficient flexibility, which they believed should have been construed as permitting relief whenever issuance of the writ was necessary to prevent a "complete miscarriage of justice."[235] Of course, the dissenters' failure to prevail emphasizes the narrower majority view of the writ's availability. Moreover, the subsequent substantial vindication of the dissenters' position by Supreme Court rulings issued in the second half of the twentieth century does not undercut the fact that much stricter limits on the writ retained their authority in the 1940s.[236]

In brief, by the summer of 1942, centuries of authority, first English and then American, supported the rule that the writ of habeas corpus would be denied to a petitioner, unless the petitioner could establish that the court which issued the judgment lacked jurisdiction. Throughout the previous six decades, federal courts in the United States had intermittently adopted broad interpretations of the term

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233. *Id.* at 181.

234. *Id.* (emphasis added).

235. *Id.* at 187 (Frankfurter, J., dissenting) (internal quotation marks and citation omitted); *see also id.* at 188 (Rutledge, J., dissenting); *id.* at 193 (noting that Justice Murphy joined in Justice Rutledge's dissent).

236. Moreover, neither of the dissenting opinions in *Sunal* accused the majority of improperly repudiating an anti-jurisdictional revolution wrought in *Waley*. To the contrary, the dissenting Justices emphasized the confusion and inconsistency in the Court's habeas corpus precedents, arguing that this very lack of jurisprudential clarity permitted the Court to render justice for the petitioners before it within the uncertain boundaries of existing law. *See Sunal*, 332 U.S. at 184–85, 187 (Frankfurter, J., dissenting); *id.* at 188–89 (Rutledge, J., dissenting):

> Confusion in the opinions there is, in quantity. But it arises in part from the effort to pin down what by its nature cannot be confined in special, all-inclusive categories, unless the office of the writ is to be diluted or destroyed where that should not happen. And so limitation in assertion gives way to the necessity for achieving the writ's historic purpose when the two collide. Admirable as may be this effort toward system, this last resort for human liberty cannot yield when the choice is between tolerating its wrongful deprivation and maintaining the systematist's art.

The dissenters' assertions that, as of 1947, the state of the law governing the availability of the writ was anything but clear provides additional evidence that the Court's April 1942 per curiam opinion in *Waley* did not of its own force throw off the long-honored rule that the writ would issue only to redress errors deemed to deprive the criminal trial court of jurisdiction.

"jurisdiction" for these purposes, but the Supreme Court's eventual abandonment of this limitation only happened well after the Court confronted and denied the petitions for the writ filed on behalf of the Nazi saboteurs in 1942. The present significance of this observation about the legal context in which the *Quirin* Court ruled is explored in Part IV. However, we first briefly summarize the Supreme Court's significant expansion of federal habeas corpus during the sixty years since *Quirin* was decided.

B. Growth of Federal Habeas Corpus Since 1942

The story of the writ's expansion in the second half of the twentieth century can be treated with much greater brevity than its pre-*Quirin* history, as the more recent events are comparatively familiar and less controversy surrounds their proper description.[237] In short, the doctrinal change which *Waley* only tentatively suggested became the law of the land. The Court ultimately abandoned the *Watkins* jurisdictional rule and authorized the writ's use to remedy serious errors in criminal justice administration regardless of whether these errors undermined the committing court's jurisdiction over the offense or the offender.

In 1948, Congress substantially revised the sections of the U.S. Code that authorized and regulated the federal courts' power to issue the writ.[238] For present purposes, this statutory revision effected two significant changes. First, it substituted a statutory remedy (codified at 28 U.S.C. § 2255) for the writ of habeas corpus as the means for federal prisoners to vindicate legitimate challenges to federal court judgments ordering imprisonment.[239] We explore below the significance that this development had for understanding the Court's subsequent expansion of the writ. The second aspect of the 1948 revision that is important for our purposes was Congress's codification of the judicially created rule that a state prisoner must exhaust all available state avenues for relief before a federal court may consider the prisoner's petition for a writ of habeas corpus.[240] This exhaustion requirement in turn presented the Court with the issue whether, and if so to what extent, a federal court

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237. Controversy abounds as to the *normative* implications of the writ's post-1940s expansion. *See, e.g.*, Bryant, *supra* note 148, at 27–28 (noting the controversy sparked by the Court's expansion of the writ in the 1950s and 60s). But few would contest the factual assertion that, as a result of the normatively controversial Supreme Court rulings in the 1950s and 60s, the federal courts issued the writ of habeas corpus far more frequently in the late-twentieth century than in prior eras.

238. *See, e.g.*, HART & WECHSLER, *supra* note 126, at 1341.

239. *See* United States v. Hayman, 342 U.S. 205, 210–19 (1952) (discussing the background to Congress's 1948 creation of the § 2255 remedy).

240. *See, e.g.*, HART & WECHSLER, *supra* note 126, at 1443–44.

should accord preclusive effect to prior state court rejection of a petitioner's federal constitutional claim.[241] When the Justices addressed this issue in their 1953 landmark ruling in *Brown v. Allen*,[242] the Court finally and decisively repudiated the *Watkins* rule that the writ of habeas corpus would be available only if the error alleged by the petitioner had undermined the committing court's jurisdiction.

In *Brown*, three North Carolina prisoners filed, in federal district court, petitions for the writ on the basis of federal constitutional claims that the North Carolina courts had previously considered and rejected. Denying the petitions, the federal district judge observed that "[t]he petitioner[s] ha[d] [their] day in Court and [their] present positions have been rejected by a Court which had and did not lose jurisdiction."[243] The district judge found dispositive "the procedural history and the record in the State Courts, for the reason that [a] habeas corpus proceeding is not available to the petitioner for the purpose of raising the identical question passed upon in those Courts."[244] The district judge explained that in such a case "[t]he judgment of the state court is ordinarily res adjudicata, not only of those issues which were raised and determined, but also of those which might have been raised."[245] The court rejected the petitioner's argument that the 1867 statute, which empowered the federal courts to grant state prisoners the writ, mandated an exception to the general rule that "adjudications made by the state courts in connection with applications made to them will be binding on the federal courts" in subsequent proceedings.[246]

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241. Another issue raised by the exhaustion requirement, and addressed by numerous Supreme Court decisions, was when should a state court's dismissal of a prisoner's claim for failure to comply with state procedures bar a federal habeas corpus court's consideration of the claim's merits. That issue is beyond the scope of this Article. For a helpful overview of the problem, see CHEMERINSKY, *supra* note 151, § 15.5.2. A related question is when will a prisoner who files successive petitions for the writ be denied relief for this reason alone, that is without inquiry into the merits of the prisoner's claim. For a discussion of this issue, see *id.* § 15.4.3. *See generally* Randal S. Jeffrey, *Successive Habeas Corpus Petitions and Section 2255 Motions After the Antiterrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues*, 84 MARQ. L. REV. 43 (2000); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699 (2002).

242. 344 U.S. 443 (1953); *see also* CHEMERINSKY, *supra* note 151, § 15.5.3, at 896-97 (discussing *Brown*). For a recent re-examination of the significance of *Brown*, see Eric M. Freedman, *Milestones in Habeas Corpus: Part III*, Brown v. Allen*: The Habeas Corpus Revolution that Wasn't*, 51 ALA. L. REV. 1541 (2000).

243. Brown v. Crawford, 98 F. Supp. 866, 867 (E.D.N.C. 1951).

244. Speller v. Crawford, 99 F. Supp. 92, 95 (E.D.N.C. 1951).

245. *Id.* at 95-96 (internal quotation marks omitted).

246. *Id.* at 96 (internal quotation marks omitted).

Justice Frankfurter, however, in an opinion endorsed by a majority of the Court,[247] adopted the petitioner's argument. Answering his call for Supreme Court clarification and liberalization of the federal habeas corpus court's role in his *Sunal* dissent, Justice Frankfurter concluded that the 1867 statute required federal district courts to decide de novo both pure questions of federal constitutional law and mixed questions of law and fact when they were properly presented by a petition for habeas corpus, even if the trial and appellate courts of the incarcerating state had previously rejected petitioner's claims. Justice Frankfurter emphasized his solicitude for the state courts charged, in the first instance in most cases, with the awesome responsibility of administering criminal justice.[248] He, nonetheless, concluded that Congress's decision to extend the federal courts' habeas corpus jurisdiction to petitions brought by state prisoners compelled a ruling that "the prior State determination of a claim under the U.S. Constitution cannot foreclose consideration of such a claim" by a federal habeas corpus court.[249] Although the Court's holding in *Brown* was, and has remained, controversial,[250] on the point central to our inquiry, a majority of the Justices made blindingly clear that the Court had abandoned the *Watkins* jurisdiction rule. Henceforth, a federal court exercising habeas corpus jurisdiction could address the merits of a petitioner's federal constitutional challenge to a state-court criminal conviction, even though a state court of competent jurisdiction had previously considered and

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247. Although Justice Reed delivered the "opinion of the Court" resolving the three consolidated appeals before the Court in *Brown v. Allen*, Justices Black, Douglas, Burton, and Clark endorsed Justice Frankfurter's discussion of "the bearing of the proceedings in the State courts upon the disposition of the application for a writ of habeas corpus in the Federal District Courts." *Brown*, 344 U.S. at 497 (Frankfurter, J., concurring in part and dissenting in part); *see also id.* at 513 (opinion of Justices Black and Douglas); *id.* at 487–88 (opinion of Justices Burton and Clark). Justice Frankfurter's opinion in *Brown* has been recognized as authoritative by both the Court, *see, e.g.*, Wright v. West, 505 U.S. 277, 288 (1992) (plurality); *id.* at 300 (O'Connor, J., concurring), and commentators, *see, e.g.*, HART & WECHSLER, *supra* note 126, at 1356–57.

248. *See Brown*, 344 U.S. at 497–98:

> Experience may be summoned to support the belief that most claims in these attempts to obtain review of State convictions are without merit. Presumably they are adequately dealt with in the State courts. Again, no one can feel more strongly than I do that a casual, unrestricted opening of the doors of the federal courts to these claims not only would cast an undue burden upon those courts, but would also disregard our duty to support and not weaken the sturdy enforcement of their criminal laws by the States.

249. *Id.* at 500 (Frankfurter, J., concurring in part and dissenting in part) (noting that under a contrary holding "the State court would have the final say which the Congress, by the Act of 1867, provided it should not have").

250. For a discussion of the controversy sparked by *Brown*, in both Congress and legal academia, see Bryant, *supra* note 148, at 27–29.

rejected that same challenge.[251] Only Justice Jackson, writing separately, indicated that he would have preserved the rule of jurisdiction as a limitation on federal habeas corpus review of state convictions.[252] The 1953 decision in *Brown* clarified that federal habeas corpus relief extended to *state* court errors of federal constitutional law, regardless of whether the errors were deemed to have affected the state court's jurisdiction or whether a federal habeas corpus proceeding was the only available avenue for relief.

The Supreme Court waited another sixteen years to elucidate that the same liberal principles, articulated in *Brown*, controlled the availability of collateral relief to a prisoner incarcerated under the sentence of a *federal* criminal court. In this period, the lower federal courts had divided, and many had held that relief under 28 U.S.C. § 2255 would not be available for claims that had been, or could have been, raised in a direct appeal from the federal conviction.[253] In *Kaufman v. United States*,[254] the Supreme Court finally rejected this distinction and recognized a parity between the relief available to state prisoners in federal habeas corpus proceedings and that available to

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251. *See generally* Bator, *supra* note 147, at 499-500. Other commentators have perceptively observed that the Court's decision in *Brown* proved essential to the Warren Court's 1960s reformation of the criminal justice system within the States. The Supreme Court lacked the capacity to review and reverse every state court conviction that contravened its increasingly generous interpretations of the Bill of Rights. Accordingly, the federal district courts, exercising habeas corpus jurisdiction, assumed responsibility for guaranteeing faithful adherence to the Supreme Court's rulings. As one commentator put the matter:

> the growth in the size of the country and the amount of litigation meant that review by the United States Supreme Court was not sufficient to remedy all allegedly unconstitutional convictions. If there was to be federal court review of state court procedures, it would have to be undertaken primarily in the district courts through habeas corpus.

CHEMERINSKY, *supra* note 151, § 15.2, at 847; *see also* HART & WECHSLER, *supra* note 126, at 1361 ("The broad scope of habeas relitigation authorized in Brown and reaffirmed in Fay v. Noia, 372 U.S. 391 (1963), is often seen as an important or even necessary aspect of the Warren Court's effort to ensure that its criminal procedure decisions were followed by state courts."); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1041 (1977) (explaining that "an expanded federal writ of habeas corpus" provided a "remedial counterpart to the constitutionalization of criminal procedure"); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 253-54 (1988) ("[T]he Court expanded the scope of the writ of habeas corpus in *Brown* because the Court recognized that it no longer could shoulder the burden on direct review of scrutinizing constitutional claims arising in state criminal proceedings.").

252. *See Brown*, 344 U.S. at 544-45 (Jackson, J., concurring).

253. *See* DUKER, *supra* note 147, at 259 n.189 (citing lower federal court decisions).

254. 394 U.S. 217 (1969).

federal prisoners in § 2255 cases, the remedial mechanism enacted by Congress in 1948 as a substitute for federal prisoner petitions for writs of habeas corpus.[255]

That the ambiguity regarding § 2255's scope persisted for so long shows that the reformulation and expansion of habeas corpus in *Brown* was a dramatic one, extended to the closely analogous proceedings under § 2255 only after much time and deliberate consideration as well as Supreme Court resolution of a longstanding disagreement among the lower federal courts. This delay, if not reluctance, in embracing the theoretical implications of *Brown* reveals that habeas corpus's narrow conception, which was captured most clearly by the *Watkins* requirement that the committing court be found to have lacked jurisdiction before the writ would issue, echoed through the case law well into the second half of the twentieth century. The staying power which this cramped view of the writ thus displayed provides additional evidence for our thesis that the narrowness of Supreme Court scrutiny in *Quirin* comported with the then-dominant understanding of the writ. This history further undermines the Bush administration's argument that this same narrowness reflected instead the Court's deliberate endorsement of a de minimus judicial role in reviewing any detention or punishment ordered by presidentially authorized military commissions.

Additional post-*Brown* Supreme Court opinions reaffirmed and extended the principle that the federal writ of habeas corpus would generally be available to remedy constitutional errors infecting criminal convictions. Perhaps chief among these rulings is the Supreme Court's decision in *Fay v. Noia*.[256] The Court held that a habeas corpus petitioner could raise constitutional challenges to a state-court criminal conviction which were not previously presented to the state courts, as long as the petitioner had not "deliberately by-passed . . . the state courts."[257] For present purposes, even more important than this generous holding[258] was the unwavering commitment to a broad conception of the federal habeas corpus jurisdiction evidenced by Justice Brennan's opinion for the Court. Justice Brennan wrote of "the extraordinary prestige of the Great Writ," which he insisted had

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255. *Id.* at 220–22.

256. 372 U.S. 391. The Court on the same day also ruled in the companion case to *Noia*, *Townsend v. Sain*, 372 U.S. 293 (1963), which identified particular circumstances in which a federal habeas corpus court might disregard state court factual determinations. *See generally* CHEMERINSKY, *supra* note 151, at 905.

257. *Noia*, 372 U.S. at 438.

258. Indeed, the precise holding of *Noia* was revisited and overruled implicitly in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and this implicit overruling was in turn made explicit in *Coleman v. Thompson*, 501 U.S. 722 (1991). *See generally* CHEMERINSKY, *supra* note 149, at 882–86.

provided "a swift and imperative remedy in all cases of illegal restraint or confinement" for centuries.[259] The author conceded that the Supreme Court "ha[d] [not] always followed an unwavering line in its conclusions as to the availability of the Great Writ" and that its "development of the law of federal habeas corpus ha[d] been attended, seemingly, with some backing and filling;" yet Brennan found dominant the precedents for reviewing habeas corpus petitioners' claims on their merits, which in his estimation "overshadowed" the contrary decisions that accorded the writ a more "grudging scope."[260] Therefore, Justice Brennan reaffirmed in sweeping terms *Brown*'s teaching that constitutional challenges to criminal convictions could be relitigated in federal habeas corpus proceedings: "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[261]

To be sure, the Warren Court's enlargement of the federal habeas corpus writ experienced retrenchment during the tenures of Chief Justices Warren Burger and William Rehnquist.[262] Despite the significance of these developments for the categories of cases affected, the Burger and Rehnquist Courts have not overruled *Brown*'s holding that constitutional challenges may generally be relitigated in federal habeas corpus cases.[263] Moreover, there has been no hint that the

259. *See Noia*, 372 U.S. at 399-400.

260. *Id.* at 411-13. Thus, Justice Brennan's historical analysis, which firmly rejected "the notion that until recently the writ was available only in a very narrow class of lawless imprisonments," *id.* at 402-03, is in some respects at odds with our treatment of this same history. *Compare, e.g.*, *supra* notes 152-211 and accompanying text (reading the *Watkins* decision as establishing a fundamental limit on federal habeas corpus jurisdiction that survived, albeit in modified form, well into the twentieth century), *with Noia*, 372 U.S. at 413-14 (asserting that "the fetters of the *Watkins* decision were thrown off in *Ex parte Lange*," an 1873 Supreme Court decision). Nor are we the first commentators to find unconvincing at least some aspects of the historical narrative presented in Justice Brennan's opinion for the Court in *Noia*. *See, e.g.*, Forsythe, *supra* note 144, at 1165 (observing that Justice Brennan's "history" in *Noia* has been "thoroughly disparaged by scholars"); Mayers, *supra* note 145, at 58 (rejecting as "without historical foundation" Justice Brennan's assertion that the Court's ruling in *Noia* "merely fulfill[ed] the intentions of the 1867 Congress"). Even though aspects of Justice Brennan's history in *Noia* may be historically inaccurate, the Warren Court's adoption of this revisionist account nevertheless evidences the Justices' commitment to and entrenchment of the *Brown* rule permitting relitigation of constitutional claims in federal habeas corpus proceedings.

261. *Noia*, 372 U.S. at 424.

262. *See supra* note 258; *see also* CHEMERINSKY, *supra* note 151, at 847-48.

263. *See generally* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 69-80 (4th ed. 2001) (providing overview of major post-*Brown* developments in federal habeas corpus and concluding that, notwithstanding some significant "contraction" of federal habeas corpus by both the Supreme Court and

Supreme Court might return to the 1940s regime, in which the writ was available to one confined under a criminal conviction if and only if the committing court exceeded or lost its "jurisdiction" over the offense or the alleged offender. Thus, the scope of review in federal habeas corpus proceedings today remains substantially broader than that typical of the period in which the Court decided *Quirin*.[264]

IV. SIGNIFICANCE FOR PRESENT CONTROVERSIES

We surveyed above ubiquitous, albeit overbroad and unsupported, reliance on *Quirin* as precedent by President Bush and numerous additional public officials for many of the Bush administration's controversial responses to the September 11 terrorist attacks. In this Section, we explore the present significance of our perspectives about how incredibly narrow was the Supreme Court opinion and how remarkably underdeveloped was the state of federal habeas corpus law circa 1942.

A. Relevance to Federal Judicial Review of Military Commission Proceedings

Our observations perhaps have greatest relevance for White House Counsel Gonzales's claim that any "habeas corpus proceeding in a

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Congress, governing law generally "recognizes the continuing obligation of federal habeas corpus courts to scrutinize state court rulings on federal constitutional claims independently").

264. Though we have focused on the dramatic changes effected in the law of federal habeas corpus jurisdiction during the sixty years since the Supreme Court ruled in *Quirin*, we recognize that other relevant areas of the law have likewise developed significantly in the intervening decades. Perhaps most relevant to potential controversies arising out of the Bush Order or the administration's prosecution of the war on terror are the revolutionary changes that have arisen in the constitutional law of criminal procedure and in the law governing the administration of military justice. *See, e.g.*, CURRIE, *supra* note 203, at 447–50 (discussing the numerous rulings that "left the contours of criminal procedure radically altered by the time [Chief Justice] Warren left [the Supreme Court] in 1969"). *See generally* JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980 (2001) (stressing the 1951 creation of the Court of Military Appeals, now known as the U.S. Court of Appeals for the Armed Forces, as a landmark event in the development of modern military justice law). International law and human rights have also dramatically expanded. *See* Dickinson, *supra* note 8, at 1421–32. Thorough consideration of these and other potentially relevant legal developments and their possible significance for present-day controversies is beyond the scope of this article. We hope, however, that our focus on the evolution of the law of federal habeas corpus during the last six decades will lead others similarly to situate *Quirin* in the legal context in which the opinion was issued, and to which it should be limited.

federal court" challenging actions taken under the Bush Order, which most prominently authorized trial of non-U.S. citizens by military commissions, would be limited to reviewing "the lawfulness of the commission's *jurisdiction*."[265] Mr. Gonzales justified this restriction on the exercise of federal habeas corpus review with express reference to *Quirin*, reasoning that, because the Court in this case framed its inquiry vis-à-vis the legality of the jurisdiction asserted by the military commission which President Roosevelt's 1942 Executive Order authorized, federal habeas corpus review of any action taken under the Bush Order would be similarly circumscribed.[266] This argument assumes both that (1) the *Quirin* Court's review was unusually narrow, excluding from judicial consideration all issues which concerned the process employed against the petitioners, and (2) that the Justices specially crafted this limitation on the scope of review for the extraordinary circumstances of *Quirin*, thus reflecting the Court's recognition that it owed enormous deference to the president's invocation of military courts. However, careful assessment of the *Quirin* opinion and clear understanding of the then-current state of federal habeas corpus law belie both of these assumptions.

As we have shown above, the scope of Supreme Court review in *Quirin* was considerably more searching than the jurisdictional label might suggest. Perhaps most critical to the issues evaluated in this Article, the Justices seriously entertained, and clearly resolved on the merits, substantive claims which petitioners asserted under the Fifth and Sixth Amendments of the Constitution. That treatment assumes even greater import because the petitioners had stipulated to certain facts which in essence admitted their guilt.

It is also important to understand that the *Quirin* Court, when framing the inquiry in terms of the military commission's jurisdiction, did not adopt a narrower scope of review than the scrutiny exercised for more routine habeas corpus proceedings. Rather, as Part III demonstrated, in the early 1940s the federal habeas corpus writ was generally unavailable to someone who was held under the judgment of a

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265. Gonzales, *supra* note 6 (emphasis added). Mr. Gonzales's *New York Times* essay provided in pertinent part: The Bush Order "preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in federal court. The language of the order is similar to the language of a military tribunal order issued by President Franklin Roosevelt that was construed by the Supreme Court to permit habeas corpus review." *Id.*; *see also supra* notes 24–25 and accompanying text.

266. Gonzales, *supra* note 6.

court having competent jurisdiction.[267] The Justices' analysis in *Quirin*, therefore, comported with the prevailing view of the writ's scope and purpose, even as applied to one imprisoned under the final judgment of a state or federal criminal court. The *Quirin* Court similarly limited its review to the legality of the military commission's jurisdiction in accordance with established federal habeas corpus practice, not as a specially tailored narrowing of broader scrutiny available in less constitutionally or politically sensitive cases.[268] Therefore, White House Counsel Gonzales's observation that the *Quirin* Court restricted its inquiry to the lawfulness of the commission's jurisdiction, although technically accurate, does not support his conclusion that a federal habeas corpus proceeding challenging the judgment of a military commission authorized by the Bush Order should be similarly circumscribed. To the contrary, an understanding of the legal context in which the Justices decided *Quirin* teaches that the limitation on the Court's review in the case to the issue of competent jurisdiction was

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267. To be sure, the Supreme Court announced its judgment denying the saboteurs' applications to petition for the writ three days *before* the military commission convicted the petitioners and sentenced them to death. Belknap, *supra* note 12, at 473-74. The Court had acquiesced to the parties' agreement whereby the trial before the commission was temporarily halted to permit the Court to hear and rule on what was in effect an expedited appeal from the federal district court's denial of relief. *See* White, *supra* note 139, at 427-28 (observing that "both sides cooperated in shepherding *Ex parte Quirin* to the Supreme Court while the saboteurs' trial was taking place" and discussing the different motives that brought the parties together on this point of procedure). One chilling reason the parties gave the Court for this odd procedural inversion (whereby the petitions for the writ were presented and considered prior to the commission's final judgment) was that, were defense counsel to follow the more typical course and wait to petition for the writ until after the commission ruled, the petitioners might be executed before any federal court had an opportunity to rule on their petitions! Oral Argument Tr. at 500, *Quirin*, 317 U.S. 1 (statement of Colonel Royall, defense counsel) ("[B]etween the time the Commission takes its action and the time the Executive acts there is no period which anyone could safely count on between the conclusion of the hearing before the Commission and the execution of any sentence that might be imposed[.]"); *id.* at 505 (statement of Francis Biddle, U.S. Attorney General) (noting as an additional reason for the Supreme Court's consideration of the merits in *Quirin*, the "very practical reason which defense counsel has urged and will urge, that even if an appeal be granted it might not act as a stay, and the case would very quickly become moot"). In fact, a mere five days intervened between the commission's conviction and sentencing of petitioners, and the execution of six of them in the District of Columbia jail. Belknap, *supra* note 12, at 474. In any event, in *Quirin* the Court took the unusual step of addressing petitions for the writ while trial was pending before the military commission, in effect assuming for the purposes of its analysis (and quite correctly, as it turned out) that the commission's ruling would be adverse to the petitioners.

268. The *Quirin* Court did speak of deference to the President in wartime. *See supra* notes 111-15 and accompanying text; *see also supra* notes 96-99 and accompanying text; *infra* note 297 and accompanying text.

merely a non-controversial application of then-controlling precedents concerning federal habeas corpus relief's availability. In the intervening decades, however, the Supreme Court has authoritatively repudiated those habeas corpus precedents. Modern federal courts should recognize that the Justices' considerable expansion of the writ during the last sixty years has modified *Quirin* while emphatically rejecting blind adherence to this outmoded feature of *Quirin* in resolving any federal habeas corpus cases that may arise out of the Bush Order.

As we detailed above,[269] a number of Supreme Court opinions issued during the 1950s and 60s, most significantly the landmark ruling of *Brown v. Allen*,[270] established that in cases which implicated the legality of imprisonment ordered by judicial judgment, the writ's availability henceforth would not be limited to those petitioners who could establish that the committing court lacked competent jurisdiction. Rather, with narrow exceptions, the writ would issue to any prisoner who was confined under a judgment secured in violation of the U.S. Constitution.[271] This expansion of the writ meant the federal courts entertained many procedural challenges to criminal convictions that had previously been excluded from federal habeas corpus proceedings because they did not affect the committing court's jurisdiction, even as the Justices had expanded that term in prior rulings. These doctrinal innovations, together with the Warren Court's expansive interpretations of the federal constitutional protections applicable to criminal defendants, radically transformed the nature and importance of the federal courts' habeas corpus jurisdiction.[272]

A few instructive examples will suffice here in lieu of exhaustively cataloging the kinds of claims judges addressed in post-*Brown* federal habeas corpus proceedings,[273] which would not have been cognizable in the early 1940s. As late as 1938, Justice Black had to exert phenomenal intellectual force when justifying Supreme Court consideration in a habeas corpus proceeding of whether a federal trial court's felony conviction of an "ignorant" defendant altogether denied legal representation was constitutional.[274] However, a frequent, important, and well-established use of the federal habeas corpus jurisdiction today is in reviewing both state and federal prisoners' claims that their state-appointed counsel did not afford them constitutionally adequate

269. *See supra* Part III.B.

270. 344 U.S. 443 (1953).

271. *See supra* Part III.B.

272. *See supra* note 251.

273. A catalogue nearer to being complete can be found in 1 HERTZ & LIEBMAN, *supra* note 263, § 9.1, at 414-56.

274. *See supra* notes 202-14 and accompanying text.

assistance.[275] The charge that trial counsel's performance was ineffective concomitantly serves as the vehicle for presenting to the federal courts numerous questions concerning the fairness of a petitioner's criminal trial. These include whether counsel properly investigated all reasonable avenues of defense and presented all potentially mitigating evidence to the trier of fact,[276] whether counsel made timely efforts to suppress evidence apparently seized in violation of the Fourth Amendment,[277] and whether the petitioner had appropriate opportunities to confer with counsel before and during trial.[278] Ten years ago, the Supreme Court confirmed that a petitioner's claim that his self-incriminating statement had been obtained absent compliance with the strictures of *Miranda v. Arizona*[279] was cognizable in a federal habeas corpus proceeding,[280] even though it would strain credulity to contend that such an error deprived the trial court of jurisdiction over the case. In 2001, the Justices reaffirmed that a petitioner held under a judgment of conviction premised on evidence constitutionally insufficient to prove each element of the crime charged beyond a reasonable doubt could secure a writ.[281] This ruling underscores the extent of the writ's expansion, given the frequent observation in pre-*Brown* Supreme Court opinions that "the writ is not designed for collateral review of errors of law committed by the trial court," a quintessential example of which was the lack "of any evidence to support the conviction."[282]

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275. *See* Kimmelman v. Morrison, 477 U.S. 365 (1986) (confirming that Sixth Amendment claims of ineffective assistance of counsel are cognizable in federal habeas corpus proceedings).

276. *See, e.g.*, Williams v. Taylor, 529 U.S. 362 (2000) (setting aside petitioner's death sentence due to trial counsel's failure to present potentially mitigating evidence at sentencing hearing).

277. *See Kimmelman*, 477 U.S. at 374–75.

278. *See, e.g.*, Jones v. Vacco, 126 F.3d 408, 416–17 (2d Cir. 1997) (holding that trial court improperly precluded consultation between petitioner and trial counsel during overnight recess).

279. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

280. *See* Withrow v. Williams, 507 U.S. 680 (1993).

281. *See* Fiore v. White, 531 U.S. 225 (2001) (per curiam); *see also* 1 HERTZ & LIEBMAN, *supra* note 263, § 9.1, at 415 n.20 (citing cases). The Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), recognized one significant exception to *Brown*'s rule of relitigation. In *Stone*, the Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494 (citation and footnote omitted). *See generally* CHEMERINSKY, *supra* note 151, at 897–98. Though "[f]or a time it appeared that *Stone* might represent a first step to overruling *Brown v. Allen*," subsequent Supreme Court decisions declined to extend *Stone* to other constitutional rights. *See id.* at 901–02.

282. *Sunal*, 332 U.S. at 179.

Our decision to enumerate these classic illustrations of the modern writ's use should not be misunderstood as asserting that defendants whom a military commission lawfully tried necessarily enjoy these or other specific constitutional protections. However, we do insist that a federal court with jurisdiction over a habeas corpus petition brought by such a defendant has the power to decide these questions on the merits. An anachronistic reference to *Quirin*'s consideration of whether the Roosevelt administration military commission's jurisdiction was lawful must not preclude a federal habeas corpus court from reviewing constitutional challenges to the manner in which the military commissions authorized by the Bush Order actually operate.

Although the myriad issues that will arise from any future Bush Order military commission trials defy accurate prediction now, we can identify a few questions which will probably arise. First, because Bush administration regulations prescribe lax evidentiary standards,[283] a military commission defendant may object that the admission of certain suspect evidence violated the Fifth Amendment right to "due process of law,"[284] either because the challenged evidence was inherently unreliable or because the defendant was denied any meaningful opportunity for cross-examination.[285] A commission defendant may similarly challenge a conviction on the grounds that it was not supported by constitutionally sufficient evidence[286] or was predicated on self-incriminating statements alleged to have been extracted coercively.[287] A defendant who is tried before a military commission also may seek to challenge the competence, independence, or both, of appointed defense counsel.[288] Of

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283. *See* DOD Order, *supra* note 19, § 6(D)(1) (providing for the admission of any evidence that "would have probative value to a reasonable person"). Indeed, Bush administration officials have cited relaxed rules of evidence as a chief virtue of military tribunals. *See, e.g.*, Gonzales, *supra* note 6 (observing that military commissions "can consider the broadest range of relevant evidence to reach their verdicts" and that "circumstances in a war zone often make it impossible to meet the authentication requirements for documents in a civilian court").

284. U.S. CONST. amend. V.

285. The Bush administration's recent reliance on ex parte affidavits in the Hamdi and Padilla litigation, *see Hamdi*, 316 F.3d 450, 472-73 (4th Cir. 2003); *Padilla*, 233 F. Supp. 2d at 608 (S.D.N.Y. 2002), may foreshadow similar tactics in cases to be tried before military commissions.

286. *Cf. Fiore*, 531 U.S. 225 (per curiam) (holding that petitioner's claim that his criminal conviction was based on evidence constitutionally insufficient to prove each element of the crime charged beyond a reasonable doubt was cognizable in a federal habeas corpus proceeding); *see also* 1 HERTZ & LIEBMAN, *supra* note 263, § 9.1, at 415 n.20 (citing cases).

287. *Cf. Withrow*, 507 U.S. 680 (holding that petitioner's claim that his *Miranda* rights had been violated was cognizable in a federal habeas corpus proceeding).

288. *Cf.* DOD Order, *supra* note 19, § 4(C)(3)(b) (providing strictures for the employment of civilian defense counsel); William Glaberson, *Tribunal v. Court-Martial:*

course, the same challenges might be lodged against the members of the commission itself, which the administration's regulations provide will include three military officers "[a]t least one [of which] . . . shall have experience as a judge."[289] Even assuming that a defendant acquiesces to tribunal composition and defense counsel's competence, the defendant may challenge the adequacy of defense counsel resources and any limits imposed on defense counsel's abilities to investigate and develop a meaningful defense.[290] Another specific question is the extent to which commission defendants enjoy a right to compulsory process and access to any potentially exculpatory evidence possessed by the government.[291]

These issues and a plethora of additional questions await resolution. Indeed, we readily acknowledge that others who are more seasoned by experience in criminal defense generally and in military law particularly can delineate additional compelling issues which may well arise. Moreover, circumstances will undoubtedly present issues that no one can imagine at this juncture. Even so, this admittedly partial list of plausible claims evidences the critical nature of the question this Article treats—whether a federal court may rule on such issues when presented in the context of a petition for the writ of habeas corpus otherwise within its statutory jurisdiction. Contrary to Mr. Gonzales's assertion, *Quirin* does not preclude a federal court from providing the ultimate answers.

B. Relevance to Judicial Review of Executive Detention of United States Citizens

In recent federal court litigation challenging the Bush administration's extrajudicial detention of U.S. citizens José Padilla and

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Matter of Perception, N.Y. TIMES, Dec. 2, 2001, at B6 (observing that defendants before an ordinary court-martial are allowed to select their own counsel, whereas defendants tried by a Bush Order military commission may not be allowed to do so).

289. DOD Order, *supra* note 19, § 6(H)(4); *see also Are Tribunal Rules Fair?*, WASH. POST, Mar. 25. 2002, at A18; Richard A. Serrano, *Terror Trials Would Mimic Courts-Martial*, L.A. TIMES, Mar. 21, 2002, at A1.

290. *See* DOD Order, *supra* note 19, § 5(H) (providing that "[t]he Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer").

291. *Compare* DOD Order, *supra* note 19, § 5(E) (stating that "[t]he Prosecution shall provide the Defense with access to evidence . . . known to the Prosecution that tends to exculpate the Accused"), *with id.* § 6(D)(5) (authorizing the presiding officer to deny defense counsel access to "Protected Information," defined broadly), *and id.* § 10 (declaring that "[t]his Order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party . . . . No provision in this Order shall be construed to be a requirement of the United States Constitution").

Yaser Hamdi, counsel for the administration has again relied substantially on *Quirin* as precedent for sharply circumscribing federal judicial review.[292] The U.S. Court of Appeals for the Fourth Circuit and the U.S. District Court for the Southern District of New York, partly acquiescing to the administration's litigation position, found their roles in scrutinizing the administration's detention decisions to be exceedingly narrow and deferential ones.[293]

The stimulus for this article was the Bush Order, which by its terms does not apply to Mr. Hamdi and Mr. Padilla, who are apparently U.S. citizens. Thus, we have only preliminarily considered the implications of our study for their pending cases. Nevertheless, we think that our treatment of the *Quirin* precedent speaks to the controversy surrounding the detentions of Hamdi and Padilla as well.

For these petitioners, the assiduously narrow character of Chief Justice Stone's opinion has telling import. Indeed, Judge Mukasey conceded as much in his careful, thorough *Padilla* ruling, when he observed that "[b]ecause the facts in *Quirin* were stipulated," the decision "offer[ed] no guidance regarding the standard to be applied in making the threshold determination that a habeas corpus petitioner is an unlawful combatant."[294] Yet Judge Mukasey then adopted a highly deferential standard to review Padilla's potentially indefinite detention—whether "some evidence" supported the executive branch determination that Padilla was properly classified as an unlawful combatant.[295] To substantiate this limited judicial role, Judge Mukasey relied primarily on an extended quotation from the Fourth Circuit's *Hamdi* decision issued earlier the same year, which had concomitantly invoked a broad reading of *Quirin* as support for the proposition that "the President's wartime detention decisions are to be accorded great deference from the courts."[296]

To be sure, Chief Justice Stone's opinion in *Quirin* recognized that "the detention and trial of petitioners [the Nazi saboteurs]—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally

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292. *See supra* notes 27–34 and accompanying text.

293. The Fourth Circuit acquiesced more than the Southern District of New York. *See supra* notes 27–34 and accompanying text.

294. 233 F. Supp. 2d at 607; *see also supra* notes 104–05 and accompanying text.

295. *Padilla*, 233 F. Supp. 2d at 608.

296. *Id.* at 606 (internal quotation marks omitted) (quoting Hamdi, 296 F.3d at 282). Judge Mukasey also relied on dicta in the U.S. Supreme Court's June 2001 ruling in *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001). *See Padilla*, 233 F. Supp. 2d at 607.

enacted"[297]—a proposition itself beyond dispute. However, the *Quirin* Court's acknowledgement of the grave context in which it ruled should not obscure either how narrow the Court's holding was or that it found review of the executive action taken, including consideration of constitutional challenges to this action, consistent with the judicial role. Insofar as the Bush administration or the lower federal courts have read *Quirin* as expressing a mood of near prostrate deference by the judiciary to Executive Branch detention decisions in times of perceived crisis, our analysis of *Quirin* and the historical and legal context in which the Court acted suggests that this reading of the opinion improperly and dangerously extends, rather than merely applies, the precedent. Instead, properly understanding *Quirin* requires meaningful judicial review to the full extent permitted by the prevailing law of federal habeas corpus while at once wisely counseling against precipitous intervention in matters of national security.

V. CONCLUSION

In the wake of the September 11 terrorist attacks, the once relatively obscure Supreme Court decision in *Ex parte Quirin* has become critical to legal and constitutional debates about civil liberties' import during times of international terror. The Bush administration has frequently invoked the ruling to support its numerous aggressive assertions regarding authority to wage a war on terrorism. Our primary focus is the contention by the Bush administration that the *Quirin* precedent limits a federal habeas corpus proceeding which challenges a military commission order to the threshold question of whether commission jurisdiction over the defendant and the alleged offense is lawful, although we also briefly treat administration reliance on *Quirin* in recent filings that implicate the *Hamdi* and *Padilla* cases.

Our review of the *Quirin* opinion and of the legal context in which the Court issued it contests the administration's assertion that the case mandates such an extremely narrow judicial role. Careful study of the history, arguments, and most importantly Chief Justice Stone's opinion, reveals that Supreme Court review of President Roosevelt's commitment of the matter to a military commission was neither as limited nor as deferential as the Bush administration has suggested. Moreover, by recovering the state of federal habeas corpus law circa 1942, we demonstrate that the Supreme Court's characterization of its role as assessing the military commission's "jurisdiction" was consonant with then-current understandings of the proper scope of inquiry in any federal

297. *Quirin*, 317 U.S. at 25.

habeas corpus proceeding, including those which involved petitions filed by prisoners incarcerated under federal and state judicial judgments. That the Court declined to accord President Roosevelt's military commission any less deference than it gave a lone state or federal trial court judge in 1942 must not be anachronistically construed as a definitive ruling that judicial review is singularly inappropriate when the judgments of military commissions are at issue. Rather, *Quirin* should be limited to its extraordinary facts, as Chief Justice Stone's opinion for the Court clearly stated, and understood as a relic of an unduly narrow and long-abandoned approach to federal habeas corpus jurisdiction.