No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF LEGAL SCHOLARS AND HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER [Effect of *Quirin*]

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INTERESTS OF *AMICI CURIAE*[1]

This *amicus curiae* brief in support of petitioner is submitted pursuant to Rule 37 of the Rules of this Court with the written consent of both petitioner and respondent, whose consent letters have been filed with the Clerk of the Court.

Amici are legal scholars and historians—Michal R. Belknap, David J. Danelski, Peter Irons, and Pierce O'Donnell—each of whom has studied, written, and published on the Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942). Writing to provide the Court an historical account of the factual circumstances surrounding the decision in *Quirin*, *amici* maintain that *Quirin* was an institutional defeat for the Court that should be repudiated.

Michal R. Belknap, Professor of Law at California Western School of Law and Adjunct Professor of History at the University of California, San Diego, is a constitutional and legal historian who has published numerous scholarly works on legal history and related topics, including several leading works examining *Quirin*. Among those works is *The Supreme Court Goes to War, The Meaning and Implications of the Nazi Saboteur Case*, 89 Mil. L. Rev. 59, 87 (1980), the first historical analysis of the case.

David J. Danelski, a lawyer, political scientist, and former Navy JAG officer, is the Mary Lou & George Boone Centennial Professor Emeritus at Stanford University. Professor Danelski has published numerous works on constitutional law, legal history, and the Supreme Court, including a leading article on *Quirin* entitled, *The Saboteurs' Case*, J. Sup. Ct. Hist. 61 (1996), for which he received the Hughes-Gossett Award for Historical Excellence from The Supreme Court Historical Society.

Peter Irons, a practicing attorney, is Professor of Political Science and Director of the Earl Warren Bill of Rights Project at the University of California, San Diego. Professor Irons is the author of thirteen books on the Supreme Court and

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1. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

constitutional litigation, including *War Powers: How the Imperial Presidency Hijacked the Constitution* (Metropolitan Books 2005). He has served as lead counsel in the successful effort to reverse the convictions of Japanese-Americans who challenged the curfew and relocation orders issued during World War II.

Pierce O'Donnell is an author and trial lawyer who has been named one of the "100 Most Influential Lawyers in America" by the *National Law Journal*. A former law clerk for Supreme Court Justice Byron R. White and Ninth Circuit Judge Shirley M. Hufstedler, Mr. O'Donnell has authored the most comprehensive work to date related to the German Saboteurs's Case in his recent book, *In Time of War: Hitler's Terrorist Attack on America* (The New Press 2005).

The instant case raises squarely the question of *Quirin*'s continued viability. It is of particular interest to *amici* because of the reliance on *Quirin* by both the court of appeals and the government to support the exercise of presidential power—specifically, the President's unilateral creation of military commissions to bypass trials by courts-martial under the authority of the Judge Advocate General.

SUMMARY OF THE ARGUMENT

Finding that *Quirin* affords a legitimate basis for the president's power to order trials by military commission in the War Against Terrorism,[2] the court of appeals sanctioned a precedent tainted by improper bias, conflicts of interest, undue executive influence, judicial haste, and lack of authority. Six men were put to death in *Quirin* despite the Court's now well-documented concerns about the validity of executive authority to establish the military commission that ordered their executions. This Court should overturn *Quirin* as an illegitimate precedent that offends this nation's modern sense of justice. With the slate clean, the Court then can decide the merits of petitioner's challenge to this modern-day military commission free of the spectre of *Quirin*.

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2. President Bush's order can be found at *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

ARGUMENT

I. THE HISTORIAL CIRCUMSTANCES SURROUNDING *QUIRIN*'S ISSUANCE DEMONSTRATE ITS INCOMPATIBILITY WITH A MODERN SENSE OF JUSTICE

A. The Historical Background of *Quirin*

In the summer of 1942, during World War II, eight German saboteurs landed on the beaches of Long Island and Florida. Arriving by U-boats in military uniforms and then changing into civilian disguise, they were well funded by the German government and armed with crates of explosives. Shortly after their arrival, one saboteur-turned-informant notified the Federal Bureau of Investigation of their arrival and plans. Over the next two weeks, the FBI captured all eight saboteurs—and so began the saga of *Quirin*. *See* Edward S. Corwin, *Total War and the Constitution* 117 (Alfred A. Knopf 1947).

The capture presented President Franklin D. Roosevelt with the difficult question of how to prosecute the saboteurs. The FBI had captured the saboteurs on American soil at a time when the civilian courts were open—a critical point under the Articles of War and *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Nevertheless, his advisors believed that the civil courts could not mete out sufficiently harsh sentences for the saboteurs's acts. *See* David J. Danelski, *The Saboteurs' Case*, 1 J. Sup. Ct. Hist. 61, 65-66 (1996).[3] Roosevelt wanted the saboteurs

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3. In reciting the factual background of *Quirin*, *amici* rely primarily on Professor Danelski's historical account. *See* David J. Danelski, *The Saboteurs' Case*, *supra*, at 65-66. The history of *Quirin* has been researched extensively and recounted in numerous works. *See, e.g.*, Michal R. Belknap, *Alarm Bells from the Past: The Troubling History of American Military Commissions*, 28 J. Sup. Ct. Hist. 300 (2003); Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 Cal. W. L. Rev. 433 (2002); Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implication of the Nazi Saboteur Case*, 89 Mil. L. Rev. 59, 87 (1980); Pierce O'Donnell, *In Time of War: Hitler's Terrorist Attack on America* (The New Press 2005); Corwin, *supra*, 117-27; Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal & American Law* (Univ. Press of Kansas 2003); Louis Fisher, *Military Tribunals & Presidential Power: American Revolution to the War on Terror* 91-129 (Univ. Press of Kansas 2005).

executed, which his advisors believed could be accomplished only by a military trial. *Id.*[4] Within a week, without congressional authority, President Roosevelt denied the saboteurs access to the civil courts, ordering their prosecution before a military commission of seven retired generals and authorizing that commission to impose a penalty of death. *Id.* at 67.[5] Despite a provision in the preamble of the Articles of War making them applicable to the armies of the United States at all times and all places, the presidential order departed from the Articles of War by permitting the admission of hearsay evidence in the trial, by reducing the number of votes necessary to convict on charges for which the death penalty was authorized, and by changing the review procedure in death-penalty cases. *Id.* In sum, the government had stacked the deck to facilitate the conviction and execution of the alleged saboteurs. *Id.*

A three-week trial of the saboteurs began on July 6, 1942, before Roosevelt's appointed military commission. *Id.* at 67-68, 71. The Attorney General, Francis B. Biddle, served as chief prosecutor for the government. President Roosevelt appointed Colonel Kenneth C. Royall to serve as chief defense counsel representing seven of the saboteurs and Colonel Cassius M. Dowell as his co-counsel. *Id.* at 67. Colonel Carl L. Ristine served as defense counsel for the eighth—the FBI's informant, George John Dasch. *Id*. During trial, Colonels Royall and

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4. That was also the position of General George Strong, Secretary of War Henry L. Stimson's chief of intelligence. Stong advised Stimson in a memorandum, dated June 28, 1942, that "the prompt trial and execution" of the saboteurs was necessary as a deterrent and that the trial should be by military commission even though martial law had not been declared and the civil courts were open. "The exigencies of the present situation," he added, "appear to demand drastic action without too much deference to technical rights which might be accorded, under the Constitution, to enemy aliens coming to our shores with the admitted intention of crippling our defense effort and with training and means adequate to accomplish that end." Record Group 165, NARA, Military Intelligence Service.

5. One of the notable constitutional issues presented by President Roosevelt's order was that it served, in effect, as an *ex post facto* law. For a discussion of that issue, see Cyrus Bernstein, *The Saboteur Trial: A Case History*, 1 Geo. Wash. L. Rev. 131, 157 (1943).

Dowell sought to devise a strategy to bring a constitutional challenge to the military proceedings. *Id.* at 68. On July 22, in contravention of orders from President Roosevelt, Colonel Royall, in an act of conscience, informed the military commission of his plan to initiate *habeas corpus* proceedings on behalf of the saboteurs in federal court. *Id.*; O'Donnell, *In Time of War*, *supra*, at 177-80.

The next day, on July 23, Colonels Royall and Dowell, Attorney General Biddle, and Judge Advocate General Myron C. Cramer, met in person with Justices Owen Roberts and Hugo Black to discuss the Supreme Court's willingness to hear the case. Danelski, *The Saboteurs' Case*, *supra*, at 68. On July 27, the Court publicly announced that it would convene a special session to hear the matter on July 29. *Id.* The saboteurs filed petitions for writs of *habeas corpus* in the United States District Court for the District of Columbia on July 28, 1942. *Ex parte Quirin*, 47 F. Supp. 431 (D.D.C. 1942). The district court summarily and immediately denied the petitions. *Id.*

The Supreme Court heard argument and received briefs exceeding 180 pages the very next day. Danelski, *The Saboteurs' Case*, *supra*, at 68. Over two days, the Court heard nearly nine hours of oral argument before returning to conference on July 30. *Id.* at 71. At noon on July 31, the Court denied the petitions in a *per curiam* order and announced that it would later file a full opinion addressing the merits. *Id.*; *Quirin*, 317 U.S. at 18-19, unnumbered note. In its one-page order, the Court summarily decided that (i) the President was authorized to order the trial before a military commission; (ii) the commission was lawfully constituted; and (iii) the saboteurs were held in lawful custody for trial before the commission. *Quirin*, 317 U.S. at 18-19.

Following the Court's denial of *habeas corpus* relief, trial resumed before the commission and quickly concluded. Danelski, *The Saboteurs' Case*, *supra*, at 71. The parties gave closing arguments on August 1, and, two days later, the Commission found all defendants guilty of all charges, recommending to President Roosevelt death by electrocution. *Id.* at 71. The commission forwarded the transcript to President

Roosevelt for review along with a recommendation that the death sentences of Dasch and another saboteur who had also assisted the FBI be commuted to life imprisonment. *Id.* at 71-72. The White House announced its approval of the commission's decision on August 8. *Id.* at 72. The only modifications to the commission's judgment included commutation of Dasch's sentence to 30 years imprisonment and that of the other cooperating saboteur to life imprisonment. *Id.* The government began the executions at noon that day and electrocuted the six saboteurs in a little over an hour. *Id.*; O'Donnell, *In Time of War*, *supra*, at 248-49.

Having issued only a *per curiam* order at the time of the executions, Chief Justice Stone assigned himself to write the Court's full opinion. Danelski, *The Saboteurs' Case*, *supra*, at 72. Nearly three months passed before the Court issued an opinion explaining its reasons for denying *habeas corpus* relief. *Quirin*, 317 U.S. 1 (full opinion filed October 29, 1942). During that time, the Justices struggled to find common ground. *See, e.g.*, Michal R. Belknap, *Frankfurter and the Nazi Saboteurs*, 1982 Y.B. Sup. Ct. Hist. Soc'y 66, 68 (1982). The Chief Justice described his effort to secure a unanimous opinion as "a mortification of the flesh." *See, e.g.* Alpheus T. Mason, *Inter Arma Silent Leges: Chief Justice Stone's Views*, 69 Harv. L. Rev. 806, 820-21 (1956) (citing Letter from Harlan Fiske Stone to Roger Nelson (Sept. 20, 1942), Harlan Fiske Stone Papers, Box 69 (on file with the Manuscript Room, Library of Congress)).

The extraordinary procedural history underpinning the Court's decision in *Quirin* does not, however, tell even half of the story. In the more than 60 years since the Court issued *Quirin*, legal historians have uncovered a wealth of information casting grave doubt on *Quirin*'s precedential value.

B. Biases, Conflicts of Interest, Undue Executive Influence, Haste, and Lack of Authority Infected the Court's Decision in *Quirin*

"The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the

discretion of the court. . . ." *Hertz v. Woodman*, 218 U.S. 205, 212 (1910). The Court should not be constrained by precedent if it believes the issue was wrongly decided; and where an opinion "significantly harms our criminal system and is egregiously wrong," the Court should repudiate it without requiring any "special justification." *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring). The facts unearthed after *Quirin*'s issuance offer compelling considerations for its repudiation. *See Patterson v. McClean Credit Union*, 491 U.S. 164, 174 (1989) (recognizing precedent may be vulnerable where it "has been found inconsistent with the sense of justice or with the social welfare") (citations omitted); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (the Court properly considers "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification"); *Burnet v. Coronado Oil & Gas*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)

> In cases involving constitutional issues . . . , this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may, as Mr. Chief Justice Taney said, "depend altogether on the force of the reasoning by which it is supported."

(quoting *The Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849)). Historians, including *amici*, have concluded uniformly that external and internal influences surrounding *Quirin* so undermine the very foundation of the opinion that it should be repudiated.

1. Judicial Bias

In the summer of 1942 when the FBI captured the eight German saboteurs before accomplishing their mission, the American public embraced the news as a great military victory. O'Donnell, *In Time of War*, *supra*, at 104; Danelski, *The Saboteurs' Case*, *supra*, at 65. At the time, Nazi forces occupied most of Europe; Russia was reeling under a savage German assault; Nazi tanks were ravaging North Africa; and Great Britain stood precariously alone. O'Donnell, *In Time of War*, *supra*, at

10, 19. German U-boats patrolling the Atlantic were sinking thousands of tons of shipping, including U.S. and Allied ships, within sight of observers on the shores of the Atlantic Coast and in the Caribbean. *Id.* at 10. Japan had destroyed Pearl Harbor just months earlier, and Japanese forces extended a vast perimeter of conquest over the Pacific. *Id.* at 10-11, 19. As anxiety about the war took hold of the popular consciousness, America looked alarmingly vulnerable. *Id.* at 19.

The members of the Court at that time—like the rest of America—strongly supported the war effort. *See* Danelski, *The Saboteurs' Case*, *supra*, at 71 (citing Frankfurter, Conference Notes in Saboteurs' Case (July 30, 1942), Felix Frankfurter Papers, Paige Box 12 (on file with the Manuscript Division, Harvard Law School)) (during conference in *Quirin* Chief Justice Stone said that the petitioners were "enemies regardless of citizenship" and entitled only to "executive justice"); *see also* Belknap, *A Putrid Pedigree*, *supra*, at 475.[6] Justice Felix Frankfurter's papers provide the most disturbing display of judicial bias against the saboteurs. Justice Frankfurter saw the war against Hitler as "a war to save civilization itself from submergence." *See* Belknap, *A Putrid Pedigree*, *supra*, at 476. In one of history's most troubling instances of judicial prejudice, Justice Frankfurter—seeking to persuade reluctant justices to join the Chief Justice's opinion—wrote to his colleagues the "F.F. Soliloquy," a fictional dialogue between Justice Frankfurter and the German saboteurs who sought writ relief. "F.F. Soliloquy," Hugo LaFayette Black Papers 1883-1976, Box 269 (on file with the Manuscript Division, Library of Congress), *reprinted in* Belknap, *Frankfurter and the Nazi Saboteurs*, *supra*, at 66.

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6. Professor Boris I. Bittker, a young lawyer in 1942 who assisted Colonel Royall with the petitions for certiorari, wrote about his perception of the national importance of the case to the war effort. "According to gossip in the corridors of the Justice Department, the White House hoped that the drama of a military trial would help to convince the public that we were really at war, and to end the civilian complacency that prevailed even in 1942." 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, 434 (1997).

The F.F. Soliloquy revealed a Justice openly hostile to the accused and "manifestly unwilling to afford them any procedural safeguards." *See* Belknap, *Frankfurter and the Nazi Saboteurs*, *supra*, at 66. Justice Frankfurter intemperately labeled the Germans as "damned scoundrels" who had a "helluvacheek" seeking writ relief, admonishing them: "You've done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress after your bodies will be rotting in lime." *Id.* at 69. According to Justice Frankfurter, the petitioners were "just low-down, ordinary, enemy spies who, as enemy soldiers, have invaded our country and therefore could immediately have been shot by the military when caught in the act of invasion." *Id.* After concluding that "for you there are no procedural rights," "F.F" ends his venomous dialogue by telling the saboteurs, "you will remain in your present company and be damned." *Id.* at 70.

The intemperate F.F. Soliloquy demonstrates that Justice Frankfurter "cared far more that these enemies be punished quickly than that they be tried fairly." *Id.* at 66. As well, it showed that his sense of patriotism and support for the Roosevelt war effort trumped all constitutional concerns. *See* Fisher, *Nazi Saboteurs on Trial*, *supra*, at 120. Rather than communicating substantive, merits-driven comments to his fellow Court members, Justice Frankfurter injected his own personal biases and "imprecations to his fellow justices not to become involved in sticky constitutional issues that might generate divisiveness amongst themselves." G. Edward White, *Felix Frankfurter's "Soliloquy" in Ex parte Quirin: Nazi Sabotage & Constitutional Conundrums*, 5 Green Bag 2d 423, 435 (2002).

2. Conflicts of Interest

Compounding his biases, Justice Frankfurter was entangled in a disqualifying conflict of interest due to his extensive contacts with the Roosevelt Administration. Justice Frankfurter was one of President Roosevelt's closest confidants while a professor at Harvard Law School, continuing to advise the Administration even after his appointment to the Court. O'Donnell, *In Time of War*, *supra*, at 199. More problematic,

Justice Frankfurter secretly advised the Roosevelt Administration specifically about its military commission for the saboteurs and how to structure it in anticipation of a Supreme Court challenge. Danelski, *The Saboteurs' Case*, *supra*, at 66 (citing Diary of Henry L. Stimson (June 29, 1942) (on file with Microfilm, Library of Congress)). Despite these *ex parte* conversations with the Administration, and the resulting conflict directly related to the case before the Court, Justice Frankfurter did not recuse himself.

Justice Frankfurter was not alone. Justices Frank Murphy and James F. Byrnes also had disqualifying conflicts. Justice Murphy was an active reserve army officer at the time, appearing in uniform during conference on July 29, 1942. Danelski, *The Saboteurs' Case*, *supra*, at 69. Eventually recognizing the appearance of impropriety raised, Justice Murphy reluctantly recused himself from *Quirin* just before the Court began hearing oral argument.[7] *Id.* Justice James F. Byrnes, like Justice Frankfurter, however, did not.

Justice Byrnes "had been a *de facto* member of the [Roosevelt] administration for the past seven months, working closely with both Biddle and F.D.R. in the war effort." Danelski, *The Saboteurs' Case*, *supra*, at 69 (citing Letter from Biddle to Byrnes (Jan. 14, 1942), James F. Byrnes Papers, Box 1230 (on file with the Robert Muldrow Library, Clemson Univ.)). He offered advice on a range of issues, including draft executive orders, war powers legislation, and other presidential initiatives. O'Donnell, *In Time of War*, *supra*, at 213 (citing James F. Byrnes, *All in One Lifetime* 148-54 (Harper & Bros. 1958)). Justice Byrnes was so intimately involved in the day-to-day functioning of the government that he arranged for the introduction—and lobbied legislative leaders for support—of administration bills. *Id*. Indeed, his involvement was so extensive that Attorney General Biddle actually thought Justice Byrnes was on a leave of absence from the Court from December 1941 to October 1942. Danelski, *The Saboteurs' Case*,

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7. During oral argument in *Quirin*, Justice Murphy, in his Army uniform, listened behind the curtain immediately behind the justices on the bench. O'Donnell, *In Time of War*, *supra*, at 214.

supra, at 69. Despite this relationship, Justice Byrnes participated in deciding the case.

3. Presidential Intimidation

In this environment laden with bias and conflict, President Roosevelt leveraged his executive power with credible threats to undermine the authority of the Court. As the *New York Daily News* reported at the time, the significance of the question before the Court in *Quirin* was that "it pit[] the authority of the Supreme Court directly against that of the President." Fred Pasley, *Spies Challenge Jurisdiction of Court Chosen by Roosevelt*, N.Y. Daily News, (undated) (cited in Jack Betts, *The Trials of War*, Carolina Alum. Rev. 32, 37 (March-April 2002)). In that high stakes context, President Roosevelt made it clear to the Court through unilateral *ex parte* communications that he would assert the supremacy of his authority regardless of the Court's position. O'Donnell, *In Time of War*, *supra*, at 213.

Specifically, several private communications from the Roosevelt Administration to the Justices reveal that the President expected—indeed, demanded—unanimous approval of the exercise of his war powers. In the Court's private chambers, immediately before hearing arguments in *Quirin*, Justice Roberts reported to his colleagues that Attorney General Biddle had expressed concerns that Roosevelt would execute the Germans no matter what the Court did. *Id.*; Danelski, *The Saboteurs' Case*, *supra*, at 69. Justice Roberts added that he believed FDR intended to have all eight men shot if they did not acknowledge his authority. O'Donnell, *In Time of War*, *supra*, at 213. The implication of President Roosevelt's threat would cause undeniable damage to the authority and sovereignty of the Court—a point not lost on Chief Justice Stone who replied, "[t]hat would be a dreadful thing." *Id.*; Danelski, *The Saboteurs' Case*, *supra*, at 69.

4. Rush to Judgment

With these internal and external influences roiling beneath the surface, the Court agreed to hear the saboteurs's petitions. The three-day process clearing the path for execution was, and with *Quirin*'s exception still is, unprecedented. The parties

submitted their briefs to the Court on July 29, 1942, and arguments were heard that very day without the benefit of reading the briefs beforehand. O'Donnell, *In Time of War*, *supra*, at 264. Then, less than twenty-four hours after the conclusion of the two-day arguments, the Court, with virtually no collective deliberation, denied writ relief in its cursory *per curiam* order. *Id.*

The Court's haste in issuing its *per curiam* order before reaching a full decision addressing the merits proved vexing to several members of the *Quirin* Court, their law clerks, historians, and other scholars. In a 1962 interview, Justice Douglas recounted, "Our experience with [*Quirin*] indicated . . . to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble." Danelski, *The Saboteurs' Case*, *supra*, at 80 (citing Transcription of Interviews of William O. Douglas, by Walter F. Murphy, at 204-05 (on file with Seeley G. Mudd Manuscript Library, Princeton Univ.)).

Several years after *Quirin* was decided, John P. Frank, Justice Black's law clerk in the summer of 1942, wrote that *Quirin* was an "instance[] of haste [where] the Court ha[d] allowed itself to be stampeded" by the executive branch. John P. Frank, *Marble Palace* 249 (Alfred A. Knopf 1958). Frank further wrote of the decision: "[I]f the judges are to run a court of law and not a butcher shop, the reasons for killing a man should be expressed before he is dead; otherwise the proceedings are purely military and not for [the] courts at all." *Id.* at 250.

5. Lack of Reliable Authority

As Chief Justice Stone drafted the full opinion, he expressed doubts about the government's position and confided in his clerk that he believed that "the President's order probably conflicts with the Articles of War." Mason, *Inter Arma Silent Leges*, *supra*, at 822 (citing Letter from Harlan Fiske Stone to Bennett Boskey (undated), Harlan Fiske Stone Papers, *supra*). He even considered, after the executions, holding in favor of the petitioners. O'Donnell, *In Time of War*, *supra*, at

255. The fact of the matter is that "counsel for the saboteurs had a more persuasive argument. . . ." Belknap, *Frankfurter and the Nazi Saboteurs*, *supra*, at 68.[8] Ultimately, Chief Justice Stone could not admit this in the opinion since it would be tantamount to a concession that the Court allowed six men to be executed illegally. Fisher, *Nazi Saboteurs on Trial*, *supra*, at 111-12 (citing "Memorandum re Saboteur Cases," at 1-2 (Sept. 25, 1942), Harlan Fiske Stone Papers, Box 69, *supra*) (if the full opinion confessed error, the Chief Justice realized that this "would leave the present Court in the unenviable position of having stood by and allowed six men to go to their death").

Instead, the Chief Justice pressed his law clerks to justify the Court's *per curiam* order. *See* Mason, *Inter Arma Silent Leges*, *supra*, at 820-21; *see also* A. Christopher Bryant and Carl Tobias, *Symposium Issue: Civil Liberties in a Time of Terror: Article: Quirin Revisited*, 2003 Wis. L. Rev. 309, 323 (2003) (citing Letter from Harlan Fiske Stone to Bennett Boskey (Aug. 9, 1942), Harlan Fiske Stone Papers, *supra*) (noting that Chief Justice Stone's 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"). In drafting the full opinion, Chief Justice Stone was keenly aware that the judiciary was "in danger of becoming part of an executive juggernaut." Mason, *Inter Arma Silent Leges*, *supra*, at 831.

Even Justice Frankfurter later had misgivings about its legal validity. Shortly after the Court issued the full opinion in October 1942, Justice Frankfurter commissioned an analysis of the opinion by a military justice expert, Frederick Bernays Wiener. Fisher, *Military Tribunals & Presidential Power*, *supra*, at 121. In three successive analyses, Wiener found serious constitutional problems with the Court's decision. *Id.* Notably, Weiner criticized the Court for creating "a good deal of confusion as to the proper scope of the Articles of War insofar

8. Colonel Royall's written and oral arguments in the Supreme Court were considered superior to those advanced by the Justice Department. Chief Justice Stone remarked, "I hope the military is better equipped to fight the war than it is to fight its legal battles." O'Donnell, *In Time of War*, *supra*, at 255.

as they relate to military commissions." *Id*. "Weaknesses in the decision flowed 'in large measure' from the administration's disregard for 'almost every precedent in the books' when it established the military tribunal." *Id.*

Wiener's severest criticism of *Quirin* concerned Chief Justice Stone's interpretation of Article of War 15, which provided:

> The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Act of June 4, 1920, ch. 227, 41 Stat. 759, 790.

Without citing reliable authority, Chief Justice Stone asserted that Congress's purpose in enacting Article 15 was to incorporate by reference the rules of the law of war. Wiener disagreed. In a letter to Justice Frankfurter, Wiener quoted Brigadier General Enoch H. Crowder's testimony to Congress in 1916 concerning Article 15's purpose: "It just saves to these war courts [including military commissions] the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient." Letter from Wiener to Frankfurter (Aug. 1, 1943), Felix Frankfurter Papers, Paige Box 12, *supra*; *see also* Danelski, *The Saboteurs' Case*, *supra*, at 73, 79; Fisher, *Nazi Saboteurs on Trial*, *supra*, at 133. In other words, Congress had no affirmative legislation in mind when it enacted Article of War 15.

Because he did not take Article of War 15's legislative history into account, Chief Justice Stone misinterpreted the provision. That was a serious error. In Chief Justice Stone's approach to justify the result in *Quirin*, it was essential that

Congress had adopted the rules of the law of war. If that proposition was false, the government, in his analysis, could not prevail. *See*, Danelski, *The Saboteurs' Case*, *supra*, at 72-73.

Wiener remained critical of *Quirin* for the rest of his life. In discussing *In re Yamashita*, 327 U.S. 1 (1946), in 1987, he said this about *Quirin*:

> The Court followed the *Quirin* case [317 U.S. 1] and the point principally raised against MacArthur was that he had abandoned the rules of evidence. The reason why he had abandoned the rules of evidence was because in the *Quirin* case everything hinged on the hearsay statements of co-conspirators and those couldn't be used against other conspirators. In the *Quirin* case the Court overlooked the preamble of the 1920 Articles of War, the substance of which was that these articles shall at all times and in all places govern the armies of the United States. That was essentially overlooked in the *Quirin* case and necessarily by the Court in the *Yamashita* case.

Frederick Bernays Wiener, Oral History 92-93 (1987) (on file at the library of The Judge Advocates General's School, Charlottsville, VA).

The foregoing indicates that the Court in *Quirin* not only lacked authority to justify the case's result, but it overlooked authority that supported a contrary result.

C. *Quirin* is a Poisoned Precedent

The Court's full opinion in *Quirin*, written and filed after the executions, was quite simply an attempt to justify a *fait accompli*. It was a "dubious decision," not an intellectually honest elucidation of the law. Belknap, *The Supreme Court Goes to War: The Meaning and Implication of the Nazi Saboteur Case*, *supra*, at 87; O'Donnell, *In Time of War*, *supra*, at 262. By necessity, the Court attempted to rationalize its prior *per curiam* order, rendering the final opinion one justly criticized as "little more than a ceremonious detour to a predetermined goal." Corwin, *supra*, at 118. In the end, *Quirin* should be

regarded as "more [of] a political act than a judicial decision." O'Donnell, *In Time of War*, *supra*, at 262.[9]

The facts ascertained by legal historians and scholars such as *amici* following the *Quirin* decision demonstrate that *Quirin* offends our modern sense of justice. *Patterson*, 491 U.S. at 174. The passage of time and change in socio-cultural attitudes, even attitudes held in times of national crisis, highlight *Quirin*'s nettlesome foundation. As Professor Danelski wrote, *Quirin* "is a fascinating tale of intrigue, betrayal, and propaganda; a prosecution designed to obtain the death penalty; questions of judicial disqualification; a rush to judgment; an agonizing effort to justify a *fait accompli*; negotiation, compromise, and even an appeal to patriotism in an effort to achieve a unanimous opinion." Danelski, *The Saboteurs' Case*, *supra*, at 61. These are not qualities of precedent on which the Court should rely today.[10] *See Hamdi v. Rumsfeld*, 542 U.S. 507, 569

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9. Aside from the conspicuous shortcomings in the manner in which *Quirin* was decided, the full opinion itself has been roundly criticized. The "most pernicious legacy of *Ex parte Quirin*" is the "cavalier dismissal of *Ex parte Milligan*," *supra*. O'Donnell, *In Time of War*, *supra*, at 262. "The decision's most glaring deficiency was upholding charges against Haupt, a U.S. citizen." *Id.; see also* Belknap, *The Supreme Court Goes to War: The Meaning and Implication of the Nazi Saboteur Case*, *supra*, at 87 ("Stone realized that Haupt should have been tried for treason in a civil court"). "Equally suspect was Stone's attempt to distinguish between the situations of Milligan and Haupt—both of whom were U.S. citizens and were prosecuted under the law of war at a time when the civil courts were capable of adjudicating the charges." O'Donnell, *In Time of War*, *supra*, at 262; *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 572 n.4 (2004) (Scalia, J., dissenting) ("The plurality's assertion that *Quirin* somehow 'clarifies' *Milligan* . . . is simply false. . . . [T]he *Quirin* Court propounded a mistaken understanding of *Milligan*").

10. The uniform criticism by scholars other than *amici* reflecting the views of *Quirin* today support this conclusion. *E.g.*, Louis Fisher, *Military Tribunals & Presidential Power*, *supra*, at 124 ("The saboteur case of 1942 represented an unwise and ill-conceived concentration of power in the executive branch"); George Lardner, Jr., *Nazi Saboteurs Captured! FDR Orders*

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(2004) (Scalia, J., dissenting) (*Quirin* was "not this Court's finest hour").[11]

In sum, improper influences both dominated and infected the decision-making process in *Quirin*: the state of war and a then-dominating Nazi army; the perceived threat of

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Secret Tribunals; 1942 Precedent Invoked by Bush Against al Qaeda, Wash. Post, at W12 (Jan. 13, 2002) (*Quirin* "is a case that stands as a classic example of what historian Robert Higgs has called the 'Crisis Constitution' overriding the 'Normal Constitution' in times of emergency, making the government's exercise of power more important than the protection of individual rights"); Bryant & Tobias, *Quirin Revisited*, *supra*, at 364 (*Quirin* should be "understood as a relic of an unduly narrow and long-abandoned approach to federal habeas corpus jurisdiction"); Maj. Guy P. Glazier, *He Called for His Pipe and He Called for His Bowl, and He Called for His Members Three — Selection of Military Juries by the Sovereign: Impediment To Military Justice*, 157 Mil. L. Rev. 1, 107-09 (1998) (with respect to the right to a trial by jury, "courts continue to blindly rely on . . . *Quirin* and [its] poorly reasoned conclusion, which was reached upon facts of no moment today"); G. Edward White, *Felix Frankfurter's "Soliloquy" in Ex parte Quirin*, *supra*, at 438 (Justice Frankfurter's soliloquy "revealed himself to be a judge passionately engaged in promoting a particular outcome in a case, and strongly desirous of providing a cursory justification for that outcome. . . ."); Stephen I. Vladeck, *Note: The Detention Power*, 22 Yale L. & Pol'y Rev. 153, 170 (2004) (*Quirin* is "a paradoxical and controversial case through and through").

11. As Pierce O'Donnell summarized the case:

> The frenzied pace of the proceedings and the Germans' execution without a full opinion gave the appearance that the Supreme Court was stampeded by Roosevelt. The justices heard argument without the benefit of reading the briefs ahead of time, decided the case in less than a day with virtually no collective deliberation (much less reflection), and were in the dark about how the secret military commission would rule. In opting to draft an after-the-fact opinion that consciously sought to do the least damage to the judiciary at the expense of justice, Stone injudiciously gave short shrift to several issues on which the German saboteurs had the more persuasive legal argument. In the end, the Court felt it had no choice but to uphold the military tribunal's jurisdiction, casting itself as little more than a "private on sentry duty accosting a commanding general without his pass."

O'Donnell, *In Time of War*, *supra*, at 264 (quoting Mason, *Inter Arma Silent Leges*, *supra*, at 830).

vulnerability of the United States to invasion from both the east and the west; the desire to support President Roosevelt in time of war; judicial bias against the saboteurs and conflicts of interest among Court members; the Roosevelt Administration's threat to eviscerate the Court's authority by executing the saboteurs regardless of the Court's action; and the Court's face-saving rationalization in struggling to validate its *per curiam* order in an opinion written after the executions occurred. Independently and collectively, these influences strike at the heart of *Quirin*'s legitimacy—discrediting an opinion that today forms the fragile backbone of the government's argument, and the decision of the court of appeals, that the President has authority to try petitioner and others similarly situated by military commission.

II. *QUIRIN* SHOULD BE REPUDIATED

Fortunately, *Quirin* has lain largely dormant during the decades since the close of World War II.[12] For sixty years, the

12. *Quirin* was a basis for sustaining the use of a military commission for the trial of Japanese General Tomoyuki Yamashita for crimes committed during the Japanese occupation of the Philippines. *In re Yamashita*, 327 U.S. 1 (1946). That case has also been the subject of widespread analysis and criticism. There, the five judges on the tribunal were officers on General Douglas MacArthur's staff with no legal experience; none of the officers appointed to defend General Yamashita had any criminal defense experience; and General MacArthur himself prepared the rules for the trial, including those governing the admissibility of evidence—rules that essentially allowed for the admissibility of anything "useful." *See, e.g.*, Harlington Wood, Jr., *Judge's Forum No. 2: "Real Judges,"* 587 N.Y.U. Ann. Surv. Am. L. 259, 272-73 (2001). "There had not even been the pretense of a fair and impartial trial in those military circumstances." *Id.* at 273; *see also* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 Harv. Hum. Rts. J. 11, 36 (1997). In two separate dissents, Justices Murphy and Rutledge severely criticized the gross and open violations of Yamashita's rights under the Fifth Amendment. *In re Yamashita*, 327 U.S. at 27 (Murphy, J., dissenting); 327 U.S. at 42 (Rutledge, J., dissenting). As Justice Rutledge reasoned, the country abdicated "the basic standards of trial which, among other guarantees, the nation fought to keep." *Id.* at 42. One commentator noted that the Supreme Court's decision effectively sanctioning the military tribunal in *Yamashita* caused "affirmative damage[] to ourselves and to the faith of men the world over in the honesty and objectiveness of our legal

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injustices exposed after its issuance remained little more than an intellectual curiosity with no serious practical consequences. That all dramatically changed with the Bush Administration's recent effort to breathe life into *Quirin* to support an expanded exercise of presidential power.

Where, as here, an opinion "significantly harms our criminal system and is egregiously wrong," the Court should repudiate it without requiring any further justification. *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring). That is what this Court should do with *Quirin*. Then, without the heavy hand of *Quirin* on the scales of justice, the Court can address the merits of the weighty constitutional issues presented in this case.

CONCLUSION

The Court should repudiate *Quirin* because it is not valid precedent for the establishment of military commissions.

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structure." Belknap, *A Putrid Pedigree, supra*, at 451 (citing A. Frank Reel, *The Case of General Yamashita* 8-9 (1949)). Another commentator argues that "[i]t is dangerous to deny enemy combatants [like General Yamashita] . . . their rights under the Fifth Amendment, for once the door has been opened and left ajar, it may swing wide open." Charles I. Lugosi, *Rule of Law or Rule by Law: The Detention of Yaser Hamdi*, 30 Am. J. Crim. L. 225, 265 (2003).