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'Not a Happy Precedent': The Story of *Ex Parte Quirin*

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The story of *Ex parte Quirin* is at once a gripping tale of wartime espionage, an exciting (though hardly suspenseful) courtroom drama, and a Keystone Kops-worthy farce. Until recently, however, the case held little interest as a legal precedent. The Court upheld President Roosevelt's establishment of a military tribunal to try accused Nazi saboteurs, but on such narrow grounds as to be easily distinguishable in subsequent cases. The troubling circumstances of its decision led the post-World War II Court to refrain from relying on it as authority for a governmental power to limit access to the courts. The original edition of Hart and Wechsler's *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* mentioned the case only in passing, and only for the proposition that the courts have the power to inquire about the legality of a detention. Hart and Wechsler probably agreed with Justice Frankfurter, to whom they dedicated their casebook, that *Ex parte Quirin* was "not a happy precedent."

After 9/11, *Quirin* experienced an unlikely second life. President Roosevelt's actions became the model for the Bush Administration's response to the terrorist attacks, and *Ex parte Quirin* became a centerpiece of the administration's legal defense of that response. The defense has been only partly successful. The modern Court has been quick to embrace *Quirin*'s affirmation of the judicial role in policing the other branches' efforts to displace the Article III courts, but slower to rely on *Quirin*'s approval of Roosevelt's military commission to try the accused saboteurs.

A closer look at the story of *Quirin* shows that the Court has been right to be cautious. *Quirin* was decided in the heat of an all-consuming war, in the shadow of a threat by a popular wartime President to disregard any adverse decision, by Justices recently appointed by that President who were themselves absorbed in the war effort, at least one of whom participated in the decision to create the tribunals in question. The briefing and argument were compressed into a three-day period, and were carried out by lawyers who, though able, lacked expertise in the issues on which the case ultimately turned. The briefs were submitted simultaneously on the day the argument began. The Justices, in turn, were kept in the dark (along with the rest of the nation) about basic facts of the case. Their judgment was issued only hours after the close of argument, only eight days after they had agreed to take the case, and before they had even agreed upon the legal grounds for their decision. In subsequently writing their opinion, they understood that they were justifying a *fait accompli*, six of the accused saboteurs having long since been executed.