ARTICLES

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

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Professor David J. Danelski has recently published an excellent account and analysis of the trial by military commission of the eight German saboteurs who landed on the beaches of Long Island and Florida during World War II, and of *Ex parte Quirin*, in which the Supreme Court, after two days of oral argument at an unusual special session called by Chief Justice Stone, upheld the constitutionality of the military commission's jurisdiction.[1] Like other commentators, Professor Danelski fo-

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I am grateful to Ernest W. Jennes and Louis J. Hector, my colleagues at the junior end of Oscar S. Cox's legal staff in the summer of 1942, to Lloyd Cutler, Deputy General Counsel of Lend-Lease Administration, and to Bennet Boskey (law clerk to Chief Justice Stone when *Ex parte Quirin* was argued and decided), for reading and commenting on a draft of this article. I claim full responsibility and credit, however, for all errors of fact and judgment.

1. David J. Danelski, *The Saboteurs' Case*, 1 J. of S. Ct. Hist. 61 (1996) (commenting on *Ex parte Quirin*, 17 U.S. 1 (1942)). For the drafting of this opinion, see Boskey, *A Justice's Papers: Chief Justice Stone's Biography and the Saboteurs' Case*, 14 S. Ct. Hist. Soc. Q. 10 (1993).

For a detailed but lively narrative account of "Pastorious" (the German code name for the sabotage project), see Eugene Rachlis, *They Came to Kill: The Story of Eight Nazi Saboteurs in America* (Random House, 1961). The arresting title is taken from a radio broadcast by J. Edgar Hoover, but there is no evidence that killing was a major, or even a subsidiary, goal of the would-be saboteurs. This was not the only instance of Hoover's penchant for exaggeration. Thus, he attributed the unmasking of the saboteurs to extraordinary sleuthing by the FBI, although the proximate cause was the defection of one of the saboteurs, whose first attempt to inform on his colleagues was brushed off by the FBI's New York office as the fantasy of a harmless crank. He then went to

cuses primarily on the central issue in *Ex parte Quirin*—the constitutional power of a military commission to try persons apprehended in the United States when the federal and state courts were open and functioning. Not surprisingly, the commentators, including Professor Danelski, have given little attention to two threshold issues that were the subject of intense inquiry during the oral argument but then faded from the forensic scene.

These preliminary issues were (1) whether the petitioners in *Ex parte Quirin* (the would-be saboteurs) had the right to seek any remedy in the federal courts and (2) whether the Supreme Court had jurisdiction to entertain and pass on their petitions for habeas corpus. Despite the fact that President Roosevelt's Proclamation of July 2, 1942, entitled "Denying Enemies Access to the Courts of the United States,"[2] seemed to deny the *Quirin* petitioners all access to the federal courts, the first issue gave the Court little trouble: both during oral arguments and in the ultimate opinion, the Court easily—but without any analysis—concluded that the petitioners could properly seek the assistance of the federal courts. The more ticklish threshold issue was whether the Supreme Court itself had jurisdiction, and it is to that question that I now turn.

Washington, called the United States Government Information Service to inquire about the difference between the FBI and the Secret Service, was told to call a Colonel Kramer of the Army's General Staff Corps, found that Kramer was not in his office, then called the FBI's Washington office, and finally reached someone who took his claim seriously. See id. at 156-59. Another comic feature portrayed by the Rachlis book is the contrast between the stereotypically Teutonic training program in Germany and the trainees themselves, a lumpenproletariat of slovenly and quarrelsome misfits who, if they had eluded capture, might well have blown up themselves rather than their designated targets.

2. The proclamation decreed:

> That all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; *and that such persons shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceedings sought on their behalf, in the courts of the United States, or of its states, territories, and possessions*, except under such regulations as the Attorney General, with the aproval of the Secretary of War, may from time to time prescribe.

56 Stat. 1964 (1942) (emphasis added).

THE SUPREME COURT'S JURISDICTION TO ENTERTAIN PETITIONS FOR HABEAS CORPUS

The second threshold question in *Ex parte Quirin* was whether the Supreme Court had jurisdiction to pass on the petitioners' applications for habeas corpus. If the Court had found it necessary to answer this question at the end of the first day of oral argument, the answer (as explained below) would have been "no." But its jurisdiction was established, retroactively so to speak, by a procedural episode that occurred between the first and second days of argument. This switch in time led Professor Robert E. Cushman, the author of the first published scholarly analysis of *Ex parte Quirin*, to observe that "the Court's jurisdiction caught up with the Court just at the finish line."[3]

Because I was personally involved in this race to the courthouse steps, I am shifting to the first person singular for the rest of this narrative account.[4]

I arrived in Washington in the summer of 1942, one year out of law school, to join the legal staff of the Lend-Lease Administration, whose general counsel was Oscar S. Cox. He was an energetic, resourceful, and self-assured lawyer, who had come to the attention of the White House (especially Harry Hopkins) and of Attorney General Francis Biddle as a principal draftsman of the Lend-Lease Act. His skills led quickly to his additional appointment as Assistant Solicitor General, who in those days was responsible for drafting two categories of documents: the Executive Orders by which President Roosevelt created, reshuffled, and reorganized the myriad of war-time agencies, and the Opinions of the Attorney General, which were especially important in interpreting the Second War Powers Act and other statutes affecting military procurement and other wartime activities. Mr. Cox held his Lend-Lease and Justice Department posts concurrently, and those wide responsibilities were augmented by still a third appointment, as general counsel for the Office of Emergency Management, a kind of executive holding company for the wartime operating agencies. His glittering reputation, enhanced by the reputations of his associates

3. Robert E. Cushman, Ex parte Quirin et al.—*The Nazi Saboteur Case*, 28 Cornell L.Q. 54, 58 (1942).

4. I made no contemporaneous notes, but have relied on my recollection, as refreshed and corrected after consulting the meager documents available in the Supreme Court and Franklin D. Roosevelt Libraries.

(including George Ball, Lloyd Cutler, Myres MacDougal, and Eugene Rostow), was a magnet for ambitious younger lawyers, especially graduates of Yale, Mr. Cox's own school.

On reporting for work, I was greeted briefly by Mr. Cox, but then saw little of him in the Lend-Lease offices. This was because he was almost wholly absorbed in preparing the legal basis for the prosecution of the eight saboteurs and then in assisting Mr. Biddle in the trial before the military commission. These functions did not fit within the job descriptions of any of Cox's three official posts, but they reflected his reputation as a can-do lawyer who brought imagination and verve to any project that attracted his attention. In contrast to the Criminal Division of the Justice Department, which questioned the constitutionality and wisdom of a military trial when the federal courts were open and functioning normally, Mr. Cox vigorously supported the military route.

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, six months after the debacle at Pearl Harbor. A military trial would also make death sentences possible, whereas the most heinous statutory federal crime for which the saboteurs could be prosecuted in the federal courts was probably conspiracy to commit a federal crime under the general conspiracy (§ 371 of Title 18), which at that time carried only a 2-year sentence.[5] Indeed, some corridor wits sardonically speculated that a prosecution in the regular federal courts might have to charge the saboteurs with such ludicrous offenses as entering the United States without valid passports or visas, importing explosives in violation of customs regulations, and failing to register for the draft under the Selective Service Act. The latter suggestion seemed (and was of course intended to seem) especially ridiculous, but life can imitate even satirical art: One of the petitioners actually

5. This barn door was closed in 1948, when conspiracy to destroy war material or war premises was given its own statutory status, with a maximum penalty of 30 years. See 48 Stat. 799 (1948).

For the 1942 views of the Attorney General, see Danelski, *The Saboteur's Case*, 1 J. of S. Ct. Hist. at 61 (cited in note 1) ("clearest offense was attempted sabotage [which] would be difficult to prove"); for additional reasons for the use of a military commission, see id.

registered for the draft after his surreptitious entry into the United States and before he was taken into custody by the FBI.[6]

The corridor speculation about possible offenses may have leaked out and inspired a popular cartoonist to portray J. Edgar Hoover holding the prisoners while the Attorney General stood on a ladder in front of an array of law books, saying "You hold on to them, Edgar, and I'll find something here that we can punish them under."[7]

The military commission, operating in secrecy except for terse public announcements, completed hearing the evidence on Monday, July 27, 1942, and adjourned for several days so that counsel could prepare their closing arguments. On the same day, Chief Justice Stone announced that the Supreme Court would convene on Wednesday in a special session. On the Tuesday between these two events, Mr. Cox summoned me from my Lend-Lease office to the Justice Department, where he and Lloyd Cutler informed me that Colonel Kenneth Royall, chief counsel for the saboteurs (and later Secretary of the Army), needed some help with his habeas corpus applications to the Supreme Court. They also informed me, to my surprise, that I must be well versed in federal practice and procedure because I had recently completed a clerkship with Judge Jerome N. Frank of the Court of Appeals for the Second Circuit.

I was given no time to disclaim knowledge of such matters, or to explain that the very few procedural and jurisdictional issues arising during my clerkship had been brought to the court's attention by counsel. Moreover, all I remembered about federal jurisdiction from my first-year course in civil procedure was that diversity jurisdiction was an antiquated procedural device exploited by wicked corporations to make life difficult for widows and orphans whose breadwinners had died in industrial accidents. There were obviously scores of experts in other offices of the Justice Department who knew more about federal jurisdiction than I; indeed, the real challenge would have been to find anyone who knew less. But I was already familiar with Mr. Cox's view that anything an expert could do, his staff could do better, so I demurred not, and went whistling in the dark to Colonel Royall.

6. Rachlis, *They Came to Kill* at 119 (cited in note 1).
7. Id. at 172-73.

When I reported to Colonel Royall, my dismay deepened. He told me that his pre-war law practice in North Carolina had seldom taken him into the federal courts, and that the arrival of an expert like me was therefore the best news he had received in days. He also said that in applying to the Supreme Court for writs of habeas corpus, he intended to rely on the Court's power to issue "extraordinary writs," as recognized by "the Civil War cases." I inferred that Colonel Royall had not had time to delve deeply into these issues, and that he had probably taken his lead in this procedural plan from conversations with Cox or Cutler. Colonel Royall then said that his brief was being shepherded through the Government Printing Office for presentation to the Supreme Court the next day, before the start of the oral argument, and that no copy was available for me. (When I later saw the briefs for both sides, I found that they discussed the first threshold issue—the legal status of the President's court-closing proclamation—at length, but both assumed without discussion that if the petitioners were entitled to sue, the Supreme Court had jurisdiction to hear and pass on their applications for habeas corpus.) Finally, Colonel Royall informed me that he was focusing wholly on preparing his oral presentation before the Supreme Court, which was to commence on the following day; and he instructed me to use my own judgment if any problems arose because he and his assistant (another military lawyer) would be unavailable in the interim even for consultation.

Leaving Colonel Royall in his unjustifiably euphoric mood, I went immediately to the Department of Justice Library, where I worked until late Tuesday night, without knowledge of the fate of the defense's simultaneous application to the federal district judge for a writ of habeas corpus.[8] I was initially stymied by my inability to find any reference to "extraordinary" writs in the official index to Title 28 of the United States Code,[9] but I then dredged up Section 451, providing as follows:

> The Supreme Court and the district courts shall have power to issue writs of habeas corpus.[10]

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8. *Ex parte Quirin*, 47 F. Supp. 431 (D.D.C. 1942) (habeas corpus denied; under Proclamation of July 2, 1942, petitioners "are not privileged to seek any remedy or maintain any proceeding in the courts of the United States").

9. "Extraordinary writs" was used as a category by Robert L. Stern and Eugene Gressman, *Supreme Court Practice* (Bureau of National Affairs, 1950), but the first edition of this work was not published until 1950.

10. 28 U.S.C. § 451 (1940); for current law, see 28 U.S.C. § 2241(a).

This provision, with a pedigree going back to § 14 of the Judiciary Act of 1789, seemed directly on point, and I learned later that it was the only statutory authority cited in Colonel Royall's brief as the basis for the Supreme Court's jurisdiction to hear and pass on the petitions for habeas corpus.

I was, however, uneasy with § 451's free-floating character and seemingly ubiquitous scope. Taken in isolation and at face value, it implied that any person detained anywhere in the United States for any allegedly unlawful reason could go straight to the Supreme Court for relief. Could the Court issue the Great Writ to any detaining agency, federal, state or local—even to a solitary policeman—without any intervening judicial filter to reduce the applications to a manageable number? Even before immersion in the future Legal Process School of pedagogy, with its emphasis on husbanding the Supreme Court's time and energies and avoiding judicial activism, I could see that § 451 had to be confined lest it become a Frankenstein's monster. I had not yet encountered the tax lawyer's maxim that if a statutory provision seems too good to be true, it probably isn't; but in that spirit, I began to search for other provisions that might restrict § 451's universe. After a while, I unearthed—or perhaps stumbled on—§ 377 of Title 28, which a knowledgeable researcher would have recognized as the "All Writs Act," providing as follows:

> The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, *which may be necessary for the exercise of their respective jurisdictions,* and agreeable to the usages and principles of law (emphasis added).[11]

Although § 377 was not labeled or indexed as authorizing "extraordinary" writs, it arguably was a candidate for that appellation. That, however, suggested two troublesome conclusions: (1) That the "extraordinary" writ authority that Colonel Royall had charged me with investigating was inapplicable, since § 377 by its own terms did not apply to writs that were "specifically provided for by [some other] statute" (e.g., § 451, for habeas corpus); and (2) that while the writs authorized by § 377 could be issued only if they were ancillary to the court's ju-

11. 28 U.S.C. § 377 (1940); for current law, see 28 U.S.C. § 1651.

risdiction, maybe § 451—despite my misgivings—could somehow *create*, not merely build upon, the Court's jurisdiction.[12]

Remembering Colonel Royall's references to Civil War precedents, I hoped that my uncertainties about § 451 might be dispelled by a dose of history. Neither *Ex parte Milligan* (1866) nor *Ex parte McCardle* (1867)—the best known judicial responses to domestic martial law under President Lincoln—proved to be fruitful,[13] but *Ex parte Yerger* (1868) seemed more promising.[14] Indeed, at first blush, it was the answer to a fledgling lawyer's prayers. In *Yerger*, the Supreme Court held that it had jurisdiction to issue a writ of habeas corpus to inquire into the constitutional validity of a judgment by the Circuit Court for the Southern District of Mississippi, remanding a civilian for trial by a military commission on a charge of murder under an 1867 Reconstruction statute, entitled "To Provide for the More Efficient Government of the Rebel states."[15] The facts were sufficiently similar to those in *Ex parte Quirin* (or would be if the district court denied habeas corpus to the *Quirin* petitioners—an event that actually occurred while I was in the library)—except

12. The original version of the All Writs Act (§ 14 of the Judiciary Act of 24 September, 1789) included both habeas corpus and other writs, with a "pursuant to the issuing court's jurisdiction" constraint. It is not clear, however, whether this qualification applied to both habeas corpus and other writs, or only to the latter. For this common problem of interpretation, see LeClerq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 1966 J. of Legal Writing Institute 81.

13. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), ruled that the Supreme Court had jurisdiction to answer questions certified to it by the Circuit Court for the District of Indiana. *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1876), held that the Supreme Court had jurisdiction over appeals from a circuit court, whether the latter's judgment was rendered on appeal from the district court or in an exercise of its own original jurisdiction. Neither of these rulings sheds light on the procedural issue I was concerned with, viz., the jurisdiction of the Supreme Court to grant writs of habeas corpus to the *Quirin* petitioners. See generally William W. Van Alstyne, *A Critical Guide to* Ex parte McCardle, 15 Ariz. L. Rev. 229 (1973).

14. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868). For an extended account of the *Yerger* case's tortuous history, see Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88* at 6 (MacMillan, 1971).

15. In so holding, the Supreme Court rejected the government's claim that its jurisdiction had been eliminated as respects pending cases by the Habeas Corpus Act of 1868 (15 Stat. 44 (1868)), enacted in the wake of the *McCardle* case. *Yerger* also held that the Court's power to grant writs of habeas corpus (at least pursuant to its appellate jurisdiction) is not limited to cases of confinement by a lower court, but also encompasses cases of imprisonment under military authority.

For precursors of *Yerger*, see *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), acutely analyzed in David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* at 79-82 (U. of Chicago Press, 1985), and *Ex parte Siebold* 100 U.S. 371 (1879) (when habeas corpus is sought in case falling within the appellate jurisdiction of the Supreme Court, writ can be granted only if detention is by a tribunal lacking in jurisdiction, not one that has jurisdiction but has allegedly committed error).

for a subsequent change in the judicial federal hierarchy. This difference was that in 1869 there was no intermediate court between the circuit court (where *Yerger's* judicial journey began) and the Supreme Court, while the petitioners in *Ex parte Quirin* could, if they lost in the District Court for the District of Columbia, appeal to the Court of Appeals for the District of Columbia before going on to interrupt the Supreme Court's summer vacation. Although there were some precedents—mostly rather antiquated—for employing habeas corpus as a substitute for certiorari,[16] its use to evade the intermediate scrutiny of the Court of Appeals was something else again.

The controlling statute on this issue was § 238 of the Judicial Code (28 U.S.C. § 345 (1940)), providing that "direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in [certain specified provisions, none of them applicable to *Quirin*] *and not otherwise*" (Emphasis added). A corollary of this provision was § 128 of the Judicial Code (28 U.S.C. § 225), providing that "[t]he circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions . . . [i]n the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

Taken together, these provisions left little room for the use of habeas corpus to bring a district court judgment to the Supreme Court without stopping en route in the circuit court of appeals. Moreover, in *Ex parte Mirzan*, the Court had announced its distaste for so-called "original" petitions for habeas corpus:

> As . . . an appeal lies to this court from the judgments of the Circuit Courts in *habeas corpus* cases, this court will not issue such a writ, *even if it has the power* . . . if there are no special circumstances in the case.[17]

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16. See Reynolds Robertson and Francis R. Kirkham, *Jurisdiction of the Supreme Court of the United States* 847 (West, 1936); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, *Supreme Court Practice* § 11.3 (Bureau of National Affairs, 7th ed. 1993).

17. *Ex parte Mirzan*, 119 U.S. 584, 586 (1887) (emphasis added); see also Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 S. Ct. Rev. 153, 206 (characterizing this procedure as an "anachronism").

On reading *Ex parte Mirzan*, Colonel Royall would have found that it relied on *Ex parte Royall Nos. 1 and 2*, 117 U.S. 241 (1886) and *Ex parte Royall*, 117 U.S. 254 (1886), in which Colonel Royall's homonym was both petitioner and counsel pro se in a habeas corpus case—and lost in both capacities.

Assuming, however, that this last clear chance to skip the court of appeals survived the enactment in 1911 of §§ 345 and 225 of Title 28 (as was implied without discussion by a 1919 case),[18] *Ex parte Quirin* arguably met *Mirzan*'s reference to a case of "special circumstances."

Another possible rationale for skipping the court of appeals was that the Supreme Court's "appellate jurisdiction," as conferred by Art. III of the Constitution, encompassed appeals from the proceedings before the military commission because it had enough judicial genes to bring its proceedings within the constitutional reference to "all cases, in law and equity, arising under this Constitution."[19] Perhaps this contention, which would render the proceedings before the district court moot, could gain some support from the fact that Chief Justice Stone convened the special session of the Supreme Court on the day before the habeas corpus petition was filed in the district court; arguably, it seemed to me, he would not have taken this precipitous step unless he believed that the proceedings before the military commission—*taken in isolation*— supplied a tenable basis for the exercise of the Court's appellate jurisdiction.

In thinking about this theory in the Justice Department Library, I did not know that before the Chief Justice convened the special session, there had been back-channel discussions between counsel for both sides and several Justices,[20] during which Colonel Royall might have assured the Justices that he would not present a naked petition to the Court, but would promptly go to the district court. Since Colonel Royall had not told me that he even contemplated the possibility of an appeal to the Court of Appeals for the District of Columbia, however, I was

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18. *Ex parte Hudgings*, 249 U.S. 378 (1919) (granting habeas corpus to petitioner held for contempt by a federal district judge acting in excess of authority and arbitrarily). I note that this remedy is accepted as still valid, though described as rare, by Stern, Gressman, and Shapiro's authoritative treatise, in their analysis of "extraordinary writs." Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, *Supreme Court Practice* § 11.3 (Bureau of National Affairs, 6th ed. 1986).

19. U.S. Const., Art. III, § 2. For the still unresolved issue of the Supreme Court's power to review quasi-judicial determinations by independent governmental agencies, without prior involvement of a lower federal court, see 16B Charles Allen Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 4005 (West Publishing, 1996); see also *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948) (no power to review actions of tribunal set up by General MacArthur as agent of Allied Powers because it "is not a tribunal of the United States"). Quaere: Is this rationale a negative pregnant, implying that a military commission established solely by United States action *could* qualify for direct review by the Supreme Court?

20. See Danelski, 1 J. of S. Ct. Hist. at 68 (cited in note 1).

left with the uncomfortable feeling that the Chief Justice had convened the special session with no greater foundation than the possibility of a threshold petition for habeas corpus to the district court, and perhaps without even that rickety infrastructure to support action by the Court.[21]

Thus, in the end, I could find no clearcut route for Colonel Royall to get from the district court to the Supreme Court without stopping in transit in the Court of Appeals for the District of Columbia. But by the time I finished my research, about ten hours before the Supreme Court was to start hearing oral argument, there was no time to perfect an appeal to the court of appeals, even if I could get my gloomy thoughts through to Colonel Royall and convince him of their accuracy. I was uneasy about a petition to the Supreme Court for an "original" writ of habeas corpus, which was Colonel Royall's plan, without a more careful analysis of this procedure than time allowed. As for direct review by the Supreme Court of the proceedings of the military commission on the theory that it was a quasi-court, I was uncomfortable about floating this novel claim in the absence of any support in the precedents.[22]

I therefore set out my lugubrious conclusions in a memorandum and, not knowing how to reach Colonel Royall, left it in

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21. In my brief conversation with Colonel Royall, I gained the impression that he thought that the Supreme Court's power to issue "extraordinary" writs was an inherent aspect of its jurisdiction, and that the power could be exercised even in the absence of any underlying proceeding in a lower court. In Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* 657 n.* (Viking Press, 1956), however, the author quotes a 1952 memorandum by Lauson Stone (the Chief Justice's son, who was part of the defense team until the proceedings before the Court), indicating that Royall had abandoned that notion after receiving a phone call from Justice Roberts, citing *Marbury v. Madison*, presumably for its ruling that the Supreme Court's "original jurisdiction" as conferred by Article III of the Constitution cannot be enlarged by Congress. I am certain that Colonel Royall did not entrust me with the secret of this phone call, an *ex parte* conversation on a matter that was about to come before the Court: such an event would have astonished me, despite my total immersion in legal realism at the Yale Law School.

The Lauson Stone memorandum also reports that Colonel Royall gave some thought to another route to the Supreme Court, viz., to treat the refusal of Justice Black to issue a writ of habeas corpus in his temporary capacity as a circuit judge as an order that could be appealed to the Supreme Court.

I have been unable to track down the original of either Lauson Stone's narrative account of the case or his 1952 letter to Professor Mason, either in the Judge Advocate General's office or at the Princeton University Library, with which Professor Mason deposited his papers.

22. In preparing this article, I found that I missed another possible route from the district court to the Supreme Court, viz., the "common law" writ of certiorari, said to be free of the conditions attached by Congress to the exercise of the statutory writ of certiorari. For this rara avis, see 16B Wright, Miller, and Cooper, *Federal Practice and Procedure*§ 4005 (cited in note 19).

Mr. Cox's office with a request that it be transmitted as soon as possible to Colonel Royall, with no confidence that it would reach him in time to influence his oral presentation.

ORAL ARGUMENT—FIRST DAY

When the Supreme Court convened on Wednesday, July 29, Colonel Royall began his opening statement by announcing that "on a previous day" (i.e., the day before the argument), the petitioners had applied to a judge of the District Court for the District of Columbia for leave to file petitions for a writ of habeas corpus, and that the judge had refused to permit the petitions to be filed.[23] "We therefore ask," said Colonel Royall, "the consideration of this present writ in the appellate jurisdiction of the Supreme Court."[24] Colonel Royall went on to inform the Court that "[t]he question of the appellate jurisdiction of the Court and the issuance of a writ of habeas corpus in connection with your appellate jurisdiction has been given careful study by the Attorney General's Office, as well as by ourselves, if the Court desires any discussion of that." The Chief Justice then asked Mr. Biddle if he challenged the Court's jurisdiction. "I do not," was the response.[25]

Justice Frankfurter, however, quickly made it clear that Colonel Royall and the Attorney General might be unexpectedly harmonious comrades-in-arms, but that their agreement did not confer jurisdiction on the Court:

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23. Philip B. Kurland and Gerhard Casper, eds., 39 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* (University Publications of America, 1975). Dasch, the defecting informant (see supra, note 1), was represented by separate counsel before the military commission and chose not to participate in the judicial proceedings, presumably in the hope of leniency.

24. Id. at 497. Colonel Royall also referred to a memorandum on the jurisdictional issue which "was finished at quarter to twelve," i.e., fifteen minutes before the oral argument commenced, saying that "[t]here should be no difficulty in filing it." Id. at 501. I cannot identify this memorandum, nor did I find it in the records I consulted in writing this article. I suspect, however, that it was the memorandum I prepared for Colonel Royall or a typed or revised version of it that was completed by one of the military lawyers after I finished my work in the early hours of the first day of argument. If so, Colonel Royall was clutching at straws when he intimated that it was helpful and that he would file it, and it is likely that on reading it in relative tranquillity at the end of the first day of argument, he saw that it would be more damaging than helpful, and hence decided not to submit it. In any event, my doubts were in effect mooted by the later decision to appeal the district judge's decision to the court of appeals.

25. Id. at 498.

> Mr. Justice Frankfurter: Will either you, Colonel Royall, or the Attorney General state briefly the grounds on which you claim this Court has jurisdiction, how it has such jurisdiction over an order to review [District] Justice [sic] Morris' denial of the petition?
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> Colonel Royall: The Court is familiar with the statute which provides that the Supreme Court may issue a writ of habeas corpus. That statute must, of course, be construed consistently with the Constitution of the United States, which limits the jurisdiction of this Court to an appellate jurisdiction. To give the statute any meaning at all, therefore, it must be construed as being a method of appeal or a method of review. The ordinary methods of review are not included within the writ of habeas corpus. Therefore the ordinary procedure —
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> Mr. Justice Frankfurter: Why do you say that?
>
> Colonel Royall: Because a writ of habeas corpus is, in and of itself, a different type of writ from a writ of certiorari or any other method of review with which I am familiar.
>
> Mr. Justice Frankfurter: You mean that the restriction upon the appellate jurisdiction of this Court, Article III [i.e., that the Court's appellate jurisdiction is subject to "such exceptions and regulations" as Congress may direct], does not apply to habeas corpus cases?
>
> Colonel Royall: I think it does apply to habeas corpus, but habeas corpus, being provided by statute, is an additional method of review. By "additional method" I mean it is in addition to certiorari or any other method of review prescribed by law.[26]

This opaque response to Justice Frankfurter's jurisdictional question is reminiscent of a report, current in my law school days, that Professor Frankfurter had asked a trembling student in a moot court argument, "Counselor, how did you get here?" In one version of the anecdote, the student responded "By train, Your Honor"; in another version, the response was to faint away. As a graduate of the Harvard Law School, Colonel Royall was no doubt familiar with this tale; his response was less dramatic, but not very much more informative.[27]

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26. Id. at 498-99.

27. Bennett Boksey informs me of an earlier (very likely the original) version of this anecdote, in which the judge was Justice Holmes and the lawyer responded that he

Justice Frankfurter then unveiled the core of his jurisdictional issue, viz., that the 1891 legislation creating the circuit courts of appeal[28] precluded direct review of district court judgments by the Supreme Court. Colonel Royall acknowledged that Congress had the power to restrict the Supreme Court's appellate jurisdiction, but asserted that the 1891 legislation did not apply to habeas corpus. He went to say that this issue had been settled, "almost upon the exact facts [of *Ex parte Quirin*]" by *Ex parte Yerger*.[29]

But Justice Frankfurter pointed out that *Ex parte Yerger* had been decided before 1891. To this rejoinder, Colonel Royall responded that "the position that we must take and do take in this matter" was that the 1891 Act did not apply to habeas corpus: "[A]s a practical matter, this was all that we could do." The practical problem, Colonel Royall explained, was that the Presidential Order establishing the military commission provides "for no review in the ordinary sense."[30] Thus, the sentences imposed by the commission (which could include the death penalty) might be confirmed by the President and put into effect before any judicial review could be sought. (Before the trial began, President Roosevelt had said to the Attorney General "I won't hand [the saboteurs] over to any United States marshal armed with a writ of *habeas corpus* Understand?")[31] "[I]t is apparent," Royall said, "that it would have been impossible, even in the matter of preparing papers, if nothing else, to have followed anything other than this procedure," viz., an appeal to the Supreme Court directly from the district court's denial of habeas corpus. Colonel Royall went on, almost plaintively, to say: "Defense counsel conceive that it is their duty to assert every right which these petitioners have to assert. They do not conceive it to be their duty to resort to anything of a dilatory nature; and this is a prompt method, if sound, of dealing with the matter."[32]

This claim that necessity is the mother of invention did not sit well with Justice Frankfurter:

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got to the Court via the Baltimore and Ohio Railroad.

28. 26 Stat. 826 (1891).

29. Kurland and Casper, 39 *Landmark Briefs* at 499 (cited in note 23). See *Yerger*, 75 U.S. at 85.

30. Kurland and Casper, 39 *Landmark Briefs* at 500 (cited in note 23).

31. Danelski, 1 J. of S. Ct. Hist. at 68 (cited in note 1).

32. Kurland and Casper, 39 *Landmark Briefs* at 500 (cited in note 23).

> Mr. Justice Frankfurter: The question on which I would like your view is why, after Justice [sic] Morris' denial, you did not take steps to appeal therefrom before the Circuit Court of Appeals for the District.
>
> Colonel Royall: Justice [sic] Morris' denial was at eight o'clock last night, or probably thereafter. The Commission meets again tomorrow [i.e., Thursday, July 30] to dispose of this matter, at least to hear our arguments and then to dispose of it as it sees fit.
>
> Mr. Justice Frankfurter: Why could not the appeal have been perfected before the circuit court of appeals? That does not require elaborate papers.
>
> Colonel Royall: No, it does not. The appeal might have been perfected if we had had a little additional element of time.
>
> Mr. Chief Justice Stone: That would not affect our jurisdiction.[33]

The Chief Justice's assertion that an appeal from the district court to the circuit court of appeals "would not affect our jurisdiction" is astonishing, since as explained below, this was the very bridge that surmounted the jurisdictional gap that so troubled Justice Frankfurter. Even more remarkable, Colonel Royall acquiesced in the Chief Justice's remark, like a drowning sailor who spurns a lifeline.

Attorney General Biddle then intervened to express his agreement with Colonel Royall's theory that the Supreme Court could use the writ of habeas corpus to review district court judgments as a substitute for a writ of certiorari, saying that "In this case your respective jurisdiction is the appellate jurisdiction over writs of habeas corpus." He dismissed Justice Frankfurter's expressed fear that the Court "might be deluged with cases" if this procedure was accepted by asserting that the Court had discretionary control of its workload.[34]

Justice Jackson then brought the protracted jurisdictional imbroglio to an end by floating a commonsense suggestion

33. Id. at 500-01. *Quaere* whether Judge Morris, having been repeatedly promoted to Justice by both counsel and members of the Court in this argument, gained crypto-tenure as such.

34. Id. at 504-06.

which enabled the Court, at long last, to move forward and hear argument on the case's substantive issues:

> Mr. Justice Jackson: Would there be objection on your part to filing an additional piece of paper which would obviate the [jurisdictional] difficulty?
>
> The Attorney General: I do not see how I could urge any objection. If counsel wishes to file any papers, let him do so.
>
> Mr. Chief Justice Stone: You [i.e., Colonel Royall] may take that under advisement if you wish. If you want to say more on the jurisdictional point or file further briefs, that may be done; and if counsel wish to make an application for certiorari, I suppose that is open.[35]

CERTIORARI BEFORE JUDGMENT BELOW— JURISDICTION IN THE NICK OF TIME

Immediately after the first day of oral argument, I was assigned (with an associate whose name I cannot now recall) to pursue Justice Jackson's suggestion that "an additional piece of paper [be filed to] obviate the difficulty." In fact, two additional documents were required, one to get the case from the district court to the court of appeals for the District of Columbia, and the second to bring it from there to the Supreme Court.

The first step proved to be more troublesome than we anticipated. Assuming that the record on appeal should include a transcript of the proceedings before the military commission,[36] we were dismayed to find that there were no extra copies on hand; and in any event, the transcript was a classified document that arguably could not be entrusted to anyone without a security clearance, not even the appellate court clerk and staff. We sought to sidestep this obstacle by stipulating that the record already on file with the Supreme Court should be deemed to have been duly filed in the Court of Appeals for the District of Columbia. The court clerk, however, refused to accept this makeshift and no doubt unprecedented document in lieu of the transcript itself.

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35. Id. at 506.

36. In hindsight, this assumption seems erroneous to me, since the record on which the district judge based his decision was the Presidential Proclamation closing the courts to the petitioners, a ground that made the testimony before the military commission immaterial.

With only a hour or so left before the Supreme Court was to hear the second day of oral argument, I reported this snag to Mr. Cox. (To be sure, my assignment was to work for Colonel Royall, but he was preparing for the second day of argument in a location not known to me.)[37] Either Mr. Cox or his deputy, Lloyd Cutler, informed the Chief Justice of this unanticipated contretemps and shortly thereafter I was informed that the recalcitrant clerk would now accept whatever papers we gave him, with no questions asked.

The final step was to petition the Supreme Court for a writ of certiorari to bring the case up from the court of appeals before judgment. Authority for this preemptory action was granted by § 240 of the Judicial Code:

> In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, *either before or after a judgment or decree by such lower court*, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal.[38]

The underscored language authorized the Supreme Court to bring the case up without delay, thus achieving three objectives in one fell swoop: (1) answering Justice Frankfurter's "How did you get here?" question; (2) enabling the Supreme Court to decide the case immediately, without waiting in the wings until the court of appeals had acted; and (3) dispelling Colonel Royall's fear that the petitioners might be executed before the constitutionality of the military commission had been decided, since there was no outstanding injunction or other judicial order prohibiting the military commission and the President from acting at once.

The Court granted the writ of certiorari immediately, so that—to quote again Professor Cushman's words—"the Court's

37. In this episode, as throughout my work on *Ex parte Quirin*, there was a blurring of the lines of responsibility that perhaps should have evoked agonizing thoughts about conflicts of interest in representing one's client. If this issue had been raised at the time and if I had been a phrase-maker, I suppose that I would have claimed to be "counsel for the situation."

38. 28 U.S.C. § 347(a) (1940) (emphasis added); see also 28 U.S.C. § 350 (1940).

jurisdiction caught up with the Court just at the finish line."[39] Another way of characterizing the finale was that the writ of certiorari conferred legitimacy, nunc pro tunc, on the two days of oral argument.

A lingering mystery in this episode is why none of the Justices drew attention during the oral argument to the Court's power to grant certiorari before judgment by the Court of Appeals.[40] Does this mean that not one of them remembered the language of the basic certiorari statute or even the Court's own Rule 39,[41] which dealt explicitly with this power to expedite review? This authority had not fallen into desuetude; it was exercised only a few years before *Ex parte Quirin* in three important cases involving the constitutionality of New Deal legislation.[42] Of the Justices who heard the *Quirin* case, four might have been expected to remember the expedited procedure used in bringing these three cases to the Supreme Court from the court of appeals: the Chief Justice and Justice Roberts, who had partici-

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39. Cushman, 28 Cornell L.Q. at 58 (cited in note 3).

40. Until I examined the transcript of the oral argument in preparing this article, I thought that one of the Justices, probably Jackson, had mentioned the Court's expediting power. But I readily acknowledge that after 55 years of wear and tear, my recollection is less reliable than the transcript, which records no reference to the Court's power to bring the case up before action by the court of appeals.

For a thorough analysis of the Court's power to grant certiorari in a case docketed in the courts of appeal before waiting for judgment there, see James Lindgren and William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari before Judgment in the Court of Appeals*, 1986 S. Ct. Rev. 259.

41. For Rule 39, see 306 U.S. 720 (1939).

Bennett Bosky informs me that he is certain that all of the Justices were familiar with the certiorari-before-judgment procedure. This increases my surprise that no one saw fit to bring this shortcut to Col. Royall's attention, once it became obvious that it was unknown to both him and the Attorney General and that they therefore thought that an appeal from the District Court of Appeals would seriously postpone action by the Supreme Court. Moreover, Justice Jackson observed during the argument about procedure that "it is a question whether, in dealing with it, we should send this to some other court and endure a period of delay, or go ahead and decide it." Tr. at p. 505. This does not sound like the comment of a Justice who knew that the Court would not have to "endure" so much as an hour of delay if, once Col. Royall docketed an appeal from the District Court to the Court of Appeals, the Court exercised its prerogative to grant certiorari before judgment below. Of course this was wartime, tensions were high, and even the Justices might overlook the details of a mundane but unusual judicial procedure. Perhaps one could say of this feature of *Ex parte Quirin* that *inter arma, silent judices*. In the event, there was, of course, no delay; but there might have been if counsel, left in the dark by the Justices, had not stumbled on the certiorari-before-judgment procedure after the first day of oral argument.

42. *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 240 (1935) (the Gold Clause Case); *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935) (holding the Railroad Retirement Act of 1934 unconstitutional); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating the labor provisions of The Bituminous Coal Conservation Act).

pated as members of the Court in all three cases; Justice Reed, who had represented a government agency in one case and served as Solicitor General when another was decided; and, above all, Justice Frankfurter, the New Deal's brooding legal omnipresence and the nation's leading academic authority on the Supreme Court.[43] Indeed, in one of Frankfurter's books, he had observed that a 1925 decision granting certiorari before judgment "foreshadows more frequent exercise of this power."[44]

Of course, the Justices have no obligation to rescue a drowning lawyer, but there was an independent collegial reason—compelling enough, one would have thought, to survive strict scrutiny—for calling attention during the oral argument to the possibility of expedited review. This reason is that the jurisdictional objections pressed by Justice Frankfurter that made Colonel Royall squirm must also have troubled the Chief Justice, who in the first year that he was at the Court's helm faced the prospect that the drama of his summons to the Justices to assemble on short notice in a special summer session would dissolve into farce if they then had to twiddle their thumbs while the less august judges of the appellate court debated and decided the issues already argued at length above. The Chief Justice was, of course, spared this embarrassment by the Court's exercise of its power to grant certiorari before judgment, which supplied it with nunc pro tunc jurisdiction.

Was anything sacrificed by this expedited review? Seven years after *Ex parte Quirin* was decided, Justice Frankfurter joined with Justice Burton in protesting the grant of certiorari before judgment in *Youngstown Sheet & Tube Co. v. Sawyer*, involving a Presidential order directing the Secretary of Commerce to seize and operate most of the nation's steel mills to forestall an impending strike during the Korean War. The dissenters asserted:

> The constitutional issue which is the subject of the appeal deserves for its solution all of the wisdom that our judicial process makes available. The need for soundness in the result outweighs the need for speed in reaching it. The Nation is entitled to the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals. Little time

43. See, e.g., Felix Frankfurter and Harry Shulman, *Cases and Other Authorities on Federal Jurisdiction and Procedure* 731 (Callghan, rev. ed. 1937) (citing two of these cases on the Supreme Court's "before judgment" appellate power).

44. Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 262 n.24 (Macmillan, 1928).

> will be lost and none will be wasted in seeking it. The time taken will be available also for constructive consideration by the parties of their own positions and responsibilities. Accordingly, I would deny the petitions for certiorari and thus allow the case to be heard by the Court of Appeals.[45]

On the other hand, Justice Frankfurter sometimes believed that "the need for speed" was paramount. In *Brown v. Board of Education*, according to his "law clerk for life," he "did something unprecedented," viz., he "had the Court put out an order inviting counsel in [*Bolling v. Sharpe* (involving school segregation in the District of Columbia)] to file a petition for certiorari which, the order said, would be granted so that the Court would have the case before it along with the cases coming from Kansas, Delaware, South Carolina, and Virginia."[46] *Bolling v. Sharpe*, of course, raised an issue not present in the other cases: the legal status of school segregation in a geographical area not covered by the Equal Protection Clause of the Fourteenth Amendment. Evidently, however, Justice Frankfurter thought the Supreme Court could dispense with whatever "wisdom" the Court of Appeals for the District of Columbia could provide on this issue.

Aside from the hectic flurry of papers in *Ex parte Quirin*, for the petitioners it was Tweedledum-Tweedledee whether the Court granted their petition for an "original" writ of habeas corpus or instead granted certiorari before judgment by the court of appeals; and this choice was equally inconsequential for the government. Moreover, in either case, the petitioners had to demonstrate that their case deserved expedited review; and this judgment was surely not affected by the ceremonial visit to the court of appeals that the Supreme Court demanded and blessed. Justice Frankfurter, to be sure, feared that the Court would be "deluged" with cases if it sanctioned the habeas corpus route. But why would that have swamped its docket, given that any litigant seeking certiorari can request that it be granted before judgment below? If anything, the conventional certiorari route would seem likely to generate more requests for expedited re-

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45. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937, 938 (1952). When the case was heard on the merits, however, Justice Frankfurter concurred in the Court's decision, which held that the President had invaded the jurisdiction of Congress in violation of the principle of separation of powers. Id. at 579.

46. Philip Elman, interviewed by Normal Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 Harv. L. Rev. 817, 826 (1987). For Elman's status as a law clerk with lifetime tenure, see id. at 817 and 832.

view; after all, it is open to all litigants and they are not penalized for asking, while the habeas corpus route could be employed only if there is a complaining corpus, and this is an inherently limited category of cases.