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## Book Review

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# BOOK REVIEW

## QUESTIONING *QUIRIN*

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LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW (UNIV. PRESS OF KAN. 2003) 193 PP.

Recent developments in the “war on terrorism” have accorded *Ex parte Quirin*,<sup>1</sup> a World War II Era opinion, fresh relevance. *Quirin* held that President Franklin D. Roosevelt (FDR) had the authority to establish a military commission, which subsequently tried, found guilty, and suggested punishment for eight Nazi saboteurs immediately after the Supreme Court rejected their petitions for writs of habeas corpus. *Quirin* languished as a wartime artifact until November 2001, when President George W. Bush invoked the ruling to create military tribunals, as well as to purportedly abrogate federal court jurisdiction and deny federal court access to those prosecuted or held for suspected terrorist behavior. The Supreme Court recently invalidated President Bush’s action.<sup>2</sup> High-echelon administration officials have concomitantly used *Quirin* to support related measures in the “war on terrorism” and to litigate terrorism cases. The new events have afforded *Quirin* much salience, provoking great interest in, and considerable reliance on, the opinion among federal lawmakers, judges, and scholars.

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<sup>1</sup> 317 U.S. 1 (1942). For valuable assessments of the relevant factual background in *Ex parte Quirin*, see GEORGE J. DASCH, EIGHT SPIES AGAINST AMERICA (1959); MICHAEL DOBBS, SABOTEURS: THE NAZI RAID ON AMERICA (2004); EUGENE RACHLIS, THEY CAME TO KILL: THE STORY OF EIGHT SABOTEURS IN AMERICA (1961).

<sup>2</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

Thus, Louis Fisher's new work, *Nazi Saboteurs on Trial: A Military Tribunal and American Law*<sup>3</sup> (*Nazi Saboteurs*), and his valuable contribution to illuminating *Quirin* merit scrutiny. In this Review, I first descriptively assess *Nazi Saboteurs*. The Review then treats the monograph's numerous beneficial features and ascertains that it enhances understanding of the important decision in *Quirin*. I conclude with several recommendations for future analysis of *Quirin*'s impact.

### I. DESCRIPTIVE ANALYSIS

Fisher first evaluates the mission Germany assembled to conduct sabotage in the United States once the U.S. declared war.<sup>4</sup> He finds that the eight saboteurs were ordinary persons,<sup>5</sup> who attended a training camp<sup>6</sup> and landed on American soil with explosives in mid-June of 1942.<sup>7</sup> Fisher analyzes the saboteurs' mistakes,<sup>8</sup> such as tendering a bribe to a Coast Guard official who witnessed their arrival.<sup>9</sup> Two quickly concluded that defecting might save them, and all eight were in custody by June 27.<sup>10</sup>

He then surveys the commission FDR and Attorney General Francis Biddle devised, mainly to facilitate capital punishment.<sup>11</sup> On July 2, an

<sup>3</sup> LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* (2003). Related books are by DOBBS, *supra* note 1, RACHLIS, *supra* note 1, and DASCH, *supra* note 1, with the last being an unpersuasive account by one saboteur. Louis Fisher has furnished Congress cogent advice for three decades as a researcher for the congressional research service. *See infra* text accompanying note 75.

<sup>4</sup> FISHER, *supra* note 3, at 1-23; *accord Quirin*, 317 U.S. at 21-22; David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 61-64, 66 (1996); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 734-45 (2002).

<sup>5</sup> *See* FISHER, *supra* note 3, at 6-16; *see also* Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 62 (1980); Danelski, *supra* note 4, at 61-64, 66.

<sup>6</sup> *See* FISHER, *supra* note 3, at 16-23; *see also Quirin*, 317 U.S. at 21; Danelski, *supra* note 4, at 63.

<sup>7</sup> *See* FISHER, *supra* note 3, at 25-27; *see also Quirin*, 317 U.S. at 21; Belknap, *supra* note 5, at 62; Robert Cushman, *Ex parte Quirin et al—The Nazi Saboteur Case*, 28 CORNELL L.Q. 54 (1942).

<sup>8</sup> I rely substantially in the remainder of this paragraph on FISHER, *supra* note 3, at 25-42.

<sup>9</sup> *See id.* at 26-27; *see also* Belknap, *supra* note 5, at 62 n.9; Danelski, *supra* note 4, at 63-64.

<sup>10</sup> *See* FISHER, *supra* note 3, at 32-42; *see also* RACHLIS, *supra* note 1, at 150-65; Belknap, *supra* note 5, at 62; Cyrus Bernstein, *The Saboteur Trial: A Case History*, 11 GEO. WASH. L. REV. 131, 136 (1943).

<sup>11</sup> I rely substantially in this paragraph on FISHER, *supra* note 3, at 43-85. *See id.* at 48-49; *see also* Turley, *supra* note 4, at 736-37; Memorandum from President Franklin Delano Roosevelt to Att'y Gen. Francis Biddle (June 30, 1942) (Box 76, FDR MSS); Memorandum from Att'y Gen. Francis Biddle to President Franklin Delano Roosevelt, (June 30, 1942)

Executive Order instituted the tribunal, named its members, prosecutors, and defense lawyers, and delineated its strictures.<sup>12</sup> On the same day, a Presidential Proclamation ostensibly vitiated federal court jurisdiction.<sup>13</sup> The approach of the tribunal differed from a court martial: it tolerated lenient evidentiary standards, allowed conviction and proposed sentences on a two-thirds vote, and named Biddle the prosecutor and FDR the final decision-maker.<sup>14</sup> The commission invented rules as needed over the three-week secret trial.<sup>15</sup> When the defense said it might file habeas corpus petitions,<sup>16</sup> Biddle agreed to seek Supreme Court review, which was granted.<sup>17</sup> After the Supreme Court denied relief on July 31,<sup>18</sup> the tribunal promptly concluded, suggested that all the saboteurs be executed, and sent the 3000 page transcript to FDR.<sup>19</sup> Within days, FDR imposed the death penalty on six of the offenders and long sentences on the two defectors.<sup>20</sup>

Fisher turns to the Court's proceeding.<sup>21</sup> He assesses the briefs, the nine hour oral arguments, and the terse per curiam order<sup>22</sup> that rejected the petitions and stated that an opinion would be issued later.<sup>23</sup> Chief Justice Harlan Fiske Stone could find minimal justification for the order,<sup>24</sup> but urged that the Court resolve unclear questions against the saboteurs, lest it

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((OF) 5036, FDR MSS).

<sup>12</sup> See Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 2, 1942); see also FISHER, *supra* note 3, at 52-53.

<sup>13</sup> See Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942); see also FISHER, *supra* note 3, at 50-52.

<sup>14</sup> See FISHER, *supra* note 3, at 50-53; see also Danelski, *supra* note 4, at 66-67; Turley, *supra* note 4, at 736-37.

<sup>15</sup> See FISHER, *supra* note 3, at 53-64; see also Belknap, *supra* note 5, at 66-67; Danelski, *supra* note 4, at 67.

<sup>16</sup> Belknap, *supra* note 5, at 68-69; see FISHER, *supra* note 3, at 56, 64-67.

<sup>17</sup> FISHER, *supra* note 3, at 56, 67-68; accord RACHLIS, *supra* note 1, at 181-82; Danelski, *supra* note 4, at 68.

<sup>18</sup> See FISHER, *supra* note 3, at 68-69; see also RACHLIS, *supra* note 1, at 272; Turley, *supra* note 4, at 739.

<sup>19</sup> See FISHER, *supra* note 3, at 66-77; see also Belknap, *supra* note 5, at 77; Danelski, *supra* note 4, at 71.

<sup>20</sup> FISHER, *supra* note 3, at 77-80; accord Belknap, *supra* note 5, at 77; Danelski, *supra* note 4, at 72. Fisher offers instructive material on the fourteen people who were arrested for assisting the saboteurs. See FISHER, *supra* note 3, at 68-71.

<sup>21</sup> I rely substantially in this paragraph on FISHER, *supra* note 3, at 87-125.

<sup>22</sup> See *id.* at 87-108; see also RACHLIS, *supra* note 1, at 272; Belknap, *supra* note 5, at 70-75; Danelski, *supra* note 4, at 68-69. Fisher shows how these developments occurred in three days, emphasizing the "rush to judgment."

<sup>23</sup> FISHER, *supra* note 3, at 68, 108; accord Belknap, *supra* note 5, at 75-76; Danelski, *supra* note 4, at 71.

<sup>24</sup> FISHER, *supra* note 3, at 109-13; accord Belknap, *supra* note 5, at 81-87; Danelski, *supra* note 4, at 72-75.

be criticized for not deciding them prior to the executions.<sup>25</sup> When no agreement materialized, Justice Robert Jackson penned a document that resembled a concurrence. Jackson's piece jeopardized the unanimity that some members thought was essential,<sup>26</sup> and led Justice Felix Frankfurter to write "*F.F.'s Soliloquy*."<sup>27</sup> Frankfurter's imaginary dialogue reviled the saboteurs for litigating and provoking an interbranch confrontation, while its patriotic appeal implored the brethren to eschew abstract theorizing in wartime.<sup>28</sup> Consensus galvanized when Jackson and the other Justices joined Stone three months after the order was issued.<sup>29</sup> The opinion was very narrow. The Court exercised jurisdiction and rejected the petitioners' Fifth and Sixth Amendment claims on the merits.<sup>30</sup> It labeled the eight saboteurs unlawful combatants, making them offenders against the laws of war subject to military tribunal trial and punishment.<sup>31</sup> However, although the Court assumed that there were offenses against the laws of war that are "constitutionally triable only by jury," an idea articulated by *Ex parte Milligan*,<sup>32</sup> in this case, the Court found that the petitioners were charged

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<sup>25</sup> Memorandum from Justice Harlan Fiske Stone to the Supreme Court, (Sept. 25, 1942) (Box 68, Harlan Fiske Stone MSS, Manuscript Div., Library of Cong.); see FISHER, *supra* note 3, at 111-13; Belknap, *supra* note 5, at 78; Turley, *supra* note 4, at 740.

<sup>26</sup> Memorandum from Justice Robert H. Jackson to the Supreme Court, (Oct. 23, 1942) (Box 124, Robert H. Jackson Papers, Library of Cong.); see FISHER, *supra* note 3, at 114-16. For the concerns of Justices Hugo Black, William Douglas and Owen Roberts that Justice Stone resolved, see A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309, 324-25 (2003) [hereinafter Bryant & Tobias, *Quirin Revisited*].

<sup>27</sup> See Felix Frankfurter, *F.F.'s Soliloquy* (Oct. 23, 1942), reprinted in 5 GREEN BAG 2d 438 (2002); see also FISHER, *supra* note 3, at 117-21; G. Edward White, *Felix Frankfurter's Soliloquy in Ex parte Quirin*, 5 GREEN BAG 2d 423 (2002).

<sup>28</sup> See FISHER, *supra* note 3, at 117-21; Frankfurter, *supra* note 27, at 439-40; White, *supra* note 27, at 432-35; see also Belknap, *supra* note 5, at 80; Danelski, *supra* note 4, at 76-79.

<sup>29</sup> See Notes Exchanged by Justice Felix Frankfurter and Justice Robert H. Jackson, (Oct. 1942) (Paige Box 12, Frankfurter Papers, Harvard Law Sch.); Notes Exchanged by Justice Owen Roberts to Justice Felix Frankfurter, undated (Paige Box 12, Frankfurter Papers, Harvard Law Sch.); see also FISHER, *supra* note 3, at 121-25; Danelski, *supra* note 4, at 78-79; Turley, *supra* note 4, at 742.

<sup>30</sup> See *Ex parte Quirin*, 317 U.S. 1, 25, 38-45 (1942); see also FISHER, *supra* note 3, at 121-25; 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 299-300 (3d ed. 2000); Belknap, *supra* note 5, at 84-85.

<sup>31</sup> The saboteurs, accordingly, were not entitled to a number of specific protections that prisoners of war typically receive. See *Quirin*, 317 U.S. at 38; see also FISHER, *supra* note 3, at 123-24; Neal Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1286-87 (2002).

<sup>32</sup> 71 U.S. 2, 3 (1866); see WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 128-37 (1998); see also Belknap, *supra* note 5, at 85-86; Katyal & Tribe, *supra* note 31, at 1286 n.102; Turley, *supra* note 4, at 732-34, 742.

with offenses that were not required to be tried by jury.<sup>33</sup> The defendants contended that the Court's holding in *Milligan* made the laws inapplicable "to citizens in states which have upheld" the government's authority and where the federal courts are open.<sup>34</sup> Yet Stone limited that ruling to its facts, as *Milligan* "was not an enemy belligerent."<sup>35</sup> The Justices found the commission's proceeding valid, concluded that the Articles of War did not "afford any basis for issuing the writ," and denied the habeas writs, but the members disagreed on the rationale.<sup>36</sup>

Fisher "rethinks" the tribunal's validity and efficacy.<sup>37</sup> First, he describes *Quirin*'s mixed evaluations at the time.<sup>38</sup> He asserts that FDR learned from the 1942 initiative to use the military system because civilians did not prosecute later saboteurs.<sup>39</sup> Fisher addresses wartime judicial deference to military and executive authorities by canvassing martial law in Hawaii, Japanese-Americans' internment, and the commission trial of General Yamashita.<sup>40</sup> He analyzes Supreme Court decisions issued after the war<sup>41</sup> and considers whether their balance of national security and civil liberties portended *Milligan*'s revitalization.<sup>42</sup> Fisher offers views in favor of and against the Bush tribunals, which he compares to the 1942 effort.<sup>43</sup>

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<sup>33</sup> See *Quirin*, 317 U.S. at 29; see also David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 978-85 (2002).

<sup>34</sup> *Quirin*, 317 U.S. at 45 (quoting *Milligan*, 71 U.S. at 121); see RICHARD FALLON, JR., DANIEL MELTZER & DAVID SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 408-10 (5th ed. 2003).

<sup>35</sup> *Quirin*, 317 U.S. at 45-46; see Katyal & Tribe, *supra* note 31, at 1277-87; Turley, *supra* note 4, at 742.

<sup>36</sup> Some of the Justices thought Congress did not intend the Articles to govern a tribunal trial of enemy invaders, see *Quirin*, 317 U.S. at 45-47; FISHER, *supra* note 3, at 123-25, while others found that the Articles allowed the measures used, but did not foreclose use of a tribunal in this case. See *Quirin*, 317 U.S. at 47; FISHER, *supra* note 3, at 125.

<sup>37</sup> I rely in this paragraph on FISHER, *supra* note 3, at 127-70; see also Turley, *supra* note 4, at 718-57.

<sup>38</sup> FISHER, *supra* note 3, at 127-38; accord Belknap, *supra* note 5, at 88. Typical is Cushman, *supra* note 7.

<sup>39</sup> See FISHER, *supra* note 3, at 107-120; see also Military Order, 10 Fed. Reg. 548 (1945).

<sup>40</sup> See FISHER, *supra* note 3, at 144-52; see also TRIBE, *supra* note 30, at 237, 300-01, 670, 966, 1320; Belknap, *supra* note 5, at 89-93; Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003).

<sup>41</sup> See FISHER, *supra* note 3, at 152-58; see also Katyal & Tribe, *supra* note 31, at 1293-95.

<sup>42</sup> See *supra* notes 32-35 and accompanying text; see also FISHER, *supra* note 3, at 152-58.

<sup>43</sup> See FISHER, *supra* note 3, at 159-70; see also Bryant & Tobias, *Quirin Revisited*, *supra* note 26; Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1412-

The author concludes with helpful insights, mostly disparaging FDR's endeavor and *Quirin* as precedents.<sup>44</sup> He believes that the approaches of the 1942 commission and Court were flawed, and measures which better honor national values existed then and are available now.<sup>45</sup> Fisher claims tribunal use accorded the Executive excessive power because FDR named the members, restricted legislative and judicial involvement, and was the ultimate arbiter.<sup>46</sup> He also considers these attributes to be major faults of the tribunal: (1) that no president could have examined the transcript with sufficient legal acumen and care; (2) that the rules were formulated as the trial proceeded; and (3) the unwarranted secrecy of the trial, which reflected the need to hide the confessions, governmental ineptitude, and the meting out of the death penalty rather than focusing on security.<sup>47</sup> Fisher also finds that the Supreme Court process was troubled, albeit less problematic than the commission's proceedings. The purported nullification of jurisdiction compromised the Justices, who had to "make a statement" by undertaking a limited review.<sup>48</sup> Furthermore, the Court failed to engage in "careful judicial deliberation."<sup>49</sup>

## II. CONTRIBUTIONS

*Nazi Saboteurs* is a cautionary tale that improves appreciation of *Quirin*.<sup>50</sup> Fisher offers novel perspectives derived from meticulously gathering, assessing, and synthesizing data, particularly the commission transcript of what occurred in 1942. For example, he scrutinizes and

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35 (2002); Katyal & Tribe, *supra* note 31; Turley, *supra* note 4, at 652-53, 743-57.

<sup>44</sup> I rely substantially in this paragraph on FISHER, *supra* note 3, at 171-75. Fisher perceptively admonishes that contemporary citation to the *Ex parte Quirin* opinion as "a precedent does not justify its repetition." *Id.* at 161.

<sup>45</sup> *Id.* at 161; see also Belknap, *supra* note 5, at 60-61, 88-89; Katyal & Tribe, *supra* note 31, at 1277-87.

<sup>46</sup> The President displaced the Judge Advocate General, who served as a lead tribunal prosecutor, with the Attorney General. FISHER, *supra* note 3, at 172-73; accord Danelski, *supra* note 4, at 80; Turley, *supra* note 4, at 743.

<sup>47</sup> FISHER, *supra* note 3, at 172-73; see Belknap, *supra* note 5, at 62-68; Danelski, *supra* note 4, at 64-67.

<sup>48</sup> The Supreme Court Justices also lacked very much applicable information about the secret commission proceeding. FISHER, *supra* note 3, at 172; see *id.* at 172-74; see also Belknap, *supra* note 5, at 78-88; Turley, *supra* note 4, at 738-43.

<sup>49</sup> The dearth of appellate and district court treatment, the hastily-issued per curiam order, and the belated, unpersuasive full opinion attest to this paucity of careful judicial deliberation. See FISHER, *supra* note 3, at 173-74.

<sup>50</sup> Earlier book-length treatment was self-serving or written for popular audiences, while law review articles were dated or narrowly focused on legal doctrine. See *supra* notes 3 and 38. This new work is the clearest, fullest rendition of *Quirin*.

compares the tribunal rules, the Articles of War, and the Manual for Courts-Martial, all of which illuminate the proceeding's flaws.<sup>51</sup> Moreover, his analysis of the defense's strategy in the hearing by, for example, emphasizing procedural deficiencies and asserting defendants' rights, clarifies the Justices' review.<sup>52</sup> Fisher also confirms, elucidates, and amplifies traditional understandings that criticize the 1942 initiative and *Quirin*. The author documents FDR's conscious selection of a tribunal to facilitate a predetermined result; use of odious means, such as pressure tactics, to secure this end;<sup>53</sup> and the ways these and other questionable internal machinations affected the Court.<sup>54</sup>

Fisher emphasizes the World War II context, but his tone is strikingly new. He filters the 2001 revival of commissions through *Quirin* and addresses myriad urgent and complex issues in light of all the improprieties that suffused the earlier tribunal and judicial opinion. Fisher warns about the hazards of concentrating power when he reveals how President Bush adopted commissions and ostensibly eliminated jurisdiction without lawmakers' input, despite the specific constitutional authorization of Congress to establish federal courts and prescribe their jurisdiction.<sup>55</sup> Also helpful is Fisher's contrast between this nascent effort, which governs any non-United States citizen who there is "reason to believe" did or will violate "all applicable laws," and its model, FDR's order, which covered eight individuals who had committed a few specified acts.<sup>56</sup>

In sum, Fisher details how FDR fashioned a tribunal approved by the Justices, and suggests that President Bush improperly relied on this endeavor to institute commissions and apply other anti-terrorism measures,

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<sup>51</sup> See *supra* notes 12, 14-15, 46, 47 and accompanying text; *infra* notes 54, 60, 64 and accompanying text.

<sup>52</sup> See *supra* text accompanying note 16. Transcript review shows the mundane, such as reading a confession into the record, and the banal, such as the executions' details and FDR's apparent obsession with them. Fisher's Court analysis is as cogent, if less novel, because others have evaluated it. See, e.g., Belknap, *supra* note 5; Danelski, *supra* note 4.

<sup>53</sup> See, e.g., *supra* notes 11, 15, 19, 20 and accompanying text; *infra* notes 60, 64 and accompanying text.

<sup>54</sup> See *supra* notes 22, 36, 49 and accompanying text. Fisher reaffirms, clarifies, and elaborates related critical themes, namely how the Supreme Court elevates security over liberty in wartime, which others have explored. See, e.g., REHNQUIST, *supra* note 32; Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 191-93 (1962).

<sup>55</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (2001); see Katyal & Tribe, *supra* note 31, at 1280. Bush first worked with Congress on the Authorization for the Use of Military Force Resolution. See Pub. L. No. 107-40, 115 Stat. 224 (2001); FISHER, *supra* note 3, at 149-60.

<sup>56</sup> See, e.g., GEORGE P. FLETCHER, ROMANTICS AT WAR 113-14 (2002); Katyal & Tribe, *supra* note 31, at 1281, 1284-87. Clear explication of such abstruse notions as separation of powers should make Fisher's book accessible.

such as detention of suspects and litigation of terrorism cases. Fisher painstakingly reviews the deficient tribunal and the Supreme Court's actions, and his treatment further undermines the value that the 1942 effort and opinion might have as precedent.

### III. SUGGESTIONS

Despite the book's many virtues, it leaves a few questions unanswered. One is whether *Quirin's* expansive reading, proffered to justify modern commission adoption and use, withstands scrutiny.<sup>57</sup> More important to tribunal creation are Articles I and III, which empower Congress to institute federal courts and grant their jurisdiction, and *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>58</sup> which suggests that this delegation precludes the chief executive from abolishing jurisdiction.<sup>59</sup> Moreover, basic ideas limit *Quirin* today: the facts were unusual and its holding was narrow; lawmakers had declared war and authorized commissions; and respected observers have now discredited the tribunal and Court processes.<sup>60</sup> Thus, the Executive lacks power to vitiate jurisdiction, although commissions may be legitimate in a few limited contexts, such as overseas prosecutions resulting from declared wars.<sup>61</sup> Tribunals also warrant analysis because the Justices recently invalidated President Bush's commissions, and Congress recently authorized them.<sup>62</sup> Judges who entertain defendants' habeas writs challenging tribunals and detention must remember that the *Quirin* Court decided petitioners' Fifth and Sixth Amendment claims on the merits, despite FDR's attempts to nullify jurisdiction.<sup>63</sup> The factors that I

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<sup>57</sup> See Bryant & Tobias, *Quirin Revisited*, *supra* note 26; Dickinson, *supra* note 43, at 1420; Turley, *supra* note 4, at 749-58.

<sup>58</sup> See 343 U.S. 579 (1952); see also A. Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373, 375-431 (2002) [hereinafter Bryant & Tobias, *Youngstown Revisited*]; Symposium, *Youngstown at Fifty*, 19 CONST. COMMENT. 1 (2002).

<sup>59</sup> For the idea's full exposition, see Bryant & Tobias, *Youngstown Revisited*, *supra* note 58; see also Turley, *supra* note 4, at 755.

<sup>60</sup> Dickinson, *supra* note 43, at 1420; Katyal & Tribe, *supra* note 31, at 1284-87; Turley, *supra* note 4, at 754.

<sup>61</sup> See, e.g., Bryant & Tobias, *Youngstown Revisited*, *supra* note 58; Katyal & Tribe, *supra* note 31, at 1293-95; Turley, *supra* note 4.

<sup>62</sup> *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006); see Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); see also Jeffrey Smith, *On Prosecuting Detainees*, WASH. POST, July 28, 2006, at A23; Jeffrey Toobin, *Inside the Wire*, NEW YORKER, Feb. 9, 2004, at 36.

<sup>63</sup> See, e.g., *supra* notes 13, 18, 22, 38 and accompanying text; see also *supra* note 55 and accompanying text.

pinpointed<sup>64</sup> mandate rejection of the opinion's invocation for some tenets, namely judicial acquiescence to the Executive.<sup>65</sup> The courts as well should modernize *Quirin*, so that it reflects burgeoning habeas,<sup>66</sup> international, and human rights law developed since 1942.<sup>67</sup> Judges deciding recent cases have actually used such ideas. For example, *Hamdan v Rumsfeld* invoked the Geneva Conventions.<sup>68</sup>

Elaboration of certain phenomena would be valuable. Fisher's admonitions respecting tribunal use and executive power's concentration are illustrative. Nonetheless, increased scrutiny of commissions' impact on world relations, especially given how the United States has disparaged others that employ analogous measures and detain suspects without access to lawyers, would yield significant benefits.<sup>69</sup> For instance, concerns over global perceptions led to the selection of international war crimes tribunals, rather than military commissions, that tried many German and Japanese officials after 1945.<sup>70</sup> Similarly, it might be worthwhile to further evaluate

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<sup>64</sup> These include the unusual facts; the use of a tribunal to secure a result; the hurried review, order, and execution; the improper pressures; and the unpersuasive, narrow opinion. See *supra* notes 13, 14, 18, 36, 60 and accompanying text.

<sup>65</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); Dickinson, *supra* note 43, at 1420; Turley, *supra* note 4, at 734-43. But see *Hamdi v. Rumsfeld*, 316 F.3d 450, 474-77 (4th Cir. 2003), *rev'd*, 542 U.S. 507, 523 (2004); Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 594-95 (S.D.N.Y. 2002), *rev'd*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004). In *Hamdi*, a plurality of the Supreme Court found *Quirin* the "most apposite precedent" on citizen detention. *Hamdi v. Rumsfeld*, 542 U.S. 507, 523 (2004). Justice Scalia, in dissent, said that "the case was not this Court's finest hour." *Id.* at 569 (Scalia, J., dissenting).

<sup>66</sup> The *Quirin* Court performed a very narrow jurisdictional inquiry which was typical in 1942. See Bryant & Tobias, *Quirin Revisited*, *supra* note 26; see also FALLON, JR., MELTZER & SHAPIRO, *supra* note 34, at 411-13; George Rutherglen, *Structural Uncertainty, Habeas Corpus and the Jurisdiction of Military Tribunals*, 5 GREEN BAG 2d 397 (2002).

<sup>67</sup> Due process is a critical example. See Dickinson, *supra* note 43, at 1421-35; Turley, *supra* note 4, at 756-57. Scrutiny of *Quirin*'s use for other terrorism initiatives, namely litigating detention of suspects, would help. The government and certain judges have invoked *Quirin* for broad ideas, such as executive deference, which it cannot support. See sources cited *supra* notes 57 and 65. In fairness, much of this occurred when *Nazi Saboteurs* was in press.

<sup>68</sup> 126 S. Ct. at 2795; see *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 158-66 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006); Padilla v. Hanft, 389 F. Supp. 2d 678 (D.S.C. 2005), *rev'd*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1649 (2006).

<sup>69</sup> Turley, *supra* note 4, at 757; David Cole, *How the Court Struck Back*, N.Y. REV. BOOKS, Aug. 10, 2006.

<sup>70</sup> GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE, THE POLITICS OF WAR CRIMES TRIBUNALS* 163-65, 180-81 (2000); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 28-33 (1992); Douglas Kmiec, *In the Wake of Hamdan, Should We Opt for an International Tribunal for Gitmo Detainees?*, FINDLAW, July 6, 2006,

how the tribunals' creation affects horizontal power distribution of authority vis-à-vis lawmakers and judges, in light of related executive claims trenchantly illustrated by domestic surveillance.<sup>71</sup> It would also be useful to calibrate the optimal balance between security and liberty when terrorism is ubiquitous, and determine whether courts are reliable guardians of freedom today, and, if not, whether Congress or additional entities such as the media would be preferable.<sup>72</sup> Such an expansion effort may suggest felicitous ways to allocate governmental responsibility for various constituents in the "war on terrorism."<sup>73</sup> This knowledge would help policymakers and citizens better appreciate the overseas and domestic ramifications of enlarging America's power vis-à-vis other nations and individuals and of eroding legislative and judicial branch authority.<sup>74</sup>

My views do not undercut Fisher's important contributions. However, he might have treated a few notions specifically or with augmented detail, gleaned more lessons from the 1942 commission and *Quirin*, and tendered some additional prescriptions. It would be valuable to have greater insights from someone who, for three decades, has furnished Congress with astute policy, legal, and historical research on numerous questions which tribunals implicate, and who has personally witnessed the origins, growth, and resolution of many fractious disputes analogous to that over military commissions.<sup>75</sup> Amplifying his expert observations drawn from this unique perspective on why developments happened as they did and on salutary measures for improving tribunals would be worthwhile, especially to address global and American concerns about such bodies in the post-

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[http://writ.news.findlaw.com/commentary/20060706\\_kmiec.html](http://writ.news.findlaw.com/commentary/20060706_kmiec.html).

<sup>71</sup> S. 3001, 109th Cong. (2006); DEP'T OF JUSTICE, OIG, *THE SEPTEMBER 11 DETAINEES* (2003); Eric Lichtblau & James Risen, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; see JOHN NOONAN, *NARROWING THE NATION'S POWER* (2002); see also Martin Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

<sup>72</sup> Judges have warned that courts are not reliable guardians. See sources cited *supra* note 54; *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 711 (6th Cir. 2002); see also Louis Fisher, *Who's Minding the Courts on Rights?*, L.A. TIMES, Feb. 23, 2003, at M2. *Hamdi* and *Hamdan* suggest otherwise. An example of congressional action is the Military Commissions Act of 2006, which expressly authorizes tribunals. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); see Bryant & Tobias, *Youngstown Revisited*, *supra* note 58, at 386-99.

<sup>73</sup> See, e.g., BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK* (2006); RICHARD POSNER, *CATASTROPHE: RISK AND RESPONSE* (2005); see also JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* (2005).

<sup>74</sup> Others have explored a rather analogous interrelationship of global and domestic concerns. See THOMAS BORSTELMANN, *THE COLOR LINE IN THE COLD WAR* (2001); MARY DUDZIAK, *COLD WAR CIVIL RIGHTS* (2000).

<sup>75</sup> A federal appellate judge said Fisher "had been sitting in a 'catbird's seat.'" FISHER, *supra* note 3, at ix.

*Hamdan* context. These ideas are essential now that the world and America face intractable problems related to security and human rights, and public debate is so controversial.

#### IV. CONCLUSION

*Nazi Saboteurs* greatly advances comprehension of how FDR depended on a military tribunal, sanctioned by the Justices, and how the Bush Administration invoked this precedent when establishing commissions and justifying related terrorism measures. This account elucidates the ongoing discourse about tribunal legitimacy and advisability, how to balance national security with civil liberties, and how to distribute federal power in a time of terror.

