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HEADLINE: A Mixed Precedent for Military Tribunals
1942 case of Nazis on U.S. soil gives administration the authority for terrorist trials, but leaves room for doubt.

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BODY:
Only a month earlier, the FBI had arrested eight German saboteurs intent on blowing upAmerican factories, bridges, and department stores.

Now, on July 23, 1942, the lawyers for the Germans and U.S. Attorney General Francis Biddle found themselves at the Pennsylvania summer farm of Supreme Court Justice Owen Roberts. They pleaded with Roberts and Justice Hugo Black, also on hand, to convince the Supreme Court to return from its summer recess immediately to weigh the constitutionality of the military commission created to try the Germans.

The justices agreed and soon announced a special session of the Court-before the trial was over and before a habeas corpus petition was filed in the case. After a breakneck briefing schedule and nine hours of oral argument on July 29 and 30, the Court almost immediately upheld the procedure in a brief per curiam decision. The full ruling came nearly three months later. Meanwhile the defendants had been found guilty. On Aug. 8, six of the Germans were electrocuted and the other two were sentenced to long prison terms, by order of President Franklin Roosevelt.

The executions marked an end to an extraordinary fast-track legal process that is the model for President George W. Bush's Nov. 13 order authorizing military commissions as a way to bring the September 11 terrorists to justice.

The Supreme Court decision that upheld the military trials of the German saboteurs, *Ex parte Quirin,* also provides the strongest authority for Bush's controversial order, which would permit swift and secret trials on military bases or even at sea.

But to some, the saboteur trials and the *Quirin* decision itself are flawed models for the current situation, and instead demonstrate that wartime justice can be too hasty to withstand the test of time.

"Insofar as *Quirin* states a rule broad enough to cover the Bush order, I am not sure that we should view it any more favorably than, say, *Korematsu,*" says Christopher Eisgruber, director of the program in law and public affairs at Princeton University. *Korematsu v. United States* was the 1944 decision, never overruled, that upheld the wartime internment of Japanese-Americans.

Justices themselves later looked back on the case as one of the high court's less shining moments.

"Not a happy precedent," said Justice Felix Frankfurter in 1953.

Justice William O. Douglas regretted ruling so quickly without issuing a fully reasoned opinion. "It is extremely undesirable to announce a decision on the merits without an opinion accompanying it," Douglas later said of *Quirin.*

Wrote scholar John Frank, who had been a clerk to Justice Black during the *Quirin* case: "The Court allowed itself to be stampeded."

Even Chief Justice William Rehnquist, in his 1998 book, *All the Laws But One,* offers *Quirin* as an example of how the Supreme Court through history has given the green light to restrictions on civil liberties while war is under way, whereas it is less willing to do so once hostilities have ended.

Problems with the case began soon after the saboteurs landed in two groups-one on Long Island in New York and the other at Ponte Vedra in Florida. A member of the Coast Guard came across the New York contingent, but the Germans had taken off by the time he ran back to his station to get help. One of the Germans, George Dasch, went straight to Washington and turned himself and the others in to the Federal Bureau of Investigation. But when FBI head J. Edgar Hoover announced the arrests, there was no mention of Dasch's assistance, and the media portrayed the arrests as the result of a daring capture by FBI agents.

Almost immediately, Biddle, the attorney general, sought authorization to try the Germans in a secret proceeding-in part, some historians assert, to avoid having to reveal that Hoover had embellished the story of the capture. Biddle also wanted to secure death sentences for the saboteurs, which would not have been available in civilian courts.

President Roosevelt issued an order authorizing the military commission and closing civilian courts to saboteurs and spies who entered the country on behalf of "any nation at war with the United States." Bush's order, by contrast, appears to apply to any noncitizen with terrorist connections, no matter what the country of origin.

The saboteurs' trial was quickly convened at the Justice Department, presided over by a panel of military officers who were apparently not lawyers. Biddle himself led the prosecution.

Noted lawyer Lloyd Cutler of Wilmer, Cutler & Pickering was the youngest member of the prosecution team, and last week recalled moments from the trial. Procedural rules favored the prosecution, Cutler said.

"You didn't need to prove anything beyond a reasonable doubt," Cutler said. Instead, a "reasonable man" standard was used. "It was very different from a civilian trial," he noted.

As soon as defense lawyer Kenneth Royall indicated he would challenge the constitutionality of the process, Biddle went to Roosevelt. The president reacted angrily, according to a 1996 article in the *Journal of Supreme Court History.*

"I want one thing clearly understood, Francis," Roosevelt said, according to Biddle's memoirs. "I won't hand them over to any United States marshal armed with a writ of habeas corpus." Biddle agreed, telling Roosevelt, "We have to win in the Supreme Court, or there will be a hell of a mess."

After the meeting at the Pennsylvania farm, the Supreme Court saw the importance of ruling swiftly and the Court's deliberations began.

At a conference before the oral arguments, Roberts reported to his brethren that Biddle had expressed concerns that Roosevelt would execute the Germans no matter what the Court did. "That would be a dreadful thing," said Chief Justice Harlan Fiske Stone. The importance of the case led Stone to decide he should not recuse, even though his son Lauson Stone, an Army major, was part of the Germans' defense team.

Justice Francis Murphy, who was an active duty officer in the Army reserves, did recuse because of his military status-though he listened to the arguments from a hidden nook of the Court.

Biddle's biggest problem during oral arguments was distinguishing the German saboteurs from the Civil War case of *Ex parte Milligan,* which barred military trials for civilians if civil courts were open. Biddle told the justices that *Milligan,* regarded by many as a triumph for the rule of law, should be overruled. Royall, arguing for the Germans, cited Justice David Davis' eloquent proclamation in *Milligan* that the Constitution governs "equally in war and peace."

After the Court upheld the tribunals in a brief order on July 31, Stone retreated to a resort in New Hampshire, where he devoted six weeks to writing an opinion in the case. He described the period as a "mortification of the flesh."

As Stone deliberated, some say he came to the realization that some of the Germans-who claimed to be naturalized U.S. citizens-should not have been tried in military court. Scholar Michael Belknap wrote that Stone saw his task as justifying "as best he could a dubious decision." Stone peppered his law clerk Bennett Boskey with memos expressing his doubts about the case. Boskey is still in private practice in Washington, D.C.

As Stone circulated his draft opinion, other justices considered writing concurrences. In the end, Stone papered over the differences and issued a ruling that said military tribunals could be used to prosecute belligerents, including "the enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property."

That language may be enough for the Bush administration to cite as justification for its controversial order. But with no formal declaration of war in the current terrorist crisis, lawyers for defendants may also find language in *Quirin* that they can exploit.

The decision only vaguely dealt with the *Milligan* precedent, and it implied that spies and saboteurs retain some constitutional rights. It avoided announcing clear rules for when military commissions are appropriate and when they are not. Stone also acknowledged that "a majority of the full Court are not agreed on the appropriate grounds for the decision."

But in the context of what Roosevelt wanted the Supreme Court to do, Stone's hand wringing was irrelevant. The justices had approved the tribunals, the saboteurs had been executed, and the parsing of *Ex parte Quirin* was left for future generations.