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Judicial Review for Enemy Fighters: The Court's Fateful Turn in *Ex parte Quirin*, the Nazi Saboteur Case

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Judicial Review for Enemy Fighters: The Court's Fateful Turn in *Ex parte* *Quirin*, the Nazi Saboteur Case

Andrew Kent

66 Vand. L. Rev. 153 (2013)

The last decade has seen intense disputes about whether alleged terrorists captured during the nontraditional post-9/11 conflict with al Qaeda and affiliated groups may use habeas corpus to challenge their military detention or military trials. It is time to take a step back from 9/11 and begin to evaluate the enemy combatant legal regime on a broader, more systemic basis, and to understand its application to future conflicts. A leading precedent ripe for reconsideration is Ex parte Quirin, a World War II-era case in which the Supreme Court held that saboteurs admittedly employed by an enemy nation's military had a right to access civilian courts during wartime to challenge their trial before a military commission. Even though admitted members of an enemy nation's military had never before accessed the civilian justice system during wartime, the Court in Quirin declined to explain why it reversed course in such a significant fashion. Since and because of Quirin, it has become accepted that literally any individual present in the United States has a constitutional right to habeas corpus.

This Article first shows that on the legal merits, the Quirin Court's ruling on court access was erroneous. The history of lack of court access for enemy fighters and nonresident enemy aliens is reviewed, starting with the English common law background on which the U.S. Constitution was written and continuing through the Founding period to the Civil War, World War I, and beyond. Second, the Article seeks to explain why the Court acted in such a surprising fashion in Quirin—ruling in favor of unsympathetic enemies during wartime, even though case law

and other legal authorities provided solid reasons to reject their plea for court access. To do so, the Article draws on a diverse set of explanatory tools, including those of legal history and political science. Next, the Article shows that Quirin's rejection of the old framework governing court access for enemy fighters and nonresident enemy aliens has had profound but underappreciated doctrinal consequences—including helping lead to the result in Boumediene v. Bush. The Article then argues that, as a policy matter, admitted or otherwise undisputed combatants in an enemy nation's employ do not need and probably should not have a right to access U.S. courts during wartime. Quirin was thus wrong on the law and highly problematic as policy. Finally, the Conclusion highlights both current and potential future situations in which the Article's legal analysis could be important.

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Andrew Kent*

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I. INTRODUCTION

In 1942, in the middle of World War II, the Supreme Court entertained a habeas corpus petition filed by German military saboteurs who had been caught by the FBI after slipping into the United States and ordered by President Roosevelt to be put on trial for their lives before a hastily conceived military commission sitting in Washington, DC. The administration argued to the Supreme Court as a threshold matter that admitted members of an enemy's military who invaded the United States during wartime lacked any right to access civilian courts. On the merits, the government contended that the saboteurs had no substantive constitutional or statutory rights to be

free from military detention and trial. The proceedings before the Supreme Court were extraordinary. The Court received briefs two days after announcing it would hear the case and held argument that day and the next. Immediately afterward, the Court issued an exceptionally terse *per curiam* opinion, captioned *Ex parte Quirin*, stating that military jurisdiction was lawful and the trial could continue.¹ The saboteurs were subsequently found guilty by the military commission—the outcome was never in doubt, largely because of detailed confessions—and they were promptly executed or sentenced to long prison terms. Then for three months, the Supreme Court wrangled internally about how to justify its decision. Ultimately the Court issued a much longer opinion that rejected the government's first argument on access, holding that the saboteurs did have a right to habeas corpus review but, as prefigured by the *per curiam*, agreed with the government on the merits.

Although the decision was generally applauded when issued and later was successfully invoked in *Hamdi v. Rumsfeld* to justify holding an American citizen captured in Afghanistan after 9/11 in military detention,² modern scholarly accounts of *Quirin* by historians and constitutional lawyers have been positively scathing.³ Leading articles call *Quirin* a “troubling” and even “putrid” precedent and an “institutional defeat” for the Court.⁴ The conventional account is that a Court beholden to President Roosevelt—he had appointed eight of the nine justices and had close relationships with several—deferred too much to the executive because of wartime pressure and dislike for the saboteurs, and with undue haste blessed an illegal military commission process that executed six men after a quick and

1. *Ex parte Quirin*, 317 U.S. 1, 18–19 (1942).

2. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion).

3. See, e.g., Bruce Ackerman, *Terrorism and the Constitutional Order*, 75 FORDHAM L. REV. 475, 482 (2006) (calling the Court's decision “shameful”); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 340 n.17 (2002) (calling *Quirin* an “embarrassing tale”) (internal quotation marks omitted); Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SECURITY L. & POLY 295, 315 (2010) (“[P]opular and academic commentaries on the decision have been nearly uniform in their withering criticism of both the merits of the Court's analysis and the unusual means by which it disposed of the case.”).

4. See Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 433, 477 (2002) (calling the history of military tribunals “putrid” and contending that the decision in *Quirin* lacked “any real legal foundation”); David J. Danelski, *The Saboteurs' Case*, 1 J.S. CT. HIST., July 1996, at 61, 80 (“institutional defeat”); Carlos M. Vázquez, *Not a Happy Precedent: The Story of Ex parte Quirin*, in FEDERAL COURTS STORIES 219, 219 (Vicki C. Jackson & Judith Resnik eds., 2010) (“troubling”).

perfunctory trial, with an opinion filled with dubious or even disingenuous legal reasoning.⁵ Justices who decided the case have not spoken kindly about *Quirin*. Frankfurter called it “not a happy precedent.”⁶ Douglas wrote that “it was unfortunate the Court took the case.”⁷ Chief Justice Stone described the process of drafting the final opinion as a “mortification of the flesh.”⁸

The fact that the Supreme Court held, over the executive’s objections, that the saboteurs had the right to seek habeas corpus relief in Article III courts has been viewed by most critics of the decision as the only redeeming feature of an otherwise exceptionally regrettable episode in the annals of Supreme Court decisionmaking.⁹ However, under well-established law, the saboteurs, having admitted that they were enemy fighters¹⁰ and, with one exception, nonresident

5. See, e.g., Brief of Legal Scholars and Historians as Amici Curiae in Support of Petitioner [Effect of *Quirin*] at 2, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184); LOUIS FISHER, NAZI SABOTEURS ON TRIAL 172, 174 (2003); PIERCE O'DONNELL, IN TIME OF WAR: HITLER'S TERRORIST ATTACK ON AMERICA xiii-xiv, 213 (2005); 12 WILLIAM M. WIECEK, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION, 1941-1953, at 314-20 (2006); Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 83-87 (1980); A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309, 331; Danelski, *supra* note 4, at 80; Vázquez, *supra* note 4, at 220, 241, 246.

6. Felix Frankfurter, Memorandum Re: *Rosenberg v. United States*, Nos. 111 and 687, October Term 1952, at 8 (June 4, 1953) (on file in the Felix Frankfurter Papers, Harvard Law School, Pt. I, Reel 70) (quoted in FISHER, *supra* note 5, at 171).

7. WILLIAM O. DOUGLAS, THE COURT YEARS 1939-1975, at 138 (1980).

8. Letter from Harlan Fiske Stone to Roger Nelson (Sept. 20, 1942) (on file in Box 22 of the Harlan Fisk Stone Papers, Manuscript Div., Library of Congress).

9. See, e.g., FISHER, *supra* note 5, at 172-73; WIECEK, *supra* note 5, at 318; Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 592-93 (2010); Vázquez, *supra* note 4, at 246.

10. I use the term “enemy fighter” to refer to all members of (1) the armed forces of a foreign nation involved in a military conflict with the United States (or Great Britain, when discussing British legal history), whether they are formally enrolled as soldiers, sailors, or airmen or perform some other military function, or (2) an organized terrorist or guerilla group engaged in an armed conflict with the United States. Although the term “enemy combatant” could have been used instead, I ultimately decided to avoid it because its controversial deployment during the George W. Bush Administration was distracting for some readers of earlier versions of this Article. Older cases and commentary often referred to fighters who were detained during a conflict as “prisoners of war.” When discussing these older sources, I use the same term, not meaning thereby to be making judgments about whether, under the modern law of armed conflict, the individual in question would be entitled to prisoner-of-war status and its special entitlements. Cf. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(A), *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva POW Convention] (setting out detailed criteria regarding who is entitled to prisoner-of-war detention and treatment). Some old English sources used the term “prisoner of war” in a broader sense, including not only enemy fighters but also alien enemy civilians who were detained during wartime for reasons of state. I do not use the term to include that latter category.

enemy aliens,¹¹ had no right to be in court in the first place. Undisputed enemy fighters like the saboteurs had never been understood to have a right to access civilian courts to claim protection against the U.S. government from the Constitution and other municipal (domestic) laws. Similarly, enemy aliens resident outside the United States, even if they were civilians rather than combatants, had no right to access the nation's courts during wartime. If the Supreme Court in *Quirin* had applied this established law and declined to participate in the matter, it would not only have been faithful to precedents, it might, ironically, have preserved institutional legitimacy in the eyes of some critics.

Although the Justices who supported court access and merits review for the saboteurs privately may have thought it justified only because they were on trial for their lives before a military commission, *Quirin*'s holding on access was not framed as being proper only in such high-stakes circumstances. Subsequently, the Court and commentators have understood *Quirin* to stand for the broad proposition that any person held in military custody within the United States has a right to habeas corpus review.¹²

This Article contends, first, that *Quirin* was incorrect to allow undisputed members of an enemy military to access the courts. I have previously used the term *human-rights universalism* to describe the view that military enemies should be able to invoke a judicially enforced Constitution for protection during armed conflicts.¹³ Longstanding legal rules precluded human-rights universalism, but the Court in *Quirin* declined to apply them, without any explanation. Not only was there a good amount of case law and commentary from

11. An enemy alien is a subject or citizen of a nation at war with the United States.

12. Even the first George W. Bush Administration, (in)famous for its aggressive claims about executive primacy and judicial disability during wartime, conceded before the Supreme Court that alleged Taliban fighter Yasir Hamdi had a right to habeas corpus because he claimed to be a U.S. citizen and was held in the United States. *See infra* notes 390–391 and accompanying text.

13. Andrew Kent, Boumediene, Munaf, and the Supreme Court's Misreading of the *Insular Cases*, 97 IOWA L. REV. 101, 104–05 (2011). I have called this view of the Constitution's scope human-rights universalism because it resembles a phenomenon in international law. "Classic international public law recognized the separation between the law of peace and the law of war." Hans-Joachim Heintze, *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, 86 INT'L REV. RED CROSS 789, 789 (2004). But in the modern era, there has been a concerted effort to inject human-rights law—the law of peacetime—into the realm of war in order to impose limits on states' warmaking powers in addition to those found in the less restrictive laws of war. *See, e.g., id.* at 789–91. Similarly, for much of U.S. history, it was understood that "we have a constitution of government for war and a constitution of government for peace," and that the international laws of war—and not a judicially enforced Constitution—protect military enemies in war. Kent, *supra*, at 104–05 (citations omitted).

earlier in American history, but in two cases bookending *Quirin* in 1942—one decided in January 1942 and the other in November 1942—the Court articulated long-standing legal rules that, had they also been applied in *Quirin* in the summer of 1942, would have barred the saboteurs from challenging military jurisdiction in civilian court.¹⁴ The Supreme Court's failure to apply established law in *Quirin* was, in some respects, inexplicable—all the more so because the Court itself did not deign to give any reasons or cite any authorities. One burden of this Article is to try to explain the inexplicable. This revisionist account of *Quirin* uses the tools of lawyers, legal historians, and political scientists—including both internal (legal and institutional) and external (biographical, political, and ideological) perspectives—to account for why the Court failed to apply well-established law that would have allowed it to side with a popular wartime President against very unsympathetic claimants.

This Article's account of *Quirin* cuts strongly against the grain of modern scholarship about the case. Once the importance of the court access issue is highlighted, *Quirin* is seen to be a significant *defeat* for the government at the hands of a Court that disregarded a substantial body of contrary case law and other legal precedents. And rather than being cowed by a popular President during wartime, the Court wanted to and did demonstrate its independence by rejecting the President's contention that the habeas claims could not be heard.¹⁵

Second, the Article contends that *Quirin's* allowance of habeas corpus claims by undisputed enemy fighters is highly problematic as a policy matter. On the one hand, undisputed enemy fighters in nation-to-nation wars generally do not need judicial protection under the Constitution and other domestic laws because they are protected by a comprehensive regime of international law as well as by diplomacy, military-to-military arrangements, and norms of reciprocity. Judicial protection may well be necessary when detainees challenge the facts underlying the government's categorization of their status—for example, maybe they were just innocent civilians caught at the wrong

14. See *infra* Part IV.

15. As to the merits issues raised by the saboteurs, to the extent that the Court's decision has been criticized because it did not cite a lot of precedent and therefore seemed unsupported or unpersuasive, see, e.g., Danelski, *supra* note 4, at 72 (offering this criticism), that is because no admitted enemy fighters had ever before had access to U.S. courts, and so no precedent was put on record about how to handle their claims once in court. But undisputed enemy fighters lacked any judicially enforceable rights, and so their legal claims were, *a fortiori*, meritless. In other words, the Court's error on the threshold issue of access explains away the many criticisms of the *Quirin* Court's performance on the substantive issues.

place at the wrong time rather than enemy fighters.¹⁶ This felt need for judicial review is even stronger in nontraditional conflicts, when no national government might be advocating for the detainees, international legal protections might be spotty or even nonexistent, and norms of reciprocity are less likely to matter. But once the jurisdictional fact of being an enemy fighter is conceded or established beyond dispute by a competent tribunal, as will almost always be the case with prisoners of war in a state-to-state war,¹⁷ the need for judicial review is substantially diminished.

On the other hand, judicial review of military detention and trial is costly. A wide variety of habeas corpus claims can be made because requests for habeas relief may be premised not just on alleged violations of individual constitutional rights, but on alleged structural constitutional problems, violations of statutes, violations of treaties, or on a general lack of legal authority to detain.¹⁸ Challenges to sufficiency of the government's factual evidence justifying wartime detention of alleged enemies by the U.S. military have also been common.¹⁹ There are many potential costs associated with such habeas corpus claims by military enemies, including aid and comfort to the enemy, use of scarce judicial time and attention, expenditures of investigatory and litigation resources by the U.S. executive, and the likelihood of overdetering the U.S. government from detaining or trying dangerous individuals. While these costs might well be justified in nontraditional armed conflicts against nonstate actors where there may be many "false positives" in detention, the costs are arguably

16. A great number of the detainees in U.S. custody as part of the post-9/11 conflict with al Qaeda and the Taliban have disputed the government's version of the facts justifying their detentions.

17. The Geneva Conventions require that a "competent tribunal" be used to determine whether a person, "having committed a belligerent act and having fallen into the hands of the enemy," qualifies as a prisoner of war if there is "any doubt" about the matter. See Geneva POW Convention, *supra* note 10, at art. 5.

18. See generally 28 U.S.C. § 2241(c)(3) (2006) (listing non-exclusive criteria for issuing writ of habeas corpus: a prisoner "in custody in violation of the Constitution or laws or treaties of the United States"). A structural separation of powers claim, as well as alleged violation of congressional statutes, were vindicated via habeas in *Hamdan v. Rumsfeld*, 548 U.S. 557, 557–58 (2006). Lack of detention authority *simpliciter*, as well as alleged violations of the Constitution and the Non-Detention Act, were the basis for the habeas claims in *Hamdi v. Rumsfeld*, 542 U.S. 507, 507 (2004). Recently, Congress has removed the ability of habeas petitioners to raise claims based on the Geneva Conventions, see Military Commissions Act of 2006, Pub. L. No. 109-366, § 5, 120 Stat. 2600 (codified at 28 U.S.C. § 2241 note (2007)), a potentially significant limitation for the kinds of military detentions discussed in this Article.

19. See, e.g., Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 769–70 (2011) (discussing habeas claims of detainees in Iraq, Afghanistan, and at Guantanamo Bay).

unjustifiably high when the potential habeas litigants are undisputed enemy fighters in a state-to-state armed conflict, as in *Quirin*.

The Article proceeds in six major parts. Part II gives an overview of the facts of *Quirin*—the saboteurs' mission and capture, the Roosevelt administration's deliberations about what to do with them, the military commission trial, and the Supreme Court litigation. Part III reaches back to old English common law and then marches through American history, showing that it had been established for centuries that persons situated as the Nazi saboteurs were had no right to seek relief from civilian courts during wartime. Part IV continues this theme, examining the two cases decided by the Supreme Court in 1942 that, by their reasoning and holdings, seemed to suggest that the Court should have ruled in *Quirin* that the saboteurs had no right to access the civilian court system. Part V considers whether different rules regarding court access applied to the one saboteur who was (probably) a U.S. citizen. Part VI attempts to understand why the Justices disregarded established law and ruled against a powerful President they liked and respected, during the depths of wartime and on behalf of despised enemy saboteurs. Part VII discusses the underappreciated doctrinal legacy of *Quirin* and then suggests policy reasons why opening U.S. courts to undisputed enemy fighters during wartime is problematic. The Conclusion discusses the contemporary significance of the Article's findings.

II. BACKGROUND AND LITIGATION IN *QUIRIN*

The facts underlying *Quirin* are colorful, but it is not necessary to go into them at length.²⁰ Eight German military saboteurs came to the United States and were captured and put on trial before a military commission. Seven petitioned the lower federal courts and the U.S. Supreme Court for a writ of habeas corpus. The eighth, George Dasch, had been cooperating with the U.S. government and did not seek habeas corpus.

A. *The Saboteurs*

In the filings with the Supreme Court, the Germans conceded the truth of the following facts, except where noted otherwise. All eight men had been born in Germany and lived for some time in the

20. For a fuller account, see MICHAEL DOBBS, *SABOTEURS: THE NAZI RAID ON AMERICA* 15–83 (2004); FISHER, *supra* note 5, at 16–21; O'DONNELL, *supra* note 5; Danelski, *supra* note 4, at 62–65.

United States.²¹ Seven were German citizens; one, Herbert Haupt, had become a U.S. citizen as a child when his parents were naturalized.²² While the United States argued that he had lost that citizenship, Haupt disagreed, and the Court assumed that he was a citizen.²³ All eight men returned to Germany after Hitler's rise to power,²⁴ where they were recruited for a sabotage operation in the United States.²⁵ The eight attended a training course conducted by an officer of the German High Command held "at a sabotage school operated at a place near Berlin, Germany," where they "receiv[ed] instruction in the use of explosives."²⁶ They were paid by the German High Command during their training and agreed that for their services for the German military "they or their relatives in Germany were to receive salary payments from the German Government."²⁷ In other words, the saboteurs were employees of the German military.²⁸ They were instructed to wear German Marine Infantry uniforms during their landing on American shores, so that if caught they could claim prisoner-of-war status, rather than being treated as spies.²⁹ In two teams of four men, the saboteurs were transported by German Navy U-boats from occupied Europe to the U.S. coast, where, in mid-June 1942, they came ashore at Long Island and Florida, wearing all or parts of their German uniforms and carrying explosives and cash.³⁰ The beaches where they landed were within areas designated by the U.S. military as parts of the coastal defense lines, and were actively patrolled by either Army or Coast Guard forces.³¹ When the Germans came ashore, they doffed their uniforms and buried them and the explosives, before splitting up and heading inland.³²

21. *Ex parte Quirin*, 317 U.S. 1, 20 (1942).

22. *Id.*

23. *Id.*

24. *Id.*

25. Respondent's Answer to Petitions at 2, *Ex parte Quirin*, 317 U.S. 1 (1942) (No. – Original and Nos. 1, 2, 3, 4, 5, 6, and 7 of July 1942 Special Term) [hereinafter Respondent's Answer] (setting out stipulated facts).

26. *Id.*; see also *Quirin*, 317 U.S. at 21.

27. Respondent's Answer, *supra* note 25, at 3; see also *Quirin*, 317 U.S. at 21.

28. Two had previously been formally enlisted as soldiers in the German military. See Vázquez, *supra* note 4, at 221. On the backgrounds of the eight, see FISHER, *supra* note 5, at 6–16; Danelski, *supra* note 4, at 62–63.

29. See *Quirin*, 317 U.S. at 22; Respondent's Answer, *supra* note 25, at 4; see also FISHER, *supra* note 5, at 23.

30. Respondent's Answer, *supra* note 25, at 2–3; see also *Quirin*, 317 U.S. at 21–22.

31. *Quirin*, 317 U.S. at 22 n.1.

32. *Id.* at 21.

One day after arriving in the United States, one of the would-be saboteurs, George Dasch, telephoned the FBI to turn himself in.³³ He traveled to Washington, DC, so he could present himself at FBI headquarters.³⁴ Though initially skeptical of his story, the FBI interrogated Dasch, who quickly revealed everything he knew about the plot and his coconspirators. With this information, the other seven were arrested. By June 27, 1942, just two weeks after landing, all eight were in FBI custody.³⁵ The FBI then publicized the arrests, omitting that Dasch had turned himself in.

B. The Decision for a Military Commission

The Department of Justice, the War Department, and the White House now began to debate what should happen to the captured saboteurs.³⁶ Fairly quickly, they decided not to try the captives in civilian court or a statutory court-martial. There were several considerations involving secrecy, deterrence, evidence, and the likelihood of achieving the result desired by all in the U.S. government: death sentences.³⁷ Therefore, the President, upon the advice of Attorney General Francis Biddle and military legal advisers,

33. See FISHER, *supra* note 5, at 32–33; Danelski, *supra* note 4, at 64; Vázquez, *supra* note 4, at 223.

34. See FISHER, *supra* note 5, at 34; Danelski, *supra* note 4, at 64–65; Vázquez, *supra* note 4, at 223.

35. See FISHER, *supra* note 5, at 38–42; Danelski, *supra* note 4, at 65.

36. See FISHER, *supra* note 5, at 45–49 (detailing interdepartmental conflicts regarding the use of a military tribunal).

37. To deter future German sabotage attempts, the U.S. government wanted to create the impression that it had infiltrated German military or intelligence agencies. The trial proceedings, therefore, needed to be secret to keep the truth from being publicized. See Vázquez, *supra* note 4, at 224. Under the Constitution, only a military trial could be conducted in secret. Another consideration supporting a military trial was that civilian statutes violated by the saboteurs did not allow sufficiently severe punishments. With the possible exception of Haupt, who, assuming he was a U.S. citizen, could be indicted for treason and faced with the death penalty, the saboteurs had only committed low-level civilian crimes—conspiracy to commit sabotage, customs offenses, and immigration offenses—which carried short prison terms. See FISHER, *supra* note 5, at 46–47; Danelski, *supra* note 4, at 65–66; Vázquez, *supra* note 4, at 224. The President and other officials believed that the death penalty was warranted because of the inherent seriousness of the offenses, the historical fact that the punishment for wartime spying and sabotage was generally death, and its deterrent effect on future attempts. A court-martial, the court used primarily to try U.S. service members, was ruled out by the administration because by statute (the Articles of War) the rules of evidence in the court-martial were strict, a death sentence was available only if the jury of military officers voted unanimously, and anyone convicted had procedural rights such as the right to appeal to the Judge Advocate General, which added time and uncertainty to the outcome. See Danelski, *supra* note 4, at 65–66; Vázquez, *supra* note 4, at 225.

decided to use a military commission, a nonstatutory tribunal used extensively to try spies, guerrillas, and others during the Civil War and the Filipino insurrection of 1899–1902.³⁸ The provenance of military commissions was even older than this. Rudimentary kinds of military commissions were employed by General Washington during the Revolutionary War and by commanders in other early conflicts, such as the First Seminole War.³⁹

C. The President's Proclamations

On July 2, President Roosevelt issued two proclamations. The first stated that:

[A]ll 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 . . . 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 laws of war, shall be subject to the law of war and to the jurisdiction of military tribunals⁴⁰

This announced the decision that the saboteurs would be tried in a military commission. Next, the proclamation set forth President Roosevelt's view that the saboteurs had no right to access civilian courts: "[S]uch persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States" ⁴¹

The President issued a second proclamation on July 2, this one constituting and appointing the members of a military commission to try the saboteurs, and directing that it meet on July 8 or as soon as possible thereafter.⁴² Seven U.S. Army generals comprised the military commission.⁴³ The President appointed as chief prosecutors Attorney General Biddle and the Judge Advocate General of the Army, Myron Cramer. Several Army officers were appointed defense counsel. Formal charges were filed in early July, alleging that the saboteurs (1) violated the customary laws of war by penetrating the defense lines of the United States in civilian clothes for the purpose of committing espionage or sabotage; (2) violated Article 82 of the statutory Articles

38. David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 40–46, 48–51 (2005).

39. *Id.* at 18–22, 27–29.

40. Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942).

41. *Id.*

42. Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 7, 1942).

43. FISHER, *supra* note 5, at 52.

of War by providing or attempting to provide information, weapons, and supplies to enemies of the United States and by spying; and (3) conspired to commit the violations of both the customary laws of war and the Articles of War.⁴⁴

The trial started at the end of the first week of July. Based on legal research conducted for the defense by, among others, Major Lauson Stone, son of the Chief Justice of the United States,⁴⁵ defense counsel Kenneth Royall decided that the military trial was unconstitutional and must be challenged in civilian court through habeas corpus. The Supreme Court was in recess for the summer. Defense counsel feared that, if they did not move quickly, the saboteurs would be convicted and executed before judicial review could occur. Royall got in touch with Justices Black and Roberts, and on July 23, Royall, another defense lawyer, Biddle, and Cramer met with Black and Roberts at Roberts's farm in Pennsylvania.⁴⁶ Biddle joined defense counsel in urging the Justices to call a special summer term to hear the case.⁴⁷ Roberts and Black were persuaded and spoke to other Justices by telephone. On July 27, the Court announced publicly that it would convene for a special term to hear the case starting in two days' time. Legal papers were quickly drawn up. Habeas corpus was sought both directly in the Supreme Court and also in the U.S. District Court for the District of Columbia, the judicial district where the military commission trial was currently ongoing.⁴⁸

On July 29, briefs were filed with the Supreme Court. Testimony had been completed in the military commission, and only closing arguments and deliberations of the commission remained. The same morning, oral argument began before the Supreme Court. It is clear from the transcript that the Justices were not prepared—how could they be? The Court heard several hours of oral argument, recessed for the evening, and then heard several more hours on July 30. A hurried conference was held that afternoon, at which the Justices decided that the military commission would be upheld in a

44. *Id.* at 61–63 (reprinting the charges and specifications).

45. See Alpheus Thomas Mason, *Inter Arma Silent Leges: Chief Justice Stone's Views*, 69 HARV. L. REV. 806, 814 (1956). At the outset of the oral argument in *Quirin*, the Chief Justice revealed his son's involvement and offered to recuse himself, but the government and defense urged him to hear the case. *Id.* at 815–16.

46. Danelski, *supra* note 4, at 68; Vázquez, *supra* note 4, at 228.

47. See FRANCIS BIDDLE, IN BRIEF AUTHORITY 337 (1962) ("Kenneth Royall and I flew up to Philadelphia, to request Justice Black, who was staying with Justice Roberts on his farm at Chester Spring, Pennsylvania, to urge the Chief Justice to call a special term of the Court.").

48. See FISHER, *supra* note 5, at 67–68; Danelski, *supra* note 4, at 68.

short *per curiam* order, with a full opinion to be filed later. The *per curiam* was issued on July 31.

D. The Court's Two Decisions

The government argued lack of court access as a threshold issue:

The great bulwarks of our civil liberties—and the writ of habeas corpus is one of the most important—were never intended to apply in favor of armed invaders sent here by the enemy in time of war. . . . Traditionally, all States in time of war have denied belligerent enemies access to their courts.⁴⁹

The President's proclamation, said the government's brief, was simply "an affirmation of a long-settled rule denying belligerent enemies any access to our courts."⁵⁰ To support the proposition that "no writ of habeas corpus will be granted for prisoners of war," the government cited eighteenth-century English decisions denying habeas corpus to anyone who was concededly a prisoner of war.⁵¹ The saboteurs' brief argued that the proclamation had no effect because it was not authorized by statute, and cited *Ex parte Milligan*, a Supreme Court decision from the Civil War,⁵² as well as several other authorities, all inapposite.⁵³ Defense counsel framed the court access issue as an unconstitutional attempt by the President to suspend habeas corpus in an area where no martial law could prevail because it was far from the front lines.⁵⁴ On the merits, the saboteurs argued that the military trial violated the jury and grand jury guarantees of the Constitution and several provisions of the Articles of War, notably the requirement for a form of appellate review by the Judge Advocate General's office.⁵⁵ They also argued that only Congress, not the President, had authority

49. Brief for the Respondent at 8–9, *Ex parte Quirin*, 317 U.S. 1 (1942) (Nos. – Original and Nos. 1, 2, 3, 4, 5, 6, and 7, July Special Term, 1942) [hereinafter Government's Brief].

50. *Id.* at 13.

51. *Id.* at 17 (citing *Rex v. Schiever*, (1759) 97 Eng. Rep. 551 (K.B.); 2 Burr. 765; *Furly v. Newnham*, (1780) 99 Eng. Rep. 269 (K.B.); 2 Doug. 419; *Three Spanish Sailors*, (1779) 96 Eng. Rep. 775 (K.B.); 2 Black. W. 1324). For a discussion of these cases, see *infra* Section III.B.

52. Brief in Support of Petitions for Writ of Habeas Corpus at 16–18, *Ex parte Quirin*, 317 U.S. 1 (1942) (Nos. – Original and Nos. 1, 2, 3, 4, 5, 6, and 7, July Special Term, 1942) [hereinafter Petitioners' Brief] (discussing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)). *Milligan* is discussed *infra*, in the text accompanying notes 222–229.

53. The brief cited a federal district court case, New York state case, and law review case comment—each of which concerned alien enemies who were peaceful civilians with prewar residences in the United States. See Petitioners' Brief, *supra* note 52, at 16–19. None of these authorities were on point factually or legally to the questions presented in *Quirin*.

54. *Id.* at 38.

55. *Id.* at 21, 31–36, 62–63.

to create and make rules for a military trial, and that the specific offenses charged were defective in various respects.⁵⁶ The government responded that the Constitution and Articles of War authorized trials by military commission for "belligerent enemies," and that the saboteurs had no cognizable rights under the Constitution or laws of the United States.⁵⁷

On July 31—only two days after receiving the briefs and four days after first announcing that it would hear the case—the Court issued the *per curiam* opinion. It recited the procedural posture and then stated:

The Court holds: (1) That the charges preferred against petitioners . . . allege an offense or offenses which the President is authorized to order tried before a military commission. (2) That the military commission was lawfully constituted. (3) That petitioners are held in lawful custody, for trial before the military commission, and have not shown cause for being discharged by writ of habeas corpus.⁵⁸

The *per curiam* did not address the prosecution's argument that the saboteurs had no right to judicial review. It is clear that, at their conference before issuing the *per curiam*, the Justices discussed how to handle the government's and saboteurs' competing arguments about court access, but it is not certain exactly what, if anything, the Court agreed upon.⁵⁹ The *per curiam* stated that a full opinion would be issued when ready.

A few days later, the military commission found all eight men guilty and sentenced them to death.⁶⁰ In an ordinary court-martial, the next procedural step would have been a form of appellate review conducted by the Judge Advocate General. Here, he was one of the prosecutors, and the President's proclamation had declared that the sole review would be by the President. The full record was thus sent directly to Roosevelt, who agreed with the convictions. On August 8, six of the saboteurs were electrocuted, but Roosevelt commuted Dash's and one other's sentences to prison terms because of their assistance to the prosecution.⁶¹

For three months, the Court struggled internally to agree upon a full opinion explaining the result announced in its *per curiam* decision. Finally, on October 29, 1942, a unanimous Court issued an

56. *Id.* at 21–29, 40–51.

57. Government's Brief, *supra* note 49, at 11.

58. *Quirin*, 317 U.S. at 11.

59. See *infra* notes 364 & 366 and accompanying text.

60. Danelski, *supra* note 4, at 72.

61. *Id.*

opinion written by Chief Justice Stone. On the issue of access to the courts, the opinion stated:

The Government challenges each of these [claims by defense counsel that the military commission was contrary to the Articles of War and unconstitutional]. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission. As announced in our *per curiam* opinion we have resolved those questions by our conclusion that the Commission has jurisdiction to try the charge preferred against petitioners. There is therefore no occasion to decide contentions of the parties unrelated to this issue.⁶²

Taking the three key sentences one at a time, this is what they appear to say. First ("But there is certainly nothing . . ."), whether or not the proclamation has the effect of denying access to the courts, the Supreme Court was authorized to look at the proclamation to see if it applied to these specific petitioners. This had to be true but was essentially irrelevant—no one questioned that the proclamation spoke directly to the situation of these saboteurs, or that the Court had the right to read its words to see if it applied. Phrased in technical terms, no one disputed that the Court had jurisdiction to decide its own jurisdiction.⁶³ The second ("And neither the Proclamation . . .") is the key sentence, and it is the very definition of an *ipse dixit*. The Court cited no authority and gave no reasons for allowing the saboteurs to access the courts via habeas corpus. It simply asserted the result. The Court should not have treated such a significant issue in so high-handed a manner.⁶⁴

62. *Quirin*, 317 U.S. at 24–25.

63. See, e.g., *United States v. United Mine Workers of Am.*, 330 U.S. 258, 291 (1947) (quoting *United States v. Shipp*, 203 U.S. 563 (1906)) ("[This Court] alone necessarily had jurisdiction to decide whether the case was properly before it."). See generally Stephen I. Vladeck, Boumediene's *Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2113 (2009) (discussing jurisdiction to decide jurisdiction).

64. See generally Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 973–74 (2000) (suggesting that when the Court declines to give reasons but simply asserts its power to mandate a result, it is arguably acting more like a legislature than a court exercising the "judicial power" given by the Constitution); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1465–67 (1995) ("[I]t is part of our understanding of judicial practice that judges' opinions should be reached by a process of 'reasoned elaboration,' and that judges should explain, justify, and give reasons for their decisions.").

The third important sentence ("As announced in our *per curiam* . . .") is ambiguous. The Court might be implying that the issue of court access had already been decided adversely to the government by the *per curiam*. If so, the Court had not stated any such thing in the *per curiam*. It is true that the reasons given in the *per curiam* for denying the habeas petitions went to the merits, suggesting that the Court may have implicitly resolved in favor of the saboteurs the threshold question of access. But it could also have been true that the Court, in its extraordinarily curt *per curiam*, passed over the threshold question in silence because on the merits it was clear that the saboteurs had no right to relief. One might think that now that the Court had the time to explain its result in this extremely high-profile and significant case, it had some obligation to indicate how it had resolved the important issue of court access. The Court chose not to. Alternately, this sentence might have an even narrower meaning, that the *merits* of the saboteurs' claims had been resolved against them already in the *per curiam*. If that was all the Court meant, it was quite correct but trivially obvious and hardly worth mentioning. The meaning of the sentence depends on what the Court meant by "those questions"—either (1) all of the issues including court access discussed in the preceding sentence, or (2) only those merits questions referenced in the second part of the preceding sentence, that is, the saboteurs' "contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."

In light of this potential ambiguity, some might question whether the Court did in fact render a holding on the threshold question of court access. Perhaps *Quirin* is a "relic[] of the pre-*Steel Co.* era," when the Court did not always neatly distinguish between jurisdictional and merits questions, and often decided jurisdiction by reference to the merits.⁶⁵ But I think it is clear that the Court did decide the jurisdictional question of court access. Contemporaneous correspondence of Chief Justice Stone, the author of the opinion, shows that he understood the full October opinion to have issued a holding about court access.⁶⁶ And in subsequent decisions, including

65. Stephen I. Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 TULSA L. REV. 587, 590 (2009) (discussing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), and other cases).

66. See *infra* notes 345–47 and accompanying text.

one coming only four years after *Quirin*, the Court viewed *Quirin* as having issued a holding on court access.⁶⁷

On the merits, the Court in its full opinion in *Quirin* held that Congress in the Articles of War had authorized military commission trials for offenses against the laws of war committed by enemies and that Congress had constitutional authority to do so;⁶⁸ that the saboteurs' conduct brought them within the category of persons who could, under the international laws of war, be tried militarily for the charged offenses;⁶⁹ that the jury and grand jury provisions of the Constitution were never intended to bar military trials for enemy belligerents, even if they were U.S. citizens;⁷⁰ and that *Milligan* applied only to U.S. citizens who were civilians.⁷¹ One issue divided the Court: the question of compliance with procedures specified in the Articles of War. The full opinion stated that some Justices believed these procedures were not intended to benefit "admitted enemy invaders," while others believed the Articles to be applicable but not shown to have been violated by the President or his military commission; all Justices agreed that no right to relief arose from the Articles of War.⁷²

III. HABEAS LAW PRIOR TO 1942

By 1942, centuries-old legal rules barred the saboteurs from accessing civilian courts. Those rules held that: enemy aliens who lacked peaceful prewar residence in the United States were barred from the courts during the war; agents of an enemy government, including as a paradigm case enemy fighters, could receive no protection against the government from domestic law and were barred from accessing the courts, including by using the writ of habeas corpus; and all enemy aliens—even civilians with a peaceful prewar residence in the United States who ordinarily could access the courts—were barred from the courts during the war so far as necessary to prevent the use of the courts to accomplish a purpose

67. See *Rasul v. Bush*, 542 U.S. 466, 474–75 (2004); *Johnson v. Eisentrager*, 339 U.S. 763, 779–81 (1950); *In re Yamashita*, 327 U.S. 1, 9 (1946). Though *Yamashita*, *Eisentrager*, and *Rasul* all saw certain Justices dissent, none questioned that *Quirin* had decided the issue of court access.

68. See *Ex parte Quirin*, 317 U.S. 1, 27–29 (1942).

69. *Id.* at 30–37.

70. *Id.* at 38–46.

71. *Id.* at 45–46.

72. *Id.* at 47–48.

which might hamper our own war efforts or give aid to the enemy. Of course, in state-to-state wars, most enemy fighters are also nonresident enemy aliens, rendering it unnecessary to distinguish between these two bases for denying court access. But when a U.S. citizen is involved, or when the conflict is against a nonstate group (meaning that no one is technically an enemy alien), the distinctions are important.

Of these rules, the one concerning enemy fighters was least well settled in law because in the centuries before *Quirin* enemy fighters almost never attempted to bring suits during wartime. The rule against their doing so is thus found not in holdings of courts but primarily in judicial dicta and learned commentary, and also follows as a policy matter from related legal rules. I argue in this Part that the rule barring enemy fighters from court was as well established as those concerning nonresident alien enemies, but candor requires an acknowledgement that its sourcing in decided cases is nowhere near as solid.

One issue where the historical record does not speak with one voice concerns the situation when the government and the prospective litigant disagree about key facts like citizenship, domicile, or status as an enemy fighter. While the record is clear that people who were undisputedly enemy fighters or nonresident enemy aliens were barred from the courts, the sources are not uniform about court access where those facts were disputed.

This Part traces the development of rules regarding court access from English common law through the American Founding, the Civil War, the wars of imperialism at the turn of the twentieth century, and World War I. Readers who do not need to be convinced that American law prior to 1942 proscribed court access during wartime for admitted enemy fighters and civilians who were nonresident enemy aliens should skip to Part IV.

Before proceeding, a note about habeas corpus history and terminology is necessary, as well as some caveats about what this Article covers and what it does not. This Article concerns the writ of *habeas corpus ad subjiciendum*, a writ dating back to ancient English common law used to test the legality of a prisoner's detention.⁷³ The detainee or a representative petitions a court to issue a writ to the jailer requiring an explanation of why the detention is lawful. If the court finds the detention is unauthorized or unlawful, it has the power

73. See PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 16–17 (2010).

to order the detainee's release.⁷⁴ Habeas corpus is protected by the U.S. Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."⁷⁵ As Professors Fallon and Meltzer have observed, "[J]ust what [the Habeas Suspension Clause] protects is a difficult puzzle."⁷⁶ The most common answer, adopted by the Supreme Court and many commentators, is that the Suspension Clause protects, at a minimum, habeas corpus "as it existed in 1789."⁷⁷ The writ as it existed when the Constitution went into effect was the writ of English common law origin, and hence exploration of English legal history has become an integral part of the analysis of the scope and reach of the U.S. writ.

In a recent article, Fallon and Meltzer provide a useful categorization of the types of habeas questions that arise in military detention cases: (1) "jurisdictional questions, involving the authority of a court to entertain a detainee's petition at all"; (2) "substantive questions, involving whether the Executive has lawful authority to detain particular categories of prisoners"; and (3) "procedural questions, involving both (a) the lawfulness of the administrative procedures followed by the Executive in classifying particular individuals as subject to detention or in trying them for war crimes, and (b) the appropriate scope of judicial review of decisions by executive officials or military tribunals."⁷⁸

Throughout the Article, I frame the main disputed issue as whether the saboteurs had a right to "access the courts" via habeas corpus, because that is the way the Supreme Court did in *Quirin* and other cases.⁷⁹ Whether a given party has the right or capacity to bring

74. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus, Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2037 (2007) (reviewing the basics of the writ); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 970–71 (1998) (same).

75. U.S. CONST. art. I, § 9, cl. 2.

76. Fallon & Meltzer, *supra* note 74, at 2037.

77. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); see also *Boumediene v. Bush*, 553 U.S. 723, 746 (2008); Stephen I. Vladeck, *The New Habeas Revision*, 124 HARV. L. REV. 941, 942 (2011) (book review of HALLIDAY, *supra* note 73).

78. Fallon & Meltzer, *supra* note 74, at 2034.

79. *Ex parte Quirin*, 317 U.S. 1, 24–25 (1942) ("[The executive] insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation."); see also *Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950) (analyzing whether German agents convicted by the U.S. military tribunal sitting in China and subsequently detained in U.S.-occupied Germany had a right via habeas corpus to have "access to our courts").

suit in the first instance is a jurisdictional question under Fallon and Meltzer's schema. In addition to speaking about "access to the courts" or the courts being "open" or "closed" to enemies during wartime,⁸⁰ the Supreme Court has variously described the question of an enemy alien's or enemy fighter's access to U.S. courts as concerning both judicial "jurisdiction" and personal "standing" or "capacity" to sue.⁸¹ Standing and jurisdiction are of course distinct concepts, but they are two sides of the same coin here.⁸²

In 1942, when the German saboteurs sought habeas corpus, Congress had provided broad jurisdiction for the federal district courts to issue writs of habeas corpus; the statutes did not distinguish between whether the petitioner was a citizen or alien and provided only that judges must act "within their respective jurisdictions."⁸³ My argument is that there was an implicit limit on the jurisdiction of the federal courts to hear habeas corpus petitions and at the same time a personal incapacity to sue for the enemy litigant. The Court has said this jurisdictional limit and corresponding incapacity derives from the common law and the law of nations⁸⁴ but has always been leavened by

80. See, e.g., *Masterson v. Howard*, 85 U.S. (18 Wall.) 99, 105 (1873) ("The existence of war, does, indeed, close the courts of each belligerent to the citizens of the other . . ."); accord *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 184 (1872) (quoted *infra* note 201).

81. See *Eisentrager*, 339 U.S. at 765 ("The ultimate question in this case is one of jurisdiction of civil courts of the United States vis-à-vis military authorities in dealing with enemy aliens overseas."); *id.* at 776 ("The standing of the enemy alien to maintain any action in the courts of the United States has been often challenged and sometimes denied."); see also *Conrad v. Waples*, 96 U.S. 279, 289–90 (1877) (quoted *infra* note 201); *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 536 (1867) (same).

82. The Court has frequently conflated the question whether a given person has "a right to judicial review" via habeas corpus "of the legality of executive detention" with the theoretically separate question of "the federal courts' power to review applications" for habeas corpus from a given petitioner. See *Rasul v. Bush*, 542 U.S. 466, 474–75 (2004) (treating these as the same question); see also *Boumediene*, 553 U.S. at 732, 745 (framing the question presented as whether petitioners had "the constitutional privilege of habeas corpus" and stating that "[t]he [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account"). On the Supreme Court's lack of clarity about the precise legal status of the court access inquiry, and the varying consequences of viewing it as a matter of standing, civil capacity, subject matter jurisdiction, individual rights, or separation of powers, see Andrew Kent, *Do Boumediene Rights Expire?*, 161 U. PA. L. REV. PENNUMBRA 20, 32–37 (2012).

83. See 28 U.S.C. § 451 (1940) ("The Supreme Court and the district courts shall have the power to issue writs of habeas corpus."); 28 U.S.C. § 452 (1940) ("The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.").

84. See, e.g., *Eisentrager*, 339 U.S. at 776 (reviewing the historical development of the rules concerning enemy suits in "the common law and the law of nations"); *Ex parte Kawato*, 317 U.S. 69, 74–75 (1942) (holding that "the common law today" allowed civilian enemy aliens, resident in

constitutional considerations sounding in separation of powers.⁸⁵ If a given detainee has a constitutional right to habeas corpus review, then he or she cannot be deprived of that by an implied exception to a jurisdictional statute or a civil incapacity arising from the common law and law of nations.⁸⁶ Therefore, my argument is necessarily also that persons who are undisputedly nonresident enemy aliens, and in particular enemy fighters, had no constitutional right to access the civilian courts during wartime via the Habeas Corpus Suspension Clause, the Due Process Clause, or otherwise.

The relevant provisions of the Constitution and habeas jurisdictional statutes do not have express exceptions for nonresident enemy aliens and enemy fighters. But in our legal system, it is perfectly appropriate and reasonably common for statutory or constitutional language to be defeasible—subject to limitation or annulment (defeat) in certain respects—by background rules of the common law or law of nations.⁸⁷ A well-known example, which, like the topic of this Article, concerns capacity to sue or be sued, is the rule derived from the common law and law of nations that U.S. states have sovereign immunity from certain kinds of suits.⁸⁸ And as James Madison explained to the Virginia ratifying convention, the broad language about jurisdiction in Article III of the Constitution was qualified by the rule of the common law and law of nations that alien enemies were barred from court during wartime.⁸⁹ It should be unsurprising that the Habeas Suspension Clause is similarly qualified, because that clause has always been understood to protect habeas as it was known to the common law.⁹⁰

the United States, to bring private suits during wartime); *Caperton v. Bowyer*, 81 U.S. (14 Wall.) 216, 236 (1871) (quoted *infra* note 201).

85. See *Boumediene*, 553 U.S. at 755 (resorting to “fundamental separation-of-powers principles” to decide whether Congress was constitutionally required to allow alien detainees at Guantanamo Bay petition for writs of habeas corpus); *Eisentrager*, 339 U.S. at 765 (“The ultimate question in this case is one of jurisdiction of civil courts of the United States vis-à-vis military authorities in dealing with enemy aliens overseas.”).

86. See *Rasul*, 542 U.S. at 477–78.

87. See Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

88. *Id.*; see also, e.g., *Alden v. Maine*, 527 U.S. 706, 716–18, 733 (1999) (explaining that state sovereign immunity derives from the common law pre-existing the Constitution and the Constitution’s design); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1567–1621 (2002) (showing that, at the Founding, state sovereign immunity was a personal jurisdiction doctrine derived from the general common law and law of nations).

89. See *infra* note 161 and accompanying text.

90. See, e.g., *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807) (Marshall, C.J.) (“[F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law.”).

Before *Quirin*, both the Constitution's provisions bearing on court access (the Suspension Clause, Due Process Clause, and Article III) and Congress's statutes giving habeas and federal question jurisdiction to the federal courts were best understood as implicitly excepting from their protections both enemy fighters and civilians who were nonresident enemy aliens. My method of interpreting the Constitution is catholic—to understand what the Constitution meant to earlier generations of Americans, this Article looks at many kinds of evidence including the original understanding, constitutional structure and principles, judicial precedent, political branch practice, and learned commentary. Background legal norms of the common law and law of nations are crucial to the analysis. Because a bar on court access for enemy fighters and nonresident enemy aliens was a well-established rule of the common law and law of nations that was repeatedly applied in practice, both the Constitution and Congress's habeas and federal question jurisdiction statutes should be read as implicitly carving out exceptions for those classes of petitioners. I have examined congressional debates during the years in which the habeas statutes were enacted or received important amendments—the 1789 Judiciary Act, the 1863 suspension statute, the 1867 amendments, the 1873–74 codification of the Revised Statutes of the United States, and the 1875 enactment of federal question jurisdiction⁹¹—and found no indication that Congress expressly decided whether enemy fighters or nonresident enemy aliens should have court access via habeas corpus or otherwise.⁹² But a background norm of the common law and law of

91. In chronological order of enactment, the relevant statutes are: Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (vesting federal courts with power to issue writs of habeas corpus); Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755 (allowing suspension of habeas corpus during the Civil War); Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86 (vesting federal courts and judges with power to grant writs of habeas corpus “within their respective jurisdictions” where “any person [is] restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States”); U.S. Rev. St. §§ 751–52 (1875) (to the same effect); Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (vesting federal courts with general federal question jurisdiction).

92. The 1867 act expanding habeas jurisdiction contained an interesting proviso:

This act shall not apply to the case of any person who is or may be held in the custody of the military authorities of the United States, charged with any military offence, or with having aided or abetted rebellion against the government of the United States prior to the passage of this act.

Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 387. In the limited debate about this provision, the only objection, voiced by one senator, was that it would allow the detention of a U.S. “civilian.” CONG. GLOBE, 39th Cong., 1st Sess. 4229–30 (1866) (statement of Sen. Davis). Lyman Trumbull, the bill’s sponsor, pointed out that it was limited to persons “held in confinement in consequence of the rebellion” like Jefferson Davis. *Id.* at 4229 (statement of Sen. Trumbull). I have found no evidence that anyone thought that such a provision was necessary in order to prevent Confederate prisoners of war from obtaining habeas corpus. Trumbull, for his part, clearly

nations would have been understood to continue to apply absent contrary legislative intent, and so the lack of debate is not dispositive.

I have repeatedly limited my claims to only “undisputed” enemy aliens or enemy fighters. In *Quirin*, all eight men conceded that they were employed by the German military to commit sabotage, and seven of the eight conceded that they were not U.S. citizens.⁹³ These facts—citizenship and employment in the enemy’s military—can be described as “jurisdictional facts,” in that they determine whether a detainee has a right to seek release from the civilian courts or whether exclusive military jurisdiction over them is proper.⁹⁴ I am sympathetic to the view that when certain classes of detainees in military custody dispute jurisdictional facts—whether they are in fact enemy aliens or enemy fighters—habeas courts must be open to hear and decide the facts.⁹⁵ In the *Quirin* litigation, the Attorney General conceded the propriety of this general view,⁹⁶ and that position has a lot to recommend it.⁹⁷ A pervasive feature of post-9/11 habeas corpus

believed that enemy fighters had no right to habeas corpus. See *infra* note 204. At the time the bill passed, the war was over and the Confederate States of America was no longer considered a de facto foreign country, see *infra* notes 200 & 210 and accompanying text, and so the ban on nonresident enemy aliens accessing the courts did not apply—positive law was required to prevent civilian U.S. citizens in the United States from accessing the courts.

93. See *supra* Section II.A.

94. Cf. *Johnson v. Eisentrager*, 339 U.S. 763, 775 (1950) (describing, in the context of executive civil detention under the Alien Enemy Act, the citizenship of the detainee as a “jurisdictional element[]” that Article III courts may review (discussing *Ludecke v. Watkins*, 335 U.S. 160 (1948))); *Ng Fung Ho v. White*, 259 U.S. 276, 283–85 (1922) (requiring independent judicial determination of the “essential jurisdictional fact” of citizenship in a habeas corpus challenge to deportation order). See generally Neuman, *supra* note 74, at 984–87, 993–94 (discussing jurisdictional fact review in the habeas context).

95. My prior work has shown that noncitizens without any property or physical presence in the United States had never, until *Boumediene v. Bush*, 553 U.S. 723 (2008), been considered to have any U.S. constitutional rights. See generally J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007) [hereinafter Kent, *Global Constitution*]; Kent, *supra* note 13; Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839 (2010) [hereinafter Kent, *Civil War*]. Jurisdictional fact review by an Article III court should therefore not be required for persons so situated. But for persons present in the United States, or persons claiming to be U.S. citizens no matter where located, I am sympathetic to the view that jurisdictional fact review is constitutionally required.

96. Transcript of Oral Argument of July 29, 1942, at 72, *Ex parte Quirin*, 317 U.S. 1 (1942) (Nos. – Original and Nos. 1, 2, 3, 4, 5, 6, and 7 of July 1942 Special Term), reprinted in 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 567 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS] (“In a writ of habeas corpus it is perfectly clear that the alien enemy is not entitled to the use of the writ except to determine the basic jurisdictional fact of whether he is an alien enemy.”).

97. See, e.g., David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 CARDOZO L. REV. 1001, 1004 (2008); Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. 963, 965 (2007). A requirement that a habeas court review disputed jurisdictional facts is related to the older doctrine that “superior courts”

litigation has been disputes about jurisdictional facts. Because this Article is primarily concerned with a different issue—court access when jurisdictional facts are undisputed—it need not and does not take a definitive position on such a complex issue. But the Article notes the different views found in historical sources about what rules pertain when jurisdictional facts are disputed.

The leading counterargument to mine is that, while undisputed enemy civilians and fighters were generally barred from the courts during wartime, that was true primarily in cases involving property, and habeas was an entirely different and special case. Originally conceived in Britain as vindicating the King's power to control his officers and tribunals, and later seen in both Britain and America as protecting a personal liberty interest of the highest order from government overreaching, habeas was, on this account, a quintessentially flexible and powerful judicial writ that reached any place and any person the judges wanted it to, even enemy prisoners of war, particularly if they were challenging a military commission proceeding.⁹⁸ This Part will assess the strength of this competing narrative following the same historical chronology as my affirmative argument.

A. *The Allegiance and Protection Framework*

This Section describes the general framework within which aliens' and enemies' legal rights, including their right to access the courts, were understood from the colonial period through the Founding, the Civil War, and the turn of the twentieth century. The twin pillars of this ancient framework, which developed in the common law and law of nations before the United States declared independence, were allegiance and protection, and they were understood to be reciprocal.⁹⁹ Only persons owing allegiance to the government were under the protection of the government and its laws and courts. Only persons within protection because of their allegiance had standing to invoke the protection of the courts and were shielded

had power to review the jurisdictional determinations of "inferior tribunals." Neuman, *supra* note 74, at 982–87.

98. In 2008, the Court in *Boumediene* seems to have accepted this view, since it placed no categorical limits—potential categorical limits rejected by the Court include citizenship, location, or enemy status—on the reach of habeas corpus, instead finding it available whenever a six- or seven-part, non-exclusive, totality of the circumstances test was met. See Kent, *supra* note 13, at 109 (discussing this aspect of *Boumediene*).

99. See Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1834–46 (2009).

by rights under the domestic constitution and laws.¹⁰⁰ The link between protection and access to the courts was clear. As a popular English law dictionary put it, “[S]uing is but a consequential Right of Protection,” that is a right that flows from being within protection.¹⁰¹ Philip Hamburger has demonstrated that this allegiance-protection framework was understood in the United States to be one of the conceptual foundations upon which the U.S. and state constitutions were adopted during the Founding period.¹⁰² Earlier work of mine has demonstrated the enduring nature of the framework, which persisted through the Civil War¹⁰³ and turn of the twentieth century.¹⁰⁴

Citizenship in the United States (or subjecthood in monarchical Great Britain) was what paradigmatically carried with it allegiance and protection.¹⁰⁵ But an alien from a friendly nation could, when visiting or residing within the United States (or Britain), be bound to a “temporary” or “local” allegiance and therefore entitled to temporary protection of the constitution, laws, and courts.¹⁰⁶ Besides citizens (or subjects) and friendly aliens within the country under temporary allegiance, all other people were not under the protection of the courts and laws. A group which paradigmatically had no protection of the law—or access to courts—was the men in arms of an enemy nation during wartime. For civilians who were citizens or subjects of an enemy nation during wartime, the rules changed over time. The older rule was that enemy nationals—called “alien enemies” or “enemy aliens”—had no protection of the laws or access to courts during war. This rule was softened over time. The newer rule was that civilian enemy aliens who peacefully resided within the United States (or

100. *See id.* at 1826–29, 1833–40.

101. 1 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW, § Aliens (4th ed., London, W. Strahan & M. Woodfall Printers 1778).

102. *See* Hamburger, *supra* note 99, at 1844–47, 1976.

103. Kent, *Civil War*, *supra* note 95, at 1853–60.

104. Kent, *supra* note 13, at 124–32.

105. *See, e.g.*, 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF PLEAS OF THE CROWN 59 (London, E. & R. Nutt 1736) (“Because as the subject hath his protection from the king and his laws, so on the other side the subject is bound by his allegiance to be true and faithful to the king”); *accord* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 354 (Oxford, Clarendon Press 1765).

106. Hamburger, *supra* note 99, at 1847, 1898–1901; Kent, *Global Constitution*, *supra* note 95, at 503; *see also* MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY 183 (Oxford, Clarendon Press 1762) (“With regard to Natural-born Subjects there can be no Doubt. They owe Allegiance to the Crown at all Times and in all Places. This is what We call *Natural* Allegiance, in Contradistinction to that which is *Local* *Local* Allegiance is founded in the Protection a Foreigner enjoyeth for his Person, his Family or Effects during his Residence here” (quoted material from second portion of work, known popularly as *Foster’s Discourses*)); *accord* BLACKSTONE, *supra* note 105, at 358.

Britain) from before the war, or those who arrived during the war with permission of the government, were, like alien friends, under the temporary protection of the laws because they owed temporary allegiance. But peaceful civilian enemy aliens who were located outside the United States (or Britain) owed no temporary allegiance and hence had no protection of the laws or access to courts. The following Sections detail these understandings, first in English common law and then in the United States during the Founding era, early antebellum period, Civil War, imperial period at the turn of the twentieth century, and World War I. As shown below, although the language of reciprocal "allegiance" and "protection" was dropping away in the twentieth century,¹⁰⁷ the rules derived from the framework—specifically the rules that enemy fighters and nonresident civilian enemy aliens lacked protection from the law and access to courts during wartime—remained established.¹⁰⁸

B. English Law

Old English law was harsh in its treatment of aliens. The famous *Calvin's Case* of 1608 described the prevailing law: alien friends—subjects of governments at peace with England—who were resident or sojourning in England could access the courts for all purposes except regarding real estate located within the realm; such real estate they were prohibited from owning and hence from suing about.¹⁰⁹ But an alien enemy, wherever located, was "utterly disabled

107. This language did, however, still appear in important Supreme Court decisions about alien rights during the 1940s and 1950s. See *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("[T]he Government's obligation of protection is correlative with the duty of loyal support inherent in the citizen's allegiance . . ."); *id.* at 769 ("[O]ur law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments."); *Ex parte Kawato*, 317 U.S. 69, 74 (1942) ("A lawful residence implies protection, and a capacity to sue and be sued." (citation omitted)).

108. As a result of U.S. imperialism and the complications of immigration laws, there are today several categories of persons who are not U.S. citizens but who should be understood to have the same rights and responsibilities as citizens in the allegiance/protection framework. These include permanent residents of U.S. possessions like American Samoa, who are denominated "U.S. nationals" rather than citizens, and so-called "green card" holders, who have been granted permanent resident status within the United States. Because U.S. citizens are both the paradigm and overwhelmingly the most numerous cases, I will use the term "citizen" to include the noncitizen groups with the same allegiance/protection rights and responsibilities.

109. *Calvin's Case*, (1608) 77 Eng. Rep. 377 (K.B.) 397; 7 Co. Rep. 1 a, 17 a. On the development of rules benefitting alien friends, see 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 94-98 (1926).

to maintain any action, or get any thing within this realm.”¹¹⁰ Alien enemies were entirely outside the protection of the municipal law.¹¹¹ According to Blackstone’s *Commentaries*, “Alien enemies have no rights, no privileges, unless by the king’s special favor, during time of war.”¹¹² Blackstone’s caveat was important. Civilian enemy aliens might be within the protection of the laws and have access to the courts *if* their presence in England were licensed by the Crown. A leading case, *Wells v. Williams*, established that an alien who came to England “in time of peace, *per licentiam domini Regis* [under the license of the Crown] . . . and lives here *sub protectione* [under protection],” may maintain a civil action even though later the alien’s home country went to war with England.¹¹³ The same access to the courts was allowed to civilian enemy aliens who came to England during the war if they came under a license from the Crown.¹¹⁴ But alien enemies resident in their home country—who owed no allegiance and hence had no protection—were denied access to courts during wartime.¹¹⁵ Even for alien enemies resident in Britain, lack of the Crown’s license meant no protection and hence no access to the

110. *Calvin’s Case*, 77 Eng. Rep. at 397; *see also, e.g.*, *Hoppen v. Leppett*, (1737) 95 Eng. Rep. 305 (K.B.) 305–06; Andr. 76 (holding that because alien friends may maintain actions, to bar suit it must be pleaded that the alien is “inimicus Curiae,” an enemy of the Crown).

111. *See* HOLDSWORTH, *supra* note 109, at 98 (stating that at common law an alien enemy “could bring no action in the courts” and quoting Dyer that “being an enemy of our lord the king he [the alien enemy] could have no benefit from his laws”).

112. BLACKSTONE, *supra* note 105, at 372; *see also* 2 BLACKSTONE, *supra* note 105, at 401 (1766) (“[S]uch [alien] enemies, not being looked upon as members of our society, are not entitled during their state of enmity to the benefit or protection of the laws.”).

113. *Wells v. Williams*, (1697) 91 Eng. Rep. 45 (K.B.) 46; 1 Salk. 46, 47; *see also* JOHN I. BURN, *THE ATTORNEY’S PRACTICE OF THE COURT OF KING’S BENCH* 68 (London, J. Butterworth 1805) (“An alien friend may have personal actions, but an alien enemy cannot have any action whatsoever. Yet it has been decided that an alien enemy, commorant here by the King’s license, and under his protection, may sue, though he came in time of war, without a safe conduct.” (citations omitted)). *See generally* HOLDSWORTH, *supra* note 109, at 100 (discussing the importance of *Wells v. Williams*); Hamburger, *supra* note 99, at 1874–75 (discussing the underlying legal principles).

114. *See* Hamburger, *supra* note 99, at 1876.

115. *See, e.g.*, *Brandon v. Nesbitt*, (1794) 101 Eng. Rep. 415 (K.B.) 415, 417–18; 6 T.R. 23, 23–29 (dismissing an insurance action because it was initiated by an enemy alien); *see also* *Crawford v. The William Penn*, 6 F. Cas. 778, 779 (C.C.D.N.J. 1815) (No. 3,372):

The general rule of the common law of England is, that an alien enemy cannot maintain an action in the courts of that country, during the war, in his own name. The rule is . . . [founded] upon the disability of the party to sue; arising out of the hostile character which the war has impressed upon him. The rule appears to be inflexible, except where the alien enemy is under the protection of the king; as where he comes into the kingdom after the war, by license of the sovereign; or being there at the time of the war, is permitted to continue his domicil.

courts.¹¹⁶ An explicit or implicit license from the Crown, which brought with it protection, was the key to the civilian enemy alien being protected by the municipal law and having access to the courts.¹¹⁷

Alien enemies who entered England in a hostile fashion, for example as part of an attacking army or navy, owed no allegiance to the Crown and received no license to remain and be protected by its laws. Sir Matthew Hale, for a time Chief Justice of the King's Bench, explained in his influential treatise that an "alien enemy [who] come[s] into this kingdom hostilely to invade it" is outside of allegiance (and hence also protection), but while "an alien, the subject of a forei[g]n prince in amity with the king live here, [he would] enjoy the benefit of the king's protection . . . for he owes a local alleg[i]ance."¹¹⁸ As John Locke wrote, temporary or "local protection" was due to aliens "who, *not being in a state of war*, come within the territories belonging to [the] government."¹¹⁹

Enemy fighters—aliens in the military service of a nation at war with Britain, who when detained were referred to as "prisoners of war"¹²⁰—were the paradigmatic example of aliens who came to Britain "hostilely" or "in a state of war," owing no allegiance and being entitled to no protection.¹²¹ An early reported case concerning enemy prisoners of war and habeas corpus was *Rex v. Schiever*, decided by the King's Bench in 1759.¹²² France and Britain were at war. Schiever sought a writ of habeas corpus to free himself from jail in Liverpool, where he was held as a prisoner of war after being captured serving aboard a French privateer.¹²³ An affidavit supporting his petition

116. See, e.g., *Sylvester's Case*, (1703) 87 Eng. Rep. 1157 (Q.B.) 1157; 7 Mod. 150 (holding that an alien enemy present in England who was not under the Crown's protection "shall be seized and imprisoned by the law of England, and he shall have no advantage of the law of England, nor for any wrong done to him here").

117. See, e.g., 1 JOHN COMYNS, *A DIGEST OF THE LAWS OF ENGLAND* 11 (4th ed., Dublin, Luke White 1793) ("[I]t is no Plea [barring access to the courts], that he is an Alien Enemy, when a Man is under the Protection of the King."). See generally *Hamburger*, *supra* note 99, at 1874–79.

118. HALE, *supra* note 105. Alien enemies who did not owe temporary allegiance to the Crown, either because of hostility or lack of local residence, lacked protection of the municipal law and could not be indicted for the municipal crime of treason; they could only be "tried and executed by martial law." *Rex v. Tucker*, (1694) 91 Eng. Rep. 897 (K.B.) 898; 1 Ld. Raym 1, 2.

119. JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* § 122, at 65 (C.B. Macpherson ed., 1980) (1764) (emphasis added).

120. See *supra* note 10 for clarification about how I use the terms "enemy fighter" and "prisoner of war."

121. See *Hamburger*, *supra* note 99, at 1887–93.

122. *Rex v. Schiever*, (1759) 97 Eng. Rep. 551 (K.B.); 2 Burr. 765.

123. *Id.* at 551.

claimed that he was a Swedish mariner who had been seized and impressed into service by the French warship.¹²⁴ Not being French—not being an alien enemy—and having only involuntarily fought against the British, he sought his freedom. According to the report of the case, “the Court thought this man, upon his own shewing, clearly a prisoner of war, and lawfully detained as such. Therefore they Denied the motion,”¹²⁵ refusing to issue a writ of habeas corpus on his behalf.¹²⁶

A second reported case concerning prisoners of war and habeas corpus, *The Case of Three Spanish Sailors*, was decided by the Court of Common Pleas in 1779.¹²⁷ Britain was then at war with France, Spain, and the rebellious colonists in North America. Three Spanish sailors were held as prisoners of war on a British warship docked in Britain. According to their habeas corpus petition, the sailors had been captured by a British warship while serving on a Spanish privateer and then taken to the British colony of Jamaica.¹²⁸ There, they were persuaded to help crew a short-handed British merchant vessel heading home to Britain, with a promise that they would receive wages and be released when they arrived.¹²⁹ But the captain broke his promise, instead delivering the Spanish sailors to the custody of the British Navy. According to the court, the sailors “upon their own shewing, are alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus.”¹³⁰ Note the extremely comprehensive language: “not entitled to any of the privileges of Englishmen.” They were outside the protection of the laws and courts of England.¹³¹

In 1820, the King’s Bench noted *Schiever* and *Spanish Sailors* in dictum, stating that the writ of habeas corpus is properly refused “when it appeared that the person applying was a prisoner of war.”¹³² English treatises often stated the rule against enemy prisoners of war being freed by habeas corpus in absolute terms, and several sources

124. *Id.*

125. *Id.* at 552.

126. See Hamburger, *supra* note 99, at 1890–91 (emphasizing that *Schiever* was “decided on an affidavit in pre-habeas proceedings” and does not show that habeas was available to prisoners of war).

127. *Three Spanish Sailors*, (1779) 96 Eng. Rep. 775 (C.P.); 2 Black. W. 1324.

128. *Id.* at 775.

129. *Id.*

130. *Id.* at 776 (citing *Schiever*).

131. See Hamburger, *supra* note 99, at 1890–91 (reading *Spanish Sailors* in this manner).

132. *Hobhouse’s Case*, (1820) 106 Eng. Rep. 716 (K.B.) 717; 3 B. & Ald. 418, 420.

made clear what was implied by the comprehensive language in *Spanish Sailors*—that this was a jurisdictional bar on bringing suit at all, like the rule barring from the courts nonresident alien enemies who were civilians.¹³³

Two additional cases are worth noting. In *Sparenburgh v. Bannatyne*, decided by the Court of Common Pleas in 1797, the plaintiff was a German national—a neutral—who served in the Dutch fleet in its war against Britain; was captured and made a prisoner of war by the British; and then, at the direction of a British officer, served as a seaman on a British merchant ship and therefore came to Britain, where he subsequently brought suit for unpaid wages.¹³⁴ The defendant urged that the plaintiff should not be allowed to access the courts of Britain during the war, being an alien enemy and prisoner of war, but the court allowed the suit to proceed. The Chief Judge seemed moved by the fact that the prisoner was from a neutral country, had renounced his hostility to Britain by faithful service on a British vessel, and had been made promises by a Crown officer.¹³⁵ The policy reason for why alien enemies were barred from court was not applicable; the Chief Judge stated, "I take the true ground upon which the plea of alien enemy has been allowed is, that a man, professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the courts of this country."¹³⁶ Because Spanerburgh was released through a

133. See, e.g., 1 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 183 (7th ed., London, A. Strahan Law Printer 1832) ("An alien enemy, prisoner of war, is not entitled, under any circumstances, to his discharge upon a *habeas corpus*."); 4 COMYNS, *supra* note 117, at 330 (same); GEORGE HANSARD, A TREATISE ON THE LAW RELATING TO ALIENS AND DENIZATION AND NATURALIZATION 101 (London, V. & R. Stevens & G.S. Norton 1844) ("[A]n alien enemy while prisoner of war is not entitled under any circumstances to be discharged upon a *habeas corpus*; and he cannot maintain any action at all . . ."); JOHN IMPEY, THE NEW INSTRUCTOR CLERICALIS: STATING THE AUTHORITY, JURISDICTION, AND MODERN PRACTICE OF THE COURT OF KING'S BENCH 746 (9th ed., London, W. Clarke & Sons Law Booksellers 1818) (same); 1 THOMAS EDLYNE TOMLINS, THE LAW-DICTIONARY, at *Habeas Corpus* II (3d ed., London, C. Baldwin Printer 1820) ("No *habeas corpus* lies for an enemy, prisoner of war . . ."); see also *From the Boston Gazette: Review of a Most Important and Interesting Pamphlet Entitled "Treatise on Expatriation"*, VA. PATRIOT (Richmond), Mar. 26, 1814, at 3 (contending that an English subject held in England as a prisoner of war could under current law challenge that detention via *habeas corpus* but "[a]ll these privileges an alien enemy cannot have").

134. *Sparenburgh v. Bannatyne*, (1797) 126 Eng. Rep. 837 (C.P.) 837–39; 1 Bos. & Pul. 163.

135. *Id.* at 840–41 (statement of Eyre, C.J.).

136. *Id.* Two other judges concurred, stressing policy also. They emphasized that a prisoner of war released on parole within Britain might, until he is exchanged and returned to his native land, need to contract with Englishmen to buy food or other necessities, and it would be unfair to allow him no judicial recourse in these necessary transactions. *Id.* at 841–42. The lenient result in *Sparenburgh* was soon applied to an actual enemy alien. See *Maria v. Hall*, (1800) 126 Eng. Rep. 1256 (C.P.); 2 Bos. & Pul. 236 (during war with France, allowing a French prisoner of war

parole arrangement with the Crown and previously contracted with a different Crown official regarding his transit, the case can also be understood as turning on an implicit license from the Crown to receive a measure of protection of the laws.¹³⁷

Anthon v. Fisher, decided by the King's Bench in 1782, emphasizes how narrow is the exception approved in *Sparenburgh*. *Anthon* is factually and legally complex; it suffices here to say that it limited the *Sparenburgh* exception to instances where the prisoner-of-war litigant's civil (nonhabeas) claim does not arise out of his own hostile actions or designs.¹³⁸ As the court put it, an alien enemy "cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war" against Britain.¹³⁹ The policy of *Sparenburgh* and *Anthon* seems clear: the courts must not be used to aid enemies with regard to claims arising out of their hostile actions. This provides policy confirmation for the bar on enemy fighters using habeas corpus announced in *Schiever* and *Spanish Sailors*.

in England to sue to recover wages owed him for voluntarily helping crew an English vessel on its homeward voyage).

137. Hamburger, *supra* note 99, at 1893 n.231.

138. In the eighteenth century, privateering was a common tactic used by warring nations. It was the practice of licensing private armed vessels to cruise the oceans and capture enemy shipping. The captured vessels would be brought into a port in the home country and, in a so-called "prize" proceeding, an admiralty court would determine whether the vessel and cargo were in fact owned by an enemy. See WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* 37–38, 43–45 (2006) (describing privateering and prize courts). If so, they were sold and some of the proceeds went to the captor with the remainder going to the government that had licensed the privateer. Some privateers and captured vessels worked out a way to contract around the hassle of dragging the captured vessel and crew to a distant port and litigating the prize case. The skipper of the captured vessel would sign a "ransom bill" pledging that the owner(s) of the vessel and cargo would pay to the privateer a sum of money; in exchange, the captured vessel was freed to pursue its voyage and sell its cargo, and was given a pass by the privateer, which informed any other privateer who might try to capture the vessel that it had already been captured and ransomed and so could not be seized again. Note that ransoming could also occur when a vessel was seized by an enemy's public navy vessel instead of a privateer. See W. Senior, *Ransom Bills*, 34 L.Q. REV. 49 (1918) (describing how ransom bills worked in English law and practice).

In the early 1780s, during the war between Great Britain, on the one hand, and France, Spain, and the American colonists on the other, a French privateer captured a British merchant ship and released it in exchange for a ransom bill. The French privateer was then captured by an English warship, and its crew brought to Britain as prisoners of war. *Anthon v. Fisher*, (1782) 99 Eng. Rep. 594 (K.B.); 3 Dougl. 166. In Britain, the captain of the French privateer vessel brought suit to collect on his ransom bill. King's Bench was divided about whether the suit could be brought, and entered judgment for the plaintiff only so that the cause could be appealed to the Exchequer Chamber. *Id.* at 599–600. There, the judges of the Court of Common Pleas and the Barons of Exchequer heard the case and held against the alien enemy. *Id.* at 600.

139. *Id.*

In sum, the rules established by the old British cases and commentary were the following: alien enemies resident abroad could not sue in British courts during wartime. Peaceful civilian alien enemies resident in Britain under the license of the Crown could sue in British courts. Even if present on British soil, admitted enemy fighters were barred from seeking a writ of habeas corpus. In addition, enemy prisoners of war, even if detained in Britain and released on parole, could not bring civil suits if the right they asserted grew out of their hostile actions against Britain.

The conclusions I reach about old English law—the bar on nonresident alien enemies and enemy fighters detained as prisoners of war seeking habeas corpus—are not universally accepted. For example, an amicus filed by legal historians supporting the detainees in *Boumediene* claims that, under English law, “prisoners of war . . . could challenge the legality of their detention by way of habeas corpus,” relying solely on the reports of *Schiever* and *Spanish Sailors*.¹⁴⁰ But many other sources, discussed above and below, contradict that conclusion, as does the language of *Spanish Sailors* itself. A person who was undisputedly a prisoner of war could not be released by a British habeas court, no matter what challenge to the “legality of [his] detention” he raised. This conclusion is buttressed somewhat by a recent book by historian Paul Halliday, for which he examined several thousand unreported habeas corpus decisions of the King’s Bench dating from 1502 to 1798.¹⁴¹ Professor Halliday found a handful of cases in which court records describe the habeas petitioner as a prisoner of war. Reviewing these cases, he concludes that “a person properly categorized” as a prisoner of war could not seek release via habeas.¹⁴²

Halliday also concludes that “the writ could be used to investigate whether a person was correctly labeled a POW.”¹⁴³ While this is seemingly a narrow claim that is not inconsistent with this Article’s conclusions, Halliday actually seems to have a much broader view of the scope of habeas in English history because he appears to believe that nonresident alien enemies had a right to habeas review as

140. Brief of Legal Historians as Amici Curiae in Support of Petitioners at 6, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196).

141. See HALLIDAY, *supra* note 73.

142. *Id.* at 169. According to Halliday, the only relevant rule limiting judicial power was not jurisdictional but substantive: the court could not release via habeas anyone who was in fact a prisoner of war, because the government was authorized to detain them until exchanged or otherwise released through military or diplomatic channels. *Id.*

143. *Id.*

well.¹⁴⁴ In combination, these two claims—that nonresident enemy aliens could access the courts via habeas during wartime and that habeas could be invoked by enemy prisoners of war to test the factual or legal bases of the English government's categorization of them as prisoners of war and the legal basis for detention—would present a very broad view of the permissible scope of habeas. This account is facially consistent with the ambiguous public report of *Schiever*¹⁴⁵ and has the support of some other commentators.¹⁴⁶

But there are reasons to doubt the conclusion that individuals who were undisputedly nonresident enemy aliens and who were detained by the government as prisoners of war were able to access the courts via habeas corpus petitions. The comprehensive language in *Spanish Sailors* certainly sounds like a categorical, jurisdictional bar: “[U]pon their own shewing, are alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus.”¹⁴⁷ The likelihood that English law applied a jurisdictional bar on nonresident-enemy-alien prisoners of war using habeas is strengthened by an interesting case, *Furly v. Newnham*, in which the King's Bench refused to allow the writ of habeas corpus to be used to bring an enemy prisoner of war temporarily into court to testify as a witness for a third party.¹⁴⁸ *Furly* could be understood as an application of a jurisdictional bar on habeas corpus being used with regard to enemy fighters who are nonresident enemy aliens.¹⁴⁹

144. *Id.* at 171. Halliday does not always distinguish resident and nonresident enemy aliens. In his book, he suggests that, during a war against France, “French captives, combatants and noncombatants alike,” successfully invoked the habeas jurisdiction of King's Bench. *Id.* A “French . . . combatant[]” sounds like a nonresident enemy alien who, because he was a “captive,” would also be a prisoner of war. But at other times Halliday seems to view nonresident enemy aliens who entered the country in a hostile fashion as categorically or jurisdictionally barred from habeas corpus. See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 708 (2008).

145. See *Boumediene*, 553 U.S. at 747 (“In *Schiever* and the *Spanish Sailors*’ case, the courts denied relief to the petitioners. Whether the holdings in these cases were jurisdictional or based upon the courts’ ruling that the petitioners were detained lawfully as prisoners of war is unclear.”).

146. See JUDITH FARBEY, R.J. SHARPE & SIMON ATRILL, *THE LAW OF HABEAS CORPUS* 119–20 (3d ed. 2011) (reaching the same conclusion as Halliday); Vladeck, *supra* note 77, at 949–50 (reviewing Halliday and agreeing with his conclusions).

147. See *Three Spanish Sailors*, (1776) 96 Eng. Rep. 775 (C.P.); 2 Black. W. 1324.

148. See *Furly v. Newnham*, (1780) 99 Eng. Rep. 269 (K.B.) 269; 2 Dougl. 419, 419. The specific form of writ here was *habeas corpus ad testificandum*. See generally WILLIAM S. CHURCH, *A TREATISE ON THE WRIT OF HABEAS CORPUS* 180–81 (2d ed., San Francisco, Bancroft-Whitney Co. 1893).

149. See *Hamburger*, *supra* note 99, at 1891–92 (reading the case in this manner).

Moreover, the legal understandings of Crown officials and members of Parliament during a high-stakes debate about subjecthood, prisoner-of-war status, and habeas corpus in the late eighteenth century seems to be that nonresident-enemy-alien prisoners of war could not access the courts via habeas. Soon after the American colonists revolted and formed an army and navy to fight the Crown, British forces began to capture and detain Americans. Britain denied the legality of the united colonies' claim that they had become an independent nation and that their captured soldiers and sailors were prisoners of war, and instead insisted that the Americans were simply rebellious British subjects—criminals, pirates, and traitors, they were called. Within the British government, it was widely assumed that American detainees brought to Great Britain were within protection of the laws and courts and would be entitled to use habeas corpus because they were British subjects.¹⁵⁰ As a result, Parliament enacted statutes that had the effect of suspending their right to be released via habeas.¹⁵¹ Lord Frederick North, Prime Minister during the Revolutionary War, wrote that statutory suspension of habeas corpus was needed in order to legally detain the Americans outside of judicial review “like other prisoners of war,” i.e., as if they were prisoners of war.¹⁵² Lord Mansfield, the Chief Justice of the King’s Bench, and George Germain, Secretary of State for America, also viewed the American detainees in Britain as potentially entitled to habeas corpus precisely because they were British subjects and therefore not properly considered enemy prisoners of war.¹⁵³ The situation changed dramatically in 1782 once American military success forced Britain to concede that the United States had become an independent nation. Even though a final peace treaty was not yet signed, Parliament no longer considered the Americans to be British subjects within the protection of the British laws and courts, and so no more habeas suspension statutes were enacted.¹⁵⁴ Instead, Parliament’s new legislation authorized the Crown “to hold and detain . . . as Prisoners of War” the American soldiers and sailors, and stated that they would be handled “according to the Custom and

150. See Amanda Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 924 (2012) (noting that it was “well settled” that persons under the protection of English law would be dealt with as domestic criminals rather than enemies of the Crown).

151. *Id.* at 925.

152. *Id.* at 946 (citing 19 THE PARLIAMENTARY HISTORY OF ENGLAND 4 (London, T.C. Hansard 1814) (known as COBBETT’S PARLIAMENTARY HISTORY)).

153. *Id.* at 948–49.

154. *Id.* at 950–51.

Usage of War, and the Law of Nations,” that is, the law governing relations between independent sovereign nations, not British domestic law, which provided its special protections for subjects, including habeas corpus.¹⁵⁵

An additional reason to believe that nonresident alien enemies held as prisoners of war were not within protection and were jurisdictionally barred from accessing the courts through habeas corpus is that the unreported cases described by Professor Halliday do not appear to provide strong support for a contrary view. Most seem to concern subjects of the English Crown accused of the domestic crime of treason; some petitioners were apparently referred to, imprecisely, as prisoners of war, but were in fact not foreign enemies at all.¹⁵⁶ Like the American colonists captured fighting during the early stages of the Revolutionary War, they would have been understood to owe allegiance and be within protection of the laws and courts. Other cases cited by Halliday did appear to involve foreigners—French—during a time of war between England and France, but some of the petitioners were apparently described in court papers as “merchants” accused of “spying.”¹⁵⁷ It thus appears they were civilians, and quite possibly resident in England as well, which would mean that they were within the protection of the law and courts because their residence implied temporary allegiance and protection.

Even if Halliday’s data set does contain one or even a few unreported cases that in fact involved habeas corpus being used by someone who was actually a nonresident alien enemy and an enemy fighter—it is hard to be sure from Halliday’s brief descriptions, which I assume are as fulsome as the underlying documents allow—one must question how persuasive this evidence would be. For one thing, the cases might be exceptions to a narrower rule rather than evidence for a broader rule; courts can never be expected to consistently apply even settled law in every single case over the course of centuries. Moreover, for purposes of assessing the impact of British legal history on the U.S. Constitution and laws, it is not clear that unreported judicial decisions are our best source. Most Americans probably learned their British law from treatises—for instance, by Blackstone, Coke, Hale, and others—and from published reports of judicial

155. *Id.* at 951 (quoting An Act for the Better Detaining and More Easy Exchange, of American Prisoners Brought into Great Britain, 1782, 22 Geo. 3, c. 10 (Gr. Brit.)).

156. See HALLIDAY, *supra* note 73, at 169–71.

157. *Id.* at 171.

proceedings and the popular digests that summarized them.¹⁵⁸ The decisions in *Schiever* and the *Spanish Sailors* were widely cited in treatises and digests, for example. Americans no doubt followed British government debates about prisoner-of-war status and habeas corpus during the Revolutionary War.

Finally, whatever may have been the case in either unreported or reported British decisions, in U.S. law, as discussed in the following Sections, an undisputed nonresident enemy alien was understood to be jurisdictionally barred from bringing suit during wartime. The law about enemy fighters is somewhat less clear only because, until *Quirin*, there were no reported American judicial decisions involving them. But, as discussed in Part V, the best understanding of the available evidence is that the bar was jurisdictional here as well.

C. American Reception and Application of the Common Law Rules

Until *Quirin*, American courts and commentators hewed very closely to British precedents about the lack of court access for individuals who were undisputedly nonresident enemy aliens or enemy fighters. Although most cases and commentary did not involve habeas corpus, there is strong evidence that the bar on court access covered habeas as well. Whether judicial review of disputed jurisdictional facts—concerning citizenship, domicile, or enemy-fighter status—was available is a more difficult question, with the available sources sometimes pointing in different directions. This Section traces American law from the Founding, through the War of 1812, the Civil War, the wars of imperialism, and World War I. The Civil War occasioned an important change in how American law conceived of the allegiance and protection of rebellious citizens.

1. Court Access for Civilian Alien Friends and Enemies

American law in the Founding era accepted that alien friends present in the United States owed temporary or local allegiance and hence were under protection of the law while in the United States.¹⁵⁹ Of course the status of alien enemies was more complex. Blackstone's

158. See, e.g., HERBERT A. JOHNSON, IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES, at xi–xiii (1978) (providing a bibliography of legal books and materials present in American law libraries in the eighteenth century).

159. See, e.g., 8 ANNALS OF CONG. 2012 (1798) (statement of Rep. Livingston) (“It is an acknowledged principle of the common law, the authority of which is established here, that alien friends . . . residing among us, are entitled to the protection of our laws, and that during their residence they owe a temporary allegiance to our Government.”).

Commentaries, one of the most influential law books in Founding era America, conveyed a harsh view of the law about enemy aliens' access to courts: "Alien enemies have no rights, no privileges, unless by the king's special favor, during time of war."¹⁶⁰ The stark rule stated by Blackstone, that no alien enemy had standing in court during wartime unless by special license of the sovereign, was accepted by prominent members of the American Founding generation¹⁶¹ and frequently reiterated by American courts.¹⁶² Although these were typically not habeas cases, exceptionally comprehensive language was often used to describe the bar on alien enemy court access,¹⁶³ making it unlikely that habeas corpus was a gaping but unmentioned exception. A number of influential antebellum treatise writers also stated in unqualified terms that alien enemies could not access the courts

160. BLACKSTONE, *supra* note 105, at 372.

161. See, e.g., Letter from Sec'y of State Thomas Jefferson to Minister George Hammond (May 29, 1792), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 201 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1833) (noting that an "alien enemy" "cannot maintain an action"); Remarks of James Madison to Virginia Ratifying Convention (June 20, 1788), in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (Jonathan Elliot ed., 2d ed. 1836) ("[A]n alien enemy cannot bring suit at all.").

162. See, e.g., *The Adventure*, 12 U.S. (8 Cranch) 221, 228 (1814) (indicating that British subjects cannot make a claim in a U.S. prize court during the war between the United States and Great Britain); *Mumford v. Mumford*, 17 F. Cas. 982 (C.C.D.R.I. 1812) (No. 9918) (reporter's summary: "[A] bill in equity [showed] that the complainant was an alien enemy, to wit, a subject of the king of the United Kingdom of Great Britain and Ireland, resident within the realm thereof . . . and thereupon the Court ordered the bill to be dismissed"); *Hamilton v. Eaton*, 11 F. Cas. 336, 339 (C.C.D.N.C. 1796) (No. 5980) (Ellsworth, Circuit Justice) (noting that an alien enemy's judicial "remedy is suspended while the war lasts"); *Hutchinson v. Brock*, 11 Mass. (10 Tyng) 119, 122 (1814) ("The comity and intercourse, every where permitted and enjoyed, among Christian and civilized nations in a state of peace, are at once withdrawn by a declaration of war. The territories and the courts of justice of belligerent nations are closed against each other, to the exclusion of their respective inhabitants and subjects. An alien enemy shall maintain neither real nor personal action *donec terrae fuerint communes*, &c [sic]. An enemy to our sovereign shall not have the use or advantage of his laws.").

163. See, e.g., *Johnson v. Thirteen Bales*, 13 F. Cas. 836, 837–38 (C.C.D.N.Y. 1814) (No. 7415) ("This claim to the protection of our courts does not apply to those aliens who adhere to the king's enemies. They seem upon every principle to be incapacitated from suing either at law or in equity. The disability to sue is personal. It takes away from the king's enemies the benefit of his courts" (quoting *Daubigny v. Davallon*, (1793) 145 Eng. Rep. 936, 2 Anst. 462, 467)); *Ex parte Newman*, 18 F. Cas. 96, 96 (C.C.D. Mass. 1813) (No. 10,174) (Story, J.) ("[A]n alien enemy . . . has no legal standing in court to acquire even inchoate rights."); *Wall v. Robson*, 11 S.C.L. (2 Nott & McC.) 498, 502 (S.C. Const. Ct. App. 1820) ("[I]n time of war no action can be maintained by an alien enemy . . ."); *Levine v. Taylor*, 12 Mass. (11 Tyng) 8, 9 (1815) ("That the plaintiff is an alien enemy may be pleaded in disability of his person. As long as the war continues, he cannot maintain any action in our courts."); *Wilcox v. Henry*, 1 Dall. 69, 71 (Pa. 1782) ("An alien enemy has no right of action whatever during the war.").

during war.¹⁶⁴ The policy underlying the rule was that U.S. courts would not be used during wartime to aid a "hostile" plaintiff,¹⁶⁵ much the same as the English courts said. It made sense to apply this rule to civilians, in addition to enemy fighters, because of the widespread view that war made every person in one country the enemy of every person in the other.¹⁶⁶

But an ameliorative trend regarding civilian alien enemies was soon apparent in both the decisional law and the treatises and digests, especially during and after the War of 1812 with Great Britain. English law had long recognized that protection of the law and courts was available to civilian enemy aliens who were in England under the license of the Crown.¹⁶⁷ This enlightened policy encouraged both trade and immigration, great sources of strength to the state. American courts came to presume that civilian enemy aliens were here under license—and came to presume that they were within protection of the law and courts—when they arrived in the United States prior to wartime, or when they arrived during war but were permitted to remain by the U.S. government, as long as they did not show any actual hostile designs against the United States.¹⁶⁸

164. See PETER STEPHEN DU PONCEAU, A TREATISE ON THE LAW OF WAR: TRANSLATED FROM THE ORIGINAL LATIN OF CORNELIUS VAN BYNKERSHOEK BEING THE FIRST BOOK OF HIS *QUAESTIONES JURIS PUBLICI* WITH NOTES 56 (Philadelphia, Farrand & Nicholas 1810) (noting the doctrine that an enemy lacks *persona standi in judicio*); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 68 (New York, O. Halsted 2d ed. 1832) (same); THOMAS SERGEANT, CONSTITUTIONAL LAW 116 (Philadelphia, P.H. Nicklin & T. Johnson 2d ed. 1830) ("[A]n alien enemy cannot sustain a suit in the courts of the United States, if it be taken advantage of by a proper plea in abatement."); HENRY WHEATON, A DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES 211 (New York, R. M'Dermut & D.D. Arden 1815) (stating that in the law of "almost every country" an alien enemy is "totally *ex lex*" and lacks "*persona standi in judicio*" even in courts applying the law of nations, unless granted a specific exception by the government).

165. See, e.g., *Crawford*, 6 F. Cas. at 779 (quoted in *supra* note 115); *Johnson*, 13 F. Cas. at 837–38 (quoted in *supra* note 163); *Hutchinson*, 11 Mass. at 122 (quoted in *supra* note 162).

166. See, e.g., *The Rapid*, 12 U.S. (8 Cranch) 155, 160–61 (1814).

167. See *supra* Section III.B.

168. See *Hutchinson*, 11 Mass. at 122 ("[T]he citizen or subject of a foreign country or sovereign, against whom we declare war, who is residing with us when war commences, and who is permitted afterwards to reside, and be at large, under the protection of our laws, is enabled by his residence, and by virtue of this protection, to maintain civil actions, notwithstanding the war."); *Clarke v. Morey*, 10 Johns. 69, 70–71 (N.Y. Sup. Ct. 1813) (Kent, C.J.) (understanding English law to hold, and adopting as the rule for America, that a license to remain, and hence to access the courts, is presumed for a civilian alien enemy who either came "in time of peace, and remained there quietly" or "came over in time of war, and continued without disturbance"); see also JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS §§ 51–52, at 52 (Boston, Little, Brown & Co. 6th rev. & corrected ed. 1857):

An alien friend has a right to sue in any court; an alien enemy is incapable of suing while he remains an enemy, at least unless under very special circumstances. . . . Alien friends come into the country, either (as was formerly the case) with a letter of

U.S. congressional policy was generally consistent with the trends in judicial decisions and legal commentary. During the Quasi War with France in the late 1790s—which predated the ameliorative trend in judicial decisions just described—overblown fears of domestic subversion by French immigrants, heightened by extreme domestic partisan tensions in the emerging two-party system, caused a Federalist-dominated Congress to enact two important statutes concerning alien rights and disabilities, the Alien Enemy Act and the so-called Alien Friends Act.¹⁶⁹ The softening of rules regarding peaceful civilian alien enemies resident in the United States, described above, had not yet fully developed at this time. In pre- and post-enactment legislative and public debates about the two 1798 Acts, some Federalists took the hard-line position that no aliens—enemy or friendly—were entitled to protection under the Constitution or other domestic laws but were only protected by the law of nations, by diplomacy, and in the discretion of Congress and the executive.¹⁷⁰ The majority view, held by Jeffersonian Republicans and more moderate Federalists, drew a sharp distinction between friendly and enemy aliens. As recognized in judicial decisions and commentary, friendly aliens resident in the United States were under the protection of the Constitution and all other domestic laws, they argued.¹⁷¹ But even those who held moderate views about the rights of friendly aliens tended to agree with the Federalists that all enemy aliens were outside the protection of the Constitution and domestic law, unless permitted (licensed) by the government.¹⁷²

The particulars of the statutes revealed the different understandings regarding alien enemies and alien friends. The Alien Friends Act was primarily an immigration statute, allowing the

safe conduct, or under a tacit permission, which presumes that authority. So, if they continue to reside here after a war breaks out between the two countries, they remain under the benefit of that protection, and are impliedly temporary subjects of the country where they reside. . . . This claim to the protection of the courts of the country does not apply to those aliens who adhere to the public enemies of the country. They seem, upon every principle, to be incapacitated from suing either at Law or Equity.

A number of the decisions stating that alien enemies could not access the courts concerned nonresident plaintiffs, and so were in conformity with the emerging rule. *See, e.g., Johnson*, 13 F. Cas. at 837–38; *Wall*, 11 S.C.L. at 502.

169. *See* An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798); An Act Concerning Aliens (Alien Friends Act), ch. 58, 1 Stat. 570 (1798) (expired 1800). The classic treatment of the tumultuous 1790s in the United States is STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800* (1993).

170. *See* Kent, *Global Constitution*, *supra* note 95, at 529 (describing these debates).

171. *See id.* at 529–30.

172. *See id.* at 529–31.

President, in his discretion, to deport "all such aliens as he shall judge dangerous to the peace and safety of the United States."¹⁷³ But, recognizing that alien friends were within the protection of the law and courts, the Alien Friends Act only allowed imprisonment after an alien refused to depart and was duly convicted of such in court.¹⁷⁴ The Alien Enemy Act was much tougher, consistent with the understanding that alien enemies were outside protection of the law and courts unless permitted to remain by express or implied license of the government. The Act allowed the President, "whenever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government," to issue orders or regulations to detain, deport, or restrain within certain areas "all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized."¹⁷⁵ If the President did not order the detention or removal of particular alien enemies, the Act contemplated that they would remain in the United States as before. Because it was an emergency security measure for wartime, the Act allowed the President to act quickly and detain under the Act without judicial process;¹⁷⁶ but the Act also contemplated that the President could choose to act through the courts instead.¹⁷⁷

That Congress's policy favored magnanimous treatment of peaceful civilian enemy aliens already resident in the United States is seen in the Act's provision allowing such aliens to remain until and unless ordered to depart, and in a separate provision giving alien enemies time to arrange their affairs and property prior to departing or being detained under the Act, if the United States had a bilateral treaty to that effect with the aliens' home nation or if the President so directed unilaterally.¹⁷⁸ In 1798, the United States had such treaties in effect with the most important European powers and many lesser

173. Alien Friends Act § 1, 1 Stat. at 570–71.

174. *Id.* § 1, 1 Stat. at 571; see also Hamburger, *supra* note 99, at 1894 n.238 (making this point).

175. Alien Enemy Act § 1, 1 Stat. at 577.

176. *Id.*

177. *Id.* §§ 2–3, 1 Stat. at 577–78.

178. *Id.* § 1, 1 Stat. at 577.

states as well,¹⁷⁹ showing strong executive and congressional preference for lenient treatment of resident civilian enemy aliens.

Given this policy expressed in treaties and the noted features of the Alien Enemy Act—a default rule that the status quo remained until the President ordered otherwise; the provision allowing presidential order or a treaty to delay execution of the Act; and contemplation of certain types of judicial review—it is not surprising that a decade later, when the Act was first invoked during the War of 1812, courts understood the U.S. government’s policy to be that peaceful resident civilian enemy aliens were entitled to access the courts.¹⁸⁰ Contrary to the suggestions of some scholars,¹⁸¹ such cases do not show that hostile nonresident enemy aliens like prisoners of war would have had the right to access the courts over the objections of the U.S. government.

2. Prisoners of War

During the Revolutionary War, the Quasi War with France of the late 1790s, and the War of 1812 against Great Britain, the United States detained on its soil a great many prisoners of war—that is, enemy fighters captured during war. Yet the extant historical record to date has not revealed a single instance where one of these prisoners of war sought judicial review of his military detention or otherwise attempted to invoke the aid of the American courts to be freed from military custody. Treatise writers during this period reflected the

179. See Treaty of Amity, Commerce, and Navigation, U.S.-G.B., art. 26, Nov. 19, 1794, 8 Stat. 116, 128; Treaty of Peace and Friendship, U.S.-Morocco, art. 24, Jan. 1787, 8 Stat. 100, 104; Treaty of Amity and Commerce, U.S.-Prussia, art. 23, Sept. 10, 1785, 8 Stat. 86, 94–96; Treaty of Amity and Commerce, U.S.-Sweden, art. 22, Apr. 3, 1783, 8 Stat. 60, 74; Treaty of Amity and Commerce, U.S.-Neth., art. 28, Oct. 8, 1782, 8 Stat. 32, 42; Treaty of Alliance, U.S.-Fr., art. 22, Feb. 6, 1778, 8 Stat. 12, 24. With regard to France, note that the Alien Enemy Act became law on July 6, 1798, and the next day Congress declared that the treaty with France was annulled because of the Quasi War. Act of July 7, 1798, ch. 67, 1 Stat. 578.

180. See, e.g., *Clarke v. Morey*, 10 Johns. 69, 73–74 (N.Y. Sup. Ct. 1812) (reading the Alien Enemy Act to support this policy). During congressional debates, several prominent Federalist supporters of the Alien Enemy bill had opined that habeas review would be available for persons detained pursuant to it. See 8 ANNALS OF CONG. 2026 (1798) (statement of Rep. Harper); *id.* at 1960 (statement of Rep. Otis).

181. See Brief of Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae in Support of Petitioners at 8–11, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2441580 (discussing, in a case concerning detention of alleged unlawful enemy fighters, Alien Enemy Act cases concerning civilians and other authorities and stating that “enemy aliens have always had access to the writ, whatever the reason for their detention”); Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 GREEN BAG 2D 39, 44–45 (2005) (suggesting that an Alien Enemy Act habeas case concerning a civilian might mean that detained enemy fighters could also use habeas).

consensus that enemy fighters could not access the courts. And there were some instances of judicial comment on the rights of prisoners of war. A few state court cases during the Revolutionary War period suggested that prisoners of war were outside allegiance or protection.¹⁸² But it was not until the war ended and the Constitution was adopted that there appeared the first clear statement in a published American judicial opinion of the rights of prisoners of war. This came in a dictum in a 1793 prize case:

The courts of England . . . will not even grant a habeas corpus in the case of a prisoner of war, because the decision on this question is in another place, being part of the rights of sovereignty. Although our judiciary is somewhat differently arranged, I see not, in this respect, that they should not be equally cautious.¹⁸³

The judge seems to have understood the bar as jurisdictional—no hearing was available to the prisoner of war, that is, the writ would not be granted to bring the prisoner into court where the hearing on the merits would occur.

During the War of 1812, a British subject and merchant named Charles Lockington, who came to the United States prior to the war and resided in Pennsylvania, sought habeas corpus review for his detention under the Alien Enemies Act.¹⁸⁴ In opposing Lockington's petition, the U.S. government argued that Lockington was in the situation of a "prisoner of war."¹⁸⁵ The Chief Justice of Pennsylvania granted that, if that were true, Lockington would not be entitled to the privilege of using the writ of habeas corpus because prisoners of war were outside the protection of the law and courts.¹⁸⁶ His comprehensive language suggests a jurisdictional bar on bringing suit:

182. The cases did not involve prisoners of war challenging military detention or military trial. See *Government v. McGregory*, 14 Mass. 499, 499 (1780) (argument of counsel for the prisoners) ("[P]risoners of war are entitled to no protection, and therefore owe no allegiance . . ."); *Respublica v. Chapman*, 1 U.S. (1 Dall.) 53, 57 (Pa. 1781) (prisoners of war outside of allegiance, as indicated by a Pennsylvania statute). *McGregory* involved men prosecuted in a civilian court for murder. *McGregory*, 14 Mass. at 499. *Chapman* arose on a judicial order to show cause why Chapman should not be attainted for treason and have his property confiscated. *Chapman*, 1 U.S. (1 Dall.) at 55–56.

183. *Moxon v. The Fanny*, 17 F. Cas. 942, 947 (D. Pa. 1793) (No. 9895).

184. *Lockington's Case* (Pa. 1813), in *REPORTS OF CASES DECIDED BY THE JUDGES OF THE SUPREME COURT OF PENNSYLVANIA* 269, 270 (Frederick C. Brightly ed., Philadelphia, James Kay Jr. & Bro. Pub. 1851), also available in 5 AM. L.J. 92, 97 (1814); see also *Lockington v. Smith*, 15 F. Cas. 758, 759 (C.C.D. Pa. 1817) (No. 8448) (stating Lockington's pedigree in a later tort suit against a U.S. marshal).

185. *REPORTS OF CASES DECIDED BY THE JUDGES OF THE SUPREME COURT OF PENNSYLVANIA*, *supra* note 184, at 276.

186. *Id.*

[T]here is another objection to this habeas corpus . . . that Mr. Lockington is in the situation of a prisoner of war. If he be so, he is not entitled to a privilege which never could have been intended for persons of that description. A prisoner of war is subject to the laws of war; he is brought among us by force; and his interests were never, in any manner, blended with those of the people of this country. He has no municipal rights to expect from us. We gave him no invitation, and promised him no protection.¹⁸⁷

The Chief Justice agreed, though, with the recent holding of a New York state case, that British civilians with prewar residences in the United States were not akin to prisoners of war and could, despite being alien enemies, invoke the protection of the courts during the war.¹⁸⁸ The case was appealed to the Pennsylvania Supreme Court, and in early 1814, Chief Judge Tilghman and two other judges rendered opinions.¹⁸⁹ Tilghman reiterated his prior views.¹⁹⁰ Judge Yeates indicated that he agreed that Lockington was not a prisoner of war under legal disabilities.¹⁹¹ The third judge, Brackenridge, thought that Lockington was akin to a prisoner of war, that he had only rights under the law of nations and not the municipal law, and that the courts had no authority to second guess the decisions of the executive about the rights of a subject of a “nation with whom we are at war.”¹⁹² As with a prisoner of war, a civilian alien enemy, concluded Judge Brackenridge, “is out of the law”—outside the protection of the law—“so far as to preclude interposition [of the courts] between him and the general government.”¹⁹³ Judge Brackenridge clearly understood the habeas bar for prisoners of war as jurisdictional.¹⁹⁴

Relying on either *Lockington* or the published British decisions discussed in Section III.B above, American treatises in the antebellum period were unanimous that prisoners of war had no right to seek release with a writ of habeas corpus, and many used broad language suggesting that this was a jurisdictional bar.¹⁹⁵ *Lockington* was

187. *Id.*

188. *Id.* at 277.

189. *Id.* at 283, *also available in* 5 AM. L.J. 301 (1814).

190. *Id.* at 283–84 (opinion of Tilghman, C.J.).

191. *Id.* at 289 (opinion of Yeates, J.).

192. *Id.* at 296, 299–301 (opinion of Brackenridge, J.).

193. *Id.* at 298.

194. Echoing the *Sparenburgh* exception, the judge noted that a prisoner of war still might sue to defend against private “trespasses.” *Id.*

195. See, e.g., 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: WITH ADDITIONAL NOTES AND REFERENCES 109 (New York, W.E. Dean Printer, 1828) (editor’s note) (“The writ of habeas corpus . . . cannot be obtained by an alien enemy, or a prisoner of war.”); 7 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 305 (Boston, Cummings, Hilliard & Co., 1824) (“[N]o writ of habeas corpus ought to issue to bring up a prisoner of war taken on board an enemy’s privateer ship . . . Nor for an alien enemy, prisoner of war, however ill used or deceived.”); SERGEANT, *supra* note 164, at 116, 285 (stating that “an alien enemy

described as resting its comments about prisoners of war on a jurisdictional disability.¹⁹⁶ In fact, as noted above, many of the leading treatises (Kent, Wheaton, Sergeant) stated without qualification that no alien enemy—of any kind, including apparently a civilian lawfully resident in the United States—could sue during wartime, suggesting a broad jurisdictional disability.¹⁹⁷

D. *The Civil War*

The Civil War raised important debates about the legal rights of enemy fighters and civilian residents in enemy territory because nearly all residents of the Confederacy and members of its armed forces had been, prior to the war, American citizens with full constitutional rights.¹⁹⁸ At the outset of the war, there was great dispute about whether the war powers of the U.S. government could be used against the rebels, displacing peacetime constitutional limitations, or whether the nation could only protect itself from treason using the constitutional processes of domestic law enforcement. As detailed in prior work of mine, Congress, the executive, and the Supreme Court eventually agreed on a dual theory of the war. One part of the duality was this: rebellion on such a scale made the conflict akin to a nation-to-nation war, and caused all residents of the Confederate States of America ("CSA")—even the civilians—to forfeit their right to protection of the laws and courts and be liable to be opposed with the full war powers of the government, limited only by the international laws of war.¹⁹⁹ As was often said at

cannot sustain a suit in the courts of the United States" and reporting, based on the case of *Lockington*, that "[p]risoners of war . . . are not entitled to the privilege of a writ of habeas corpus").

196. See, e.g., 1 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 140 (3d ed., Philadelphia 1855) (describing *Lockington's* ruling that habeas is not available for prisoners of war because they are "not entitled to the same privileges" as other potential litigants but are rather "subject to the laws of war").

197. A few cases arose during the War of 1812 concerning American citizens who were arrested by the U.S. military, having allegedly spied for the British. They were neither enemy prisoners of war nor alien enemies, and, therefore, it is not surprising that the New York state courts held that these individuals were within the protection of the laws and could seek the aid of the courts on habeas corpus. See *Smith v. Shaw*, 12 Johns. 257 (N.Y. Sup. Ct. 1815); *In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813). For a discussion of these cases, see Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567 (2004).

198. Most of the remainder were resident aliens who, because of their temporary allegiance, would have been understood to be under the protection of the Constitution and laws of the United States.

199. See Kent, *Civil War*, *supra* note 95, at 1872–83, 1899–1902, 1905–07, 1913–17.

the time, by creating a de facto separate nation through their massive armed rebellion, residents of the CSA had made themselves akin to alien enemies out of protection.²⁰⁰ Hence, all residents of the CSA were held barred from the civilian courts of the Union for the duration of the war by the U.S. Supreme Court on at least *ten* occasions²⁰¹ and by every state high court that considered the issue.²⁰² Though these were not habeas cases, the courts' language was comprehensive, rendering

200. See *id.* at 1876–83, 1899–1902, 1905–07.

201. See *Lamar v. Micou*, 112 U.S. 452, 464 (1884) (“A state of war . . . suspends until the return of peace the right of any one residing in the enemy’s country to sue in our courts.”) (citations omitted); *Dow v. Johnson*, 100 U.S. 158, 164–65 (1879) (stating that during the Civil War “the courts of each belligerent were closed to the citizens of the other” (quoting *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603, 621 (1803))); *Conrad v. Waples*, 96 U.S. 279, 289–90 (1877) (“During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended.”); *Masterson v. Howard*, 85 U.S. (18 Wall.) 99, 105 (1873) (“The existence of war does, indeed, close the courts of each belligerent to the citizens of the other”); *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 184 (1873) (“The principle of public law which closes the courts of a country to a public enemy during war, renders compliance by him with [a statute of limitation] impossible.”); *Caperton v. Bowyer*, 81 U.S. (14 Wall.) 216, 236 (1872) (noting the rule that enemies are “totally incapable of sustaining any action in the tribunals of the other belligerent” and that there is an “[a]bsolute suspension of the right to sue and prohibition to exercise it during war, by the law of nations”) (citation omitted); *Semmes v. Hartford Ins. Co.*, 80 U.S. (13 Wall.) 158, 162 (1871) (“We have no doubt that the disability to sue imposed on the plaintiff [resident of Mississippi] by the war relieves him from the consequences of failing to bring suit [against the defendant Connecticut corporation] within twelve months after the loss, because it rendered compliance with that condition impossible.”); *Levy v. Stewart*, 78 U.S. (11 Wall.) 244, 250 (1871) (noting the “[a]bsolute suspension of the right to sue . . . during war, by the law of nations” of residents of the enemy’s country); *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 536 (1868) (describing “the inability of an alien enemy to sue or sustain, in the language of the civilians, *a persona standi in judicio*”); *Mrs. Alexander’s Cotton*, 69 U.S. (2 Wall.) 404, 421 (1864) (“Mrs. Alexander, being now a resident in enemy territory, and in law an enemy, can have no standing in any court of the United States so long as that relation shall exist.”). Lower federal courts repeatedly stated the same thing. See, e.g., *Elgee’s Adm’r v. Lovell*, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4344) (Miller, J.) (applying the “principle of the law of nations, recognized and enforced in all civilized countries, that, in time of war, an enemy cannot sue in the courts of the country with which he is belligerent”).

202. See, e.g., *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 402 (1863) (holding, in suit by resident of Arkansas, that “those principles of the common law, which suspend an alien enemy’s right of action during war, apply to this case, and forbid our courts from aiding the appellee to recover money which might be used by her to support the war against the United States”); *Stiles v. Easley*, 51 Ill. 275, 276 (1869) (“While hostilities continued, Easley, as the citizen of a hostile State [Virginia], was disabled from suing in our courts”); *Dorsey v. Kyle*, 30 Md. 512, 519 (1869) (“As a general rule, an alien enemy is not allowed to maintain suit in the Courts of the country with which he is, at the time, in hostility. This, however, is a personal disability, of a temporary duration, and is founded upon reason and policy, and, to some extent, upon the necessity of the case.”); *Kershaw v. Kelsey*, 100 Mass. 561, 563 (1868) (“The rule is certainly well settled that during any war, foreign or civil, an action cannot be prosecuted by an enemy, residing in the enemy’s territory. . . .”); *Bonneau v. Dinsmore*, 23 How. Pr. 397, 398 (N.Y. Ct. App. 1862) (applying to a resident of South Carolina, which “is in a state of actual hostility to and in open war with the United States,” the rule that an “alien enemy” must be “exclude[ed] . . . from our courts,” but holding him not to be an enemy alien).

it unlikely that an extraordinarily important category of cases—habeas corpus—was an unmentioned but glaring exception to the closure of the courts. Also supporting the view that all residents of the CSA lacked any right to access the civilian courts via habeas corpus is the Supreme Court's holding that Union military tribunals could exercise exclusive jurisdiction over residents of the CSA free of any limitations except the international laws of war.²⁰³

Since civilian residents of the CSA were outside the protection of the laws and courts, it follows *a fortiori* that so too were Confederate combatants in arms against the U.S. government. This was true regardless of the fact that most were U.S. citizens. Rebellion on such a large scale allowed the U.S. government to choose to treat them as akin to alien enemy fighters. It was routinely stated during²⁰⁴

203. See Kent, *Civil War*, *supra* note 95, at 1925–27.

204. See, e.g., Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 90 (1861) (opinion of Attorney General Bates) (“[S]hall it be said that when [the President] has fought and captured the insurgent army, and has seized their secret spies and emissaries, he is bound to bring their bodies before any judge who may send him a writ of habeas corpus, to do, submit to, and receive whatever the said judge shall consider in that behalf? I deny that he is under any obligation to obey such a writ, issued under such circumstances.”); CONG. GLOBE, 37th Cong., 2d Sess. 18–19 (1861) (statement of Sen. Trumbull) (“[T]he judicial tribunals have no right or power to interfere with the Army in the exercise of its powers in suppressing an insurrection, either by issuing writs of *habeas corpus* or otherwise [in areas where the President has exercised power delegated by Congress to call out troops to suppress insurrection.] [P]ersons captured by the military authorities in insurrectionary districts may still be retained as prisoners by the military power, without interference from the courts till their cases are finally disposed of, notwithstanding they may, for purposes of safety, or other reasons of State, be brought within districts where the judicial power is in full operation.”); CONG. GLOBE, 37th Cong., 1st Sess. 339–40 (1861) (statement of Sen. McDougall) (“It is, therefore, an established rule of law that the writ of *habeas corpus* does not run against a prisoner of war”); GEORGE M. WHARTON, REMARKS ON MR. BINNEY’S TREATISE ON THE WRIT OF HABEAS CORPUS 16 (Phila., John Campbell Bookseller 2d ed. 1862) (“If the Courts undertake to interfere with the military power in its proper exercise, and to handle prisoners of war, their intervention is irregular; and it is a sufficient return to a Writ of Habeas Corpus, issued in such a case to say, that the party is held as a prisoner.”); A.H. Reeder, *The Habeas Corpus Question*, N.Y. DAILY TRIB., June 15, 1861, at 7 (contending that the government erred in *Ex parte Merryman*, discussed in *infra* note 206, by failing to file a return to the habeas petition stating that the prisoner was held as a “prisoner of war,” because that would have convinced Chief Justice Taney and all other jurists that the civil courts had no jurisdiction over the petition).

Even some Copperheads in the North (sympathizers with the CSA) agreed that enemy prisoners of war could not benefit from habeas corpus. See *Habeas Corpus—Personal Liberty*, AM. MONTHLY KNICKERBOCKER, Sept. 1864, at 206, 210 (“A prisoner taken in war, and kept by the public authorities in confinement, is not entitled to be discharged from imprisonment, if the fact appear that he is held as a prisoner of war. If the fact appear by the petition, the writ will not be granted; if it appear by the return at the hearing, the prisoner will be recommitted. The writ is the privilege of the citizen, and not of a public enemy.”). For what it is worth, it appears that Confederate executive authorities also maintained that civil courts in the Confederacy had no power to question the detention of anyone averred by the military to be a prisoner of war. See

and after the war²⁰⁵ that enemy prisoners of war were barred from using habeas corpus. Some of these sources go so far as to suggest that the United States' view of the jurisdictional fact that a detainee is a prisoner of war cannot be questioned by the courts. About one hundred and fifty thousand Confederate soldiers were detained as prisoners of war during the conflict; I have found no record of a single one attempting to access the civilian courts during the war to protect alleged rights by habeas corpus or otherwise.²⁰⁶

OLIVER P. TEMPLE, *EAST TENNESSEE AND THE CIVIL WAR* 393 (1899) (quoting statement by Secretary of War Judah Benjamin).

205. See, e.g., Military Comm'ns, 11 Op. Att'y Gen. 297, 314 (1865) (opinion of Attorney General Speed) ("[I]n time of war, if a man should sue out a writ of habeas corpus, and it is made appear that he is in the hands of the military as a prisoner of war, the writ should be dismissed and the prisoner remanded to be disposed of as the laws and usages of war require."); 1 MATTHEW BACON, *A NEW ABRIDGMENT OF THE LAW TO WHICH ARE ADDED NOTES AND REFERENCES TO AMERICAN LAW AND DECISIONS BY JOHN BOUVIER* 213 (Phila., T. & J.W. Johnson & Co. 1876) ("An alien enemy, prisoner of war, is not entitled, under any circumstances, to his discharge upon a habeas corpus."); 1 JOEL PRENTISS BISHOP, *COMMENTARIES ON THE CRIMINAL LAW* § 63, at 33–34 (4th rev. ed. 1868) ("If a party is held by military arrest under the law-martial, – that is, as a prisoner of war, – the judicial tribunals, even, it seems to the writer, by the common law as brought to this country from England, would have no jurisdiction to proceed in the case by *habeas corpus*; much less has the 'judicial power' any such authority under our Constitution, wherein the different functions of the government are intrusted to separate departments . . ."); THEODORE W. DWIGHT, *COMMENTARIES ON THE LAW OF PERSONS AND PERSONAL PROPERTY* 96 (Boston, Little Brown & Co. 1894) ("The writ will not run in favor of an alien enemy, – a prisoner of war.").

206. A few cases came close to the line, and so are worth noting. Early in the war, two federal judges sitting in Union states entertained habeas petitions from disloyal members of local militias who had been detained by U.S. forces. See *In re McDonald*, 16 F. Cas. 17, 23 (E.D. Mo. 1861) (No. 8751); *Ex parte Merryman*, 17 F. Cas. 144, 144–47 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.); see also BURRUS M. CARNAHAN, *ACT OF JUSTICE* 51–53 (2007) (discussing the arrest and habeas petition of John Merryman, lieutenant in the Baltimore County Horse Guards); *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, SERIES II, VOL. I*, at 113–16 (Washington, Govt. Printing Office 1894) (discussing the arrest and habeas petition of Emmett MacDonald, captain in the Missouri militia). Since these men were residents of loyal states and not formally affiliated with the Confederacy, their cases do not undermine the statement in the main text that no enemy prisoners of war sought habeas corpus during the war. The *Merryman* case gave rise to the famous controversy of President Lincoln directing his military to refuse to obey the federal court order to produce the detainee in court for a habeas corpus hearing. See CARNAHAN, *supra*, at 51–53.

Also early in the war, a federal judge in New York City entertained a habeas petition on behalf of a man sometimes described in newspaper accounts as a prisoner of war. See *Ex parte McQuillon*, 16 F. Cas. 347, 348 (S.D.N.Y. 1861) (ordering the writ to issue to the U.S. Army custodian to bring the detainee into court but declining to take further action when the military refused to obey); *The News*, N.Y. HERALD, July 26, 1861, at 4 (reporting on the habeas case of McQuillan [sic], "a British subject, seized as a prisoner of war"). Although the detainee may have been enrolled briefly in the Confederate forces, he was in fact seized within Union lines while in civilian life and held as a "state" or political prisoner, not a prisoner of war. See *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE*

The other side of the duality arose from the fact that the U.S. government denied the legality of secession, denied that the CSA was a de jure independent nation or had any legal existence, and sought to return all of the rebels in the CSA to their allegiance as citizens. The federal government could choose in its discretion to treat rebels as mere criminals by holding them to the standards of domestic civil and criminal laws. When and to the extent the government chose this latter route—asserting that allegiance was unimpaired because secession was illegal and a nullity, and using ordinary domestic legal processes rather than war powers against enemies to fight rebellion—the affected rebels retained the protection of the Constitution and laws.²⁰⁷ For example, in criminal prosecutions of rebels for treason, all the usual safeguards of the Constitution and laws were available to the defendant.²⁰⁸ The dual theory meant that the U.S. government had discretion to choose the means of fighting the rebellion, either war or law enforcement.²⁰⁹ And the applicable legal regime flowed from this choice. When and where the United States chose to wage war

ARMIES, SERIES II, VOL. II, at 228, 415–24 (Washington, Govt. Printing Office 1897) (describing arrest and detention of Purcell M. Quillen [sic]). It does not appear that the U.S. government ever argued that he should be jurisdictionally barred from using habeas corpus; instead, on orders of Winfield Scott, the commander of the Union army who had suspended habeas corpus along the eastern seaboard at the direction of President Lincoln, the government followed the precedent of the Merryman incident and simply refused to obey the court order. *See id.* at 423. In any event, the detainee was soon ordered released by Secretary of State Seward at the request of the British ambassador because he was a British subject and had apparently served the Confederacy briefly and only under duress. *See id.* at 415–24.

In 1863, a city judge in New York ordered the release via habeas of a civilian resident of Alabama who had been arrested in New York and charged by military authorities with spying for the Confederacy. *See The Kirtland Habeas Corpus Case*, N.Y. HERALD, June 9, 1863, at 5. The detainee contended that he left the Confederacy because he was a loyal citizen of the Union and wanted to avoid conscription into the rebel army. *Id.* At the habeas hearing, the government could produce no evidence to sustain its charges. *See id.* It is notable that the alien enemy disability rule was not applied to bar Mr. Kirtland's use of the courts. Probably that was because the court credited Kirtland's claim that he was a refugee who wanted to be in the Union because of his loyalty. *See generally Zacharie v. Godfrey*, 50 Ill. 186, 193–94 (1869) (holding that a resident of Louisiana who left the state at the outset of the war because of his loyalty to the Union was not covered by the enemy alien disability rule). In any event, the fact that Mr. Kirtland was not a combatant, and the general confusion and untidiness about citizenship status during a civil war, makes his case an inapposite precedent for the admitted Germany military saboteurs in *Quirin*. After the war ended, a New York court order freed via habeas corpus an alleged spy caught in New York City in civilian dress who had apparently been “an officer in the confederate army” and was held by the U.S. military. *In re Martin*, 31 How. Pr. 228 (N.Y. Sup. Ct. 1865). In its December 1865 opinion, the court reasoned that military detention authority had ended with the close of the war and the President's repeal of the proclamation suspending the writ of habeas corpus.

207. *See Kent, Civil War*, *supra* note 95, at 1872, 1884–85.

208. *Id.* at 1884–85.

209. *Id.* at 1872.

against the CSA as a de facto enemy nation, rebels—de facto enemy aliens—had no protection from domestic law or courts but only from international laws of war.²¹⁰ When law enforcement means were chosen, the targeted residents of the CSA qua U.S. citizens had full protection of domestic law and courts.²¹¹

The dual theory—and its implications for access to the courts during wartime for certain U.S. citizens—was a legal innovation of the Civil War. Under English law and American law during the Founding and antebellum periods, if citizens (in the United States) or subjects (in Britain), or resident foreigners under the license of the sovereign, revolted against the government, their obligation of allegiance was deemed unimpaired and they remained within protection of the law and courts, meaning that they could not be treated as military enemies under the international laws of war and habeas corpus remained available to them.²¹² When captured in arms against the government, they were entitled to be treated as civilians, not prisoners of war.²¹³ This understanding was exploded by the imperatives of the Civil War—its massive territorial scale, akin to a nation-to-nation conflict—and the dual theory took its place.

Nonetheless, it has recently been argued that the older understanding continued unimpaired throughout the Civil War,²¹⁴ and specifically that all residents of the CSA, including Confederate prisoners of war, remained within protection of the laws and had access to Union courts, including via habeas corpus.²¹⁵ There is little evidence to support this view. The primary evidence adduced is that (1) Congress's 1863 statute allowing suspension of habeas corpus but requiring subsequent judicial review for some classes of detainees excluded "prisoners of war" from getting this judicial review, and (2) President Lincoln's proclamation of habeas suspension pursuant to the 1863 statute included "prisoners of war" within the suspension.²¹⁶

210. *Id.* at 1884–85.

211. *Id.* at 1872.

212. *See id.* at 1860–61.

213. *Id.*

214. *See* Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 867, 919–20 (2006).

215. *See* Tyler, *supra* note 150, at 989–92.

216. *See* Act of Mar. 3, 1863, ch. 81, §§ 1–2, 12 Stat. 755, 755 (providing that the President may suspend the writ of habeas corpus anywhere in the United States; that when it is suspended, a statement that the person is held by the U.S. military is a sufficient answer to a writ; and providing judicial processes for the eventual release or criminal trial of detainees held by the executive "otherwise than as prisoners of war" in loyal states); Proclamation No. 7, reprinted in 13 Stat. 734, 734 (1863) ("[I]n the judgment of the President, the public safety does

It is contended that both Lincoln and the Congress must have believed that Confederate prisoners of war would have been entitled to habeas corpus review of their detentions absent a valid suspension of habeas, because otherwise neither the statute nor the proclamation would have had any reason to mention prisoners of war.²¹⁷

But that does not necessarily follow. As a general matter, the government always has an interest in reducing burdensome or vexatious litigation against its officers, especially during wartime, even if the potential legal claims are meritless.²¹⁸ More specifically, in 1863 both Congress and the President operated in a fluid legal environment dominated by risk and uncertainty, and would have wanted to make clear in positive law that enemy prisoners of war could not access the courts even though they did not believe that prisoners of war should have had that entitlement under the preexisting common law. In 1863, the Chief Justice of the United States was still Roger Taney, an extremely visible symbol of the fact that a number of federal judges were politically unreliable and took exceptionally narrow views of the legitimate war powers of the federal government and correspondingly broad views of the alleged rights of rebels.²¹⁹ In spring 1863, the Court by a 5–4 vote, with Taney dissenting, had narrowly accepted the dual theory of the war as

require that the privilege of the said writ shall now be suspended throughout the United States in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted or mustered or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services by authority of the President of the United States, or for resisting a draft, or for any other offence against the military or naval service . . .”).

217. See Tyler, *supra* note 150, at 989–92.

218. As the Court commented about the related subject of immunity for executive branch officials:

[I]t cannot be disputed seriously that claims frequently run against the innocent, as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.”

Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (citation omitted).

219. On Taney’s support for slavery and secession and opposition to many important war powers claimed by the U.S. government, see BRIAN MCGINTY, LINCOLN AND THE COURT 65–91 (2008); 5 CARL B. SWISHER, OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–64, at 844–52 (1974).

applied to prize seizures of Confederate civilians' property at sea.²²⁰ When Congress and President Lincoln acted to suspend habeas in 1863, it was still unknown how much further beyond the prize context the Court would be willing to accept the U.S. government's dual theory of the war, which treated U.S.-citizen Confederates as de facto enemy aliens for some purposes. As it happened, the Court would fully accept the dual theory in future decisions. But in 1863 Congress and the President could not have known this and acted prudently in the face of legal uncertainty to confirm important aspects of the dual theory in unimpeachable positive law, such as the suspension of habeas corpus for many classes of detainees, including prisoners of war.²²¹

The Nazi saboteurs placed great reliance on the famous Civil War case of *Ex parte Milligan*²²² in their arguments to the Court. *Milligan* held unconstitutional the military commission trial of an Indiana resident, not enrolled in the Confederate armed forces or otherwise employed by the Confederacy or a disloyal state government, who was accused of plotting in the loyal state of Indiana to attack federal facilities to steal weapons and liberate Confederate prisoners.²²³ Although the Court used some sweeping language about the universality of the Constitution's protections,²²⁴ language that was

220. See Kent, *Civil War*, *supra* note 95, at 1893–1902 (discussing The Prize Cases, 67 U.S. (2 Black) 635, 666–68 (1863)). The Court contained six Democrats, three of whom were from slave states and five of whom had been in the majority in *Dred Scott*. *Id.* at 1894 n.191. It was entirely rational for Republicans in Congress and the White House to distrust the Court.

221. It was not until 1864 that the Court manifested its agreement with the Lincoln Administration's view that all residents of the CSA were barred from U.S. courts for the duration of the war because they were akin to enemy aliens. See *id.* at 1905–07 (discussing *Mrs. Alexander's Cotton*, 69 U.S. (2 Wall.) 404, 418–23 (1864)); see also *supra* note 201. These Court decisions were not habeas cases, however, meaning that the legal uncertainty for the Union continued through the end of the war. Only in 1866, after the war ended, did the Court in *Ex parte Milligan* suggest in dicta that Confederate prisoners of war had no constitutional right to be free from military detention or trial, see *infra* notes 226–28 and accompanying text, implying that they were out of protection of the law and courts and, hence, would not have had access to habeas. And it was several more years before the Court upheld the use of military tribunals in captured CSA territory, stating that against residents of the CSA “the laws of war take the place of the Constitution and laws of the United States as applied in time of peace.” *New Orleans v. The S.S. Co.*, 87 U.S. (20 Wall.) 387, 393–94 (1874); see also Kent, *Civil War*, *supra* note 95, at 1925–27.

222. 71 U.S. (4 Wall.) 2 (1866).

223. *Id.* at 60, 118–31.

224. *Id.* at 120–21 (“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”).

quoted to the Court in 1942 by the saboteurs' counsel,²²⁵ *Milligan* in fact was a narrow decision, as other language in the opinion and many other Civil War-era decisions of the Court made clear. In *Milligan*, the Court suggested that military commissions could lawfully try persons in certain categories including "prisoners of war" and persons resident in enemy territory,²²⁶ categories of people understood at the time by the Court, executive, Congress, and leading commentators to be outside the protection of the Constitution and laws when the U.S. government was acting as a belligerent (exercising its war powers).²²⁷ *Milligan's* holding, therefore, only covered civilian residents of loyal states, notwithstanding some expansive language in the opinion. Some have suggested that *Milligan* established an extremely broad rule that no person may be tried by a military commission in the United States if the area is not under martial law and if the civilian courts are open and functioning there.²²⁸ But *Milligan* itself makes clear that its rule about the exclusivity of civilian courts is limited to the case of "a citizen in civil life, in nowise connected with the military service."²²⁹ Mr. Milligan's military trial—and hence his detention without access to habeas corpus—would have been upheld had he been in the position

225. See Transcript of Oral Argument of July 30, 1942, at 64, *Ex parte Quirin*, 317 U.S. 1 (1942) (Nos. — Original and Nos. 1, 2, 3, 4, 5, 6, and 7 of July 1942 Special Term), reprinted in LANDMARK BRIEFS, *supra* note 96, at 665.

226. *Milligan*, 71 U.S. at 118 ("The controlling question in the case is this: upon the facts stated in Milligan's petition and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past . . ."); *id.* at 123 (stating that the Fifth and Sixth Amendment's jury provisions except members of the U.S. military forces but protect "[a]ll other persons, citizens of states where the courts are open"); *id.* at 126 (suggesting that the Court's holding does not speak to "what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection"); *id.* at 127 (suggesting that martial law was proper "in Virginia, where the national authority was overturned and the courts driven out"); *id.* at 131 ("But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion."); *cf.* *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 (2004) (plurality opinion) (stating that *Milligan* "turned in large part on the fact that Milligan was not a prisoner of war" and suggesting that "[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict . . .").

227. See Kent, *Civil War*, *supra* note 95, at 1872–83, 1899–1902, 1905–07, 1913–17, 1925–27.

228. For instance, this is how counsel for the saboteurs read *Milligan*. See Transcript of Oral Argument of July 30, 1942, at 49, reprinted in LANDMARK BRIEFS, *supra* note 96, at 650.

229. *Milligan*, 71 U.S. at 121–22.

of the *Quirin* saboteurs: residents of the enemy's country who were also enemy fighters.

E. The Spanish-American War and Filipino Insurrection

The United States captured and detained at least thirty-seven thousand Spanish troops during the Spanish-American War of 1898, but none of them were held in U.S. territory within the reach of U.S. courts.²³⁰ The fact that none of them sought to access to U.S. courts via habeas corpus is, therefore, unremarkable.²³¹

The Filipino insurrection against the United States (1899–1902) is a different matter, however. For most of the insurrection, a U.S. civilian court system functioned in the archipelago, but enemy fighters had no right to seek habeas corpus in those courts. The Philippines was ceded to the United States by Spain as of April 11, 1899.²³² In spring 1899, the U.S. military government reestablished the civilian Philippine Supreme Court, courts of first instance, and justice of the peace courts to operate in pacified districts and granted them their former criminal and civil jurisdictions, but with the proviso that military tribunals retained exclusive jurisdiction over a broadly defined set of crimes involving the military conflict and laws of war.²³³ The writ of habeas corpus was introduced in the civil courts in April

230. See GEORGE G. LEWIS & JOHN MEWHA, HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 1776-1945, at 44–46 (Dep't of Army Pamphlet No. 20-213, 1955) (reporting that twenty-four thousand Spanish troops surrendered in Cuba and thirteen thousand in the Philippines, but providing no numbers for Puerto Rico).

231. Some Spanish nationals without residence in the United States did appear in U.S. courts during the war, but these instances do not undermine my description of the prevailing law on alien enemy court access. They appeared as claimants in prize proceedings, suits initiated by the U.S. executive to condemn as prizes of war Spanish merchant vessels. See, e.g., *The Buena Ventura*, 87 F. 927, 928 (D. Fla. 1898) (subsequent history omitted). The Spaniards' access to courts was permitted by the rule announced by the Supreme Court during the Civil War in property confiscation cases that enemy aliens can defend suits initiated against them or their property by the U.S. government. See *infra* note 360 and accompanying text.

232. See Kent, *supra* note 13, at 119 (describing the diplomatic and legal process by which the Philippines became a U.S. territory).

233. *General Orders No. 22, of June 17, 1899*, in ANNUAL REPORTS OF THE WAR DEPT FOR THE FISCAL YEAR ENDED JUNE 30, 1899: REPORT OF MAJ.-GEN. COMMANDING THE ARMY IN THREE PARTS, PT. 2, H.R. DOC NO. 56-2, at 148 (Washington, Government Printing Office, 1899) (noting the re-opening of the civil courts and providing that their jurisdiction "shall not extend to and include crimes and offenses, committed by either citizens of or persons sojourning within the Philippine Islands, which are prejudicial to military administration and discipline, except by authority specially conferred by the military governor. Jurisdiction to try and award punishment in the class of cases designated remains vested in provost courts, courts-martial, or military commissions.").

1900 by military order,²³⁴ but civil tribunals were barred from employing the writ to free prisoners of war or question the legality of military detentions or trials.²³⁵ The Philippine Supreme Court upheld this comprehensive ban on habeas jurisdiction over military detentions.²³⁶

F. World War I

In April 1917, the United States entered the First World War, which had been raging since fall 1914, fighting against Germany and on the side of the Allied or Entente Powers. A few thousand enemy prisoners of war were detained in the United States during and after the war.²³⁷ Like all previous wars, World War I came and went without a single known case arising in which an enemy prisoner of war sought habeas corpus or other judicial relief in a state or federal court in the United States. There were some notable developments, however. Courts, Congress, and commentators reaffirmed core rules that enemy fighters and nonresident civilian enemy aliens were barred from U.S. courts during wartime.

1. Trading With the Enemy Act

In 1917, Congress codified and amended long-standing common law rules concerning trading with the enemy during wartime.²³⁸ The basic rules, dating back centuries, held that the existence of war automatically made illegal all contracts and other commercial intercourse between civilian residents of the respective warring

234. See *General Order 58*, in REPORT OF MAJ.-GEN. E.S. OTIS, U.S. ARMY, COMMANDING THE DIVISION OF THE PHILIPPINES, AND MILITARY GOVERNOR OF THE PHILIPPINES, SEPT. 1, 1899 TO MAY 5, 1900, at 268–70 (Washington, Government Printing Office, 1900) (outlining provisions for a writ of habeas corpus).

235. See *In re Calloway*, 1 PHIL. REP. 11 (1901) (recounting the military order).

236. *Id.* at 11–12.

237. See, e.g., *Germans Have Good Time in Prison Camps Here*, N.Y. TIMES, Mar. 3, 1918, at 77 (reporting two thousand German prisoners of war currently detained in the United States, including German sailors at a camp in Hot Springs, North Carolina); *German Prisoners 507 Strong, Join Interned Comrades*, ATLANTA CONST., Apr. 2, 1918, at 4 (reporting 1,373 German prisoners of war at Fort McPherson in Georgia, and that other camps are located in Georgia and Utah); *Largest Camp for Interned Aliens*, N.Y. TIMES, Dec. 2, 1917, at SM6 (reporting that hundreds of captured German navy officers and men were held as prisoners of war at Fort Douglas in Utah, along with civilian enemy aliens and some “spies”).

238. Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917).

nations.²³⁹ A ban on alien enemy access to the courts had long been understood to be part of these common law rules.

Congress's Trading with the Enemy Act ("TWEA") codified some of this while liberalizing other features of the common law. Of interest in this Article, Congress addressed the question of an enemy alien's entitlement to access U.S. courts during wartime. With regard to natural persons, the TWEA defined "enemy" in three separate ways: (1) a person having his or her residence or commercial domicile in the territory of a nation with which the United States was at war; (2) any officer or agent of a government of a nation with which the United States was at war; and (3) any person wherever located who was the citizen or subject of a nation with which the United States was at war and whom the President proclaimed must be treated as an enemy as required for "the safety of the United States or the successful prosecution of the war."²⁴⁰ As to the ability of these enemies to sue in U.S. courts during the war, the Act stated that "[n]othing in this Act shall be deemed to authorize the prosecution of any suit or action at law or equity in any court within the United States by an enemy or ally of enemy prior to the end of the war," with a few exceptions.²⁴¹

The legislative history makes clear what is implicit in this structure—that Congress intended the Act to leave in place the old common law rules regarding alien enemy access to courts unless it specifically changed them. According to the committee report, "The enemy, or ally of an enemy, has no jurisdiction other than that conferred by [the Act] to maintain suits or actions within the United States"²⁴² This Senate report reprinted a legal memorandum by Assistant Attorney General Charles Warren—an important constitutional historian—which announced that "an alien enemy . . .

239. See *Matthews v. McStea*, 91 U.S. (1 Otto) 7, 9–10 (1875) ("It must also be conceded, as a general rule, to be one of the immediate consequences of a declaration of war and the effect of a state of war, even when not declared, that all commercial intercourse and dealing between the subjects or adherents of the contending powers is unlawful, and is interdicted."); *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 535 (1867) ("[A]s soon as war is commenced all trading, negotiation, communication and intercourse between the citizens of one of the belligerents with those of the other, without the permission of the government, is unlawful.").

240. Trading with the Enemy Act § 2.

241. *Id.* § 7(b). A noteworthy exception was that "an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him." *Id.* This is consistent with prior precedent. See *infra* note 360 and accompanying text. Two other exceptions were insignificant and irrelevant to this Article. See Trading with the Enemy Act §§ 7(b), 10(a), (g) & (h).

242. AN ACT TO DEFINE REGULATE AND PUNISH TRADING WITH THE ENEMY, S. REP. NO. 65-111, at 14 App. A (1st Sess. 1917).

has no right to sue" in U.S. courts, and cited cases from the Civil War and War of 1812 that established the distinction between alien enemy civilians with prewar residence in the United States who were generally allowed to sue and those resident abroad who were strictly barred from the courts.²⁴³ Warren's memorandum cited *Lockington* as representing the law in the United States regarding alien enemy access to courts.²⁴⁴ Thus, under the TWEA and the common law, any agent or officer of an enemy government had no access to the courts. Civilian alien enemies who were resident abroad were also barred from the courts, while civilian alien enemies resident in the United States could access the courts unless the President issued a proclamation barring them. In suits filed after the war had reopened the courts to them, former enemies challenged the constitutionality of various aspects of the TWEA, which was repeatedly upheld by the Court on the theory that it was an "exertion of the war power, and untrammelled by the" Constitution's protections for individual rights.²⁴⁵

2. Case Law and Commentary

Apparently no prisoners of war attempted to use the U.S. courts during World War I. Three types of cases arose during the war and after concerning civilian enemies' access to the courts: commercial or property cases arising under the TWEA, detention cases arising under the Alien Enemy Act, and private law cases where U.S. litigants claimed that their adversaries in litigation could not sue because they were alien enemies. In a TWEA case, the Supreme Court noted "the rule . . . denying access by enemy citizens to our courts," but did not have the need to make a holding on that issue.²⁴⁶ One habeas case was pursued by an alleged German spy facing a military commission trial. These cases generally left the law where they found it at the start of the war.

a. Cases Concerning Enemy Civilians

Pursuant to the Alien Enemy Act, the United States interned several thousand enemy civilians during the First World War. In a number of instances, the detainees sought writs of habeas corpus

243. *Id.* at 21–22 App. B.

244. *Id.* at 22 App. B. For a discussion of *Lockington*, see *supra* Section III.B.

245. *Cummings v. Deutsche Bank und Disconto-Gesellschaft*, 300 U.S. 115, 120 (1937).

246. *Sutherland v. Mayer*, 271 U.S. 272, 289–90 (1926).

challenging their imprisonment. In line with earlier cases, the courts held that habeas corpus could be used for the limited purpose of challenging the jurisdictional fact whether the detainee was a citizen or subject of a nation at war with the United States; if that fact were established, the courts no longer had any role to play and dismissed the petitions.²⁴⁷ The Court of Appeals for the Ninth Circuit upheld the Alien Enemy Act from a constitutional challenge, stating that Blackstone's view that alien enemies lacked all rights except by license of the government was still the law in the United States.²⁴⁸

A number of cases arose in state and federal courts where U.S. litigants claimed that their adversaries in private litigation could not sue because they were alien enemies. The courts were quite consistent in holding, in line with long-established law, that alien enemies who were civilians and lived in the United States prior to the war could invoke the aid of the courts, whereas alien enemies who lived abroad could not.²⁴⁹

b. Prisoners of War

Although no prisoners of war attempted to use the U.S. courts during World War I, there was some judicial dicta and commentary noting that enemy prisoners of war could not access the courts on habeas corpus,²⁵⁰ and that civilian enemy aliens could not access the courts if they had been guilty of hostile acts against the United States.²⁵¹

247. See, e.g., *Ex parte Graber*, 247 F. 882, 887 (N.D. Ala. 1918); *Ex parte Fronklin*, 253 F. 984 (N.D. Miss. 1918). See generally Vladeck, *supra* note 97, at 970–73.

248. *De Lacey v. United States*, 249 F. 625, 626 (9th Cir. 1918). On Blackstone, see *supra* note 112 and accompanying text.

249. See, e.g., *Speidel v. N. Barstow Co.*, 243 F. 621, 621–22 (D.R.I. 1917); *Held v. Goldsmith*, 96 So. 272, 272–75 (La. 1919); *Kolundjija v. Hanna Ore Mining Co.*, 193 N.W. 163, 164–65 (Minn. 1923); *Rothbarth v. Herzfeld*, 167 N.Y.S. 199, 199–200 (N.Y. App. Div. 1917), *aff'd*, 119 N.E. 1075 (N.Y. 1918).

250. See *Krachanake v. Acme Mfg. Co.*, 95 S.E. 851, 852 (N.C. 1918) (“[T]he alien enemy resident here . . . may be interned and held as a prisoner of war without the right to apply for the writ of habeas corpus.”); cf. *Ex parte Graber*, 247 F. 882, 887 (N.D. Ala. 1918) (noting that under English and Canadian law “the rule that a court will not entertain an application for habeas corpus from a prisoner of war applies to a civilian subject of an enemy state, who has been interned as a measure of public safety”). Commentary published in England discussed the situation of prisoners of war. See, e.g., W. M. DAVIDSON, *THE STATUS OF THE ALIEN* 128 (1909) (“An alien enemy, a prisoner of war, was not entitled to bring any action nor even to be discharged upon a writ of Habeas Corpus.”).

251. See *Rau v. Rowe*, 213 S.W. 226, 227 (Ky. 1919) (“[T]he following general principles seem to have received full recognition in England, Canada, and the United States: First. That a person of enemy nationality resident in his own country can neither institute an action in the

There was one prominent case concerning an alleged German military spy, cited in the *Quirin* litigation by counsel for the saboteurs. But the case provides little support for the Nazi saboteurs. Herman Wessels arrived in the United States in November 1916, prior to the United States' involvement in the World War, and lived north of New York City, claiming to be a Swiss businessman named Carl Rodiger.²⁵² After the United States entered the war and the U.S. government developed information that Rodiger was in fact a German national named Wessels, "an officer in the Imperial German navy," and a spy for Germany, he was arrested in May 1918 and detained under the Alien Enemy Act.²⁵³ In 1918, Wessels was indicted for treason and conspiracy to commit espionage in federal court in New York.²⁵⁴ The government's theory explaining how a German citizen was guilty of treason against the United States was that his prewar residence during peacetime meant that he owed allegiance to the United States.²⁵⁵ In other words, the U.S. government itself argued that Wessels was an alien enemy with a peaceful prewar residence in the United States—exactly the category of person who had long been held to have a right of access to the courts. Wessels sought habeas corpus only after the war in 1920, when the government began military proceedings against him in a navy court-martial on the charge of spying.²⁵⁶ The government did not argue that Wessels lacked access to the courts,²⁵⁷ and the district court did not consider whether the petitioner's status as a German spy, allegedly in the employ of the German military, prevented him from having a right to access civilian courts. The court proceeded directly to the merits and held that the Constitution and laws of the United States provided no protection

courts of the country with which his own is at war, during the continuance of the war, nor prosecute one instituted before its commencement, but such disability continues only while he is abiding in his own country, and consequently does not exist where he is permitted to enter and remain in the country in which suit is brought, unless while therein he is carrying on trade with the enemy country, is a spy, or has been guilty of other acts of hostility.").

252. United States *ex rel.* Wessels v. McDonald, 265 F. 754, 756–57 (E.D.N.Y. 1920).

253. *See id.* at 757.

254. *Id.* at 759.

255. *See* Transcript of Record at 10, Wessels v. McDonald, 256 U.S. 705 (1921) (Nos. 287, 465 & 813) ("Abstract of Treason Indictment of December 6, 1918. Wessels, resident and domiciled here, adhered to the enemy, the German government . . ."); *Grand Jury Indicts Two for Treason*, N.Y. TIMES, Dec. 7, 1918, at 22 (describing the indictment's allegations about Wessels's pre-war residence and consequent duty of allegiance).

256. Apparently, the venue change resulted because the treason prosecution in civilian court had run into evidentiary difficulties. *See Navy to Try Wessels Here as German Spy*, N.Y. TIMES, Nov. 16, 1919, at 1; *Wessels Taken to Court*, N.Y. TIMES, Feb. 7, 1920, at 20.

257. *See* Transcript of Record, *supra* note 255, at 14–18.

against military trial for an alleged enemy spy.²⁵⁸ Because the government did not argue and the lower court did not rule on the court access issue, and because Wessels had a prewar residence in the United States that the government claimed gave rise to a duty of allegiance, his case does not support the Nazi saboteurs.

IV. THE OTHER 1942 DECISIONS ABOUT ALIEN ENEMY ACCESS TO CIVILIAN COURTS

In 1942, the Supreme Court decided two cases besides *Quirin* raising the issue of whether, and in what circumstances, enemy aliens had a right to access U.S. civilian courts during wartime. Neither 1942 case involved enemy fighters, but one did involve a representative of a government at war with the United States. The rules announced in both cases were consistent with prior precedent and practice denying court access to enemy fighters and to nonresident enemy alien civilians. Neither case gave any hint that the Court in *Quirin* would overthrow centuries of precedent and find a right of access to habeas corpus for admitted enemy fighters during wartime.

A. Ex parte Colonna

In January 1942, just months before the Nazi saboteurs landed in the United States, the Supreme Court decided *Ex parte Colonna*, a suit by the Italian ambassador to the United States.²⁵⁹ The United States had declared war against Italy on December 11, 1941. Colonna invoked the Court's original jurisdiction, and sought writs of prohibition and mandamus to free an Italian government vessel that had been seized under orders of the district court of New Jersey.²⁶⁰ The Court made quick work of his petition. It noted that the TWEA defined enemies who could not sue during wartime to include the officers and agents of any government with which the United States was at war, and then stated that "[t]his provision was inserted in the act in light of the principle recognized by Congress and by this Court that war suspends the right of enemy plaintiffs to prosecute actions in

258. Wessels appealed to the Supreme Court, but by agreement with the government, he dismissed his appeal. See *Wessels v. McDonald*, 256 U.S. 705, 706 (1921). The government apparently agreed to stay the military trial in exchange for his not seeking Supreme Court review. About one year later the government dismissed the federal court indictment against him. See *Treason Charges Dismissed in Court*, N.Y. TIMES, Oct. 5, 1922, at 11.

259. 314 U.S. 510 (1942).

260. *Id.* at 510–11.

our courts.”²⁶¹ Accordingly, “the application will not be entertained.”²⁶² This would seem to be a very strong precedent against the Nazi saboteurs, who admitted they were in the employ of the German military, and who sought to use another ancient prerogative writ, habeas corpus.

B. Ex parte Kawato

Kumezo Kawato immigrated to the United States from Japan in 1905 but never became a U.S. citizen.²⁶³ In 1941, he filed a libel in admiralty court, seeking unpaid wages and compensation for an injury sustained while working on a U.S.-flagged fishing boat based in California. After the Pearl Harbor attack on December 7, 1941, the United States declared war on Japan. The boat owner defended the case by asserting that, as an enemy alien, Kawato was barred from U.S. courts for the duration of the war. The Supreme Court unanimously held in November 1942 that Kawato had a right to pursue his case notwithstanding his enemy nationality.²⁶⁴ According to the Court, a “policy of severity toward alien enemies was clearly impossible for a country whose life blood came from an immigrant stream.”²⁶⁵ Therefore, as early as the War of 1812, “peaceable law-abiding aliens seeking to enforce rights growing out of legal occupations” had been allowed to access U.S. courts even when their home country was at war with the United States.²⁶⁶ Quoting a leading case arising from the War of 1812, the Supreme Court explained that “[a] lawful residence [in the United States] implies protection, and a capacity to sue and be sued.”²⁶⁷ This amelioration of the harsh common law rule against enemy alien court access only protected “resident alien enemies,” whose peaceful residence in the United States established their temporary allegiance and hence right to protection.²⁶⁸

261. *Id.* at 511 (citing cases from the Civil War).

262. *Id.*

263. *Ex parte Kawato*, 317 U.S. 69, 70 (1942). Because of his race, Kawato was not eligible for naturalization under then-existing law. See *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (holding Japanese were not eligible for naturalization under the existing statute).

264. This result was consistent with announced U.S. policy. See Brief for the United States as Amicus Curiae, *Kawato*, 317 U.S. 69 (No. 10); Press Release, Dept. of Justice (Jan. 31, 1942) (quoted in *Kawato*, 317 U.S. at 77 n.13).

265. *Kawato*, 317 U.S. at 73.

266. *Id.* at 78.

267. *Id.* at 73–74 (quoting *Clarke v. Morey*, 10 Johns. 69, 72 (N.Y. Sup. Ct. 1813)).

268. *Id.* at 74–75.

It is difficult to understand how the Nazi saboteurs were allowed to access the courts, given the *Kawato* Court's (correct) explication of the law. *Quirin* is even more inexplicable in light of this caveat in *Kawato*: "The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent the use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy."²⁶⁹ In other words, even a civilian enemy alien who had peacefully resided in the United States prior to the outbreak of war would be barred from the courts if allowing access would "hamper" the United States' "war efforts or give aid to the enemy." *A fortiori*, allowing German military saboteurs fresh off their U-Boats to protect themselves from a U.S. military tribunal by accessing civilian courts would seem to be clearly barred.²⁷⁰ Making *Quirin* even more inexplicable is the way *Colonna* was distinguished by the Court in *Kawato*, on the ground that it concerned "an enemy government" and as such had "no bearing on the rights of resident enemy aliens."²⁷¹ Nazi agents who admitted they entered the United States on a mission of sabotage while on the payroll of the German High Command should have been understood to fall under this rule.

V. THE CASE OF HAUPT, THE U.S. CITIZEN

Recall that one of the saboteurs, Haupt, claimed to be a U.S. citizen. Though the executive challenged this before the Supreme Court, the Court assumed his citizenship. Because U.S. citizenship has always been understood to bring with it heightened protection from the Constitution, laws, and courts of the United States, Haupt was differently situated than the other saboteurs regarding court access. Haupt's claim for court access is the only one that presents a close call legally. The bar on nonresident enemy aliens accessing the courts was deeply entrenched in U.S. law, and hence the other saboteurs had no right to be in U.S. courts because of citizenship and domicile, without even reaching the issue of their enemy-fighter

269. *Id.* at 75.

270. *See, e.g.,* *Bernheimer v. Vurpillot*, 42 F. Supp. 830, 831 (E.D. Pa. 1942) (decided prior to *Quirin* in January 1942):

It may be stated generally that in time of war no nation will permit a citizen of an enemy country to use its courts in any way which might be hurtful to it, or helpful to the enemy, in the prosecution of the war. But it has been held that a citizen of an enemy country peaceably residing in this country during time of war may maintain a purely personal action here, where no possible benefit could inure to the enemy nation thereby.

271. *Kawato*, 317 U.S. at 75 n.7.

status. But the categorical bar on the use of the courts by nonresident enemy aliens did not, of course, apply to Haupt as a U.S. citizen. It is necessary to address whether a U.S. citizen in Haupt's situation would fall within the bar on undisputed enemy fighters using habeas corpus. I believe the best legal answer is yes, though the question is undoubtedly a difficult one.

First, notwithstanding his (assumed) U.S. citizenship, Haupt voluntarily took up residence in Germany during the war against the United States. There is authority for the proposition that voluntary residence in the enemy's country is enough to bar a U.S. citizen from U.S. courts during wartime.²⁷² Second, the rule articulated in *Colonna* as interpreted by *Kawato* and by Congress in the TWEA (barring agents of an enemy government from court)²⁷³ should still have applied to him no matter what his citizenship. Third, even assuming that, prior to the Civil War, Haupt's citizenship would have meant continued protection of the law and access to courts even after he joined an enemy nation's war effort against the United States, that allowance of court access ended during the Civil War. As discussed above in Section III.D, during the Civil War, the Court, Congress, the executive, and prominent Union commentators all accepted the dual theory of the war. On the one hand, secession was illegal and void, the allegiance of all residents of seceded states was unimpaired, rebels could be prosecuted for treason and other domestic crimes, and, if the U.S. government chose this route, rebels still had protection of the law. On the other hand, the CSA had become a kind of de facto independent military power and, despite their U.S. citizenship, its residents had become de facto alien enemies outside the protection of the law because their massive rebellion and rejection of allegiance had forfeited protection. So, at its option, the U.S. government could use its full war powers against them, untrammelled by any municipal law limitations and without giving them access to the courts to protect themselves.²⁷⁴

272. See, e.g., *Lamar v. Micou*, 112 U.S. 452, 464 (1884) ("A state of war . . . suspends until the return of peace the right of any one residing in the enemy's country to sue in our courts."); *Mrs. Alexander's Cotton*, 69 U.S. (2 Wall.) 404, 421 (1864) ("Mrs. Alexander, being now a resident in enemy territory, and in law an enemy, can have no standing in any court of the United States so long as that relation shall exist."). In prize proceedings, a U.S. citizen who established a domicile in the enemy's country was treated as an enemy whose vessels and goods could be seized during wartime. See *The Venus*, 12 U.S. (8 Cranch) 253, 277-80 (1814).

273. See *supra* Part IV.

274. See *supra* Section III.D; see also Kent, *Civil War*, *supra* note 95, at 1872-83, 1899-1902, 1905-07, 1913-17, 1925-27.

Did the dual theory of the Civil War represent a broad and enduring change in U.S. law that covered the case of Haupt—a U.S. citizen who arguably forfeited his right to protection by traveling to Germany and agreeing to work for the German military against the United States after the declaration of war? While the issue cannot be said to be free from doubt, the better understanding is that once Haupt admitted to being a German military saboteur who, though a naturalized U.S. citizen, had taken up residence in Germany during the war, he should have been barred from proceeding any further in court. Under the Civil War paradigm, the default state for U.S. citizens who lived in enemy territory, and especially those who joined the enemy military, was out of protection—with no access to the courts. During the war, it was only when the U.S. government chose to recall specific residents of the CSA to their allegiance, for example by instituting domestic criminal prosecutions against them for rebellious acts, that they were within protection. A full return of protection for everyone had to await the U.S. government's defeat of the CSA. The U.S. government could have recalled Haupt to his lapsed allegiance by charging him with treason in civilian court; if it had done so, he would have had full protection of the Constitution and laws. But it chose to treat him as a military enemy outside of protection, and under the Civil War precedents, his U.S. citizenship could not prevent that.

VI. EXPLAINING THE *QUIRIN* DECISION

Parts III–V demonstrated the continued validity in 1942 of legal rules that should have been applied to deny the German saboteurs access to the courts. In *Quirin*, the Supreme Court chose not to apply these established legal rules or to enforce the President's proclamation denying the saboteurs access to the civilian courts. This Part attempts to understand why. Both internal and external explanations are offered. By internal, I mean explanations arising from the substantive and procedural law itself and the legal materials prepared by counsel and consumed by the Court, namely the briefs and oral arguments. In addition, I discuss issues of timing and other characteristics of the *Quirin* litigation itself, as well as the negotiations and deliberations among the Justices. By external explanations, I refer to the political and ideological contexts in which the case arose, the nature of unique interbranch (Court-executive) dynamics, the ideological predilections of the Justices, and the shape of public and elite opinion about the saboteurs and the Court's involvement.

Internal explanations for a court decision are, among lawyers, the ordinary mode of legal analysis. But explanation might be thought necessary for two of the external analytical perspectives used below. One is based on the claim by political scientists and some legal scholars that judicial review occurs within a politically constructed space. As Richard Fallon describes this thesis, “[T]he domain within which the [Supreme] Court possesses recognized and effective authority is politically constructed. . . . by the wishes and tolerances of Congress and the President, as supported by public opinion.”²⁷⁵ In other words, the Court, either consciously or unconsciously, recognizes the political limits of what it can do, and tends to abide by them. One way to study the Court’s review of the government’s actions in *Quirin* is, therefore, to examine how much and what kind of judicial review was constructed by the President, Congress, and public opinion as politically tolerable.

The second is the “attitudinal model” in political science, which claims that Supreme Court Justices’ votes can be predicted with a high degree of success based on their ideological predispositions toward the issues in a case.²⁷⁶ Many traditional legal scholars and some political scientists respond that precedent and legal reasoning do importantly constrain the Justices’ ability to reach ideologically preferred results.²⁷⁷ I do not take a definitive position on this debate but simply use an attitudinal perspective as one among many means to try to explain the *Quirin* Court’s decision to hear the saboteurs’ habeas petitions.

It is worth noting that the Court’s behavior in *Quirin*—disregarding established law and ruling against a powerful President during the depths of wartime, on behalf of despised enemy saboteurs—contradicts a standard claim made about courts’ behavior during wartime: that they defer too much to the government and fail to adequately protect unpopular individuals’ rights.²⁷⁸ Trying to

275. Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 360, 363 (2010).

276. See, e.g., Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 272–74 (2005) (summarizing the literature).

277. *Id.* at 274–76.

278. See Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 4–6 (2005) (surveying the literature and concluding that “the belief that the Court acts to suppress rights and liberties under conditions of threat is so widely accepted in post-September 11 America, and has been so widely accepted since the World War I period, that most observers no longer debate whether the Court, in fact, behaves in this way”); cf. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL

understand why the Court acted differently in *Quirin* should therefore be particularly useful. Using both internal and external perspectives, I suggest the following explanations.

A. The Justices' Backgrounds

Compared to previous Courts, the Court that heard *Quirin* in 1942 was composed of ideologically and politically liberal Justices, including some whose pre-Court legal careers showed real concern for the due process rights of aliens. It is possible that the Justices' ideological predispositions may have had some influence on the outcome in *Quirin*. I do not mean this as a criticism of the Justices; it seems both inevitable and desirable that pre-Court attitudes and experiences help shape behavior on the bench. My point is simply that understanding the views of the Justices who heard *Quirin* might have some explanatory value.²⁷⁹

The most widely used measure of the ideological predilections of Justices was devised by political scientists Jeffrey Segal and Albert Cover.²⁸⁰ They measure ideology prior to the Justice joining the Court rather than based on Court voting—because it is precisely votes as Justices that Segal and Cover are trying to explain.²⁸¹ Segal and Cover have rated the ideology of Justices starting with Franklin D. Roosevelt's appointees, giving each an "ideological value" score ranging from -1.00 ("extremely conservative") to 1.00 ("extremely liberal").²⁸² In 1942, seven of the Justices were Democrats who had been appointed by Roosevelt. Their Segal-Cover scores, ranging from 0.33 to 1.00, show that the Roosevelt appointees were moderately to "extremely" "liberal."²⁸³ The Roosevelt Justices were all recently

INQUIRIES L. 1 (2004) (finding that historically the Court has engaged in meaningful judicial review during wartime, but that it has focused on preserving institutional structures for decisionmaking rather than making first-order judgments evaluating the merits of individual rights claims).

279. As a thought experiment, ask yourself whether it is possible that a Court still containing the "four horsemen of reaction" might have approached *Quirin* in a somewhat different way than the 1942 Court did.

280. See Epstein et al., *supra* note 278, at 55–56 (describing Segal-Cover scores as the most widely used measurement).

281. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

282. *Id.* at 816.

283. The scores were: Black 0.75, Reed 0.45, Frankfurter 0.33, Douglas 0.46, Murphy 1.00, Jackson 1.00. See *id.* Segal and Cover did not rate James Byrnes, probably because he sat for such a brief time on the Court (July 1941 through Oct. 1942). Note that Murphy recused himself from *Quirin* because of his position in the Army.

appointed in 1942,²⁸⁴ making it more likely that they retained their pre-Court ideologies on which the Segal-Cover scores are based.

All of Roosevelt's appointees had significant ties to the President. In the view of some commentators, this dampened their willingness to buck Roosevelt and contributed to the Court running roughshod over the civil liberties of the saboteurs.²⁸⁵ I see it somewhat differently. Roosevelt put these men on the Court because of their congenial political and ideological views, as demonstrated by their careers in government, the academy, or in private law practice before joining the Court.²⁸⁶ The Justices' relative liberalism likely contributed to their decision to uphold the Court's power of judicial review of civil liberties issues.

Segal and Cover did not rate the ideologies of Justices appointed by presidents before Roosevelt. Sitting in 1942 were Chief Justice Harlan Fiske Stone, who had been appointed Associate Justice by Coolidge but was elevated to the chief's chair by Roosevelt in 1941, and Owen Roberts, appointed by Hoover. Both were Republicans, which might perhaps have some relevance to their willingness to rule against the Democrat Roosevelt. At the time of Roosevelt's inauguration in 1933, Stone was "commonly rated as [a] liberal."²⁸⁷ While dean of Columbia Law School, Stone had publicly opposed Attorney General Palmer's "Red Raids" of 1919. He sent a letter to an investigating congressional committee arguing that any alien lawfully present in the United States was a "person" under the Due Process Clause, and that the Palmer raids had not comported with constitutional due process.²⁸⁸ When Roosevelt elevated Stone to Chief Justice, the philosopher Morris Cohen praised him as a civil

284. The longest serving, Hugo Black, had not even been on the Court for five years when *Quirin* was heard.

285. See, e.g., Vazquez, *supra* note 4, at 220, 229.

286. See C. HERMAN PRITCHETT, *THE ROOSEVELT COURT* 3, 10–11 (1948) (detailing pre-Court backgrounds of FDR's justices). Felix Frankfurter, a well-known Harvard law professor and informal FDR advisor before joining the Court, was—despite his later reputation on the bench as a conservative because of his philosophy of judicial restraint—in the 1930s arguably the leading liberal or progressive intellectual in the United States. An immigrant himself, Frankfurter had long been active on behalf of the rights of immigrants and aliens. He protested Attorney General Palmer's "Red Raids" of 1919, and filed an amicus brief "condemn[ing] Palmer's Justice Department for denying the detainees access to lawyers and for obtaining evidence through illegal searches." NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* 14 (2010). Later, Frankfurter worked tirelessly for Sacco and Vanzetti, advised the NAACP, and served as a national leader of the American Civil Liberties Union. *Id.* at 21–27.

287. PRITCHETT, *supra* note 286, at 3.

288. ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 113 (1956).

libertarian who knew that “even an alien is a person and entitled to the protection of civilized law.”²⁸⁹ During the titanic fights of the mid-1930s over the constitutionality of the New Deal, Stone frequently joined Justices Brandeis and Cardozo in a liberal bloc voting to uphold the New Deal. Roberts, the other pre-Roosevelt justice to hear *Quirin*, was seen as an ideological moderate.²⁹⁰ He had joined the liberal justices in 1937 to decisively swing the Court in favor of the constitutionality of the New Deal—in the famous “switch in time that saved nine.” Roberts was capable of defending civil liberties during wartime, as demonstrated by his dissenting opinion in *Korematsu*.²⁹¹ As it turned out, it was these two liberal or moderate Republicans who lacked close ties to Roosevelt—Roberts and Stone—who took the lead on promoting court access for the saboteurs.

B. The Broader Legal Context

Several aspects of U.S. law probably helped shape how the Justices thought about the issues in *Quirin*. First, the long tradition of allowing resident enemy aliens who were peaceful civilians to access U.S. courts during wartime was discussed above in Parts III and IV. Because enemy fighters never sought to access U.S. courts and nonresident civilian enemy aliens rarely did, a great number of the decided cases concerned the sympathetic situation of the peaceful resident civilian alien enemy who was merely trying to protect his or her private rights. Anyone reading law books in 1942 would have come across many of these cases. As discussed in Part IV, one was on the Court’s docket already in summer 1942—*Ex parte Kawato*.²⁹² This tradition of access probably influenced some Justices by making the government’s argument for court closure in *Quirin* seem like a harsh attempt to make an exception to a general rule of openness.

Second, in 1942 the Court was on the verge of a revolution in habeas corpus jurisprudence, turning it from a very narrow and limited procedure for ascertaining that jurisdiction had been proper in the tribunal that ordered the detention into an extremely broad procedure allowing collateral review of all aspects of the processes that led to detention. For several decades prior to 1942, the Court had

289. *Id.* at 568–69.

290. PRITCHETT, *supra* note 286, at 3.

291. *Korematsu v. United States*, 323 U.S. 214, 225–33 (1944) (Roberts, J., dissenting).

292. Chief Justice Stone referenced the *Kawato* papers during oral argument in *Quirin*. See Transcript of Oral Argument of July 29, 1942, at 72, reprinted in LANDMARK BRIEFS, *supra* note 96, at 567.

been liberalizing its habeas corpus jurisprudence to allow more and more error correction to occur on collateral review; when *Quirin* was litigated, the Court was on the cusp of an incredible expansion of federal habeas corpus that provided much of the procedural underpinning for the Warren Court's revolutions in criminal procedure and civil rights.²⁹³

Third, in 1942 the Court was in the beginning stages of another revolutionary change—the move to bifurcated review in which economic constitutional rights were given minimal judicial protection, but civil liberties and civil rights were more aggressively protected.²⁹⁴ Chief Justice Stone, the chief proponent of court access for the saboteurs, was one of the leading theorists of this revolution, as seen, for example, in his famous footnote four in *Carolene Products*.²⁹⁵

Fourth, the Court has shown particular sensitivity when it perceived that the President or Congress had or might attempt to restrict habeas corpus jurisdiction over controversial executive detentions. In *Milligan*, for example, the Court reached out to decide a constitutional issue not presented by the case in order to suggest that using military courts during the postwar reconstruction of the South could be unconstitutional.²⁹⁶ In *McCardle*, the Court strained to find a path for habeas review of a military trial of a civilian during Reconstruction even though Congress had attempted to strip its jurisdiction.²⁹⁷ After *Quirin*, the Court has applied exacting clear statement rules to avoid finding that Congress stripped habeas jurisdiction over executive detentions.²⁹⁸ In *Boumediene v. Bush*, the Court misread precedent in a fairly dramatic fashion in holding unconstitutional Congress's stripping of habeas jurisdiction over habeas cases by Guantanamo Bay detainees.²⁹⁹ In retrospect, *Quirin* was arguably part of an emerging trend of the Court aggressively protecting habeas jurisdiction over executive detentions, especially

293. See Bryant & Tobias, *supra* note 5, at 338–54 (summarizing the expansion of habeas corpus jurisprudence from 1879 to *Quirin*).

294. See generally G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 301–02, 310–52 (1996) (reviewing the historical development of “bifurcated review”).

295. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

296. See Kent, *Civil War*, *supra* note 95, at 1928–29.

297. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1869); see also *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869) (exercising the jurisdiction claimed in *McCardle*).

298. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 576–84 (2006); *Demore v. Kim*, 538 U.S. 510, 517 (2003); *INS v. St. Cyr*, 533 U.S. 289, 299–300, 314 (2001).

299. See Kent, *supra* note 13 (showing that *Boumediene v. Bush*, 553 U.S. 723 (2008), relied on a demonstrably incorrect reading of key precedents).

during war or similar crises, and even when it required creative misreading of statutes or Court precedent to accomplish that.

Professors Jack Goldsmith and Cass Sunstein have posited that civil liberties have been increasingly protected in wartime due to a “ratchet” mechanism, because after each war, elites have criticized what appeared in retrospect to be abuses, and “[d]uring the next war, the perceived abuses of the last war are used as the baseline for determining which civil liberties restrictions are appropriate.”³⁰⁰ It is possible that *Quirin* was an example of the ratcheting up of habeas corpus protections against potentially questionable executive detentions, as a result of perceptions by Justices and other elites of abuses during past wars, like the Civil War.

One might also posit that these cases show that the Court can be moved to act, even during security crises and on behalf of unpopular claimants, when it is trying to preserve for itself “a seat at the table” by resisting attempts by the political branches to limit its jurisdiction.³⁰¹ I explore this latter thought more in Section VI.E below.

C. The Politically Acceptable Scope of Judicial Review

The Court’s actions in *Quirin*—taking jurisdiction, hearing the merits, but ruling for the government—conformed almost exactly to the politically acceptable scope of judicial review. This issue must be examined at two levels. The less important one is general public opinion. The more important is what the President and Congress would tolerate from the Court. The Court’s involvement in *Quirin*—just four days from when the clerk announced the Court would convene until the issuance of the *per curiam* decision—was too brief for Congress to make its views known. But the President did convey to the Court the limits of what he would tolerate in terms of judicial review, in quite dramatic fashion.

1. The President

By way of the Attorney General, the Court heard two messages from the President: first, that hearing the case was acceptable,

300. Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 285 (2002).

301. See Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122 (2011) (explaining the Court’s post-9/11 national security jurisprudence in this way).

perhaps even desirable; and, second, that it would be intolerable for the Court to order that the saboteurs be freed.

Once defense counsel decided to seek Supreme Court habeas review, they contacted the Attorney General and proposed that they jointly reach out to the Justices. One might have expected the Attorney General to oppose Supreme Court review; he had, after all, recently drafted the President's proclamation purporting to deny the saboteurs access to civilian courts and would soon write a brief arguing the same thing. In fact, though, Biddle traveled with defense counsel and personally told several Justices that he supported Supreme Court review.³⁰² This information was conveyed to the Chief Justice, who decided to call a special Court session. Days later, when Biddle in his brief and orally told the Court that it had no right to entertain the habeas petition, he might have seemed a little schizophrenic, perhaps undercutting his authority with the Justices on the court access issue. Biddle probably desired that the Court agree to entertain the saboteurs' case on the theory that it had jurisdiction to decide its jurisdiction, but then to hold that it lacked jurisdiction (or that the saboteurs lacked capacity to sue). It is not clear that the Justices understood this subtlety.³⁰³

While the President's and Attorney General's views on court access may have seemed muddled, their views on the merits were clear and clearly conveyed to the Justices: the saboteurs could not and would not be freed by habeas corpus. Sometime in late June or early July, Biddle met with FDR to discuss the case. The President informed his Attorney General, "I want one thing clearly understood, Francis: I won't give them up I won't hand them over to any United States marshal armed with a writ of habeas corpus. Understand?"³⁰⁴ "I understood clearly," wrote Biddle in his memoirs, while going on to note the difficult position that this put him in.³⁰⁵ The President's unwillingness to see a civilian court free the saboteurs was

302. See *supra* note 47 (quoting Biddle's memoirs). According to Lauson Stone, the Chief Justice's son who was working on the defense team, though at first Biddle "showed signs of resisting" the application to the Supreme Court, he soon "became cooperative" and even had lawyers from the Department of Justice working with defense counsel to make sure the Supreme Court's jurisdiction was established. See Mason, *supra* note 45, at 818 (quoting letter from Lauson Stone to Mason, June 27, 1952).

303. Based on Biddle's support for Supreme Court review, G. Edward White concludes that "*Ex parte Quirin* came into being because an expedited constitutional challenge to the commission suited all the parties in the case." G. Edward White, *Felix Frankfurter's 'Soliloquy' in Ex parte Quirin*, 5 GREEN BAG 2d 423, 427-28 (2002).

304. BIDDLE, *supra* note 47, at 331.

305. *Id.*

conveyed by Biddle—directly or indirectly, we do not know—to at least one justice, Owen Roberts, who told the rest of the Court. Notes taken by Justice Murphy at the July 29 conference of the Court, just before the first day's oral argument in *Quirin* was to begin, report that Roberts told his brethren that "Biddle has real[] apprehension that commission may enter order and president will order men shot despite proceedings in this court."³⁰⁶ "That would be a dreadful thing," the Chief Justice responded, according to Murphy.³⁰⁷ Jackson, who was personally close to the President, tried to reassure his colleagues, saying, again according to Murphy's notes, that the President was extraordinarily pressed by time and events, and "he is punch drunk in a sense and has pounded Biddle who is really frightened. But [the] president is jealous of his place in history + will do [the] right thing."³⁰⁸ It is unclear whether this prediction mollified the Justices. Douglas later wrote in his memoirs that this incident represented "a blatant affront to the Court" by both the President and Attorney General.³⁰⁹ On the first morning of oral argument, coming just after the conference at which Biddle's fears about FDR were related by Justice Roberts, Biddle told the Court that the case might "very quickly become moot."³¹⁰ In light of their earlier discussion, the Justices might have perceived this as a veiled warning about the President's unwillingness to tolerate judicial interference that would lead to release of the saboteurs.

2. Public Opinion

Like the President, the American public seemed to agree that it was acceptable and perhaps even desirable for the Court to hear the saboteurs' pleas, but that swift punishment by the military commission was the only acceptable result on the merits. Some newspapers noted discontent with the Court's decision to hear the case.³¹¹ There was certainly a strong feeling that Supreme Court

306. Frank Murphy, Notes on Supreme Court Cases Concerning President's Powers During Wartime 1 (July 29, 1942) (on file in Box 2 of the Papers of Eugene Gressman, Univ. of Mich. Bentley History Library) (copy on file with author).

307. *Id.*

308. *Id.*

309. DOUGLAS, *supra* note 7, at 139.

310. Transcript of Oral Argument of July 29, 1942, at 10, *reprinted in* LANDMARK BRIEFS, *supra* note 96, at 505.

311. See, e.g., Lewis Wood, *Supreme Court Is Called in Unprecedented Session to Hear Plea of Nazi Spies*, N.Y. TIMES, July 28, 1942, at 1, 10; Editorial, *The Saboteurs Seek Civil Court*

review should not divert the saboteurs from their path to the gallows.³¹²

At the same time, many leading papers expressed the view that Supreme Court review was a positive development because it ensured that the Constitution was being followed and gave an object lesson to Americans and to the world in the superiority of American justice as compared to the practices of the Nazis and their allies.³¹³ The *Wall Street Journal* editorialized that the Court's action in hearing the saboteurs' case showed that, in the United States, the "liberties" of the people were safe even during "total global war."³¹⁴ The *New York Times* editorial page praised the Court for giving the saboteurs "due process" and showing that "this country and its government are sufficiently free from hysteria to pause in the midst of a . . . dreadful conflict and deal out calm and exact justice."³¹⁵ The influential *Times* columnist Arthur Krock celebrated that, in America, the maxim *inter arma silent leges*—the law is silent during wartime—was not the prevailing rule and noted that the Court was hearing the saboteurs' pleas "in an hour when this country's own nationals were returning from Axis captivity to relate ordeals of torture and inhuman confinement on trumped-up charges or no charges at all."³¹⁶ The *Washington Post* opined that the Nazis were known to summarily execute their captives but that "the Nazi way is not our way":

Americans have faith in their institutions, confidence in their inherent strength. Even in as desperate a crisis as that which faces our Nation and other free nations today, we do not propose to imitate the enemy, but only to act in accordance with the precepts of law and right. For that reason there is an element of the sublime in the action of Chief Justice Stone in calling this extraordinary session of the court . . . It is not [the saboteurs'] liberties which are involved in the elaborate precautions that have been taken to see that they got a fair trial, but ours.³¹⁷

Relief, L.A. TIMES, July 29, 1942, at A4; see also Goldsmith & Sunstein, *supra* note 300, at 264–70 (surveying the American press's views about the saboteurs case).

312. See, e.g., Lewis Wood, *Capital Awaiting High Court Action on 7 Nazis Today*, N.Y. TIMES, July 29, 1942, at 1, 11 (quoting a congressman that "[a]ny interference with [the military commission] trial by civil court would strike a severe blow to public morale," and that the saboteurs "should be executed with all possible dispatch"); *Saboteur Case*, WASH. POST, Aug. 1, 1942, at 8 (opining that it would be "intolerable" and would "help Hitler immensely" if spies could not be swiftly executed after military rather than civil trials).

313. According to Chief Justice Stone's biographer, "[p]ublic sentiment . . . seemed to favor giving the Nazis a judicial hearing before they were shot." MASON, *supra* note 288, at 653.

314. Editorial, *A Constitution Still Governs*, WALL ST. J., July 30, 1942, at 6.

315. Editorial, *Due Process in Washington*, N.Y. TIMES, July 31, 1942, at 14.

316. Arthur Krock, *In the Nation: The Issues of Law and Fact in Sabotage Case*, N.Y. TIMES, July 30, 1942, at 20.

317. Editorial, *Habeas Corpus*, WASH. POST, July 31, 1942, at 12.

Other leading papers echoed these sentiments.³¹⁸ It is striking how closely the Court's actions in the case conformed to the politically acceptable scope of the judicial review.

D. Fears of Presidential Domination

1. Ideological, Political, and Institutional Contexts

The views of the Court that decided the saboteurs' fate was likely shaped by concerns about its institutional integrity in the face of presidential domination. Roosevelt, who had recently been elected to an unprecedented third term, was, in 1942, arguably the most popular and powerful president in American history. This was, to some observers, a concerning development. American constitutional law has always been obsessed with balance between and among the so-called "coordinate" or "coequal" branches of the national government. As intended by one of its chief designers, James Madison, each branch would jealously guard its powers and prerogatives against encroachment by the others. Though the capacity of each branch to consistently engage in institutional self-protection has probably been overstated,³¹⁹ it nonetheless has clearly been an enduring feature of the American scheme of government, at least at the rhetorical level.

The desire of the Court to protect its prerogatives from domination by other branches was almost certainly heightened in 1942, when *Quirin* came before the Court. Events of the 1930s and early 1940s in Europe colored many Americans' attitudes about domestic issues, including about the desirability of a super-strong presidency. The rise of totalitarianism in Europe caused some American elites to fear the exploitation of the masses' emotional desires by charismatic leaders, and to prize a truly independent judiciary as an essential bulwark against the rise of dictatorship here.³²⁰ At the same time, "revulsion against Nazi practices influenced

318. See, e.g., Editorial, *Saboteurs' Plea*, ATLANTA CONST., Aug. 1, 1942, at 4 ("That the Supreme Court of America heard [the saboteurs'] plea has irritated many Americans who have not thought it through. We are fighting for civilized rights and among those rights are the rights of appeal to courts."); Editorial, *The Court Speaks*, CHI. TRIB., Aug. 1, 1942, at 10 ("The fact that our government was required to prove its right to try the suspects under military law has had the effect, and quite probably the intended effect, of pointing the contrast between totalitarian justice and American justice. That is all to the good.")

319. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2312–16 (2006).

320. See, e.g., David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741, 759 (1981). For contemporary examples, see, for instance, William J. Donovan, *An Independent Supreme Court and the*

American attitudes toward racial and religious minorities, treatment of criminal defendants, . . . eugenic sterilization . . . [and] freedom of speech.”³²¹ The need to decisively distinguish American law and values from the horrors of totalitarianism was widely felt, including by the Supreme Court Justices.³²²

In this developing ideological context there occurred, in 1936 and 1937, a momentous confrontation between President Roosevelt and the Supreme Court. The clash was still reverberating in 1942, and the meaning of the events of 1936–37 would have unavoidably been filtered through the prism of the emerging antitotalitarianism, with its concomitant emphasis of judicial independence from the executive and judicial preservation of civil liberties. The story of Roosevelt’s confrontation with the Court about the constitutionality of the New Deal has been told many times and will not be rehashed here. I think it suffices to make two points. First, even many people who were committed New Deal Democrats and strong supporters of President Roosevelt felt that he had overreached with his court-packing plan, which was widely seen as a brazen attempt to put the Court under his thumb.³²³ Whatever their feelings about court packing while they were private citizens or executive officials in 1937, once on the Court, Roosevelt’s Justices would likely have felt protective of the institution and its independence. Second, besides Stone, Justice Roberts seems to have been the most committed to resisting Roosevelt’s argument that

Protection of Minority Rights, A.B.A. J., Apr. 1937, at 254, 254–56 (arguing that the independence of the Supreme Court must be protected so it can defend minority rights, in contradistinction to what was happening in Europe); Robert N. Wilkin, *An Appointed Judiciary—Its Place in the Balance of Government*, A.B.A. J., Jan. 1937, at 57, 57–59 (implying that the role of an independent, appointed judiciary was to “restrain[] the ambition of ‘the one’ and the emotions of ‘the many’”).

321. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 43–44 (1996).

322. See *id.* at 34, ~65. See generally Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 423 (1996) (“[T]he desire to articulate principles that distinguished America from the Soviet Union and Nazi Germany contributed to a long line of liberal Supreme Court decisions from the Second World War through the Warren era.”).

323. See, e.g., FELDMAN, *supra* note 286, at 108–10 (stating that even Justice Brandeis was adamantly against the court-packing plan and explaining that the plan “looked . . . like a grab for power on the part of a president who would not take no for an answer. The brazenness of telling the Supreme Court that if it would not accept his policies, he would change its composition, ranked as one of the most remarkable pieces of constitutional one-upsmanship ever tried.”); JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 315–16, 321 (2010) (describing the Senate progressives’ abhorrence to the idea of “remaking the Supreme Court virtually overnight”). Some critics of court-packing compared FDR “to Stuart tyrants and European dictators.” WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 137 (1995).

the courts were closed to the saboteurs. It might be relevant that Roberts had personally borne the brunt of charges that in 1937 certain Supreme Court Justices had switched their views and votes in response to Roosevelt's court-packing threat. Just a few years later, in 1942, Roberts might have desired to show that he could not be pushed around by the President.³²⁴

Another factor may have caused the Court in the summer of 1942 to wish to send a message that the President could not preclude judicial review of wartime detentions. The Japanese and Japanese-American removal and internment program was well underway by July 1942,³²⁵ and was already controversial for its race-based targeting of an entire ethnic group.³²⁶ Habeas corpus challenges had already been filed in federal courts when the Court heard *Quirin*.³²⁷

324. As of 1942, the leading academic and popular accounts of the Court's "switch in time" in 1937 concluded that politics—the overwhelming election victory of FDR and his congressional supporters in November 1936 and his spring 1937 "court packing" plan—caused Justice Roberts and Chief Justice Hughes to switch their views and votes. See, e.g., Michael Arians, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 631–33 (1994) (surveying contemporary accounts of the switch in time). Roberts, in particular, was singled out as having switched his position in response to political pressure. According to Professor Carl Swisher's 1943 book on the Supreme Court and the Constitution, "the feeling of the public, and probably of the bar as well, was that Justice Roberts had deemed it expedient to change his position because of the movement to reorganize the Court." CARL B. SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 946 (1943). The best-selling popular account of the court-packing crisis and switch in time came to the same conclusion. See JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 140 (1938) (suggesting that Roberts might have decided to "take a hint from the election returns"). Such public and repeated accusations of weakness and surrender of principles in the face of Roosevelt's criticism and threats must have stung Roberts. President Roosevelt's Attorney General, soon to be on the Court himself, poured some salt on Roberts's wounds. In his 1941 book, Robert Jackson wrote that "some Justices"—obviously referring to Hughes and Roberts—"belated[ly]" recognized "the validity of the complaints against their course of decision" made by the President and others, changed their views, "confessed legal error and saved themselves from political humiliation." ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* vi (1941). Recently there has been a lively debate about whether Roberts and Hughes in fact switched their views in 1937, and, even if they did, whether political pressure was an important causal factor. See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998). Whatever actually occurred behind the scenes, Hughes and in particular Roberts were publicly accused of succumbing to political pressure at the time.

325. See e.g., Exec. Order 9102, 7 Fed. Reg. 2,165 (Mar. 18, 1942) (establishing the War Relocation Authority); Exec. Order 9066, 7 Fed. Reg. 1,407 (Feb. 19, 1942) (empowering the Secretary of War or a designee to deem U.S. territory "military areas" and exclude "any and all persons" from them); *West Coast Finishes Removing Japanese*, N.Y. TIMES, June 8, 1942, at 5 (reporting the progress of evacuation efforts). See generally ROGER DANIELS, *PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II* (rev. ed. 2004).

326. See, e.g., *Japanese Decries Mass Evacuation*, N.Y. TIMES, June 19, 1942, at 8 (describing the ACLU, American Friends Service Committee, and various Japanese-American organizations' criticisms of evacuations).

327. See, e.g., Lawrence E. Davies, *Evacuation Stay Denied to Japanese*, N.Y. TIMES, Apr. 23, 1942, at 15.

Some Justices might have been thinking they would have to rule on its legality, and wanted to send a message to the President that the courts would be open to all comers.

A final bit of context might help explain why the Court in 1942 stood up to the President on court access. Chief Justice Stone was concerned that Justices were too personally and professionally close to the executive branch, and probably feared that President Roosevelt was intentionally drawing them into his web. In early June 1942, when the Court recessed for the summer, Justice Murphy accepted a commission as lieutenant colonel (inactive status) in the U.S. Army and departed for officers' training school.³²⁸ Stone, who had not been consulted ahead of time, was reportedly "furious," since he thought that it was inappropriate and perhaps illegal for a sitting Justice to accept an executive-branch appointment.³²⁹ A few months earlier, Justice Roberts had accepted Roosevelt's request to head a commission studying the Pearl Harbor tragedy.³³⁰ Stone believed that this extrajudicial employment hurt both "the work and reputation" of the Court.³³¹ Since the war began, Justice Byrnes had been operating as an unofficial White House employee, to the Chief Justice's dismay.³³² The newspapers were, according to Stone's biographer, "full of stories about Justice Douglas and Felix Frankfurter going over to the White House to see F.D.R. and advise him. Occasionally Stone would grumble about the Court participating in such affairs"³³³ In the early summer of 1942, Roosevelt had asked Stone himself to lead an investigation of problems in the supply of rubber, a critical war commodity. Stone refused, believing it essential to the separation of powers that Justices not become too entangled with the executive branch.³³⁴ He wrote President Roosevelt a long letter about the need to preserve judicial independence.³³⁵ While individually the justices doubtless all were pleased by the President's attention and desired to help their country, especially during wartime, it seems reasonable to speculate, especially in light of Stone's documented views, that some

328. See SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 216-17 (1984).

329. See *id.* at 217; Melvin I. Urofsky, *The Court at War, the War at the Court*, J. SUP. CT. HIST., July 1996, at 3.

330. See Exec. Order No. 8983, 6 Fed. Reg. 6,569 (Dec. 20, 1941) (creating the commission).

331. Alpheus Thomas Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 HARV. L. REV. 193, 199 (1953).

332. See MASON, *supra* note 288, at 581; Mason, *supra* note 331, at 199.

333. Mason, *supra* note 331, at 198 (internal quotations omitted).

334. See *id.* at 201-05; Urofsky, *supra* note 329, at 3.

335. See Mason, *supra* note 331, at 203-04 (providing the text of the letter from Stone to the President).

number of them became uncomfortable that the President might be compromising judicial independence by his constant attempts to deputize them.

In combination, it seems that the ideological, political, and institutional contexts in 1942 all pointed toward the need for the Court to demonstrate its independence from the President and show that the federal courts would be open to wartime claims involving civil liberties.

2. The Executive's Mishandling of the Court Access Issue Raised Fears of Executive Overreaching

If I am right that concerns about presidential domination of the judiciary and its potential effect on civil liberties were salient for the Justices in 1942, then it seems likely that the manner in which the executive branch handled the court access issue in *Quirin* exacerbated these concerns and helps explain why the Court ruled against the government. Recall that the executive's first action regarding court access came weeks before the Supreme Court agreed to hear the case. A presidential proclamation issued in early July described the saboteurs and then stated that:

[S]uch persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States . . . except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.³³⁶

It is not entirely clear what legal effect the President's advisers thought this provision would have. Before the proclamation was issued, the Attorney General had advised the President—accurately—that the saboteurs had no legal right to access the courts because it had “long been traditional to deny our enemies access to the courts in time of war.”³³⁷ Because the saboteurs had, under preexisting law, no right to access the courts, the Attorney General advised Roosevelt—again, accurately—that a proclamation purporting to deny them access would *not* constitute a legally controversial attempt by the President to suspend the writ of habeas corpus.³³⁸ (President Lincoln had purported to suspend the writ on his own authority at the outset of the Civil War, when Washington, DC was besieged and Congress

336. Proclamation No. 2561, *supra* note 40.

337. FISHER, *supra* note 5, at 50 (quoting Memorandum from Biddle, Attorney Gen. of the United States, to Roosevelt, President of the United States (June 30, 1942) (on file with the Franklin D. Roosevelt Presidential Library and Museum, Official File 5036, Box 4)).

338. See *id.* (quoting Memorandum from Biddle, *supra* note 337).

not in session; Chief Justice Taney had declared the presidential suspension unconstitutional in *Ex parte Merryman*; the full Court never decided the issue.³³⁹ But since the saboteurs had no right to access the courts, it is not entirely clear why the Attorney General advised the President that he should issue a proclamation stating this.³⁴⁰

The way the proclamation was framed contributed to the impression that mere executive discretion was being invoked to close courts that otherwise would have been open to the saboteurs. The proclamation did not cite the rule of the common law and law of nations barring enemy aliens and military enemies from the courts during wartime. It did not cite any specific cases, statutes, or other legal authorities; nor did it cite the historical practices of the U.S. government in previous conflicts. It did not even assert that the saboteurs lacked any entitlement to access the courts. Instead it was framed as a denial of access by the President. The proviso that the Attorney General could authorize case-by-case access added further to the impression that it was pure executive discretion being invoked.³⁴¹

Defense counsel for the saboteurs were savvy lawyers, and they picked up on this mistake by the executive. In their briefing and oral argument, they framed the issue of court access as an attempt by the President to suspend habeas corpus and to use a mere executive proclamation to bar the courthouse door.³⁴² They successfully fostered the perception that Roosevelt was heavy-handedly seeking to deny judicial review that would otherwise have been available. The government's response to this defense tactic was not good enough. In

339. See Kent, *Civil War*, *supra* note 95, at 1866-67.

340. The executive may have believed that the Alien Enemy Act's provision allowing the president, by proclamation, to "direct the conduct to be observed, on the part of the United States, toward" alien enemies, An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798), could be read to authorize the President to proclaim a bar on court access. The proclamation cited unnamed "statutes" authorizing it, but did not mention the Alien Enemy Act. Proclamation No. 2561, *supra* note 40.

341. See Proclamation No. 2561, *supra* note 40.

342. See Petitioners' Brief, *supra* note 52, at 18 (arguing that the proclamation is "unconstitutional and invalid" because "there is a lack of statutory authority for such action of the part of the Executive," and it violates the Habeas Suspension Clause); *id.* at 37 ("We contend that the President has no authority to issue such Proclamation in the absence of a statute giving him this authority. We know of no inherent Constitutional right of the President to issue Proclamations in matters affecting such substantial rights as this Proclamation purports to affect."); Transcript of Oral Argument of July 29, 1942, at 40, *reprinted in* LANDMARK BRIEFS, *supra* note 96, at 535 ("We do not think, sir, that [the President] has any constitutional authority to suspend the writ of habeas corpus in the absence of an express statute."); *id.* at 41, *reprinted in* LANDMARK BRIEFS, *supra* note 96, at 536 (framing the issue as whether "the President has authority to make this proclamation and to deprive these men of a right in the civil courts").

his oral argument, the Attorney General contended that the saboteurs had no right to access the courts "because of the President's proclamation and because of the statutes governing the case, and also because of the very ancient and accepted common law rule that such enemies have no rights in the courts of the sovereign with which they are enemies."³⁴³ The Attorney General mentioned the proclamation first, as if it were the most important consideration in denying access, and then suggested that certain statutes had some bearing on the question, but without specifying which ones. Throughout oral argument, the Attorney General largely acceded to the defense's framing of the issue as involving executive discretion. Biddle even emphasized that "in cases of war the rights of an enemy depend on the grace of the sovereign."³⁴⁴

There are some indications that the Justices were indeed influenced by the perception that the President was overreaching dictatorially and seeking to deny a preexisting right to the saboteurs and to oust the judiciary from its proper role. Stone's private letters suggest this perspective was salient for him. For instance, after the Court issued its full opinion in October, the Chief Justice wrote to his close friend Sterling Carr: "I hope you noticed that the opinion flatly rejected (as unobtrusively as possible) the President's comment that no court should hear the plea of the saboteurs. That, I thought, was going pretty far."³⁴⁵ A former law clerk wrote to Stone asking about the Court's brief and confusing discussion of the court access issue in the full opinion in *Quirin*. Stone wrote back: "The somewhat cryptic sentence appearing on page 6 of the Saboteur opinion on which you comment was the result of patient negotiations to get the Court to agree unanimously to rejecting of the argument that access to the court by the prisoners could be denied."³⁴⁶ Writing to a friend and former colleague, John Bassett Moore, Stone stated: "The Saboteur cases presented a great many legal puzzles which have never been ironed out or considered by the courts. An interesting feature of the cases which was not commented on by the newspapers was the

343. Transcript of Oral Argument of July 29, 1942, at 70, *reprinted in* LANDMARK BRIEFS, *supra* note 96, at 565; *id.* at 73, *reprinted in* LANDMARK BRIEFS, *supra* note 96, at 568.

344. *Id.* at 73, *reprinted in* LANDMARK BRIEFS, *supra* note 96, at 568.

345. Letter from Harlan Fiske Stone to Sterling Carr (Nov. 17, 1942) (on file in Box 9, Folder "Carr, Sterling 1942" of the Harlan Fiske Stone Papers, Manuscript Div., Library of Congress).

346. Letter from Harlan Fiske Stone to Roger Nelson (Nov. 30, 1942) (on file in Box 69, Folder "July Special Term 1942 *Ex Parte Quirin et al.*" of the Harlan Fiske Stone Papers, Manuscript Div., Library of Congress).

President's Order prohibiting any court from listening to the saboteurs."³⁴⁷ Note that Stone consistently focused on whether the President could bar court access, rather than asking whether the saboteurs were entitled to access. In other words, the Chief Justice seems to have seen the proclamation as a power play by the executive to sideline the Court, and to have reacted to preserve the Court's seat at the table. There are some indications that other Justices might have felt the same as Stone about this issue. For instance, according to a leading historian of the *Quirin* case, Justice Roberts read an early draft of Stone's full opinion for the Court "as recognizing the validity of the president's proclamation closing the courts to the petitioners" and indicated to his colleagues that he "thought that the Court should say that the President does not have such power."³⁴⁸

Seen through this lens, the Court's resolution of *Quirin*—rejecting the executive's claim that the courts were closed, thereby preserving judicial power to fight another day, but ruling for the executive on the merits on the politically explosive issue that really mattered to the President—might be usefully compared to Chief Justice Marshall's artful resolution of the executive-Court confrontation in *Marbury v. Madison*. In *Marbury*, the Court asserted its power for the future—judicial review of congressional (and by implication, executive) actions for constitutionality and control by mandamus of the executive's conduct—but in a way that gave the President the immediate political victory he desired and therefore avoided direct interbranch confrontation. Seen in this way, what I have been calling the Court's "error" on court access in *Quirin* might be seen instead as an act of high judicial statesmanship. But critics who deplore the *Quirin* Court's holding on the merits that the military commission was lawful might have preferred that the Court duck the issue entirely.

E. Court Processes and Internal Dynamics

This final Section turns back to familiar terrain, the internal processes and dynamics on the Court that might help explain the result in *Quirin*. One obvious point, mentioned by numerous prior commentators, is that the Court's processes were hasty and flawed—four days after first announcing it would hear the case, the Justices

347. Letter from Harlan Fiske Stone to John Bassett Moore (Dec. 31, 1942) (on file in Box 69, Folder "July Special Term 1942 *Ex Parte Quirin* et al." of the Harlan Fiske Stone Papers, Manuscript Div., Library of Congress).

348. Danelski, *supra* note 4, at 75.

issued a brief *per curiam* decision that, as later deliberations about the full opinion showed, had papered over serious internal disagreements about key issues. In addition, the Justices and counsel lacked expertise in the relevant legal issues, and Chief Justice Stone misread key precedents.

The Court announced on July 27 that it would hear the case.³⁴⁹ The briefs were quickly drafted and filed the morning of July 29, when the Court convened to begin hearing oral argument. Chief Justice Stone remarked to his law clerk that “[b]oth briefs have done their best to create a sort of legal chaos.”³⁵⁰ This was an uncharitable comment by the Chief Justice, who himself contributed greatly to the Court’s error on court access. But it is true that the briefing would have been much better had the lawyers more time to prepare. The government’s briefing on court access was perfunctory and inadequate, relying primarily on English authorities predating the U.S. Constitution and making no real attempt to show that the principles established in those cases had been accepted in American law.³⁵¹

The *Quirin* briefs were filed the morning that oral argument started, so it is not a surprise that at least some Justices had not read them.³⁵² The oral argument transcript suggests that the Justices may have known relatively little about the laws of war, practices relating to prisoners of war, or relevant jurisprudence on access to the courts during wartime.³⁵³ None of them had relevant experience in their careers before the bench, and none had been a Justice when the country was last at war.

Already on the first day of oral argument—in other words, probably before he had fully digested the briefs, much less the underlying legal materials—Chief Justice Stone seems to have made up his mind about how to think about the question of court access for

349. Wood, *supra* note 311, at 1.

350. Letter from Harlan Fiske Stone to Bennett Boskey (Aug. 4, 1942) (on file in Box 69, Folder “July Special Term 1942 *Ex Parte Quirin* et al.” of the Harlan Fiske Stone Papers, Manuscript Div., Library of Congress).

351. See Government’s Brief, *supra* note 49, at 13–18.

352. See Transcript of Oral Argument of July 29, 1942, at 13, reprinted in LANDMARK BRIEFS, *supra* note 96, at 508 (Justice Frankfurter stating “I have not read any of the papers”). Justice Douglas missed the first day of argument while traveling to Washington, and it seems certain that he would have had little time to absorb the lengthy briefs before argument resumed on July 30.

353. See, e.g., *id.* at 19, reprinted in LANDMARK BRIEFS, *supra* note 96, at 514 (Chief Justice Stone misusing term of art “martial law”); *id.* at 102, reprinted in LANDMARK BRIEFS, *supra* note 96, at 597 (Justice Reed expressing surprise that prisoner-of-war status was unavailable to combatants who did not wear uniforms).

the saboteurs. In a colloquy with defense counsel, Stone suggested that the saboteurs had a "right to make a defense" to the government's charges and that this right might extend to "habeas corpus in order to make their defense effective."³⁵⁴ Stone pressed harder on this point when the Attorney General argued on the first day.³⁵⁵ By the second day of oral argument, Stone was confidently articulating this theory:

What I was raising is whether, when a man has a right to make a defense, and that includes the court in which he should be tried, he is foreclosed from making that defense by way of habeas corpus because he is an alien enemy. . . . These men are engaged in defense of their liberty, and they are using this process as an instrument of defense. . . . I think it is the duty of the Court in coming abreast of habeas corpus to look through forms.³⁵⁶

Stone likely picked up this idea from either or both of two sources. First, there were civil cases decided during both World War I and the early parts of World War II in which American plaintiffs had sued alien defendants who, once war began, had become alien enemies—for instance, because they were German citizens. When the American plaintiffs then argued that they should win their suits because the alien enemy defendants had no right to appear in court during wartime, the courts had generally rejected this and held that alien enemies had a right to defend themselves if sued, even though they might lack the ability to affirmatively sue themselves.³⁵⁷ A second and older set of precedents came from the Civil War. As discussed above, the Supreme Court and lower federal and state courts had made clear that residents of the Confederacy were akin to nonresident alien enemies in that they had no right to sue during wartime. But it was a different matter when Confederates were sued in civil courts of the Union. This occurred frequently when the U.S. government sued in federal court to confiscate rebel property.³⁵⁸ In some instances, lower federal courts had stricken the answers filed by

354. See *id.* at 23, reprinted in LANDMARK BRIEFS, *supra* note 96, at 518.

355. See *id.* at 71–72, reprinted in LANDMARK BRIEFS, *supra* note 96, at 566–67 (“[An alien] would have his right to defend himself? That is recognized even in a court martial. . . . What I am coming to is this: Is the writ of habeas corpus anything more than a mode of defense . . . ?”).

356. Transcript of Oral Argument of July 30, 1942, at 4, reprinted in LANDMARK BRIEFS, *supra* note 96, at 605.

357. See generally *Rau v. Rowe*, 213 S.W. 226, 227 (Ky. 1919):

[T]he liability of an alien enemy to be sued carries with it the right to use all the means and appliances of defense that might be employed by a resident citizen of the country in which the action is brought. In other words, although the existence of war closes the courts of each belligerent to the citizens of the other, it does not prevent the citizens of one belligerent, when sued, from taking proceedings for the protection of their own property against the citizens of the other when sued by the latter.

358. These were styled as *in rem* proceedings where the property was technically the defendant, but courts recognized that the property owner was the true defendant.

Confederates and entered default judgments on the ground that they had no right to access the courts during the war.³⁵⁹ The Supreme Court disagreed, holding that, if sued in civil courts, rebels had a right to defend themselves in those same courts.³⁶⁰

Stone misapplied this idea of the right of an alien enemy to make a defense to the saboteurs' case. The government did not deny that the saboteurs could defend themselves before the military tribunal. The saboteurs had very capable lawyers appointed by the President for that purpose. Habeas corpus has always been conceived of as an affirmative civil proceeding that was separate and distinct from the criminal trial or other process that resulted in detention.³⁶¹ When habeas corpus review of a military detention is sought, it is an attempt to transfer jurisdiction and control over the proceeding from the military authorities to the civil judicial system. But only certain kinds of persons have a right to civilian judicial review, and admitted enemy fighters and nonresident alien enemies were not among them.³⁶²

How did Stone convince the other Justices to adopt his view—a view contrary to voluminous practice and precedent—that the saboteurs had a right to “defend” the military commission charges by seeking collateral review via habeas? Few Justices kept notes about their oral deliberations, and those that exist are often hard to decipher and/or in conflict with the notes of other Justices. The papers of Stone, Jackson, Black, and Douglas at the Library of Congress contain some memoranda that the Justices exchanged about *Quirin*, but these all date from the period after the *per curiam* opinion had been issued, diminishing their utility for explaining the genesis of the decision to allow the saboteurs to proceed to the merits. Still, it is possible to piece together some hypotheses about what might have happened to convince the Justices to support Stone's view about the “right to defend.”

359. See, e.g., *Law Reports: Notes of Admiralty Decisions*, N.Y. TIMES, Nov. 13, 1863, at 2 (describing decision of Judge Betts of the federal district court in New York City, in the case *United States vs. Seventeen Hundred and Fifty-six Shares of the Stock of the Great Western Railway*).

360. See *Windsor v. McVeigh*, 93 U.S. (3 Otto) 274, 277 (1876); *Univ. v. Finch*, 85 U.S. (18 Wall.) 106, 111 (1873); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 267 (1870).

361. See generally *Riddle v. Dyche*, 262 U.S. 333, 335–36 (1923) (“The writ of habeas corpus is not a proceeding in the original criminal prosecution, but an independent civil suit . . .”); *Ex parte Tom Tong*, 108 U.S. 556, 559–60 (1883) (stating that a writ of habeas corpus is not part of a criminal prosecution, but rather “a suit brought . . . to enforce a civil right”).

362. See *supra* Parts III & IV.

Recall that the *per curiam* opinion of July 31 did not address the government's argument that the saboteurs had no right to judicial review, and that the October full opinion made three points about court access: (1) court access had already been decided in the *per curiam*, and (2) whether or not the proclamation has the effect of denying access, the Supreme Court was authorized to look at it to see if the proclamation applied to these specific petitioners, and (3) "neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."³⁶³

It is clear that, at their conference before issuing the *per curiam*, the Justices discussed how to handle the government's and saboteurs' competing arguments about court access. But the notes of Justices Black and Frankfurter give somewhat different accounts of what was said and decided. Black's typed notes report that Stone recounted "Biddle's argument that aliens cannot resort to habeas corpus," but was "[r]eluctant to say that [an] alien enemy cannot resort to habeas corpus. Thinks we should avoid if possible."³⁶⁴ Seen in this light, the *per curiam* decision would likely have been understood by the Justices as passing over the contested issue of court access because, on the dispositive issue of entitlement to substantive relief, the Court was unanimous that the saboteurs must lose. In the pre-*Steel Co.* era, this was an acceptable way of resolving a case.³⁶⁵ If that was what the Justices agreed to, Stone's later claim in the full October opinion that court access had already been decided in favor of the saboteurs in the *per curiam* was not accurate. This raises an uncomfortable and seemingly unlikely possibility—that Chief Justice Stone claimed in July that the Court's opinion would not address the jurisdictional issue of court access and got his brethren to agree to issue a *per curiam* that discussed the merits, but then in October pointed to the merits discussion in the *per curiam* as evidence that court access had already been granted to the saboteurs. Stone was well known to be a man of great integrity, making it unlikely that he would have been anything less than exceptionally forthright with his colleagues. But the Court's mysterious actions in *Quirin* make it

363. *Ex parte Quirin*, 317 U.S. 1, 24-25 (1942).

364. Notes of Hugo Black, Nos. 1-7 *Ex parte Quirin* - July Special Term 1942, at 3 (on file in Box 77, Folder 25 of the William O. Douglas Papers, Manuscript Div., Library of Congress).

365. See *supra* note 65 and accompanying text (stating that before *Steel Co.*, courts did not always distinguish between questions of jurisdiction and questions of merit, and often made jurisdictional decisions by reference to the merits).

necessary to examine all possible explanations. One possibility is that Stone did not have a preordained plan in mind in July, but that by October he came to see the fact that the *per curiam* had addressed the merits as a way to press his colleagues to resolve the court access issue in favor of the saboteurs.

Justice Frankfurter's notes of the July 31 conference are very hard to decipher—his handwriting is terrible—but do not seem to contradict Black's or disprove the possibility that Stone managed the process to get the result he wanted. According to Frankfurter's notes, Stone first recounted Biddle's argument about court access and then stated: "Habeas Corpus a defensive proceeding[.] Reluctant to say suspending [indecipherable] bet. belligerents, being narrow. Procl. not necessary."³⁶⁶ One leading scholar of *Quirin* reads these notes as stating that Stone "said that despite the presidential proclamation, habeas corpus was available to the petitioners and the Court had jurisdiction to hear the case."³⁶⁷ If that is the right reading of those notes, there was no craftiness on the part of the Chief Justice, but I am not absolutely convinced that it is the right reading of the notes. We know from Frankfurter's notes that Stone adverted to his view that habeas corpus was merely "defensive" and thus did not fall within the general ban on prisoners of war or nonresident civilian enemy aliens accessing the courts. But the rest of Frankfurter's notes do not establish that Stone reached agreement with his colleagues that the *per curiam* would be understood to have adopted that theory. Rather, the references to being "narrow" and the issue of the proclamation not being "necessary" might instead confirm Black's account—that the Chief Justice advocated that the threshold issue of court access need not be reached. Frankfurter's notes are too hard to decipher to allow a conclusion one way or the other.

But, notably, there is evidence suggesting that in July, Stone might not have received the assent of all seven colleagues³⁶⁸ to the proposition that the saboteurs had a right to access the courts. We know from other evidence that at least one, and maybe two or three, of his colleagues disagreed with Stone on court access. This disagreement was, of course, not made manifest in the full October opinion, which was unanimous. But it was real nonetheless, as internal Court documents reveal. Justice Jackson's disagreement

366. Felix Frankfurter, Conference Notes in Saboteur's Case (July 30, 1942) (on file in Paige Box 12 of the Frankfurter Papers, Manuscript Div., Harvard Law School, Cambridge, Mass.).

367. Danelski, *supra* note 4, at 71 (emphasis omitted).

368. Murphy had recused himself.

about court access is easiest to document. Sometime after July, he drafted a separate opinion that he ultimately decided not to issue, for reasons discussed below. Several drafts of this separate opinion exist in the Justices' papers at the Library of Congress; each version rejects court access for the saboteurs;³⁶⁹

The prisoners admit that while engaged in the enemy's service they were landed on our shores by enemy submarines, and were especially trained, equipped and under German military instruction to execute enemy schemes of destruction among us. Their presence under such circumstances was indistinguishable in point of law from invasion. When these facts appear I do not see how they have standing to proceed further in our civil courts. Beyond this I am unable to find that they have in any law that it is my function to apply any rights to assert here. Certainly the majestic generalities of the Bill of Rights designed to safeguard our own free society are not to be made available to enemy military forces while attempting to invade or invest it. . . . If advancing views not accepted by a single one of my respected seniors in service on this Court seems to betoken over-self-confidence, I may say in extenuation that the field they are entering is as novel to experienced judges as to new ones. If any court of any jurisdiction to which we pay the respect of citation has ever before admitted prisoners of war to standing to sue their military custodians, the [draft majority] opinion does not cite it. If any judicial body ever before construed procedural or substantive provisions of domestic law to be available as a shield for enemy military forces in the act of invasion, the opinion does not cite it.³⁷⁰

Jackson's draft did not cite any authority for the proposition that the saboteurs, as enemy prisoners of war, lacked a right to access the courts and, on the merits, lacked any protection from domestic law. As shown in Parts III and IV, above, Jackson was correct, but did not do a good job demonstrating that to his colleagues.

Jackson decided not to issue this separate opinion after Frankfurter circulated on October 23 an extraordinary memo, styled by him "F.F.'s Soliloquy," which was in the form of an imaginary dialogue between the Justice and the saboteurs.³⁷¹ Before the dialogue begins, Frankfurter's prefatory note states that he sees no essential legal differences between the views expressed by Stone's draft

369. Several versions, including a handwritten first draft, are kept in Box 124, Folder 10 of the Robert H. Jackson Papers, Manuscript Div., Library of Congress. Copies can also be found at the Manuscript Division of the Library of Congress in the Box 77, Folder 26 of the William O. Douglas Papers and Box 269, Folder "Special Term July 1942 Ex parte Quirin" of the Hugo L. Black Papers.

370. The easiest version of Jackson's opinion to access is the October 23 draft reprinted in the GREEN BAG. See Jack Goldsmith, *Justice Jackson's Unpublished Opinion in Ex parte Quirin*, 9 GREEN BAG 2D 222, 232–41 (2006). The first part of the language quoted in the main text above is found *id.* at 233; the text after the ellipsis is located *id.* at 239.

371. Copies of "F.F.'s Soliloquy" can be found at the Manuscript Division of the Library of Congress in Box 124, Folder 10 of the Robert H. Jackson Papers; Box 269, Folder "Special Term July 1942 Ex parte Quirin" of the Hugo L. Black Papers; and Box 77, Folder 26 of the William O. Douglas Papers. It too is reprinted in the GREEN BAG. See White, *supra* note 303, at 438–40.

majority opinion and Jackson's separate opinion.³⁷² This is very hard to understand, but I will put it aside for the moment. The first portion of the imaginary dialogue has Frankfurter telling the saboteurs that "[y]ou damned scoundrels have a helluvacheek to ask for a writ that would take you out of the hands of the Military Commission," because Congress authorized the use of military commissions in these type of cases and had constitutional power to do so, and therefore "I will deny your writ and leave you to your just deserts with the military."³⁷³ Rather than focus on the issue of court access—about which Jackson and Stone clearly differed—Frankfurter just emphasizes that the saboteurs had no right to relief on the merits. Frankfurter probably exaggerated about Stone and Jackson being close to each other on the substance in order to get his brethren to agree to his larger point, that the Court needed to be unanimous and say as little about controversial constitutional issues as possible.

The second part of the Soliloquy's dialogue has Frankfurter berating the saboteurs for stirring up a needless interbranch conflict during wartime and simultaneously advocating that his brethren present a united front to the outside world.³⁷⁴ Frankfurter closes by imagining what men serving in the U.S. armed forces at the moment would say to the Court if it issued a splintered decision containing disagreement about the constitutional powers of the President.³⁷⁵ In the face of the Soliloquy, Jackson decided to join a majority opinion that he clearly thought was deeply wrong on the issue of court access.

Justice Byrnes probably agreed with Jackson, not Stone, about court access. But by summer and fall 1942, he was spending very little time on his Court duties because he had effectively become a White House employee. As of October 2, Byrnes officially resigned from the Court³⁷⁶ and became head of the War Mobilization Board. I have found no memos or other documents by Byrnes or other Justices that

372. See White, *supra* note 303, at 438–39 (quoting Frankfurter's Soliloquy).

373. *Id.* at 439.

374. See *id.* ("You've done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress after your bodies will be rotting in lime. It is a wise requirement of courts not to get into needless rows with the other branches of the government by talking about things that need not be talked about if a case can be disposed of with intellectual self-respect on grounds that do not raise such rows.").

375. See *id.* at 440 ("Haven't we got enough of a job trying to lick the Japs and the Nazis without having you fellows on the Supreme Court dissipate the thoughts and feelings and energies of the folks at home by stirring up a nice row as to who has what power when all of you are agreed that the President had the power to establish this Commission and that the procedure under the Articles of War for courts martial and military commissions doesn't apply to this case.").

376. See Danelski, *supra* note 4, at 76.

describe what Byrnes said behind closed doors about the *Quirin* case. But from the tone and substance of his questions at oral argument in July, it seems that he thought the saboteurs' legal claims were frivolous.³⁷⁷

I said above that a third Justice may have disagreed with Stone about court access, referring to Justice Frankfurter.³⁷⁸ There is a decent amount of documentary evidence about Frankfurter's views, but they are hard to pin down. Frankfurter's overriding concern—seen in his Soliloquy as well as other internal memoranda—seems to have been to get a unanimous opinion that ruled against the saboteurs while saying as little as possible about controversial constitutional issues. He was clear about that and much less so about his underlying legal views.³⁷⁹

Despite Jackson's dissenting views, possibly shared by Byrnes and Frankfurter, Stone was able to get a unanimous decision issued in October 1942 that declared that the saboteurs had the right to access the courts. That Stone was uncomfortable about how he had handled the court access issue in *Quirin* can be inferred from the fact that he soon seriously misdescribed it. The occasion arose just after World War II, when a U.S. military tribunal was set up to try some Japanese

377. See, e.g., Transcript of Oral Argument of July 29, 1942, at 25, reprinted in LANDMARK BRIEFS, *supra* note 96, at 520.

378. Recall that Jackson's draft opinion of October 23 stated that he was setting forth "views not accepted by a single one of my respected seniors in service on this Court." Goldsmith, *supra* note 370, at 239. This does not contradict my claim that one or perhaps two of Jackson's colleagues agreed with him on court access. First, Byrnes had left the Court by the time Jackson circulated his draft. Second, it is not clear that Jackson's statement refers to the court access issue specifically, instead of other parts of his draft. For instance, Jackson's opinion made an aggressive claim about the President's power to disregard statutory limits on his war powers that would certainly have provoked opposition from his brethren.

379. Frankfurter wrote to his colleagues that the President had the authority to unilaterally suspend the writ of habeas corpus, though he had not purported to exercise it here, see Danelski, *supra* note 4, at 75 (quoting Letter from Felix Frankfurter to Harlan Fiske Stone (Oct. 15, 1942) (located in Box 172 of the Frankfurter Papers, Harvard Law School)), and that "legislation bearing on the exercise of this [the President's commander-in-chief] military power – the actual combative aspect of war – is peculiarly outside the expectancies of judicial review," Memo from Felix Frankfurter to Harlan F. Stone, copied to Robert Jackson (Oct. 29, 1942) (on file in Box 124, Folder 10 of the Robert H. Jackson Papers, Manuscript Div., Library of Congress). This does not bear directly on the issue of court access, but Frankfurter's robust view of the President's and Congress's war powers and minimal role for judicial review during war suggest he may have believed that admitted enemy fighters lacked access to the courts. Mostly Frankfurter referred to the court access issue as a "Pandora's box" that was best kept closed by saying as little as possible about it. See Danelski, *supra* note 4, at 75–76 (stating that when Roberts thought Stone's opinion recognized the President's proclamation as valid and urged that they say the President does not have that power, Frankfurter wrote to Stone saying "that he was satisfied with Stone's 'treatment of the [P]resident's proclamation because it kept the pandora's box of the proclamation closed'").

soldiers for war crimes. One of the defendants, a General Yamashita who was tried in the Philippines, then a U.S. territory, sought habeas corpus review in the Supreme Court in 1946. Here is what the Court, per Chief Justice Stone, said regarding *Quirin* and Yamashita's right to access the civilian courts:

[W]e held in *Ex parte Quirin*, as we hold now, that Congress by sanctioning trials of enemy aliens by military commission for offenses against the law of war had recognized the right of the accused to make a defense. It has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive branch of the government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.³⁸⁰

This is not accurate. In the Articles of War, the statutes Stone referenced, Congress had said nothing about access to civilian courts via habeas corpus for defendants tried by military commission.³⁸¹ Congress had spoken about enemies' court access in the Trading with the Enemy Act of 1917; as discussed above, Congress there recognized and supported the continued application of common law rules depriving essentially all enemies, except civilians with peaceful prewar residence in the United States, of access to the courts. During deliberations about the final October 1942 opinion in *Quirin*, Frankfurter had sent a memo to his colleagues about the court access issue that noted that all the Justices were "agreed that the President did not go counter to any legislation."³⁸² The Court in *Quirin* said nothing about Congress's views on the court access issue. Stone's suggestion to the contrary four years later in *Yamashita* is simply incorrect. This mistake might have been due to sloppiness and the press of time and events; it is also possible that it indirectly evidences some caginess about how Stone had resolved the court access issue in *Quirin*.

* * *

It appears that *Quirin*'s holding on court access for the saboteurs did not arise from any single cause, but rather from a complex of factors. No definitive conclusions can be drawn because the

380. *In re Yamashita*, 327 U.S. 1, 9 (1946) (citations omitted).

381. The relevant provision, Article 15, as quoted in *Quirin*, simply stated that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." *Ex parte Quirin*, 317 U.S. 1, 27 (1942).

382. Felix Frankfurter, Comments on Brother Roberts' Suggestion (on file in Box 124, Folder 10 of the Robert H. Jackson Papers, Manuscript Div., Library of Congress).

extant documentary record does not describe the Court's internal deliberations with any specificity. Several factors, however, seem likely to have been important. The Court did not have sufficient time to research and deliberate, and may have misunderstood or been unaware of key precedents. At least several members of the Court, including Chief Justice Stone and Justice Roberts, were probably concerned that the Court demonstrate its independence of President Roosevelt and its commitment to protection of civil liberties during wartime, given the historical context in Europe and at home in which concerns about executive overreaching were salient. The executive's handling of the saboteurs' case—framing the proclamation as a denial of access by presidential fiat, and failing to dispel that impression in the written and oral arguments—contributed to the Court's concerns. Especially when seen in the light of subsequent habeas jurisdiction-stripping cases, we can speculate that what may have seemed an attempt by President Roosevelt to withhold otherwise-available court access by mere executive fiat was received by some Justices as a red flag is by a bull, motivating them to smack down the President's pretensions and assert the Court's authority and jurisdiction. In addition, the Court received signals that limited judicial review—taking jurisdiction to decide jurisdiction at least, and perhaps more—was viewed as appropriate by both the executive branch and elite public opinion reflected in leading newspapers.

VII. THE SIGNIFICANCE OF THE COURT'S REVERSAL

This final Part first discusses the significant legacy of *Quirin's* overthrow of the old rules barring court access for enemy fighters and nonresident enemy aliens, and then suggests some policy reasons why its rule on court access for enemy fighters is problematic.

A. *Quirin as a Precedent*

Quirin's holding on court access has had important doctrinal effects. Just a few years after *Quirin* was decided, the Court received a habeas corpus petition from a Japanese general, held as a prisoner of war, who was being tried for war crimes before a U.S. military commission in the Philippines, then a U.S. territory.³⁸³ The government urged that an undisputed "enemy belligerent" had no

383. *Yamashita*, 327 U.S. at 4–5.

right to access the courts during wartime,³⁸⁴ but, based on *Quirin*, the Court found that the general was entitled to habeas review, and implied that this was a constitutional rule based on the Suspension Clause.³⁸⁵

The next occasion on which *Quirin*'s influence was felt was in the 1950 case *Johnson v. Eisentrager*.³⁸⁶ *Quirin*'s influence on the way the Court resolved *Eisentrager* has had far-reaching consequences. In *Eisentrager*, German agents convicted of war crimes by a U.S. military tribunal sitting in China sought review of their convictions and detention in the D.C. Circuit and then the Supreme Court. The Court, per Justice Jackson, struggled somewhat to say why these Germans were different than the German soldiers in *Quirin* in their entitlement to judicial review. We know from Jackson's unpublished opinion in *Quirin* that he believed that undisputed enemy fighters had no right to access U.S. courts, wherever they were located.³⁸⁷ But he could not say that, because the Court had unanimously held otherwise in *Quirin* (and *Yamashita*). Instead, for the majority in *Eisentrager*, Jackson pointed to a number of factual differences between the cases, ultimately focusing primarily on territorial location—these petitioners had been tried and detained abroad, rather than in the United States.³⁸⁸ Jackson relied entirely on the long-standing rule that noncitizens outside the United States lack constitutional rights because he could not rely on their enemy-fighter status, due to *Quirin*. For the dissent in *Eisentrager*, the Constitution was potentially a global document whose protections, including the Habeas Corpus Suspension Clause, did not depend for their application on

384. Brief of Petitioner at 1, *In re Yamashita*, 327 U.S. 1 (1946) (No. 61 Misc. & No. 672).

385. *Yamashita*, 327 U.S. at 9; see *supra* note 380 and accompanying text.

386. *Johnson v. Eisentrager*, 339 U.S. 763, 779–80 (1950).

387. See *supra* note 370 and accompanying text.

388. *Eisentrager*, 339 U.S. at 779–80 (citations omitted):

The prisoners rely, however, upon two decisions of this Court to get them over the threshold—*Ex parte Quirin*, and *In re Yamashita*. Reliance on the *Quirin* case is clearly mistaken. Those prisoners were in custody in the District of Columbia. One was, or claimed to be, a citizen. They were tried by a Military Commission sitting in the District of Columbia at a time when civil courts were open and functioning normally. They were arrested by civil authorities and the prosecution was personally directed by the Attorney General, a civilian prosecutor, for acts committed in the United States. They waived arraignment before a civil court and it was contended that the civil courts thereby acquired jurisdiction and could not be ousted by the Military. None of the places where they were acting, arrested, tried, or imprisoned were, it was contended, in a zone of active military operations, were not under martial law or any other military control, and no circumstances justified transferring them from civil to military jurisdiction. None of these grave grounds for challenging military jurisdiction can be urged in the case now before us.

geographical location. They asked, pointedly, why the fortuity of the location of detention should be entirely determinative of individual rights and court access. For admitted agents of the German military tried in China and detained in Germany, geographical location seemed to the majority to be a perfectly satisfactory reason to reject their court access, in light of the well-established rules against extraterritorial constitutional rights for noncitizens. But in later cases with different petitioners seeking court access, geographic location alone came to seem to some like an arbitrary and unsatisfactory answer. *Quirin* had prevented the Court from giving a stronger answer, based on the longstanding policy of not allowing military enemies to enlist U.S. courts against the U.S. executive during wartime.

The next military detention case the Court decided in which *Quirin* featured prominently was the post-9/11 decision in *Hamdi*.³⁸⁹ Here, the government conceded that the prisoner—a U.S. citizen who had been captured in Afghanistan allegedly fighting for the Taliban, a jurisdictional fact that he denied—had a right to habeas corpus review of his detention in a military facility in the United States.³⁹⁰ As a result of the concession, the Court did not linger over the access issue. In particular, it did not specify precisely whether habeas corpus access was based on citizenship, the location of detention in the United States, and/or the dispute about a key jurisdictional fact (whether *Hamdi* was an enemy fighter). Based on *Quirin*, *Yamashita*, and *Eisentrager*, it seems most likely that the Court assumed that Mr. Hamdi was entitled to habeas corpus solely because of his presence in the United States.³⁹¹ This understanding is consistent with *Rasul v. Bush*, decided the same day as *Hamdi*, which concerned the statutory territorial jurisdiction of federal courts over habeas petitions filed by noncitizens detained at Guantanamo Bay. The *Rasul* Court described *Quirin* as establishing “the federal courts’ power to review applications for habeas relief . . . of admitted enemy aliens convicted of war crimes during a declared war and held in the United States.”³⁹²

389. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518–19 (2004) (plurality opinion).

390. See Brief for Respondents at 10, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696) (“An enemy combatant who is a presumed citizen and who is detained in this country is entitled to judicial review of his detention by way of habeas corpus.”).

391. See *Hamdi*, 542 U.S. at 525 (plurality opinion) (“All [parties] agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.” (citations omitted)).

392. *Rasul v. Bush*, 542 U.S. 466, 474–75 (2004) (citations omitted).

Four years later in *Boumediene v. Bush*, the agreed-upon availability of habeas corpus for everyone within the United States, even undisputed enemy fighters who were also enemy aliens (as in *Quirin*), had an important but unacknowledged impact on how the constitutional issues were understood. *Quirin*'s court access rule likely made it seem but a small step for the Court to extend habeas to territory that was extremely close to being under U.S. sovereignty,³⁹³ and where detainees who were noncitizens but not alien enemies challenged the jurisdictional fact of whether they had committed hostile acts against the United States during the post-9/11 conflict. *Quirin*'s legacy was quite important here. Before *Quirin*, being within protection of the Constitution and other domestic laws depended on citizenship, territorial location, and enemy status. The concepts of allegiance and protection provided a coherent way to think about both legal rules and the policy reasons justifying those rules. Because it was correlative with allegiance, protection was reserved for U.S. citizens and peaceful alien civilians present in the United States; everyone else was outside protection. *Quirin* exploded the protection-allegiance framework and therefore disrupted the policy justifications for excluding certain people from court access and entitlement to constitutional rights. After *Quirin*, the only people outside protection were noncitizens located outside the United States. Noncitizens in the United States were within protection, even if they were admitted Nazi military saboteurs fresh off the U-Boat. Once admitted enemy fighters seeking to destroy U.S. citizens' lives and property at Hitler's direction were within protection (when present in the United States), it seemed excessively harsh and arbitrary to deny protection of the courts and laws to noncitizens who were or claimed to be *civilians*, solely because of their territorial location. *Quirin*'s destruction of the allegiance-protection framework of justification therefore greatly helped to undermine the centuries-old principle that constitutional protections were unavailable to noncitizens outside the United States.

Some people doubt that this principle has been undermined—and hence will doubt my claim about *Quirin*'s far-reaching doctrinal effects—and defend *Boumediene* against charges of being overly expansive by describing it as a narrow decision only about the Suspension Clause and only about a unique quasi-sovereign piece of

393. *Boumediene v. Bush*, 553 U.S. 723, 753 (2008) (explaining that the United States controls Guantanamo under a permanent lease, which formally disclaims sovereignty, but gives the United States "complete jurisdiction and control" and, according to the Court, effectively excludes Cuba from exercising any sovereign rights there (quoting 1903 Lease Agreement)).

territory.³⁹⁴ I think this is mistaken. There are several reasons to think *Boumediene*, building on *Quirin*, points toward a new era of a globally protective Constitution for noncitizens, even including military enemies. First as to which constitutional rights noncitizens abroad can assert: *Boumediene* was not only about the Suspension Clause, no matter what the Court might have said.³⁹⁵ The Insular Cases, key precedents that *Boumediene* mistakenly relied upon to hold that the Constitution ‘can protect noncitizens outside the United States,’³⁹⁶ involved claims under a diverse array of constitutional provisions. After deciding *Boumediene*, the Court vacated and remanded “for further consideration in light of *Boumediene*” a D.C. Circuit opinion that had dismissed Guantanamo detainees’ damages claims under the Due Process and Cruel and Unusual Punishment Clauses because of circuit precedent that aliens outside the United States lacked constitutional rights.³⁹⁷ Even before *Boumediene*, in *Hamdi*, the Court had confirmed that having a right to habeas corpus entails having rights under the Due Process Clause.³⁹⁸ In explicating

394. See, e.g., Stephen I. Vladeck, *Insular Thinking About Habeas*, 97 IOWA L. REV. BULL. 16, 18–19 (2012) (arguing that Justice Kennedy’s *Boumediene* analysis was anchored by the understanding that the scope of the Suspension Clause is unrelated to individual rights). But see, e.g., Jules Lobel, *The Supreme Court and Enemy Combatants*, 54 WAYNE L. REV. 1131, 1141 (2008) (“The Court’s rejection of a test that focuses exclusively on the formal legal status of a territory and its invocation of the concept of ‘objective degree of control’ that the United States exercises, suggests that *Boumediene* might not be cabined to the particular status of Guantanamo, and could possibly be a significant step in an expansion of habeas jurisdiction and other constitutional rights to aliens abroad.”).

395. See, e.g., *Boumediene*, 553 U.S. at 732–33 (“We hold these petitioners do have the habeas corpus privilege. . . . [O]ther questions regarding the legality of their detention are to be resolved in the first instance by the District Court.”); *id.* at 798 (“It bears repeating that our opinion does not address the content of the law that governs petitioners’ detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus.”).

396. *Id.* at 756–60 (discussing, *inter alia*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922), and *Downes v. Bidwell*, 182 U.S. 244 (1901)). In a recent article, I showed that the Insular Cases said literally the opposite of what *Boumediene* claims they did—properly understood, the Insular Cases confirmed the long-standing rule that noncitizens outside the United States lacked constitutional rights. See Kent, *supra* note 13, at 103, 109–16 (explaining how the Court erred in 2008 in relying on the Insular Cases to support the expansion of constitutional rights to noncitizens and “alleged military enemies held abroad”).

397. See *Rasul v. Myers*, 555 U.S. 1083, 1083 (2008) (vacating and remanding 512 F.3d 644 (D.C. Cir. 2008)).

398. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion) (stating that “the Due Process Clause . . . informs the procedural contours of” habeas corpus); *id.* at 555–57 (Scalia, J., dissenting) (discussing the close relationship between “due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned”). It is true that the plurality and dissenting Justices made these statements in the context of a U.S. citizen present in the United States, but it is hard to

what habeas review entailed, *Boumediene* cited the same key Due Process precedent that *Hamdi* adopted³⁹⁹ and then implied that the Suspension Clause might provide even broader procedural rights than the Due Process Clause.⁴⁰⁰ Moreover, in *Hamdan v. Rumsfeld*, involving a noncitizen Guantanamo detainee's challenge to his military commission trial, the Court appeared to rely on constitutional separation of powers in ruling for the detainee.⁴⁰¹ Likewise, *Boumediene* itself repeatedly invoked "separation of powers" to justify its holding.⁴⁰² It therefore appears that wherever habeas is available—and *Boumediene* held that it is available in at least some extraterritorial locations—noncitizen detainees will be able to assert, at the least, Due Process and separation of powers claims under the Constitution. Why not other constitutional claims as well? And why not in a cause of action other than habeas corpus? It is not obvious why there should be any limits once the old categorical rules have been overthrown.

Nor was *Boumediene* a narrow and limited decision as to the places where it applies. It is true that the Court emphasized that Guantanamo Bay was almost U.S. territory.⁴⁰³ But the Court decisively rejected the government's argument for continued application of the bright-line rule that noncitizens outside the United States had no constitutional rights.⁴⁰⁴ In its place, the Court substituted what it called a "practical" and "functional approach."⁴⁰⁵ This "framework" is an extraordinarily open-ended and malleable test that includes either six or seven factors (the Court described it as

understand why the conceptual link between due process and habeas corpus would turn on citizenship.

399. See *Boumediene*, 553 U.S. at 781 (discussing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

400. *Id.* at 784–85.

401. The government had argued that as an alien outside the United States Hamdan could not rely on the constitutional separation of powers. See Brief for Respondents at 43, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 460875 (asserting that "an enemy combatant detained outside the United States . . . does not enjoy the protections of our Constitution"). The Court did not expressly hold otherwise, but used language sounding in the separation of powers. See *Hamdan*, 548 U.S. at 591–93, 602. Justice Kennedy expressly relied on separation of powers in his concurrence. See *id.* at 638 (Kennedy, J., concurring) ("Trial by military commission raises separation-of-powers concerns of the highest order.").

402. *Boumediene*, 553 U.S. at 743, 746, 755, 764–65, 772, 784, 797.

403. *Id.* at 753–55, 771.

404. *Id.* at 755 (rejecting "the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends"). For the government's briefing on this, see, e.g., Brief for Respondents at 9–10, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2972541.

405. *Boumediene*, 553 U.S. at 764.

three⁴⁰⁶) and is nonexclusive, unweighted, and largely undefined by the Court.⁴⁰⁷ The Court also implied that it would violate the Court's *Marbury* power to "say 'what the law is' " if the Constitution were thought to be wholly "off" in any given piece of territory.⁴⁰⁸ Thus in *Boumediene* the Court surely intended to leave itself the maximum amount of flexibility as to where the Constitution applies extraterritorially, and to keep the political branches off balance by not allowing them to assume that the Constitution was wholly "off" anywhere.⁴⁰⁹ It was no accident, then, but almost certainly an intended effect of *Boumediene*, that the U.S. military in both the Afghanistan and Iraq theaters of war took dramatic steps to change their arrest and detention procedures to account for the possibility of judicial review.⁴¹⁰ One might criticize as novel this threatened intrusion of the judiciary into wartime detention of many people who are undisputedly enemy fighters, but then again, there is the precedent of *Quirin*.

In sum, *Quirin*'s overthrow of the allegiance-protection framework has had far-reaching but previously under-appreciated effects on the doctrine about the availability of constitutional rights and court access for noncitizens abroad.

B. *Quirin* as Policy

Quirin's holding—that undisputed enemy fighters who are detained in the United States during a state-to-state war have a right to access civilian courts via habeas corpus in order to challenge the President's disposition of them—raises serious policy concerns. With the accumulation of Supreme Court precedents allowing undisputed or alleged enemy fighters to invoke habeas jurisdiction as a

406. *Id.* at 766 ("[W]e conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.").

407. See Kent, *supra* note 13, at 109 (describing the ambiguous nature of the test created in *Boumediene*).

408. *Boumediene*, 553 U.S. at 765 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

409. See *id.* at 794 (suggesting that the Court might not extend constitutional habeas corpus to an extraterritorial location if it deemed that the political branches had provided "suitable alternative processes . . . to protect against the arbitrary exercise of governmental power").

410. See Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003-2010*, 51 VA. J. INT'L L. 549, 570-72 (2011); Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 849-51 (2011).

constitutional right when they are in de jure U.S. territory (*Quirin*, *Yamashita*, *Hamdi*) or in U.S.-controlled foreign territory (*Boumediene*), the U.S. military could well be besieged by habeas corpus petitions if a future war again brings significant numbers of prisoners of war to the United States proper or de facto U.S. territory like Guantanamo.

There are many reasons to doubt that undisputed enemy fighters in a state-to-state war need the protections of Article III judicial review applying constitutional standards. As of World War II, and even more so today, there is a comprehensive framework of international treaty law concerning who can be detained during armed conflicts, for how long, under what circumstances, and what can be done to prisoners during their detention, including what forms of military trial are appropriate and for what types of offenses.⁴¹¹ In the interstices of these rules of international law, both diplomacy and military-to-military negotiations have always been active as well.⁴¹² There is also an active nongovernmental organization (“NGO”) community, led by the International Committee for the Red Cross, which monitors compliance with these international laws of war and seeks to fill gaps in protection by advocating for the extension of existing law or the creation of new legal instruments.⁴¹³ In the state-to-state wars like the conflict underlying *Quirin*, *Yamashita*, and *Eisentrager*, one-sided U.S. judicial involvement—meaning judicial protection for enemies in U.S. custody that has little chance of being reciprocated—is arguably both unnecessary and undesirable.

Since 9/11, courts, the executive, Congress, scholars, and NGOs have thought long and hard about what kind of judicial review via habeas corpus should be available to persons detained by the United States as part of the conflict against al Qaeda, the Taliban, and affiliated groups. Among the most persuasive justifications for habeas review in post-9/11 military detention and trial cases are: the pervasiveness and factual complexity of disputes about jurisdictional facts, primarily whether the detainee is in fact a fighter; the concomitant likelihood of “false positives,” which is increased by the fact that citizenship cannot be used as an easy proxy for enemy status and that detainees who in fact are enemy fighters lack an incentive to self-identify as such because they will not receive prisoner-of-war

411. See, e.g., Geneva POW Convention, *supra* note 10, at pt. III (detailing the conditions, protection, and activities of prisoners of war in captivity).

412. See generally PRISONERS IN WAR 57–70 (Sibylle Scheipers ed., 2010) (discussing the practices of exchange and negotiation for prisoners of war during conflict).

413. See *id.* at 68–69.

protections but instead might be tried for unlawful belligerency or domestic crimes; the indeterminacy about which international legal protections apply to detainees, and skimpiness of those which do apply, like Common Article 3 of the Geneva Conventions of 1949; the indefinite and highly malleable scope and length of the conflict; and the fact that the home governments of many detainees are U.S. allies in the conflict against al Qaeda and the Taliban and therefore do not always advocate for strongly the detainees' interests. In my view, none of these justifications for habeas corpus review applies to cases like *Quirin*, where the detainees are undisputedly members of an enemy nation's military forces during a traditional international war duly declared by Congress and comprehensively regulated by international law, diplomacy, reciprocity, and NGO oversight.

VIII. CONCLUSION

Quirin's holding on court access for undisputed enemy fighters was contrary to practice and precedent, is not supported by substantial reasons, and interferes with a detailed framework of international law and diplomacy that has long governed detention and treatment of captured enemy combatants. It is ripe for reconsideration.

Some might wonder how significant in practice is the argument of this Article against court access for undisputed enemy fighters. I suggest that it is quite important in both traditional state-to-state wars and conflicts against nonstate actors. Consider first a traditional state-to-state war. In World War II, hundreds of thousands of enemy prisoners of war were detained in the United States.⁴¹⁴ This could well occur again in a future large-scale war.⁴¹⁵ Under *Quirin* as interpreted by later decisions, all prisoners of war detained in the United States would apparently have a right to access the civilian courts to challenge their detention or treatment.⁴¹⁶ It is even possible, under

414. At its peak in the spring of 1945, the total was approximately four hundred and twenty-five thousand. See LEWIS & MEWHA, *supra* note 230, at 91.

415. Notably, the Geneva Conventions of 1949 require that prisoners of war be held a safe distance from the battlefield. See Geneva POW Convention, *supra* note 10, at art. 19.

416. The Military Commissions Act of 2006 purported to strip jurisdiction over habeas claims by persons determined by the U.S. government to be "enemy combatant[s]." 28 U.S.C. § 2241(e) (2006). Though that term was not defined by Congress, it seems clear that it would cover both unprivileged, illegitimate belligerents like terrorists as well as lawful, privileged belligerents like members of an enemy nation state's military who qualify for prisoner-of-war status. *Boumediene's* invalidation of jurisdiction-stripping would apply equally to habeas petitions brought by lawful or unlawful enemy combatants.

Boumediene, that prisoners of war detained outside the United States will in the future be deemed to have a constitutional entitlement to habeas.⁴¹⁷ While it might appear that Congress could respond by simply “suspending” the writ of habeas corpus, as the Constitution clearly allows,⁴¹⁸ this is not the quick fix it appears to be. The Constitution only allows suspension “in Cases of Rebellion or Invasion,” which are events internal to the United States. A war fought wholly in and around China or Iran, for example, would likely not qualify for habeas corpus suspension, even if the United States were deluged with prisoner-of-war habeas petitions that were tying up the courts, distracting the military and civilian executive agents, and, potentially, providing real aid and comfort to the enemy.⁴¹⁹ The Supreme Court should consider overruling *Quirin*’s grant of court access to undisputed enemy fighters in state-to-state armed conflicts.

Were the rule revived that undisputed enemy fighters are barred from U.S. courts, this could have important implications in the ongoing post-9/11 conflict. But the policy reasons for reviving the rule in untraditional conflicts against nonstate actors are not as clear cut as they are in the state-to-state context. The dozens of detainees at Guantanamo who have been found by habeas courts in the aftermath of *Boumediene* to be enemy fighters might, on that basis, be denied the right to file additional legal claims in the future.⁴²⁰ Or consider Salim Hamdan. Once he conceded that he had been “captured on the battlefields of Afghanistan and claim[ed] POW protection,” under pre-*Quirin* law, that would likely have been enough to find him an enemy fighter and perhaps bar him from further litigation in U.S. civilian courts.⁴²¹ If so, his famous challenge to the legality of his military

417. The D.C. Circuit recently refused to extend *Boumediene* to detainees in Afghanistan. See *al Maqaleh v. Gates*, 605 F.3d 84, 98–99 (D.C. Cir. 2010). This is surely not the last word on the subject, if for no other reason than the highly fact-specific and malleable nature of *Boumediene*’s test for when and where habeas is constitutionally required. See *supra* notes 403–10 and accompanying text (discussing the indeterminate nature of the *Boumediene* test).

418. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

419. I have previously argued that the political branches’ inability ever to suspend habeas during conflicts occurring wholly outside the United States is a powerful structural reason to read the Suspension Clause as not protecting extraterritorial habeas. See Kent, *Global Constitution*, *supra* note 95, at 521–24 (articulating why the Suspension Clause should be read to have a “domestic limitation”).

420. See Kent, *supra* note 82 (sketching the argument that *Boumediene* rights to court access have expired for judicially confirmed enemy fighters at Guantanamo).

421. Brief for Petitioner at 25, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184). Hamdan was quite careful in his admissions. He denied membership in al Qaeda or knowing participation in any terrorist attacks against the United States, and denied that he qualified as

commission trial, which he won before a splintered Supreme Court, should never have been heard.

I am purposely hedging here, however, because the implications of a rejection of *Quirin* are less straightforward with respect to nontraditional wars like that against al Qaeda than they are with state-to-state conflicts. The factual concession by someone like Hamdan, or the determination by a post-*Boumediene* habeas court that a war-on-terror detainee is an enemy fighter, settles the issue with regard to the jurisdictional fact of their combatant status. Perhaps, under pre-*Quirin* law, that should be enough to bar them from the courts. But important parts of my policy argument for judicial review being unnecessary for undisputed enemy fighters do not apply to detainees like Hamdan who are not in a national military during a state-to-state conflict. For instance, because al Qaeda is not and cannot be a party to the Geneva Conventions, almost all of the comprehensive protections of those treaties, including strict limits on detention authority and military trials, are unavailable to its members. Whether or not one supports this result on policy grounds, it seems undeniable that it distinguishes the situation of these unlawful combatants from the case of prisoners of war in a state-to-state conflict.

Since *Quirin*'s holding on court access is the law of the land and seems likely to remain that for the foreseeable future (see *Boumediene*), it is not necessary to fully pursue difficult counterfactual inquiries about what all aspects of a world without *Quirin* would look like. The major aims of this Article were to (1) show that *Quirin* overturned a significant body of practice and precedent that had denied court access to enemy fighters and nonresident enemy aliens, (2) highlight *Quirin*'s problematic policy result with regard to undisputed members of an enemy nation's military, and (3) explain

an "unlawful combatant." Joint Appendix at 51, *Hamdan*, 548 U.S. 557 (No. 05-184), 2006 WL 46431. However, he apparently conceded that he worked for bin Laden. See Brief for Respondents at 5, *Hamdan*, 548 U.S. 557 (No. 05-184) (alleging that petitioner "acknowledged that he worked for bin Laden for many years"). Under post-*Boumediene* detention law elaborated by the D.C. Circuit in habeas cases, a person may be detained under the Congress's post-9/11 Authorization for the Use of Military Force if he admits or the government shows by a preponderance of the evidence that he is, among other things, "part of" al Qaeda or that he "purposefully and materially support[ed]" al Qaeda or Taliban forces "in hostilities against U.S. Coalition partners." *Uthman v. Obama*, 637 F.3d 400, 402 & n.2 (D.C. Cir. 2011) (citation omitted), *cert. denied*, 132 S. Ct. 2739 (2012). Under the D.C. Circuit's "functional test," "demonstrating that someone is part of al Qaeda's command structure is sufficient to show that person is part of al Qaeda." *Id.* at 403. Receiving orders from someone in al Qaeda's "command structure"—which Hamdan appears to have conceded when he admitted working for bin Laden—suffices. *Id.*

why the Court shifted gears in such a significant fashion and decided to offer novel judicial protection to admitted enemy fighters during the depths of total war.