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## **WHY Roberts Should not be Confirmed as Chief Justice**

Not the court's finest hour

Pierce O'Donnell (op-ed)  
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Supreme Court nominee John G. Roberts Jr. had secret meetings (as reported by the Washington Post) with Bush administration officials while serving as an appellate judge deciding a high-profile case about the extent of the president's war powers to detain and prosecute enemy combatants before special military tribunals. The participants -- including U.S. Attorney General Alberto Gonzales, Vice President Dick Cheney, White House Chief of Staff Andrew Card Jr. and Deputy Chief of Staff Karl Rove -- predictably deny that they discussed the pending case of Hamdan vs. Rumsfeld. Nevertheless, the timing of these conversations about aspects of Roberts' legal philosophy -- held before President Bush announced his nomination -- is troubling.

In response to numerous court challenges, Bush has consistently advocated an expansive view of his prerogative as commander in chief to detain indefinitely in military prisons -- without charges, counsel or trials -- U.S. citizens and noncitizens suspected of terrorist acts or allegiances.

Thus, the issue of a prospective chief justice's thinking about separation of powers and judicial checks on executive branch actions is of great interest to the White House. Hamdan involves the habeas corpus petition of Salim Ahmed Hamdan, an alleged al Qaeda member and former driver for Osama bin Laden, who was captured while attempting to flee Afghanistan and return his family to Yemen. Detained for nearly four years by the American military, he has been confined since June 2002 at Guantanamo Bay Naval Base. In July 2003, the president determined that he was an enemy combatant subject to a military commission trial, and a year later, he was finally charged with a single count of conspiracy.

Hamdan filed a habeas corpus petition protesting his innocence and alleging that the president's military scheme -- not authorized by Congress -- violated U.S. and international law. A federal trial court judge agreed and prohibited his trial by Bush's military commission -- a sharp blow to a cornerstone of the administration's anti-terrorism legal strategy.

With Judge Roberts on a three-judge panel, the U.S. Court of Appeals for the District of Columbia Circuit reversed the lower court, holding that enemy combatants had no right to enforce in U.S. courts the Geneva Conventions on the treatment of prisoners of war. In the most expansive judicial articulation of presidential powers since the Sept. 11 terrorist attacks, the opinion found no legal deficiencies in the military commissions. Attorney General Gonzales, a prime architect of Bush's military commissions, praised the appeals court's Hamdan decision for reaffirming the president's "critical authority" over the handling of detainees.

Hamdan has recently petitioned the U.S. Supreme Court to hear his case, and a decision on whether he will get a hearing is likely in October, when the justices reconvene. If the justices accept the case, they must decide how much weight to give a World War II-era Supreme Court decision heavily relied upon by Roberts and his colleagues in sustaining the president's position. In one of those ironic twists of history, that opinion -- in *Ex parte Quirin* -- is itself highly suspect because of vexing questions about appearances of impropriety.

In the summer of 1942, eight German saboteurs -- captured in civilian disguise on American soil - - were prosecuted before a military commission of seven retired generals. Facing the death penalty, the Nazis filed a habeas corpus petition attacking President Franklin D. Roosevelt's order

dispensing with a normal civilian trial in favor of a military tribunal. The Supreme Court returned from its summer vacation, heard two days of oral argument, and unanimously upheld FDR's actions. Six of the eight terrorists were promptly executed.

Bush's lawyers have repeatedly invoked this 63-year-old case as precedent for his broad powers in the war on terrorism. *Ex parte Quirin*, however, is a dubious decision that should be ignored -- and, indeed, overruled -- by the Supreme Court because of the unseemly compromising of impartiality leading up to the decision. Unbeknown to the Germans' counsel, Justice Felix Frankfurter had been involved as an adviser to Roosevelt about the use of a military commission and how to insulate it from constitutional attack in anticipation of a Supreme Court challenge. Later, Frankfurter (as he did a decade later in *Brown vs. Board of Education*) had undisclosed communications with the Justice Department about the court case and wrote an incendiary internal memo that bludgeoned several recalcitrants into joining a unanimous opinion upholding Roosevelt's exercise of his war powers.

Not surprisingly, the Supreme Court gave the popular wartime president what he wanted, rushing to judgment with a one-page order only a day after oral argument and not issuing a full opinion for another three months. In the justices' stampede to appear supportive of the war effort, justice was corrupted. Six men went to their death, despite the grave doubts of Chief Justice Harlan Fiske Stone, the author of *Ex parte Quirin*, about the validity of the president's actions. Justice Antonin Scalia has correctly disparaged *Ex parte Quirin* as "not this court's finest hour."

Hamdan presents a timely opportunity for the Supreme Court to sweep this illegitimate decision into the dustbin of history and to write on a clean slate the law of the land about this nation's commitment to the rule of law and the reach of presidential power in wartime. In the meantime, the Senate -- whose constitutional power to prescribe the procedures for military trials is at stake - - should consider Roberts' meetings with the Bush administration while sitting on this historic case in deliberating his confirmation.

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