

JUSTICE AT DACHAU<sup>1</sup>REVIEWED BY MAJOR WARREN L. WELLS<sup>2</sup>

*If you are determined to execute a man in any case, there is no occasion for a trial . . . Lynch law . . . often gets the right man. But its aftermath is a contempt for the law, a contempt that breeds more criminals. It is far, far better that some guilty men escape than that the idea of law be endangered. In the long run, the idea of law is our best defense against Nazism in all its forms.*<sup>3</sup>

When President George W. Bush authorized the use of military tribunals to try suspected terrorists and their aiders and abettors,<sup>4</sup> critics wondered whether the system would provide due process of law to the men detained at Guantanamo Bay, Cuba.<sup>5</sup> Critics claimed that military tribunals would make a mockery of the justice system under the rule of law.<sup>6</sup> Military attorneys helped prepare tribunal rules and procedures in order to

---

1. JOSHUA M. GREENE, *JUSTICE AT DACHAU: THE TRIALS OF AN AMERICAN PROSECUTOR* (2003).

2. U.S. Army. Instructor, Military Justice, Air Force Judge Advocate General's School, Maxwell Air Force Base, Montgomery, Alabama.

3. GREENE, *supra* note 1, at 115 (quoting Lieutenant Colonel (LTC) Douglas T. Bates, chief defense counsel of former Dachau concentration camp administrators).

4. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

5. *See, e.g.*, Michael Eric Dyson, Editorial, *Basic Rights Under Siege*, CHI. SUN-TIMES, NOV. 20, 2001, at 29 (arguing that trying suspected terrorists before military tribunals is "dangerous, even frightening" because the tribunals are a "threat to the moral and legal fabric of [our] society;" and that they may result in a "rejection . . . of due process" that "smacks of injustice"); Katharine Q. Seelye, *A Nation Challenged: The Military Tribunals*, N.Y. TIMES, DEC. 8, 2001, at B7 (reporting more than 300 law professors were protesting the presidential order for military tribunals).

6. *See, e.g.*, Frank Davies, *Plan to Try Terrorists Raises Debate Over Powers*, MIAMI HERALD, NOV. 15, 2001, at 27A (reporting that some activists and legislators questioned the President's power to order tribunals and the wisdom of having proceedings that omit rights provided to citizens in ordinary criminal trials); Todd J. Gillman, *Tribunal Raises Civil Rights Questions; Cheney Defends Military Court; Others Say It Sidesteps Constitution*, DALLAS MORNING NEWS, NOV. 15, 2001, at 1A (quoting critics who called the authorization of military tribunals "unprecedented" without a declaration of war, "hypocritical," a "suspension of civil rights" that should be "an impeachable offense," and "too costly to fundamental rights").

preserve the integrity of the justice system and also accomplish the President's objective of efficiently punishing wrongdoers.<sup>7</sup>

According to Joshua Greene, military attorneys trying Nazi concentration camp guards and administrators were equally concerned about perceptions that their tribunals lacked due process.<sup>8</sup> Like the pending tribunals of the early 21st century, the tribunals of 1945-47 received their fair share of criticism. For example, Supreme Court Justice Harlan Stone compared the war crimes trials in Nuremburg to a "lynching party" and a "pretense" court, while Senator Robert Taft argued that the "spirit of vengeance" at the trials threatened to overshadow history's view of justice meted out there.<sup>9</sup>

One of Greene's primary themes in *Justice at Dachau* is that the military tribunals of the late 1940s, and particularly the advocacy of prosecutor William Denson, succeeded in obtaining a one-hundred percent conviction rate while affording defendants fair trials with full due process rights.<sup>10</sup> Greene's other focus of the book is to honor Denson's work and to educate the public about the often-overlooked trials.<sup>11</sup> In the end, Greene provides details enough to whet the reader's appetite, but he leaves his literary guests hungry in all three areas.

### Denson and Due Process

The subtitle of *Justice at Dachau, The Trials of an American Prosecutor*, focuses on the efforts of LTC William Denson, the chief prosecutor of the leaders of the Dachau, Mauthausen, Flossenburg, and Buchenwald concentration camps. While Denson was only a part of the system of prosecutors and defenders created to conduct war crime tribunals through-

---

7. See *A Nation Challenged*, N.Y. TIMES, Dec. 7, 2001, at B6 (providing excerpts from Attorney General John Ashcroft's testimony before the Senate Judicial Committee regarding the Bush administration's vision regarding military tribunals for suspected terrorists).

8. See GREENE, *supra* note 1, at 231-32.

9. *Id.*

10. See *id.* at 357.

11. See *id.* at 4.

out Germany,<sup>12</sup> he personally tried more Nazis than any other single prosecutor.<sup>13</sup>

In all, William Denson spent almost two years prosecuting officials of four of the most notorious German concentration camps.<sup>14</sup> According to Greene, Denson logged long hours and expended superhuman effort to ensure that prosecutions were both just and impartial.<sup>15</sup> Denson, the author asserts, wanted to conduct the trials so that observers from throughout the world and historians would not ascribe harsh sentences to “victors’ justice,” but to the validity of charges and evidence brought before tribunals that afforded due process of law.<sup>16</sup> Greene concludes that Denson’s efforts validated the effective use of tribunals, and that Denson’s “greatest contribution [was getting] convictions according to due process and recognized international law.”<sup>17</sup>

Unfortunately for LTC Denson, Greene fails to clearly show how his protagonist sought complete due process for the 177 German concentration-camp officials<sup>18</sup> he prosecuted. While William Denson may have intended to convict with due process, the illustrations Greene uses undercut that proposition. For example, numerous defendants claimed that American interrogators, including Denson’s lead investigator, Lieutenant (LT) Paul Guth, coerced incriminating statements from them.<sup>19</sup> Denson never seriously investigated such allegations,<sup>20</sup> even after other investigations substantiated claims that some American interrogators engaged in abuses.<sup>21</sup> If investigators coerced statements from Germans, those confessions have far less credibility. On several occasions when defendants tried to explain away their written confessions as coerced, Denson

---

12. *See id.* at 16. At the conclusion of World War II, judge advocates conducted 189 war crimes tribunals involving 1,672 defendants in Germany and Japan. *See id.* Lieutenant Colonel Denson prosecuted 177 defendants before four tribunals. *See id.* at 2.

13. *See id.*

14. *See id.*

15. *See id.* at 232-33.

16. *See id.* at 3, 119.

17. *Id.* at 357.

18. *See id.* at 2.

19. *See id.* at 76-77, 179-80, 186, 202, 262.

20. *See id.* at 187. Greene writes, “The repeated accusations concerning young Paul Guth’s interrogations could not be ignored. Denson wanted wins, but not like that, and he truly believed the rumors to be nothing more than a defense tactic.” *Id.* Greene’s characterization, however, of not “ignore[ing]” the accusations consists of an intense cross examination in which Denson repeated asks whether the witness handwrote wrote the statement himself. *See id.*

objected, arguing that allegations of coercion by American interrogators were irrelevant to the proceedings.<sup>22</sup> Testimony about why a defendant made an incriminating statement is unquestionably relevant when the government introduces that statement against the defendant.<sup>23</sup>

The charge Denson used also raises due process concerns. Denson indicted all 177 of the people he prosecuted with the same charge of “acting in pursuance of a common design to commit” crimes such as murder, torture, “abuses and indignities.”<sup>24</sup> It was a vague charge.<sup>25</sup> Defense counsel, who represented multiple defendants at the same trial,<sup>26</sup> found it difficult to prepare specific defenses against such a vague and relatively novel charge.<sup>27</sup> The document authorizing tribunals in post-war Germany stated, “[t]he Indictment shall include full particulars specifying in detail the charges against the Defendants.”<sup>28</sup> Despite that, Denson vigorously fought defense objections to both mass trials and indistinct charges.<sup>29</sup>

---

21. *See id.* at 232, 262. Among those interrogators confirmed to have acted improperly were several stationed at Freising, Germany, which is where LT Guth worked before he moved to Dachau. *See id.* at 256, 262. Similarly, another American-led tribunal held at Dachau convicted seventy-four German Soldiers of massacring prisoners near Malmedy, Belgium during the Battle of the Bulge. These convictions were based on seventy-four confessions that the defendants claimed were involuntary. *See* MICHAEL REYNOLDS, *THE DEVIL’S ADJUTANT* 256-57 (1995). The Soldiers’ American defense attorney, LTC Willis M. Everett, filed a writ of habeas corpus to the Supreme Court alleging that American interrogators withheld food and blankets, subjected prisoners to beatings, told prisoners that their families were in danger, showed prisoners “execution chambers” where bullet holes in the wall included human hair and flesh, put hangman’s nooses around their necks, and subjected them to mock trials with interrogators posing as defense counsel. *See id.* An administrative review board appointed to investigate the allegations determined that, for the most part, there was insufficient evidence to substantiate claims of physical abuse, but the board confirmed the use of staged trials to elicit statements. *See* Evan J. Wallach, *The Procedural And Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide An Outline For International Legal Procedure?*, 37 COLUM. J. TRANSNAT’L L. 851, 870 (1999) (citing U.S. War Department, Final Report of Proceedings of Administration of Justice Review Board (The Raymond Report) (Feb. 14, 1949)).

22. *See id.* at 76-77, 186, 203. For example, one 22-year-old defendant had been beaten and received threats of being shot. In response to such evidence, LTC Denson immediately objected to “testimony along this line unless it has some connection with this case.” *Id.* at 202-03.

23. *See, e.g.,* *Brown v. Mississippi*, 297 U.S. 278 (1936) (holding that coerced confessions violate due process).

24. *Id.* at 41.

25. *See id.* at 189.

26. *See id.* at 116.

Moreover, he refused defense requests for a bill of particulars specifically stating the alleged wrongdoings by each defendant.<sup>30</sup>

The indistinct “common design” charge appears especially unfair if defense claims of insufficient evidence were true.<sup>31</sup> Excerpts from defense arguments indicate that the government provided no direct evidence of wrongdoing by some accused; counsel argued that with respect to some defendants, the government could only prove that they were assigned to the camp at some point during the war.<sup>32</sup> Apparently defense’s argument struck a cord with Denson; on rebuttal argument Denson declined to get “into a discussion of each man individually, because,” he urged tribunal members, “I do not want the court to feel that it is necessary to establish individual acts of misconduct to show guilt or innocence.”<sup>33</sup> Common design, in Denson’s view, was akin to guilt by association—in this case, association with the concentration camp system.<sup>34</sup>

Greene also adds defendants’ and others’ trial testimony which in some parts contradicts and discredits government evidence.<sup>35</sup> Greene

---

27. *See id.* at 42-43, 136. One defense attorney claimed that “common design [was] not a crime.” *Id.* at 136. Defense counsel in both the Dachau and Mauthausen trials unsuccessfully petitioned the tribunal to know exactly what wrongful acts each defendant had committed. One counsel specifically stated that knowing what acts his clients were charged with was “necessary” to “intelligently present a defense.” *Id.* at 43. The other intimated as much when he pointed out that he had to prepare defenses for sixty-one clients covering three and a half years and alleging eighteen areas of criminal conduct which may or many not apply to each defendant. *See id.* at 136.

28. Charter of the International Military Tribunal art. 16(a), signed 6 October 1945, available at <http://www.ess.uwe.ac.uk/documents/chtrimt.htm> (last visited Oct. 26, 2004).

29. *See* GREENE, *supra* note 1, at 43, 136, 186.

30. *See id.* at 136.

31. *See id.* at 106-8.

32. *See id.*

33. *Id.* at 112.

34. *See id.* at 24, 205, 112. Denson’s “mission [was] to bring to justice everyone who had been involved irrespective of title or authority.” *Id.* at 24. The charge of acting in pursuance of a common design could be used against anyone who ever worked at or in support of a concentration camp, including doctors who gave comfort and treatment to the sick, work supervisors who gave prisoners extra food against the orders of the camp commandant, and even prisoners who acted as block leaders to keep fellow prisoners in line. *See id.* at 197-98, 202-04, 206, 214. Such a wide-reaching charge could be analogous to guilt by association; in this case, association with those who controlled conditions at the camp. In LTC Denson’s mind, even though a defendant “may not have personally wielded the club,” if he voluntarily worked in support of a camp, he “was guilty of a common design to torture, starve and kill prisoners and deserved to hang.” *Id.* at 205, 213.

35. *See id.* at 184-85, 197-98, 200, 222.

provides no government rebuttal evidence, if there was any, nor does he indicate whether his reading of the trial transcripts bears out defense's condemnation of government evidence. He says that every man Denson tried was convicted, and ninety-seven were sentenced to die.<sup>36</sup> He also reveals that most defense counsel believed even before trials began that convictions were a *fait accompli*.<sup>37</sup> By not addressing the apparent lack of evidence as to some men, the reader is left to wonder whether certain defendants went to the gallows unjustly or whether the author failed to convey the strength of the prosecution's case.

Greene admits that some damning evidence presented to the tribunals would have been inadmissible in a typical U.S. criminal trial.<sup>38</sup> According to Greene, some witnesses "offered illogical testimony" in order to get revenge, and that it sometimes "breached the limits of credibility."<sup>39</sup> Since Denson was in charge of choosing witnesses to appear on behalf of the prosecution,<sup>40</sup> one wonders why he selected such witnesses if he wanted to give fair trials.

Whether or not Denson actively sought to show the world that his cases afforded fairness and due process, Greene's book gives less surety that tribunals gave each individual due process.<sup>41</sup> From the anecdotal evidence the book provides, tribunals rarely ruled in favor of the defense on motions or objections.<sup>42</sup> Furthermore, in the Dachau and Mauthausen trials, each tribunal deliberated just ninety minutes before handing down guilty verdicts for forty and sixty-one defendants, respectively.<sup>43</sup> Between the two trials, tribunal members gave less than two minutes deliberation for each man accused of a capital crime. After the trial for Dachau administrators, one tribunal member made a late-night, clandestine visit with LTC Douglas T. Bates, the chief defense counsel, telling Bates that "we have made a terrible mistake," and that he would be drafting a dissent.<sup>44</sup> The next day the former tribunal member told Bates that the

---

36. *See id.* at 2.

37. *See id.* at 135

38. *See id.* at 159-60.

39. *Id.*

40. *See id.* at 55.

41. *See supra* note 34 and accompanying text (discussing common design compared to guilt by association).

42. *See GREENE, supra* note 1, at 43, 47, 50, 93, 100, 136, 156-67, 166-67, 199, 244-45, 252.

43. *See id.* at 115, 221.

44. *Id.* at 119-21.

meeting “never took place.”<sup>45</sup> Bates went to his grave sure that his clients did not receive “a fair trial.”<sup>46</sup> A member of William Denson’s own prosecution team for the Buchenwald trial, attorney Solomon Surowitz, resigned mid-way through the proceedings disillusioned with the system and distrustful of his own witnesses, who Surowitz believed would “swear to anything if it g[ot] the Germans killed.”<sup>47</sup>

Despite inadequacies, *Justice at Dachau* demonstrates that defendants enjoyed some due process rights. Defense counsel had full access to government files at the beginning of the war crimes program.<sup>48</sup> Defendants were allowed to utilize the right to counsel, to cross examine government witnesses, to make statements to the tribunal, and to have indictments and proceedings translated into a language they knew.<sup>49</sup> Greene notes that most German defendants were flabbergasted at the rights afforded them; they were amazed to receive a trial at all considering their prior government’s *modus operandi*.<sup>50</sup>

Contrary to LTC Bates’ view, Captain Victor Wegard, a lawyer on Bates’ defense team, remembered that two prominent defendants, to include the Dachau camp commandant, told Wegard that they believed they got a fair trial and that the defense held the government to its burden of proof.<sup>51</sup> Denson’s other teammate on the Buchenwald trial was so convinced that they “conducted th[e] trial in as fair and as humane a way as would be possible anywhere,” that he rallied with Denson against the later commutation of some sentences.<sup>52</sup>

To counter defense arguments and satisfy readers that innocent men were not convicted, Greene should have better articulated what evidence convinced the tribunals of guilt. He should have provided more government evidence that rebutted the defendants’ assertions and those of their witnesses. Including evidentiary photographs depicting camp horrors might have helped. The book did not compare Denson’s 100 percent con-

---

45. *Id.* at 121.

46. *See id.* at 125-26.

47. *Id.* at 273.

48. *See id.* at 189-90. Prosecutors later curtailed such open discovery, bringing the tribunal system in line with the more limited disclosure practices then common among American criminal courts. *See id.*

49. *See id.* at 36.

50. *See id.*

51. *See id.* at 352.

52. *Id.* at 330.

viction rate to the overall war crimes tribunal conviction rate. Such a comparison would provide a better idea of Denson's contribution and give insight into the tribunals' willingness to acquit.

Since Denson's time at Dachau, numerous court decisions and laws have refined legal thought on due process.<sup>53</sup> Likewise, current events and societal conditions shape people's perception of what constitutes adequate due process.<sup>54</sup> Greene could have better explained the world's concept of due process at the end of World War II. By putting what happened in historical context with what the world expected, Greene could better show whether Denson achieved his goal of providing due process.

### Honoring William Denson

In writing *Justice at Dachau*, Greene attempts to honor William Denson. Greene's purpose is noble, but his book never really brings Denson to life. From beginning to end, the reader wonders who William Denson really was and what shaped him as a man and an attorney. In the first half of the book Greene reveals that Denson, a soft-spoken Alabamian with a Harvard law school education, taught at West Point and tried over 300 civil cases by the time he was thirty-one years old.<sup>55</sup> The reader never learns about Denson's childhood, whether he had siblings, the type of law practice he had before teaching at West Point, his struggles and successes in his early law practice, the type of military service he acquired before he became a judge advocate, whether he volunteered for military service when the war broke out or whether he was called out of the reserves, or whether he asked to go to Germany or was ordered to go. Greene hints that Denson's father was a strict, demanding man who had a great influence on his son, but he never directly addresses the senior Denson or his role in William Denson's life.<sup>56</sup> Greene provides a pleasant side story about Denson's courtship of his second wife, Huschi, a German aristocrat-turned-refugee.<sup>57</sup> More such stories would personalize Denson. While

---

53. See George F. Will, Editorial, *Trials and Terrorists*, WASH. POST, Nov. 22, 2001, at A47 (defending the use of military tribunals to try modern terrorists, by noting that the Constitution left "due process" undefined and "vague," so that today's understanding of due process has "acquired its content incrementally, over many years, from judicial interpretations" based on traditional crimes during times of peace).

54. See *id.*

55. GREENE, *supra* note 1, at 2, 44, and 17. This information is scattered piecemeal through the first forty-five pages.

56. See *id.* at 85, 131, 344.



not a biography, the book revolves so much around Denson that to omit such personal information leaves the central figure wooden.

A dedicated officer, William Denson's devotion to duty shines through the pages. Denson labored to the point of physical collapse during the course of the four trials, the job of chief prosecutor taking a heavy toll on his life.<sup>58</sup> He lost almost fifty pounds, and worked over 300 hours of overtime.<sup>59</sup> His collection and preservation<sup>60</sup> of the records of these "forgotten"<sup>61</sup> trials show how seriously he took his job. When he learned that certain sentences were later commuted, he led a campaign that resulted in congressional hearings on the matter.<sup>62</sup> Denson's devotion to prosecuting crimes of immeasurable inhumanity cannot be questioned.

Unfortunately, the overall lack of character development, combined with the failure to support the claim that Denson suffered in order to ensure full due process, deprives the reader of the empathy Denson deserves. The reader detects that Denson's submersion in the gruesome evidence of his trials blinded him so that he sought more for convictions than for ensuring total due process.<sup>63</sup> One suspects that Greene ignored Denson's failure because as a Holocaust documenter,<sup>64</sup> Greene's heart was with Denson's zealous prosecution; he felt indebted to Huschi and Paul Guth who provided access to their memories and the documents William Denson stored;<sup>65</sup> and he was awed by Denson's dedication. With more effort to reveal Denson's personality, readers could better admire Denson and better understand how a man vicariously reliving stories of torture and

---

57. *See id.* at 80-84, 126-28, 224, 343-45

58. *See id.* at 227, 280.

59. *See id.* at 4, 128, 226-27, 280. Not only did Denson lose weight and collapse from exhaustion, but he also developed trembling hands and had frequent nightmares. *See id.* at 226-27. Additionally, the strain of his absence precipitated his first wife to divorce him while he was in Germany. *See id.* at 4.

60. *See id.* at 350.

61. *See id.* at 349.

62. *See id.* at 323.

63. *See id.* at 205. Denson stated later in his life that no one who worked at a concentration camp was innocent, and that he would willingly "spring the [gallows'] trap." *Id.*

64. *See Witness: Voices from the Holocaust* (PBS television broadcast, May 1, 2000) (produced and edited by Joshua M. Greene & Shiva Kumar); JOSHUA M. GREENE & SHIVA KUMAR, *WITNESS: VOICES FROM THE HOLOCAUST* (2001).

65. *See GREENE, supra* note 1, at 361-2.

oppression<sup>66</sup> could lose some of the objectivity a prosecutor should maintain.<sup>67</sup>

### The Story of the Trials

The author hoped to educate the public about the little known trials held at Dachau.<sup>68</sup> Greene writes movingly of the Dachau, Mauthausen and Buchenwald concentration camp experiences. His narrative portions, in which he introduces officials such as Franz Ziereis, Commandant of Mauthausen, who gave his son prisoners to shoot as a birthday present, convince the reader that many defendants were despicable criminals.<sup>69</sup> Greene also does a fantastic job showing defense counsel's efforts for their clients, and explaining that by providing a genuine, vigorous defense, those Army officers did their duty just as prosecutors did theirs.<sup>70</sup>

Greene fails to follow up, though, on several characters readers meet during the book. In one chapter, Greene introduces Johannes Grimm, a civilian who managed a stone quarry where prisoners from Mauthausen worked under the supervision of SS guards.<sup>71</sup> Evidence showed that he provided prisoners with food from home and from two large gardens he kept.<sup>72</sup> Later, Greene describes the oldest defendant, sixty-two year old Emil Mueller, the company commander of a garrison unit near Mauthausen whose company shot escaping prisoners.<sup>73</sup> Finally, Greene describes defense witnesses who testified about five different Mauthausen doctors and other workers who comforted prisoners and tried to help them.<sup>74</sup> Amazingly, Greene never reveals what ultimately happened to Grimm, Mueller, or the others. The tribunal found all of the defendants guilty, but the book does not say what sentence the tribunal gave to each of these men or if their sentences were later commuted.<sup>75</sup> Lapses such as

---

66. *See id.* at 227.

67. *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS 23 (1 May 1992) (Comment to Rule 3.8, Special Responsibilities of a Trial Counsel) ("A trial counsel is not simply an advocate but is responsible to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.").

68. *See id.* at 4.

69. *See id.* at 142.

70. *See id.* at 40, 42, 56-57, 108, 121, 135.

71. *See id.* at 206.

72. *See id.* at 206, 214.

73. *See id.* at 193-94.

74. *See id.* at 197-98, 200.

these are a disappointing part of an otherwise fascinating story. Similarly, the book gives only superficial treatment of the nature or character of other attorneys and trial staff and their relationships and inner workings.

### Conclusion

Greene, a noted director of television and film documentaries,<sup>76</sup> relied upon thousands of documents, trial transcripts and photographs that William Denson collected and stored in his basement.<sup>77</sup> The author, faced with synthesizing mounds of previously unreleased information,<sup>78</sup> does not fully capture the story of the trials or of William Denson. Despite this lapse, Greene's focus on providing due process to men accused of loathsome crimes arousing great passion gives modern attorneys, who may litigate cases stemming from the war on terror, a glimpse of the challenges they face, including historical and world-wide scrutiny. Despite any shortcomings under tremendous pressure, Denson and his fellow officers' efforts were highly admirable and, until now, inadequately recognized by history.

---

75. *See id.* at 222-23.

76. Found at <http://www.greatertalent.com/bios/green.shtml> (last visited Oct. 29, 2004).

77. *See GREENE, supra*, note 1, at 4, 360-62.

78. *See id.* at 1, 361-62.

By Order of the Secretary of the Army:

PETER J. SCHOOMAKER  
*General, United States Army*  
*Chief of Staff*

Official:

JOEL B. HUDSON  
*Administrative Assistant to the*  
*Secretary of the Army*  
0402904