

IN TIME OF WAR¹REVIEWED BY COLONEL DAVID A. WALLACE²

Pierce O'Donnell, one of the leading trial lawyers in the United States, has authored a masterful and spellbinding book about an important but, until recently, obscure historical footnote from World War II—the German Saboteur Case.³ O'Donnell's book is meticulously detailed, thoroughly researched, and highly readable. For the judge advocate, *In Time of War* proves a ready source of background information to the terrorism challenges our nation faces today.

Throughout *In Time of War: Hitler's Terrorist Attacks on America*, O'Donnell provides the reader with a thrilling narrative about a nearly forgotten episode during the early years of World War II—a precarious and volatile time in our nation's history.

The facts of the case are straightforward and undisputed but read like a spy novel. In June 1942, two German U-boats, one off the coast of Florida and the other off Long Island, New York, landed eight Nazi terrorists under the cover of darkness. Hitler and his senior advisors were intimately involved in planning a once-secret mission, now known as Operation Pastorius.⁴ The mission's purpose was to fan out across the United States and destroy strategic transportation, manufacturing, and hydroelectric plant targets in a series of attacks that would create public panic.⁵

O'Donnell skillfully introduces the reader to each of the saboteurs. Although they all had different backgrounds and were from different segments of German society, they had one trait in common—long-term residency in America between the Great wars.⁶ Two of the eight

¹ PIERCE O'DONNELL, *IN TIME OF WAR* (2005).

² U.S. Army. Currently serving as an Academy Professor, Department of Law, U.S. Military Academy, West Point, New York.

³ *Ex Parte Quirin*, 317 U.S. 1 (1942).

⁴ O'DONNELL, *supra* note 1, at 21. The secret mission was named for Franz Pastorius, the leader of the first German immigrant community in the America in the 17th Century. According to O'Donnell, it was not unusual for Hitler to involve himself in the planning of tactical missions much to the consternation of some of his senior military officers.

⁵ *Id.*

⁶ *Id.* at 23. O'Donnell also notes that the eight "volunteers" had a strong aversion to service on the Eastern Front, where the German Army was suffering significant casualties.

saboteurs were U.S. citizens and all were fluent in English.⁷ Of note, O'Donnell's description of the eight leaves the reader with the sense that Hitler's terrorists were a motley crew, not the best of the Third Reich, yet surprising in their resulting terrible successes.⁸

The author's fascinating narrative brings the hapless terrorists to life with insights into their training at a secret saboteur school,⁹ their journey across the ocean by submarine,¹⁰ their landing in America and, for one of the teams, their chance encounter with an unarmed, twenty-one-year-old Coast Guard Seaman Second Class John C. Cullen.¹¹ Not long after arriving in the United States, the leader of the group, George Dasch,¹² double-crossed his comrades and reported everyone to the FBI.¹³ All of the saboteurs were consequently and swiftly apprehended.

Of particular interest to judge advocates, especially in light of recent events such as the Guantanamo Bay detainee situation, is O'Donnell's account of President Roosevelt's decision-making process on how to treat the captured saboteurs. The President's Attorney General, Francis Biddle,¹⁴ realized there were three options for disposing of the case.¹⁵ First, the detained Germans could be treated as prisoners of war, given combatant immunity, and imprisoned for the duration of the war.¹⁶ However, treating the Germans as prisoners of war had little appeal. Doing so was not required under international law because the Germans had been caught in civilian clothes, thus making them unlawful

⁷ *Id.* at 4.

⁸ *Id.* at 23.

⁹ *Id.* at 4-5. The training was conducted at Quenz Lake, Brandenburg, the capital of the state of Prussia, located approximately thirty miles from Berlin. The campus was once a luxurious farm owned by a wealthy Jewish shoe manufacturer. Alumni of the school had performed many other successful missions in Europe.

¹⁰ *Id.* at 56-59.

¹¹ *Id.* at 60-61.

¹² *Id.* at 23-25.

¹³ *Id.* at 80. Dasch's motive for scuttling the mission and turning in his comrades to the FBI is not entirely clear. His own claim was that he always intended to sabotage the mission as it was a way to strike back at Hitler. He was, by far, one of the most unsympathetic characters in the story.

¹⁴ *Id.* at 72. As Attorney General, Francis Biddle is one of the main characters of the story. He was a graduate of Harvard College and Harvard Law School. He was also a former federal appellate judge and solicitor general. O'Donnell describes him as having a brilliant legal mind and being politically liberal for his day.

¹⁵ *Id.* at 124.

¹⁶ *Id.*

combatants.¹⁷ Although President Roosevelt could accord prisoner of war status as a matter of “grace,” such an option was unsatisfactory. According to the author, Roosevelt needed a show trial to prove to the American people and Hitler that the United States could protect itself.¹⁸ Also, merely imprisoning the eight seemed like a weak, inadequate response to a serious act of terrorist aggression against the United States.¹⁹

The second of President Roosevelt’s alternatives involved trying the six Germans in civilian federal court for violating a sabotage-related criminal statute, and charging the two United States citizens with treason.²⁰ This option also proved unappealing to Roosevelt. First, only treason was punishable by death.²¹ The Espionage Act of 1917, the charging mechanism for the six German saboteurs, carried a maximum punishment of only thirty years’ confinement.²² This assumed, of course, a successful prosecution. The author astutely highlights the concerns of the attorney general in this regard:

No actual acts of sabotage had ever been committed. A charge of attempted sabotage, the attorney general concluded, would probably not be successful in federal court “on the ground that the preparations and landings were not close enough to the planned act of sabotage to constitute attempt.” . . . And an attempted act of sabotage “carried a penalty grossly disproportionate to their acts – three years.”²³

In addition to the other shortcomings associated with a trial in a civilian court, a public trial would expose one of the truths about the case—the eight Germans penetrated America’s defenses with ease and were only captured because Dasch proved to be a turncoat. FBI Director

¹⁷ *Id.*

¹⁸ *Id.* at 125.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* Additionally, the Constitution made it difficult to establish a conviction for treason. It requires a confession in open court or the testimony of two witnesses. U.S. CONST. art. III, § 3.

²² O’DONNELL, *supra* note 1, at 126.

²³ *Id.*

J. Edgar Hoover and the FBI had orchestrated a media extravaganza taking credit for their “brilliant and swift” capture of the German spies.²⁴

Finally, the saboteurs could be tried at a special military commission which was authorized to impose the death penalty for alleged violations of the law of war.²⁵ According to the author, this option instinctively appealed to President Roosevelt for several reasons: Roosevelt could appoint reliable generals to adjudicate the case; he could authorize the death penalty for the saboteurs; the case would be tried swiftly without unduly cumbersome rules of evidence and procedure; and the trial could be held in secret.²⁶ Roosevelt elected to try to saboteurs by military commission.²⁷

To ensure the secrecy of the proceedings, the trial itself was held in a virtual “black hole” on the fifth floor of the Justice Department in Washington, D.C.²⁸ The pseudo-courtroom was formerly used by the FBI as a lecture hall for training special agents.²⁹ The windows were covered with black curtains and the clear glass doors of the entrance were painted black.³⁰ O’Donnell provides a riveting and vivid picture of the proceedings that ensued. On the one side of the room sat the government’s all-star prosecution team, including the Attorney General, the Judge Advocate General of the Army, and the Director of the FBI.³¹ On the other side, the defendants were sat alphabetically behind their defense team, which was led by Colonel (COL) Kenneth Royall, lead counsel for seven of the saboteurs.³² Sitting in the front of the room was

²⁴ *Id.* at 105. In Anthony Lewis’s introduction to the book, he describes a press conference held by J. Edgar Hoover after the capture of the saboteurs. Hoover did not mention the real reason for the capture. Instead, he led the press to believe that it was the FBI that was responsible for cracking the case with their sophisticated investigative techniques. In fact, Hoover received a congressionally authorized medal for his effort. The true story did not emerge for years. *Id.* at xiii and xiv.

²⁵ *Id.* at 126.

²⁶ *Id.* at 126-27.

²⁷ *Id.* at 127. Arguably, the disposition of the case was not a difficult decision for Roosevelt. Three days after the Nazis were in custody, Roosevelt sent a memo to his attorney general saying that all eight should receive the death penalty. *Id.* at xiv.

²⁸ *Id.* at 141.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 143.

³² *Id.* at 144. Royall did not represent George Dasch because of the conflict of interest. Colonel Carl Ristine represented Dasch.

the military commission, which was comprised of a distinguished collection of Army general officers.³³

The O'Donnell's account leaves the reader with the vague impression that the military commission was merely a kangaroo court.³⁴ Utilizing relaxed rules of procedure, evidence, and a seemingly biased "jury,"³⁵ the defense lost virtually every motion, ruling, or request for relief. To make matters worse for the defense, the commission itself was only an advisory body.³⁶ Its role was to receive testimony and other evidence, create a record of the proceedings, and present a recommendation to President Roosevelt on guilt and punishment. Roosevelt alone would make the ultimate decision on the case.³⁷ Given the probable level of effort expended before the commission and the anticipated lack of a favorable result for his clients, Colonel Royall quickly realized that the only hope for his doomed clients was the United States Supreme Court.³⁸

Colonel Royall's Herculean effort to obtain relief from the Court makes for compelling reading. Royall realized the quickest way to get the case to the Court was by action through a Supreme Court justice.³⁹ During a recess in the commission proceedings, Royall personally visited the home of Justice Hugo Black, the only justice available in the Washington, D.C. area, seeking a writ of habeas corpus.⁴⁰ Justice Black flatly refused involvement in providing any assistance to COL Royall.⁴¹

³³ *Id.* at 143-44. The president of the commission was Major General (MG) Frank McCoy. He had initially retired from the Army in 1938. During his career, he served in a number of interesting and important assignments including aide to Teddy Roosevelt during the Spanish-American War. Additionally, he served on the court-martial that tried Brigadier General William "Billy" Mitchell, the outspoken advocate for airpower. Other members included: MG Blanton Winship (former judge advocate general); MG Lorenzo Gasser (former deputy chief of the Army); MG Walter Grant (former Third Corps commander); Brigadier General (BG) John T. Lewis (distinguished artillery officer); BG Guy Henry (distinguished cavalry officer); and BG John Kennedy (Congressional Medal of Honor winner).

³⁴ *Id.* at 147. The term "kangaroo court" originated in Texas courts in the mid-nineteenth century. In a mockery of justice, defendants were swiftly hung after a trial that had a preordained outcome.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 148

³⁹ *Id.* at 190.

⁴⁰ *Id.* at 190-94.

⁴¹ *Id.* at 194.

Although stunned and disappointed at Black's response,⁴² Royall persisted with his efforts to spark Supreme Court interest in the case. Colonel Royall took the extraordinary step of traveling to Justice Owen Robert's farm near Philadelphia and persuading him, and eventually the entire Court, to hear his habeas corpus petitions.⁴³

Six days later, the Supreme Court convened in an unusual summer session to hear arguments on the petitions.⁴⁴ O'Donnell devotes an entire chapter of the book to the Supreme Court arguments. Colonel Royall zealously and unswervingly made his plea at this unanticipated opportunity. The major theme of his argument was that President Roosevelt had unconstitutionally bypassed well-established criminal statutes.⁴⁵ Royall unapologetically contended that the Germans had a right to file petitions and the President could not suspend the Great Writ.⁴⁶ Additionally, he argued that the German saboteurs were entitled to trial in civilian courts with all of the normal procedural safeguards.⁴⁷ Relying, in part, on *Ex parte Milligan*,⁴⁸ a Civil War era Supreme Court precedent, Royall contended that his clients were deprived of vital civil rights.

⁴² *Id.* Throughout his career on the bench, Justice Black had a reputation for his strident efforts for the poor, downtrodden, and unpopular.

⁴³ *Id.* at 202-03. Procedurally, the case could not start in the Supreme Court because it only has appellate jurisdiction in such matters. Royall filed seven writs of habeas corpus in the district court of Washington, D.C. In his summary rejection of Royall's petitions, Judge James W. Morris's terse order stated:

In view of this statement of fact [by counsel], it seems clear that the petitioner comes within the category of subjects, citizens or residents of a nation at war with the United States, who by proclamation of the President . . . are not privileged to seek any remedy or maintain any proceedings in the courts of the United States.

Id. at 203.

⁴⁴ *Id.* at 208.

⁴⁵ *Id.* at 217.

⁴⁶ *Id.* at 204. The U.S. Constitution gives only Congress the power to suspend the Writ of Habeas Corpus. Specifically, it provides that "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." U.S. CONST. art. I, § 9.

⁴⁷ O'DONNELL, *supra* note 1, at 204.

⁴⁸ 71 U.S. 2 (1866). In that case, Lambdin Milligan was accused of planning to steal weapons and invade Union prisoner-of-war camps. He was sentenced to death by a military commission. Milligan sought release through the federal courts with a writ of habeas corpus. The Court held that the trial by military commission was unconstitutional because civilian courts were still operating.

The government matched Royall's zeal in the presentation of its case. In its submission to the Court, the government contended that *Ex parte Milligan* was distinguished from the instant case because "Milligan had never worn an enemy uniform or crossed lines in a theater of operations; this was a total war where the theaters of operations were inherently different from those in the Civil War."⁴⁹ Additionally, military commissions had a grant of authority from Congress to try violations of the law of war and Articles of War.⁵⁰ Moreover, the President as Commander in Chief had the constitutional authority to convene the proceedings and prescribe the rules.⁵¹

It did not take long for COL Royall and his clients to get their answer from the Supreme Court.⁵² In a cryptic, unanimous per curiam order, the Court upheld the military commission as lawfully constituted and denied the petitions for the writs of habeas corpus.⁵³ Remarkably, the Court did not provide its full opinion in the case until eighty-two days after the Germans were executed.⁵⁴

After the Supreme Court's decision, the commission proceedings advanced toward their inevitable conclusion on 1 August 1942.⁵⁵ The military commission, after nineteen days in session and three thousand pages of testimony and argument, made its recommendations to President Roosevelt on guilt and punishment—guilt for all; death for six, and life imprisonment for two.⁵⁶ President Roosevelt approved the judgment of the military commission.⁵⁷ Within days, the six were executed by electrocution.⁵⁸

Both the author and Anthony Lewis, a two-time Pulitzer Prize winner and author of the book's introduction, concluded that the case was a stain on the history of the Supreme Court.⁵⁹ Aside from the bias

⁴⁹ *Id.* at 204.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 233-34.

⁵³ *Id.*

⁵⁴ *Id.* at 257. Justice Roberts told his colleagues on the bench that he believed that Roosevelt would execute the Germans no matter what the Court did. *Id.* at xiv.

⁵⁵ *Id.* at 235-43.

⁵⁶ *Id.* at 243, 248.

⁵⁷ *Id.* at 249.

⁵⁸ *Id.*

⁵⁹ *Id.* at xiv, 350-51.

behind the scenes,⁶⁰ the Court decided the case in one day.⁶¹ It summarily denied relief for the saboteurs without explanation.⁶² It did not even provide its full opinion on the case until nearly three months after the saboteurs' executions. In the words of John P. Frank, Justice Black's law clerk at the time of the case, "If the judges are to run a court of law and not a butcher shop, the reasons for killing a man should be expressed before he is dead."⁶³

In Time of War is a must read for all judge advocates. First, the case of the Nazi saboteurs is no longer just an interesting tidbit of World War II trivia. Anthony Lewis explains why the case is no longer just a matter of historical curiosity.⁶⁴ Specifically, President Bush used the Supreme Court's decision in *Quirin*, in part, as the basis to establish a legal framework to try terrorists associated with the attacks of September 11, 2001.⁶⁵ O'Donnell brings the lessons learned and contemporary relevance of the Saboteur Case to the present in evaluating the recent Supreme Court terrorism cases. The author draws the logical conclusion that *Quirin* should not be treated as a valid precedent for establishing presidential power.⁶⁶

The second reason for judge advocates to read the book is the tale of COL Kenneth Royall.⁶⁷ Royall, who later went on to become the

⁶⁰ *Id.* at xiv, 265. Lewis observed that two of the justices, James F. Byrnes and Felix Frankfurter, had a close relationship with the Roosevelt Administration that raised serious questions about the propriety of their involvement with the case. Byrnes had been working closely with the administration for months. Specifically, Byrnes provided the administration with advice on draft executive orders, war powers legislation, and other presidential initiatives. Frankfurter specifically talked with the secretary of war and recommended the use of military commissions. Frankfurter recommended that the commissions be entirely military. He also offered advice on how to structure the commission in anticipation of a Court challenge. *Id.* at 213.

⁶¹ *Id.* at xiv.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at xiii.

⁶⁵ Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), 66 Fed. Reg. 57,833 (Nov. 16, 2001).

⁶⁶ O'DONNELL, *supra* note 1, at 352-53.

⁶⁷ *Id.* at 110-11. O'Donnell provides a good biographical sketch of Royall, a main character of the book. Born in 1894 in North Carolina, Royall was a highly intelligent child, skipping several grades in school. He graduated from high school at the age of fourteen. He attended the University of North Carolina, where he graduated Phi Beta Kappa. Royall was one of the youngest students ever to attend Harvard Law where he served as an editor for the *Harvard Law Review*. In the spring of his third year of law school, he joined the Army to fight in World War I. He received his law degree while he

Secretary of the Army, vigorously defended his clients and the Constitution in the face of a hostile president and bloodthirsty public. He was a model judge advocate. He performed his duty with dignity and honor under extremely difficult circumstances. Lewis expresses it very well: “[T]he safety of our country depends on the morality, commitment to the rule of law, and good faith of lawyers.”⁶⁸ Even the saboteurs, in the midst of their crisis, sincerely appreciated his efforts.⁶⁹ The story of Kenneth Royall is one of the main reasons this book is a must-read.

Lastly, *In Time of War* provides excellent insights for trial attorneys. The book exquisitely details the strategy and tactics of the courtroom advocates at the military commission and the Court. O’Donnell, a master storyteller and world-class trial attorney, captures the give and take of the courtroom drama in a way that is not only entertaining but also educational. He is at his very best in his mesmerizing account of the proceedings before the secret military commission as well as the expedited appeal to the United States Supreme Court. O’Donnell makes the reader feel as if he is present in the courtroom with Royall and the saboteurs. The relevance of this half-century-old tale to the challenges facing the United States and today’s judge advocate make *In Time of War* a topper on an SJA’s short list of recommended reading. Judge advocates will find applicability on a myriad of levels in this well-written, fascinating account.⁷⁰

was in basic training. He served as an artillery officer where he saw action overseas. After World War I, he returned to Goldsboro, where he made his mark as a trial attorney and civic leader. At age thirty-five, he was elected the president of the North Carolina Bar Association. At the beginning of World War II, Secretary of War Henry Stimson persuaded Royall to come to Washington, D.C. to help break the procurement logjam brought on by the war. *Id.* at 110-13, 132.

⁶⁸ *Id.* at xv.

⁶⁹ *Id.* at 252. After the trial but before their execution, six of the saboteurs wrote Royall a note that stated, in part, as follows:

Being charged with serious offenses in wartime, we have been given a fair trial . . . Before all we want to state that defense counsel . . . has represented our case as American officers unbiased, better than we could expect and probably risking the indignation of public opinion. We thank our defense counsel for giving its legal ability. . . in our behalf.

Id.

⁷⁰ O’Donnell made excellent use of the declassified trial transcript from the military commission as well as the never-before-seen papers of COL Royall. *Id.* at 367.