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The laws will fall silent : Ex Parte Quirin, a troubling precedent for military commissions.

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“THE LAWS WILL FALL SILENT: *EX PARTE QUIRIN*, A TROUBLING
PRECEDENT FOR MILITARY COMMISSIONS”

By

Brad P. Luebbert
B.E.S., University of Missouri, Columbia, 1991

A Thesis
Submitted to the Faculty of the
College of Arts and Sciences of the University of Louisville
In Partial Fulfillment of the Requirements
for the Degree of

Master of Arts

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A Thesis Approved on

April 13th, 2010

By the following Thesis Committee:

Thesis Director

For my girls

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ABSTRACT

“THE LAWS WILL FALL SILENT: *EX PARTE QUIRIN*, A TROUBLING
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BRAD P. LUEBBERT

APRIL 13 2010

For over two hundred years a major issue in the history of the United States is the contentious issue of military commissions. Military commissions are not new or specific to the United States, but the United States traces its first military commission to the trial of a British officer, Major John Andre in September 1780. This thesis is about the trial of Nazi saboteurs before a military commission and their battle before the United States Supreme Court. A fight pitting civil liberties and due process versus national security during the time of war and crisis in the United States during World War II that resulted in the Supreme Court’s *Ex Parte Quirin* decision in 1942 which established a dangerous and troubling precedence. The Nazi saboteur case of July 1942 was not a snapshot in time but a precedent that the United States is dealing with at the present time. This thesis demonstrates that a pattern exists concerning civil liberties and national security in the United States. The federal government in times of war and crisis, restrict civil liberties in the name of national security, and only after the crisis passed, do policy makers acknowledge error. *Ex parte Quirin* is a reminder about the need for balance between rights and liberties in the context of war-time.

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INTRODUCTION

For over two hundred years a major issue in the history of the United States is the contentious issue of military commissions. While military commissions are not new or specific to the United States, the Americans can trace their first military commission to the trial of a British officer, Major John Andre in September 1780. The United States military used military commissions during the War of 1812 up to and including the Civil War to try both civilian and military personnel. After the Civil War, the military avoided using commissions but re-instituted them at the commencement of World War II.

The first military commission, originally called a court of inquiry, convened to hear the case against Major John Andre. Andre had been captured by the Colonial Army behind enemy lines and in civilian clothes and therefore, tried as a spy instead as a prisoner of war. After Andre's capture, General George Washington convened a board of fifteen general officers to conduct the trial of Andre in order to determine his guilt or innocence. On September 29, 1780, the board found Andre guilty of being behind enemy lines and in disguise and ordered Andre to hang. On October 2, 1780, the United States first military commission concluded with the hanging of Major Andre.

After the American Revolution, military commissions did not play a role in the United States until the War of 1812 when General Andrew Jackson declared

martial law in New Orleans in the anticipation of the British invasion. On December 15, 1814, Jackson issued a general order for martial law which required anyone entering New Orleans to report to the Adjutant General's office, and anyone wishing to leave New Orleans to obtain permission in writing from General Jackson. Failure to do so resulted in arrest and detention.

After the American victory at the Battle of New Orleans, residents expected Jackson to lift martial law, but he did not. In defiance to Jackson and martial law, Louis Louallier wrote in the local newspaper that civilians accused of a crime should be heard before a civilian judge, not military tribunals. On March 5, 1815, Jackson had Louallier arrested on the charge of inciting mutiny and disaffection in the army. Louallier's attorney went to the United States District Judge Dominick Augustin Hall to request a writ of *habeas corpus* which the judge granted after concluding martial law was no longer justified. Jackson ordered his officers that if anyone served a writ of *habeas corpus* for Louallier, then that person would be arrested and confined.¹

Andrew Jackson continued the use of military tribunals in Florida during the Seminole War in 1818. Jackson accused two British subjects, Alexander Arbuthnot and Robert Christy Ambrister of inciting and aiding the Creek Indians against the United States. Both men pleaded not guilty and the military tried them by a special court established by Jackson consisting of eleven officers. The court found Arbuthnot guilty and sentenced to be hung. Further, the court found Ambrister guilty

¹ Louis Fisher. *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (University Press of Kansas, 2005) 25.

and sentenced him to be shot, but the Court later reduced his sentence to 50 lashes. Jackson over rode the verdict and ordered Ambrister shot to death.²

Less than thirty years later in 1846, at the start of the Mexican War, General Winfield Scott drafted an order calling for martial law in Mexico. Determined to not allow undisciplined soldiers create havoc in the Mexican population, Scott thought martial law imperative to his efforts to prevent the local population from starting a guerrilla movement against United States forces. On February 19, 1847 General Scott issued General Orders number 20 proclaiming martial law in the city of Tampico, Mexico. According to Scott, certain acts committed by civilians or soldiers would be tried before a military tribunal.³

Before General Scott retired from the military, the country would again be at war and the military re-instituted commissions. But, this war was not a war against a foreign power; rather, it was civil war. In April 1861, with Congress in recess and at the outbreak of the Civil War, President Abraham Lincoln suspended the writ of *habeas corpus* and authorized martial law in select areas. Congress retroactively authorized his order. During the Civil War the Union Army used military commissions to punish war crimes with most trials taking place in border areas. After the war, military commissions continued during Reconstruction in the South.⁴

² Ibid., 28-29.

³ Ibid., 32-35. It is important to note that General Scott recognized Congress' authority to control military tribunals. Prior to his issuance, Scott showed his draft to the Secretary of War and the Attorney General. The Secretary of War then went to Congress to recommend legislation to authorize military tribunals, but Congress refused to act. After Scott issued martial law, he did so until "Congress could be stimulated to legislate on the subject."

⁴ Michael Belknap. "Alarm Bells from the Past." *Journal of Supreme Court History* vol. 28 Issue 3 (November, 2003) 302-303.

Military commissions were not exclusive to the Civil War theatre of operations alone. In 1862, violence in Minnesota between Dakota Indians and American settlers escalated resulting in the deaths of over 100 American soldiers, 358 settlers, and 29 Dakota soldiers. In response to the violence, the military established a five member military tribunal. Between September 28 and November 3, 1862 the military tried close to four hundred Dakota men for murder, rape, and robbery. The military commission found all but seventy guilty with 303 of the Indians condemned to die. In time, Lincoln reduced the number of planned executions to thirty-nine and he commuted or pardoned the rest of the Dakota Indians. The military executed thirty-eight Dakota Indians for their uprising.⁵

At the conclusion of the Civil War and until the end of Reconstruction, the military used commissions. The trials of the conspirators in the Lincoln assassination plot and the military trial of Confederate Captain Henry Wirz, former commander of Andersonville Military prison, constituted the most prominent cases tried before military commissions after the Civil War; each ended in the death penalty. Until the start of World War II, military commissions were not used but Congress conducted hearings to revise the Articles of War.

This thesis begins with the start of World War II and interprets the history of eight accused Nazi saboteurs, each recruited for his knowledge of the United States. The Germans trained these eight men as saboteurs at a special school on the Quenz farm near Brandenburg, Germany. At the completion of the training, German U-Boats transported the saboteurs to the United States coast in an effort to sabotage

⁵ Carol Chomsky. "The United States-Dakota War Trials: A Study in Military Injustice" *Stanford Law Review*, vol. 43 No. 1 (November, 1990) 13-14.

American industries. Their mission failed because a member turned himself in to the Federal Bureau of Investigations (FBI), which led to the capture of the remaining seven saboteurs.

Upon the capture of the saboteurs, President Franklin D. Roosevelt issued a Proclamation on the procedures in dealing with the saboteurs. The United States Congress remained silent throughout the series of events, hearings, and decisions. Due process for the accused became an afterthought and the United States Supreme Court's July 1942 *Ex Parte Quirin* decision established a troubling precedent. This thesis analyzes the trial of the saboteurs before a military commission and examines the saboteur's battle before the United States Supreme Court. This thesis examines the on-going controversy between due process and national security during times of war.

The Nazi saboteur case of July 1942 reflects one of the key problems facing the United States in the time of war. In times of war and crisis, the federal government restricts civil liberties in the name of national security. Only after the crisis has passed, do policy makers acknowledge error, if any. *Ex parte Quirin* is a reminder about the need for balance between rights and liberties in the context of war-time.

“Well, We Will Lose a Few Good Nazi’s
Then.”

-Admiral Wilhelm Canaris¹

CHAPTER ONE

THE SABOTEURS

March 7, 1936 Germany invaded the Rhineland beginning Adolf Hitler’s grandiose plan to rule all of Europe. Following his unopposed occupation, Europeans left the door open for further German conquests. In November, 1937, Hitler and Italy’s Benito Mussolini formed the German Alliance, the Anti-Comintern Pact, against the Soviet Union. March 1938, Germany invaded Austria and neither France nor Great Britain did anything to stop Hitler other than protest. October 1938 saw the German invasion Czechoslovakia. One year later, Germany invaded Poland along with the Soviet Union. April through May of 1940, Denmark, Norway, Belgium and France fell to German armies onslaught, thus fulfilling Hitler’s plan to rule Europe; he appeared unstoppable.²

¹ Admiral Canaris was Adolf Hitler’s Chief of military intelligence. A man of legendary status in the German military that started with his service in World War I when he served on a U-boat. He took over the leadership of *Abwehr* in 1934 and transformed the organization into a productive and highly prized intelligence arm of the Third Reich.

² David Faber, *Munich 1938: Appeasement and World War II* (Simon and Schuster, New York, 2008), 36-39. John Keegan, *The Second World War* (Penguin Books, 1989), 428-451.

Winston S. Churchill, *Memoirs of the Second World War* (Houghton Mifflin Company, Boston, 1959), 357. As John Keegan stated, there are over 15,000 books on WWII in the Russian language alone, I will use Faber, Churchill, Keegan, Shirer and Weinberg to give the reader a general interpretation of the time period.

With the apparent invincibility of the German Reich and Hitler on the brink of domination, this chapter asks two questions. The first, why did Germany decide to attack the United States directly on her shores? The second and most important, why did the German *Abwehr* continue with the planned saboteur mission to the United States when the leadership firmly believed the mission would not succeed?

On September 27, 1940 in Berlin, representatives from Germany (Adolf Hitler), Italy (Foreign Minister Galeazzo Ciano) and Japan (Ambassador Saburo Kurusu) signed a pact establishing the Axis Powers of World War II. Those three nations agreed for the next ten years they would cooperate and stand with one another. Their prime purpose was to establish and maintain a new order and recognize each other's spheres of interest.³

By December 1941, German armed forces stood in France overlooking the English Channel as well as fighting in Africa and the Russian Front. Up to this point, the German Army had lost thousands of tanks, vehicles, airplanes and an irreplaceable number of personnel. The *Blitzkrieg* (Lightning War) style of fighting left the German soldiers with only horses to drag their equipment to battle instead of their motorized vehicles by the time they hit the Russian Front.⁴ By early 1942, Germany had been waging war against its European foes for three years and Germany had a new adversary - the United States.

On December 7, 1941, after Japan's surprise attack on Pearl Harbor, Honolulu, Hawaii, the United States declared war on Japan. Even though President Franklin D.

³ Gerhard Weinberg, *A World at Arms: A Global History of World War II*. (Cambridge University Press, 2005), 199-201. See also William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany*. (Simon and Schuster, New York, 1990), 803-808.

⁴ Michael Dobbs, *Saboteurs: The Nazi Raid on America*. (Alfred A. Knopf, New York 2004), 6.

Roosevelt believed Germany was the greater threat to the United States, he knew Congress would not declare war against Germany due to the isolationist mentality of the country and because it was Japan that attacked the United States, not Germany. But on December 11, 1941 Hitler resolved Roosevelt's situation when he declared war on the United States. The United States military was in no condition to be a threat to Germany, but the potential industrial capacity of the United States could, in time, surpass Germany's, especially if Germany allowed that potential to grow unimpeded.⁵

Based upon his own personal observations during World War I, Hitler had little respect for the United States soldier. In 1941 while at the Wolf's Lair headquarters he commented, "I'll never believe that an American soldier can fight like a hero,"⁶ but he did respect the United States industrial capacity. At the end of 1940, President Roosevelt announced his vision of the United States becoming "the great arsenal of democracy" by using its "industrial genius to produce more ships, more guns, more planes, more of everything." By 1942, the United States produced 60,000 planes, 45,000 tanks, 20,000 anti-aircraft guns, and six million tons of shipping a year.⁷ The sheer production numbers were staggering, and if unchecked, might defeat Germany by out producing them. For Germany to win the war, they had to stop or slow down the United States' unimpeded industrial growth.

⁵ The United States was already supplying both Great Britain and the Soviet Union with parts, munitions and vehicles via the Lend Lease Act passed in March of 1941 prior to their declaration of war against Japan and Germany, but now, the United States would also supply manpower directly to support their new allies to fight directly against Germany.

⁶ Adolf Hitler quote from Dobbs, 7

⁷ Dobbs, 7.

After the Pearl Harbor attacks, reports circled the globe of the unrivaled success of German and Japanese military operations. Germany stood at the gates of Moscow, airplanes fought the Battle of Britain above England and many believed that the German invasion of Great Britain was imminent. Japan conquered one country after another with nothing standing in their way. By February 1942, Singapore had surrendered to Japan and the Japanese stood within striking distance of Australia. With the Japanese attack on Hawaii, the relentless veracity of Nazi submarine attacks in the Atlantic, and the reports of both Japanese and German activities on United States soil, the citizens of the United States felt vulnerable.⁸ United States soil had not been invaded since the War of 1812 and Hitler was confident he could exploit this paranoia and thus Germany could “shake the American public’s confidence and upset the production and flow of war materials.”⁹

In April 1942, Adolf Hitler summoned his chief of intelligence, Admiral Wilhelm Canaris, and Colonel Erwin von Lahousen-Vivremont, head of *Abwehr II*, to the *Wolfsschanze* (the Wolf’s Lair) located near the small town of Rastenburg, Poland to begin planning a new mission. It was time for Germany to bring the war to the United States of America.

Support existed for Germany and the National Socialists in the United States. After Hitler took power in Germany in 1933, several Germans residing in the United

⁸ Pierce O’Donnell, *In Time of War: Hitler’s Terrorist Attack on America* (The New Press, 2005), 18-19.

Faber, 36-45. Keegan, 254-265. In May of 1941, Churchill told Roosevelt that British shipping losses would start to outpace new production if the U-Boat problem was not resolved. In the United States, the U-Boats successes could be seen on American beaches from oil spills, cargo and even bodies that washed up on the beaches.

⁹ Adolf Hitler quoted in Marouf Hasian Jr., *In the Name of Necessity: Military Tribunals and the Loss of the American Civil Liberties* (The University of Alabama Press, 2005), 143.

States created an organization called “Friends of New Germany.” Their mission was to promote the values and political goals of National Socialization including racial inequality. Within this organization were Germans who had become United States citizens, but their loyalty lay with Germany. They emphasized their German heritage as the Master Race, not to their United States citizenship or residence. The Friends of New Germany kept its original name until 1936, and then changed it to the German-American Bund (*Amerika Deutscher Volksbund*).¹⁰

With the threat of war, the German government made a concerted effort to have Germans living overseas return. This policy of recalling former German citizens provided additional man power to the military and offered valuable intelligence especially from those residents of the United States who returned. One of the incentives to encourage repatriation was *Ruckwanderer* (returnee, or repatriate) marks.¹¹ The returning individual gave the German government \$1,000 dollars, and in return, they received 4,000 marks. Any individual who accepted this incentive and returned to Germany agreed to remain in Germany.¹²

Germany’s intelligence organization, the *Abwehr* (defense), dated back to 1866, headquartered in Berlin, located on the *Tirpitzufer*, a tree lined street along a canal and commanded by Admiral Wilhelm Canaris. Overtime, the *Abwehr* evolved into three

¹⁰ Louis Fisher, *Nazi Saboteurs on Trial* (University Press of Kansas, 2005), 1-2.

¹¹ The *Ruckwanderer* marks worked as a form of currency that created a line of credit in Germany. A few of the eight saboteurs re-entered Germany through this program. The *Ruckwanderer* mark was a contract made with the government and this program was one way to gain German citizenship.

¹² Fisher, 2. The incentive was two-fold: first, many men were having a hard time finding jobs, Germany had jobs because of the build-up of the military and the war, the men would be able to provide for their family. And second, once the individual returned to Germany, they had to stay.

branches: Branch I oversaw espionage, Branch II oversaw sabotage and uprisings in foreign countries and Branch III took control of counterespionage.¹³

Prior to Germany's declaration of war with the United States, Germany was without a single reliable agent in the United States. The lack of operatives can be attributed to William G. Sebold.¹⁴ Although born and raised in Germany, Sebold's job required him to travel to the United States and South America to work in industrial and aircraft plants. During his travels to the United States, Sebold became a United States citizen in 1936. In 1939 he traveled back to Germany to visit family and while home the Gestapo approached him and asked him to return to the United States as a spy for Germany. The Gestapo agents informed Sebold they knew his real name (Wilhelm George Debowski or Debrowsky), they knew his maternal grandfather was a Jew and if he refused to cooperate, serious repercussions for his family living in Germany might occur.¹⁵ Sebold contacted the American Consulate in Cologne regarding the Gestapo's demands. He told the consulate that he was loyal to the United States and thus began his life as a double agent working for the United States while pretending to work for the Germans.¹⁶

The Gestapo sent Sebold to spy school in Hamburg where he learned how to microphotograph documents, learned the use of secret ink, learned how to code and

¹³ Fisher, 1.

¹⁴ Rachlis, *They Came to Kill* (Random House, New York, 1961), 13. Hollywood made a movie in 1945 about the Sebold Affair called *The House on 92nd Street*.

¹⁵ Fisher, 2.

¹⁶ *Ibid.*, 2. There was no mention of any action taken against his family once it was discovered he was a double agent. This does not mean that nothing happened to them, I was not able to find any more information in my research on his family. It is also important to note that Walter Nipkin who was also a German born yet naturalized American citizen, also helped the FBI as a counterespionage agent.

decode messages, build and operate short wave radios, and use Morse code. On February 8, 1940 he arrived in New York City with his new given name by *Abwehr*, William (or Harry) Sawyer, where he began his life as a double agent. With the help of the Federal Bureau of Investigations (FBI), he set up an office at 152 West 42nd Street where the FBI installed hidden cameras and microphones in the office to record conversations and to photograph the Nazi's and Nazi sympathizers who came to visit him. One of these recorded conversations enabled the FBI to discover the Nazi's plans to destroy the General Electric Company in Schenectady, New York.¹⁷

Sebold's office was on 42nd Street but the FBI housed Sebold in a rented house in Centerport, Long Island where they proceeded to transmit worthless information and receive details on the operations of spies in the United States. From Sebold's arrival in February 1940 until July and August of 1941, Sebold acted as a double agent enabling the FBI to monitor Nazi transmissions and actions. In early 1941, with Sebold's help, the FBI sprung the trap. The FBI arrested thirty- three Nazi spies. They brought these men to trial on September 3, 1941 and the three judge panel found them guilty two months later.¹⁸ This unexpected and sudden loss of a significant number of agents blinded the German intelligence¹⁹ and as a result the German Foreign Office gave strict orders to agents for stay out of the United States.²⁰

Hitler was furious with the loss of so many assets in such a critical location and the sudden lack of intelligence on the United States. Once Germany declared war on the United States, Hitler demanded Admiral Canaris and Colonel Edwin von Lahouson,

¹⁷ Fisher, 3.

¹⁸ Rachlis, 3.

¹⁹ Rachlis, 13.

²⁰ *Ibid.*, 13.

Chief of the Sabotage Branch in *Abweher*, to initiate operations against the United States. After the meeting, Canaris told Lahousen: “We’ll just have to do it. I know, as you know, that the whole thing is hopeless. But examine every possibility in the light of present circumstances. We have got to make some show of co-operation in this business, and at least demonstrate some good will.”²¹ The leaders of the *Abwehr* understood there was little to no chance of success of operations existed without an established network in the United States, yet they knew they had to attempt some mission or their own lives would be at risk from Hitler.

Within a week of the meeting with Hitler, Walter Kappe visited Lahousen. Kappe had come up with an idea on how to infiltrate the United States with saboteurs and even boasted he had already indentified ten men to conduct the operations.²² Kappe had been preparing for this opportunity his whole life. In 1922 he joined the *Deutsche Freikorps* organized to fight Communists and ended up as the nucleus of Hitler’s Storm Troopers. He was also a member of the illegal German Army, the *Black Reichsweher* (illegal because it went against the terms of the Versailles Treaty) for nine months before joining the newly formed Nazi Party. He roamed the country with other bands of men looking for work, the *Wandervogels* (Wandering Birds), who caused trouble to all the communities they went through. The *Wandervogels* provided the first political lessons for many men who later held positions in the Nazi Party and the Nazi Government.²³

Kappe came to America in 1925 where he found work in Kankakee, Illinois in a farm implement factory. He did not enjoy factory work and applied to be a journalist for

²¹ Fisher, 3.

²² Ibid., 3.

²³ Rachlis, 16-17.

German language newspapers in Chicago; in time he landed a job with the Chicago *Abendpost*. He became known as one to embellish articles and even tried to pass himself off as someone of higher status at parties. The paper fired him in 1930 for an offensive article about a local Jewish business man.²⁴ He then moved to Cincinnati, Ohio and became quite active in pro-Hitler groups. He and some friends evolved the idea of a single national organization built along Nazi Party lines. A national group called *Teutonia* already existed and in late 1932, *Teutonia* and the local pro-Hitler clubs came together under the name of “Friends of the Hitler Movement.”²⁵

In January 1933, the Nazi party ceased being a political movement in Germany when it came to power through the elections. That month Kappe and some of his fellow Nazi leaders called a convention of the Friends of the Hitler Movement in New York. It was in New York City that the organization changed its name to “Friends of New Germany” and the assembly named Kappe as its Press and Propaganda Chief. Three years later in 1936, America’s version of the Nazi Party became the German American Bund and Fritz Kuhn became the American Fuehrer.²⁶

As the former propaganda chief of the German American *Bund* and now the editor of the *Bund* newspaper, in 1936 Kappe launched a power struggle to lead the German American *Bund* in the United States. His attempt failed and he returned to Germany in 1937. When the war began, he joined *Abweher* and became a lieutenant. As one of the Nazi party’s first hundred thousand members, he was able to make inroads in *Abweher*. He wore the gold button, signifying his early membership in the Nazi party,

²⁴ *Ibid.*, 18.

²⁵ *Ibid.*, 18.

²⁶ *Ibid.*, 19.

which demonstrated his long time loyalty to the Nazi's. He had been a member since the 1920's when it was not certain they would come to power.²⁷

When Kappe visited Lahousen he approached Abwehr with an idea to penetrate the United States. Kappe's idea was not innovative. His plan was to use repatriated German Americans, train them as spies/saboteurs, and have them return to the United States. Kappe was a loud man and had a broad vision of the possibilities these spies could unleash on the United States, but he had no prior training as a spy on which to base his claim.²⁸ Although both Canaris and Lahousen did not think Krappe's idea would be successful, the Gestapo and Party Leaders supported it. With no other options available, Canaris and Lahousen began the program.²⁹

Aware of the Sebold incident, Kappe determined to not make the same mistakes. He would ensure the proper recruitment and training of the selectees in order to ensure the program's success. The sabotage school was located on the Quenz farm near Brandenburg, about 35 miles west of Berlin.³⁰ His plan for sabotage, Operation Pastorius, had the ultimate goal of undermining United States industrial productivity. Operation Pastorius, named by *Abwehr*, was after Franz Daniel Pastorius, the leader of the first German immigrant community in America settled in 1683. He had been the leader of thirteen Quaker families who arrived in Philadelphia and then went on to

²⁷ Dobbs, 9.

²⁸ Dobbs, 9.

²⁹ Fisher, 4.

³⁰ Fisher, 4-5. Kappe was never apprehended for his leadership and involvement in Operation Pastorius. Even after the war, Kappe was convinced the United States was trying to track him down and he even changed his last name to Konig. The FBI formally closed its investigation on Kappe in December 1946. Kappe became a trade union official in Hanover then later ran a souvenir shop outside a US Army post in Frankfurt and died in 1958.

develop a German settlement which became known as Germantown in Pennsylvania. Pastorious' group fought against slavery and helped outlaw it in other local communities. It is quite ironic the *Abwehr* chose the name for its operation after Pastorious, a man who lead a settlement opposed to slavery, and yet the Germans were proposing a Master Race.³¹

Eight men conducted Operation Pastorius: George John Dasch, Edward John Kerling, Ernest Peter Burger, Herbert Hans Haupt, Richard Quirin, Heinrich Heinck, Hermann Otto Neubauer, and Werner Thiel. The team varied in age from Haupt, the youngest at 22, to Dasch, the oldest at 38. They came from various backgrounds, some previously knew another, one had military experience, most were married, most were members of the Nazi party, one had been held in a concentration camp by the Gestapo, two were American citizens and one had a daughter. The one common thread they all had together was that they all had been long term residents in the United States.³²

The oldest of the eight, George John Dasch, was born in 1903 in Speyer am Rhein, Germany. Dasch was one of twelve children, educated in a Catholic seminary and fell in love with the United States as a young boy. At the age of 19, he stowed away on a

³¹ Fisher, 4-5. Kappe was never apprehended for his leadership and involvement in Operation Pastorious. Even after the war, Kappe was convinced the United States was trying to track him down and he even changed his last name to Konig. The FBI formally closed its investigation on Kappe in December 1946. Kappe became a trade union official in Hanover then later ran a souvenir shop outside a US Army post in Frankfurt and died in 1958.

³² George Dasch, *The Truth About the Eight Spies Against America* (Robert M. McBride Company, New York, 1959). Very little scholarly work is available about the eight saboteurs. Dasch's autobiography is the only firsthand account, but he does at times exaggerate his role and also plays down his intentions as a saboteur. Louis Fisher's *Nazi Saboteurs on Trial*, Michael Dobbs' *Saboteurs* and Eugene Rachlis' *They Came to Kill* were the best sources of information pertaining to the biographies and training of the eight saboteurs. O'Donnell, 23.

boat bound for Philadelphia. He worked in Philadelphia for one week before hitchhiking to New York City where he worked as a waiter and took night classes with other immigrants to help fit in . A few years later he and a few buddies decided to move to California and worked as waiters. In 1927 he joined the United States Army where he served in the aviation corps, at the same time he applied for U.S. citizenship. After thirteen months the Air Corps honorably discharged Dasch. For the next few years he moved around the country from St Louis, to Chicago and then back to New York City. It was in New York City that he met his wife, Rose Marie Guillie a United States citizen, and they later married in September of 1930.³³

In 1939 Dasch qualified for his United States citizenship, but he never showed up at the court house to complete the requirement to qualify as a citizen. When Dasch's mother visited from Speyer am Rheim, they found out about the nonaggression pact Germany signed with the Soviet Union. Dasch's mother rushed back to Germany and urged her son to return as well. In December 1940, Dasch informed his wife he wanted to return to Germany so they could have a better life. To do so, he would have to register as an alien in the United States because Dasch was still not a United States citizen. (Because he was living in the United States, but wanting to move back to Germany, he would have to register in the United States as an alien first in order to receive a German passport). His wife was not allowed to enter Germany, because as a United States citizen, the 1939 Neutrality Act barred her from traveling into a war zone. Dasch returned to Germany without Rose where he met fellow conspirator Werner Thiel,

³³ O'Donnell, 23-25. Fisher, 6-7. In my research most only mentioned that he joined the military, only Fisher stated specifically his service in the aviation corps. Dasch does not mention his specific occupation in his autobiography.

arriving in Berlin on May 13, 1941.³⁴ Upon arriving in Germany, he registered with the *Ausland Institut*. Shortly after his registration, Kappe found him a job at a radio station monitoring American broadcasts.

Edward John Kerling, the second saboteur, was born in Wiesbaden in 1909 and became attracted to Hitler and his policies during his youth. By 1928, he became a member of the Nazi party and one of its first seventy thousand members. In 1929, although he immigrated to the United States, he remained an active Nazi and joined the German American *Bund* without registering to become an American citizen. While living in the New York City area, Kerling worked menial jobs. In 1931 he married Marie Sichart who emigrated to the United States from Munich. After a few years of marriage, the relationship ended and they separated, but they never divorced.³⁵

In September 1939 when Germany invaded Poland, Kerling and some friends decided to return to Germany. They purchased a sail boat and were determined to make the trip across the Atlantic Ocean, but the United States Coast Guard stopped them. After this failed attempt to reach Germany, in late July 1940, Kerling took the SS *Exchorida*³⁶ to Lisbon, then flew to Rome, took a train to Innsbruck and arrived in Germany in August 1940. Because of his early support for Hitler, the Nazi's gave Kerling a job at an army listening post in France where he translated English language broadcasts coming into Germany. In March 1942, Kappe interviewed Kerling at the Ministry of Propaganda. Kappe liked Kerling because of his loyalty to the Nazi party, his intelligence, and his

³⁴ O'Donnell, 23-24. Fisher, 5-7.

³⁵ O'Donnell, 25-27. Fisher, 10-11.

³⁶ On the boat Kerling met Neubauer. Also, the author O'Donnell spells the boat as Exchordia, Fisher spells it as Exochorda.

Aryan good looks. Kappe offered him an opportunity to serve the Party and Germany and Kerling accepted the offer.³⁷

Ernest Peter Burger was the third of the eight. He was born in 1906 in Augsburg, Germany. A member of the Nazi party since the 1920's, he was present at the Munich "Beer Hall Putsch" of 1923 when the Weimer Republic sent Hitler to prison. He attended a vocational institute and worked as a machine builder. Burger was a good fighter and this attribute had landed him into some trouble in Germany. Instead of facing the German courts, he chose to leave for the United States and arrived in February 1927.³⁸

Burger worked in Wisconsin as a tool maker and later moved to Illinois where he filed to become a United States citizen. In 1929, he joined the Michigan National Guard, honorably discharged, returned to Wisconsin and joined the National Guard there. After becoming a United States citizen in 1933, he decided to return to Germany and resume his role as an active Nazi. He worked for the Chief Adjutant's Office, attached to Chief of Staff Ernst Rohm and who later appointed Burger as his aide-de-camp. Rohm was the leader of the Nazi *Sturmabteilung* (SA, Storm Troopers). On June 30, 1934, Burger turned out to be on assignment away from Rohm when Hitler approved the purge of the SA by his personnel bodyguards, the *Schutzstaffel* (SS). This night is known as the "Night of the Long Knives" and the Nazi's executed Rohm along with hundreds other SA members. Although Burger survived the Night of the Long Knives, his past association with Rohm haunted him.³⁹

³⁷ O'Donnell, 25-27. Fisher, 10-11.

³⁸ O'Donnell, 27-29. Fisher, 7-8.

³⁹ Ibid. No author tells of his time in service in either state National Guard or his specific military occupational skill

After the purge, Burger took a minor position in the party's domestic propaganda division in Berlin. While there he took night classes and graduated from the University of Berlin. He married his secretary and became acquainted with Professor Karl Haushofer, a favorite of Hitler. Professor Haushofer liked Burger and had him assigned to his tutelage. Burger wrote and analyzed material on the German dismantling of Czechoslovakia. In this report, Burger made derogatory comments about the Gestapo accusing them of harsh treatment of the population and extortion of money.⁴⁰

Burger's next assignment involved a similar study of the German occupational rule in Poland. This report made it to the Gestapo who arrested him in March of 1940, and accused him of falsifying documents. Upon conviction, the Gestapo sent him to a concentration camp for 17 months. None of his associates came to his aid for fear of repercussions.⁴¹ Eventually, after four court appearances, the Gestapo dropped the charges and on July 22, 1941 the court released him from prison. After his release, Burger became a German Army guard for British and Yugoslavian prisoners outside of Berlin. Burger's future looked bleak because the army told him he would have no chance of promotion in the army because of the negative Gestapo reports. In February 1942, Kappe interviewed Burger and in April he was released from his guard duty position and sent to the Sabotage school.⁴²

The fourth and youngest member of the team, Hans Herbert Haupt, was born in Stettin, Germany in December 1919. When he was five years old his parents immigrated

⁴⁰ Ibid.

⁴¹ The Gestapo even visited his wife (pregnant at the time) and told her that he had stolen money in Vienna. She knew this was a lie but it did not matter. Because of the constant pressure and strain on her, she had a nervous breakdown and a miscarriage

⁴² O'Donnell, 27-29. Fisher, 7-8.

to Chicago and at the age of ten, he became an American citizen. He went to public school but dropped out his sophomore year to become an optician's apprentice. After dropping out of school, several events occurred that changed his initial plans: first his girlfriend Gerda Stuckmann Melind, who happened to be a widow, became pregnant. Second, because he was a United States citizen the United States required Haupt to apply for the draft. He chose to avoid the responsibilities of both the draft and the girlfriend. He told Gerda he was taking a trip to California and told his mother he was taking a vacation. Instead, Haupt panicked and went to Mexico. In Mexico, it was difficult for Haupt to find work without a work permit. He met Hans Sass who took Haupt with him to the German consulate and the officials there told them they could find a job at a Japanese monastery and the consulate would pay their fare back to Germany.⁴³

In July 1941, Haupt and a few other Germans landed in Yokhama, Japan for work and discovered they would not be working in a monastery but a labor camp. They tried to rebel, but the German consulate told them that they had to earn a living serving the German war effort either here or somewhere else. He and a couple of his friends qualified as seamen and the consulate sent them on a German freighter back to Germany. Once in Germany, Haupt, tried to join the *Luftwaffe*. Walter Kappe found out about Haupt and asked him to come to Berlin to discuss his return. During their second meeting, Kappe signed Haupt as a member of the Saboteur School.⁴⁴

The fifth of the eight conspirators was Richard Quirin who was born in 1908 in Berlin. He attended trade schools and became a machine's apprentice. In 1927 jobs were scarce, so he borrowed money from his uncle and came to the United States. He lived in

⁴³ O'Donnell, 29-31. Fisher, 13.

⁴⁴ O'Donnell, 29-31. Fisher, 13-14.

Schenectady, New York. He worked with an uncle as a tinsmith and took night classes in English. Later, General Electric hired him in maintenance and soon after he applied for his American citizenship.⁴⁵

After three years, General Electric laid him off work. He then moved to New York City where he worked as a house painter. He joined the German American *Bund* and decided against becoming an American citizen. In 1939, he discovered the German government was paying *Ruckwanderer* marks for Germans to return. His wife, Anna Sesselmann whom he married in 1936, wanted to return and with the promise of work, Quirin and his wife returned to Germany for good. Upon his return, he worked for *Volkswagenwerk* in Braunschweig and the couple had a daughter.⁴⁶

The sixth member, Heinrich Heink, was born in 1907 in Hamburg. Heink attended trade schools and left Germany for the United States in 1927 in search of better jobs. Heink worked on the Hamburg-American Line's SS *Westphalia* but jumped ship in New York which made his stay in the United States illegal. Because he was in the country illegally, he associated and socialized with other German nationals and in 1933 he married Anna Isabella Goetz, a fellow German.⁴⁷

In 1934, Heink joined the German American *Bund* and became a Storm Trooper. Shortly after he joined, all non-U.S. citizens were ordered to leave the organization. While he was a member, he heard Kappe give four or five speeches. Heink still attended the social functions and applied for membership in the Nazi party. In 1939, American Machine Tool Company employed him but talk of rumors circulated that American

⁴⁵ O'Donnell, 31. Fisher, 9-10.

⁴⁶ Ibid.

⁴⁷ O'Donnell, 31-32. Fisher, 9.

companies with government contracts could not employ non-United States citizens. Armed with this information, Heink and his wife returned to Germany, and he started work at the *Volkswagenwerk* factory in Braunschweig as a tool maker where he met Richard Quirin.⁴⁸

In October 1941 Heink went to the *Ausland Organization* (AO) to inquire if he could return to America. Kappe came to the AO and met with men, like Heink and Quirin, who had spent time in the United States. Later, Richard Quirin came to Heink's house and asked him if he would be interested in being a part of a team to help stop or slow down the industrial production in the States. Heink agreed and shortly after their meeting he received orders from Kappe to report to the Sabotage School at the Quenz farm.⁴⁹

The seventh recruit, Hermann Otto Neubauer, was born in Hamburg in 1910 and immigrated to the United States in 1931 when he was 21. In 1939, Neubauer joined the Nazi party, became a member of the German American *Bund*, married to Alma Wolf and met Kerling on the fateful boat trip that was stopped by the United States Coast Guard.⁵⁰ Neubauer and his wife returned to Germany in 1940 and almost immediately upon his return, he was drafted in the German Army. The Army sent him to the Russian Front where he received wounds to one of his eyes, his face, and a leg. During his time convalescing from his wounds, officials began to ask him about his time in the United States. While hospitalized in Vienna, he received a letter from Kappe asking if he was

⁴⁸ Ibid.

⁴⁹ O'Donnell, 31-32. Fisher, 9.

⁵⁰ O'Donnell, 32-33. Fisher, 11-12.

interested in going back to the States on a special assignment. After he left the hospital, he headed back to Hamburg to visit his family and then left for the sabotage school.⁵¹

Werner Thiel was the eighth and final recruit. He was born in 1907 in Augsburg and immigrated to the United States in 1927. He settled in Detroit and initially worked as a tool and die maker for the Ford Motor Company and then later worked for Detroit Bodies. The work was not steady so he traveled the United States taking odd jobs in states such as Michigan, Indiana, California, Pennsylvania, and Florida.⁵²

In 1933, he joined the Friends of New Germany, became active in the German American *Bund* and then joined the Nazi Party in 1939. In March 1941 he sailed to Tokyo on the *Tatuta Maru* where he met Dasch. He knew Burger from working as a tool and die maker in Detroit and had attended one of Kappe's speeches in Chicago in 1934. Upon his return to Germany, he worked as a small screw machine setup man from July 1941 to April 1942. During this time, he attended an *Ausland* group meeting and met Dasch and Kappe. A few days later he met Dasch again at a bar where Dasch asked him to join a group of people returning to the United States. Thiel agreed to the plan and left shortly thereafter for sabotage school.⁵³

The training of the saboteurs lasted only three weeks at the Quenz Farm, located in a wooded section outside Brandenburg, Germany. Each day started at 7AM and consisted of calisthenics, classroom instruction consisting of lectures and laboratory

⁵¹ O'Donnell, 32-33. Fisher, 11-12.

⁵² O'Donnell, 33-34. Fisher, 12

⁵³ O'Donnell, 33-34. Fisher, 12. Of notable interest, Thiel was the only candidate that had been wounded and saw some form of actual combat. He also had one brother killed in action and another brother who lost his left eye in combat. It would not have been uncommon for Thiel to be experiencing some form of Post Traumatic Stress Disorder and/or some trepidation on the thought of returning back to frontline action.

work, and long sessions spent reading American periodicals, and focusing on American slang and recent news events. Once training started, Kappe broke the saboteurs into groups and gave them training missions on the farm, in order to expose them to the realistic conditions designed to prepare them for their future missions in the United States.⁵⁴

Group 1

<u>Original Name</u>	<u>Alias for Operation Pastorious</u>
George John Dasch*	George John Davis
Ernest Peter Burger	Ernest Peter Burger
Heinrich Harm Heink	Henry Kaynor
Richard Quirin	Richard Quintas

Group 2

<u>Original Name</u>	<u>Alias for Operation Pastorious</u>
Edward John Kerling*	Edward J. Kelly
Herbert Haupt	Lawrence Jordan
Hermann Neubauer	Henry Nicholas
Werner Thiel	William Thomas

*indicates Group Leader

54 Fisher, 14-17. The saboteurs would have to be able to improvise fuses and explosive devices from what they could build and purchase in the United States after they expended the equipment they would initially bring with them. They would have to depend on what they learned at the school in order to be successful.

Their training missions would be to destroy a bridge or a factory (simulated by a railroad track or a shack) and to succeed without being detected. It was then up to each respective group to develop an infiltration scheme, decide what type of detonation and explosive to use to meet the mission requirements and then their exit plan. The level of difficulty increased on each training mission in order to test their capability and their knowledge.

The group's classes and practical work ended on April 30, 1942 and each were given time for vacation from May 1 to May 12. During the next three days they were given further instructions and tours of aluminum plants, railroad yards and canal locks in the Berlin area. On May 20 all the instructors and students gathered in a private room at the *Restaurant Tiergarten* in Berlin for a farewell banquet and spirits appeared to be high, but not among the individual saboteurs. On May 22, the eight saboteurs along with Kappe boarded a train for Paris for some more relaxation. The group then boarded a train for Lorient, France on May 25 to be taken to the submarines.^{55/56} Kappe instructed them to wear their German uniforms onto the American shore, as in the event that they were captured immediately, they would be treated as prisoners of war rather than as spies. Once they were on the beaches and undetected, they were to change into civilian clothes,

⁵⁵ Fisher, 18-20. Keeping in mind that the training for the candidates was only three weeks long and with only one having any basic military training, and no form of infrastructure (safe houses, point of contact to meet them at their arrival, emergency extraction plan, etc.) one would have to wonder how serious was the commitment and how confident of success did the German's have with Operation Pastorious?

⁵⁶ O'Donnell, 56-57. Prior to their departure each team was given \$80,000 in American cash. The problem was that the bills were in sequential order, which would bring unnecessary attention to them once they started to use the money. Some even had oriental block symbols stamped on them because they were circulated in Japan and this money was of no use as well. Another problem was that they were issued gold certificates to use. These certificates were pulled out of circulation in 1933. If they tried to use these, they surely would have brought attention to themselves.

place their uniforms into a bag that would go back to the submarine. All eight of the men knew that if they were caught, they would be treated as spies and most likely executed.⁵⁷

On May 26 1942, Kerling's group of Haupt, Neubauer and Thiel became the first to begin their mission to the United States. Their group was the first to depart because they would be going the furthest distance, to Florida, the second group headed to New York. As they readied themselves, they changed into their uniforms and brought on board the submarine their civilian clothes, sea bags, shovels, four crates of explosives and fuses, and their money belts. They loaded onto U-584, a type VIIC submarine and commanded by Lieutenant Commander Joachim Deecke. Days later, when they departed the submarine, they would be in United States sovereign waters.⁵⁸

The second group, made up of Dasch, Burger, Heinck and Quirin departed on the evening of May 28. They boarded U-202, also a type VIIC submarine, commanded by Lieutenant Commander Hans-Heinz Lindner. Their destination was Long Island, New York which would take the crew fifteen days to reach.

THE INVASION

On June 12, 1942 Dasch's group landed first on United States soil at Amagansett, Long Island. With the help of two sailors from the submarine, the four men rowed ashore in a rubber boat carrying with them four boxes of explosives and other equipment for their mission. After a brief time on the beach, the group encountered John C. Cullen, a Coast Guardsman.⁵⁹

⁵⁷ Louis Fisher, *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (University Press of Kansas, 2005), 92.

⁵⁸ O'Donnell, 56-57.

⁵⁹ Dobbs, 92-94. Coast Guard stations were approximately six miles apart from one another. Between each station was a navigation beacon. These Coast Guardsmen

Cullen asked them who they were, and Dasch told him they were fishermen from South Hampton who ran aground. While Cullen was chatting with Dasch, he noticed others in the fog just a short distance away. Another individual came up to Dasch and said something to Dasch in a language that Cullen did not understand. Dasch yelled at the second person in English telling him to shut up. It was at this point that Cullen believed his life might be in danger. Dasch then told Cullen to forget what he had just seen and bribed Cullen with \$300. With the money and his life still in hand, Cullen left the area and started back to his post to report what had just happened.⁶⁰ During the time Dasch and Cullen were talking, the other men had buried the four boxes along with their German uniforms and other items in the sand.⁶¹

Cullen finally made it back to his station and reported the incident to Boatswain's Mate Carl R. Jenette. Jenette counted the money that Cullen received from Dasch then telephoned the station's commander, Warrant Officer Warren Barnes, to brief him on the event (the money was the only proof of Cullen's story). After his report, Jenette armed Cullen and three other men and headed towards the location of Cullen's encounter with

required to patrol the beaches would walk from their respective stations to the navigation beacon and walk back. To finish the six mile circuit would take approximately two hours to complete. Base upon this information, the chance of Dasch's group to run into someone when they came ashore, giving them approximately 20 minutes on shore, was one chance in six.

⁶⁰ It would not be implausible for fishermen to be stranded since the area was a fishing community. Cullen did not speak German but he did know it was not English. When he saw the figures moving boxes onto the beach and how Dasch seemed nervous, he knew his life was in danger, so he took the bribe. When he returned to the headquarters, the amount was only \$260. The prearranged order for the group if they encountered someone was to take them prisoner or kill them, put them into the rubber boat with the accompanied sailors, and bring them to the submarine, not to bribe the person and let them report what just happened.

⁶¹ The group was supposed to send their uniforms and other incriminating items back to the submarine with the sailors when they returned.

Dasch. By the time they arrived, Dasch and the group had departed but they could smell fuel and hear an engine noise coming from the ocean. As they turned and looked, just off the coast, they could make out a submarine in the ocean. The group conducted a search of the area and within a short time, they discovered the boxes and uniforms left behind by Dasch and his group.⁶²

Dasch and his group made it to a train station and purchased tickets to New York City where they broke up into groups of two: Dasch with Burger and Quirin with Heink. After less than 48 hours into their assignment, Dasch started dropping hints to Burger on his doubts on the success of their mission. Later, Dasch told Burger he planned to turn himself in to the FBI and divulge to them the entire plan. After he gained Burger's confidence, he called the New York FBI office and spoke with agent Dean McWhorter. Dasch told McWhorter he was Frank Daniel Pastorious, recently from Germany, and he wanted McWhorter to know that he was going to get in touch with the FBI office in Washington D. C. on Thursday or Friday.⁶³

On Thursday, Dasch took the train from New York to Washington D.C. and checked in the Mayflower Hotel. The next morning, Friday June 19, he telephoned the FBI and talked to agent Duane L. Traynor. Dasch divulged that he was the leader of German saboteurs. Traynor knew about the discovery of the explosives and equipment

⁶² Rachlis, 99-103. The Coast Guardsmen also found the uniforms, German cigarettes and German brandy. The reason they could hear the submarine's engines was because the submarine had ran around onto a sandbar. The commander of the submarine was prepared to scuttle the boat but was finally able to free her after about three hours of attempts. By this time, others had also seen the sub, reported to the army and other individuals, but none of their calls were taken seriously. The actions of the first and second group are covered quite extensively here in Rachlis, and also in Dobbs, Fisher and O'Donnell.

⁶³ Dobbs, 119-126.

on Long Island and the manhunt for the missing men. Traynor told Dasch to stay in his room and he would be there to pick him up. The agents went to the hotel, picked up Dasch and brought him back to the Department of Justice headquarters. It was at the headquarters, where Dasch told the FBI everything: names of the saboteurs, the second group coming ashore vicinity of Ponte Vedra Beach, Florida, the location of the other saboteurs in his group, their mission and their target locations.⁶⁴

On June 16 1942, the second group reached Ponte Vedra, Florida. They reached shore sometime after midnight without any problems, buried their equipment, and made their way to Jacksonville, Florida to a train station to purchase tickets. Thiel and Haupt took a train to Cincinnati, with Haupt continuing on to Chicago. Kerling and Neubauer took a train to Cincinnati as well, Kerling went to New York City with Thiel and Neubauer went to Chicago.⁶⁵

On June 20, from Dasch's information, the FBI arrested the other members of Dasch's group in New York City. Burger knew of Dasch's plan to tell the FBI about their mission, and waited in his room for the FBI to come to him. The FBI apprehended Heinck and Quirin at different locations and took them to the federal courthouse in lower Manhattan. On June 23, the FBI arrested Kerling and Thiel in New York City and Haupt and Neubauer in Chicago on June 27.⁶⁶

Within 15 days of the first group of saboteurs landing, all the men and equipment had been apprehended and seized. Germany's planned mission of industrial sabotage on the United States, Operation Pastorious, had been a total failure for Germany and Hitler.

⁶⁴ Dobbs, 129-142.

⁶⁵ Dobbs, 154-156

⁶⁶ Dobbs, 155-156.

Hitler counted on instilling panic on the American populace, but instead helped unite them on the danger of future German attacks. Hitler's miscalculation not only sealed the fate of the German Reich but the fate of his eight saboteurs. The difference between the saboteurs' and the Reich would be the eight saboteurs' fate would be in the courts of the United States of America.

“I Won’t Give Them Up”
-Franklin D. Roosevelt to
Francis Biddle¹

CHAPTER TWO

THE MILITARY TRIAL

In the subsequent handling of the case of the German saboteurs, the Director of the Federal Bureau of Investigations J. Edgar Hoover placed the Bureau’s image and reputation before the interests of the President, the military and the American people by withholding key information and the FBI’s role in the apprehension of the eight saboteurs. Because of the lack of accurate information, the President announced a Proclamation on the handling of the German saboteurs and convened a secret military commission without the complete knowledge of the evidence due to Hoover’s manipulation. Because of Hoover’s deception and Roosevelt’s movement towards a secret trial, Hoover and Roosevelt assured themselves a rendezvous with the United States Supreme Court.

For eight days after his arrest on June 19, 1942, Dasch dictated his story to the FBI agents. The FBI and other government and military organizations asked Dasch questions regarding Operation Pastorious, German military intelligence, the Quenz Farm training, German submarines, and anything of interest in the war against Germany.

¹ Francis Biddle, *In Brief Authority* (Doubleday and Company Inc, New York, 1962), 331.

Dasch was determined to tell his side of the story and his interview ran 254 typescript pages.²

Throughout the interrogation of Dasch, the FBI agents repeated their assurance to Dasch and the saboteurs they would be tried in civilian courts. The agents also assured Dasch he would be pardoned and his role kept secret in order to protect him and his family.³ In order to keep Dasch's role secret and his family safe, the FBI told Dasch he would have to spend some time in prison for appearances, not because of his guilt, but to ensure his and his family's safety.⁴ The FBI agents also told Dasch his case would go before the federal court and he would appear before a federal judge when he entered his plea of guilty.⁵

² Dasch, 127. Dasch, in his autobiography, stated his confession was 265 type written pages, but the trial transcripts states 254. This confession started on June 19, 1942 and ended June 25, 1942.

Joel Samaha, Sam Root, Paul Sexton. "Transcript of Proceedings before the Military Commission to Try Persons Charged with Offenses against the Law of War and the Articles of War, Washington D.C., July 8 to July 31, 1942." (Minneapolis: University of Minnesota, 2004) 602. URL: www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm Dasch's interrogation would be read in its entirety during the trial, pages 1026-1495. The reading would take the afternoon of July 15, the entire day of July 16, and the morning of July 17.

Subsequent notes from the Trial transcripts will be entitled; Trial transcripts.

³ Trial transcripts, p 541-542. FBI agents answered on the stand during the trial that Dasch was promised a Presidential pardon. David Alan Johnson, *Betrayal: The True Story of J. Edgar Hoover and the Capture of the Nazi Saboteurs Captured During WWII*. (Hippocrene Books Inc, New York, 2007), 219.

During the interrogation of Dasch by the FBI, a pardon was not offered until June 27, 1942. Trial transcripts 549-551.

Even as late as 1944, Colonel Carl Ristine, his former defense attorney, told Dasch the War Department would grant Dasch a Presidential pardon after the war.

⁴ Trial transcripts p 541-542. Cross examination of FBI agent Mr. Wills by defense counsel Colonel Ristine.

⁵ FBI agent Mr. Wills answer to Colonel Ristine during cross examination. Trial transcripts, 545-546. FBI agent Mr. Thomas Donegan during cross examination by Colonel Ristine, Trial transcripts, 677.

On June 27, 1942, the FBI informed Dasch he would be indicted and tried before a federal court and Dasch agreed to plea guilty on the agreement his role would be kept secret. Yet, on June 28, Dasch saw an agent reading a news paper through the slit of his cell door. Dasch's photo was on the front page and news of the capture of the eight saboteurs appeared in the *New York Times*. The headline read, "FBI SEIZES 8 SABOTEURS LANDED BY U-BOATS HERE AND IN FLORIDA TO BLOW UP WAR PLANTS." The article credited the capture of the eight saboteurs to the FBI.⁶ The *New York Times* article mentioned Coast Guardsman Cullen, but claimed the FBI as the federal agency responsible for the apprehension of the saboteurs, no one else.⁷ Dasch believed he had been betrayed and withdrew his plea of guilty. He reaffirmed his innocence and decided to stand trial in a civil court in order to make a full account of what happened.⁸

After Dasch's announcement, the Roosevelt Administration leaned toward trying the saboteurs by military commission in order to keep the trial secret and to prevent Dasch from telling the press that he turned himself into the FBI, not the FBI apprehending him. Dasch's revelation would have caused bad publicity for the FBI and

⁶ Hitler also found out about the failure of Operation Pastorious on June 28 at the *Wolfs Lair*. Upon his notification he became livid and summoned both Canaris and Lahousen to him. When they arrived Hitler chastised them and went on a tirade complaining about an American propaganda victory.

⁷ Fisher, "Nazi Saboteurs on Trial," 33. Also, it is interesting to note, even though Attorney General Francis Biddle knew the fact that Dasch turned himself into the FBI, Biddle in his autobiography, "In Brief Authority," maintained the lie that the FBI apprehended all the saboteurs from their diligent investigative work. His exaggeration of Hoover's, the FBI's actions, and his disregard of the facts during the time of his writing is quite incredulous even more so because Biddle even cross examined the FBI agent during the trial where the agent stated under oath while on the stand, that Dasch turned himself in to the FBI. Also, Dasch's published his autobiography two years earlier detailing his action of turning himself in to the FBI and turning in the rest of the saboteurs.

⁸ Dasch, 127-150. Fisher, 39-40.

informed the German Government about the ease the saboteurs had in infiltrating the United States. The administration had toyed with the idea of a military tribunal⁹, but Dasch's plan of going public swayed the administration to a military commission. The Administration had two major ulterior motives for desiring a military commission:

First, to maintain the secrecy of the ease in which the saboteurs infiltrated the United States and cover up the truth on how the FBI apprehended the Germans. Hoover led the American people to believe the FBI apprehended and interrupted an attack on the United States. Along with the FBI, the federal government did not want the American people or even the Germans, to know how easily the German U-Boats dropped off saboteurs on to the country's shores.¹⁰ The revelation of Dasch turning himself in and the U-Boat's unrestricted infiltration would have been a major embarrassment to the FBI, the Coast Guard, the United States Navy, and to the Roosevelt Administration. If the public had known the whole truth, the federal government would have had to explain to American people the lack of security on its own shores and the FBI would have had to explain the cover up on the apprehension of the saboteurs.

J. Edgar Hoover discovered what happened at Amagansett not from his FBI agents, but from the local police chief. He sent his agents to the location to confiscate all the evidence (explosives, uniforms, and shovels) and took all precautions to maintain the landings a secret. First, Hoover contacted Attorney General Francis Biddle. He announced to Biddle his intention of keeping the affair secret and he made it clear he

⁹ The United States had not commissioned a military tribunal since the Lincoln assassination in 1865.

¹⁰ Biddle, 328.

would not alert the military. Hoover feared the larger the number of people/organizations knowing about the saboteurs, the harder to keep it secret.¹¹

Biddle agreed to Hoover's request, but wanted President Roosevelt's approval first, which Roosevelt gave.¹² Hoover first contacted Roosevelt directly on June 16, 1942 via a short memo. The memo detailed the thirteen items found inside the crate from Dasch's group, mentioned items received from the Coast Guard but did not mention the German brandy or the packet of German cigarettes found on the beach as well.¹³

Hoover controlled all the information received by the press, the politicians and the American people. From the beginning, Hoover informed Biddle he had control of the investigation and who would be notified concerning the case. Hoover did not tell the media what to report, but he did have the power to influence what they reported through updates and reports. Politicians jumped on the band wagon and made their feelings

¹¹ Johnson, 123-124. This was a military matter as well. The saboteurs landed via German U-Boat which crossed across the Atlantic Ocean evading both the British and US navies. At the time of the writing of the memo, June 16, Kerling's group had not landed in Florida which landed on June 17, 1942.

Dobbs, 202. U-Boat 202's story did not end with its drop off of the saboteurs at Amagansett, New York. On June 22, just nine days after their narrow escape from the sand bar, U-Boat 202 sunk the Argentinean *Rio Tercero* a 4,900 ton vessel. On June 30, U-Boat 202 struck again and sank the 5,900 ton American vessel, *City of Birmingham* off Cape Hatteras. 381 passengers were on board but only nine people were killed.

¹² Biddle, 327.

¹³ Johnson, 124-125. After the last of the saboteurs were captured, Hoover submitted a report to Roosevelt and stated the leader of the group, Dasch, had been apprehended by the FBI on June 22 at New York City. Dasch turned himself to the FBI in Washington D.C. on June 18. Hoover chose to leave out vital and factual information from Roosevelt, and later the media, to shroud his plan for the FBI to take all the credit on the capture of the German saboteurs. The President honestly believed, because Hoover was the person giving the President his information, all eight saboteurs were dedicated saboteurs bent on the destruction of the American industrial complex. Because of Hoover's dishonest reporting, Roosevelt had no knowledge that Dasch turned himself in and Burger helped apprehend the others in his group. The President would not know the truth until he read the trial transcripts. From my research, I did not find if Roosevelt confronted Hoover over his lack of forth coming with the facts about the saboteurs.

known as well. For example: Representative Carl Vinson (GA-D) stated, "They ought to be shot, since they are clearly spies." Senator Tom Connally (TX-D), chairman of the senate foreign relations committee said, "The severest penalty should be inflicted on these men, and they should be promptly tried." The *New York Times* published a poll showing, "Americans everywhere were demanding the death penalty for the audacious criminals." *Life* magazine's headline on the capture of the saboteurs was: "THE EIGHT SABOTEURS SHOULD BE PUT TO DEATH." These stories all ran prior to the start of the trial.¹⁴

During this time of the capture of the saboteurs, American's civilian morale was low. The news coming from the war front was not positive and bad news added fuel to the American people's fire for revenge. Pearl Harbor was fresh on American's mind. The Japanese military ran rampant throughout the Pacific. Hong Kong and Singapore surrendered and the Japanese occupied the Philippines. Photos of American soldiers from the Bataan Death March appeared in the papers. The American military produced a victory with the Battle of Midway in June, but news from the European theatre dampened the success. The German Army appeared unstoppable in Russia and North Africa and the German U-Boat attacks throughout the Atlantic Ocean seemed unstoppable.

The second reason for preferring a military trial was based upon the maximum penalty the saboteurs could receive if tried in civil court versus a military trial. If the saboteurs were tried in civil court, the maximum penalty each could receive was thirty years for sabotage. The government was not confident they could gain a conviction

¹⁴ Rachlis, 172-174. Johnson, 155-156. An example of Hoover's influence over the control of information to the public and the military, when Dasch first met his lawyer Colonel Ristine, every thing Ristine knew about the case came from the newspapers and radio, not from the government or the military. Ristine learned from Dasch about Dasch turning himself in to the FBI, not the FBI apprehending him.

against the saboteurs for sabotage because they had not committed sabotage prior to or during their capture. But in a military tribunal, the saboteurs could be tried in secret, tried as spies, and the government could seek the death penalty as punishment.¹⁵

Attorney General Francis Biddle told the President the saboteurs had not committed any act of sabotage. He continued to state the indictment for “attempted sabotage would not have sustained in a civil court on the ground that the preparations and landings were not close enough to the planned act of sabotage to constitute attempt. If a man buys a pistol, intending to murder, that is not an attempt at murder.”¹⁶ The federal law covering conspiracies to commit crimes applied and the maximum number of years for conspiracy to commit sabotage was three years.¹⁷

Biddle was a descendent of Colonel William Randolph who had come to Virginia in 1673 and whose son had married Pocahontas. In 1909 Biddle graduated from Harvard College and in 1911 he graduated from Harvard Law School then served as the law clerk to Supreme Court justice Oliver Wendell Holmes Jr. in 1911-1912. Biddle served during World War I and, after his military service, he started a successful law practice in Philadelphia, Pennsylvania, for twenty years. He then served in the United States Attorney General’s office and had a reputation as formidable and incorruptible. Roosevelt appointed Biddle to the United States Court of Appeals for the Third Circuit in

¹⁵ Biddle, 328.

¹⁶ Ibid., 328.

¹⁷ The Judge Advocate General Army Major General Myron C. Cramer reached the same conclusion in a June 28, 1942 memo to Secretary of War Stimson. Cramer concluded the district court could impose a sentence of two years and a fine of \$10,000 for conspiracy to commit a crime. The Germans could also be punished for violating immigration laws and custom laws.

1939. In 1940, Roosevelt selected Biddle to become the United States Solicitor General and in 1941, appointed him as the United States Attorney General.¹⁸

On June 30, President Roosevelt disclosed to Biddle his thoughts on the subject in a secret memo, "Offenses such as these are probably more serious than any offense in criminal law."¹⁹ Roosevelt and Biddle knew military trials could be held in secret, military trials offered greater flexibility, and a military tribunal possessed the power to impose the death penalty.²⁰ If the saboteurs were tried by civil courts, six of the eight could not be executed because of the conspiracy charge. The other two saboteurs, Burger and Haupt, could be executed; but they would have to be charged with treason and found guilty, since they were still United States citizens.²¹ Biddle knew the Administration could choose between three options: first, treat the Germans as prisoners of war and imprison them for the duration of the war; second, try them in a civilian court for sabotage offenses or, third and finally, establish a military tribunal that could impose the preferred and desired punishment pursued by the President; the death penalty.²²

¹⁸ O'Donnell, 71-72.

¹⁹ Michael Belknap, "The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case". *Military Law Review, Department of the Army Pamphlet 27-100-89*, (Summer 1980) 63.

²⁰ Belknap, 63-64. Biddle, 329-331.

²¹ Fisher, 40. Belknap, 63. In Biddle's autobiography, Biddle includes a memo from Roosevelt dated June 30, 1942 summarizing his conclusions as the Commander in Chief (he did not state President) on the saboteurs and thoughts on what to do. His first thought was that the two American citizens (Burger and Haupt) were guilty of high treason and tried by court martial. He later stated they were surely guilty and the death penalty is almost obligatory. His second thought was on the other six saboteurs. He stated since they came here in German uniforms yet apprehended in civilian clothes, this is an absolute parallel of the case of Major Andre in the Revolution and of Nathan Hale, and they were both hanged. 330.

²² O'Donnell, 126-127. Biddle knew he did not have to treat the Germans as POW's since they were apprehended in civilian clothes; a pure violation of the law of war in which the United States and Germany were both signatories to the various treaties of the time that defined the treatment of combatants and non-combatants. The Administration still could

On late afternoon, Sunday, June 28, 1942, Biddle called Secretary of War Henry L. Stimson to schedule an appointment for Monday to decide whether to try the saboteurs in a civil or military court. On Monday, Biddle told Stimson about his talks with the President and Major General Myron C. Cramer, the Judge Advocate General of the Army, and recommended the saboteurs turned over to the military for a military court. Biddle further suggested that instead of a court-martial, the government should appoint a special military commission with Stimson serving as the chairman.²³

On June 30, 1942, Biddle wrote a memo to Roosevelt to set up the rudiments of a trial by military commission. Biddle stated that the advantages of the commission were its ability to be swift in its ruling and the ability to impose the death penalty.²⁴ Biddle stated his concern about the possibility of a review by civil courts so he recommended

have pursued this course of action if they chose to. The second option required open courts and the punishment would not be as harsh as the Administration felt the saboteurs deserved nor would the death penalty be easily had. The third option Roosevelt preferred. The military tribunal would allow the President to appoint generals under his command, authorize the death penalty, justice would be swift, not handcuffed to the traditional rules of evidence and the trial could be held in secret.

²³ Biddle, 331. Fisher, 41-42. In Biddle's autobiography, Biddle stated he urged the President to appoint him as the prosecuting official. He took this time to point out Major General Cramer had never briefed before the Supreme Court and told the President, "We have to win in the Supreme Court, or there will be a hell of a mess." The President replied, "You're damned right there will be, Mr. Attorney General." Biddle led the prosecution and Cramer performed a backup role. Secretary Stimson did not like the fact that a civilian was prosecuting a military case and did not like how it looked that the United States Attorney General had the time to prosecute this one case of "little national importance." Stimson surmised Biddle was looking for personal publicity for himself.

²⁴ A civil court could only impose a death penalty for treason and certain espionage laws. Biddle and the Administration concluded the saboteurs would not be convicted of either in a civil trial because of the difficulty of proof as stated earlier. From the very beginning of the apprehension of the saboteurs, the Administration only talked of wanting a death sentence verdict. In all my research, no other possibility or outcome was mentioned.

language to deny the Germans access to them. He acknowledged it had been tradition to deny our enemies access to our courts in time of war.²⁵

Roosevelt and Biddle knew from the beginning of their deliberations that, whether to pursue a civil trial or military trial, the trial would most likely be decided by the Supreme Court. Biddle's main reason for this belief was the Supreme Courts *Ex Parte Milligan* decision in 1866.²⁶ But the President made his intentions clear to Biddle when he said, "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?"²⁷

²⁵ Fisher, 42-43.

²⁶ The Milligan case arose during the Civil War. In 1864 military authorities arrested Lambdin P. Milligan, a United States citizen and resident of Indiana, on charges of conspiracy. A military tribunal found Milligan guilty and sentenced him to be hung. He presented a petition of *habeas corpus* to a federal judge asking to be discharged because the military did not have jurisdiction over him. He argued he was entitled to a jury before a civilian court because he did not reside in any of the rebellious states, there were no hostile military operations going on there in Indiana, he was not connected with any armed forces on either side of the war, the civilian courts were open, and he was not a prisoner of war. By the time the Supreme Court heard the case, the Civil War had ended. The Court ruled that the laws and usages of war can not be applied to citizens in states where the civilian courts are open and their process unobstructed. George T. Schilling. "Constitutional Law: Saboteurs and the Jurisdiction of Military Commissions." *Michigan Law Review Vol 41, No 3*, (Dec, 1942), 493.

For a concise yet brief summary of *Ex Parte Milligan* see: Michael Grossberg and Christopher Tomlins. "The Cambridge History of Law in America: Volume II, The Long Nineteenth Century (1789-1920)." (*Cambridge University Press, 2008*) 579-585.

²⁷ Biddle, 331. Roosevelt understood the significance of his proclamation, *habeas corpus* and trying civilians. At the signing of his proclamation, he stated to his confidential secretary William D. Hassett, "This does not suspend the writ of *habeas corpus*, but it does deny access to the civil courts of certain described persons." Rachlis, 175.

THE PROCLAMATION

On July 2, 1942, less than a week after the apprehension of the final saboteurs, President Roosevelt issued Proclamation 2561 entitled "Denying Certain Enemies Access to the Courts of the United States," creating a military tribunal to try the German Saboteurs.

It read:

Whereas, the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage, or other hostile or warlike acts, should be promptly tried in accordance with the Law of War;

Now, THEREFORE, I, Franklin D. Roosevelt, President of the United States of America and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution and the statutes of the United States do hereby proclaim that all 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 or any territory or possession thereof, 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 law or war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such 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, or of its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.

Also on July 2, Roosevelt issued a military order appointing the members of the military commission, the prosecutors and the defense counsel. Four major generals and three Brigadier Generals composed the commission: Major General Franck McCoy (President of the commission), Major General Blanton Winship (former Judge Advocate General), Major General Lorenzo D. Gasser (formerly Deputy Chief of the Army), Major

General Walter S. Grant (former Third Corps commander), Brigadier General John T. Lewis (career artillery officer), Brigadier General Guy V. Henry (cavalry officer), and Brigadier General John T. Kennedy (Medal of Honor recipient).²⁸ The order directed Biddle and Cramer to act as the prosecution and assigned Colonel Cassius M. Dowell and Colonel Kenneth Royall to serve as defense counsel.²⁹

Roosevelt directed the commission to meet on July 8, 1942, or as soon as is practicable. The commission would “have power to and shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it.” The order authorized it to admit any evidence, which of the opinion of the president, Major General McCoy, would have, “probative value to a reasonable man.” The order required the “concurrence of at least two-thirds majority of its members” for conviction or the imposition of any sentence. The order also required after the proceedings, the trial record should be sent to the President for the appropriate action thus ensuring there would be no appeal except to the Commander in Chief himself.³⁰

²⁸ O’Donnell, 143-144. To be a on a military commission or even a court martial, no legal experience or background is required.

²⁹ Fisher, 44. O’Donnell, 128. Stimson selected the members of the commission on June 30.

³⁰ Belknap, 65. The military order departs from the Articles of War with regard to the votes needed for sentencing. Under the Articles, and in a court martial, a death penalty requires a unanimous decision not two-thirds.

Roosevelt’s order to have the record of the trial, including the judgment or sentence, transmitted directly to him also violated Articles of War 46 and 50 ½, any conviction or sentence was subject to review within the military system, including the Judge Advocate General’s Office. With the Judge Advocate General part of the Prosecution and the President the final authority, there was no appeal option to the defense.

On July 3, 1942, the FBI delivered the eight saboteurs into the custody of the Provost Marshall of the Military District of Washington and the following charges were preferred against them: "1. violation of the law of war; 2. violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy; 3. violation of Article 82, defining the offense of spying; 4. conspiracy to commit the offenses alleged in the foregoing charges."^{31/32}

Roosevelt's reference to the "law of war" was critical. If Roosevelt would have cited the "articles of war," he would have initiated the statutory procedures established by Congress for courts martial. The "law of war" category was undefined by statute and represented a more scattered collection of principles and customs developed in international law. Thus, a military tribunal could pick and choose among the principles and procedures it found that met their specific needs to reflect Roosevelt's proclamation.³³

³¹ Schilling, 483.

Article 81 provides that "Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court martial or military commission may direct."

Article 82 provides that "Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments, of any of the armies of the United States, or elsewhere, shall be tried by a general court martial or by a military commission, and shall, on conviction thereof, suffer death."

Schilling clearly points out the difference between a court martial and military commission in terms of Articles of War. Court martials try offenses against the Articles of War, military commissions try offenses against the rule of warfare (Law of War) established by international law and treaties. 487. See also Winthrop's "Military Law and Precedents".

³² For the full version of the Charge Sheet see: Trial transcripts, Prosecution Exhibit No. 14 Charge Sheet; p 96-98.

³³ Fisher, 43.

Major General Franck McCoy presided as the president of the commission. McCoy's record had been impeccable. He served in the Spanish-American War with Theodore Roosevelt and received a wound in the charge up San Juan Hill with the rest of the Rough Riders.³⁴ McCoy had been an aide-de-camp to General Leonard Wood. McCoy commanded the Sixty-Third Infantry Brigade in France during World War I, and served as a member of the Brigadier General William Mitchell court martial proceedings in 1925, retiring in 1938. But with the United States back at war, McCoy returned to active duty. McCoy also served on the board to investigate the events at Pearl Harbor prior to the Japanese attacks.³⁵

The military order assigned Colonel Cassius M. Dowell and Colonel Kenneth Royall as the defense counsel. Both Royall and Dowell took their oaths to defend the Germans seriously even though neither sought the job as defense attorneys.³⁶ Due to Dasch turning himself in to the FBI and turning in the other seven saboteurs, it was later determined to assign Dasch a separate lawyer, Colonel Carl L. Ristine, from the rest of the saboteurs.

Royall graduated from Harvard Law School in 1917, became the editor of the *Harvard Law Review* and started his law career in North Carolina after spending time serving in the Army overseas during World War I. He had vast experience as a trial lawyer, served a term as president of the state bar association, and became a member of the North Carolina state senate. Prior to his selection as defense counsel for the saboteurs, Secretary of War Stimson appointed him to head the legal section of the

³⁴ Dobbs, 212.

³⁵ Biddle, 332. Rachlis, 176.

³⁶ Prior to the executions of six saboteurs, all seven of the defendants wrote Royall and Dowell thanking them for everything they did.

Army's department responsible for financial supervision of military contracts. Royall had served in his new job for one month when selected to defend the saboteurs so he was surprised when selected to defend the German saboteurs. He did recommend to his superiors that civilians be given the task to defend the saboteurs, but the military commanders denied the request. Royall then assumed his duties as defense counsel and took over as the lead attorney for the defense.³⁷

Dowell was a career Army man with forty years of service. He joined as a private and became a commissioned officer prior to the United States involvement in World War I; during the First World War he was wounded. Dowell studied law after he returned from World War I and later taught law as well to other officers. Although Dowell did not have the trial experience as Royall, his expertise was court martial procedures. Even though Dowell outranked Royall and older, Dowell requested Royall to assume the lead in the defense of the Germans.³⁸

Once Royall read the President's proclamation, he noticed how the President worded the Proclamation claiming violations of the law of war. By stating violations of the law of war, not the Articles of War, Roosevelt shifted the balance of power and control from the legislative body to the executive body of the government, allowing Roosevelt to call for a military trial without having to obtain congressional approval.³⁹

³⁷ Rachlis, 181. O'Donnell, 108-113. O'Donnell goes into the most detail than any other author in my research on Royall and his personality.

³⁸ O'Donnell, 132. Rachlis, 180-181.

³⁹ O'Donnell, 132. In the United States Constitution, Article 1, section 8 gives Congress power to: constitute tribunals inferior to the Supreme Court, to define and punish piracies and felonies committed on the high seas and offenses against the law of nations, and to declare war, grant letters of Marque and Reprisal, and make rules concerning captures on land and water. Article 1, section 9 also states the privilege of writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public

Because both Royall and Dowell had serious misgivings about the legality and constitutionality of the President's proclamation, and his order creating a military commission, they became convinced they must challenge the Administration in civil courts. The proclamation ruled out an appeal therefore denying the defense the fundamental right of a fair trial.⁴⁰

Royall and Dowell realized the only chance their clients had to avoid the death penalty was to appeal to the United States Supreme Court. But Royall and Dowell were both commissioned officers in the United States Army, and their Commander in Chief gave them an order in the Proclamation, the defendants were denied access to the courts. The two counsels for the defense were in a quandary: they had an obligation to follow the orders of their commander in chief, yet they also had the obligation as defense attorneys to fulfill their duty to their clients.⁴¹

Royall and Dowell decided to write a letter to the President about their concerns on the constitutionality and validity of the Proclamation and the order to the commission:

There has been delivered to us your Order of July 2, 1942 which provides for a Military Commission for the trial of Ernest Peter Burger, George John Dasch, Herbert Haupt, Heinrich Harm Heinck, Edward John Kerling, Herman Neubauer, Richard Quirin, and Werner Thiel, and which further designates us as defense counsel for these persons.

There has also been delivered to us a copy of your Proclamation of the same date, which Proclamation provides that a military tribunal shall have sole jurisdiction of persons charged with committing classes of acts set forth in the Proclamation and that such persons shall not have the right to seek any civil remedy.

Our investigation convinces us that there is a serious legal doubt as to the constitutionality and validity of the Proclamation and as to the

safety may require it. Roosevelt stating Law of War in his proclamation took away Congress's authority granted to them from the Constitution to prosecute the saboteurs.

⁴⁰ O'Donnel, 133

⁴¹ Dobbs, 207-208. O'Donnell, 133.

constitutionality and validity of the Order. It is our opinion that the above named individuals should have an opportunity to institute an appropriate proceeding to test the constitutionality and validity of the Proclamation and of the Order.

In view of the fact that our appointment is made in the same Order which appoints the Military Commission, the question arises as to whether we are authorized to institute the proceeding suggested above. We respectfully suggest that you issue to us or to someone else appropriate authority to that end.

We have advised the Attorney General, the Judge Advocate General, General McCoy, General Winship and Secretary Stimson of our intention to present this matter to you.

The President had three choices in regard to how to respond back to the defense lawyers: reject the defense counsel's request, authorize an appeal to the Supreme Court, or say nothing to leave the defense counsel to come up with their own conclusions. The President chose to say nothing and had his secretary, Marvin McIntyre, inform Royall and Dowell that the Proclamation was valid, but they should decide for themselves how to perform their duties.⁴²

Confused and dumbfounded with the President's message, Royall and Dowell returned to the Pentagon to figure out what to do next. Both felt conflicted between their ethical responsibilities to their clients versus their loyalty to the Commander in Chief. To whom was their higher duty? Royall decided the two should write another letter:

We have considered carefully this Order and the Proclamation of the same date and of the opinion that we are authorized, and our duty requires us, first, to try to arrange for civil counsel to institute the proceedings necessary to determine the constitutionality and validity of the Proclamation and Order of July 2 and, second, if such arrangements cannot be made, to institute such proceedings ourselves at the appropriate time. Unless ordered otherwise, we will act accordingly.

⁴² Dobbs, 208

This time, neither Roosevelt nor a member of his Administration responded back to the defense counsel.⁴³

THE TRIAL

Federal government lawyers searched the archives to find a precedent on military commissions as opposed to a court martial. During the War of 1812, General Andrew Jackson had used them in New Orleans. Tribunals had been used by both the North and the South during the Civil War in a wide range of offenses. The 1865 Mary Surrat trial was the most recent precedent of a military commission which led to her conviction and execution with her conspiring with John Wilkes Booth to assassinate President Abraham Lincoln. Military commissions fell out of favor after the Civil War, but the military reintroduced them in Hawaii after the December 1941 attack on Pearl Harbor.⁴⁴

One day prior to the trial, the tribunal adopted rules encompassing three and a half pages. The rules stated that the sessions were not open to the public, covered the taking of the oaths of secrecy, and covered the identification of counsel for the defendants and prosecution, as well as the keeping of records. Rules of procedure encompassed eight lines which included no peremptory challenges and provided for only one challenge for cause. The most intriguing language stated: "In general, wherever applicable to a trial by Military Commission, the procedure of the Commission shall be governed by the Articles of War, but the Commission shall determine the application as such Articles to any particular question." The Commission could then discard procedures from the Articles of War and/or the Manual for Courts Martial whenever it chose to. General Cramer told

⁴³ Ibid., O'Donnel, 135-136.

⁴⁴ Dobbs, 211.

the commission during the trial: “Of course, if the Commission please, the Commission has discretion to do anything it pleases; there is no dispute about that.”⁴⁵

The trial met in room 5235 on the fifth floor of the west wing of the Justice Department building in Washington D.C. Soldiers patrolled outside the room to prevent unauthorized access from personnel, and the public and the press were not allowed in to the proceedings. The windows in the room were covered with heavy black curtains and the glass doors at the end of each corridor were also blacked over in order to maintain secrecy.

Precisely at 10 a.m. on July 8, 1942, the first day of the trial began. Before the commission could swear itself in, Colonel Royall stood and spoke to the President of the Board. Royall requested before the defense counsel takes any part or recognized he desired to make a statement. The president granted his request. Royall then stated:

In deference to the Commission and in order that we may not waive for our clients any rights which may belong to them, we desire to state that, in our opinion, the order of the President of the United States creating this court is invalid and unconstitutional. I do not think it necessary or appropriate to argue that question unless I am so requested. It is perhaps sufficient to state that our view is based, first, on the fact that the civil courts are open in the territory in which we are now located and that, in our opinion, there are civil statutes governing the matters to be investigated. In the second place, we question the jurisdiction of any court except a civil court over the persons of these defendants. In the third place, we think that the order itself violates in several specific particulars congressional enactments as reflected in the Articles of War.⁴⁶

Biddle rose to his feet objecting to Royall’s statement. He then said, “The defendants were in exactly and precisely the same position as armed forces invading this

⁴⁵ Louis Fisher, “Military Tribunals: The Quirin Precedent.” *CRS Report for Congress*, (March 26, 2002), 10. From “Rules Established by the Military Commission Appointed by Order of the President of July 2, 1942,” 8-10.

⁴⁶ Trial transcripts, 5. Royall’s first point about the civil courts is in direct reference to *Ex Parte Milligan* of 1866.

country.” Therefore, they had no civil rights worth considering.⁴⁷ He went on and said: “This is not a trial of offenses of law of the civil courts but is a trial of the offenses of the law of war, which is not cognizable to the civil courts.”⁴⁸

For the first thirty-two hours, the public was not aware of the trial because no member of the press was allowed into the courtroom.⁴⁹ Roosevelt summoned Elmer Davis, head of the Office of War Information (OWI), to his office. Because of the demand for information from the media, Roosevelt felt pressure to release information to the press on the saboteurs. Davis insisted on greater press access, Stimson invoked the policy of no transparency on the grounds of national security. Roosevelt intervened and instructed the commission to start issuing communiqués through the OWI. At first, the communiqué appeared to be a positive compromise until the media received the first report from the OWI. It read information already known: the military commission had convened in the presence of defendants and their respective lawyers; the commission was closed to the outside due to the nature of national security.⁵⁰

Later, Stimson did make some minor concessions to the media. He permitted United States Signal Corps photographs distributed to the press from the commission. On July 11, the fourth day of the trial, he allowed twelve reporters to visit room 5235 during a break. They were not allowed to talk to anyone in the room, but were allowed to report what they saw, take photographs, and allowed to inspect items on the evidence

⁴⁷ Dobbs, 211.

⁴⁸ Trial transcripts, 5.

⁴⁹ Cushman, 1084.

⁵⁰ Dobbs, 217.

table. Brigadier General Albert Cox, the Provost Marshall of the Military District of Washington D.C., pointed to the prisoners and identified them to the press.⁵¹

Colonel Royall more than once indicated to the prosecution that he would go to the civil courts to test the constitutionality of the President's Proclamation and order.⁵² On July 21, at the end of twelfth trial day and after the saboteurs left the room, Royall told the commission he thought it was necessary to give a brief history of how he and Dowell were appointed as the defense team. He went on and told the commission since he did not have much experience with this military procedure, he sought guidance from the Manual for Courts-Martial. On page 35 he found the guidance he searched for and read the paragraph to the commission:

An officer, or other military person, acting as individual counsel for the accused before a general of special court-martial, will perform such duties as usually devolve upon the counsel for a defendant before civil courts in a criminal case. He will guard the interests of the accused by all honorable and legitimate means known to the law.⁵³

Royall proceeded to tell the commission the letters he and Dowell wrote to the President and the responses received from the White House. He then continued and told the commission the defense counsel prepared papers for a writ of *habeas corpus* for the

⁵¹ Fisher, *Nazi Saboteurs*, 46-47. Princeton University conducted a poll during the trial which suggested the American people agreed the trial should be held in secret with 69% in favor of a secret trial and 27% felt reporters should be allowed. Dobbs, 218-219.

⁵² Letters to the President requesting guidance prior to the trial, Dowell's initial opening statement of the trial about the constitutionality of the Proclamation and the order, and his meetings with members of the Supreme Court.

⁵³ Trial transcripts, 2100. It is important to note Colonel Dowell did not support Colonel Royall's petition for writ of habeas corpus. Dowell was conflicted over the order from President Roosevelt, Dowell's commander in chief, and his duty as a defense counsel. Dowell stood up at the commission and told the commission he has been a soldier for over forty years and accustomed to taking orders from the commander in chief. He also stated his duty as the defense counsel was to do everything legitimate and honorable in the interest of their clients. Although Dowell did not support Royall's decision to seek the writ, Dowell did work with Royall on the appeal to the Supreme Court.

“purpose to test the constitutionality and validity of the President’s Order and the President’s Proclamation.”⁵⁴

Royall drafted the papers to reveal “nothing more about the proceedings here than is absolutely necessary for the assertion of the rights which we think out to be asserted.”⁵⁵ In order to maintain secrecy concerns, Royall agreed to show the draft petition to the commission, but not to Biddle or the rest of the prosecution team. He asked the commission to examine the proposed petition to see if it disclosed any facts from the case. The commission closed the proceedings, discussed the petition among them, and upon their return told Royall, “The commission does not care to pass on that question.”⁵⁶

Royall started to contact the Justices of United States Supreme Court to see if they would be willing to meet in the summer for a special session. Royall first met Justice Hugo Black at Black’s home in Alexandria, Virginia. On Sunday, July 23, 1942, Royall, along with Biddle, Cramer and Dowell, met with Black and Associate Justice Owen Roberts at Robert’s farm outside Philadelphia, Pennsylvania to discuss the Supreme Court handling the writ. After the meeting, Roberts talked with Chief Justice Harlan Fiske Stone by phone. Stone agreed to hear oral arguments on Wednesday, July 29, 1942.⁵⁷

⁵⁴ Ibid., 2105.

⁵⁵ Ibid.

⁵⁶ Ibid., 2114.

⁵⁷ CRS Report, 12. Dobbs, 237.

The Supreme Court did agree to hear arguments, but a lower court must first rule before the Supreme Court can hear arguments. Royall filed petition for a writ of *habeas corpus* on behalf of seven of the saboteurs (Dasch was not included), On July 28, it took only minutes for District Judge James W. Morris to issue a statement denying permissions and stated the defendants came within the category: subjects, citizens, or residents of a nation at war with the United States. That under President Roosevelt’s proclamation (the defendants) “are not privileged to seek any remedy or maintaining any proceeding in the courts of the United States.” This case would be known as *Ex Parte Quirin* after Richard Quirin.

On July 27 1942, the federal government notified reporters to be at the Supreme Court at 5:45 PM where they learned the Supreme Court agreed to hear the saboteur case. This news was not well received throughout the United States. The *Los Angeles Times* reported that such a hearing was “totally uncalled for.” “The Supreme Court should never have been dragged into this wartime military matter.” The *Detroit Free Press* and the *Meridian Star* both condemned the hearing. Royall’s home state newspaper the *Charlotte News* chastised him for his role in the affair. But the *Washington Post*, the *New York Times*, and the *Atlanta Constitution* commended the justices for upholding the Bill of Rights and the Fifth and Fourteenth Amendment’s insistence on the due process of the law. The *Washington Post* editor wrote what was at stake was not the saboteurs’ liberties, but the country’s larger liberties.⁵⁸

At this point of the trial, the military commission had met for sixteen days to prosecute the eight saboteurs. The defense and prosecution presented the testimonies of Cullen, the Coast Guardsman, who ran into Dasch on the beach, the FBI agents that interrogated Dasch, the evidence the saboteurs left on each respective landing site, the three days of Dasch’s interrogation transcripts, and each respective saboteurs claim they had no intention of committing sabotage once they reached the United States. Both the defense and the prosecution knew the commission was at a stand-still until the United States Supreme Court made its decision.

When the Supreme Court agreed to hear case, the military commission put their trial on hold since the writ of *habeas corpus* challenged the constitutionality of the President’s proclamation and his order, not the innocence or guilt of the German saboteurs. What initially started as an interagency publicity grab and a quest for a secret

⁵⁸ Belknap, 69-70.

trial with a quick conviction, turned into a legal fight in front of the highest court in the land. The ensuing court fight not only held the fate of eight Germans, but the right of due process in times of war.

“We have to win in the Supreme Court,
or there will be a hell of a mess.”

-Attorney General Francis
Biddle to President Franklin
Roosevelt¹

CHAPTER THREE

THE BATTLE BEFORE THE SUPREME COURT

For sixteen days the government’s military commission had been listening to the case against the eight German saboteurs, but the commission had been put on hold because a new fight on a different battlefield was about to start. On one side, the federal government, bent on preserving the nation’s security in time of war. On the other, the defense counsel, argued due process under the Articles of Wars to proceed against the accused saboteurs. The pressure on the government’s counsel was enormous; the United States security had been breached by German U-Boats filled with saboteurs bent on bringing death and destruction from across the Atlantic Ocean to the United States homeland. The defense counsel felt the pressure as well; the fate of the German’s lives and the country’s basic principles of due process were in their hands. The final battleground to decide the fate of the saboteurs was about to begin in the house of the United States Supreme Court. The Supreme Court Justices had to decide which was

¹ Biddle’s “In Brief Authority”, 331. President Roosevelt’s response was: “You’re damned right there will be, Mr. Attorney General.”

more important in time of war: the nation's security or ensuring the correctness in process of enemy infiltrators. If the justices had known they too would be under pressure, they may have chosen to not take the case. This decision became a battle between the powers of the executive branch versus the powers of the judicial branch. This chapter will analyze the composition of the United States Supreme Court that heard these key arguments, analyze the *per curiam* decision that they the justices handed down, and chronicle the fate of the German saboteurs after the hearing.

After Chief Justice Harlan Stone agreed to hear arguments before the Supreme Court, both the defense and prosecution rushed to complete their briefs. With only two days of preparation, the United States Supreme Court would hear arguments over due process versus national security in time of war. Normally the Supreme Court received briefs in advance from both the prosecution and the defense. The Justices would then study the issues, conduct independent research, and, decide on questions they would pose to each respective counsel.²

At the time of the hearing, the President had appointed seven of the sitting Justices of the Supreme Court.³ Many of the justices had past relations with the President in varying degrees from professional associations to having served as a close presidential advisor. Many of the Justices also had worked for, worked with, or even appointed members of the current Roosevelt Administration.

Sitting on the United States Supreme Court were: Harlan F. Stone (Chief Justice of the United States Supreme Court), Owen J. Roberts (Associate Justice), Hugo

² At the beginning of oral arguments, the Justices had not had time to read the briefs submitted to the Court by both the defense and prosecution.

³ The judges appointed by Roosevelt were: Black, Reed, Frankfurter, Douglas, Byrnes, Murphy and Jackson.

Lafayette Black (Associate Justice), Stanley Forman Reed (Associate Justice), Felix Frankfurter (Associate Justice), James Francis Byrnes (Associate Justice), Robert H. Jackson (Associate Justice), Frank Murphy (Associate Justice), and William O. Douglas (Associate Justice). During Roosevelt's first term in office, he did not appoint one person to the Supreme Court, but during his second term, he appointed more than any other president except George Washington.⁴

In 1925, President Calvin Coolidge appointed Justice Harlan Fiske Stone to the Supreme Court. Stone attended Columbia Law School from 1895 to 1898 and was admitted to the New York bar in 1898. He practiced law in New York City from 1898 to 1899. From 1899-1905 he taught law at Columbia Law School and became the school's dean from 1910-1923. In 1924, President Coolidge appointed Stone as the United States Attorney General, and the next year, Coolidge appointed Stone to the Supreme Court. In 1941, President Roosevelt elevated Stone to the role of Chief Justice of the Supreme Court.⁵

Roberts was born in Philadelphia, Pennsylvania and attended the University of Pennsylvania. In 1898 he graduated from the University of Pennsylvania Law School. After graduating, he led a successful career as a trial lawyer. He gained notoriety as assistant district attorney in Philadelphia for prosecuting 1917 Espionage Act violators, and later, President Coolidge appointed him to investigate oil reserve scandals which led to the conviction of former Secretary of the Interior, Albert Fall, of bribery in the Tea Pot

⁴ Robert Harrison. "The Breakup of the Roosevelt Supreme Court: The Contribution of History and Biography." *Law and History Review*, 2, (Autumn, 1984): 165-166.

⁵ O'Donnell 196-197. Interesting point; Stone was responsible for the appointment of J. Edgar Hoover to head of the Department of Justice (FBI).

Dome scandal. In 1930 President Herbert Hoover appointed Roberts to the Supreme Court.⁶

Hugo L. Black was born and raised in Alabama and graduated from the University Of Alabama School Of Law in 1906. From 1907 through 1917 he pursued his legal practice, he received election to the Birmingham City Commission for four years where he served as the Jefferson County Prosecuting Attorney. He joined the army during World War I, but he never saw combat and returned back to his practice at the end of the war. In 1926, he won a seat as a Democrat to the United States Senate and, in 1937, Roosevelt nominated Black for the Supreme Court.⁷

Stanley Reed was born in Kentucky and attended Kentucky Wesleyan College where he earned a B.A. in 1902. He then attended Yale College where he received his second B.A. in 1906 and studied law at the University of Virginia School of Law and at the Columbia University School of Law but he never attained a law degree. After further studies, Reed returned to Kentucky and was admitted to the bar in 1910 where he started his legal practice. In 1912 he served in the Kentucky General Assembly but joined the army in 1917 to fight in World War I. After the war, he returned back to Kentucky to practice law. In 1929 President Hoover appointed Reed as the new general counsel for the Federal Farm board where he served until 1932. After Roosevelt defeated Hoover in the election, Roosevelt became impressed with Reed's work and kept him in his administration. Because of his exceptional performance, Roosevelt selected Reed to be

⁶ O'Donnel, 196-197.

⁷ Harrison, 173-176. Black was Roosevelt's first "Court Packing" nominee. Black was considered quite a radical man in the senate and his views were in line with Roosevelt's. Black was also a member of the Ku Klux Klan but said he only joined the organization to get their votes.

the Solicitor General in 1935, and in 1938, Roosevelt appointed Reed to the Supreme Court.⁸

Felix Frankfurter was born in 1882 in Vienna, Austria. He did not emigrate to the United States until he was twelve years old. In 1902, he graduated college from the City College of New York and later attended and graduated from Harvard Law School. At the Harvard Law School, he proved so successful that he was selected as the Editor-in-Chief of the *Harvard Law Review*. After graduation, he joined a law firm but chose to become the assistant of Henry Stimson, the United States Attorney for the Southern District of New York in 1909. In 1911, President William Howard Taft selected Stimson to be Secretary of War, so Stimson selected Frankfurter as a law officer in the Bureau of Insular Affairs. In 1917, while working as a law professor at the Harvard Law School, he took leave to work as a special assistant to the Secretary of War; President Woodrow Wilson then appointed him the Judge Advocate General the same year. In 1920, Frankfurter became a charter member of the American Civil Liberties Union. In 1921, the Harvard Law School awarded him an endowed Chair in Law. When President Roosevelt was elected to the Presidency in 1932, Frankfurter became an advisor to the President-elect and he continued to be an unofficial advisory to Roosevelt while he continued his teaching at Harvard. Frankfurter managed and recommended a steady stream of the nation's best and brightest young lawyers for federal service in Roosevelt's New Deal. In 1938, Roosevelt nominated Frankfurter to the Supreme Court.⁹

⁸ Harrison, 177-178. Reed was also the last Supreme Court Justice not to graduate from law school.

⁹ Ibid., 178-182.

James F. Byrnes was born and raised in Charleston, South Carolina. He never attended high school, college, or law school, but he did apprentice to a lawyer and in 1903, he was admitted to the South Carolina bar. In 1910, he became a United States Congressman and he served in Congress until 1925. After losing an election, he opened a law practice, but he returned to politics in 1930 when he became a United States Senator from South Carolina. In the Senate, himself an ardent supporter of Roosevelt's New Deal, in 1940, Roosevelt rewarded him for his loyalty by nominating him for the United States Supreme Court.¹⁰

In the summer of 1941, Roosevelt appointed Robert H. Jackson to the Supreme Court; Roosevelt's seventh appointee to the Court since 1937. Prior to Roosevelt's appointment, Jackson had served as the nation's Solicitor General from 1938-1940, Roosevelt then nominated him and the United States Senate confirmed him as United States Attorney General from 1940-1941. Jackson was born in Pennsylvania, but raised in Frewsburg, New York. He graduated from high school in 1909 and apprentice in a law firm. After working for the firm and taking classes, Jackson attended Albany Law School and, in 1913, passed the New York Bar Exam. For the next twenty years, Jackson practiced law in New York.¹¹ Roosevelt appointed Jackson as General Counsel to the United States Treasury Department's Bureau of Internal Revenue. In 1936 he became an Assistant Attorney General in charge of the tax division of the Department of Justice and, in 1937, he became Assistant Attorney General heading the Anti-Trust Division. Later in

¹⁰ Harrison, 188-190. Byrnes went on to become the United States Secretary of State 1945-1947, and South Carolina Governor 1951-1955.

¹¹ Dennis J. Hutchinson. "'The Achilles Heel' of the Constitution: Justice Jackson and the Japanese Exclusion Case." *The Supreme Court Review, Vol 2002 (2002): 457-458.*

1945, President Truman would appoint Jackson as Chief Counsel for the prosecution of Nazi war criminals.¹²

Frank Murphy had quite an eclectic background prior to his appointment to the Supreme Court. Born and raised in Michigan, he attended the University of Michigan Law School where he graduated in 1914. He served in the United States Army during World War I and then opened a private law firm in Detroit where he later became the chief assistant United States Attorney for the Eastern District of Michigan from 1919-1922. He also taught at the University of Detroit. From 1930-1933 he served as Detroit's mayor where he caught the eye of President Roosevelt. In 1933, Roosevelt rewarded his performance by selecting him to be Governor-General of the Philippines where he served until 1935 when he became the High Commissioner to the Philippines from 1935 through 1936. With all of his recent executive position experience, in 1937, Murphy ran and defeated the incumbent Governor of Michigan to become Michigan's 35th Governor. He served only one term as governor because Roosevelt appointed him United States Attorney General in 1939. In 1940, Roosevelt nominated Murphy to become an Associate Justice to the Supreme Court.¹³

William O. Douglas was born in 1898 in Minnesota but moved around a lot during his formative years. He graduated from Whitman College in Walla Walla, Washington, and through hard work and perseverance, in 1925, graduated from Columbia Law School. Soon after graduation, he taught at Columbia Law, but later joined the Yale Law school faculty. In 1934, Roosevelt selected him to work at the United States

¹² This position would keep him away from the Supreme Court until 1946. Alpheus Thomas Mason. "Extra-Judicial Work for the Judges: The Views of Chief Justice Stone." *Harvard Law Review*, 67. (December, 1953): 212-213.

¹³ Harrison, 185-188.

Securities and Exchange Commission (SEC) and in 1937, he became an advisor to the SEC chairman and to the President. In 1939, because of his extraordinary work and reform of and within the SEC, Roosevelt nominated Douglas for the Supreme Court.¹⁴

Based upon their past experience and relationships with the President and some of his members of his administration, at least three Judges could have been excused for personal involvement or conflicting interests: Murphy, Frankfurter, and Byrnes. Away on military duty at the time of the summons, Murphy appeared in his military uniform as a reserve Lieutenant Colonel. He disqualified himself on the grounds he was an officer on active duty with the Army, therefore, he could not pass judgment on a case involving military authority based upon Roosevelt's Proclamation and order.

Frankfurter had been Roosevelt's confidant on public policy matters for years and he advised Secretary Stimson to try the saboteurs by military commission. Frankfurter even advised Stimson the commission should be made up entirely of military personnel and Frankfurter went further and secretly advised Stimson on how to structure the tribunal in the anticipation of a Supreme Court battle.¹⁵

Byrnes had served in the Roosevelt Administration the previous seven months. He worked closely with both Roosevelt and Biddle on issues dealing with draft executive orders, war powers legislation, and other presidential initiatives.¹⁶

¹⁴ Ibid., 182-185.

¹⁵ Fisher, "Nazi Saboteurs on Trial". 80. Frankfurter talked with Stimson June 29 over dinner about these recommendations.

¹⁶ Jonathan Turley. "Quirin Revisited: The Dark History of a Military Tribunal." *National Law Journal*. (October, 2002).
O'Donnell, 212-213.
Biddle, 337.

Prior to the Court convening, Associate Justice Roberts reported to his fellow justices that Biddle told him the President would execute the Germans no matter what the court decided. He also passed along the information that the President would not accept anything but total support from the Supreme Court, and that Roosevelt expected the Court to acknowledge Roosevelt's authority.¹⁷

Because of the shortage of time from the actual submittal of the briefs and their receipt, Chief Justice Stone waived the courts ruling limiting each side to one hour each of oral argument.¹⁸ In the filled capacity 300 public seats of the Supreme Court, oral arguments before the United States Supreme court began at noon on July 29, 1942.

Chief Justice Stone set the tone on the importance of this session by stating that this hearing was a special session beginning: "The Court has ordered that it convene in Special Term in order that certain applications might be presented to the Court, in open court, and argument be heard in respect thereto." He then stated the reason for the session: "Mr. Attorney General, from the papers filed, we are aware that this proceeding

Fisher, "CRS Report." 20. Byrnes would resign from the Court on October 3 and join the Roosevelt Administration full time in the Office of Economic Stabilization. This was prior to the issuing of the full opinion of *Ex Parte Quirin*.

Chief Justice Stone's son, Major Lauson H. Stone, was part of the defense team. At the beginning of the oral arguments after the oath was administered, the Chief Justice's first item of business was to ensure this information was placed on the record and asked both the defense and the prosecution if this was a problem. Both sides announced it was not a problem since Major Stone was ordered to help the defense with the military commission and he did not participate in the case before the Supreme Court. See Oral Arguments, 496-497.

¹⁷ Turley, 2. O'Donnell, 213.

¹⁸ There is no specific or formal time line between the submission of the briefs to the date of the oral argument in order for the Justices to prepare for cases. But, for this case, the briefs submitted by Royall and Biddle were dated July 29, 1942, the same day oral arguments commenced.

is brought to contest the validity of the detention of certain persons now being tried by a military commission.”¹⁹

The proceedings continued with the Chief Justice identifying the fact his son helped with the defense during the military commission and asked if either the defense or prosecution believed the Chief Justice should have to excuse himself. Attorney General Biddle spoke up and stated that Major Lauson H. Stone assisted the defense counsel in the presentation of the case before the military commission under orders to do so. He did not work on the proceedings before the Supreme Court and thus his work on the case was not inappropriate. Biddle then stated that both sides urged the Chief Justice to remain sitting on the case.²⁰

Royall began the arguments on behalf of the petitioners.²¹ Immediately, Frankfurter launched in questioning if either side questioned the jurisdiction of the court without waiting for the judgment of the appellate court. Biddle said he did not question the jurisdiction and neither did Royall. Frankfurter then ticked off questions right after the other and asked both Royall and Biddle, on what grounds the Supreme Court could

¹⁹ Philip B. Kurland and Gerhard Casper, ed. *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law. Vol 39* (University Publications of America, 1975): 496. All further reference will be: Oral Arguments.

²⁰ Oral Arguments, 496-497.

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²¹ *Ibid*, 495. They were: Burger, Haupt, Heinck, Kerling, Neubauer, Quirin and Thiel. Dasch was assigned a separate lawyer, Ristine, prior to the military commission. Ristine believed his client, Dasch, would receive lenient treatment due to his cooperation with the FBI, and thought his client should disassociate himself from the other saboteurs and not be a part of the Supreme Court hearing.

take the case directly from District Court Judge Morris? Royall was not able to site any source or precedent to satisfy Frankfurter's questions. Finally, Frankfurter asked Royall why he did not appeal Morris' decision to the D.C. Circuit? Royall then reminded Frankfurter and the Court that Morris acted at 8 P.M. the previous evening and Royall did not have time to do so.²² Royall then suggested to the court they continue with oral arguments and he would undertake any procedural steps necessary to get the proper paper work to the D.C. Circuit court.²³

With the question of the jurisdiction of the court at least set to the side, Royall focused on the reason for his request for a hearing before the United States Supreme Court. Associate Justice Reed asked if the court had to determine the question of guilt or innocence of the accused saboteurs. Royall responded, no. The sole issue was the jurisdiction of the military tribunal. That question would be up to the Court to decide

²² Judge Morris' opinion:

The petitioner, Hermann Otto Neubauer, asks leave to file a petition for a writ of *habeas corpus* by his counsel. It is conceded by petitioner's counsel that petitioner landed on the coast of the United States in June, 1942, from a German submarine, with explosives which he was instructed by a German officer to use for the purpose of committing sabotage on certain American industries. In view of this statement of fact, it seems clear that the petitioner comes within that category of subjects, citizens or residents of a nation at war with the United States, who, by a proclamation of the President, dated July 2, 1942, are not privileged to seek any remedy or maintain any proceeding in the courts in the United States.

I do not consider that *Ex Parte Milligan*, 4 Wall.2, is controlling in the circumstances of this petitioner. The application of the petitioner must, therefore, be denied.

Dated this 28th day of July, 1942.

²³ Oral Arguments, 497-502. Royall did remind the court that even if he had gone to the D.C. Circuit Court, Royall would have appealed the ruling and the case would still end up in the Supreme Court.

and, if the jurisdiction of the military tribunal was denied, then the defendants could have their case before a civilian court.²⁴

Soon, the discussion turned into questions pertaining to martial law and, who and where, one has the power to order and declare martial law in operation: the President, Congress? Was it the executive branch when the President was acting as the Commander in Chief, or does the power lay with the Congress? Was the entire country under martial law at the time, or does a martial law only cover specific territory or location? Royall agreed the President had the power to declare martial law if properly and constitutionally declared.²⁵

With this line of inquiry, the questioning then turned to how the saboteurs came on to land, in or out of uniforms. Since they were not captured upon landing, and not in the act of committing sabotage, does this fact change the results? This line of questioning was not the direction Royall wanted the oral arguments to go. Royall wanted to concentrate on the five propositions as the defense counsel.²⁶

After some more questions from the Court, Royall proceeded with his five propositions before the court.

Royall read:

The petitioners submit to the Court the following propositions, to wit:

First, the petitioners, including the aliens, are entitled to maintain this present proceeding.

Second, the President's Proclamation, which assumes to deny the right of the petitioners to maintain this proceeding, is unconstitutional and invalid.

²⁴ Oral Arguments, 511.

²⁵ Ibid., 514-516.

²⁶ Ibid., 511-516.

Third, the President's Order, which assumes to appoint the alleged Military commission, is unconstitutional and invalid.

Fourth, the President's Order, relating to the alleged Military Commission, is contrary to statute and, therefore, illegal and invalid.

Fifth, the petitioners are entitled to be tried by the civil courts for any offenses which they may have committed.²⁷

The first proposition was the most important. He had to prove the petitioners had the right to bring this action to the Supreme Court. Royall contended Herbert Haupt was entitled to do so because he was an American citizen and he never took an oath of allegiance to Germany, never joined the Nazi party, nor did he renounce his United States citizenship: therefore, he retained all his privileges as a United States citizen.²⁸ Royall conceded the other six defendants were enemy aliens, but he insisted, in the absence of some valid statute or proclamation, they were entitled to initiate actions within the United States court system.²⁹

The second proposition concerned President Roosevelt's Proclamation. Royall challenged the proclamation as unconstitutional and invalid. Royall argued that the President lacked either the statutory authorization or inherent power to issue the

²⁷ Oral Arguments, 516.

²⁸ Brief In Support Of *Writs of Habeas Corpus* from: Philip B. Kurland and Gerhard Casper, ed. *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law. Vol 39.* (University Publications of America, 1975), 317-320. Will be further stated as: Brief in Support Of.

The sabotage school the eight men attended was not part of the German army, but it was run by Lieutenant Kappe, a member of the German military. They did not take an oath to the German government or to the Nazi party while attending.

²⁹ Oral Arguments, 517. Brief in Support Of, 320-324.

The defense and the prosecution agreed Haupt and Burger both were United States citizens. Burger did join the German army years before attending the saboteur school, therefore he forfeited his citizenship. Haupt never joined the German army, but, like the rest, attended the saboteur school. Neither the prosecution nor the defense had documentation or proof that could confirm or deny if the saboteurs took an oath at the saboteur's school to the German army prior to coming to the United States for their mission. The gray area, which both counsels were trying to establish, was if Haupt lost his citizenship due to attending the saboteur school.

proclamation. Roosevelt increased the penalties to which the saboteurs were accused and he did so after the date of the committed offense. This proclamation constituted an *ex post facto* declaration in excess of the president's executive power. Royall argued that the proclamation violated the Constitution's Judicial article (Article 3) and Article 2 §9, paragraph 2 clause governing suspension of the writ of *habeas corpus*.³⁰

On the third proposition, Royall argued that the order creating the commission was as flawed as the proclamation because the presidential order failed to justify the jurisdiction it conferred. Royall conceded spying could be dealt with constitutionally by a military court; but, only if the spying was committed on or near a military installation or in a zone of actual military operations. Royall conceded that the spying had to be committed by a member of the United States armed services, and this necessity was obviously not the case in this fact-pattern. Royall reiterated that the beach patrols were unarmed where the saboteurs landed; therefore, that specific area could not be areas of operation. Consequently the Article 82 charge against the accused was invalid.³¹

Royall discussed to the court on the meaning of spying versus the meaning of espionage. His exchange with the justices is worth quoting at length:

MR. CHIEF JUSTICE STONE: Is that stipulation laid to the proof or to the specification?

COLONEL ROYALL: It is laid to the facts themselves.

MR. CHIEF JUSTICE STONE: That would be, of course, a matter of proof.

MR. JUSTICE FRANKFURTER: You say that this was not in a fortification and nowhere near a fortification?

COLONEL ROYALL: That is right.

MR. JUSTICE FRANKFURTER: You cannot have spying in the Mellon Art Gallery?

COLONEL ROYALL: No, sir. You can have espionage, which has a different meaning from the military spying.

³⁰ Brief in Support Of, 343-344.

³¹ *Ibid.*, 312.

MR. JUSTICE JACKSON: Could you not spy on an industrial plant?

COLONEL ROYALL: I do not think so.

MR. JUSTICE JACKSON: You think that the definition of spying would differ where it was done on an industrial establishment, which in modern warfare is very important?

COLONEL ROYALL: I think that would be espionage.

MR. JUSTICE REED: Suppose the plant were making guns.

COLONEL ROYALL: I still do not think that would be military spying.

MR. JUSTICE FRANKFURTER: The reason you take that position is that, as you say, the permission of trial by military commission unwarranted constitutionally by Article 1, Section 8, and also by the Fifth Amendment?

COLONEL ROYALL: Yes, the Fifth Amendment.

MR. JUSTICE FRANKFURTER: You think they have restricted meanings, the restriction being-

COLONEL ROYALL: Land and naval forces.

MR. JUSTICE FRANKFURTER: Land and naval forces?

COLONEL ROYALL: That is right.

MR. JUSTICE FRANKFURTER: That is your argument?

COLONEL ROYALL: That is our argument. Now let me answer the question with regard to an industrial plant, because, that is relevant to this inquiry here. There is the crime of espionage, and I think it is very material that Congress has enacted a law covering the crime of espionage and has made a distinction between time of peace and time of war. In other words, they legislated for this very circumstance that is confronting us today and have expressly and explicitly provided for punishment for just what these men are charged with today; and it is stipulated they did, in the most unfavorable light to them, and those are matters which have to be tried in civil courts and not in military commissions.

MR. CHIEF JUSTICE STONE: What is the penalty?

COLONEL ROYALL: In the case of sabotage it is a maximum of thirty years, and it is thirty years in the case of espionage other than military, and the death sentence is discretionary.³²

Royall then pointed out that Article 82 of the Articles of War copied a criminal law which the civil courts had the ability to enforce and the saboteurs were arrested by civilian authority (the FBI) not military authority. Royall proceeded to insist the prosecution's allegation of spying was technically wrong:

³² Oral Arguments, 532-534. One of the reasons Roosevelt, Biddle, and Hoover all were steadfast for holding a military tribunal was because of the maximum punishment the saboteurs could receive would be thirty years.

MR. JUSTICE BLACK: So far as Article 82 is concerned, is there any necessary relationship between the fact that one enters the country and the offense charged here?

COLONEL ROYALL: I do not think so.

MR. JUSTICE BLACK: So that so far as that section is concerned, it is the same as though there had been no invasion, as though they had not entered as they did.

COLONEL ROYALL: I think it could exist without that.

MR. JUSTICE BLACK: And it exists as to a citizen or a non-citizen?

COLONEL ROYALL: I would think so, sir. I do not know of any distinction.

MR. JUSTICE BLACK: And the claim is that it has reference to anyone who is around a plant, lurking around a plant? Does it go that far?

COLONEL ROYALL: No, sir. I think it has got to be an actual military establishment. It becomes espionage when it relates to industrial plants.³³

Royall stated that for the same reasons that should prevent the military from trying the defendants under Article 82, the military therefore had no right to try them under Article 81.³⁴

The fourth proposition contended Roosevelt's order conflicted with preexisting statutory law. Royall insisted Congress possessed the constitutional authority on military courts and tribunals and any action the President took contradicting Congress's authority was invalid. Royall then read Article 38:

The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States. Provided, that nothing contrary to or inconsistent with the Articles shall be so prescribed.³⁵

Royall insisted the President's Proclamation and order violated Article 38.

Instead of complying with Article 38, the President transferred the function to the

³³ Oral Arguments, 539.

³⁴ Brief in Support Of, 325-345.

³⁵ Oral Arguments, 550.

military commission which published their rules on July 7, the day before the trial began. The three and half page document dealt with the sessions being closed to the public, taking the oaths of secrecy, identification of both counsels, and the keeping of the record. Only eight lines dealt with rules of procedure. The commission made up the rules as the trial went along. Royall insisted the procedures adopted by the President to form the military commission must follow the manual for Courts Martial and no procedure can be prearranged for the commission that did not follow the Articles of War.³⁶

Royall then stated the proclamation was in violation of Article 43 which states:

No person shall, by general court martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court martial present at the time the vote is taken, and for an offense in these Articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all the members present at the time the vote is taken.³⁷

Royall reminded the Court that the President's order stated the concurrence of "at least two-thirds of the Members of the Commission present shall be necessary for conviction." The President's order was inconsistent with Article 43 which required a unanimous vote for the death penalty.³⁸ Royall then referred to the court Article 70 which provides a formal investigation before charges are preferred or filed.³⁹

The fifth and final proposition, Royall pointed to two other inconsistencies between Roosevelt and the commission. The first was the review procedure from Article 46 which states the trial record of a general court martial or a military commission had to be referred to a staff judge advocate or the Judge Advocate General for review.

³⁶ See chapter 2, page 38 for the President's Proclamation and summation of his order.

³⁷ Oral Arguments: 551-552.

³⁸ *Ibid.*, 552.

³⁹ *Ibid.*, 553-554.

Article 46 states:

Under such regulations as may be prescribed by the President every record of trial by general court martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.⁴⁰

The second was Article 50 ½ which provided for examination by a board of review.

Article 50 ½ states:

Before any record of trial in which there have been adjudged a sentence requiring approval or confirmation by the President under the provisions of Article 46, Article 48, or Article 51 is submitted to the President, such record shall be examined by the board of review.⁴¹

Roosevelt's proclamation required the trial record to be sent to him and he, the President, would be the final reviewing authority. To compound matters, the Judge Advocate General could not fulfill his duty as an independent reviewer; Roosevelt selected the Judge Advocate General to serve with the Attorney General for the prosecution.

Royall concluded the defense with the following comments:

Now those, may it please the Court, are our contentions. I did not deal with some of them exactly in the order that I had planed, but that is immaterial, of course. We tried in our briefs to cover these various contentions as best we could.

The *Milligan* case, I am sure, is familiar learning to every member of this Court. It is the basis of our position here. We think that both the majority and minority opinions fully sustain our view.

The distinction between the *Milligan* case and ours, if one exists, must be on the ground that *Milligan* was a citizen or on the ground that the conditions of war have changed since the *Milligan* case. Those are the distinctions that the Attorney General makes, and possibly there are some more.

⁴⁰ Ibid., 557.

⁴¹ Ibid., 557.

We think that the *Milligan* case, which has been law for 75 years, is still law today, and that these petitioners are entitled to trial before a criminal court, just as the court in the *Milligan* case granted. I won't say anything more about that, but I do mention it because I may want to deal with it in reply to the Attorney General.⁴²

When the Attorney General began his argument, he started by attacking Royall's last remarks on *Milligan*. He concentrated on the key point of citizenship, the rights guaranteed because of citizenship granted by the Constitution, and the saboteurs' right to be heard by civilian court:

May it please the court: The United States and the German Reich are now at war. That seems to be the essential fact on which this case turns and to which all of our arguments will be addressed.

The other essential fact, as is clearly admitted in the stipulation, which itself as one of the stipulated facts admits the averments in our answer, is that these petitioners are enemies of the United States who have invaded this country, and that they are now asking this Court for the rights guaranteed by the Fifth and other Amendments to the Constitution to protect them in the trial by a military court from warlike acts calculated to destroy the country under whose Constitution they are now claiming these rights.

We will show first that alien enemies – and Mr. Justice Reed asked the status of these persons – have no rights to sue or to enter the courts of the United States under these circumstances, both because of the President's Proclamation and because of 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 which they are enemies.⁴³

Biddle specified the “the essential factor of the status is that all of these persons are enemies of the United States.”⁴⁴ One major question at hand was the citizenship of Ernest Burger and Haupt. Biddle stated Burger lost his citizenship when he joined the German army, and Haupt forfeited his citizenship as well by joining the saboteur school. Biddle said “nothing in the *Milligan* case affects this decision except a certain dictum in

⁴² Ibid., 564-565.

⁴³ Oral Arguments, 565.

⁴⁴ Ibid., 565.

the *Milligan* case which seemed to me profoundly wrong.”⁴⁵ After answering questions,

Biddle elaborated on *Milligan*:

In the *Milligan* case you will remember that Congress, by the Act of 1863, provided the method by which certain persons arrested by the Executive, by the military, should be tried. What the *Milligan* case really held was that the statute had not been followed in the trial of *Milligan*, and therefore his petition should be granted.⁴⁶

Biddle said *Milligan*'s petition for writ of *habeas corpus* should have been granted, and in that sense, *Milligan* was a matter of not following a statute and did not represent a general right of citizens to a civil trial when the courts were open.

Later, Associate Justice Black brought up the issue of jurisdiction, in reference to territorial jurisdiction, under which the President and Congress could establish military law, at the heart of the defense's point on the validity of trying the saboteurs by military commission. Biddle responded the jurisdiction was lawful based “very much on total war.” Black then questioned Biddle:

MR. JUSTICE BLACK: In other words, as I understand your argument, it is based on the concept of total war, authorizing an order something like that which was issued in Hawaii, where the courts are closed entirely?

THE ATTORNEY GENERAL: Mr. Justice Black, it seems to me that it is based not only on total war – and I do not think that that phrase includes this sort – but that war today is so swift and so sudden and so universal that it would be absurd to apply a doctrine like the doctrine in the *Milligan* case, where they said that Indiana during the Civil War had not recently been invaded. The facts existing in 1863 do not today exist, and a bomber may drop a bomb tomorrow on Chicago. Can it be said that there is not area of warfare, no area of military operations in Chicago under those circumstances? I think not.

MR. JUSTICE JACKSON: Why not under the theory of total war? Where do you draw the line?

THE ATTORNEY GENERAL: That is the question, Mr. Justice Jackson, which always comes up in argument at a certain point, and that is where you draw the line.

⁴⁵ *Ibid.*, 571.

⁴⁶ *Ibid.*, 575.

MR. JUSTICE JACKSON: That is the question that this sort of thing presents.

THE ATTORNEY GENERAL: It does.

MR. JUSTICE JACKSON: Where is the line?

THE ATTORNEY GENERAL: I do not know where you draw the line, but I know that you draw it where invaders invade the coast of the United States against a patrol which is directed against that, and the orders of the patrol – and it is an admitted fact – are to prevent an invasion and to be on the lookout for submarines. There can be no question of drawing it there.⁴⁷

The Court adjourned at 6:30 P.M. to reconvene Thursday, July 30, 1942 at twelve noon.

The first day of oral arguments consumed five and half hours.

SECOND DAY OF ORAL ARGUMENTS

At twelve noon, Thursday, the oral arguments before the Supreme Court resumed.

At this time, Associate Justice Douglas had arrived back from the West Coast and was sitting on the dais with the rest of the Justices

The Court reconvened and after a few questions from the Justices, Biddle again addressed the *Milligan* ruling:

I think that the case of *Ex Parte Milligan* is very bad law and that its effect not only on the courts but on the Army is harmful. I hope very definitely that, even should you decide that the Proclamation stands in the way of further action, you may think it advisable to consider whether now you shall not, at least, overrule that portion of the opinion of the majority in *Ex Parte Milligan* which says that where civil courts are sitting under the circumstances in the *Milligan* case, there can be no trial by military commissions.⁴⁸

Biddle continued to attack the *Milligan* case pertaining to this oral argument and went so far as to say, "You can satisfy all the requirements of this case without touching a hair of the *Milligan* case."⁴⁹

⁴⁷ Ibid., 580-581.

⁴⁸ Ibid., 603.

⁴⁹ Ibid., 611.

Then, Biddle made it clear the Constitution did not give aliens the right of access to United States courts, but, to the extent such rights did exist, those rights came from statutes enacted by Congress. Those statutes were the Alien Act of 1798 and the Trading with the Espionage Act of 1917.⁵⁰ The Court asked if the President's Proclamation could overturn the policy Congress established at statute. Biddle responded, "There is nothing in the statute which permits them to come into court without the proclamation."⁵¹ Justice Reed then jumped in:

MR. JUSTICE REED: Without the proclamation.

THE ATTORNEY GENERAL: Therefore, I think that at common law and under the statutes to which I have referred they have no right; but to close any possibility, the President signed a proclamation.

MR. CHIEF JUSTICE STONE: Assume that your opponents are right in saying that there is no jurisdiction in a military court to try the case of these people on its merits. Would a proclamation change that?

THE ATTORNEY GENERAL: Oh, I think not.

MR. CHIEF JUSTICE STONE: So, we come down to the question whether or not these men, in the circumstances of this case, were following what has been called the Law of War, and whether under the Law of War they are subjects to summary disposition by the military authorities?

THE ATTORNEY GENERAL: That is right.

MR. CHIEF JUSTICE STONE: That is really the crux of your case?⁵²

As soon as Biddle answered the question, Biddle realized he may have answered Chief Justice Stone's question a little too flippantly:

THE ATTORNEY GENERAL: Yes. I think, Mr. Chief Justice, that perhaps I answered your question a little too quickly. I think it is conceivable, as I just pointed out in the opening of this argument, that the powers of waging war, of raising armies, of making regulations governing the armies, and the powers of the President as Executive and Commander-in-Chief—these powers in the Constitution express all the powers of the Executive and of the Legislative.

⁵⁰ Ibid., 606. The two acts are mentioned in the oral arguments, but written in greater context in the brief. For better understanding of the two acts, see Briefs in Support Of, 423-424.

⁵¹ Ibid., 607.

⁵² Ibid., 607.

It is conceivable that if there were no statute, or even if the statute, as in the *Milligan* case, specifically provided that these men under certain circumstances could not be tried by a military tribunal, the President, in the exercise of his great authority as the Commander-in-Chief during the war and in the protection of the people of the United States, might issue such proclamations which no Congress could set aside, because it might be considered that those proclamations were a proper expression of this executive power; but, as I said yesterday --⁵³

Biddle thought he had made his point, but later thought he had to reaffirm his point:

THE ATTORNEY GENERAL: . . . I have always claimed that the President has special powers as Commander-in-Chief. It seems to me, clearly, that the President is acting in concert with the statute laid down by Congress. But I am glad you have brought up the point, because I argue that the Commander-in-Chief, in time of war and to repel invasion, is not bound by a statute.

MR. JUSTICE ROBERTS: That is to say that the Articles of War bind him sometimes and sometimes they do not?

THE ATTORNEY GENERAL: No. I do not say that, Mr. Justice Roberts. I say that it is perfectly clear that in this case there is no conflict.

MR. JUSTICE ROBERTS: You mean, his action does not conflict with the Act of Congress?

THE ATTORNEY GENERAL: Yes, sir.

MR. JUSTICE ROBERTS: That is a perfectly understandable argument. But I understood you to say that if he acted in conflict with the Acts of Congress it still was all right.

THE ATTORNEY GENERAL: I do not think I went quite as far as that. I think we could imagine situations where the President could act, in repelling invasion, irrespective of an Act of Congress. He must have some constitutional power that Congress cannot interfere with, as Commander-in-Chief. I think it is unnecessary for me to argue it here, first, because he has acted clearly under the Articles of War, and secondly, whether or not that procedure is followed is not for this court to go into.⁵⁴

Then Biddle addressed the Articles of War:

I think, Mr. Chief Justice, also, if I am accurate in saying so, that Article 46 is the only case where there is doubt. The other sections very clearly deal with courts martial, if I am correct in my construction of Article 38. In Articles 50 ½, 46 and 48 the question goes solely to the matter of review. The other points I claim are not well taken, because they came under regulations which do not apply to the Commission under my construction of Article 38.⁵⁵

⁵³ Ibid., 607.

⁵⁴ Ibid., 636.

⁵⁵ Ibid., 636-637.

After Biddle concluded, Royall began his reply on behalf of the defendants. He readdressed Articles 46 and 50 ½ since the articles had just been brought before the Court by Biddle. Shortly there after, Chief Justice Stone called a recess at 2 PM and reconvened the Court at 2:30 P.M. For the next hour and twenty-five minutes the Justices engaged in discussion on the Articles of War brought before the Court and how they applied to the President. Royall made an important point which opposed any thought that the Law of War could create any offense punishable in the courts. Royall said, “We do not concede that anyone can create an offense in the absence of express Congressional enactment. The Constitution requires that.”⁵⁶ Royall debated with the Court again on the *Milligan* case and the Articles of War. Finally he closed his argument:

Suggestion was made by the Attorney General in his opening remarks that we are fighting a war here. We realize that. We also realize that the Constitution is not made for peace alone, that it is made for war as well as peace. It is not merely for fair weather. The real test of its power and authority, the real test of its strength to protect the minority, arises only when it has to be construed in times of stress.⁵⁷

The Chief Justice stated, “The Court stands adjourned until twelve noon tomorrow.” With that last statement and a quick slam of the gavel, oral arguments ended that pitted due process versus national security during wartime.

THE DAY AFTER

For the last three days the eight saboteurs had been confined to their cells. On July 31, 1942, ten o’clock in the morning, the military commission reconvened back in room 5235 to begin closing arguments by the defense and the prosecution. The Judge

⁵⁶ Ibid., 652.

⁵⁷ Ibid., 666.

Advocate General, Major General Cramer, began with the prosecution's closing remarks. His remarks were brief; he stated how each defendant had lived in the United States during some point in their lives, all returned back to Germany, and that all had attended the saboteur school. They all then boarded one of the two submarines, landed on the coast in New York and Florida to conduct sabotage missions against the United States.

Cramer concluded his argument:

We have brought charges, first, under the law of war, in two specifications, one of which is coming through lines, and I forgot to say, in stating the facts, that they came through our lines and landed in German marine uniforms, for the particular purpose as stated in the testimony, so that they were captured they could be treated as prisoners of war. They came through our lines at a time when, if it had happened that there had been a stronger force there, their submarine could have been attacked and shot down as an invading source.

Under the first charge, therefore, we have laid two specifications, one for coming through lines in that way, and the second for operating behind the lines for the purpose which I have related.

We have laid two charges under the Articles of War, one under the 81st Article and one under the 82nd Article.

We have laid another charge, a charge of conspiracy of all these men, these eight defendants, to do these things.

The prosecution submits upon that evidence that we have made out a case for which we ask on each of these charges and specification a finding of guilt and a sentence in the cases of death.⁵⁸

Royall then stood and began his defense of the eight Germans. He began by stating that his appeal to the Supreme Court requesting a writ of *habeas corpus* and the appeal based upon jurisdiction was in no way a challenge to the personnel serving on the commission based upon their ability for wisdom or fairness. He then argued the Articles of War, the definition of spying versus espionage, and then spoke about each individual he was defending.⁵⁹ Colonel Dowell then stood, made further comments on the defendants' behalf and then Royall resumed with the closing argument until Major

⁵⁸ Trial Transcripts, 2769.

⁵⁹ Ibid., 2770-2786.

General McCoy declared a recess at 11:40 A.M. in order to hear the Supreme Court's *per curiam* opinion scheduled for twelve o'clock noon at the United States Supreme Court.⁶⁰

Just before noon, Royall and Dowell sat in the same seats they sat the previous two days before the Supreme Court, awaiting the members of the Court to arrive and announce their judgment. At noon Friday, July 31, 1942 the United States Supreme Court reconvened and Chief Justice Stone walked into the chambers with the rest of the Justices. He stated the *per curiam* unanimous, then discussed the procedural posture of the case, the granting of petition for writ of *certiorari* before judgment, and then the opinion itself:

THE *PER CURIAM*

The Court holds:

1) That the charges preferred against the petitioners on which they are being tried by military commissions appointed by the order of the President of July 2, 1942, 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 military commission, and have not shown cause for being discharged by writ of *habeas corpus*.

The motions for leave to file petitions for writs of *habeas corpus* are denied.

The orders of the District Court are affirmed. The mandates are directed to issue forthwith.⁶¹

Royall and Dowell's wait had been short; in four minutes, they learned they lost their efforts for their clients before the United States Supreme Court and they had no further opportunity for appeals.

⁶⁰ *Ibid.*, 2787-2807.

⁶¹ *Per Curiam*,

After the announcement, Royall, Dowell, and Biddle returned to the Justice Department building where the commission reconvened at 1:30 P.M. At this point, Royall then stood and read the *per curiam* to the commission. Then, Royall resumed with his closing argument. After he finished, Colonel Ristine stood and began his closing argument on behalf of Dasch and asked the commission to consider two issues. First, he reminded the commission that had it not been for Dasch turning himself into and volunteering to help the FBI, the case would in all probability be an unresolved problem today. Second, he asked the commission to put themselves in the position Dasch put himself in. The rest of Ristine's argument focused not on the charges against Dasch, but Dasch's intention throughout the entire ordeal.⁶² By 4:40 P.M., the commission recessed with an order to reconvene at 9 A.M. Saturday, August 1, 1942.

On August 1, after the opening formalities, Ristine continued with his argument once again focusing on the Dasch's intentions of turning himself into the FBI and helping them capture the rest of the saboteurs. Ristine rested his argument and Royall rose to make final arguments on behalf of Burger and Haupt and concluded:

Now, it has been a difficult task to argue about all these defendants. It is difficult to be fair to all of them and present the case of one. We have sought to do it. We are convinced that they are different. We are convinced that none of them should receive the severe penalty. With that remark we leave the matter to the Commission.⁶³

At 12:57 P.M., a recess was taken and at 2:24 P.M. the same day, the Commission reconvened. The President of the Commission, Major General McCoy, stated, "The prosecution and the defense have nothing further to offer, the Commission is closed."⁶⁴

⁶² Trial Transcripts, 2820-2823.

⁶³ *Ibid.*, 2928.

⁶⁴ Trial Transcripts, 2967.

The military commission had sat for nineteen days, July 8 through August 1, 1942, and the transcripts of the trial would total over three thousand pages.

After the trial ended on August 1, the military commission deliberated throughout the weekend. For two days of deliberation, together they reviewed evidence against each defendant then wrote down their recommendations of guilt and punishment for the President. Unbeknownst to the lawyers or the defendants, the commission's verdict was unanimous.

On August 3, Monday morning, Royall received a call telling him the verdict was in and to get to the Justice Department building. When Royall and Dowell entered room 5235 and sat down, they noticed most of the members from the prosecution were not in the room. Then the prisoners were brought into the room and took their assigned seats. Major General McCoy addressed the group: "The Commission is now open. The Commission has reached a verdict concerning the eight accused men, and this verdict will be transmitted to President Roosevelt for review and approval. The Commission is now closed."⁶⁵ The generals making up the commission stood and departed the room and the prisoners were escorted back to their cells without knowing their fate. Cramer, McCoy and Oscar Cox took the three thousand page transcripts and the sealed verdicts to the White House for the President to review.⁶⁶

⁶⁵ O'Donnell, 245. Keep in mind, one of the areas the defense argued against was about review. The verdict was not given from the commission to the prisoners or to anyone else. The Commission's verdict and punishment went straight to the President for approval and there was no reviewer.

⁶⁶ O'Donnell, 244-246. The President was not at the White House but at Hyde Park and an army plane would deliver the transcripts and verdict to him. It is ironic that on this same day, President Roosevelt signed legislation authorizing a medal of honor for J. Edgar Hoover for his performance in apprehending the eight saboteurs. Roosevelt was

By August 4, the defendants had not been told their fate, but the President had made his decision. The military commission had sentenced all eight saboteurs to death by electrocution, but, Biddle and Cramer recommended clemency for both Dasch and Burger in recognition for their help with the FBI. They recommended that Dasch receive thirty years imprisonment and Burger was recommended for life imprisonment. Roosevelt approved the commission's recommendation; six of the men would be executed and Dasch and Burger's sentences commuted. For the time being, the prisoners remained under heavy guard, and in order to prevent a suicide, army guards were posted in each prisoner's cell with the lights kept on all night as well.

On Saturday, August 8, the prisoners were fed their breakfast at 7 A.M. By 7:30 A.M., Cox went to each cell, starting with Haupt, and told each of the six condemned to die: "The military tribunal has found you guilty on all the crimes as charged and recommended to the President of the United States that you suffer death by the electric chair." For Burger he read the same statement but followed it with, "The President has commuted your sentence to life imprisonment at hard labor." And to Dasch, "The President has commuted your sentence to thirty years of imprisonment and hard labor."

At noon the military escorted the first man to the electric chair. The procedure was the same for each man; each sat on the chair, straps wrapped around the waist, arms and legs. A rubber mask slipped over their face and small sponges, soaked in salt solution, were placed on their head and calf where the electricity would enter their body. Then the attendant placed a metal helmet on their head prior to the executioner turning

briefed by Biddle two weeks earlier on Dasch's and Burger's assistance, but Roosevelt was not aware of the full extent of their cooperation.

the switch. The military conducted the executions in alphabetical order starting with Haupt and ending with Werner Thiel. In sixty-four minutes, all six men had been put to death by order of the President. Officials notified the White House after the electrocutions and by 1:20 P.M., the White House released an official statement about the six executions and the commutation of Dasch and Burger (this statement was the first public announcement of the verdict of the military commission as well). Defense counsels, Royall and Dowell, learned of their clients' fate from this official statement. The Commission sealed the records of the trial until after the end of the war.⁶⁷

President Roosevelt was adamant that no trace remained of the saboteurs. By his instructions, all the saboteurs clothing had been burned. Their bodies were placed in plain pine boxes, and under armed guard, a truck took the coffins to Blue Plains, a potter's field for the District of Columbia. Crude wooden stakes were made with three numbers on each, starting with 276 through 281. A six foot high wire fence separated their graves from the rest of the field. By 7:30 P.M., Tuesday August 11, 1942, two army chaplains said some prayers while the saboteurs' bodies were laid to rest. No photographs were taken and no word was given to the press.⁶⁸ Adolph Hitler's mission to bring the war to the United States ended in total failure. The only remnants of Operation Pastorious existence were six pine box coffins in unmarked graves and two men locked in a federal military prison.

The military commission lasted eighteen days and the United States Supreme Court heard nine hours of oral arguments over a two day period arguing the constitutionality of the President's Proclamation and order. The Court issued its *per*

⁶⁷ O'Donnel, 247-229. Dobbs, 258-263.

⁶⁸ O'Donnel, 249-250. Dobbs, 264-265.

curiam in support of the President, but the Court would not issue its full opinion for another three months. During those three months, questions and doubt arose among the justices on whether they made the correct decision, but the Court had to maintain its unanimity on their full opinion. If the Court reversed its *per curiam* after the execution of six of the saboteurs the Court would lose credibility. After the release of the full opinion, Associate Justice Frankfurter requested Frederick Bernays Wiener, one of his former students and an expert constitutional scholar, to analyze their decision; Frankfurter would regret his request. The Roosevelt Administration also found themselves in a déjà vu within two years of the *Quirin* case; their second attempt to handling German saboteurs proved quite different than their first attempt.

“As guilty as it is possible to be.”

-President Franklin Roosevelt
to Attorney General Francis
Biddle.¹

CHAPTER FOUR

EX PARTE QUIRIN

After two days of oral arguments before the United States Supreme Court and eighteen days before the military commission which was established from an order by the President of the United States, it was time for Chief Justice Harlan Fiske Stone to pen the full opinion of the court. This decision was not Stone's first time he wrote for the majority of his Court, but the complexity of this opinion increased after the execution of the six German saboteurs. The United States Supreme Court's *per curiam*, which upheld President Roosevelt's Proclamation and order on conducting the military tribunal, made possible their execution. Anything written in the full opinion that could cast doubt on the *per curiam*, and by extension the military commission, could cause irreparable harm to the Supreme Court's reputation. The Court's opinion had to stand up to constitutional scholarly scrutiny and, in the event another group of saboteurs infiltrated the United States, the opinion had to allow the Roosevelt Administration the ability to charge and try any new saboteurs in line with the *Quirin* decision. This chapter will address the legal

¹ Biddle, 330. On June 30, 1942, Roosevelt sent this letter to Biddle on his thoughts on the guilt of the saboteurs.

issues and questions the Supreme Court Justices had in writing a unanimous opinion, the Supreme Court's full opinion, the scholarly scrutiny of the opinion, and the Roosevelt Administration's attempt in trying a second group of German saboteurs.

Stone wrote the full opinion of the Court and started to do so the first week of August 1942 at his summer home in Franconia, New Hampshire. Nothing inappropriate existed with the Chief Justice deciding to write the full opinion in New Hampshire, but the Chief Justice realized that he needed more access to legal opinions in Washington D.C. So, he wrote to his law clerk, Bennet Boskey, multiple times requesting he research topics to support the Chief Justice's opinion. Stone's concern on the task of writing the opinion heightened with the execution of the six saboteurs on August 8, 1942. Stone knew the Court's full opinion had to answer the defense's proposition of a full review in reference to the Article 50 ½ in the Articles of War. Six of the saboteurs had been executed, and therefore, would no longer be able to request a review. The knowledge of letting six men go to their death without the proper review would be humiliating to the Court.²

By September, Stone was still working on the initial draft of the full opinion. He wrote to Associate Justice Felix Frankfurter in September and told him he had a difficult time supporting the Government's construction of the Articles of War (in reference to Article 50 ½). Stone told Frankfurter that he found it:

very difficult to support the Government's construction of the articles of war, it seems almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed and it is too late for them to raise the question if in fact the articles as they construe them have violated."³

² Fisher, *Military Tribunals and Presidential Power*, 114-115. Fisher references Stone's letter to Boskey and Stone's letter to Frankfurter.

³ Fisher, *Nazi Saboteurs*, 92.

He did admit that neither of the two living saboteurs nor the public would be made aware of this mistake until after the war since the President sealed the transcripts and documents from the trial until after the war.⁴

Stone's frustration grew while writing his initial draft. He noticed Royall's higher quality of written work and his oral argument over the federal government's, and even commented to his law clerk, "I hope the military is better equipped to fight the war than it is to fight its legal battles."⁵ Stone even considered ruling against the *per curiam* in favor of the saboteurs:

counsel for the saboteurs had a more persuasive argument on the issue than did the government. The order creating the body that tried the German agents rather clearly did not comply with the requirements of these articles (46 and 50 ½). If they applied to the saboteur case, then those six of the eight defendants who were already dead...had been executed illegally.⁶

Additionally, Stone continued to ask for additional documents from Boskey. He asked for legal documents to show that the saboteurs were unlawful belligerents in view of International Law and Law of War. Stone focused this argument along the lines that if the saboteurs were in violation of Law of War, then the saboteurs could then be tried by a Military Tribunal in which the President would have the authority to convene.⁷ If the Court showed this violation of war, then the *Quirin* case would be different from

⁴ Fisher, CRS Report. 27-28.

Fisher, Nazi Saboteurs, 91-92.

⁵ Quote from O'Donnell, 255.

⁶ *Ibid.*, 255.

Fisher reported when Frankfurter was writing his comments, he also came to the same conclusion as Stone, and stated the President did not follow Articles 46 through 53 and that he did not have, "a shadow of a doubt that the President did not comply with Article 46."

⁷ Fisher, Nazi Saboteurs, 92. The President would be authorized to convene a tribunal under the Constitution and Article 15 of the Articles of War.

Milligan case. *Milligan* was not a belligerent or waging war, he was not associated with the military or acting under the direction of the military.⁸

By the middle of September, Stone had returned to Washington. With his initial draft completed, he circulated the draft to his associate justices. Most of the justices sent back draft concurrences and memos debating the power of the Commander-in-Chief overriding the power of Congress, the vagueness of the uncodified law of war, the Articles of War, and military tribunals.

In October, prior to the publishing of the full opinion, Associate Justice Frankfurter sent an internal memo to his fellow justices entitled “F.F.’s Soliloquy” in which Frankfurter had a conversation between himself and the German saboteurs. The soliloquy revealed Frankfurter’s hatred for the German saboteurs and their audacity to petition the high court. Frankfurter’s soliloquy was only three pages which began with the saboteurs request for a writ of *habeas corpus*. He sent the memo to his fellow justice’s with this note attached: “Dear Brethren: This goes to you with affection and respect. F.F.” The soliloquy begins:

Saboteurs: Your Honor, we are here to get a writ of *habeas corpus* from you.

F.F.: What entitles you to it?

The soliloquy followed the defense’s propositions on why the commission was unconstitutional and why the defendants should have access to the civil courts.

Saboteurs: The facts in the case are agreed to in a stipulation before your honor.

F.F. (after reading the stipulation): You damned scoundrels have a helluvacheek to ask for a writ that would take you out of the hands of the Military Commission and give you the right to be tried, if at all, in a federal district court. You are just low-down, ordinary, enemy spies who, as enemy soldiers, have

⁸ Fisher, *Nazi Saboteurs*, 92.

invaded our country and therefore could immediately have been shot by the military when caught in the act of invasion...

Saboteurs: But, Your Honor, since as you say the President himself professed to act under Articles of War, we appeal to those Articles of War as the governing procedure, even bowing to your ruling that we are not entitled to be tried by civil courts and may have our lives declared forfeit by this Military Commission. Specifically, we say that since the President has set up this commission under the Articles of War he must conform to them. He has certainly not done so in that the requirements of Articles 46-50 ½ have been and are being disregarded by the McCoy tribunal.

F.F.: There is nothing to that point either. The articles to which you appeal do not restrict the President in relation to a Military Commission set up for the purposes of and in the circumstances of this case....In lawyer's language, a proper construction of Articles 46-50 ½ does not cover this case and therefore on the merits you have no rights under it....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.... And for you there are no procedural rights such as you claim because the statute to which you appeal – the Articles of War – don't apply to you. And so you will remain in your present custody and be damned.⁹

After completing his monologue, he continued:

Some of the very best lawyers he knows are now in the Solomon Islands battle, some are seeing service in Australia, some are sub-chasers in the Atlantic, and some are on the various air fronts. It requires no poet's imagination to think of their reflections if the unanimous result reached by us in these cases should be expressed in opinions which would black out the agreement in result and reveal internecine conflict about the manner of stating that result. I know some of these men, very, very intimately. I think I know what they would deem to be the governing cannons of constitutional adjudication in a case like this. And I almost hear their voices were they to read more than a single opinion in this case. They would say something like this but in language hardly becoming a judge's tongue: "What in hell do you fellows think you are doing? Haven't we got enough of a job trying to like the Japs and 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 agreed that the President had the power to establish his Commission and that the procedure under the Articles of War for courts martial and military commission doesn't apply to this case. Haven't you got any more sense than to get people by the ear on one of the favorite American pastimes-abstract constitutional discussions. Do we have to have another Lincoln-Taney row when everybody is agreed and in this particular case the constitutional questions aren't reached. Just relax and don't be

⁹ Associate Justice Felix Frankfurter's Soliloquy sent to his fellow justices in October prior to the publishing of the full opinion.

too engrossed in you own interest in verbalistic conflicts because in inroads on energy and national unity that such conflict inevitably produce, is a pastime we had better postpone until peacetime.¹⁰

Frankfurter wrote the soliloquy in order for the other Justices to know how he thought the rest of the country and the military would perceive the Supreme Court if the Court reversed their original *per curiam* and allowed the German saboteurs access to civilian courts.

On October 29, 1942, eighty-two days after the United States executed six saboteurs; the United States Supreme Court issued its full opinion. Chief Justice Stone wrote the unanimous forty eight page opinion which held that the trial of the German saboteurs by military commission on charges of violating the law of war and the Articles of War conformed with the laws of the United States and passed Constitution scrutiny.

Towards the beginning of the opinion, the Supreme Court held: "In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in the time of war as well as in the time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay."¹¹ It was noteworthy the Supreme Court took this time to speak about constitutional safeguards and civil liberty when the Court knew from their work on publishing their full opinion, they were not holding the President accountable for his issued Proclamation and order. The opinion proceeded to discuss the procedural history of the trial of the saboteurs and then Chief Justice Stone established three main points for their decision:

¹⁰ F.F.'s Soliloquy.

¹¹ *Ex Parte Quirin*, 317 U.S. 1, 19.

military jurisdiction to prosecute the saboteurs, the topic of the 1866 *Milligan* case, and the petitioners' right to review.

The first issue decided that the Military Commission did have the jurisdiction to try the German saboteurs. Stone began by stating that, "Congress and the President, like the courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its preamble, is to 'provide for the common defence'."¹² To support this argument, he stated that the Constitution granted war powers and the Constitution authorized Congress to declare war and gave the President, as the Commander-in-Chief, the authority to wage the war that Congress declared.¹³ Congress also passed the laws of conduct which the military follows. Passed by Congress, the Articles of War provided for the military commission and the Articles of War recognized military tribunals to punish offenses against the law of war.¹⁴ The offenses charged against the saboteurs were offenses against the law of war.

¹² *Ex Parte Quirin*, 25-26.

¹³ *Ex Parte Quirin*, 26; The Constitution confers the President the Executive Power (Article 2, §1, cl.1), and imposes on him the duty to "take care that the laws be faithfully executed (Article 2, §3). The Constitution makes him the Commander in Chief of the Army and Navy (Article 2, §2, cl.1), empowers him to appoint and commission officers of the United States (Article 2, §3, cl.1)

¹⁴ Powers given to Congress from the Constitution quoted from *Ex Parte Quirin*, 26: The power to "Provide for the common defense" (Article 1, §8, cl.1), "To raise and support Armies," and "To provide and maintain a Navy," (Article 1, § 8, cl.12, 13), and "To make Rules for the Government and Regulation of the land and naval forces," (Article 1, §8, cl.14). Congress is give the authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," (Article 1, §8, cl.11), "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," (Article 1, §8, cl.10) and the Constitution authorized the Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof." (Article 1, §8, cl.18).

The law of war distinguished between lawful combatants and unlawful combatants. Lawful combatants (uniformed soldiers) when captured the Articles of War authorized to be treated as prisoners of war. Unlawful combatants (enemies who enter the country in civilian dress) are subject to military trial and punishment by military tribunals. The fact that the Germans changed into civilian clothes upon their arrival was never argued. Therefore, they were considered unlawful combatants and subject to military tribunals.¹⁵

He concluded his first point made -- why the commission had jurisdiction -- and stated, regardless of the citizenship of Herbert Haupt and the other Germans, offenses against the law of war are not exclusive crimes committed by aliens from foreign countries. American citizens can commit a violation against the law of war, and still fall under the jurisdiction of a military tribunal.¹⁶

On the second point, the Court distinguished the difference between the saboteur's case and the *Milligan* case. In the 1866 *Milligan* case, the Supreme Court stated that the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."¹⁷ The German defendants "upon the conceded facts, were plainly within those boundaries (jurisdiction of military tribunals), and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying

¹⁵ Ibid., 30-31.

¹⁶ Ibid., 36-38.

¹⁷ *Ex Parte Milligan*. 71 U.S., 2, 121. (1866).

war materials and utilities, entered, or after entry remained in, our territory without uniform – and offense against the law of war.”¹⁸

The key difference was that *Milligan* was a United States citizen who lived in Indiana, he did not reside in any rebellious state, and he was not an enemy belligerent. He was a non-belligerent and not subject to the law of war; therefore, no comparison could be drawn between the two cases.¹⁹

The third and final point of the Court’s opinion dismissed the other propositions of the defense. It stated:

Since the first specification of Charge I sets forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional.²⁰

The Court held that since the first charge was legally valid, the Court did not have to decide to take action on the other three charges. On the defense’s proposition on violating Articles of War 38, 43, 46, 50 ½, and 70 the Court held that “the secrecy surrounding the trial and all proceedings before the Commission, as well as any review of its decision, will preclude a later opportunity to test the lawfulness of the detention.”²¹

The Opinion concluded:

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted;

¹⁸ *Ex Parte Quirin*, 46.

¹⁹ *Ibid.*, 45-46. Surprisingly, although the *Milligan* case was a focal point for both the defense and the prosecution, the Court spent little time on the argument and dismissed the comparison in a few short paragraphs in their decision.

²⁰ *Ibid.*, 46.

²¹ *Ibid.*, 47.

that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for *habeas corpus* in this Court should be denied.²²

For the executive branch, the German saboteur case was a constitutional and a public victory. For the United States Supreme Court, the Saboteur case signaled a power shift towards the executive branch and an example that the court should be hesitant to depart from its established rules and practice, even in the time of war.

BAD PRECEDENT?

After the publishing of the full *Ex Parte Quirin* opinion, Justice Frankfurter felt unease with the Supreme Court's decision and asked Frederick Bernays Wiener, a military justice expert, to comment on the Court's opinion in the *Quirin* case. Wiener wrote three letters: the first on November 5, 1942, the second on January 13, 1943 and the last letter on August 1, 1943. In each letter he criticized the Supreme Court's *Quirin* opinion.

Weiner's first letter credited the Supreme Court for taking on the case and in holding that the eight German saboteurs were war criminals in violation of international law, and under established American precedent, violators were not entitled access to civilian courts or to a jury trial. Wiener criticized the Supreme Court for creating confusion as to the proper scope of the Articles of War in relation to military commissions, specifically in reference to the Roosevelt's Administration disregard to almost every precedent when the administration established the tribunal.

²² *Ibid.*, 48.

Weiner further critiqued the Court's ruling for it lacked holding the Administration responsible in regards to Article 46 which required the trial record of the military commission to be referred to the staff judge advocate or the Judge Advocate General. Weiner made the point that although procedural errors occurred and questions of the saboteurs' guilt or innocence existed, these issues did not justify the issuance of the writ of *habeas corpus*. Weiner concluded that the saboteurs could have been tried by a commission appointed by the Commanding General of New York or Florida, or by a military commission under the limitations of a general court martial, but President Roosevelt's Proclamation made these options impossible.²³

Weiner composed his second letter to Frankfurter two months later in January 1943. Weiner expanded on his views on Article 46 and explained that, in his view, Article 46 and Article 50 ½ when read together requires that the record of military commission appointed by the President must go before a board of review and the Judge Advocate General. He then argued that military commissions were subject to the same procedures as ordinary military commissions except those that where statutes make it so. Congress, from the Constitution, not the President, defines and punishes offenses against the law of nations. Weiner concluded both Articles 46 and 50 ½ imposed such limitations on the President.²⁴

In August of 1943, Weiner wrote and sent his third and final letter to Frankfurter that concentrated on Article 15 of the Articles of War. Weiner included a 1916 letter to Congress from Brigadier General Enoch H. Crowder the Judge Advocate General of the Army from 1911 to 1923. Crowder's letter to Congress articulated the reason for the

²³ Fisher, CRS Report, 36-37.

²⁴ *Ibid.*, 38.

inclusion of Article 15 was to clarify two points: “the first was that it was not the intent in legislating on courts-martial to exclude trials by military commissions, and that military commander’s in the field in the time of war had the option of using either one.”²⁵ Weiner argued that Congress did not intend for military commissions to invent their own rules during their commissions or tribunals. He continued with this line of logic and stated that when Congress created the Judge Advocate General in 1862, Congress directed the Judge Advocate General to receive for “revision, the records and proceedings of all courts-martial and military commissions.” The procedure would be the same for both a court martial and military commissions, but President Roosevelt’s Proclamation and order changed the procedural safeguard established by Congress.²⁶

On further review on the Court’s decision to convene a special session, the Supreme Court had another opportunity to hear arguments in a session where the Court would issue their full opinion much later after their *per curiam*. In 1953, the United States Supreme Court voted to grant *certiorari* in *Rosenberg v. United States*. The Court discussed the option of deciding the case in a summer session, then defer the release of the full opinion in the fall similar to the Court’s July 1942 special session to hear the Nazi saboteur case. Associate Justice Frankfurter responded quickly, that case “is not a happy precedent.”²⁷ In 1958, Associate Justice Hugo Black’s legal clerk, John P. Frank, wrote that the Saboteur’s Case was “of haste [where] the Court allowed itself to be stampeded... [I]f 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; otherwise the proceedings are

²⁵ Quote taken From Fishers CRS Report on Brigadier General Crowder’s response before Congress. 38.

²⁶ Fisher, CRS Report, 39.

²⁷ Quote taken from David Danelski’s “The Saboteurs’ Case”, 80.

purely military and not for [the] courts at all.”²⁸ Lastly, Associate Justice Douglas remarked in an interview, “Our experience with [the Saboteurs’ Case] indicated to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds... is made, sometimes those grounds crumble.”²⁹

The United States Supreme Court issued a unanimous opinion on *Quirin*. Although the opinion was unanimous, the justices had concerns with the lack of due process afforded to the defense prior to the publishing of the full opinion. The justices’ misgivings gave way to serious doubt after Weiner published his three letters to Associate Justice Frankfurter revealing the executive branch’s abuse of power with Roosevelt’s issuance of the Proclamation and order in the name of national security. The true test of the *Quirin* opinion could only be known in the event of another capture of an enemy belligerent on United States soil.

SECOND CHANCE

On November 29, 1944, two German saboteurs, William Colepaugh and Erich Gimpel arrived in Frenchmen’s Bay, Maine from Germany on U-Boat 1230 with a mission of sending intelligence back to Germany. The two men made their way to Bangor, Maine, then to Boston and finally ending up in New York City. In a matter of weeks, the two men had a falling out with each other and the FBI captured both men in New York City; Colepaugh on December 26 and Gimpel on December 30.³⁰

²⁸ Ibid., 80.

²⁹ Ibid., 80.

³⁰ Louis Fisher. “Military Tribunals: Historical Patterns and Lessons.” *CRS Report to Congress*. (July 9, 2004): 46. Colepaugh was born in Connecticut, therefore a United States citizen. Gimpel was a native of Germany.

At first the Roosevelt Administration believed the two saboteurs would be tried by the same procedures as the eight saboteurs who had been tried in 1942 with Attorney General Biddle and Judge Advocate General Cramer prosecuting. But this time, Secretary of War Stimson persuaded President Roosevelt to allow the Commanding General to be responsible for the case.

On January 12, 1945, Roosevelt issued a military order that empowered the commanding generals, under the supervision of the Secretary of War, to appoint a military tribunal. The commanding general of the Second Service Command, Major General Thomas A. Terry, appointed a seven man tribunal. Terry selected officers to serve as the prosecution and the defense counsel. Two lawyers from the Justice Department assisted the prosecution and the military held this tribunal at Governors Island, New York.

On February 14, 1945, the tribunal sentenced Colepaugh and Gimpel to death by hanging. The military tribunal found the two Germans guilty on three counts: violation of the law of war by passing through enemy lines, violation of the 82nd Article of War for spying, and conspiracy. The verdict and sentencing then followed the military's procedure of review and went to Major General Terry, the appointing office, and then to the Judge Advocate's General office.³¹

The two saboteurs were found guilty on nearly identical charges as the eight saboteurs in 1942 and sentenced to be hung. Prior to the saboteurs hanging, President Roosevelt died April 12, 1945. On May 8, 1945, President Truman announced the end of the war in Europe and in June 1945, Truman commuted the saboteurs' death sentences to

³¹ Ibid., 46-47.

life imprisonment. In 1955, Gimpel was released by the United States Government and deported back to Germany and Colepaugh was paroled in 1960.

The United States Supreme Court wrote an opinion, upholding President Roosevelt's Proclamation and order, even though they knew the federal government's case against the German saboteurs did not follow due process according to the Articles of War written by Congress. To make matters worse, a military justice expert revealed serious legal flaws to the members of the court on their *Quirin* opinion. Adding insult to injury, when the FBI captured a second group of saboteurs in 1944, due to the legal debacle that followed the *Quirin* case, the administration chose to let the military try the saboteurs instead of the civilian authority that tried the eight saboteurs from 1942.

Ex Parte Quirin would have been a forgotten decision, except by those that studied the case against the German saboteurs, if it had not been for the attacks on September 11, 2001. The United States found herself having to deal with aggressors from another country that invaded the shores of the United States on a mission of death and destruction. The United States would go to war in both Iraq and Afghanistan justifying the use of force by naming it "The Global War on Terror" in order to kill or capture those responsible for the attacks and to prevent another attack like September 11 again. President George W. Bush, determined to bring these terrorists to justice, issued a memorandum on the detention and treatment of our enemies, established military commissions and used *Ex Parte Quirin* as precedent for the establishment of the proceedings. The federal government claimed the importance of national security over due process and individual rights in the time of war.

The attacks on September 11, 2001 rekindled the provocative subject of military commissions, the legal and military frameworks established to prosecute this new war on terror. But a far more important question is at hand, did the Bush Administration simply mirror the Roosevelt Administration's handling of the saboteur case from 1942 or has the federal government consistently curtailed civil liberties during the time of war in the name of national security?

“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

-Justice Sandra Day O’Connor,
Hamadi vs. Rumsfeld (2004)

CONCLUSION

The importance of the *Quirin* case was not the trial and subsequent execution of the Nazi Saboteurs by the Roosevelt Administration during World War II. Rather, the importance of *Quirin* exists because of how, after the September 11, 2001 terrorist attacks in New York City and Washington, D.C., the George W. Bush Administration used the 1942 precedent to justify its use of military commissions and the detainment of prisoners in Guantanamo Bay, Cuba.

In 1942, in response to the German saboteurs, Congress played no role in the prosecution, although Article 1 § 8 of the Constitution specifies Congress’ role in military commissions. Congressional inaction was and is a decision of its own. Deferring to the President and the military in war-times is no surprise. While the Supreme Court played its constitutional role in the *Quirin* decision, the Supreme Court’s ruling did not become relevant again until recently.

This chapter discusses two questions: First, after the attacks on September 11, 2001, would the executive branch request the restriction of civil liberties in the name of national security? And second, would Congress succumb to war hysteria and pass all

measures to support the war, and would the Supreme Court uphold those laws and orders?

DEJA VU . . . OR NOT

On September 11, 2001, terrorists attack on the United States brought the world to a stand-still. These attacks left 2,976 individuals dead. Those killed were civilians (except for those military personnel killed in the Pentagon) and included individuals from over 90 countries. These attacks provided the world a new enemy: an enemy without a nation, but centered on extreme religious beliefs. These series of events set off a chain reaction of laws designed to protect the United States all in the name of national security.

One week after the attack on September 18, 2001, the United States Congress passed a joint resolution authorizing the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the attackers or harbored such organizations or persons.¹ On October 24, 2001, Congress passed the Patriot Act with the intent to “deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.”²

On November 13, 2001, President Bush signed a military order in regard to the detention, treatment, and the trial of certain non-citizens in regard to the war on terror, quite similar to the Proclamation issued by President Roosevelt in 1942. This order symbolized how the President viewed the September attack as an act of war and not a

¹ “Authorization for Use of Military Force.” September 18, 2001. Public Law 107-40 [S.J. RES. 23], 107th Congress.

² House Resolution 3162. 107th Congress. The act’s full name is: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism. (USA PATRIOT Act)

criminal act. The scale of the attack required the use of the entire United States military forces. Through the use of the military, it became necessary to detain certain non-citizens, try them for violations against the law of war, and conduct military tribunals.³

President Bush's order from November, 13, 2001 stated that to individuals to whom it applies, "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 . . . any court of the United States."⁴ President Bush's order replicated President Roosevelt's Proclamation from 1942 which sought to prevent the Nazi saboteurs' access to the courts.⁵

By 2004, the United States Supreme Court had begun to hear challenges to President Bush's order. Up to that point, Congress rubber stamped the wishes of the

³ Jennifer Elsea. "Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions." *CRS Report to Congress Order Code RL 31191* (December, 2001): 1.

⁴ "Military Order-Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Federal Regulation 57833 (November 13, 2001) The order defines the class of persons that it subjects to possible military trial as including "any individual who is not a United States citizen" with respect to which the President determines in writing that:

1. there is reason to believe that such individual, at the relevant times,
 - i. is or was a member of the organization know as al Qaida [sic.]
 - ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation there of, that have caused, threaten to cause, or have was their aim to cause, injury to, or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
 - iii. has knowingly harbored one or more individuals in subparagraphs (i) or (ii).

⁵ In my email discussions with Louis Fisher, Mr. Fisher pointed out some interesting information: on September 11, 2001, the Office of Legal Counsel occupied the same general area in the Justice Department where the Nazi saboteurs were tried and there is a plaque on the wall explaining the use of the space in 1942. Also, Bill Barr, former head of the Office of Legal Counsel, is rumored to have been familiar with the Saboteur case and recommended to the Bush Administration to adopt the Roosevelt model.

Commander in Chief through legislation such as: the USA PATRIOT Act, funding the Global War on Terror and the joint resolution authorizing the President to use all the force necessary to prosecute the war. The question became would the United States Supreme Court follow the precedence of past Court's decisions and uphold the Commander in Chief's wide latitude to protect the country against attacks and sabotage in times of war?

The United States Supreme Court handed down its first decisions on the same day, June 28, 2004. The first case, *Rasul v. Bush*, the Supreme Court held that the federal courts have *habeas corpus* jurisdiction to review the legality of the confinement of the Guantanamo Bay detainees.⁶ The second case, *Hamdi v. Rumsfeld*, the Court refused to grant undue deference to the military and executive officials in the war on terrorism. Significant to this decision was that Yaser Hamdi was an American citizen captured in Afghanistan by an American ally, the Northern Alliance. The Northern Alliance turned Hamdi over to the United States military. The Bush Administration detained Hamdi as an enemy combatant; therefore, the federal government could hold him without access to counsel or any formal charge or proceeding indefinitely. The Supreme Court decided eight-to-one, and agreed that the executive branch does not have the power to hold a United States citizen indefinitely without due process protections.^{7/8} Associate Justice

⁶ 542 U.S. 466 (2004).

⁷ 542 U.S. 507 (2004).

⁸ Of interest to note, Associate Justice Antonin Scalia asserted that the government only had two options to detain Hamdi: 1. either Congress suspend *habeas corpus* (a power under the Constitution only in times of invasion or rebellion which did not happen in this case unless Congress considers the attacks of September 11, 2001 an invasion) or 2. Hamdi tried under normal criminal law. Scalia then stated "If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court." Scalia ended his

Sandra Day O'Connor wrote the opinion and stated, "A state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

On June 29, 2006 the Supreme Court decided the third and most recent opinion, *Hamdan v. Rumsfeld*. The Supreme Court ruled in a five-to-three opinion that the procedures used by the Administration for military commissions violated military and international law. More specific, the order violated the Uniform Code of Military Justice (UCMJ) and the 1949 Geneva Convention.⁹ The Supreme Court held that Congress was responsible for the changes and updates to the UCMJ; therefore, the President must work through the Congress to make the changes to the UCMJ.

The initial panic and uncertainty that followed the September 11, 2001 attacks were no different than past wars of the United States. Yet with each crisis, each branch of the federal government plays a specific role and duty. In these most recent cases involving military commissions during the current Global War on Terror, the United States Supreme Court reversed the pattern of restricting civil liberties and due process in time of war in despite of the actions of the executive and legislative branches.

As of December 2009, the United States was still at war against terrorism and had deployed thousands of troops to Iraq and Afghanistan. Individuals and enemy combatants are still detained at Guantanamo Bay, Cuba awaiting trials before a military commission in response to former President Bush's order from 2001 based upon the *Ex*

opinion by quoting Alexander Hamilton from Federalist Papers No. 8, "Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free."

⁹ 126 Supreme Court. 2749 (2006)

Parte Quirin precedent. In November 2009, President Barak Obama and his administration announced plans to try some individuals, currently held in Guantanamo, in civilian court in New York City. As of April 2009, no final decision has been made and no trial dates have been set.

Military Commissions have been used since the American Revolution, and will continue into future; yet, commissions are and will remain a contentious issue within the United States. The question of where to draw the line between civil liberties and national security has not been answered, and will no doubt be asked during every national crisis. Two outcomes to these issues can be predicted; the American people can count on contentious debate on the use of military tribunals and the Supreme Court will maintain an important role in balancing civil liberties and national security.

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UNITED STATES CONSTITUTION

Article I

Article II

Article III

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