

Book Review

IN TIME OF WAR: HITLER'S TERRORIST ATTACK ON AMERICA¹

REVIEWED BY MAJOR CHRISTINE M. SCHVERAK²

[Colonel] Royall had to have been struck by the parallels to the story of *Alice in Wonderland*, in which Alice found herself in a kangaroo-style trial where the Red Queen famously intoned, "Sentence first, verdict afterward," and then pronounced, "Off with her head!" It would be a whole lot easier to get a black man acquitted of almost any crime by a southern white jury than to secure an acquittal — or even something less than the death penalty — for these defendants.³

Soon after the attack on Pearl Harbor in World War II, Germany attempted to terrorize the American public by dispatching eight covert military operatives to Ponte Vedra Beach, Florida and Long Island, New York.⁴ Their mission was to destroy American industrial capabilities by sabotage and inflict terror bombings on the populace.⁵ After one operative turned himself in to the Federal Bureau of Investigation (FBI), the FBI quickly located and arrested the remaining seven.⁶ All eight operatives confessed.⁷ Although two were citizens of the United States, the government tried all eight men by military commission instead of in federal district court.⁸ Colonel (COL) Kenneth Royall, an Army judge advocate, defended seven of the eight saboteurs.⁹ Within forty-four days of apprehension, the commission sentenced all of the saboteurs to death, and the government executed six of them.¹⁰ President Roosevelt spared two saboteurs because they cooperated with the government.¹¹ The government then tried many of the saboteur's friends and family in federal court for assisting them.¹²

In Time of War is a must read for any judge advocate contemplating whether or not it is *just* for the government to try enemy combatants by military commission. Pierce O'Donnell provides an entertaining and panoramic look at historical events surrounding the case of the German saboteurs and the resulting precedent from their trial. *In Time of War* then compares the case of the German saboteurs in 1942 to the current detention of Taliban and Al Qaeda operatives.¹³ The author offers four significant conclusions: (1) *Ex Parte Quirin* should not be treated as precedent;¹⁴ (2) all detainees, even unprivileged belligerents, should be tried in accordance with the Uniform Code of Military Justice or by a jury in federal court;¹⁵ (3) the lower federal courts or a competent person, rather than a military officer, should convene an Article Five¹⁶ tribunal;¹⁷ and, (4) all captives should be treated as prisoners of war (POWs).¹⁸ The author's commitment to his conclusions

¹ PIERCE O'DONNELL, *IN TIME OF WAR: HITLER'S ATTACK ON AMERICA* (2005).

² U.S. Army. Written while assigned as a student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

³ O'DONNELL, *supra* note 1, at 132. Colonel Kenneth C. Royall defended seven of the eight "saboteurs." *Id.* at 138.

⁴ *Id.* at 55-65; *see* EUGENE RACHELIS, *THEY CAME TO KILL: THE STORY OF EIGHT NAZI SABOTEURS IN AMERICA* 21 (1961).

⁵ O'DONNELL, *supra* note 1, at 6.

⁶ *Id.* at 78.

⁷ *Id.* at 101-03.

⁸ *Id.* at 133-34; *see Ex parte Quirin*, 317 U.S. 1 (1942).

⁹ *Id.* at 131.

¹⁰ RACHELIS, *supra* note 4 (listing the date of capture as 27 June 1942 and the date of execution as 8 August 1942).

¹¹ O'DONNELL, *supra* note 1, at 248.

¹² *Id.* at 288-89 (stating that as many as fourteen people were prosecuted, including: Hans Haupt, the father of one saboteur, who was convicted of treason and received life imprisonment; Anthony Cramer, a friend of two of the saboteurs, who was convicted of treason and received a forty-five year prison sentence; Hedy Engemann, a saboteur's mistress, who received a three year prison sentence after pleading guilty to misprision of treason).

¹³ *Id.* at xiii-xviii.

¹⁴ *Id.* at 353.

¹⁵ *Id.* at 365.

¹⁶ An article five tribunal is a tribunal convened pursuant to Article Five of the Geneva Convention for Prisoners of War to determine an individual's status when the situation is unclear. Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

¹⁷ O'DONNELL, *supra* note 1, at 365.

can be seen by his willingness to provide a website that makes much of his supporting documentation available to the reader for personal study.¹⁹ When visiting the website, one document the reader should skim is Colonel Royall's oral history transcript. The transcript provides eye-opening first hand accounts of how executive level decisions were made during World War II and also summarizes the entire career of a very intellectually bright judge advocate who rose from a modest home in North Carolina to become Under Secretary of War in 1945.²⁰

While the book is entertaining, at times the author is overly dramatic in his presentation of history. More conservative readers may find the Introduction and the overall tone of the book difficult to stomach. The Introduction, written by Anthony Lewis,²¹ gleefully slings muddy adjectives at all aspects of the U.S. government from the past to the current Bush administration.²² This is unfortunate because the audience that could benefit the most from this book—attorneys from the military, Justice Department, and general counsel's offices—are immediately put on the defensive, perhaps blinding them to an area of law that needs refinement.

The book also fails to direct the reader to the author's overall conclusions through a step by step comparative analysis of both sides of the federal, military, and international law surrounding the use of military commissions. The author, however, does a good job stating military commissions are bad because many people say so.²³ The text and footnotes are often a who's who of famed civil rights supporters.²⁴ While that may persuade many in the general public, an attorney reading this book may crave more information. Nevertheless, this book is a useful starting point for discussions on the justice of military commissions and how to improve them.

The Law of Sausages—An Ugly Look at History

The author is deliberately overdramatic in his approach to history. Today, the United States detains al Qaeda terrorists by relying on *Ex Parte Quirin*,²⁵ a Supreme Court case arising from a habeas corpus request filed by COL Royall during the saboteurs' trial.²⁶ Mr. O'Donnell believes that, much like sausage, if the American public really knew how *Ex Parte Quirin* was decided, they could not stomach it.²⁷ Putting his considerable trial advocacy skills²⁸ to work, Mr. O'Donnell's view of history seeks to persuade the reader that *Ex Parte Quirin* is such bad law that it is equivalent to the following cases:²⁹ *Dred Scott v. Sandford*,³⁰ *Plessy v. Ferguson*,³¹ and *Hirabayashi v. United States*.³²

¹⁸ *Id.* at 354.

¹⁹ In Time of War Home Page, http://www.intimeofwar.org/source_documents.htm (last visited Mar. 13, 2005).

²⁰ Colonel Kenneth C. Royall was an artillery officer in World War I who got out of the military after the war. William T. Ingersoll & Frank W. Rounds, Jr., *The Reminiscences of Kenneth Clairborne Royall* 8 (1964) (unpublished manuscript) (on file with Manuscripts Department, Wilson Library, University of North Carolina at Chapel Hill). The Under Secretary of War, Bob Patterson, asked Kenneth Royall to join the army as a Colonel for World War II. *Id.* at 9. Both Supreme Court Justice Felix Frankfurter and North Carolina Governor J. Melville Broughton helped to persuade him. *Id.* at 9 and 21. He came to Washington to work in the legal section on war department contracts. *Id.* at 10. After representing the saboteurs, Colonel Royall was later appointed a Brigadier General in 1943. *Id.* at 43. President Truman then appointed him Under Secretary of War in November 1945. *Id.* at 86. Additionally, COL Royall has interesting memories of the Nuremberg trials—he was asked if he would be interested in "taking charge of the whole thing" and he was not because he disagreed with the charge of "waging an aggressive war." *Id.* at 311-12.

²¹ Mr. Lewis is a graduate of Harvard College, the author of *Gideon's Trumpet*, a novel about the landmark Supreme Court case, *Gideon v. Wainwright*, and a two-time Pulitzer Prize winner. He lectured at Harvard Law School, teaching a class on the Constitution and the press for fifteen years. Anthony Lewis: *Abroad At Home/ At Home Abroad*, N.Y. TIMES ON THE WEB, http://www.nytimes.com/library/opinion/lewis/bio_lewis.html (last visited Mar. 13, 2006).

²² O'DONNELL, *supra* note 1, at xiii-xviii.

²³ *Id.* at 306-09.

²⁴ *Id.* at 296-324, 429 nn.36-39.

²⁵ *Ex Parte Quirin v. Cox*, 317 U.S. 1 (1942).

²⁶ O'DONNELL, *supra* note 1, at 190-221; *see Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (citing *Ex Parte Quirin* as support for the detention of Mr. Hamdi).

²⁷ Prince Otto von Bismarck-Schonhausen, Duke of Lauenberg, 1815-1898 (stating that "People who enjoy eating sausage and obey the law should not watch either being made").

²⁸ O'DONNELL, *supra* note 1, at jacket (stating that Mr. O'Donnell is a graduate of Georgetown and Yale who clerked for Supreme Court Justice Byron R. White. He was named one of the "100 Most Influential Lawyers in America" by National Law Journal).

²⁹ *Id.* at 353.

³⁰ *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (finding that a slave could not sue his master for assault because he wasn't a citizen and so could not bring the action).

³¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896) (finding that it did not conflict with the Thirteenth and Fourteenth Amendment for a railroad to provide separate accommodations for the white and colored races).

One way the book discredits *Ex Parte Quirin* is by marring President Roosevelt's character and painting his decision to try the German saboteurs by military commission as unfair. The author even notes that President Roosevelt once told the Secretary of the Treasury that, "I am perfectly willing to mislead and tell untruths, if it will help win the war."³³ In another unnecessary example of drama run awry, the author states, "as far as the president and his attorney general were concerned, the eight German defendants were doomed men who would be sped on their way to execution in an expedient, preordained process masquerading as a fair trial."³⁴ Ironically, if the reader checks the footnote, it was a junior member of the defense team, Lausen H. Stone, who felt this way.³⁵

Meanwhile, to garner the reader's sympathy, the author depicts the saboteurs as ordinary men with regular jobs and families.³⁶ The author opines, through the character of COL Royall, that "they hardly looked or talked like cold-blooded saboteurs or the pride of the Third Reich."³⁷ The insinuation is that by appearances, they were innocent. The likeability of a client, however, may have absolutely no relation to his or her guilt!³⁸

Finally, after spending several chapters calling the military commission a "kangaroo court,"³⁹ it is ironic that later on in the book, the author has to concede it was a fair trial with a fair outcome. He states,

The president's prosecution team presented an airtight case based on the German defendant's own damaging statements and incriminating physical evidence . . . All in all, the government struck hard but mostly *fair* blows in securing the Germans' inevitable convictions . . . That they had already confessed to the charges without any coercion by the FBI had more to do with the outcome than any bias or predisposition on the part of the seven generals [who sat on the commission].⁴⁰

One Seems Right Until Another Pleads His Case⁴¹

In Time of War raises good questions, but fails to lead the reader to the author's overall conclusions through a step by step comparative analysis of both sides of the federal, military, and international law on the issue. One of the author's most challenging points is the question of what civil rights a U.S. citizen should receive when the government detains that citizen as an enemy combatant.⁴² For example, when the government presses charges against a U.S. citizen who fights for the enemy, should the government: (1) file federal charges in a federal court after a grand jury indictment; (2) file military charges in a military court after an Article 32 proceeding; or (3) file charges in a military commission or an international tribunal? Alternatively, can the government simply detain the citizen until the end of the conflict? The author never does a step by step analysis that looks at all sides of this issue. It is as if the reader is seeing the defense's case for civil rights without ever seeing the government's case for limiting those rights.

The author's short-sighted approach can be seen by looking at two of his conclusions in relation to current cases. Mr. O'Donnell advocates that the government must give Yaser Hamdi and Jose Padilla POW status⁴³ and either try them in federal court or release them.⁴⁴ The military captured Mr. Hamdi on a battlefield in Afghanistan.⁴⁵ He is a U.S. citizen with

³² *Hirabayashi v. United States*, 320 U.S. 81 (1943) (affirming conviction for violation of a military curfew where curfew order did not unconstitutionally discriminate against persons of Japanese ancestry).

³³ O'DONNELL, *supra* note 1, at 50.

³⁴ *Id.* at 128.

³⁵ *Id.* at 390 n.43.

³⁶ *Id.* at 138.

³⁷ *Id.*

³⁸ Captain Ryan Rosaeur, Senior Defense Counsel, Fort Riley, Kansas ("I am firmly convinced that the likeability of my clients has absolutely no relation whatsoever to their guilt or innocence").

³⁹ O'DONNELL, *supra* note 1, at 141.

⁴⁰ *Id.* at 348-349 (emphasis added).

⁴¹ *Proverbs* 18:17 ("The first to present his case seems right, til another comes forward and questions him").

⁴² O'DONNELL, *supra* note 1, at 354.

⁴³ *Id.*

⁴⁴ *Id.* at 359.

ties to the Taliban.⁴⁶ The police arrested Mr. Padilla, a U.S. citizen with ties to al Qaeda, at Chicago O'Hare Airport following a flight from Pakistan.⁴⁷ The U.S. government is detaining both men as unprivileged belligerents or unlawful enemy combatants.⁴⁸

By concluding that the government should give Mr. Padilla and Mr. Hamdi POW status and a trial in federal court, Mr. O'Donnell glosses over the real question. The real question is where and how to draw the line between when a U.S. citizen is simply a criminal as opposed to a lawful combatant or an unprivileged belligerent. Mr. O'Donnell would treat all categories the same. But, while the government could try a criminal in federal or state court on charges with all the associated constitutional protections, the government would also have to expeditiously charge the criminal or *release* him.⁴⁹ During World War II, however, the government could detain a captured German soldier as a POW until the war with Germany was over.⁵⁰ Interesting questions start to arise when the reader considers a citizen, like Mr. Padilla, who joins an international terror organization and allegedly enters the United States to blow up apartment buildings.⁵¹ The United States is arguing that the government can detain Mr. Padilla until the end of hostilities with al Qaeda.⁵² At first blush, it would seem to be an odd result if a POW could be legally held until the cessation of hostilities, but an unprivileged belligerent could not. However, when does a citizen like Mr. Padilla become an unprivileged belligerent or a POW who can be detained for the duration of hostilities as opposed to a criminal? Does he or should he lose his citizenship rights by simply joining al Qaeda? What if he goes to Afghanistan to train and then guards an al Qaeda outpost?⁵³ If a citizen can lose his rights for that reason, could a citizen lose his citizenship rights by joining a gang that wants to overthrow the government? The author brings this matter to light and voices his opinion on this issue, but never comparatively analyzes this intersection of federal and international law so that the reader can come to his own conclusions.

The author's short-sighted approach can also be seen in the way the book dismisses the option of using military commissions to try detainees. The author does a great job of saying that William Safire,⁵⁴ the American Civil Liberties Union,⁵⁵ the International Commission of Jurists (ICJ),⁵⁶ Lord Steyn of Great Britain,⁵⁷ Lord Peter Goldsmith,⁵⁸ and others all dislike military commissions. The author cites the critics as wondering, "why special tribunals [are] necessary at all."⁵⁹ But the book never truly analyzes why special tribunals may be necessary. For example, military commissions have historically relaxed the rules of evidence to prevent guilty men from going free when war has destroyed traditional means of proving

⁴⁵ Hamdi v. Rumsfeld, 542 U.S. 507, 587 (2004).

⁴⁶ *Id.*

⁴⁷ Padilla v. Hanft, No. 05-6396, 2005 U.S. App. LEXIS 19465, at *4 (4th Cir., Sept. 9, 2005). Mr. Padilla's case has taken significant twists since both *In Time of War* and this review were written. On 17 November 2005, the United States indicted Mr. Padilla in the U.S. District Court for the Southern District of Florida on allegations of conspiracy to commit acts of murder, kidnapping, and maiming within the United States. *United States v. Hassoun*, No. 04-600001-CR-COOKE (S.D. Fla. filed Nov. 17, 2005). The U.S. Supreme Court granted the Solicitor General's application to move Mr. Padilla from military custody to civilian custody on 4 January 2006. *See* Hanft v. Padilla, No. 05A578, 126 S. Ct. 978 (U.S. 2006). Mr. Padilla entered a plea of not guilty on 13 January 2006, and his trial was set for September 2006. Curt Anderson, *Former 'Enemy Combatant' Pleads Not Guilty*, BOSTON.COM, Jan. 12, 2006. Mr. Padilla filed a petition for writ of certiorari on 25 October 2005 that is currently under consideration by the U.S. Supreme Court. *See* Padilla v. Hanft, No. 05-533 (U.S. filed Oct. 25, 2005).

⁴⁸ O'DONNELL, *supra* note 1, at 318-20, 334-39.

⁴⁹ U.S. CONST. amend. V. (stating that "No person . . . [shall] be deprived of life, liberty, or property, without due process of law. . ."); U.S. CONST. amend. VI. (stating that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . ."); Speedy Trial Act of 1974, 18 U.S.C. § 3161(b) (2000) (as amended).

⁵⁰ Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364 [hereinafter GC III] (stating that "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities").

⁵¹ Padilla, 2005 U.S. App. LEXIS 19465, at *9.

⁵² *Id.* at *5.

⁵³ *Id.* at *8.

⁵⁴ William Safire is a *New York Times* columnist. O'DONNELL, *supra* note 1, at 306.

⁵⁵ *Id.* at 305.

⁵⁶ The International Commission of Jurists is an organization of judges and lawyers dedicated to advancing and promoting human rights. *Id.* at 308; *see* International Commission of Jurists, http://www.icj.org/rubrique.php?id_rubrique=11&lang=en (last visited Mar. 13, 2006).

⁵⁷ Lord Johan Steyn was one of the judges on the United Kingdom's highest court, the House of Lords, until he retired in 1995. He is known as a steadfast supporter of human rights. O'DONNELL, *supra* note 1, at 312-13, 429 n.38; *see* Wikipedia, Johan Steyn, http://en.wikipedia.org/wiki/Johan_Steyn (last visited Mar. 13, 2006).

⁵⁸ Lord Peter Goldsmith is the current Attorney General for England and Wales. O'DONNELL, *supra* note 1, at 359; *see* Wikipedia, Peter Goldsmith, Baron Goldsmith, http://en.wikipedia.org/wiki/Peter_Goldsmith%2C_Baron_Goldsmith (last visited Mar. 13, 2006).

⁵⁹ O'DONNELL, *supra* note 1, at 305.

evidence.⁶⁰ For example, a civilian victim who was raped by a soldier may have recorded the war crime in a diary only to later die in a detention camp prior to the end of the hostilities.⁶¹ A military commission or tribunal would likely relax the rules to allow the diary of the deceased victim to be entered in evidence. Indeed, the rules of evidence were relaxed in the Nuremburg trials, a trial that all the critics approve of.⁶² Since the Nuremburg trials are held up as an example of justice, it begs the question of whether or not the 1949 Geneva Conventions intended to abolish the use of military commissions, along with the relaxed rules of evidence that typically go with them.⁶³ Mr. O'Donnell does not do enough analysis to truly argue that military commissions should be extinct. The reader needs additional information to make an informed evaluation of whether the government can and should relax the rules of evidence during current military commissions that are trying the detainees held at Guantánamo Bay, Cuba.

Those Who Give Up Liberty for Safety Deserve Neither⁶⁴

In Time of War is a must read for any judge advocate willing to consider whether or not it is *just* for the government to try enemy combatants by military commission. The author is overly dramatic, but generally accurate, in his portrayal of history. Although the author has four very interesting conclusions, he fails to complete his conclusions with a thorough comparative analysis of the applicable federal, military, and international law surrounding the issue. The book, however, still awakens the reader to an area of law that needs refinement. Specifically, the law, or the government itself, needs to identify some boundaries lines to assist in classifying whether an individual is a criminal or whether the same individual is better classified as a detainee who will be held until the cessation of hostilities with the possibility of eventual prosecution by military commission. These boundary lines need to be publicly available. As the global war on terror continues, the United States will continue to face criticism that the use of military commissions is unjust. Understanding the history of civil rights in this area will give attorneys for the military, Justice Department, and general counsel's offices a much better grasp of how to pursue justice, yet maintain the United States commitment to life, liberty, and the pursuit of happiness.⁶⁵ After all, "[i]n time of... war the people look . . . to the executive solely."⁶⁶

⁶⁰ Christine Schverak, A Comparative Analysis of the Military Trial of General Tomoyuki Yamashita 35 (Spring 2002) (unpublished manuscript on file with author).

⁶¹ *Id.* at 36; see also RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY (1982) (discussing means of proving General Yamashita's guilt before a military commission); GEORGE F. GUY, THE DEFENSE OF YAMASHITA, 6 USAFA J. LEG. STUD. 215, 222 (1996) (discussing evidence received by the military commission).

⁶² RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL 15 (1971); O'DONNELL, *supra* note 1, at 309.

⁶³ O'DONNELL, *supra* note 1, at 129; GC III, *supra* note 50, art. 102 ("A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed").

⁶⁴ O'DONNELL, *supra* note 1, at page before contents (quoting Benjamin Franklin, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety").

⁶⁵ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

⁶⁶ O'DONNELL, *supra* note 1, at 11, 370 n.9.