

In Time of War: Hitler's Terrorist Attack on America

By Pierce O'Donnell, The New Press, New York, N.Y. 365 pages, \$28

Reviewed by Ronald W. Meister

Consider a mid-twentieth century capital trial, in which there is no indictment, no trial by peers, no rules of evidence, and no appeal. Add that the statements of each defendant, obtained in the absence of counsel, are admitted against all co-defendants; that the triers of fact are hand-picked by the prosecutor's boss; and that all the proceedings are secret.

Hardly, you say, a model of which our judicial system should be proud? Yet, this describes *Ex Parte Quirin*, the case of the World War II German saboteurs, the precedent most often cited by proponents of the current administration's military tribunals for trials of "unlawful combatants."

Pierce O'Donnell, a trial lawyer and partner in a Los Angeles firm, has written a meticulously-detailed and highly readable account of the case, from the training of the saboteurs who were landed by submarine on Long Island and in Florida, through the trial, the extraordinary Supreme Court session, and the execution of six of the eight defendants. A concluding section brings the narrative down to the present, and includes sharp comparisons with the Supreme Court's 2004 trilogy of decisions in *Rasul*, *Hamdi* and *Padilla*.

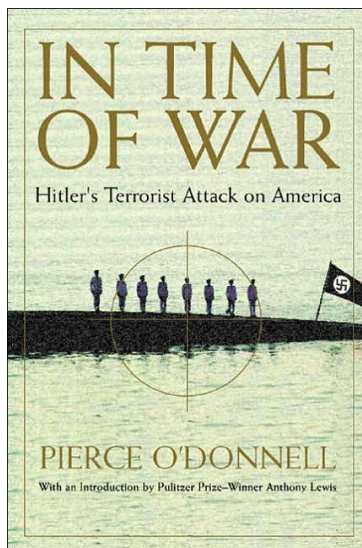
Drawing on sources including the now-declassified trial transcript, the memoirs of the chief defense and prosecution counsel, and a work by one of the two defendants whose sentences were commuted by President Truman, O'Donnell's book is part history and part editorial, characterizing the trial as a "Kangaroo Court," and going so far as to say "the fix was in" at the Supreme Court. But it is hard to fault his conclusion when there is strong evidence that sitting Supreme Court Justice Felix Frankfurter advised President Roosevelt how to structure the trial to avoid Constitutional difficulties; that the FBI broke its promise of a pardon to the one defendant who had turned himself in and revealed all the details of the plot, enabling the capture of the others; and that Roosevelt made known to the chief prosecutor, Attorney General Francis Biddle, and through him to the tribunal, that he expected death sentences for all the defendants. Indeed, memos of Supreme Court justices reveal that they feared Roosevelt would have had the defendants executed regardless of the Court's decision.

O'Donnell's narrative is enlivened by well-drawn descriptions of the major participants, and by references to the assortment of minor players who later gained repute, including junior prosecutor Lloyd Cutler, and young defense counsel Boris Bittker and Lauson Stone, son of the Chief Justice. But the unabashed hero of the book is chief defense counsel Col. Kenneth Royall, later Secretary of the

Army and prominent member of the firm that has now, after many changes, become Clifford Chance LLP. It was Royall who devised the strategy of seeking relief from the Supreme Court, despite the President's declaration that all civilian courts were closed to the defendants. It was Royall who knocked on the front door of Justice Hugo Black's home seeking a writ of certiorari, only to be told, "I don't want to have anything to do with that case of the German spies." It was Royall who persisted, flying to Justice Owen Roberts's farm outside Philadelphia during a trial recess and persuading him, and eventually the Court, to entertain his application. And it was Royall who ultimately received what must be one of the most touching letters ever sent by a losing client to his lawyer. It read, in the careless grammar of his German clients,

"[W]e want to state that defense counsel...has represented our case as American officers unbiased, better than we could expect and probably risking the indignation of public opinion. We thank our defense counsel for giving its legal ability...in our behalf."

By the time he read that letter, his clients were dead.



The odd epilogue to the trial was the Supreme Court's post-mortem opinion, issued three months after the executions. The Justices had struggled, and failed, to come to an agreement on the rationale for their prior summary order upholding the jurisdiction of the military tribunal. One scholar has described the resulting opinion as "little more than a ceremonious detour to a predetermined goal." Several of the Justices in later years acknowledged that the *Quirin* decision shed little credit on the Court, and Chief Justice Stone himself is said to have expressed misgivings about the outcome. Yet, it is this decision, with all its weaknesses, and the underlying trial, with all its flaws, that is a principal basis for the Government's position on the current trials of enemy combatants.

O'Donnell writes persuasively about the weakness of *Quirin* as a precedent, and about the circumstances that distinguish Guantanamo prisoners from the German saboteurs. But his final note of optimism, that District Court decisions in the cases of "dirty bomber" Jose Padilla and Guantanamo prisoner Salim Hamdan reflect the beneficial lessons of history, has been undone by the recent Court of Appeals reversals in both cases. It remains to be seen whether the current Supreme Court will consider *Quirin* to be a valuable precedent, or instead regard it as the Court and the country at large have come to view its notorious decision two years later in *Korematsu*.

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