Three Prosecutors Reassigned After Protesting Rigged Guantanamo Trials

By Hans Sherrer

At least three military prosecutors have been relieved as prosecutors of Guantanamo Bay detainees after they expressed concerns to superiors that the trial process was rigged to ensure convictions.

The revelations are in emails turned over in late July 2005 to defense lawyers for detainees by a whistleblower, Air Force Colonel Will Gunn. Gunn had access to the emails because he was the retiring head of the Defense Department's office that provides legal counsel to individuals charged under the military commission (tribunal) system authorized by President Bush in 2001. The Defense Department has confirmed the authenticity of the emails.

One of the prosecutors, Air Force Major Robert Preston, who was nominated for the Air Forces' outstanding judge advocate award in 2004, wrote to his superior:

"I consider the insistence on pressing ahead with cases that would be marginal even if properly prepared to be a severe threat to the reputation of the military justice system and even a fraud on the American people." [1]

He also wrote, "Surely they don't expect that this fairly half-assed effort is all that we have been able to put together after all this time." In relaying to his superior that he found it intolerable to work in a situation that he found professionally, ethically and morally reprehensible, Maj. Preston wrote, "I lie awake worrying about this every night. I find it almost impossible to focus on my part of the mission. After all, writing a motion saying that the process will be full and fair when you don't really believe it is kind of hard, particularly when you want to call yourself an officer and lawyer." [2]

Less than a month after writing the March 15, 2004, email, Maj. Preston was transferred, and he is currently an instructor at the Air Force Judge Advocate General's School at Maxwell Air Force Base in Montgomery, Alabama.

A second prosecutor, Air Force Captain John Carr, wrote to his superior:

"When I volunteered to assist with this process and was assigned to this of-

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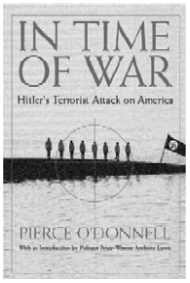
In Time of War: Hitler's Terrorism Attack on America

By Pierce O'Donnell

The New Press, 2005, 449 pgs (hardcover)

Review by Hans Sherrer



Books are worth reading for various reasons. Some because they are humorous, others because they are gripping dramas, still others because they have useful self-help information.

In Time of War is worth reading because it is important: It puts the extra-legal treatment of people captured and designated by the United States as "enemy combatants" since 2001 in historical perspective, by casting light on the similar proceedings used in 1942 to railroad the conviction of eight alleged German saboteurs.

In mid-June 1942 eight men, six German citizens and two U.S. citizens of German descent, were transported to the U.S. in a German U-boat. They were all arrested within two weeks after their leader informed the FBI they were allegedly planning acts of sabotage in the United States.

Five days after the last man's arrest on June 27, President Roosevelt issued Proclamation 2561: "Denying Certain Enemies Access to the Courts of the United States." O'Donnell writes:

"Under the decree, the Germans "shall be subject to the law of war and to the jurisdiction of military tribunals" and would not be "privileged" to seek relief from confinement in any court by means of a writ of habeas corpus or any other judicial remedy."

"[U.S. Attorney General Frances] Biddle had recommended that the president close the civil courts to enemy saboteurs as a class rather than naming the specific [eight] defendants. Curiously, he advised the president that this phrasing of his proclamation would have the effect of denying these Germans access to the courts *without suspending habeas corpus*." (p. 129)

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Ex-Guantanamo Prisoner Acquitted of Terrorism Charges

By JD Staff

Nasser al-Mutairi was imprisoned for three years without charges by the United States military at Guantanamo Bay, Cuba. The U.S. claimed al-Mutairi, a Kuwaiti citizen, was an alleged terrorist who worked with the Taliban "as a kind of mediator." Al-Mutairi denied the accusation.

After being in U.S. custody since his capture in Afghanistan in late 2001, al-Mutairi was released from Gitmo and sent to Kuwait in January 2005. He was arrested upon his arrival in Kuwait and charged with terrorism related crimes. After being in custody for three months, Al-Mutairi was released on bail by Kuwait's Criminal Court released on April 14, 2005. His trial began shortly thereafter.

Al-Mutairi's lawyer, Mubarak al-Shimmiri, made a pretrial challenge to the jurisdiction of a Kuwaiti court to try al-Mutairi for what he was accused of: Joining foreign military forces without permission; harming Kuwait by serving the interest of a "foreign country;" and undergoing illegal weapons training. Al-Shimmiri unsuccessfully argued that the charges should be dismissed because none of al-Mutairi's alleged acts occurred in Kuwait, and they weren't considered crimes in Afghanistan when they were allegedly committed.

Al-Mutairi is a devout Muslim, and at trial his defense was he went to Afghanistan in 2000 for humanitarian work – long before the United States' invasion of that country in the fall of 2001. He also claimed that he did not work with or aid any of the forces fighting in Afghanistan. Al-Mutairi asserted that the U.S. military manufactured alleged "interrogation records" that he admitted working on the front line of fighting in Afghanistan. Prior to al-Mutairi's release into Kuwaiti custody for prosecution, that interrogation "evidence" was used by military prosecutors before a military panel to justify al-Mutairi's continued indefinite imprisonment.

The charges against al-Mutairi were based on the U.S. military's interrogation records, However, there was no independent corroboration of his alleged incriminating admissions. Most particularly, there were no witnesses who confirmed his alleged involvement with fighting in Afghanistan.

On June 29, 2005, al-Mutairi was acquitted of all the charges. His lawyer, al-Shimmiri, said

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> fice, I expected there would at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged. You have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees and that we only needed to worry about building a record for the review panel." [3]

Capt. Carr also wrote that "an environment of secrecy, deceit and dishonesty" pervaded the Guantanamo prosecutors office, and that defendants weren't provided with exculpatory evidence that was in documents conveniently withheld from disclosure for national security reasons by the Central Intelligence Agency.

Capt. Carr suggested that prosecutors had been advised to avoid making a written record of sensitive comments and concerns, and that prosecutors were advising the "appointing authority" that was overseeing the trials, and which might rule on defense motions and requests. He wrote that practice created "a potential appearance of partiality." [4]

Capt. Carr furthermore stressed that notes by military staff and statements by detainees concerning torture and abuse disappeared. He wrote that an FBI agent, "related last week that he called and spoke to Cmdr. Lang about the *systemic destruction of statements by detainees*, and Cmdr. Lang said that did not raise any issues." [5]

In summarizing his concerns to his superior, Capt. Carr wrote that the actions in the prosecutors office "may constitute dereliction of duty, false official statements or other criminal conduct." [6]

After being transferred soon after his March 11, 2004, email, Captain Carr was promoted to Major. He now handles civil litigation at the Pentagon.

A third prosecutor, Air Force Captain Carrie Wolf shared the concerns about the unfairness of the Guantanamo Bay trial process expressed by Maj. Preston and Capt. Carr. She was also transferred to a different assignment.

In a memo he distributed around the Guantanamo prosecutors office, the chief prosecutor, Army Colonel Frederick Borch, described the allegations of the three prosecutors as "monstrous lies." [7] After conducting an internal investigation, the Pentagon determined no evidence supported the officers claims of criminal misconduct and ethical violations. As of early September 2005, that report has not been made public. A month after the prosecutors made their concerns known, and after they were forwarded to the Pentagon, Col. Borch was reassigned to the Army's Judge Advocate General's School in Charlottesville, VA. Soon thereafter he retired from the military. He is currently employed as the Clerk of the Court for the U.S. District Court in Raleigh, N.C.

Although denied by the Pentagon, many of the allegations in the emails of the concerned prosecutors — who stood to be virtually guaranteed of garnering convictions by the tactics they exposed — were similar to those expressed by defense lawyers for the detainees and groups like Amnesty International, Human Rights Watch, and even the American Bar Association. The ACLU issued a statement, "Clearly the concerns raised by these two confirm what we've been saying from the beginning: (the Pentagon) rigged the system to render the result the Bush administration wants, which is conviction of these first accused, at any cost." [8]

The rules for the terrorism tribunals constitute a body of law that is distinct from military and civilian law. Among other things, they allow witnesses to anonymously testify for the prosecution, and information is admissible as evidence if the presiding judge determines it is "probative to a reasonable person." Under that minimal standard, e.g., hearsay evidence that is inadmissible under military or civilian law will be admissible. As of September 2005 it is in a gray zone as to whether a confession or other admissions obtained through coercion or torture will be admissible.

Four detainee trials began in August 2004 at Guantanamo Bay. One of those men, Salim Ahmed Hamdan, filed a habeas corpus petition challenging the legality of his prosecution. He claimed the proceedings violated Constitutional due process protections and U.S. treaty obligations under the Geneva Conventions. The trials were halted in November 2004 when a federal judge granted Hamdan's habeas petition. The government appealed, and in July 2005 a three-judge panel of the D.C. Circuit Court of Appeals unanimously reversed the lower courts ruling. That panel, which included Supreme Court Chief Justice nominee John Roberts, ruled, "… the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court." [9] The *Hamdan* decision relies in part on the Supreme Court's 1942 ruling in *Ex Parte Quirin* 317 U.S. 1 (1942), in which the Court ruled eight men arrested in the U.S., including two U.S. citizens, could be tried by a secret military tribunal in Washington D.C. under rules that included depriving them of a public trial by jury, or any means of appealing their conviction or sentence. Six of the eight men were executed in Washington D.C., days after their conviction. (See, *In Time of War*, on page 14 of this issue of *Justice:Denied*.)

Since Hamdan cannot enforce the Geneva Convention's mandates of prisoner treatment, under the Circuit Court's ruling there is no bar to the conducting of his trial, and that of other U.S. detainees at Guantanamo and elsewhere, in a manner that violates the letter and the spirit of the Convention's due process protections. Hamdan has appealed the ruling to the Supreme Court, but as of mid-September 2005 it hasn't been announced if it will review the decision.

As of early September 2005 the Pentagon has not announced when the trials will resume.

Australian David Hicks is one of the four detainees whose trial was stopped. He was arrested in Afghanistan allegedly aiding the Taliban. After the prosecutor's emails were made public, his defense lawyer said, "For the first time, we're seeing that concerns about the fairness of the military commissions extend to the heart of the process." [10] Hicks' father said, These commissions weren't set up to release people. These commissions were set up to make sure they were prosecuted and get the time that they give them, and the other thing we've said all along, that we believe that this system has been rigged as they call it." [11]

Endnotes:
1 Leaked Emails Claim Guantanamo Trials Rigged, Leigh Sales, *Australian Broadcast Corporation*, August 1, 2005.
2 *Id.*
3 *Id.*
4 Two Prosecutors At Guantanamo Quit in Protest, Jess Bravin, *Wall Street Journal*, August 1, 2005, p. B1.
5 *Id.*
6 Two Prosecutors Faulted Trials for Detainees, Neil A. Lewis, *New York Times*, August 1, 2005.
7 *Id.*
8 Ex-Military Prosecutors Fault Gitmo Trials, AP, *New York Times*, August 2, 2005.
9 *Hamdan v. Rumsfeld*, No. 04-5393 (D.C.Cir. 07/15/2005); 2005.CDC.0000166, ¶58 <http://www.versuslaw.com>
10 Leaked Emails Claim Guantanamo Trials Rigged, *supra*.
11 *Id.*

Other Source: Third Prosecutor Critical of Guantanamo Trials, Leigh Sales, *Australian Broadcast Corporation*, August 3, 2005.

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