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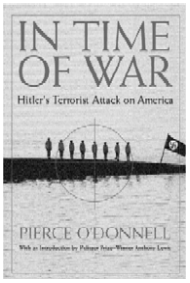
# In Time of War: Hitler's Terrorism Attack on America

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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Biddle recommended the proclamation's wording because he didn't think the President had the authority to suspend habeas corpus under the Supreme Court's ruling in, *Ex Parte Milligan*, 71 US 2 (1866). A secret military trial was scheduled to start in Washington D.C. within weeks of the men's capture. The charges against the men included entering the U.S. "for the purpose of committing acts of sabotage, espionage, and other hostile acts," "lurking or acting as spies," and criminal conspiracy. [1]

Only two days before the trial began, two Army lawyers were assigned to defend seven of the men. Those lawyers were Army Col. Kenneth Royall and Army Col. Cassius Dowell. A separate lawyer was assigned to the man who had informed to the FBI. Royall and Dowell didn't just think Roosevelt's executive order denying the men due process protections — including trial by jury — was unconstitutional, but that it was intended to railroad their clients. O'Donnell writes about their first meeting with the seven defendants, "As the two lawyers left their clients, Royall pondered their predicament. *This whole thing is a publicity stunt. All they want is to make a show of this trial and I am just an actor in this spectacle*." (p. 138)

The secret military trial was to be presided over by seven generals and a 2/3 vote was necessary to recommend a verdict and sentence to Roosevelt, whose judgement — even though he wouldn't attend any of the proceedings — would be final since no appeal to either the military or civilian legal system would be permitted.

After the trial began the worst fears of the lawyers about the unfairness of the proceedings was confirmed. They decided to file a habeas corpus petition challenging the legality of Roosevelt's proclamation denying the defendants any civilian or military due process protections. Knowing that filing a petition that was likely to be denied by the federal District Court would be futile unless the Supreme Court would agree to review the case, Royall met with Sup. Ct. Justice Hugo Black to see if he would support certiorari. Black told him he didn't want anything to do with the "spies" case. Royall then approached Justice Owen Roberts, who was agreeable to reviewing the case. After contacting the other justices (including Black), Justice Roberts informed Royall the Supreme Court would agree to hear the case.

Royall and Dowell immediately filed the habeas petition. After the writ was swiftly denied, they appealed directly to the Supreme Court. The trial was adjourned pending the outcome in the Supreme Court. The oral arguments on July 29 and 30, 1942, lasted more than nine hours, and are among the longest in Supreme Court history.

Yet unbeknownst to the defense lawyers, the hearing was rigged in all but name. O'Donnell writes, e.g., that three of the justices had "disqualifying conflicts, either in the actual development of the case, advising the Roosevelt Administration, or serving in the military. … This kind of presidential pressure on the Supreme Court made a mockery of impartial justice. Royall was walking into a set trap and everyone knew it except him." (p. 213) Justice Murphy recused himself because he had enlisted in the Army, however he remained secretly involved, and even sat behind a curtain separating him from the justices hearing the case. Justice Felix Frankfurter, however, didn't recuse himself, even though he had secretly advised Roosevelt to try the men with a military tribunal, and he "secretly advised the president's men on how to structure the military tribunal in anticipation of a Supreme Court challenge." (p. 213) Justice James Byrnes, O'Donnell writes, "had been serving as a de facto member of the Roosevelt Administration for the previous seven months, working closely with Roosevelt and Biddle on the war effort. Byrnes offered advice on a range of issues, including drafting executive orders, war powers legislation, and other presidential initiatives." (p. 213)

The day after the oral arguments ended, the Court orally announced its unanimous decision denying the habeas petition. (see*, Ex Parte Quirin*, 317 U.S. 1 (1942)). O'Donnell sets out a compelling case that the justices didn't accept the case to honestly review its merits, but to put on the show of appearing to do so in order to have the opportunity to judicially endorse Roosevelt's authority to suspend constitutional due process protections for selected classes of people in the name of national security.

On August 1, the day after the Supreme Court's decision, the trial ended with the tribunal's recommendation that Roosevelt find all the men guilty and sentence them to death. Roosevelt agreed with the guilty verdicts and the death sentence for six of the men – including the two U.S. citizens. However, based on the recommendation of administration officials, Roosevelt ordered sentences of life in prison and 30 years in prison for the two men who cooperated. The man sentenced to 30 years, George Dasch, was double-crossed by FBI Director J. Edgar Hoover and A.G. Biddle, who had promised him a six month sentence and a full presidential pardon for his cooperation.

On August 8, just seven days after the trial concluded, the death sentences were carried out when the six men were electrocuted. Only seven weeks had passed from the first man's arrest on June 17 to the carrying out of the death sentences - and that included time-out for the Supreme Court's review! There was so much secrecy surrounding the case that the executions weren't publicly reported until several weeks after they were carried out.

Royall bluntly described the entire process of the men's prosecution under Roosevelt's proclamation as a "legal lynching." (p. 268) He had argued to the tribunal that the men hadn't actually done anything except illegally enter the country, and there was no proof the men – who were all amateurs – would have been able to carry out any acts of sabotage. He told the tribunal, "A man who had a pistol "with intent to kill" would be fined no more than $50 in most jurisdictions." [2] O'Donnell's opinion of the proceedings legality is summed up in his title for the chapter about the trial, "Kangaroo Court" (chapter 14).

The general shadiness of the entire process used to prosecute the eight men is indicated by the fact the Supreme Court's written decision in *Ex Parte Quirin* is officially dated July 31, 1942 – the date the oral decision was announced, and eight days before the six condemned to death were executed. However the decision wasn't actually issued until October 29, 1942 — 82 days after the executions.

So no one knew the reasons the Supreme Court rejected the men's habeas petition until they had been dead for almost three months. Justice Black's law clerk was so disturbed by the way the case was handled that he said, "If the judges are to run a court of law and not a butcher shop, the reasons for killing a man should be expressed before he is dead; otherwise the proceedings are purely military and not for courts at all." [3]

*In Time of War* also explores in depth another major denial of due process rights in the U.S. during WWII — Roosevelt's February 1942 Executive Order 9066 — which enabled the military's summary imprisonment of almost 120,000 Japanese-Americans without the indictment, trial, conviction or sentencing of a single one of them. (See, In Memoriam - Fred Korematsu 1919-2005, *Justice:Denied*, Spring 2005, Issue 28, p. 5)

To demonstrate that we are now experiencing a déjà vu like repetition of events, O'Donnell explains at length the similarities between the justification for, and implementation of Roosevelt's Proclamation 2561, and President Bush's November 13, 2001, "Order concerning the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Ter-

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rorism (66 Fed. Reg. 57,833). Just as the purpose of Roosevelt's proclamation was to circumvent fundamental due process principles of American and military law to ensure that defendants prosecuted under it would be convicted, substantial evidence has come to light since O'Donnell's book was published in June 2005, that Bush's order is intended to serve the same purpose. (See, Guantanamo Trials Rigged – Claim Three Prosecutors, on page 14 of this issue of *Justice:Denied*.) Quite frankly, the only reason to deny a person the ability to effectively defend him or herself is to ensure the person's conviction.

In 1942, defense attorney Royall considered the entire military tribunal process to be "an undeclared war on the rule of law." (p. 149) O'Donnell thinks we are experiencing the same thing today. However he is hopeful the eventual result will be different, and "that the federal judiciary will eventually force the total dismantling of President Bush's "black hole" at Guantanamo Bay. In its place the United States should resort to the highly regarded Uniform Code of Military Justice. Then – and only then will America be able to begin to reclaim its leadership role as a champion of human rights and the rule of law." (p. 365)

*In Time of War* is a very readable book written to be clearly understandable by lay people interested in history and current events, as well as readers curious about the legal cases it discusses. Befitting O'Donnell's status as a distinguished lawyer, the book is replete with many hundreds of footnotes for people wanting to verify his sources or who want to do further research.

*In Time of War* is available for purchase from *Justice:Denied's* Innocents Bookshop at, http://justicedenied.org/books.htm.

Endnotes:
1. *Saboteurs: The Nazi Raid on America*, Michael Dobbs (Vintage 2004). *Saboteurs* focuses on the details of the events surrounding the eight men prior to and after their entry into the U.S., and what happened to the two who weren't executed.)
2. *Id.*
3. *Id*. at 264-265.

## Ex-Gitmo cont. from page 14

after his trial, "He was acquitted because nothing could be proven against him."

As of the summer of 2005, eleven Kuwaitis remain imprisoned indefinitely without charges at Guantanamo Bay.

Source: Ex-Gitmo Inmate Acquitted of All Charges, Diana Elias, *Associated Press*, June 29, 2005.
Ex-Guantanamo prisoner didn't know of 9/11, *China Daily*, April 15, 2004.

## Wenatchee cont. From page 12

and extensive "sex-ring." Perez was provided critical aid by the Washington Department of Human Services — which duly removed the children of accused and convicted parents from their home. Local prosecutors also aided Perez by uncritically examining the evidence of alleged child abuse by dozens of people prior to pursuing criminal charges against those people.

In 1998 the *Seattle Post-Intelligencer* published a week-long series of 12 articles about the cases titled "The Power to Harm." The articles documented that the abuse that occurred in Wenatchee wasn't by the accused parents against their own and other children - but by the city of Wenatchee and Chelan and Douglas counties in prosecuting the people for fictitious crimes, with the support of the Washington DHS. The articles had titles that included, "With every step, rights were trampled," "'Lies, lies and more lies,' says jailed man," "Lives ruined because lessons ignored." "The Power to Harm" series can be read on the *Post-Intelligencer's* website at, http://seattlepi.com.

Throughout the years from the first arrests through the appeals of convictions, city, county and state authorities defended their actions as appropriate, even as the insubstantial legal basis for the prosecutions was publicly laid bare.

Five of the defendants served the full-term of their sentence, several were released after their convictions were vacated, and several others who didn't want to sit in prison for the years that their appeal might last, agreed to plead guilty to a lesser charge in exchange for their immediate release. The last "sex-ring" defendant was released in December 2000 after his conviction was reversed. He had been wrongly imprisoned for six years.

In 1998 members of three families that had either been acquitted or had "sex-ring" charges dismissed, filed a $20 million lawsuit in state court seeking compensation related to having been falsely accused of being serial child abusers and rapists. Two of the acquitted defendants who sued were Reverend Robert Roberson and his wife Connie. The Roberson's were targeted for their wrongful prosecution after they publicly questioned the truthfulness of the charges filed against the alleged "sex-ring" members, many of whom attended their East Wenatchee church.

In addition to the city of Wenatchee and Chelan County, the suit named Wenatchee Det. Bob Perez and police Chief Ken Badgley as defendants. Prior to the trial held in Seattle in 1998, the judge ordered the removal of Perez and Badgley as defendants, and Wenatchee didn't provide the plaintiffs with Perez's employment records. The plaintiffs lost at trial and appealed on multiple grounds, including that the judge erred by removing Perez and Badgley as defendants, and that Wenatchee had improperly withheld Perez's employment records.

In November 2002 Spokane County Superior Court Judge Michael Donohue ruled that Perez and Badgley had been improperly removed as defendants, and that Wenatchee had deliberately withheld Perez's employment records from the plaintiffs and the trial court. The judge also ruled that since those records were key evidence that Wenatchee knew could have changed the trial's outcome, he ordered the city to pay a fine of $718,000.

It is now known why Wenatchee didn't want to disclose Perez's employment records: "*they show he was suffering from a serious mental disability at the time he conducted the investigations*." [1] Perez's employment file also documents that at the time he was involved in the "sex-ring" investigations, "*police officials expressed concerns about Perez's fitness for duty*." [2]

In August 2005 the state Court of Appeals upheld Judge Donohue's decision, and in September 2005 the Washington Supreme Court declined to review the decision.

After the Supreme Court announced it was letting the lower court decision stand, Tyler Firkins, one of the plaintiff's attorneys said, "They are really excited about the possibility to get some justice." [3]

Wenatchee's lawyer, Patrick McMahon, said, "We're exploring what our options are." [4]

The case will now be scheduled for a retrial with Perez and Badgley as defendants, and Perez's employment records as evidence. Unless a settlement can be agreed to, the case will be retried with the jury's exposure to Perez's unfavorable employment records, and intense questioning of Perez and Badgley about presently undisclosed details about how and why the "sex-ring" investigations spun out of control instead of being shelved before the first person was prosecuted.

Endnotes and sources:
1. High Court Declines To Consider Judgment Against The City of Wenatchee, AP, *Seattle Post-Intelligencer*, September 10, 2005.
2. *Id.*
3. Sex-ring ruling may cost Wenatchee $1 million, Mike Barber, *Seattle Post-Intelligencer*, September 10, 2005, p. B1, B4.
4. *Id.*