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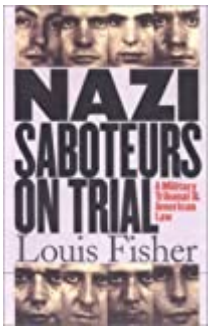

Louis Fisher. *Nazi Saboteurs on Trial: A Military Tribunal and American Law.* Lawrence: University Press of Kansas, 2003. xi + 193 pp. $29.95 (cloth), ISBN 978-0-7006-1238-3.

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On November 13, 2001, President George W. Bush ordered the creation of special military tribunals to try non-U.S. citizens suspected of engaging in or abetting terrorist attacks on the United States. As a precedent, administration officials invoked the military tribunal created by President Franklin D. Roosevelt to try eight Nazi saboteurs, two of them naturalized U.S. citizens, who landed on the East Coast of the United States in 1942. Louis Fisher, a political scientist at the Congressional Research Service who specializes in constitutional law, has written the most thorough account to date of that episode and its legal implications. His book questions the wisdom and effectiveness of both Roosevelt's original decision and Bush's far more ambitious plans for military tribunals. Fisher sees the actions of both presidents as a dangerous concentration of power in the executive branch at the expense of constitutional protections. (Those interested in the issues will want to see Fisher's longer study that generated this brief account, a book tentatively entitled *Military Tribunals: The Law of War and Constitutional Rights*, forthcoming from the University Press of Kansas.)

Fisher's account begins with a description of the inept Nazi sabotage team, "doomed from the start" (p. 4) by poor training, low morale, and so many obvious logistical obstacles that German intelligence decided to provide only half-hearted backing. "The whole thing is hopeless," despaired the head of the *Abwehr* (military intelligence), Admiral Wilhelm Canaris, who delegated the project to subordinates after receiving an order from Hitler to plan acts of sabotage against the United States" (p. 4).

The misadventures of these "Keystone Kommandos" have been told before.[1] Two teams of four men each arrived by submarine off Long Island and Florida, buried their explosives in the sand, and then meandered around American cities looking up friends and relatives until George John Dasch, a team leader tormented by second thoughts, tipped off the FBI and they were all arrested. All but two were executed. Fisher's narrative of the events leading up to the arrests is detailed, but presented in an uninspired, cataloguing style that could have benefited from tighter editing, especially to eliminate unnecessary repetition. We are informed four times within eleven pages that the saboteurs' training site was near

Brandenburg (pp. 5, 11, 14, 16), twice on one page that mechanical pens and pencils were to serve as detonators (p. 30), once that two pounds of explosives would cut a railroad line and a little later that one pound would do the job (pp. 18, 30). Saboteur Herbert Haupt's attempt to mislead the FBI in Chicago is reported this way on page 36: Haupt "stopped by the FBI office to inform the bureau that he had returned from Mexico. Something about the visit and Haupt's story made the FBI suspicious; when Haupt left the FBI office, he was followed each day until his arrest on June 27." The echo comes six pages later: "Haupt went to the FBI office in Chicago and said that he had been out of the country, in Mexico. His story did not sound quite right, and the FBI put a tail on him. He was apprehended a little after 9 a.m. on June 27" (p. 42). Fisher's and-then-what-happened reportage is not always compelling and does not seem connected to the argument in the rest of the book. It is based largely on a long transcript of the military trial; other sources, primary or secondary, that might have helped contextualize the events are lacking. For example, Dasch's decision to turn himself and his colleagues over to the FBI remains mysterious. Where did his sympathies lie? Fisher notes that Dasch told the military tribunal he was an opponent of Nazism and Hitler, yet he voluntarily returned to his native Germany in March, 1941. "This part of the story is confusing," Fisher admits (p. 8), although it does not seem all that surprising that a defendant on trial for his life would seek to cast himself in the best possible light to his captors.

But the narration of the saboteurs' actions takes up only forty pages, and then the strongest part of the book begins, as might be expected coming from the author of a dozen works on the separation of powers: Fisher's sharp analysis of the legal and constitutional issues involved in the prosecution of the saboteurs by a special military tribunal and the Supreme Court's rushed decision to approve the procedure in *Ex parte Quirin*. The author carefully and clearly explains both juridical events, relying on trial transcripts and the papers of the court justices.

To begin with, Fisher examines the issue of why a military tribunal was deemed necessary when the civil courts were readily available–in the words of the landmark Civil War case from 1866, *Ex parte Milligan*, the courts were "open and operating." The Supreme Court had held in *Milligan* that civilians could not be tried before military courts under these circumstances. In fact, the FBI initially told Dasch that he would get a civilian trial as part of a plea bargain promising him an eventual presidential pardon for his cooperation. After seeing his picture on the front page of a Washington newspaper, however, Dasch withdrew his plea and demanded the right to tell his story in open court (p. 46). This action, according to Fisher, fostered one of the two reasons that propelled the Roosevelt administration to seek a military tribunal: to prevent the defendants from speaking in public. When secrecy is invoked by Bush administration officials today, they usually argue that accused terrorists could take advantage of open court proceedings to send messages to sleeper cells. In 1942, Fisher reports, embarrassment seems to have been the motive. J. Edgar Hoover's FBI was being praised in the press for its quick work rounding up all the Nazi infiltrators, and did not want it to become known that they cracked the case only because one of the infiltrators walked into FBI headquarters and turned himself in before they could blow anything up. The truth about American vulnerability to infiltration would have been unpopular with the public, and might have been dangerously encouraging to the Axis.

A second reason for the administration's preference for a military tribunal was that such a body could mete out harsher punishment. Espionage and treason carried the death penalty, but it would have been difficult to show that the infiltrators had committed either offense. Congress had created a statute under the Articles of War providing a maximum thirty-year prison sentence for acts of sabotage, but the infiltrators had not actually managed to commit any acts, only to prepare for them. The maximum penalty for conspiracy was three years. But President Roosevelt, and others in his administration, wanted to see them executed. Even a regular court-martial would have had to follow statutory procedures. A military tribunal could devise its own procedures. Within a week of the arrests, Roosevelt issued an order creating the tribunal and denying the defendants access to the civil courts for judicial review. "I won't give them up," FDR told Attorney General Francis Biddle. "I won't hand them over to any United States marshal armed with a writ of habeas corpus, understand?" (p. 52). He further specified that the tribunal's judgment should be transmitted "directly to me for my action thereon," rather than being subject to review within the military, as are ordinary courts-martial (p. 53).

The challenge these moves presented to the principle of due process and to the authority of the judicial branch are obvious. Fisher points out that the procedure represented a seizure of legislative authority as well. Although the Constitution provides Congress the power to define crimes and punishments for the military realm through the Articles of War, the tribunal prosecuted the defen-

dants under the "law of war," an unwritten collection of principles, thereby in effect creating new criminal offenses and new punishments. As Fisher writes, "Charging individuals with violations of the 'law of war' shifts the balance of power from Congress to the Executive" (p. 59).

Despite Roosevelt's resolve not to have the civil courts interfere, the defendants did attempt a legal challenge by asking the Supreme Court to rule on the tribunal's competence. Attorney General Biddle argued that the Supreme Court had no jurisdiction over the presidential decision to create a military tribunal, but that there should be no problem with the Court reviewing a habeas corpus petition, "so long as it rejected it" (p. 96). Like the tribunal itself, the Court's decision was supposed to be preordained in order to result in the conviction of defendants presumed to be guilty. Biddle spoke for a consensus within the Roosevelt Administration in claiming that Roosevelt stood above the Supreme Court in this matter. The Justices themselves seem to have understood their role. They agreed to rush through a decision after two days of oral argument and without time for legal research. In *Ex parte Quirin*, they sustained the legitimacy of the tribunal. Their correspondence reveals some anguished second thoughts over the Court's decision not to rule on a key question: whether Roosevelt's creation of the tribunal violated the Articles of War created by Congress. Chief Justice Harlan Fiske Stone worried that the Court was "in the unenviable position of having stood by and allowed six to go their death [... although] it had left undecided a question on which counsel strongly relied to secure petitioners' liberty" (p. 112). As they mulled over the language of their written decision (to be issued three months later, after the six executions), Justice Felix Frankfurter circulated a memorandum to the Brethren calling for them to stiffen their spines. Frankfurter called the defendants "just low-down, ordinary, enemy spies" whose "bodies will be rotting in lime," and urged that no dissenting opinions about the separation of powers be made public because any publicity could weaken "national unity" at a time when American fighting forces are "trying to lick the Japs and the Nazis." Frankfurter's "sense of patriotism in wartime," Fisher concludes, "placed national unity above constitutional concerns" (pp. 120-121). That would seem to apply equally to the other Justices, like Stone, who chose to keep their qualms from the public.

Fisher's study of the saboteur case places in doubt whether a military tribunal can ever be expected to offer the fairness of a civilian trial, given the duty most officers feel to abide by the wishes of their superiors. Colonel Cassius M. Dowell, assigned to the defense, accepted his task but refused to employ the obvious and fundamental defense strategy of appealing to a civilian court to question the legitimacy of Roosevelt's convocation of the tribunal while civilian courts were open on these grounds: "He told the tribunal that he had been a soldier for over forty years and was accustomed to taking orders from the Commander in Chief" (p. 66). If the defense attorney felt more obligation to the president than to his clients, and the president had already stated that the death penalty was "almost obligatory" in this case (p. 49), the tribunal clearly takes on a perfunctory character.

Colonel Kenneth Royall, Dowell's partner on the defense team (who did decide to go to the Supreme Court), opened his argument by noting that it was difficult to defend seven men (Dasch had separate counsel) because "what is said in favor of one may not be favorable to another" and he was left "arraying one of our clients against the other" (p. 71). Even without this dilemma, Royall found the entire process unsound. The law created by Congress provided thirty years in prison for wartime sabotage, and his clients had not been able to commit any acts of sabotage, only to prepare for them; yet they were facing execution. Going beyond the mandate of Congress with this ex post facto escalation of the penalty presented the dual risk, in Royall's view, of endangering both American democracy and American soldiers. The United States should not try to win the war "by throwing away everything we are fighting for," Royall argued, "because we will have a mighty empty victory if we destroy the genuineness and the truth of democratic government and fair administration of law" (p. 72). Americans, he observed, were moving into European and Asian theaters of operations, and if captured, might soon be brought before foreign military tribunals. With more American soldiers shipping out every day, what kind of a precedent was being set for "our own boys who are going overseas" (p. 71)?

Although it is today cited as a precedent, Roosevelt's Proclamation 2561 creating the military tribunal was actually much narrower than Bush's order. Roosevelt's proclamation applied to "enemies who have entered upon the territory of the United States [...] in order to commit sabotage, espionage, or other hostile or warlike acts" (p. 50). That applied only to the eight saboteurs of 1942 (and two more who tried their luck in 1945). The Bush order applies to any non-U.S. citizen whom the President "has reason to believe=85has engaged in, aided or abetted, or conspired to commit, acts of inter-

national terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy" (p. 160). As Fisher writes, "FDR had looked backward at a handful of known saboteurs who had confessed. Bush looked forward to a large population of unknowns, not yet apprehended or charged [...]. 'Aiding or abetting' could involve innocently contributing money to a group that seemed to be a legitimate charitable or humanitarian organization" (p. 160). And although Attorney General John Ashcroft has argued that "foreign terrorists who commit war crimes=85are not entitled to and do not deserve the protection of the American Constitution," Fisher rightly responds that "the key legal issue, of course, is demonstrating that someone *is* a foreign terrorist. Reaching that judgment requires the fact-finding and procedural protections of an independent court capable of distinguishing between the guilty and the innocent" (p. 161). Back in 1942, a separate, civil trial of friends and relatives of one of the saboteurs who knew about his plans resulted in six convictions for treason, including three death sentences. A retrial was ordered by the Seventh Circuit Court because the defendants' rights to due process had not been respected, in a decision that implicitly condemned the Supreme Court's decision in *Ex parte Quirin*:

"Of the many rights guaranteed to the people of this Republic, there is none more sacred than that of trial by jury [...]. The right is all-inclusive; it embraces every class and type of person. Those for whom we have contempt or even hatred are equally entitled to its benefits [...]. How wasted is American blood now being spilled in all parts of the world if we at home are unwilling or unable to accord every person charged with a crime a trial in conformity with this constitutional requirement."[2]

The admonition is worth recalling as debate flares anew over the convening of military tribunals in the war against terrorism.

Notes:

[1]. Ladislas Farago, *The Game of the Foxes: The Untold Story of German Espionage in the United States and Great Britain during World War II* (New York: David McKay, 1971); David Kahn, *Hitler's Spies: German Military Intelligence in World War II* (New York: Macmillan, 1978); Eugene Rachlis, *They Came to Kill: The Story of Eight Saboteurs in America* (New York: Random House, 1961); George J. Dasch, *Eight Spies against America* (New York: McBride, 1959); and Gary Cohen, "The Keystone Commandos," *Atlantic Monthly* (February 2002): pp. 46-59.

[2]. *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943), 671, quoted in Fisher, p. 81.

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