

**THE EXECUTION OF THE INNOCENT IN MILITARY TRIBUNALS:  
PROBLEMS FROM THE PAST AND SOLUTIONS FOR THE FUTURE**

*By Justin Walker\**

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\* Assistant Professor of Law, University of Louisville Brandeis School of Law. I am grateful to Neil Barton and Leah Spears for their excellent research assistance. I am also grateful for the helpful advice I received from Kristin Bateman, Joe Bilby, Lesley Bilby, Rich Chen, Eric Nguyen, Leah Litman, Lee Liberman Otis, Richard Re, Andrew Wright, my faculty colleagues, and participants at the SEALS Annual Conference and the University of Kentucky Developing Ideas Conference.

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For the past 15 years, the United States has struggled with the question of how to administer military tribunals. During that time, most commentators have assumed that the right to a speedy trial that protects traditional criminal defendants also benefits military tribunal defendants. But in the context of military tribunals, history suggests that delay is good for defendants—especially innocent defendants. This is perhaps best illustrated by two previous military tribunals: The Dakota War tribunals of 1862 and the German Saboteurs tribunal of World War II. Those earlier tribunals led to the conviction and execution of defendants who were likely innocent. These injustices were largely the result of the public fear and hysteria surrounding the military events precipitating the tribunals, which in turn caused structural infirmities in the tribunals like denial of counsel, unreliable evidence, unnecessary secrecy, biased decision makers, and hastiness. If the tribunals had been sufficiently delayed, the hysteria likely would have abided, and the structural infirmities would likely have been either improved or even cured. If military tribunals are going to be used in the future, we should remember the benefits of, and insist on, a new right for defendants to delay the tribunals.

## I. INTRODUCTION

Beginning with General George Washington's trial of the British spy John André, the United States military has at times used military tribunals to try enemy combatants suspected of violating the laws of war. After military tribunals were constituted in the immediate wake of the September 11, 2001, attack, the concept received renewed attention among the public, in Congress, and by the Supreme Court.

One of the key debates was—and remains—the question of what procedural protections the tribunals should provide defendants and whether the proposed procedural rules are comparable to the rules used by previous tribunals. The later inquiry, however, turns out to be too simplistic. The question is not merely whether previous tribunals have jettisoned certain procedural protections, but what we can learn from those experiences. This Article seeks to learn from a close look at two previous sets of military tribunals that demonstrate the danger of convicting innocent defendants in military tribunals: The Dakota War tribunals of 1862 and the German Saboteur tribunal of 1942.

The Dakota War tribunals were convened amid the chaos of the American Civil War.<sup>1</sup> Hundreds of Sioux Indians were tried for war crimes in trials that often lasted no longer than five minutes.<sup>2</sup> Hearsay was liberally admitted, and defendants received no legal representation. More than 300 defendants were sentenced to death.<sup>3</sup> President Lincoln stayed many of those executions, but permitted the hanging of 38 individuals, the government's largest mass execution in American history.<sup>4</sup>

Eight decades later, the United States military tried eight men from Germany accused of being Nazi spies and saboteurs.<sup>5</sup> None of the eight attempted to commit a single act of sabotage, and several took actions inconsistent with any intent to carry out their mission—including turning themselves in to the FBI.<sup>6</sup> But a military tribunal with a host of structural

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<sup>1</sup> GLENN SULMASY, *THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR* 44 (2009).

<sup>2</sup> LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 52 (2005) [hereinafter FISHER, *MILITARY TRIBUNALS*] (citing Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 *STAN. L. REV.* 13, 27 (1990)).

<sup>3</sup> *Id.* at 52; SULMASY, *supra* note 1, at 44.

<sup>4</sup> Chomsky, *supra* note 2, at 14.

<sup>5</sup> FISHER, *MILITARY TRIBUNALS*, *supra* note 2, at 91.

<sup>6</sup> *Id.*

infirmities found the defendants guilty.<sup>7</sup> Six of them were executed, including a 22-year-old American citizen.<sup>8</sup>

This Article uses these two sets of tribunals to argue that public fear, hysteria, and pressure can have a much greater distorting effect on the creation of military tribunals than has been conventionally recognized. It proposes that if military tribunals must be used, they should be delayed until after the initial panic accompanying many major military conflicts has abided. Delaying these trials will increase the likelihood of procedural protections, which will in turn increase the likelihood of acquitting innocent defendants.

There is something counterintuitive about delaying a trial in order to protect possibly innocent defendants. The Speedy-Trial Clause of the Sixth Amendment of the Bill of Rights protects against the danger of a prolonged imprisonment of innocent defendants. The phrase “justice delayed is justice denied” is a cliché—and a not often challenged one. Conventional wisdom holds that delay is unfair, or even dangerous. Indeed, many have complained that the military tribunals authorized by Congress in 2006 have been moving too slowly. In the years (more than a decade) since the capture of detainees who the Department of Defense plans to try in military tribunals, only a handful of defendants have been tried.<sup>9</sup>

But for two reasons, the slow pace of today’s military tribunals is actually a good thing. First, defendants in military tribunals *suffer* from a speedy trial process *more* than civilian defendants do, because conducting the tribunal quickly often leads to structural infirmities that do not plague civilian trials. Second, defendants in military tribunals *benefit* from a speedy trial process *less* than civilian defendants do, because military combatants are likely to be detained as Prisoners of War for the duration of a military conflict, regardless of the timing of military tribunals—which only punish war crimes and which do not, like a combatant status review hearing, determine whether a detainee can be held as a prisoner of war for the duration of the conflict.

In short, this Article argues that military tribunals should provide far greater procedural protections than procedures used in 1862 and 1942; that a cause of prior procedural infirmities was public sentiment; and that a delay in the military tribunals offers some promise of reducing or eliminating those procedural infirmities—which would make the acquittal of innocent defendants more likely. It begins in Part II with a review of the Dakota War, its tribunals, and public sentiment surrounding those tribunals. Part III reviews the German would-be saboteurs who arrived in the United States in 1942, their tribunal, and

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<sup>7</sup> *Id.*

<sup>8</sup> Gary Cohen, *The Keystone Kommandos*, ATLANTIC (Feb. 2002), <http://theatlantic.com/magazine/archive/2002/02/the-keystone-kommandos/302405>.

<sup>9</sup> *Guantanamo: By the Numbers*, MIAMI HERALD (Aug. 24, 2016), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2163210.html>.

public sentiment surrounding that tribunal. Part IV argues that structural infirmities in both sets of tribunals—infirmities that were partly the result of public hysteria—led to wrongful convictions and the execution of innocent defendants. Part V demonstrates the importance of these issues in light of the Supreme Court’s jurisprudence, and the acts of Congress surrounding the detention of military detainees since September 11, 2001. Part VI proposes that Congress adopt a “super-statute” that provides defendants with a right to delay their military tribunals, explains why the delay mechanism would improve military tribunals’ structural infirmities and better protect defendants, and outlines the ideal procedural protections of a military tribunal. Part VII concludes.

## II. THE DAKOTA WAR, ITS TRIBUNALS, AND PUBLIC SENTIMENT

### A. *The Dakota War*

In the summer of 1862, the 7,000 men, women, and children of the four Dakota tribes of southern Minnesota—part of the seven tribes of the Sioux nation—were facing a desperate situation. Before 1851, the lower 35,000 square miles of the state had been their home.<sup>10</sup> But over the previous decade, they had lost 97% of their land through treaties that promised them as little as \$0.12 per acre.<sup>11</sup> Even this paltry amount of money was slow in coming. Indian agents sometimes withheld annuity payments until peaceful Indians captured outlaws. At other times, agents made payments directly to corrupt traders who claimed Indians owed them money.<sup>12</sup> In still other years, like the summer of 1862, Congress was simply late in appropriating the funds.<sup>13</sup> The result was that the Dakota lacked their own food and the money to buy food from traders. They were starving.<sup>14</sup>

On August 17, 1862, four young Dakotas began arguing about eggs found in a nest on the property of a white family, the Joneses.<sup>15</sup> They were hungry and were returning to their reservation after an unsuccessful hunting

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<sup>10</sup> Relations: Dakota & Ojibwe Treaties, *1851 Dakota Land Cession Treaties*, TREATIESMATTER.ORG, <http://treatiesmatter.org/treaties/land/1851-Dakota> (last visited Oct. 6, 2016) [hereinafter *Dakota & Ojibwe Treaties*].

<sup>11</sup> *Id.*; see also SULLIVAN, *supra* note 1, at 44.

<sup>12</sup> *Dakota & Ojibwe Treaties*, *supra* note 10.

<sup>13</sup> FISHER, *MILITARY TRIBUNALS*, *supra* note 2, at 52; SULLIVAN, *supra* note 1, at 44; Chomsky, *supra* note 2, at 16–17.

<sup>14</sup> FISHER, *MILITARY TRIBUNALS*, *supra* note 2, at 52; SULLIVAN, *supra* note 1, at 44; Chomsky, *supra* note 2, at 15–17; *Dakota & Ojibwe Treaties*, *supra* note 10.

<sup>15</sup> MICHAEL CLODFELTER, *THE DAKOTA WAR: THE UNITED STATES ARMY VERSUS THE SIOUX, 1862–1865*, at 35 (2d ed. 2006).

expedition.<sup>16</sup> One young man advised a second to leave the eggs.<sup>17</sup> The second accused the first of fearing white people.<sup>18</sup> The argument escalated until each was determined to demonstrate what young, desperate people sometimes mistake for courage.<sup>19</sup> They murdered Robinson Jones, his friend, his neighbor, his wife, and his daughter.<sup>20</sup>

When the four Dakotas returned to their village, many elders wanted to turn them over to the white authorities.<sup>21</sup> But other, more bellicose Dakotas believed that violence was the only way out of the desperate situation the treaties, delayed annuities, and starvation had forced them into.<sup>22</sup> At a large council, they advocated for waging a war that they believed might drive away the whites and allow the Dakota to return to their old lands and their old way of life.<sup>23</sup>

The next day, some Dakota went to war, and some did not. In particular, most of the men in two of the four Dakota tribes—the Sisseton and Wahpeton—refused to fight.<sup>24</sup> Some in the other two tribes—the Mdewakanton and Wahpekute—also declined to join an uprising. Of the four tribes combined, it is likely that a majority of the Dakota elected not to participate.<sup>25</sup> But on the morning of August 18, 1862, a group of those who chose war attacked the United States government's Redwood Agency, where government officials, agents, traders, and other families (white and Indian) lived.<sup>26</sup> Twenty whites were killed, and ten more captured.<sup>27</sup> Forty-seven white civilians successfully fled to the United States Army's Fort Ridgely, 13 miles to the east.<sup>28</sup>

Violence continued for the next 40 days. At times, Dakota warriors and United States soldiers fought each other at military installations like Fort Ridgely.<sup>29</sup> At other times, Dakotas and militia-like citizen-soldiers fought at

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 36.

<sup>21</sup> KENNETH CARLEY, *THE DAKOTA WAR OF 1862: MINNESOTA'S OTHER CIVIL WAR* 10–11 (2d ed. 2001).

<sup>22</sup> *Id.*

<sup>23</sup> Chomsky, *supra* note 2, at 18–21.

<sup>24</sup> Ralph K. Andrist, *Massacre!*, *AM. HERITAGE*, Apr. 1962, at 8.

<sup>25</sup> Ellen Farrell, *The 1862 Dakota Conflict in White Imagination*, 1 *J. INDIAN WARS*, no. 3, 2014, at 2.

<sup>26</sup> Chomsky, *supra* note 2, at 18.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 18–19; CARLEY, *supra* note 21, at 12–14.

<sup>29</sup> Chomsky, *supra* note 2, at 19.

strategically important towns like New Ulm.<sup>30</sup> In still other instances, some Dakotas attacked civilians traveling on roads or at home on their farms, which spread terror throughout southern Minnesota.<sup>31</sup> Approximately 358 white settlers were killed.<sup>32</sup>

By late September, 30,000 settlers had “completely depopulated” a 23-county-wide area of 12,500 square miles.<sup>33</sup> The Dakotas were “winning” the war in the sense that the fatalities they inflicted—77 United States soldiers; 29 white citizen-soldiers—dwarfed their own 29 military fatalities.<sup>34</sup> But in another sense, the war had never been winnable. Even in the middle of the American Civil War, the United States Army could always outnumber and out gun a small Dakota population that was starving. While an army of Dakotas was fighting and losing the battle of Wood Lake, anti-war Dakotas seized control of the warriors’ best leverage for a negotiated peace—the white women and children who had been taken prisoner.<sup>35</sup> The pro-war Dakota leaders then fled Minnesota with many of their followers, while the anti-war Dakotas returned the prisoners to the United States Army in exchange for an end to hostilities.<sup>36</sup> On September 26, 1862, the Dakota War ended.<sup>37</sup>

Approximately 2,000 Dakotas surrendered to Colonel Henry Sibley, the Army’s field commander.<sup>38</sup> A large number of them were women and children.<sup>39</sup> Many of the others were men who had never joined the pro-war Dakotas.<sup>40</sup> The remaining minority—perhaps several hundred—had participated in the war, while those who led them—and most of those who fought with them—were hundreds of miles away, having decided to flee north and west rather than surrendering to Sibley.

Two days after the surrender, Sibley established a military commission to try prisoners for “murders or other outrages upon the Whites.”<sup>41</sup> Military tribunals had been used to try suspected war criminals in the American

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 21; FISHER, MILITARY TRIBUNALS, *supra* note 2, at 52.

<sup>33</sup> Andrist, *supra* note 24.

<sup>34</sup> FISHER, MILITARY TRIBUNALS, *supra* note 2, at 52; Chomsky, *supra* note 2, at 21.

<sup>35</sup> CLODFELTER, *supra* note 15, at 57.

<sup>36</sup> *Id.*

<sup>37</sup> CARLEY, *supra* note 21, at 64–67.

<sup>38</sup> Andrist, *supra* note 24.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Chomsky, *supra* note 2, at 23.

Revolution<sup>42</sup> and the Mexican-American War.<sup>43</sup> After the Civil War, military tribunals would be used to try suspected war criminals from the Civil War,<sup>44</sup> the Philippines insurrection,<sup>45</sup> and both theaters of war in World War II.<sup>46</sup> But never before had the United States government imposed criminal punishments on American Indians merely for fighting on a military battlefield—likely because participation in a war is not by itself a war crime—and the government would never do so again after the conclusion of the tribunals Sibley established.<sup>47</sup>

Even though it was unprecedented to try American Indians in military tribunals merely for participating in a battle, Colonel Sibley acted as if the tribunals were ordinary, with neither Sibley nor his commanding officer, General John Pope, thinking to ask permission from—or even inform—their Commander in Chief, Abraham Lincoln.<sup>48</sup> Thus began what historian Roy Meyer has called “one of the blackest pages in the history of white injustice to the Indian.”<sup>49</sup>

The tribunals established by Sibley tried defendants on often vague charges of committing sundry “murders and massacres.”<sup>50</sup> Each trial lasted less than a day, and many of them took only five minutes.<sup>51</sup> They did not provide the defendant with an attorney, the right to remain silent, or the opportunity to cross-examine witnesses.<sup>52</sup> They also admitted large amounts of hearsay and other highly unreliable evidence.<sup>53</sup> Presence at a battle against military forces was sufficient evidence to convict a defendant of “various murders and outrages.”<sup>54</sup> Guilt was adjudged by a five-member court of Army officers, each of whom had fought against the Dakota uprising.<sup>55</sup> Of the 392 Dakota tried by the tribunal over

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<sup>42</sup> David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 19 (2005).

<sup>43</sup> FISHER, MILITARY TRIBUNALS, *supra* note 2, at 33.

<sup>44</sup> Lewis Laska & James M. Smith, “*Hell and the Devil*”: *Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865*, 68 MIL. L. REV. 77, 104 (1975).

<sup>45</sup> Glazier, *supra* note 42, at 48.

<sup>46</sup> See *In re Yamashita*, 327 U.S. 1 (1946); see, e.g., FRANK M. BUSCHER, *THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946–1955* (1989).

<sup>47</sup> Chomsky, *supra* note 2, at 14.

<sup>48</sup> FISHER, MILITARY TRIBUNALS, *supra* note 2, at 52.

<sup>49</sup> ROY W. MEYER, *HISTORY OF THE SANTEE SIOUX: UNITED STATES INDIAN POLICY ON TRIAL* 123–24 (rev. ed. 1993).

<sup>50</sup> ISAAC V. D. HEARD, *HISTORY OF THE SIOUX WAR AND MASSACRES OF 1862 AND 1863*, at 252 (2d ed. 1975).

<sup>51</sup> Chomsky, *supra* note 2, at 47.

<sup>52</sup> *Id.* at 48–53.

<sup>53</sup> HEARD, *supra* note 50, at 267.

<sup>54</sup> Chomsky, *supra* note 2, at 27.

<sup>55</sup> *Id.* at 24.



37 days, 69 defendants were acquitted, 20 were convicted of non-capital crimes, and 303 were convicted and sentenced to death.<sup>56</sup>

After word of the death sentences reached Lincoln—the telegram from Pope listing the condemned names was so long it cost \$400 to send—he reviewed the records and suspended the death sentences of those found guilty only of participating in battles against military forces.<sup>57</sup> On the day after Christmas, 1862, two defendants found guilty of rape and 36 defendants found guilty of killing whites away from the battlefield were hanged in Mankato, Minnesota.<sup>58</sup> It was the largest mass execution in the history of the United States government.<sup>59</sup>

Those who were spared the gallows in 1862 were not pardoned by Lincoln's decision to suspend the executions. With a few exceptions (described in the paragraph below) they remained in prison. President Andrew Johnson later released the prisoners, not by pardoning them, but by commuting their sentences to time served—between three and four years.<sup>60</sup>

After the mass hanging on December 26, 1862, reviewing officials like Sibley began to recognize instances in which the evidence was insufficient—even by their low standards—to convict some of the prisoners still alive. Just a month after the executions, Colonel Sibley asked Lincoln to pardon a defendant who had fought under duress, and Lincoln found the evidence of duress sufficient to merit a pardon.<sup>61</sup> That month, Lincoln also pardoned a defendant named Toonwanwakinyachatka because the evidence “was altogether too imperfect to justify the government in carrying the sentence into execution.”<sup>62</sup> Three months later, Lincoln granted 30 more pardons based on the recommendations of Reverend Stephen Riggs and Reverend Thomas Williamson, who noted instances of wrongful convictions.<sup>63</sup> At least two more Dakotas were later pardoned.<sup>64</sup> But for the 38 Dakotas already executed, there was no opportunity for this version of quasi-appellate review. It is possible—perhaps probable—that a months-long review by people both inside and (like Reverends Riggs and Williamson) outside the government would have found innocent people on Lincoln's execution list, just as it found innocent people among the other prisoners.

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<sup>56</sup> *Id.* at 13.

<sup>57</sup> CARLEY, *supra* note 21, at 70.

<sup>58</sup> MEYER, *supra* note 49, at 129.

<sup>59</sup> Chomsky, *supra* note 2, at 13.

<sup>60</sup> CARLEY, *supra* note 21, at 78.

<sup>61</sup> Chomsky, *supra* note 2, at 39.

<sup>62</sup> *Id.* at 39–40.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

*B. Chaska: Wrongfully Convicted*

Among the most illuminating examples of a wrongful conviction and execution is that of Chaska, a Dakota farmer who, like many Dakotas, had spent time with and around white settlers before the war. On the war's first day, Chaska and another Dakota named Hapa encountered a wagon with four white Minnesotans, driven by George Gleason and carrying Sarah Wakefield and her two young children.<sup>65</sup> Hapa killed Gleason by shooting him three times.<sup>66</sup>

After Hapa's final shot, he pointed his gun at Wakefield.<sup>67</sup> Chaska knocked the gun away and argued with Hapa for an hour, trying to persuade him not to kill Wakefield and her children.<sup>68</sup> After convincing Hapa to spare the Wakefields' lives and only take them captive, Chaska began a weeks-long effort to protect them at the Dakotas' village.<sup>69</sup>

It was not uncommon for the more violent of the pro-war Dakotas to kill or sexually assault captured women, and Chaska took "extraordinary steps to keep Sarah [Wakefield] out of the hands of the most violent Dakota warriors."<sup>70</sup> On the Wakefields' first night of captivity, Chaska hid Sarah and her children by moving them from house to house among people he trusted, as well as moving them in and out of wooded areas just outside the village.<sup>71</sup> The next morning, Chaska enlisted his mother in an effort to make the Wakefields less conspicuous by dressing them in Dakota attire and darkening their faces with dirt, while continuing to move them in and out of friendly homes and uninhabited forest areas.<sup>72</sup> Throughout her second night, Sarah Wakefield's hiding spot required her to keep a foot in a stream in order to remain out of sight.<sup>73</sup>

A week later, Chaska once again took "extraordinary steps" to protect Sarah Wakefield. When Hapa decided to force her to marry him—her husband Dr. John Wakefield was then at the Yellow Medicine Agency—Chaska told Hapa she was already Chaska's wife.<sup>74</sup> For the next month, Chaska kept up this

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<sup>65</sup> SCOTT W. BERG, 38 NOOSES: LINCOLN, LITTLE CROW, AND THE BEGINNING OF THE FRONTIER'S END 29–30 (2012).

<sup>66</sup> *Id.* at 30–31.

<sup>67</sup> *Id.* at 31.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 36.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 37.

<sup>73</sup> *Id.* at 38.

<sup>74</sup> *Id.* at 86.

ruse to protect Wakefield and her children, while in fact neither marrying her nor engaging in a sexual relationship.<sup>75</sup>

Chaska surrendered to Colonel Sibley with the other surrendering Dakotas, and despite Sarah Wakefield's statements to Reverend Riggs's quasi-grand jury that Chaska had saved her life and was innocent of any wrongdoing, the tribunal tried Chaska for "murders and massacres."<sup>76</sup> At his trial, Chaska pleaded not guilty.<sup>77</sup> He admitted to being present at three battles, but said, "I wanted to prevent the other Indians from shooting."<sup>78</sup> He also tried to explain his protection of Sarah Wakefield, but the absence of counsel and his lack of command of the English language appears to have muddled his explanation.<sup>79</sup>

At Chaska's trial, Sarah Wakefield also testified.<sup>80</sup> She clarified what Chaska had done when Hapa had murdered George Gleason. After Hapa's first two shots, Gleason was mortally wounded and was, as Wakefield said, "in his death agony."<sup>81</sup> At that point, on Hapa's command, Chaska pulled the trigger of his gun, which would have "put him out of his misery."<sup>82</sup> Chaska's gun did not fire, and Hapa shot Gleason again.<sup>83</sup>

Wakefield also testified, "I saw this Indian endeavor to prevent the other Indian from firing at me. He raised his gun twice to do it. He said he did not go into this thing willingly."<sup>84</sup> She then explained how Chaska "had to beg victuals for [her]" while she was a captive and how he had protected her throughout six weeks of danger in which her death at times appeared imminent.<sup>85</sup> Another white captive named Angus Robertson confirmed much of what Wakefield and Chaska said.<sup>86</sup>

Despite the absence of evidence of war crimes—and the presence of evidence indicating Chaska's innocence—the tribunal convicted Chaska of Gleason's murder and "sundry hostile acts against the whites" after just "a few minutes."<sup>87</sup> Lincoln stayed the execution of Chaska, but when the executioner

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<sup>75</sup> *Id.* at 85–86.

<sup>76</sup> *Id.* at 170.

<sup>77</sup> *Id.* at 168–69.

<sup>78</sup> *Id.* at 169

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 169–70.

<sup>87</sup> *Id.* at 170.

confused Chaska with another Dakota of the same name, he was hanged.<sup>88</sup> Chaska's name was a common one, simply the Dakota word for "firstborn, if a male."<sup>89</sup> In his final statement to Reverend Riggs, Chaska reiterated his innocence: Only Hapa had "shot Mr. Gleason"; Chaska had "saved Mrs. Wakefield and the children"; but now he was about to die "while she lives."<sup>90</sup> The same mistake occurred with regard to a Dakota named Washechoons, who shared a name with one or two other convicted defendants.<sup>91</sup>

After Chaska's hanging, a white Minnesotan named John Meagher obtained his scalp and made it into a watch chain.<sup>92</sup>

C. *Public Opinion Among White Minnesotans Regarding the Dakota War and Its Tribunals*

The Dakota tribunals began only two days after the Dakota War ended—two days after the conclusion of a 40-day-long conflict that had caused fear, bloodshed, and displacement in a state's white community more than any Indian war since before American independence.<sup>93</sup> In the midst of this terror and panic, most whites assumed that all Dakotas were responsible for the war, including its rapes and murders of civilians. As Reverend Thomas Williamson wrote at the time, "From our Governor down to the lowest rabble there is a general belief that all the prisoners are guilty, and demand that whether guilty or not they be put to death as a sacrifice to the souls of our murdered fellow citizens."<sup>94</sup> This sentiment strongly affected the tribunals' procedural rules and the commissioners' deliberations and verdicts. It may have also affected the President's consideration of clemency. This public sentiment manifested itself in at least three ways.

*First*, Lincoln was "bombarded"<sup>95</sup> by letters "pleading with him to execute all sentenced to death by the commissions."<sup>96</sup> One letter to Lincoln said the "Indian's nature can no more be trusted than the wolf's. Tame him, cultivate him, strive to Christianize him as you will, and the sight of blood will in an instant call out the savage, wolfish, devilish instincts of the race."<sup>97</sup> The "citizens of St.

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<sup>88</sup> *Id.* at 231–33.

<sup>89</sup> *Id.* at 227.

<sup>90</sup> *Id.* at 230.

<sup>91</sup> MEYER, *supra* note 49, at 130.

<sup>92</sup> BERG, *supra* note 65, at 300.

<sup>93</sup> Chomsky, *supra* note 2, at 92.

<sup>94</sup> *Id.* at 54 n.258.

<sup>95</sup> CARLEY, *supra* note 21, at 71.

<sup>96</sup> SULMASY, *supra* note 1, at 44.

<sup>97</sup> FISHER, MILITARY TRIBUNALS, *supra* note 2, at 54.

Paul” also demonized all Indians, describing the Dakota’s “wanton, unprovoked and fiendish cruelty” in an open letter to Lincoln.<sup>98</sup> Minnesota’s Senator Morton Wilkinson and its two United States Representatives, Cyrus Aldrich and William Windom, likewise pleaded with Lincoln not to pardon outrages “well known to our people,” because “[t]hese two peoples cannot live together.”<sup>99</sup>

*Second*, the opinions expressed in Minnesota’s newspapers were, if possible, even more hyperbolic in their hateful rhetoric. The *Goodhue County Republican* wrote, “They must be exterminated, and now is a good time to commence doing it.”<sup>100</sup> The *Mankato Semi-Weekly Record* declared, not quite halfway into the war, that the “cruelties perpetrated by the Sioux nation in the past two weeks demand that our Government shall treat them for all time to come as outlaws, who have forfeited all right to property and life.”<sup>101</sup> A letter published by the *Central Republican* said, “Extermination, swift, sure, and terrible is the only thing that can give the people of Minnesota satisfaction, or a sense of security.”<sup>102</sup> The town of Stillwater’s *Messenger* was more concise: “DEATH TO THE BARBARIANS! is the sentiment of our people.”<sup>103</sup>

*Third*, public sentiment was expressed through the threat—and reality—of mob violence. General Pope’s telegram to Lincoln eight days after the tribunals ended stated that “if the guilty are not all executed I think it nearly impossible to prevent the indiscriminate massacre of all the Indians—old men, women, and children.”<sup>104</sup> The members of Minnesota’s congressional delegation who wrote Lincoln made the same prediction: “We do not wish to see mob law inaugurated in Minnesota, as it certainly will be, if you force the people to it.”<sup>105</sup>

Even though Pope and the congressmen were using their predictions to pressure Lincoln into acting as they wished, there was a strong basis for their predictions. That same month, a mob of Minnesotans attacked a caravan carrying the 303 convicted prisoners as it passed through New Ulm.<sup>106</sup> Colonel Sibley wrote to his wife that the Dakota were “set upon by a crowd of men[,] women,

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<sup>98</sup> Chomsky, *supra* note 2, at 30.

<sup>99</sup> *Id.* at 29.

<sup>100</sup> MEYER, *supra* note 49, at 124 (quoting GOODHUE COUNTY REPUBLICAN (Red Wing, Minn.), Aug. 22, 1862).

<sup>101</sup> *Id.* (quoting MANKATO SEMI-WEEKLY RECORD, Aug. 30, 1862).

<sup>102</sup> *Id.* (quoting CENTRAL REPUBLICAN (Faribault, Minn.), Feb. 18, 1863).

<sup>103</sup> Chomsky, *supra* note 2, at 29 (quoting MESSENGER (Stillwater, Minn.), Nov. 11, 1862, at 1).

<sup>104</sup> FISHER, MILITARY TRIBUNALS, *supra* note 2, at 53.

<sup>105</sup> *Id.* at 54.

<sup>106</sup> CARLEY, *supra* note 21, at 70.

and children, who showered brickbats and other missiles upon the shackled wretches.”<sup>107</sup>

As a Dakota in the caravan named George Crook later recalled, “[w]omen were running about, men waving their arms and shouting at the top of their voices.”<sup>108</sup> The caravan’s driver tried to turn back, but before he could, the white mob had overwhelmed them.<sup>109</sup> Crook recalled,

We were pounded to a jelly . . . my arms, feet, and head resembled raw beef steak. How I escaped alive has always been a mystery to me. My brother was killed and when I realized he was dead I felt the only person in the world to look after me was gone and I wished at the time they had killed me.<sup>110</sup>

In addition to the murder of George Crook’s brother, 15 defenseless prisoners were injured, as were several guards.<sup>111</sup> The mob’s assault ended only after the soldiers’ bayonet charge forced them back.<sup>112</sup>

Public sentiment against the Dakota was so vitriolic that even a different caravan carrying 1,700 Dakotas *not* tried for wrongdoing was attacked by a violent mob.<sup>113</sup> “When they passed through towns the people brought poles, pitchforks and axes and hit some of the women and children in the wagons,” recalled a Dakota survivor named Good Star Woman, whose father was among those struck.<sup>114</sup> “A boy was driving an ox cart and the white people knocked him down,” she reported.<sup>115</sup> “Some Indians died from the beatings they received.”<sup>116</sup> Among them was an infant, taken from its mother and murdered.<sup>117</sup>

Later that month, in mid-November, Colonel Stephen Miller, in charge of guarding the convicted prisoners, learned of a conspiracy to capture and

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<sup>107</sup> *Id.*

<sup>108</sup> George Crook, *George Crook’s Account*, in *THROUGH DAKOTA EYES: NARRATIVE ACCOUNTS OF THE MINNESOTA INDIAN WAR* 261, 262 (Gary Clayton Anderson & Alan R. Woolworth eds., 1988) [hereinafter *THROUGH DAKOTA EYES*].

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> MEYER, *supra* note 49, at 127–28.

<sup>112</sup> CARLEY, *supra* note 21, at 70.

<sup>113</sup> *Id.*

<sup>114</sup> Good Star Woman, *Good Star Woman’s Recollections*, in *THROUGH DAKOTA EYES*, *supra* note 108, at 263.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> MEYER, *supra* note 49, at 128; Chomsky, *supra* note 2, at 31.

immediately execute the prisoners.<sup>118</sup> He said he believed it was an “extensive secret organization including men of character in all this upper country, and many soldiers.”<sup>119</sup> Early the next month, Miller’s men fought back an armed mob of several hundred whites who attacked late at night, hoping to seize and kill the Dakota prisoners.<sup>120</sup> How a combination of procedural infirmities, public pressure, and bias from decision makers led to the deaths of so many innocent Dakotas is described in Part IV.A of this article.

### III. THE GERMAN WOULD-BE SABOTEURS, THEIR TRIBUNAL, AND PUBLIC SENTIMENT

#### A. *The German Sabotage Mission and Tribunal*

In the spring of 1942, German military intelligence began training eight men for a secret sabotage mission to the United States.<sup>121</sup> At a facility they called “the Farm,” they studied how to box, shoot, and make explosives.<sup>122</sup> They were taught to memorize the locations on maps of American aluminum factories—crucial to war production—as well as other factories and transportation infrastructure.<sup>123</sup> From late May to mid-June, a submarine carried a team of four would-be-saboteurs from Nazi-occupied France to the shores of Long Island, New York.<sup>124</sup> At the same time, another sub carried another team of four to a beach near Jacksonville, Florida.<sup>125</sup> Each team carried boxes of explosives and \$80,000 in cash—approximately \$1 million in today’s dollars.<sup>126</sup>

The men chosen for the mission were selected because they had spent much of their lives in the United States.<sup>127</sup> All were born in Germany, but most had left in the 1920s to find work in the United States.<sup>128</sup> Once abroad, some married, and all formed attachments.<sup>129</sup> Two became American citizens.<sup>130</sup> But

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<sup>118</sup> BERG, *supra* note 65, at 213.

<sup>119</sup> Chomsky, *supra* note 2, at 31.

<sup>120</sup> *Id.*; BERG, *supra* note 65, at 214.

<sup>121</sup> MICHAEL DOBBS, SABOTEURS: THE NAZI RAID ON AMERICA 16 (2004).

<sup>122</sup> *Id.* at 23, 25.

<sup>123</sup> *Id.* at 32.

<sup>124</sup> Cohen, *supra* note 8.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*; DOBBS, *supra* note 121, at 195.

<sup>127</sup> Cohen, *supra* note 8.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

after jobs dried up during the Great Depression, they returned to Germany—most of them to find work.<sup>131</sup>

Their English skills and familiarity with the United States were expected to allow them to travel about the country inconspicuously, as they bombed factories, blew up bridges, and sowed panic.<sup>132</sup> But as soon as the first team arrived on the shores of Long Island, it became apparent that their work required other traits they lacked—including loyalty to Nazi Germany and a willingness to follow orders.

On June 13, 1942, the team that landed on Long Island was quickly approached by a Coast Guardsman on a routine, unarmed patrol of the Amagansett beach.<sup>133</sup> The team leader, George Dasch, was under orders to kill anyone they encountered during their landing and to send his body on a rubber dingy back to the submarine.<sup>134</sup> Dasch instead told Coast Guardsman John Cullen they were lost fishermen, put a wad of cash in his hand, and made no effort to stop Cullen from leaving.<sup>135</sup>

Dasch and the three men with him took a train into Manhattan.<sup>136</sup> Two of them—Dasch and Peter Burger—immediately made a shopping trip to Macy's that required three suitcases to transport all the clothes back to their swanky hotel.<sup>137</sup> Dasch and Burger then decided to end the mission by reporting it to the FBI.<sup>138</sup>

Two nights after their beach landing, Dasch called the FBI's New York Office, but he was mistaken for a prank caller and was reported to the "nutter's desk."<sup>139</sup> After then playing 36 straight hours of pinochle at what had once been his favorite New York gambling club, he took a train to Washington, D.C., and checked into the Mayflower Hotel.<sup>140</sup> From there, he called the FBI, asked to speak to then-Director J. Edgar Hoover, and was brought to FBI headquarters.<sup>141</sup> He turned over \$82,000 in cash and told everything he knew about his team and

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> DOBBS, *supra* note 121, at 92.

<sup>134</sup> *Id.* at 95.

<sup>135</sup> *Id.* at 93.

<sup>136</sup> Cohen, *supra* note 8.

<sup>137</sup> DOBBS, *supra* note 121, at 112.

<sup>138</sup> Cohen, *supra* note 8.

<sup>139</sup> DOBBS, *supra* note 121, at 12.

<sup>140</sup> *Id.* at 127–28.

<sup>141</sup> Cohen, *supra* note 8.



the team that had landed in Florida.<sup>142</sup> Six days later, when he ran out of things to confess, the typed record of his statement was 254 pages long.<sup>143</sup>

Due entirely to Dasch, the FBI was quickly able to arrest the seven other members of the two sabotage teams. Director Hoover claimed credit for the captures, hiding from the public (and, for a time, from the President) the fact that Dasch had turned in himself and the other would-be saboteurs.<sup>144</sup> The question for President Franklin Roosevelt was what to do with them. His Attorney General, Francis B. Biddle, argued for a military tribunal, because it could impose the death penalty after speedy and secret proceedings.<sup>145</sup> In contrast, a public trial would expose Hoover's false, self-promotional story.<sup>146</sup> Plus, the "two-year offense" of conspiracy was the only charge possible in civil courts, according to lawyers at the War Department.<sup>147</sup>

On July 2, 1942, President Roosevelt issued an order creating a military tribunal to try the eight captured Germans. Roosevelt appointed seven generals to serve as commissioners, only one of whom was a lawyer.<sup>148</sup> He assigned Attorney General Biddle to prosecute the case, with assistance from the Army's Judge Advocate General.<sup>149</sup> Two experienced lawyers—both colonels—would serve as attorneys for seven defendants, with the eighth defendant, Dasch, represented by his own counsel, also a colonel.<sup>150</sup>

The defendants were charged with violating the (unwritten) law of war by passing through military lines in civilian dress to commit sabotage and espionage (Charge I); violating the (statutorily enacted) Articles of War 81 and 82 by committing or attempting sabotage and espionage (Charges II and III); and conspiracy to commit the acts specified in the previous charges (Charge IV).<sup>151</sup>

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<sup>142</sup> DOBBS, *supra* note 121, at 151.

<sup>143</sup> Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W.L. REV. 433, 478 (2002).

<sup>144</sup> THE COMM. ON COMM'C'N AND MEDIA LAW OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., *The Press and the Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper* 15 [hereinafter COMM. ON COMM'C'N].

<sup>145</sup> Tony Mauro, *A Mixed Precedent for Military Tribunals*, THE LEGAL TIMES (Nov. 19, 2001), [http://webcast-law.uchicago.edu/tribunals/lt\\_111901-2.html](http://webcast-law.uchicago.edu/tribunals/lt_111901-2.html).

<sup>146</sup> *Id.*

<sup>147</sup> George Lardner, Jr., *Nazi Saboteurs Captured! FDR Orders Secret Tribunal*, WASH. POST MAG. (Jan. 13, 2002), <https://washingtonpost.com/archive/lifestyle/magazine/2002/01/13/nazi-saboteurs-captured-fdr-orders-secret-tribunal/f47e7bee-4b40-4079-8a50-aebb5ea89e43/>.

<sup>148</sup> Cohen, *supra* note 8.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> LOUIS FISHER, NAZI SABOTEURS ON TRIAL 51–54 (2003) [hereinafter FISHER, NAZI SABOTEURS].

Roosevelt's order permitted the tribunal to admit any evidence probative to a "reasonable man."<sup>152</sup> Guilt would also be determined based on a "reasonable man" standard, rather than the "beyond reasonable doubt" standard in civilian criminal courts.<sup>153</sup> A conviction and death sentence required five votes from the seven commissioners.<sup>154</sup> No appellate review was permitted—with one exception: the President would personally review the commission's verdicts.<sup>155</sup> All proceedings would be closed to the press and public.<sup>156</sup>

The tribunal began on July 8 in a room with blacked out windows on the fifth floor of the Department of Justice.<sup>157</sup> Several FBI agents testified, referring freely to statements obtained during interrogation of all eight defendants.<sup>158</sup> Each defendant also testified, as did a few of their American acquaintances.<sup>159</sup> On July 27, the defense rested.<sup>160</sup>

The next day, before closing arguments could begin, the defense attorneys filed a habeas corpus petition in federal district court, challenging the jurisdiction and rules of the tribunal.<sup>161</sup> They had already had informal discussions with Supreme Court Justices about the importance of the Court considering those questions, and after the district court immediately denied the petition, the Supreme Court granted review.<sup>162</sup> It scheduled oral argument for the next two days.<sup>163</sup> The case was *Ex parte Quirin*.<sup>164</sup>

For nine hours over July 29 and 30, the Court considered the defendants' arguments that military courts lacked jurisdiction in places where civil courts were open and that the minimal appellate review provided by Roosevelt's order violated the Articles of War.<sup>165</sup> Those articles, as passed by Congress, required any death sentence to be reviewed by three officers from the Judge Advocate

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<sup>152</sup> Mauro, *supra* note 145.

<sup>153</sup> *Id.*

<sup>154</sup> FISHER, NAZI SABOTEURS, *supra* note 151, at 45.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> DOBBS, *supra* note 121, at 219–20.

<sup>159</sup> *Id.* at 224–29.

<sup>160</sup> FISHER, NAZI SABOTEURS, *supra* note 151, at 60.

<sup>161</sup> *Id.* at 58.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 59.

<sup>164</sup> 317 U.S. 1 (1942).

<sup>165</sup> DOBBS, *supra* note 121, at 240.

General's office, then by the Judge Advocate General, and then, in the case of any disagreement, by the Secretary of War.<sup>166</sup>

Less than 24 hours after arguments ended, the Supreme Court issued a brief per curiam order denying the defendants' petition.<sup>167</sup> It promised to release a full opinion explaining its decision at a later time.<sup>168</sup> The next day, August 1, the tribunal resumed and concluded.<sup>169</sup> On August 3, the commissioners reached a verdict: all the defendants were guilty of all charges and sentenced to death.<sup>170</sup>

When the tribunal sent its verdict and the trial record to President Roosevelt, it recommended commuting the sentences of Dasch and Burger to life in prison, in light of their decision to turn themselves in.<sup>171</sup> On August 8, all eight defendants were told of the verdicts and their sentences: 30 years in prison for Dasch (who was later released and deported to Germany in 1948); life in prison for Burger (also released and deported to Germany in 1948); and death sentences for the other six defendants.<sup>172</sup>

On the same day the government informed the defendants of their sentences—less than two months after the first team landed in the United States—the government carried out the six executions.<sup>173</sup> Nearly three months later, on October 29, the Supreme Court released its opinion explaining its decision in *Ex parte Quirin*.<sup>174</sup>

#### *B. George Dasch, Peter Burger, and Herbert Haupt: Wrongfully Convicted*

The United States government imprisoned George Dasch and Peter Burger even though it appears likely that both were innocent of all charges against them. The government also executed a saboteur (and American citizen) named Herbert Haupt who was probably innocent as well. This section considers the case of Dasch and Burger's innocence, followed by Haupt's case. It then concludes by discussing the possibility that the other defendants were guilty only of—at most—conspiracy, which carried a mere two-year prison sentence.

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<sup>166</sup> Louis Fisher, *Bush Can't Rely on the FDR Precedent*, L.A. TIMES (Dec. 2, 2001), <http://articles.latimes.com/2001/dec/02/opinion/op-fisher> [hereinafter Fisher, *FDR Precedent*].

<sup>167</sup> FISHER, NAZI SABOTEURS, *supra* note 151, at 90.

<sup>168</sup> *Id.* at 91.

<sup>169</sup> DOBBS, *supra* note 121, at 249.

<sup>170</sup> *Id.* at 253.

<sup>171</sup> *Id.*

<sup>172</sup> Cohen, *supra* note 8.

<sup>173</sup> *Id.*

<sup>174</sup> See FISHER, NAZI SABOTEURS, *supra* note 151, at 102–06.

### 1. George Dasch and Peter Burger

George Dasch immigrated to the United States when he was 19 years old. By 1939, he had completed the requirements for citizenship, but he returned to Germany in 1941 without ever appearing in court to be sworn in.<sup>175</sup> Once in Germany, the regime's military intelligence recruited him for the sabotage mission.<sup>176</sup> As the first recruit, Dasch was largely responsible for finding the other seven would-be saboteurs.

Among those Dasch recruited was Peter Burger—an odd choice, unless Dasch was not particularly interested in seeing the mission succeed. Burger had immigrated to the United States in 1927, had become a United States citizen in 1933, and had returned to Germany to find work.<sup>177</sup> After his return, he wrote a dissertation criticizing the Gestapo and was punished for it with a year and a half in a concentration camp.<sup>178</sup> At his first meeting with Dasch, Burger cursed Heinrich Himmler.<sup>179</sup>

If Burger's dissertation was the first indication he was not a loyal Nazi, his second was his behavior on the Long Island beach immediately after the sabotage team's arrival. He purposefully left a German cigarette tin behind, along with German clothes and a bottle of schnapps.<sup>180</sup> He even went out of his way to drag the crates of explosives through the sand, rather than carrying them, so their marks would lead authorities straight to their burial spots.

Dasch also behaved on the beach in a manner unlike that of someone attempting to succeed in a sabotage mission. He was under orders to kill anyone they encountered and to send the body back to the waiting submarine.<sup>181</sup> When he encountered an unarmed Coast Guardsman, Dasch let him leave.<sup>182</sup> When the Coast Guardsman led the Coast Guard back to the landing spot, they found the German cigarette tin, the German clothes, the tracks left by Burger, and the buried explosives.<sup>183</sup>

When Dasch and Burger reached Manhattan, they had not yet had an opportunity to privately sound out to each other about their intentions. But it did not take them long. On their first evening, Dasch told Burger about his sister's father-in-law, who had been sent to a concentration camp because of his

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<sup>175</sup> Cohen, *supra* note 8.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> DOBBS, *supra* note 121, at 121.

<sup>180</sup> *Id.* at 98.

<sup>181</sup> *Id.* at 94.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 103.

Catholicism.<sup>184</sup> Burger told Dasch of his paper opposing the Gestapo and his time in a concentration camp, when his wife had miscarried due, he believed, to the stress of the Gestapo's harassment of their family.<sup>185</sup> The next morning, he told Dasch of the evidence he had purposefully left on the beach.<sup>186</sup> Dasch revealed that he had planned on sabotaging the sabotage mission from the first time he heard about it.<sup>187</sup> They decided then to turn themselves in to the FBI, as described above—with Dasch going to Washington, D.C., and Burger remaining in New York to keep the other two team members at bay and in the dark.<sup>188</sup>

Before Dasch left for D.C., he wrapped his \$82,000 cash into an envelope with the note: "Money from German government for their purpose, but to be used to fight the[] Nazis."<sup>189</sup> He also left a note at his hotel's front desk for Peter Burger stating that he was going to D.C. to "finish that wh[ic]h we have started."<sup>190</sup> He added, "I shall try to straighten everything out, to the very best possibility."<sup>191</sup>

Once in D.C., as described above, Dasch made a full, 254-page report to the FBI, which led them to each of the other seven would-be saboteurs.<sup>192</sup> He told the FBI his plan to wreck the mission was "eight months old" and that Burger had agreed to the mission "as a way to get even."<sup>193</sup> When Burger spoke to the FBI he was, though not as verbose, even more helpful than Dasch, because he provided "far more detailed descriptions of the school for saboteurs and of his colleagues."<sup>194</sup>

At the tribunal, his attorney referred to the government's offer to trade a presidential pardon for Dasch's guilty plea. The attorney asked an FBI agent whether Dasch would be required to enter his plea and be sentenced without divulging the agreement, waiting until "after the case had died down for

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<sup>184</sup> *Id.* at 116.

<sup>185</sup> FISHER, NAZI SABOTEURS, *supra* note 151, at 36 ("Haupt knew that Burger hated the Gestapo 'more than anything else on earth, that his wife lost a child because of the treatments of her by them.'").

<sup>186</sup> DOBBS, *supra* note 121, at 122.

<sup>187</sup> *Id.* at 121.

<sup>188</sup> *Id.* at 116–23; Cohen, *supra* note 8.

<sup>189</sup> DOBBS, *supra* note 121, at 138.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *See supra* text accompanying note 143.

<sup>193</sup> Cohen, *supra* note 8.

<sup>194</sup> *Id.*

about . . . three to six months” before “the FBI would get a Presidential pardon for him?”<sup>195</sup> “That, in substance,” said the agent, “is true.”<sup>196</sup>

When Dasch realized there would be no pardon, he pleaded not guilty, as did Burger.<sup>197</sup> How a combination of procedural infirmities, public pressure, and bias from decision makers led to their conviction is described in Part IV.B of this article.

## 2. Herbert Haupt

A third would-be saboteur named Herbert Haupt was also probably innocent, although there is more uncertainty in his case than in Dasch and Burger’s because unlike them, Haupt did not turn himself in to the FBI.

Haupt was born in Germany in 1919 and moved to Chicago with his parents when he was six years old.<sup>198</sup> An American citizen, he drove to Mexico with his friend Wolfgang Wergin in 1941.<sup>199</sup> Haupt was twenty-one years old, had just learned that his girlfriend was pregnant, and wanted an escape from his life.<sup>200</sup> But with only \$180 in Mexico, the two friends soon ran out of money and decided to return home.<sup>201</sup>

To get enough money for a return trip, they sold their car and bought train tickets, only to learn at the border that regulations to deter tax evasion by car sellers required Americans who left the country in a car to return in a car.<sup>202</sup> They returned to the room they had been renting and learned from the landlord about a ship bound for Los Angeles.<sup>203</sup> He told them a friend of his could arrange a place for them on the ship.<sup>204</sup>

After the ship left Mexico, Haupt and Wergin—who had been planning to hitchhike once they reached Los Angeles—learned to their great surprise that the ship was in fact bound for Japan.<sup>205</sup> After docking in Yokohama, they tried

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<sup>195</sup> FISHER, NAZI SABOTEURS, *supra* note 151, at 39.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 40.

<sup>198</sup> Cohen, *supra* note 8.

<sup>199</sup> *The Facts Don’t Matter*, THIS AM. LIFE (Mar. 12, 2004), <http://www.thisamericanlife.org/radio-archives/episode/260/the-facts-dont-matter> [hereinafter *This American Life*].

<sup>200</sup> DOBBS, *supra* note 121, at 148.

<sup>201</sup> *This American Life*, *supra* note 199.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

again to return home—this time via Portugal.<sup>206</sup> They found work on a ship they were told was headed for Lisbon.<sup>207</sup> Instead, it landed in Nazi-occupied France on the same day Germany declared war against the United States.<sup>208</sup> As American citizens, they were arrested and sent to an internment camp.<sup>209</sup>

When German officials learned Haupt and Wergin had been born in Germany, they were sent to live there with relatives.<sup>210</sup> And when Dasch approached Haupt about the sabotage mission, Haupt “saw a ticket back home.”<sup>211</sup>

Haupt’s behavior after landing in Florida with the second sabotage team strongly suggests he never intended to spy for Germany or commit any acts of sabotage. He went from Florida to his parents in Chicago.<sup>212</sup> There, he resumed his life—going to the movies, drinking with old friends, and proposing marriage to his former girlfriend.<sup>213</sup> He even registered for the draft and visited the FBI’s Chicago headquarters to clear up questions about why he had not already registered.<sup>214</sup> Five days later, he was arrested.<sup>215</sup> Six weeks later, he was executed.<sup>216</sup>

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> DOBBS, *supra* note 121, at 148.

<sup>213</sup> *Id.* at 172–73.

<sup>214</sup> *Id.* at 167.

<sup>215</sup> *Id.* at 184–85.

<sup>216</sup> To be sure, unlike the wrongfully convicted Dakotas, the innocence of the wrongfully convicted Dasch, Burger, and Haupt, was not absolutely certain, in part because they likely satisfied some of the elements of some of the charges against them. In particular, they did cross enemy lines dressed as civilians (an element of Charge I). But even for the charges for which they satisfied some of the elements, they likely lacked the mens rea necessary for guilt. Below, I quote each charge from the indictment, as well as their specifications, and I then explain why the three defendants lacked the necessary mens rea.

Charge I: Violation of the Law of War

Specification 1: In that, during the month of June 1942, Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States, along the Atlantic Coast, and went behind such lines and defenses in civilian dress within zones of military operations and elsewhere, for the purpose of committing acts of sabotage, espionage, and other hostile acts, and, in particular, to destroy certain war industries, war utilities, and war materials within the United States.

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Specification 2: In that, during the month of June 1942, Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, appeared, contrary to the law of war, behind the military and naval defenses and lines of the United States, within the zones of military operations and elsewhere, for the purpose of committing or attempting to commit sabotage, espionage, and other hostile acts, without being in the uniform of the armed forces of the German Reich, and planned and attempted to destroy and sabotage war industries, war utilities, and war materials within the United States, and assembled together within the United States explosives, money, and other supplies in order to accomplish said purposes.

FISHER, NAZI SABOTEURS, *supra* note 151, at 51–52.

Charge II: Violation of the 81st Article of War

Specification: In that, during the month of June 1942, Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, and without being in the uniform of the armed forces of that nation, relieved or attempted to relieve enemies of the United States with arms, ammunition, supplies, money and other things, and knowingly harbored, protected and held correspondence with and gave intelligence to enemies of the United States by entering the territorial limits of the United States, in the company of other enemies of the United States, with explosives, money, and other supplies with which they relieved each other and relieved the German Reich, for the purpose of destroying and sabotaging war industries, transportation facilities, or war materials of the United States, and by harboring, communicating with, and giving intelligence to each other and to other enemies of the United States in the course of such activities.

*Id.* at 52–53.

Charge III: Violation of the 82nd Article of War

Specification: In that, during the month of June 1942, Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, were, in time of war, found lurking or acting as spies in or about the fortifications, posts, and encampments of the armies of the United States and elsewhere, and secretly and covertly passed through the military and naval lines and defenses of the United States, along the Atlantic Coast, and went about, through, and behind said lines and defenses and about the fortifications, posts, and encampments of the armies of the United States, in zones of military operations and elsewhere, disguised in civilian clothes and under false names, for the purpose of committing sabotage and other hostile acts against the United States, and for the purpose of communicating intelligence relating to such sabotage and other hostile acts to each other, to the German Reich, and to other enemies of the United States, during the course of such activities and thereafter.

*Id.* at 53.

Charge IV: Conspiracy to Commit All of the Above Acts

Specification: In that, during the year 1942, Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German



C. *Public Opinion in the United States Regarding the Would-Be Saboteurs and Their Tribunal*

Unaware that one of the saboteurs had turned himself in, the public assumed that all eight captured Germans were determined and dangerous German spies, and six months into a war in which so much was at stake and so little was going right, the public reacted to the Germans' capture with one, near-universal sentiment: the Germans should be killed.<sup>217</sup>

The sentiment was expressed in newspapers and magazines. Under the article title, "The Eight Nazi Spies Should Die," *Life* magazine ran a photo of eight American Legion members who had volunteered as executioners. The *New Orleans States* editorialized, "Shoot Them."<sup>218</sup> The *El Paso Times* said, "Give them death."<sup>219</sup>

A poll of 1,097 in the *South Bend Tribune* found that the vast majority of respondents advocated for the Germans' summary execution.<sup>220</sup> One of the paper's readers suggested feeding the Germans to a famous circus gorilla and sent the paper money for the gorilla's funeral, because it would "surely . . . die of such poisonous eating."<sup>221</sup>

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Reich, a belligerent enemy nation, did plot, plan, and conspire with each other, with the German Reich, and with other enemies of the United States, to commit each and every one of the above-enumerated charges and specifications.

*Id.* at 54.

Given the facts, it is likely that an objective jury in a fair trial would have found all three men lacked the necessary mens rea for charges I through III. Each of those charges required that the defendants have "the purpose" of committing hostile acts such as sabotage and espionage on behalf of the German Reich. They likely didn't. Burger hated the Gestapo, and his lack of loyalty to them was apparent long before he arrived in America. Dasch also hated the Gestapo and had planned on sabotaging the mission from the moment he heard about it. And Haupt registered for the draft shortly after arriving in America, which suggests that his loyalties lied with the United States.

As to charge IV on the indictment, it is likely that an objective jury in a fair trial would have found that Burger, Dasch, and Haupt were not guilty of conspiracy for two reasons. First, if they lacked the mens rea to complete the underlying target offenses (as suggested in the paragraph above), they could not be guilty of conspiracy to commit those offenses. Second, Burger, Dasch, and Haupt lacked the actus reus and mens rea to agree their statements, coupled with their actions, suggest that they had only pretended to reach an agreement. Both Burger and Dasch had conspired *against* the German Reich. As for Haupt, his conduct before and after returning to the United States suggests he had no intentions of sabotaging anyone and just wanted to return home to his family.

<sup>217</sup> *This American Life*, *supra* note 199 ("[T]he entire country was calling for them to be executed.").

<sup>218</sup> DOBBS, *supra* note 121, at 222.

<sup>219</sup> *Id.*

<sup>220</sup> Cohen, *supra* note 8.

<sup>221</sup> *Id.*

Other people interviewed by newspapers were just as extreme in their hatred of the captured Germans and their assumption of the Germans' guilt. A businessman from Baltimore proposed they should get a "fair trial" and then should be "shot at sunrise."<sup>222</sup> A shipfitter from Charleston, South Carolina, asked, "Why waste bullets or electricity on them?"<sup>223</sup> He proposed hanging, adding "I am not the man to kill a chicken, but I would like to get my hands on those rats."<sup>224</sup> Sympathy for the alleged saboteurs was so rare that when a woman in Los Angeles wrote to the President encouraging him "to show that we have not lost all sense of justice and decency in our treatment of the fine German people who have not harmed us in any way," the FBI investigated her.<sup>225</sup>

Just as crowds of hostile civilians crowded around the arrested Dakotas as they passed through Minnesota towns, thousands of Washington, D.C., office workers came out to see the Germans as they were transported each day from their jail to their tribunal at the Department of Justice. They shouted, "There go the spies," and "Nazi rats,"<sup>226</sup> although to their credit they were, unlike the crowds in 1862, non-violent.

Also as in 1862, guilt by association—and by associated ethnicity—was pervasive. Because three would-be saboteurs had been waiters while previously living in the United States, the Department of Justice decided that Germans and Italians could not be trusted in that job—and similar jobs—because they might learn secrets from eavesdropping on customers' conversations. The Department "ordered the dismissal of all German and Italian waiters, barbers, busboys, housemen and maids."<sup>227</sup>

Even though the tribunal began within two weeks of the last capture and met for only 17 days, most Americans believed the trial took *too long* and afforded the Germans *too much* process. They did not want to see, as the *New York Times* wrote, "the delays and technicalities incident to civil trials."<sup>228</sup> When the Supreme Court intervened, the *Times* wrote that the intervention "did not meet with popular approval in Washington," where there was "great dissatisfaction . . . with the length to which the [tribunal] had already proceeded."<sup>229</sup>

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<sup>222</sup> DOBBS, *supra* note 121, at 222.

<sup>223</sup> *Id.* at 221.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 222.

<sup>226</sup> *Id.* at 209.

<sup>227</sup> Lardner, *supra* note 147.

<sup>228</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 51 (2007) (quoting Lewis Wood, *Army Court to Try 8 Nazi Saboteurs*, N.Y. TIMES, July 3, 1942, at 1, 3).

<sup>229</sup> *Id.* (quoting Lewis Wood, *Supreme Court is Called in Unprecedented Session to Hear Plea of Nazi Spies*, N.Y. TIMES, July 28, 1942, at 1, 3).

In a similar vein, the *Los Angeles Times* called the Supreme Court hearing “totally un-called for.”<sup>230</sup> The *Washington Post* called it “extraordinary.”<sup>231</sup> An outraged *Detroit Free Press* wrote, “Realism calls for a stone wall and a firing squad, and not a holier-than-thou eyewash about extending the protection of civil rights to a group that came among us to blast, burn, and kill.”<sup>232</sup>

The public also showed irritation and animosity toward the attorney who represented the saboteurs at the Supreme Court, Colonel Kenneth Royall. A *Charlotte News* editorial called him a “braying ass,” and a woman from California sent Royall a dime to buy a cigar to celebrate his “mockery” of his country.<sup>233</sup>

When the Supreme Court ruled against the defendants, newspapers and magazines, including those with progressive reputations, celebrated. The *Washington Post* applauded the decision to affirm the military tribunal’s jurisdiction: “To handle [the saboteurs] in the civil courts would be to help Hitler immensely, and that would be intolerable. We cannot afford to give our enemy, in the present pass, the slightest assistance.”<sup>234</sup>

In short, the American public—uninformed about many of the relevant details and worried about a war that they were not yet winning—was convinced of the saboteurs’ guilt, and the prevailing sentiment was strongly in favor of vengeance.

#### IV. HOW THE STRUCTURAL INFIRMITIES OF THE DAKOTA AND SABOTEUR TRIBUNALS LED TO WRONGFUL CONVICTIONS

Wrongful convictions have many forms. Some are wrongful because the convicting body has no jurisdiction over the defendant. Others are wrongful because inadmissible evidence was considered or procedural protections were violated. There is a strong argument that the convictions from the Dakota and Saboteur Tribunals were wrongful for *all* these reasons. But, this article focuses on a different reason why their convictions were wrongful: Most of the convicted defendants had credible claims of actual innocence.

These convictions of the actually innocent were caused in part by structural infirmities in the tribunals, which were themselves the result of the public hysteria described above in Parts II.C and III.C. The public was impatient for quick and certain capital convictions. Because decision makers who created and ran the military tribunals were both caught up in that hysteria and were eager

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<sup>230</sup> FISHER, NAZI SABOTEURS, *supra* note 151, at 73.

<sup>231</sup> *Id.* at 108.

<sup>232</sup> GOLDSMITH, *supra* note 228, at 51–52.

<sup>233</sup> DOBBS, *supra* note 121, at 51.

<sup>234</sup> GOLDSMITH, *supra* note 228, at 52 (quoting Editorial, *Saboteur Case*, WASH. POST, Aug. 1, 1942).

to appease it, the tribunals were structurally infirm—from bias, to undue speed, to the admission of unreliable evidence. This section describes how those structural infirmities frustrated the defenses of innocent defendants and emphasizes the need for delay in military tribunals.

A. *How the Structural Infirmities of the Dakota Tribunals Led to Wrongful Convictions*

Even before the creation of the tribunals, the conviction of innocent Dakotas was made more likely by the dynamic of a divided Dakota community in which those who were most anti-war “surrendered” to Colonel Sibley and those who were most likely to fight in the war fled north and west after its conclusion. As historian Ronald Meyer writes, “Since the most clearly guilty among the Sioux were scattered over the prairies to the west, the popular demand for retribution had to be satisfied by punishing such Indians as were available.”<sup>235</sup>

The tribunals’ procedures did little in turn to accurately separate the guilty from the innocent, because they dispensed with many of the procedural protections designed to protect the innocent. They replaced a traditional grand jury with a grand jury of just one person—Reverend Riggs.<sup>236</sup> They rushed through the trials. They charged defendants with vague charges of committing sundry “murders and massacres.”<sup>237</sup> They denied counsel to the defendants, which precluded non-English-speaking Dakotas from understanding the nature of the tribunals and from making the kind of case for innocence a trained attorney would have been able to make. They admitted unreliable hearsay and other unreliable evidence suggesting guilt, while preventing defendants from confronting and cross-examining witnesses whose testimony was misleading. They placed biased commissioners in the positions of finding facts, all of whom had fought in battles against the Dakotas and some of whom were candid in their admission that they were not open-minded or clear-headed about the defendants. Finally, the commissioners and the commissions were a product of a public sentiment that wrongly believed *all* male Dakotas had joined the uprising and *all* male Dakotas had committed massacres against civilians. It would have taken an unusually independent-minded commission to defy that public sentiment, and everything about it—from its selection of commissioners to the one-sided presentation of unreliable evidence—made that defiance unlikely.

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<sup>235</sup> MEYER, *supra* note 49, at 125.

<sup>236</sup> HEARD, *supra* note 50, at 251.

<sup>237</sup> *Id.* at 252.

### 1. A Grand Jury of One

The tribunals' procedural infirmities began with the manner in which defendants were chosen for trial and charged. Shortly after the Dakotas' surrender, a missionary named Stephen Riggs met with whites who had been captured by the Dakotas, as well as mixed-race Indians who had allied with the whites. According to the commission's recorder and assistant adjutant, Lieutenant Isaac Heard, Riggs "was, in effect, the Grand Jury of the court."<sup>238</sup>

Even worse than having a grand jury of one was the low bar for selecting Dakotas for trial. According to Riggs, "instead of taking individuals for trial, against whom some specific charge could be brought, the plan was adopted to subject all grown men, with a few exceptions, to an investigation of the commission, trusting that the innocent could make their innocency [sic] appear."<sup>239</sup>

A final problem with the quasi-indictment process was the vague charge that was made against each defendant. Although some were accused of specific acts of murder, rape, or robbery, almost all were also accused of, "between the 19th of August, 1862, and the 28th day of September, 1862, join[ing] and participat[ing] in the murders and massacres committed by the Sioux Indians on the Minnesota frontier."<sup>240</sup> This allowed the tribunal process to indict defendants without finding—or even alleging—a specific crime against a specific person.

### 2. Five-Minute Trials

A second problem with the tribunal process was its haste. The commissioners deciding the defendants' fates disposed of 392 trials in a 37-day period. No trial lasted longer than a day. Many of them lasted five minutes. Some days saw as many as 40 separate trials.<sup>241</sup>

As Reverend Riggs observed, when "the cases of forty men are passed upon in six or seven hours," it is "not the place for the . . . clear bringing out of evidence and securing a fair trial to every one."<sup>242</sup> Even by the standards of the day, the speed of the trials shocked observers like Reverend J.P. Williamson, an advocate for the Dakota. "Four hundred have been tried," he said, "in less time than is general[ly] taken in our courts with the trial of a single murderer."<sup>243</sup>

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<sup>238</sup> *Id.* at 251.

<sup>239</sup> MEYER, *supra* note 49, at 125.

<sup>240</sup> HEARD, *supra* note 50, at 252.

<sup>241</sup> CARLEY, *supra* note 21, at 69; MEYER, *supra* note 49, at 127.

<sup>242</sup> Chomsky, *supra* note 2, at 47.

<sup>243</sup> *Id.*

It appears that although the tribunals were never deliberate—the first day saw 16 trials—they increased in speed due to public pressure to convict as many Dakota as quickly as possible, combined with a decision not to recall (or allow defendants to cross-examine) witnesses who had already given relevant testimony. Lieutenant Heard later explained that after “the commission became acquainted with the details of different outrages and battles,” then the “only point” of the tribunal was to “connect[] . . . the prisoner with them,” so “five minutes would dispose of the case.”<sup>244</sup>

Within those five minutes, the commissioners were sworn; the charges were read to the defendant in his language; the commission listened to any statement the defendant made; the commission cross-examined the defendant if he denied his guilt; and then sometimes witnesses were called. The commissioners then deliberated in private for a few minutes before announcing their verdict. Eighty-two percent of the time, the verdict was guilty.<sup>245</sup>

At a commission in which the commissioners are biased and the state-wide assumption is that all male Dakotas committed war crimes, it would have taken longer than five minutes for an innocent defendant to dispel factfinders of that assumption. In fact, on the first day of the tribunals, when the relatively small number of 16 defendants were tried—relative only to the 40 defendants who be tried on later days—6 defendants were acquitted. This was a time when tribunals took considerably longer than the five minutes they later took and when witnesses were testifying in person. Over time, however, this 38% acquittal rate fell to 18%, a decline that correlates with the increased speed of the tribunals. It appears that the shorter tribunals became, the less likely acquittals became.

### 3. The Absence of Defense Counsel

Compounding the tribunals’ procedural defects was the complete absence of legal representation for the accused.<sup>246</sup> Necessary for a fair trial in even the best of circumstances, counsel would have been particularly useful for the Dakota, who did not understand the proceedings that would decide whether they lived or died.<sup>247</sup>

As Reverend John Williamson explained at the time, the defendants knew “nothing of the manner of conducting trial.”<sup>248</sup> He added, “[O]ften not

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<sup>244</sup> HEARD, *supra* note 50, at 254–55.

<sup>245</sup> See generally Chomsky, *supra* note 2, at 28, 47.

<sup>246</sup> CLODFELTER, *supra* note 15, at 57.

<sup>247</sup> CARLEY, *supra* note 21, at 69.

<sup>248</sup> Chomsky, *supra* note 2, at 53.

understanding the English language in which the trial is conducted, they very imperfectly understand the evidence upon which they are convicted.”<sup>249</sup>

Moreover, none were informed that their lives depended on the outcome of the tribunals. Even one of the defendants with more familiarity with western customs than most of the others said he thought the tribunals’ purpose was “merely to ascertain what parties should be held for a regular trial to be had at some future time in the Courts of the country.”<sup>250</sup>

#### 4. Hearsay and Unreliable Evidence

Even if the defendants had been represented by counsel, it is unclear whether their attorneys would have been allowed to fulfill most of the functions of a defense attorney—such as objecting to hearsay evidence, insisting on live testimony by the prosecution’s witnesses, and engaging in cross-examination. In any event, without counsel, the defendants were able to do none of these things.

The absence of confrontation is obvious from the repeated consideration by the commission of testimony that was heard only in *other* tribunals. For example, the testimony of a Dakota named Wakenyawashtay was considered in 92 tribunals; in 60 of those tribunals, he did not actually testify.<sup>251</sup> Similarly, the testimony of Thomas Robertson was used against the defendants in 66 tribunals; in half of them, he did not actually testify.<sup>252</sup> The record lists Alex Graham as a witness in 61 tribunals; in 45 of them, he did not actually testify.<sup>253</sup>

What seems to have happened is that witnesses like Wakenyawashtay or Robertson would list the names of defendants he saw in battle or the names of defendants he heard boasting about battlefield exploits. This evidence would not be cross-examined the first time (or other times) they testified. In later trials of defendants named in the prior testimony, the prior testimony was sufficient to convict the defendant.

As with the absence of counsel, this decision to dispense with live testimony and cross-examination would have been problematic in even the best of circumstances. But factors unique to the Dakota tribunals made particularly problematic the absence of the traditional mechanisms for testing the veracity of witnesses’ recollections.

First, Dakota names were confusing to whites. “Because so many Indian names in the vernacular were similar and because the white man had trouble pronouncing those names, the wrong man was often accused because of mistaken

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 52.

<sup>251</sup> *Id.* at 28 n.85.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

identity.”<sup>254</sup> As described above, this problem would plague the tribunal process all the way up to the morning of the final mass execution of 38 Dakotas, at least three of whom were hanged because their executioner likely confused their names with the list of names on Lincoln’s black list.<sup>255</sup>

Second, testimony by witnesses who overheard Dakotas discussing their battlefield exploits was highly unreliable. From the time of Homer, exaggeration of one’s role in a battle has been a common element of warfare. In a war in which the Dakota had begun hostilities divided over whether to fight, exaggerating one’s exploits may have been a way of proving one’s loyalty.<sup>256</sup> “Moreover, according to Dakota custom, the man who struck the mortal blow was not the only entitled to claim a kill in battle.”<sup>257</sup> White captives would likely have heard a Dakota warrior claiming to have killed a white when the Dakota was the first to enter a house in which someone was later killed, was one of the first three Dakotas to touch an enemy after the enemy had been killed, or who first touched a white soldier who was later killed by another Dakota.<sup>258</sup>

A final reason why evidence in the tribunals was especially in need of the testing that comes from cross-examination is that much of it came from other defendants who believed—with good cause—that they would curry favor with the tribunal if they implicated other Dakotas. An ex-slave who fought with the Dakotas was spared a death sentence after he testified in 55 tribunals.<sup>259</sup> According to Reverend Riggs, “he was everywhere in all the battles and . . . [later wanted] to convict everyone else.”<sup>260</sup> Thomas Robertson, Charles Crawford, and Wakanhdehota were acquitted or received a commuted sentence after they testified (respectively) in 55, 8, and 7 trials.<sup>261</sup>

Of course, the testimony of co-conspirators has always been a part of the American judicial system, and witnesses routinely turn state’s evidence in trials today. But equally routine—and necessary—is a probing cross-examination of those witnesses by counsel skilled at impugning their credibility before juries that may find their self-interested testimony unreliable. Nothing like that occurred in the Dakota tribunals.

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<sup>254</sup> CLODFELTER, *supra* note 15, at 57–58.

<sup>255</sup> *Id.* at 58.

<sup>256</sup> Chomsky, *supra* note 2, at 48.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 49.

<sup>259</sup> *Id.* at 51.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 50–51.



### 5. Low Evidentiary Standard for Convictions

An additional defect in the Dakota military tribunal was that many Dakotas were convicted merely for their presence at a battle in a war.<sup>262</sup> In previous and later wars, participation was not criminal. Enemy combatants were often taken prisoner during hostilities to keep them off future battlefields, and on occasion, military tribunals were—and still are—used to try *unlawful* enemy combatants who engaged in war crimes like rape, torture, or the targeted killing of civilians.<sup>263</sup> But in the ordinary course, when a prisoner of war had not committed a war crime, he is released after the war ends.<sup>264</sup>

That did not happen after the Dakota War. Participation in the war was treated as a war crime. “As soon as a prisoner admitted firing a shot at whites, no matter where, the commission with unseemly haste sentenced him to hang.”<sup>265</sup> The commission was not interested in what Colonel Sibley called the “degree of guilt;” it was sufficient to be “a voluntary participant.”<sup>266</sup> “To the commission, evidence that a defendant had shot a gun in battle with soldiers was just as damning as testimony that he had killed a family of settlers fleeing in a wagon.”<sup>267</sup>

Lincoln sought to stay the execution of those who had merely shot a gun in battle, and in *Military Tribunals & Presidential Power*, Professor Louis Fisher states that Lincoln “commuted or pardoned the rest” of the Dakota defendants who were not executed on December 26, 1862.<sup>268</sup> But that’s not quite accurate. Lincoln stayed their execution, but he never pardoned the vast majority of them. Nor did he officially reduce their sentences from death sentences to prison sentences. Instead, he delayed a final decision about their fate. After his assassination, President Johnson released those still imprisoned in March of 1866, although even then he did not pardon them. Johnson’s decision was a commutation of their sentences.

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<sup>262</sup> CARLEY, *supra* note 21, at 69.

<sup>263</sup> See generally Chomsky, *supra* note 2.

<sup>264</sup> See generally *id.* Sibley and the commission might have counter-argued—though they found no need to—that the Dakota were insurrectionists and that insurrection is itself a war crime. But that argument fails on a number of fronts. First, the Dakotas’ sovereignty put them outside the context of common domestic insurgents. *Id.* Second, in 1862, the United States was waging war against bona fide domestic insurgents—the Confederate armies—and the government treated southern Confederates’ participation in battle as a war crime punishable by a military tribunal. *Id.* When the war ended, Confederate prisoners of war were released. *Id.*

<sup>265</sup> CARLEY, *supra* note 21, at 69.

<sup>266</sup> Chomsky, *supra* note 2, at 54 (quoting Letter from Brigadier Gen. Henry Sibley to John Usher, Assistant Sec’y of Interior (Dec. 19, 1862) (on file with the National Archives)).

<sup>267</sup> *Id.* at 88.

<sup>268</sup> FISHER, *MILITARY TRIBUNALS*, *supra* note 2, at 54.

Thus, after 323 convictions, 303 death sentences, 38 executions, and at least 42 pardons, a total of approximately 243 Dakotas went unpardoned and served between three and four years in prison.

These were men whom Lincoln found *not* to have participated in violence against civilians. They, therefore, were convicted and incarcerated for participating in battles against United States soldiers (and because of the flaws in presenting and testing evidence, there is reason to doubt they did even that). Because participation in a war is not a war crime, none of these men were convicted of a war crime. Therefore, 243 men who were likely innocent of any crime were convicted and incarcerated.

Among them was George Quinn. “Nothing was proved against me except that I was in some of the battles against the whites,” he later recalled.<sup>269</sup> “I took no part in killing the settlers and was opposed to such work.”<sup>270</sup>

Even if those merely imprisoned and not executed are not counted among those wrongfully convicted—a dubious prospect—there are still numerous examples of Dakotas executed even though they committed no war crimes (despite Lincoln’s effort not to execute them). One was named White Dog. His worst offense was talking with a United States Army captain while other Dakotas encircled the captain’s column of men and then fired on them. Although this was a tricky ploy, deception is a part of warfare, and it is not a war crime to employ deception in a battle against uniformed soldiers in the enemy’s army.<sup>271</sup>

Likewise, Rattling Runner was executed even though no evidence against him indicated that he was guilty of a war crime. His worst offense was leading other Dakotas into battles against uniformed soldiers in the enemy’s army and then later opposing the return of prisoners captured by the Dakotas. Although his case appears to be a closer one than White Dog’s—because the capture of unarmed non-combatants is inconsistent with modern-day concepts of the rules of war—there was nothing illegal about leading soldiers into a battle against enemy soldiers, and capturing and holding non-combatants was done by Colonel Sibley himself. At the time of Rattling Runner’s execution, Colonel Sibley had under guard some 2,000 Dakota civilians, most of them women and children.

On the eve of his execution, Rattling Runner blamed his death in part on his father-in-law, who encouraged him to surrender. “You have deceived me,” Rattling Runner told him. “You told me that if we followed the advice of General Sibley, and gave ourselves up to the whites, all would be well; no innocent man

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<sup>269</sup> George Quinn, *Narrative 13*, in *THROUGH DAKOTA EYES*, *supra* note 108, at 258–59.

<sup>270</sup> *Id.*

<sup>271</sup> Chomsky, *supra* note 2, at 89.

would be injured.”<sup>272</sup> He reiterated what the facts from his trial suggested: “I have not killed, wounded, or injured a white man, or any white persons. I have not participated in the plunder of their property; and yet today I am set apart for execution . . . .”<sup>273</sup>

#### 6. Bias and Prejudice of Decision Makers

At the core of the military tribunals’ defects were the five members of the commission, as well as the commanding officers who chose them and the adjutant who assisted them. The five commissioners were Lieutenant Colonel William Marshall, Colonel William Crooks, Captain Hiram Grant, Captain Hiram Bailey (later replaced by Major George Bradley), and Lieutenant Rollin Olin, who also served as judge advocate. Assisting Olin was Adjutant Isaac Heard.

None of these men were unbiased. Each had fought in the Dakota War.<sup>274</sup> Some had likely seen their comrades killed in battle. All had been at the vortex of a crisis that caused such panic that 30,000 white Minnesotans fled their homes—most based on the assumption, as discussed in Part II.C, that the terror was the responsibility of *all* Dakotas.<sup>275</sup> Bishop Whipple reported that Assistant Lieutenant Colonel Marshall, the senior commissioner, admitted “his mind was not in a condition to give the[] men a fair trial.”<sup>276</sup>

Among the most candid about his biases was Adjutant Isaac Heard, who later wrote a history of the Dakota War.<sup>277</sup> He believed,

The fact that they were *Indians*, intensely hating the whites, and possessed of the inclinations and revengeful impulses of *Indians*, and educated to the propriety of the indiscriminate butchery of their opponents, would raise the moral certain that, as soon as the first murders were committed, all the young men were impelled by the sight of blood and plunder . . . .<sup>278</sup>

The commanding officers above these members of the commission—who appointed them and to whom they were subject in the chain of command—

<sup>272</sup> CARLEY, *supra* note 21, at 72.

<sup>273</sup> *Id.*

<sup>274</sup> Chomsky, *supra* note 2, at 24.

<sup>275</sup> CLODFELTER, *supra* note 15, at 61.

<sup>276</sup> Chomsky, *supra* note 2, at 55 (quoting Letter from Henry Whipple, Bishop, to John Usher, Assistant Sec’y of the Interior (Apr. 21, 1863) (in *Whipple Papers*, MASS. HISTORICAL SOC’Y)).

<sup>277</sup> See HEARD, *supra* note 50.

<sup>278</sup> *Id.* at 257.

were also extremely biased. Directly above them was Colonel Sibley, who had led the United States forces in the field against the Dakota. He was, if anything, more sure of the Dakotas' collective guilt than the commissioners he chose. Sibley called the Dakotas "fiends" and "devils in human shape" undeserving of "any touch of mercy."<sup>279</sup> In a letter to Bishop Whipple shortly after the tribunals ended, he wrote, "I sent back many cases where men had been acquitted for lack of evidence for revision, and in several of these, additional testimony was adduced, and the Indians sentenced to be hung."<sup>280</sup>

Sibley answered in the chain of command to General John Pope, commander of the Military Department of the Northwest. Hoping to one day "exterminate them all,"<sup>281</sup> Pope said the Dakotas should "be treated as maniacs or wild beasts."<sup>282</sup>

At the top of Sibley and Pope's chain of command was President Abraham Lincoln. The commander in chief took a far more nuanced view of the Dakota War than those in Minnesota, and he was already becoming famous for exercising the "touch of mercy" that General Pope was so loathe to embrace. But Lincoln's political position was precarious, and even though the decision of who to execute, pardon, or grant a commuted sentence was ultimately his, he was acutely aware of the public sentiment that had affected the commission—and that was on him—to punish the Dakota defendants.

*B. How the Structural Infirmities of the Saboteur Tribunals Led to Wrongful Convictions*

The near-universal public sentiment against the alleged saboteurs both fueled, and was fueled by, the lack of procedural protections in their military tribunal. The secrecy of the tribunal fueled the public sentiment, because the secrecy hid the fact that two of the saboteurs had turned themselves in. At the same time, the same fear and hysteria that gripped the nation also biased key decision makers, from President Roosevelt to Justices on the Supreme Court. It led to them ordering or consenting to the use of hearsay, evolving rules, possibly involuntary confessions, failure to require a unanimous verdict, lack of appellate

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<sup>279</sup> *Id.* (quoting Letter from Brigadier Gen. Henry Sibley to Mrs. Henry Sibley (Aug. 24, 1862) (in *Sibley Papers*, roll 11, frame 664, MASS. HISTORICAL SOC'Y [microfilm])).

<sup>280</sup> Chomsky, *supra* note 2, at 57 (quoting Letter from Brigadier Gen. Henry Sibley to Major Gen. John Pope (Dec. 7, 1862) (in *Whipple Papers*, MASS. HISTORICAL SOC'Y)).

<sup>281</sup> *Id.* at 25 (quoting Letter from Major Gen. John Pope to Brigadier Gen. Henry Sibley (Oct. 6, 1862)) (in Letter from Major Gen. John Pope to Brigadier Gen. Henry Sibley (Oct. 6, 1862) (in Letters Rec'd-Adj. Gen., NARG 95 (M619, roll 483))).

<sup>282</sup> *Id.* at 23 (quoting Letter from Major Gen. John Pope to Colonel Henry Sibley (Sept. 28, 1862)) (in Letter from Major Gen. John Pope to Colonel Henry Sibley (Sept. 28, 1862) (reprinted in ROBERT N. SCOTT, 13 WAR OF THE REBELLION, Ser. 1 (1985))).

review, and extreme speed. This section considers how each of these structural problems led to the conviction of innocent defendants.

### 1. Secret Proceedings

Immediately after the arrest of the would-be saboteurs, FBI Director J. Edgar Hoover held a press conference in which he claimed credit for their capture. The *New York Times* reported, “Before the [saboteurs] could begin carrying out their orders, the FBI was on their trail and the round-up began. One after another, they fell into the special agents’ net.”<sup>283</sup> As Attorney General Biddle later wrote in his autobiography, the “country went wild” and “generally concluded that a particularly brilliant FBI agent, probably attending the school in sabotage where the eight had been trained, had been able to get on the inside and make regular reports to America.”<sup>284</sup>

The public remained misled up to, and after, the execution of six of the defendants. No reporters or members of the public were allowed in the room where the tribunal took place. With the exception of the defendants, everyone in the room was sworn to secrecy.<sup>285</sup>

By keeping the military tribunal’s proceedings secret, the government was able to keep the public misinformed. The purpose of the secret was supposedly to keep the German government in the dark, but at least some members of the prosecution believed otherwise. As explained by Lloyd Cutler—an attorney for the prosecution and later White House Counsel for Presidents Carter and Clinton—“the reason it was done in secret was because [the government] had a dirty, little secret,”<sup>286</sup> which was “that it wasn’t the FBI that had done the real work in capturing the Nazis.”<sup>287</sup>

The secrecy may have had a profound effect on the fate of the defendants. At least one set of legal scholars have concluded that two defendants—Dasch and Burger—would “not have been convicted if the trial had been open,” because “Dasch’s confession, which took three days to read into the records, detailed [the plot by Dasch and Burger] to undermine the Nazis.”<sup>288</sup> Of course, it is difficult to know with certainty how the public would have reacted if it had heard the tribunal’s proceedings, but it does not seem remarkable to suspect that the public might not have been as tolerant of the manner in which at least Dasch and Burger were treated if it had been widely known that every action

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<sup>283</sup> DOBBS, *supra* note 121, at 194 (quoting Will Lissner, *FBI Seizes 8 Saboteurs Landed by U-Boats Here and in Florida to Blow Up War Plants*, N.Y. TIMES, June 28, 1941, at 27).

<sup>284</sup> Lardner, *supra* note 147.

<sup>285</sup> *Id.*

<sup>286</sup> *This American Life*, *supra* note 199.

<sup>287</sup> COMM. ON COMMC’N, *supra* note 144, at 18 (quoting Seth Kantor, *How Hoover Sold Out ‘An American Hero’*, ATLANTA J. & CONST., Jul. 4, 1980, at 6-A).

<sup>288</sup> *This American Life*, *supra* note 199.

of Dasch and Burger, from their conduct on the landing beach to Dasch's 254-page confession, indicated their animosity toward the sabotage mission.

## 2. Bias and Prejudice of Decision Makers

Intertwined with the public hysteria was the bias of the men responsible for the tribunal's creation and progress. They were as quick to rush to judgment as the public was, and several of them sought to stoke and preserve the public sentiment as an aid to the war effort. As a result, as one of the defense attorneys for the saboteurs later said, "[t]he whole thing was kind of a legal farce because you knew what was going to happen from the beginning."<sup>289</sup>

No decision-maker's bias was more important than President Roosevelt, because it influenced so many others. His predetermination of their guilt was evident in a memo he wrote to Attorney General Biddle on June 30. In the memo, referring to Burger and Haupt, he said, "The two American citizens are guilty of high treason. . . . I do not see how they can offer any adequate defense. Surely they are just as guilty as it is possible to be and it seems to me that the death penalty is almost obligatory."<sup>290</sup>

With regard to the other six alleged saboteurs, the President was just as quick to prejudice them. "They were apprehended in civilian clothes. This is an absolute parallel of the case of Major Andre in the Revolution and of Nathan Hale. Both of them were hanged. . . . Without splitting hairs, I can see no difference."<sup>291</sup>

Roosevelt's less-official expressions of his views also demonstrated his assumption of the defendants' guilt and his enthusiasm for their punishment. He joked to the Attorney General, "Let's make real money out of them. Sell the rights to Barnum and Bailey for a million and a half—the rights to take them around the country in lion cages at so much a head."<sup>292</sup> This was from the only person permitted by the tribunal's enabling order to review any verdict against the defendants. Later, while the tribunal was still hearing evidence, Roosevelt asked an aide, "What should be done with them? Should they be shot or hanged?"<sup>293</sup>

President Roosevelt's bias may also have had an effect on the Supreme Court Justices considering the defendants' habeas corpus petition. Roosevelt told Attorney General Biddle, "I want one thing understood, Francis. I won't give

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<sup>289</sup> *Id.*

<sup>290</sup> DOBBS, *supra* note 121, at 195 (quoting Memorandum from President Roosevelt to Attorney Gen. Biddle on German Saboteurs (June 30, 1942)).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 223 (quoting WILLIAM D. HASSET, OFF THE RECORD WITH F.D.R., 1942–1945, at 90 (1958)).

them up. . . . I won't hand them over to any United States marshal armed with a writ of habeas corpus. Understand?"<sup>294</sup> After Biddle told Supreme Court Justice Owen Roberts what Roosevelt had said, Roberts told the other Justices that the President planned to execute the defendants even if the Court ruled in their favor.<sup>295</sup> Recognizing the constitutional crisis Roosevelt's action would constitute, as well as the injustice of an unauthorized execution, Chief Justice Harlan Stone replied, "That would be a dreadful thing."<sup>296</sup>

Regardless of whether the Court's decision in *Ex Parte Quirin* was at least somewhat affected by the threat of a constitutional crisis—and it is hard to imagine how it could not have been—one Justice made his bias plain. Justice Felix Frankfurter, who had recommended a military tribunal to the administration when it was still considering how to handle the would-be saboteurs, circulated to his colleagues what he called "a dialogue between the saboteurs and myself as to what I, as a judge, should do in acting upon their claims."<sup>297</sup>

In the imagined "dialogue," Frankfurter called the alleged saboteurs "damned scoundrels" with "a helluva cheek to ask for a writ."<sup>298</sup> They were "low-down, ordinary, enemy spies."<sup>299</sup> He added, "You've done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress after your bodies will be rotting in lime."<sup>300</sup> He then asked his colleagues,

What in the hell do you fellows think you are doing? Haven't we got enough of a job trying to lick the Japs and the Nazis without having you fellows on the Supreme Court dissipate the thoughts and feelings and energies of the folks at home by stirring up a nice row . . . ?<sup>301</sup>

Pressure from President Roosevelt may also have affected the seven commissioners he chose for the tribunal, although they left behind no evidence of bias as transparent as Frankfurter's "dialogue." A member of the prosecution, Lloyd Cutler, believes "perfectly valid" objections by the defense were overruled in a manner that chilled future objections.<sup>302</sup> According to Cutler, defense

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<sup>294</sup> Lardner, *supra* note 147.

<sup>295</sup> Belknap, *supra* note 143, at 476.

<sup>296</sup> *Id.* (citing David J. Danelski, *The Saboteurs' Case*, J. SUP. CT. HIST. SOC'Y 61, 67 (1996)).

<sup>297</sup> FISHER, NAZI SABOTEURS, *supra* note 151, at 99.

<sup>298</sup> *Id.* at 100.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 101.

<sup>301</sup> *Id.* at 102.

<sup>302</sup> Lardner, *supra* note 147.

attorney Colonel Kenneth Royall “stood up and made an objection” early on the first day of proceeding that was “a perfectly good one,”<sup>303</sup> because “no proper foundation for [Attorney General Biddle’s] question had been laid.”<sup>304</sup>

The president of the court banged his gavel and said, “The court will rise.” Forty-five minutes later the court came back and said, “Objection overruled.” Then Biddle asked a second question, and the same thing happened. The court took another forty-five minute break and overruled the objection. Royall got the message.<sup>305</sup>

### 3. Hearsay and Inconstant Rules of Evidence

The commissioners’ decision to overrule the defense’s two early objections—though not their decision to chill future objections—was justified in part by President Roosevelt’s order creating the tribunal, which not only gave the tribunal tremendous flexibility to make up many of its own rules of procedure and evidence, but also gave the tribunal the power to make new rules during the trial. By the order’s terms, the tribunal had the “power to and shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it.”<sup>306</sup>

One of the lead prosecutors was candid with the commissioners about their power over procedures. “Of course,” said Judge Advocate General Cramer, “the Commission has discretion to do anything it pleases; there is no dispute about that.”<sup>307</sup>

With regard to evidence, hearsay was freely and frequently admitted. The commissioners could admit any evidence “as would, in the opinion of the President of the Commission, have probative value to a reasonable man.” This permitted the tribunal to hear confessions that would likely have been excluded in courts-martial, for two reasons. First, courts-martial and civil trials were prohibited from considering statements by one member of a conspiracy against co-conspirators that were taken by authorities before trial.<sup>308</sup> Second, as Professor Louis Fisher has written, “[c]onfessions from suspects are supposed to

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<sup>303</sup> Cohen, *supra* note 8, at 12.

<sup>304</sup> *This American Life*, *supra* note 199.

<sup>305</sup> Cohen, *supra* note 8.

<sup>306</sup> FISHER, NAZI SABOTEURS, *supra* note 151, at 44–45 (quoting President Roosevelt’s July 2, 1942 Military Order).

<sup>307</sup> *Id.* at 49.

<sup>308</sup> Dobbs, *supra* note 121, at 219.



be given voluntarily, without any promise or inducement from the government. Yet Dasch had been told by FBI agents that if he agreed to plead guilty, they would set in motion the wheels for a presidential pardon.”<sup>309</sup>

A final possible problem with the confessions—the main evidence against the defendants—is that some of them may have been involuntary. Two alleged saboteurs claimed at trial that an interrogator slapped them and pulled their hair.<sup>310</sup> Although there was no evidence of coercion other than the defendants’ accusations, the issue was rendered at least somewhat mute by the permissive rules of evidence; no rule expressly prohibited the commissioners from admitting and considering an involuntary confession.

#### 4. The Absence of Meaningful Appellate Review

President Roosevelt’s order creating the saboteur tribunal required the verdict to be sent “directly to me for my action thereon.”<sup>311</sup> He was not only, as the order said, the “final reviewing authority;” he was the only reviewing authority.<sup>312</sup> This was contrary to the review of military commissions required by the congressionally enacted Articles of War, which required review of death sentences by three JAG officers, then by the JAG him- or herself, and finally, if there was any disagreement, by the Secretary of War.<sup>313</sup>

For two reasons, the absence of meaningful appellate review may have been important. First, the evidence against several of the saboteurs was quite weak and may not have been enough to survive review by an authority less committed than President Roosevelt to the defendants’ guilt. Second, even assuming the defendants intended to commit sabotage and espionage, trained lawyers reviewing the case—recall that only one of the seven commissioners was an attorney—may have nevertheless found them guilty only of conspiracy, the fourth of four charges against them, which carried only a two-year sentence. That’s because Charges II and III depended on proving that the United States was a “zone of military operations”—a dubious proposition—and Charge I charged the defendants with the common law crime of violating the unwritten “law of war.”<sup>314</sup> As the alleged saboteurs argued before the Supreme Court, it was a “settled . . . principle that there is no common law crime against the United States Government.”<sup>315</sup> Although the Supreme Court rejected these arguments, it is not clear that an intermediate-level review (if unbiased) would have reached

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<sup>309</sup> FISHER, NAZI SABOTEURS, *supra* note 151, at 39.

<sup>310</sup> *Id.* at 60.

<sup>311</sup> *Id.* at 45 (quoting President Roosevelt’s July 2, 1942 Military Order).

<sup>312</sup> *Id.*

<sup>313</sup> Fisher, *FDR Precedent*, *supra* note 166.

<sup>314</sup> FISHER, NAZI SABOTEURS, *supra* note 151, at 75.

<sup>315</sup> *Id.*

the same conclusion, especially because (as mentioned above) the Supreme Court was under pressure from the President to deny the defendants' claims, and because (as mentioned below) the Justices were rushed into a decision that at least several of them later regretted.

### 5. The Rush to Issue a Supreme Court Decision

The saboteurs' tribunal lasted only 17 days. Defense attorneys were given only five full days to prepare for trial. Although this tribunal process was not nearly as rushed as the Dakota tribunals, it is possible that the defense would have benefited from a longer process. What is even more probable, however, is that the Supreme Court would have handled the alleged saboteurs' habeas petition differently if their review had been more deliberate. Instead, with a public already angry that the tribunal had not already ended, "the Justices were under pressure to render a quick decision, so [the tribunal] could resume."<sup>316</sup>

The Court issued its brief per curiam decision less than 24 hours after oral arguments ended. The ruling against the defendants promised that a subsequent opinion would explain the Court's reasoning. Eight days later, six alleged saboteurs were executed. Nearly three months later, the Court issued its opinion. By then, at least four Justices, as Professor Michael Greenberger has said, "believed they had made a mistake and . . . came to the conclusion that they'd been buffaloed into this."<sup>317</sup>

The first to doubt the Court's decision was Chief Justice Stone, the opinion's author. Shortly after beginning the writing process, he began to "pepper[] his law clerk Bennett Boskey with memos expressing his doubts about the case."<sup>318</sup> He told Justice Frankfurter it was "very difficult to support the Government's construction of the articles [of war]."<sup>319</sup> He was considering holding that, because the tribunal had not reached a verdict when the per curiam decision was issued, the Court had not had before it the question of whether the Articles of War required appellate review beyond that described in Roosevelt's order. The thinking was that at the time of the per curiam, it was still possible the President would allow additional appellate review (by the JAG office and Secretary of War). That of course had not happened, so Chief Justice Stone recognized that his reasoning would be "an embarrassment" for the Court.<sup>320</sup> It

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<sup>316</sup> Belknap, *supra* note 143, at 473–74.

<sup>317</sup> *This American Life*, *supra* note 199.

<sup>318</sup> Mauro, *supra* note 145.

<sup>319</sup> FISHER, NAZI SABOTEURS, *supra* note 151, at 92.

<sup>320</sup> *Id.* at 94.

“would not place the present Court in a very happy light.”<sup>321</sup> In particular, it would allow Dasch and Burger to seek more review, and

[i]f the decision should be in their favor it would leave the present Court in the unenviable position of having stood by and allowed six to go to their death without making it plain to all concerned—including the President—that it had left undecided a question on which counsel strongly relied to secure petitioners’ liberty.<sup>322</sup>

Nevertheless, Chief Justice Stone opted for this “embarrassment” of reasoning in the opinion because he saw no better option, calling the opinion writing process “a mortification of the flesh.”<sup>323</sup>

Others involved in the Court’s decision also later expressed regret. Justice William Douglas later wrote that *Ex parte Quirin* shows why it is “extremely undesirable” to issue a decision before writing an opinion “because once the search for grounds . . . is made, sometimes those grounds crumble.”<sup>324</sup> Justice Hugo Black’s law clerk later wrote that the court was “stampeded,” and that “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.”<sup>325</sup>

Even Justice Frankfurter—who was so eager to execute the defendants as quickly as possible—later said *Ex parte Quirin* was “[n]ot a happy precedent.”<sup>326</sup> His former student, a military law expert named Frederick Bernays Wiener, had informed Frankfurter within months of the ruling that “unless it could be shown” that Roosevelt would allow for a military review of the verdicts, the Court should have ordered him to release the defendants because of his “flagrant disregard” of the Articles of War.<sup>327</sup> But, as Professor Michael Belknap has written, the “timing” of the writing of *Ex Parte Quirin*’s full opinion left the Court “with little choice but to resolve, in his favor, the issue of Roosevelt’s alleged failure to comply with the procedural provisions of the Articles of War.”<sup>328</sup>

To sum up, most of the defendants convicted in the Dakota and Saboteur tribunals had credible claims of innocence. But the tribunals were structurally infirm because those who created and presided over them were susceptible to the hysteria that surrounded the Dakota War and the beginning of World War II.

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<sup>321</sup> *Id.* at 93.

<sup>322</sup> *Id.* at 94.

<sup>323</sup> Lardner, *supra* note 147.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* (quoting John P. Frank, clerk to Justice Hugo Black).

<sup>326</sup> Mauro, *supra* note 145.

<sup>327</sup> Lardner, *supra* note 147.

<sup>328</sup> Belknap, *supra* note 143, at 474.

Those structural infirmities made it highly difficult—and in many cases impossible—to acquit innocent defendants, which indicates the need for delay in military tribunals that is discussed in greater detail in Part VI below.

*C. The Dakota and Saboteur Tribunals Were Not Isolated Incidents*

Although this Article focuses on two examples of military tribunals, they are by no means anomalies. In fact, military tribunals for war crimes are as old as the republic, and from the Revolutionary War through the Civil War, the rules of evidence did little, if anything, to protect the accused. Hearsay evidence was prevalent. The standard of evidence was low. And in some instances, the evidence was in practice irrelevant, as final authority was exercised in a near-summary fashion by the commanding general. Procedural protections ranged from minimal to insufficient throughout the 18th and 19th centuries—including George Washington’s decision in the Revolutionary War to treat John André’s trial for espionage to be merely advisory;<sup>329</sup> Andrew Jackson’s decision in the Creek War to deny Robert Christy Ambrister the right to call a key witness to his defense (not to mention Jackson’s decision to execute Ambrister despite the tribunal’s contrary recommendation);<sup>330</sup> and the military’s decision to use great amounts of unreliable hearsay in the Civil War era tribunals of the Andersonville defendants<sup>331</sup> and the Booth conspirators.<sup>332</sup>

While the first half of the 20th century saw a significant reduction in the use of military tribunals, that trend was reversed during World War II and its immediate aftermath. In that era, the United States prosecuted over 1,800 defendants through military tribunals.<sup>333</sup> And although those defendants enjoyed better protections than those afforded by the 18th and 19th centuries’ leading military tribunal precedents, they in no way applied rules of evidence as protective of civil liberties as courts-martial and civil trials.<sup>334</sup> From the hundred *ex parte* depositions and affidavits admitted against Japanese General Tomoyuki Yamashita (even though there was no showing that the deponents were

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<sup>329</sup> Glazier, *supra* note 42, at 20.

<sup>330</sup> FISHER, MILITARY TRIBUNALS, *supra* note 2, at 29.

<sup>331</sup> Laska & Smith, *supra* note 44, at 118.

<sup>332</sup> James H. Johnston, *Swift and Terrible*, WASH. POST, Dec. 9, 2001, at F1.

<sup>333</sup> BUSCHER, *supra* note 46, at 165.

<sup>334</sup> See *Homma v. Patterson*, 327 U.S. 759, 761 n.1 (1946) (Rutledge, J., dissenting) (quoting the military directive creating Homma’s tribunal: “All purported confessions or statements of the accused shall be admissible without prior proof that they were voluntarily given, it being for the commission to determine only the truth or falsity of such confessions or statements.”); Patricia Heberer, *Early Postwar Justice in the American Zone*, in *ATROCITIES ON TRIAL* 25, 25 (Patricia Heberer & Jürgen Matthäus eds., 2008).

unavailable),<sup>335</sup> to the confessions of Battle of the Bulge defendants obtained through “psychological tricks”<sup>336</sup> that may have included “mock trials and mock priests,” as well as beatings, the procedures frequently used in military tribunals throughout the 20th century unfairly stacked the deck against the defendants.

And just as the original Dakota and Saboteur tribunals were not isolated incidents, the enhancement of procedural protections directly resulting from the delay of military tribunals has not been limited to the few delayed Dakota and Saboteur tribunals. The Supreme Court’s ruling in *Ex parte Milligan*<sup>337</sup> illustrates how delay can lead to better protections in military tribunals. In an opinion issued in 1866, one year after the end of the Civil War, the Court ruled in favor of an Indiana resident who challenged the jurisdiction of a military tribunal.<sup>338</sup> In holding that military tribunals are not permitted in territories where the civilian court system is available, the Supreme Court paid more attention to the rights of military tribunal defendants than had been afforded military tribunal defendants from the year before, like the Booth conspirators and the commandant of the infamous Andersonville prisoner-of-war camp. This provides further evidence that once a conflict has ended and time has begun to pass, courts tend to be more open to providing procedural protections to defendants accused of war crimes.

#### V. MILITARY DETAINEE JURISPRUDENCE SINCE SEPTEMBER 11

The importance of the history of military tribunals and of this Article’s proposal in light of that history cannot be understood without first understanding the manner in which we have been litigating and legislating about military commissions for the past 15 years. This section will briefly outline the Supreme Court’s post-9/11 precedents regarding the constitutionality of military detainee procedures, as well as the relevant acts of Congress, which were often passed in response to those precedents. Because a purpose of this Article’s proposal of delay is to improve tribunals’ procedural protections, particular focus will be given to what each post-9/11 precedent stands for in relation to the procedural protections afforded to those detainees. This section will begin with the Court’s

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<sup>335</sup> Brief in Support of Mot. for Leave to File Petition for Writs of Habeas Corpus and Prohibition and of Petition for Writ of Certiorari at 32–33, *Yamashita v. Styer*, 327 U.S. 1 (1946) (No. 61 672).

<sup>336</sup> Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 598 (1949) (quoting one of the prosecution’s witnesses who obtained some of the confessions).

<sup>337</sup> 71 U.S. 2 (1866).

<sup>338</sup> *Id.* at 141–42.

decision in *Rasul v. Bush*<sup>339</sup> and end with the most recent amendment to the Military Commissions Act in 2009.<sup>340</sup>

The defendants in *Rasul* were 12 Kuwaiti and 2 Australian citizens who were captured by United States forces in Afghanistan during military conflict with the Taliban.<sup>341</sup> All 14 were held without trial or tribunal at the Naval base in Guantanamo Bay, Cuba.<sup>342</sup> Relatives of those captured challenged the detainees' status as enemy combatants in the United States District Court for the District of Columbia under the general federal habeas corpus statute.<sup>343</sup> Their case was dismissed for lack of jurisdiction, and the court of appeals affirmed on the ground that the habeas statute did not extend to Guantanamo Bay.<sup>344</sup> The Supreme Court reversed and remanded the case to determine the merits of the challenges to each detainee's enemy combatant status.<sup>345</sup> This had the practical effect of asserting that even a non-citizen held in Guantanamo Bay would be granted some access to the federal system and the protections afforded therein.

On the same day the Supreme Court decided *Rasul*, it also decided *Rumsfeld v. Padilla*.<sup>346</sup> Padilla, a United States citizen who had been arrested and detained in New York due to his connection with the 9/11 attacks on the World Trade Center, was transported to the Consolidated Naval Brig in Charleston, South Carolina.<sup>347</sup> Padilla petitioned for a writ of habeas corpus to challenge his status as an enemy combatant.<sup>348</sup> The Supreme Court dismissed Padilla's petition, but on something of a technicality. It ruled that he should have filed his petition in the Fourth Circuit, where he was currently detained, rather than the Second Circuit, where he had previously been detained.<sup>349</sup>

Another case that was decided the same day as both *Rasul* and *Padilla* was *Hamdi v. Rumsfeld*.<sup>350</sup> There, a United States citizen captured during the conflict with the Taliban in Afghanistan was transported back to the United States and held as an enemy combatant.<sup>351</sup> Hamdi, like the petitioners in *Rasul* and *Padilla*, challenged his indefinite detention as an enemy combatant by filing

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<sup>339</sup> 542 U.S. 466 (2004).

<sup>340</sup> Military Commissions Act of 2009, 10 U.S.C. §§ 948a–950t (2012).

<sup>341</sup> *Rasul*, 542 U.S. at 470.

<sup>342</sup> *Id.* at 471.

<sup>343</sup> *Id.* at 471–72.

<sup>344</sup> *Id.* at 472–73.

<sup>345</sup> *Id.* at 485.

<sup>346</sup> 542 U.S. 426 (2004).

<sup>347</sup> *Id.* at 426.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 451.

<sup>350</sup> 542 U.S. 507 (2004).

<sup>351</sup> *Id.* at 507.

a writ of habeas corpus. The district court sought in-camera review of the records documenting Hamdi's enemy combatant status, but the Fourth Circuit Court of Appeals reversed, dismissing Hamdi's claim on the basis that the detention was legally authorized under the Authorization for Use of Military Force ("AUMF").<sup>352</sup> The Supreme Court held that the AUMF authorizes the detention of true enemy combatants for the duration of hostilities, but it also held that United States citizens detained by the military in the United States are entitled to at least some procedure to challenge their designation as enemy combatants.<sup>353</sup>

In response to the Court's holdings in *Rasul* and *Hamdi*, the Detainee Treatment Act ("DTA") was signed into law on December 30, 2005. One of the provisions of the DTA prohibited federal courts from hearing a military detainee's challenge to his status as an enemy combatant while being held at Guantanamo Bay.<sup>354</sup> Instead, the Act provided that aliens detained at Guantanamo Bay may have their status determined by a Combatant Status Review Tribunal ("CSRT").<sup>355</sup> Final appeal of the status was then limited to the United States Court of Appeals for the District of Columbia Circuit.<sup>356</sup> The effect of this statute was to cut off the Supreme Court's ability to hear habeas petitions of military detainees at Guantanamo Bay.

Less than one year after the DTA was signed into law, the Supreme Court, in *Hamdan v. Rumsfeld*,<sup>357</sup> construed the DTA to not deny federal courts review of habeas petitions filed prior to the passage of the Act.<sup>358</sup> The Court then considered a question that it had not considered since World War II: What procedural protections do the Uniform Code of Military Justice and the Geneva Conventions provide for a defendant in a military tribunal? Prior to *Hamdan*, the Court's post-9/11 cases had not addressed military tribunals, which try defendants for past war crimes and impose a punishment that can include, among other punishments, death or imprisonment beyond the end of hostilities. Instead, prior to *Hamdan*, the Court's post-9/11 cases had addressed an entirely separate question—whether suspected enemy combatants detained without a trial for the duration of hostilities can file habeas petitions to challenge their designation as enemy combatants.

*Hamdan* held that the procedures for military tribunals proposed by the Executive after 9/11 violated both the Uniform Code of Military Justice and the

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<sup>352</sup> *Id.* at 509; see Authorization for Use of Military Force, Pub. L. 107-40, *codified at* 115 Stat. 224 (2001).

<sup>353</sup> *Hamdi*, 542 U.S. at 532–33.

<sup>354</sup> Detainee Treatment Act of 2005, 10 U.S.C. § 801 (2006).

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> 548 U.S. 557 (2006).

<sup>358</sup> *Id.* at 567.

Geneva Conventions.<sup>359</sup> The congressional and executive response to the ruling in *Hamdan* was to create the Military Commissions Act of 2006 (“MCA”).<sup>360</sup> Similar to the DTA outlined above, one of the MCA’s provisions sought to prohibit a military detainee from petitioning the federal courts via habeas corpus to challenge his enemy combatant status. It also stripped military tribunal defendants of some procedural protections that had previously been provided by the Uniform Code of Military Justice and the Geneva Conventions.<sup>361</sup>

In 2008, the Supreme Court in *Boumediene v. Bush*<sup>362</sup> took up the question of whether the MCA was an unconstitutional suspension of the writ of habeas corpus. Like *Rasul*, *Padilla*, and *Hamdi*—and unlike *Hamdan*—*Boumediene* did not address the procedures of military tribunals. Instead, it addressed whether Congress can deny detainees the right to file habeas petitions to challenge their designation as enemy combatants. *Boumediene*, along with other non-citizen military detainees at Guantanamo Bay, argued they had a constitutional right to seek federal habeas corpus review of their designations as enemy combatants. The Court agreed.<sup>363</sup> This holding again reinstated the minimal procedural protections of habeas corpus in the federal judicial system.

In 2009, Congress amended the Military Commissions Act<sup>364</sup> to provide detainees with stronger procedural protections, including more protections against hearsay evidence. Under the procedures required by the new MCA and rules subsequently promulgated by the Department of Defense, the government has created military tribunals to try a small fraction of the detainees at Guantanamo Bay. These military commissions are being conducted to try defendants for war crimes committed against the United States during the War on Terror. Charges have ranged from “conspiracy to provide material support to terrorism” to “murder in violation of the laws of war.”<sup>365</sup> As of August 2014, only seven detainees—out of nearly 800 detainees previously or currently held as enemy combatants at Guantanamo Bay—had received sentences from military tribunals. The majority of those sentences were the result of detainees accepting plea deals and reduced sentences in return for cooperating with prosecutors. In fact, only two detainees—Salim Ahmed Hamdan and Ali Hamzan Ahmad Suliman al-Bahlul—had been actually tried and convicted by military tribunals

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<sup>359</sup> *Id.* at 635 (holding that “the Executive is bound to comply with the rule of law that prevails in this jurisdiction” regarding the charges and criminal detention of Hamdan and any proceeding stemming therefrom).

<sup>360</sup> Military Commissions Act of 2006, 10 U.S.C. §§ 948–950 (2006).

<sup>361</sup> *Id.*

<sup>362</sup> 553 U.S. 723 (2008).

<sup>363</sup> *Id.* at 771.

<sup>364</sup> Military Commissions Act of 2009, 10 U.S.C. §§ 948–950 (2009).

<sup>365</sup> *Id.*



for war crimes since 2001, and both of those convictions have since been vacated on appeal.<sup>366</sup>

Seven more Guantanamo detainees currently await military tribunals.<sup>367</sup> Of those seven, five are charged with committing war crimes in connection with the September 11th terrorist attacks. The prosecution is seeking the death penalty for those five detainees.<sup>368</sup> Although many commentators across the ideological spectrum have criticized the Guantanamo tribunals for taking so long to begin, the delay has not affected the length of the detainees' detention because *Hamdi* held that enemy combatants can be detained for the duration of hostilities, which continue. Even if the detainees had been tried and acquitted of past war crimes in military tribunals, the government could and likely would *still* detain them for the duration of hostilities. That is because the designation and detention of enemy combatants—and their challenges to that designation and detention through habeas petitions—is entirely separate from the trial of those same enemy combatants for allegations of past war crimes.

Moreover, as this Article argues, the delay has likely benefited prospective tribunal defendants—so much so that I propose providing military tribunal defendants with a right to delay their tribunals, if they so choose.

## VI. THE CASE FOR DELAY

In this section, I argue that military tribunal defendants should have the option of delaying their trials. I begin in Part VI.A by considering the benefits of delay. In subsequent subsections, I address several questions raised by such a delay: How can Congress create a mechanism for delay? What do proper procedural protections look like? What has happened in the past when there actually was a delay? How long should the delay be? And why is current legislation insufficient?

### A. *The Benefits of Delay*

The Sixth Amendment guarantees more than the right to a speedy trial. It guarantees the right to a *fair* trial.<sup>369</sup> And in the case of military tribunals, fairness gives way to hastiness. Allowing defendants the right to delay their military tribunals increases the likelihood that they will have the fair trial the Sixth Amendment guarantees. Admittedly, delay, in the face of the Sixth Amendment, seems more harmful than beneficial. However, there are several examples of legal principles which were created to protect criminal defendants that, when practiced, only harmed them.

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<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> U.S. CONST. amend. VI.

### 1. Delay is Beneficial to Defendants in the Context of Military Tribunals

It is likely that a delay in military tribunals would increase the likelihood of acquitting innocent defendants. This is admittedly counterintuitive. In the civilian system, the requirement of speedy trials protects innocent defendants against prolonged incarceration when a trial would acquit them. But for two reasons, the military tribunal system is different.

First, an enemy combatant tried for war crimes in a military tribunal is not entitled to be released if he is acquitted at a military tribunal. Instead, an enemy combatant can be detained for the duration of hostilities as an incident to war, as the Supreme Court made clear in *Hamdi*.<sup>370</sup> Thus, whereas a delay in trial costs a defendant his freedom in the civilian system, that is not the case with military tribunals. The cost of delay is far, far less significant.

Second, in the context of military tribunals, the speedier the trial, the less likely it is to be fair. The reason for this is simple: The public often panics during wars, especially at the start of wars. When the public is hysterical, it tends to demonize not only the enemy but also groups of people that they associate with the enemy, whether it is Dakota women and children in caravans after the Dakota War or German-American waiters and busboys in the first year of World War II. In times of panic, fear, and hysteria, the government—which benefits from pandering to public sentiment and may also benefit from stoking certain irrational public opinions—has catered to the public’s view of captured enemies and suspected enemies by creating tribunals that all but ensure their convictions and punishment.

Public hysteria plagues speedy military tribunals directly and indirectly. It affects them directly because the decision makers in a military tribunal sometimes become caught up in the public’s hysteria and rush to judgment. In the Dakota trials in 1862, for example, commissioners and members of the Court shared the public’s blanket assumptions about all Dakotas, as did the military officers who selected them and to whom they answered. As detailed above, General Sibley called the Dakotas “fiends” and “devils in human shape” undeserving of “any touch of mercy.”<sup>371</sup> His commanding officer, General Pope, wrote of a desire to “exterminate them all”<sup>372</sup> and said the Dakotas should “be treated as maniacs or wild beasts.”<sup>373</sup> Although racism and bias against American

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<sup>370</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

<sup>371</sup> Chomsky, *supra* note 2, at 57 (quoting Letter from Brigadier Gen. Henry Sibley to Mrs. Henry Sibley (Aug. 24, 1862) (in *Sibley Papers*, roll 11, frame 664, MASS. HISTORICAL SOC’Y [microfilm])).

<sup>372</sup> *Id.* at 25 (quoting Letter from Major Gen. John Pope to Brigadier Gen. Henry Sibley (Oct. 6, 1862) (in Letters Rec’d-Adj. Gen, NARG 94 (M619, roll 483))).

<sup>373</sup> *Id.* at 23 (quoting Letter from Major Gen. John Pope to Colonel Henry Sibley (Sept. 28, 1862) (reprinted in SCOTT, *supra* note 282)).

Indians sadly lasted much longer than any possible delay in the tribunals, General Pope's decision just a year later to find a way to spare the life of a Dakota convicted in a 1863 tribunal (described in more detail below) suggests some possibility that decision makers like Pope would have afforded the Dakotas more process if the tribunals had been delayed.

Likewise, in the review of the saboteur tribunal in 1942, key decision makers were caught up in the hysteria of the times. As detailed above, Justice Felix Frankfurter called the alleged saboteurs "low-down, ordinary, enemy spies" and "damned scoundrels" with "a helluva cheek to ask for a writ," and he wrote blithely of their "bodies . . . rotting in lime."<sup>374</sup> The military commissioners were only slightly less transparent than Justice Frankfurter; they overruled valid objections and may have purposefully chilled future objections.<sup>375</sup> The fact that as many as four Justices regretted their decision before the opinion was even finished, as well as Justice Frankfurter's later admission that the tribunal decision was "not a happy precedent," strongly suggest that if the entire process had been delayed, the Supreme Court's decision may have been different.

Not only does public hysteria in the wake of a military conflict directly affect the outcome of military tribunals, it also indirectly affects it. In 1862, the widespread assumption that almost *all* Dakotas were guilty motivated the tribunal to dispense with procedural protections that could have revealed the defendants' innocence. It led those who created and implemented the tribunals to, among other things, deny the defendants legal representation, the right to confront witnesses, and an adequate evidentiary standard for conviction. The men responsible for these severe infirmities in the tribunals' structure saw no problem because they were sure the defendants were guilty. The results were trials as brief as five minutes, at which hundreds of likely-innocent defendants were convicted. If the tribunals had been delayed, the public may have been more tolerant of tribunals that at least afforded defendants a real chance to prove their innocence (even though that still inappropriately shifts the burden to the defense).

The public hysteria in 1862 may also have affected Lincoln's review of the tribunals' sentences. Famous for his pardons of army deserters sentenced to death, Lincoln is an unlikely candidate for ordering the government's largest mass execution in American history. But Lincoln's political position was weak in 1862—with the Civil War going poorly—and he may not have believed he could afford to alienate his supporters in Minnesota by pardoning all the Dakota defendants. He received a multitude of letters demanding swift executions, and the fact that he went farther than the vast majority of white Minnesotans wanted in terms of staying some executions suggests he may have gone farther if he had felt less political pressure due to the public's hysteria. Instead, his efforts stopped

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<sup>374</sup> FISHER, NAZI SABOTEURS, *supra* note 151, at 100–01.

<sup>375</sup> Cohen, *supra* note 8.

well short of providing procedures to adequately protect against the imprisonment of innocent Dakotas, and in some instances he even failed to protect against wrongful executions. Lincoln may well have felt able to stay more of the death sentences if the tribunals had been delayed.

A similar version of that public hysteria also indirectly affected the 1942 German saboteur tribunal. Like Lincoln, Roosevelt was overseeing a war that was not going well, and by rushing the military tribunal of the alleged saboteurs, he saw an opportunity to give the people a “victory.” This led to a host of structural infirmities that made conviction of the defendants more likely—the tribunal’s secrecy; its admission of hearsay and possibly involuntary confessions; and perhaps most importantly, the Supreme Court’s rushed decision, which it later regretted. Delay may well have led to a different Supreme Court decision.

In short, delaying military tribunals makes procedural protections more likely (indirectly aiding innocent defendants), and at the same time, it bolsters those procedural protections, making it less likely that fact finders and reviewing authorities will be caught up in a rush to judgment (directly aiding innocent defendants).

## 2. The Right to a Speedy Trial is Not the Only Legal Principle That Sometimes has the Potential to Harm Defendants More Than It Protects Them.

Suggestions that a speedy trial might counterintuitively disadvantage defendants in military tribunals is not entirely unlike suggestions by recent scholars that other principles of criminal law that were designed to benefit defendants might actually disadvantage defendants. According to scholarship by Professor William Stuntz and Professor Daniel Epps, those principles include the prohibition against vague laws, the rule of lenity, and the Blackstone principle.

The vagueness doctrine stands for the notion that people need to be able to understand the law they are bound to follow. Upon reading a law, one should be aware of what conduct is prohibited and what conduct is permitted. If “men of common intelligence must necessarily guess at its meaning and differ as to its application” then the law is unconstitutionally vague.<sup>376</sup> Accordingly, the courts’ enforcement of this doctrine prevents “legislatures from creating all-encompassing crimes”—which theoretically protects defendants.<sup>377</sup> But when courts use this doctrine to invalidate vague laws,<sup>378</sup> legislatures sometimes

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<sup>376</sup> *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>377</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 558 (2001).

<sup>378</sup> See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

respond by “replacing them with a series of more carefully defined offenses.”<sup>379</sup> Thus, according to Professor Stuntz, the doctrine may ultimately lead to the expansion of criminal law.

Professor Stuntz explained this phenomenon in *The Pathological Politics of Criminal Law*.<sup>380</sup> He began with the premise that “legislatures have a natural bias toward overcriminalization,”<sup>381</sup> and through tools such as the vagueness doctrine, courts can act as a restraint. This point was illustrated by cases such as *Papachristou v. City of Jacksonville*<sup>382</sup> and *City of Chicago v. Morales*.<sup>383</sup> In both cases, the Supreme Court invalidated a law using the vagueness doctrine. So it would seem that the purpose behind the doctrine had been satisfied. But as Professor Stuntz pointed out, although the vagueness doctrine “rules out enacting all-encompassing crimes,” it simultaneously “permits the creation of many smaller, more tightly defined offenses.”<sup>384</sup> And this effect “in turn restricts not legislatures, but courts.”<sup>385</sup>

In *The Pathological Politics of Criminal Law*, Professor Stuntz next discussed the effect of a second source of judicial restraint: the rule of lenity. This doctrine “authorizes courts to resolve statutory uncertainties in defendants’ favor.”<sup>386</sup> The Supreme Court has held that “when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”<sup>387</sup> For example, in *McNally v. United States*<sup>388</sup> and *Ratzlaf v. United States*,<sup>389</sup> the Supreme Court resolved ambiguities “in a way that limited the government’s ability to charge and convict people.”<sup>390</sup> But both cases were later overruled by Congress, which criminalized the conduct that the defendants in *McNally* and *Ratzlaf* had been charged with committing.

Therein lies one problem that Professor Stuntz points out about the rule of lenity: “narrowing judicial interpretations, once made, can be overturned.”<sup>391</sup> A study conducted by Professor William Eskridge revealed that interpretations

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<sup>379</sup> Stuntz, *supra* note 377, at 560.

<sup>380</sup> *Id.* at 558.

<sup>381</sup> *Id.* at 557.

<sup>382</sup> 405 U.S. 156 (1972).

<sup>383</sup> 527 U.S. 41 (1999).

<sup>384</sup> Stuntz, *supra* note 377, at 560.

<sup>385</sup> *Id.* at 561.

<sup>386</sup> *Id.* at 559.

<sup>387</sup> *McNally v. United States*, 483 U.S. 350, 359–60 (1987).

<sup>388</sup> *Id.*

<sup>389</sup> 510 U.S. 135 (1994).

<sup>390</sup> Stuntz, *supra* note 377, at 563.

<sup>391</sup> *Id.* at 562.

of criminal statutes were overruled more frequently than statutes in any other area of law.<sup>392</sup> A second problem that Professor Stuntz points out about the rule of lenity is that when it is strictly enforced by courts, it incentivizes legislators to “eliminate doubts about the crime’s coverage in advance.”<sup>393</sup> And those doubts “are likely to be resolved in the government’s favor.”<sup>394</sup> Consequently, the rule of lenity, just like the vagueness doctrine, may cause “more overcriminalization than it prevents.”<sup>395</sup>

A third doctrine that may adversely affect criminal defendants is the Blackstone principle. This doctrine is exemplified by the adage “better that ten guilty persons escape, than that one innocent suffer.”<sup>396</sup> In his article, *The Consequences of Error in Criminal Justice*, Professor Epps says the Blackstone principle requires that “we must strongly err in favor of false negatives (failures to convict the guilty) in order to minimize false positives (convictions of the innocent), even if doing so significantly decreases overall accuracy.”<sup>397</sup> While this may seem beneficial to defendants, Professor Epps argues that there are two drawbacks to the accused.

First, the Blackstone principle “provides fewer benefits to innocent defendants than it seems, perhaps even making them worse off overall.”<sup>398</sup> In a criminal justice system that “errs heavily in favor of letting the guilty go free,”<sup>399</sup> defendants (convicted or acquitted) will face increased social stigma. On the one hand, “a conviction will be seen as nearly certain evidence of guilt.”<sup>400</sup> And once convicted, a defendant will face harsher punishments because society is convinced of his or her absolute guilt.<sup>401</sup> On the other hand, an acquittal will not be seen “as a strong indication of innocence—and indeed may be taken as evidence of guilt.”<sup>402</sup> Thus, even after being acquitted, it is likely society will treat defendants as if they were guilty.<sup>403</sup> This has social and professional

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<sup>392</sup> William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 344 tbl.4 (1991).

<sup>393</sup> Stuntz, *supra* note 377, at 562.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 561.

<sup>396</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*352.

<sup>397</sup> Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1068 (2015).

<sup>398</sup> *Id.* at 1110.

<sup>399</sup> *Id.* at 1099.

<sup>400</sup> *Id.*

<sup>401</sup> *See id.* at 1103.

<sup>402</sup> *Id.* at 1100.

<sup>403</sup> *See id.* at 1102.

consequences for acquitted defendants who, for example, might apply for a job from an employer who considers them acquitted, but not innocent.

In addition to increased social stigma, defendants will also face a second drawback. The Blackstone principle “reinforces a widely recognized political-process failure in criminal justice, hurting not only defendants but also society as a whole.”<sup>404</sup> Professor Epps begins with the premise that the “political process consistently creates outcomes that are suboptimal or unjust when it comes to criminal law.”<sup>405</sup> He then goes on to explain the various ways that the Blackstone principle exacerbates those problems. First, it leads to the concentration of “punishment on a more discrete, less politically involved, and less politically attractive group of people.”<sup>406</sup> Second, it causes voters to “feel less sympathy for defendants”<sup>407</sup> because it “enhance[s] the perception that defendants are almost uniformly guilty.”<sup>408</sup> And third, it causes voters to be “more concerned about crime.”<sup>409</sup> Ultimately these effects “make voters more eager to treat convicted criminals harshly.”<sup>410</sup>

Like the vagueness doctrine, the rule of lenity, and Blackstone principle, the right to a speedy trial was designed to protect defendants. And like those other three doctrines, a speedy trial can—at least in the context of a military tribunal—actually harm defendants more than it helps them. This is evident by both the Dakota War tribunals of 1862 and the German Saboteurs tribunal from World War II. In each tribunal defendants were tried in the midst of public fear and hysteria. Fairness gave way to a speedy resolution. Had there been some mechanism for delay, the lives of innocent defendants might have been saved. Knowing this, defendants should be given the right to delay their military tribunals.

### *B. Binding Ulysses to the Mast*

Before military hostilities arise, Congress should pass a law providing for a mechanism for delay. It would allow defendants in future military tribunals to delay the tribunal for some number of years. For example, the defendant would have the right to delay the military tribunal until three years after the end of the war or ten years after the conduct at issue in the tribunal, whichever is sooner.

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<sup>404</sup> *Id.* at 1070.

<sup>405</sup> *Id.* at 1115.

<sup>406</sup> *Id.* at 1117.

<sup>407</sup> *Id.* at 1103.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.* at 1105 (emphasis removed from original).

<sup>410</sup> *Id.* at 1106.

It is important for Congress to pass this law *before* military hostilities arise. This has the effect of binding Ulysses to the mast, as the *Odyssey*'s hero did to resist the temptations of the Sirens. If Congress and the President wait until after military hostilities arise, the political pressure on them not to delay the tribunal may be too strong for them to resist. The history of the Dakota War tribunals and the Saboteurs tribunal suggests it is unlikely that in a time of hysteria, the House, the Senate, and the President will *all* agree to significant and unprecedented procedural protection for defendants in military tribunals.

By creating a legislative mechanism of delay that has the effect of “binding us to the mast,” the mechanism would function in a manner similar to what Professor William Eskridge calls a “super-statute.”<sup>411</sup> Super-statutes attempt to establish a “new normative or institutional framework for state policy” that “‘stick[s]’ in the public culture” so that “the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.”<sup>412</sup> It generally takes a lengthy debate about the problem in order for the super-statute to become enacted and the super-statute must be proven as a “robust” solution to the problem.<sup>413</sup> When there are inconsistencies between super-statutes and ordinary legislation the super-statute trumps so long as the super-statute does not conflict with the constitution.<sup>414</sup>

Eskridge provided a test to establish whether a legislative enactment constitutes a super-statute.<sup>415</sup> The first criterion is that the statute must “alter substantially the then-existing regulatory baselines with a new principle or policy.”<sup>416</sup> The second criterion requires a waiting period to determine whether “the new principle or policy ‘sticks’ in the public culture in a deep way, becoming foundational or axiomatic to our thinking.”<sup>417</sup> The final criterion is a “procedural marker” created by a “reflective and deliberative manner over a long period of time.”<sup>418</sup> The creation of a super-statute does not happen quickly. It is only created after lengthy debates, public discussions, and official deliberation, which is then scrutinized by administrators and judges. This lengthy process is “essential” in the creation of a super-statute: “Each super-statute has a pre-enactment history and a post-enactment history that are as important as—and usually more important than—its enactment history.”<sup>419</sup>

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<sup>411</sup> William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215–16 (2001).

<sup>412</sup> *See id.*

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> *See id.* at 1230–31.

<sup>416</sup> *Id.* at 1230.

<sup>417</sup> *Id.* at 1231.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*



Just as a future Congress could theoretically repeal a “super-statute,” a future Congress could theoretically repeal the delay mechanism this article proposes. But just as a future Congress would in practice face almost insurmountable obstacles to repealing a “super-statute”—because super-statutes create a “new normative or institutional framework for state policy” and “stick in the public culture”—a future Congress would in practice face considerable obstacles to repealing tribunal defendants’ right to delay. That’s because any effort to repeal would face the *presumption* that the delay is a right of the defendants. Politicians and the public would have to explain why they are changing the rules midstream. Arrayed against them would be the powerful argument that the delaying mechanism was created in cooler times by men and women with judgments that were not clouded by the fog of war—through a “reflective and deliberative manner over a long period of time.”<sup>420</sup> And of course, it would take more than just a single house of Congress, or a single President, to rebut the presumption. The repeal would require a majority of the House, a filibuster-proof majority of the Senate, and the President. It could thus be blocked by the President *or* a majority of the House *or* a minority of the Senate sufficient to filibuster.

### C. *The Proper Procedural Protections That Delay Makes Possible*

If, as history suggests, delay leads to greater procedural protections for military tribunal defendants, the question then arises: What do proper procedural protections look like? In other words, what procedural protections would properly balance, on the one hand, the need to better sort the innocent from the guilty, with, on the other hand, the need to adapt tribunals to the unique circumstances of a military conflict? Although what follows does not pretend to be an exhaustive list of proper rules of procedure, it is a start.

First, the procedures should ensure that more than one person is responsible for determining if an individual should be charged with an offense that would justify convening a military tribunal. In this sense, these decision-makers would act in a manner that is more consistent with the grand jury protection that a criminal defendant has in federal court. The proposed delay mechanism would quell the need for hasty indictments making such a potentially time-consuming procedure less problematic.

Adequate communication with counsel should be a second requirement. The argument against this otherwise guaranteed procedural protection revolves around the fear that counsel will be a courier for information sent from detainees to terrorist allies. While this may be a reasonable concern, recent history shows it can be alleviated through effective security vetting of defendants’ attorneys.

The third recommended procedural requirement for military tribunals revolves around the use of hearsay. There is a long history of lax evidentiary

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<sup>420</sup> *Id.*

rules in military tribunals, particularly when it comes to allowing hearsay. The reasoning behind the admission of hearsay in tribunal proceedings has historically been to prevent the onerous diversion of resources that is involved when a witness is required to be present for cross-examination for the tribunal to proceed. But the evidentiary rules regarding hearsay in courts-martial and civil trials remain relevant: that a defendant *should* have the ability to cross-examine a witness on his or her statements to ensure truthfulness. Taking into consideration these two competing policies, hearsay should be admissible only upon a showing by the government that the declarant is both truly unavailable and sufficiently reliable. A mechanism for delay would reduce the likelihood that a declarant would be unavailable since the conflict would, in most cases, have ended by that point.

Fourth, the evidentiary standard for conviction in a military tribunal should mirror the standard used to convict a defendant in a criminal proceeding in the United States: The fact finder must conclude that the defendant is guilty “beyond a reasonable doubt.” The main reason for such a high standard is to prevent an innocent defendant from being wrongfully convicted. The same concerns apply to a defendant in a military tribunal. And in the context of a military tribunal, the risks associated with high evidentiary standards are actually smaller than in the civilian context. Where there is a real risk in the civilian context of a guilty person going free not because of innocence, but because the evidence was lacking for the prosecution to meet the high standard, there is no such risk during a war because the detainee will remain in custody as an enemy combatant so long as the conflict is ongoing. In an era when asymmetric wars last decades, such detention will often last longer than the prison sentence a military tribunal would impose on a guilty defendant.

Fifth, the issue of bias amongst the commission also needs to be addressed through added procedural protections of military tribunals. In both the Dakota and Saboteur tribunals, there was evidence of bias on the part of the commissioners who determined the defendants’ guilt. Although it may be impossible to completely eliminate such biases, anyone associated with the particular battle where the defendant was captured should be precluded from being appointed as commissioners of the tribunal. In addition, the proposed delay mechanism allows for cooler heads to prevail, mitigating the likelihood of bias against the defendant.

Sixth, military tribunals, whenever possible, should also be open to the public. Because of the nature of these proceedings, there are conceivably times when the subject matter discussed will cause a potential security risk. But the proposed delay mechanism would often mitigate any risk that the proceeding would raise national security issues. Therefore, without a clear showing by the prosecution that such a security risk is present, any military tribunal conducted should be made open to the public.

Seventh, the rules of procedure should not change throughout the proceeding. In the past, military tribunals have allowed for changes in the

evidentiary rules *during* a proceeding. But defendants should not be forced to hit a moving target. For that reason, military tribunals should have a mandatory stay on any evidentiary rule changes once that proceeding has entered into the pre-trial phase.

Eighth, and finally for our purposes, defendants should enjoy an adequate procedure to directly appeal their convictions. Whether this is accomplished by naming a particular circuit court, such as the United States Court of Appeals for the District of Columbia Circuit, the procedure proscribed must allow for adequate, and impartial, review of that decision.

Because the procedural protections for tribunal defendants become less unpopular when sufficient time after a crisis has passed and public hysteria has abated, the delay mechanism proposed in this article will facilitate the enactment of many, if not all, of the procedural protections listed above. And as the following section shows, history suggests that when tribunals have been delayed, procedural protections have increased.

#### *D. Examples From History of a Short Delay Improving Procedural Protections*

In the cases of the Dakota and Saboteur tribunals, even a short delay actually led to several procedural and structural improvements when compared to the Dakota and Saboteur tribunals that preceded them. To be sure, those corrections were not nearly as robust as the ideal procedural protections described above, and they were not nearly sufficient to provide fair trials. But the improvements may have saved at least two lives. And the trajectory—the longer the delay, the more structural protections—is positive, suggesting that a far longer delay might lead to far better procedural protections and better outcomes.

##### 1. Subsequent Dakota Tribunals

In 1863 and 1864, the United States Army conducted three additional tribunals of Dakotas who had allegedly participated in the Dakota uprising and who were captured after the 1862 executions. In some ways, these tribunals were similar to those that occurred in the immediate aftermath of the war in 1862. Charges were vague. Evidence was unreliable. And the tribunal convicted defendants simply for participating in battles with United States soldiers.

But the 1863 and 1864 tribunals were better than the incredibly low bar set by the 1862 tribunals. Each of the later trials afforded the defendants *some* protections that they did not enjoy in 1862, and in one of the three, the procedural protections saved the life of the defendant. Although these later tribunals were far from fair, their inclusion of even a few additional procedural protections suggests some correlation between, on the one hand, the amount of time between the tribunals and the defendants' alleged conduct, and on the other hand, the amount of procedural protects provided to them.

The first post-1862 tribunal tried a Dakota named Wowinape for murders and outrages during the Dakota War, as well as for stealing horses and attempted murder the next year.<sup>421</sup> The tribunal occurred between August 22 and September 28, 1863, which is itself a sign that the tribunal provided the opportunity for a more deliberate consideration of the defendant's guilt than the 1862 tribunals.<sup>422</sup> Thirty of these 38 days were spent in recess while the tribunal moved from one fort to another, where witnesses could more easily testify. But the trial took longer than *any* of the 1862 trials. And the mere fact that the tribunal went to the effort to cross the frontier to facilitate witness testimony is an improvement of 1862 tribunals in which witnesses were often not even required to testify in person.<sup>423</sup>

Perhaps the most dramatic difference between Wowinape's tribunal and the 1862 tribunals was its outcome. After Wowinape was convicted and sentenced to death, the Judge Advocate General's Office referred General Pope to Article 65 of the Articles of War, which prohibited the officer who convened a court-martial from reviewing the judgment if he is the defendant's "accuser or prosecutor."<sup>424</sup> Although Colonel Sibley accurately pointed out that "a precisely similar condition of things existed in 1862," General Pope refused to approve of the proceedings in light of Article 65.<sup>425</sup> Wowinape's life was spared, and he was eventually released.

The second post-1862 Dakota tribunal tried a chief named Wakanozanzan, who had fled to Canada after the uprising and who was captured in Canada in 1864. He was charged with the murder of a white Minnesotan named Philander Prescott, with killing "sundry white men[,] women and children whose names are unknown," and with "murders[,] massacres and other outrages committed by the Sioux Indians upon the white settlers of the State of Minnesota."<sup>426</sup>

Like Wowinape's tribunal, Wakanozanzan's included procedural protections that the 1862 defendants did not enjoy. Most importantly, for the first time in Dakota trials, Wakanozanzan was allowed the assistance of counsel.<sup>427</sup> The commission granted his request for a two-day recess for the defendant to find and consult with counsel, as well as an additional two days after the testimony of five witnesses for him to prepare a defense. When the tribunal

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<sup>421</sup> Chomsky, *supra* note 2, at 41.

<sup>422</sup> *Id.*

<sup>423</sup> *Id.* n.173.

<sup>424</sup> *Id.* at 42 (quoting Act of May 29, 1830, ch. 179, § 1, 4 Stat. 417).

<sup>425</sup> *Id.* at 43 (quoting Letter from Brigadier Gen. Henry Sibley to Judge Advocate Gen. Joseph Holt (Dec. 7, 1863) (in *Souix War Trials*, P1423, MASS. HISTORICAL SOC'Y)).

<sup>426</sup> *Id.* at 43-44.

<sup>427</sup> *Id.* at 44.

reconvened, Wakanozanzan returned with a statement prepared by former Minnesota Governor Willis Gorman and his aide, Cushman Davis, a future Governor and Senator.<sup>428</sup> Despite this assistance from counsel, Wakanozanzan was convicted and sentenced to death.

The third post-1862 Dakota tribunal tried Shakopee, another chief who had fled to Canada, where he was captured. The charges were various acts of unspecified murders with an “unknown murderous weapon” and “general participation in the murders[,] massacres and other outrages.”<sup>429</sup> Like Wakanozanzan, Shakopee was granted a recess to seek and consult with counsel. But like Wakanozanzan, after the recess, he was found guilty and sentenced to death, based on the testimony of six witnesses.

To be sure, the trials of Wakanozanzan and Shakopee were travesties of justice. Neither was provided counsel that appeared in person. In fact, after Shakopee failed to find counsel that could assist him before the end of the recess he received, the tribunal failed to grant him an additional recess, and he went unrepresented. In addition, unreliable hearsay was used to convict both defendants. And after their convictions, General Pope did not spare their lives, even though their 1864 tribunals suffered from the same infirmity—being convened by the defendants’ accuser—that Pope used to justify commuting Wovinape’s sentence in 1863.

But like Wovinape’s 1863 tribunal, the tribunals of Wakanozanzan and Shakopee provided more procedural protections than did the 1862 tribunals. They were not conducted in a mere five minutes (though they were not sufficiently deliberate). They did not rely on the testimony of witnesses who had appeared only in previous tribunals (though it would have been difficult for Dakota-speaking defendants to cross-examine the witnesses). They made some (minimal) allowances for permitting the defendants to obtain legal representation. Professor Carol Chomsky has written, “These trials and their review differed significantly from the trials conducted in 1862.”<sup>430</sup> Since the later trials under the command of the same General Pope who commissioned the 1862 tribunals, and since at least two of the defendants—the two chiefs—were likely *more* responsible for the Dakota uprising than most of the 1862 defendants, the question is: Why were the defendants afforded new procedural protections? Is it possible that the cause was that some of the dust had settled from the Dakota War, the public was less hysterical, and the fear of the Dakotas—“the other”—was less pervasive, if only by a degree?

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<sup>428</sup> *Id.*

<sup>429</sup> *Id.* at 45.

<sup>430</sup> *Id.* at 41.

## 2. Subsequent Saboteur Tribunals

Just as the Dakota tribunals of 1862 were followed by military tribunals in 1863 and 1864 that provided more procedural protections, the Nazi saboteur tribunal of 1942 were followed by a military tribunal in 1945 that provided more procedural protections to similarly situated defendants.

In 1944, the German military trained a team of spies and landed them off the coast of Maine in November. The two-man team was led by Erich Gimpel, who hoped to learn about the effort in the United States to build an atomic bomb, send information about the effort back to Germany via shortwave radio, and recruit South American agents to blow up buildings being used in that effort.<sup>431</sup> Gimpel's team member was the United States-born William Colepaugh.

After landing in Maine, Colepaugh soon told a friend he had recently arrived from Germany with a dangerous companion.<sup>432</sup> The friend told the FBI.<sup>433</sup> The FBI interviewed Colepaugh.<sup>434</sup> Colepaugh told the FBI everything, including information that allowed them to quickly find Gimpel on December 26, 1944.<sup>435</sup>

Gimpel appears to have been far more committed to his espionage and sabotage mission than most of the 1942 team of would-be saboteurs (he may have been more committed to it than was *anyone* on the 1942 team). However, the public was less panicked in 1944. The United States was winning the war, and unlike in 1942, they expected victory to arrive soon.

With less reasons to fear Germany, the United States public had less reason to fear Germany spies, and the public was less insistent on a quick execution. In this environment, President Roosevelt was receptive to Secretary of War Stimson's advice that Gimpel and Colepaugh should not be tried in the same manner as the 1942 defendants. Another tribunal like that was, he said, "likely to have unfortunate results."<sup>436</sup> Stimson argued for adopting rules of courts-martial that had been jettisoned in 1942, including a prohibition against convictions based on confessions unsupported by corroborating evidence and appellate review by a JAG board and the JAG.<sup>437</sup>

Over the objection of Attorney General Biddle, who appeared to want another opportunity to promote himself at tribunal defendants' expense, President Roosevelt took Stimson's advice. Unlike in 1942, he provided for

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<sup>431</sup> FISHER, NAZI SABOTEURS, *supra* note 151, at 116–17.

<sup>432</sup> *Id.* at 117.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at 118–19.

review by trained lawyers in the JAG office, issuing an order that said, “The record of the trial, including any judgment or sentence, shall be promptly reviewed under the procedures established in Article 50½ of the Articles of War.” Also unlike in 1942, Roosevelt did not handpick counsel or the tribunal’s commissioners.<sup>438</sup>

Most important of all, like General Pope in 1863 (when he saved Woinape’s life based on what Pope viewed as a procedural technicality that had not mattered to him in 1862), Roosevelt was in less of a hurry to carry out executions in 1944 and 1945. Although Gimpel and Colepaugh were both convicted and sentenced to death in February 1945, he did not order the executions to be carried out before he died in April 1945. After the war in Europe ended in May, President Truman commuted the sentences to life in prison. Ten years later, Gimpel was released and deported to Germany. Colepaugh was released on parole in 1960.<sup>439</sup>

*E. How Much Delay is Enough?*

This article has attempted to show that when the public demands the proverbial “blood,” governments have an incentive to oblige them—even governments led by American icons like Abraham Lincoln and Franklin Roosevelt. If Lincoln and Roosevelt had waited until the public hysteria abated—in both instances, it would have required waiting beyond the president’s death—the administrations and the military would have had far less incentive to set up the kangaroo courts they (in Lincoln’s case) tolerated and (in Roosevelt’s case) created.

Of course, suggesting delay raises a new question: How much delay is enough? The story of the two Dakotas executed in 1864 suggests that two years was not nearly long enough. Nor was the tribunal of the two alleged saboteurs tried in 1945 sufficiently delayed, with one of the two convicted defendants probably innocent.

Although it seems difficult to put an exact number on the amount of years necessary for a delay, one would want to ensure that it does not imprison the defendant longer than necessary once the conflict ends and does not last so long that witnesses forget material facts or pass away; however, it must not be so short that public fear, prejudice, and rushes to judgment occur at dangerous levels. The amount of procedural protections afforded the detainees tried by the Obama administration suggests that a delay of more than a decade since the September 11 attacks may be enough.

The length of the proper delay would vary from conflict to conflict. The Dakota War lasted only about a month, and the hysteria around it did not abate when the fighting stopped; for a delay to have had a positive influence, it may

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<sup>438</sup> *Id.* at 119.

<sup>439</sup> *Id.* at 120.

have required waiting until years after the conflict ended. The Cold War lasted more than four decades, and the struggle against Al Qaeda has already lasted more than a decade; waiting years until after the conflict ends is waiting *too* long, but it may be beneficial to wait several years until after the height of public trepidation that often accompanies conflict, although even then it would be inaccurate to suggest that irrational fear has completely subsided. Drawing on the example of the Dakotas and Saboteurs, a delay of eight years from the date of the initial crisis or four years from the end of the military conflict associated with the initial crisis—whichever is sooner—could be sufficient to cool tempers and allow society and our tribunals to properly reflect on how best to serve justice. Although any time period with a specified date will have an arbitrary element to it—why eight years instead of seven years and 364 days?—establishing a firm period for the delay before a crisis is an important part of tying the hands of decision-makers in the aftermath of the crisis.

*F. The Amended Military Commissions Act is Not Sufficient*

Although Congress's 2009 amendment to the Military Commissions Act<sup>440</sup> does provide some procedural protections to those tried by military tribunals, these protections are not sufficient for three reasons.

First, the MCA is too easy to repeal. It was created for a particular time, and a particular enemy. Unlike super-statutes, it did not establish a “new normative or institutional framework for state policy” that was intended to “stick in the public culture” and apply to all future military tribunals.<sup>441</sup> In addition, without a mechanism for delay, any statute governing military tribunals, like the MCA, does not create a presumption against tinkering with it—and reducing procedural protections—in the immediate aftermath of a crisis. In other words, the MCA is most vulnerable to attack at the exact time that its protections are most necessary.

Second, the MCA is limited in its scope. It applies only to military detainees who are non-citizens of the United States.<sup>442</sup> While the majority of detainees subject to trial by military tribunal would likely be such non-citizens, this leaves vulnerable any citizen of the United States accused of being an enemy combatant. And the annals of military tribunal history are riddled with many examples of such detainees. They include the Andersonville defendants, the Booth conspirators, the Native Americans from the Dakota Tribunals, and two

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<sup>440</sup> Military Commissions Act of 2009, 10 U.S.C. § 948a (2012).

<sup>441</sup> See Eskridge & Ferejohn, *supra* note 411, at 1215–16.

<sup>442</sup> 10 U.S.C. § 948b (stating “Any *alien* unprivileged enemy belligerent is subject to trial by military commission as set forth in this this chapter” and further defining an alien as “an individual who is not a citizen of the United States”) (emphasis added).



of the Germans from the Saboteur Tribunals, to name just a few.<sup>443</sup> Because of the obvious need to protect not only non-resident aliens from unfair judicial practices, but the citizens of our own nation as well, the MCA is simply too limited to provide the protections that should necessarily be available to everyone.

Third, even putting procedural protections aside, the MCA—by not having a mechanism for delay—fails to fulfill one of the primary purposes of delay: to reduce the bias of fact finders and decision makers against the defendants. As time passes, the delay reduces the pressure to rush to judgment, and judges and jurors become less prejudiced against the defendants of military tribunals. And because the MCA provides no mechanism to ensure such a delay, it fails to adequately protect tribunal defendants in a manner that sufficiently sorts the guilty from the innocent.

## VII. CONCLUSION

The tribunals following the 1862 Dakota War and the 1942 German sabotage mission were dark chapters in American legal history. Of the 44 defendants executed in the two sets of tribunals discussed at length in this article, many of them—and perhaps most of them—were innocent.

These injustices were partly the result of structural infirmities in the tribunals, and those infirmities were partly caused by the public hysteria surrounding the creation and proceedings of the tribunals. If the tribunals had been sufficiently delayed, the hysteria would have abated, and the structural infirmities may have been, depending on the length of the delay, either improved or even cured, while decision makers and fact finders would have become less biased.

This phenomenon is illustrated by the improved procedural protections and improved structure of the military tribunals that were held after the initial 1862 Dakota War and 1942 German sabotage mission. The inadvertent delay of the subsequent Dakota tribunals and subsequent saboteur tribunals allowed public hysteria to subside, and the defendants were granted *some* watered-down civilian protections, such as a quasi-right to assistance of counsel and quasi-appellate review process. If the unplanned and slight delays of those tribunals resulted in procedural protections rejected just years before, the deliberate effort of enacting a statute to allow defendants to delay their tribunals for a set period of time would likely increase procedural protections and better ensure justice is served for both the innocent and the guilty.

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<sup>443</sup> See Laska & Smith, *supra* note 44, at 118; Johnston, *supra* note 332, at F1; Douglas Linder, *The Trial of Lincoln Assassination Conspirators*, FAMOUS TRIALS <http://www.law.umkc.edu/faculty/projects/ftrials/lincolnconspiracy/lincolnaccount.html> (last visited Oct. 7, 2016).

Given the large population of military detainees currently held by the United States, and the checkered history of post-9/11 litigation and legislation concerning military commissions and detainee procedures, the need for procedural protections for future military defendants seized after future national emergencies is all the more clear. While the Supreme Court's recent decisions and Congress's recent amendment to the Military Commission Act move toward providing some procedural protections to these defendants, the protections do not guarantee that the structural infirmities that often result from the public hysteria that surrounds military crises will be avoided in the future. For these reasons, when considering military tribunals in the future, we should remember the benefits of, and insist on, giving defendants the power to delay.