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Nazis in America

By

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On May 7, 1945, Germany surrendered. After years of bloody and terrible fighting, the Allied powers had finally beaten the German war machine. Three years earlier, in June 1942, that victory looked far from inevitable. German U-boats attacked Allied ships all along the American coast, rattling America and revealing its vulnerability. Into this climate of uncertainty and fear, the German army launched Operation Pastorius. Their objective: to secretly land eight men along the eastern seaboard carrying explosives, equipment, and large sums of American money. They planned to sabotage the American war effort. On June 13, 1942, the first group of four Nazis left U-202 in a rubber raft and headed for the beach near Amagansett, New York. The second group of four landed on the beach at Ponte Vedra Beach, Florida, near Jacksonville on June 17. Before the end of August, all eight men were arrested, tried, and sentenced to death for their participation in the plot. Six of the eight would ultimately pay with their lives, while two would receive prison sentences.

Edward Kerling, Herbert Haupt, Werner Thiel and Hermann Neubauer comprised the Florida landing force. The four in New York consisted of George Dasch, Ernest Burger, Robert Quirin and Heinrich Heinck. Their biographies hardly read like those of professional saboteurs, making them seem like unlikely choices for such a dangerous and important mission.
George Dasch

Dasch, the only one of the eight to participate in the First World War, led the New York group. According to the FBI, he served as clerk towards the end of the Great War. After that conflict, he moved to America, where he worked in hotels, mainly as a waiter, in New York, San Francisco, Sacramento and Los Angeles. Eventually Dasch married an American. The couple toured the European countryside on their honeymoon. Eventually, they returned to America where Dasch continued to work as a waiter in New York, California and Florida. On May 15, 1941, Dasch repatriated to Germany, eager for greater career opportunities. He wished to help the Nazi war effort but the only job he could obtain was that of a radio monitor. However, Dasch wanted to do "something bigger and better for [his] country." Eventually the Germans recruited him into their sabotage training program.

Dasch played an integral role in capturing the other members of the sabotage team. Dasch's betrayal of the group ultimately sealed the fates of the other men. Spared execution thanks to his assistance in capturing and testifying against the others, the government sentenced him to life in prison. Dash's motivations for betraying the mission will be explored later in this paper. However, it is important to note here that at least part of his motivation stemmed from his deluded belief he would be treated as a hero by the American people.

After the war ended, President Truman pardoned Dasch and allowed him to return to Germany. Years later, Dasch recounted his experiences in his book, *Eight Spies Against America*. Published in 1959, seventeen years after the original landing, the book
chronicles both the particulars of the mission and details of Dasch’s life prior to the event.

Dash’s work represents an important firsthand account of the mission as told by one of the participants, though it should be read with a skeptical eye. Not only written many years after the events transpired, much of the work appears written with the goal of rehabilitating Dasch’s image in America.

Few of the passages of the book express criticism of America. This is difficult to reconcile with the reality of Dasch’s experience. While Dasch saw himself as an American hero, he suffered the ignominy of being called a spy, saboteur and a traitor by his adopted countrymen. While one might think this would engender feelings of anger and betrayal, Dasch appears to harbor almost no ill will towards the United States for placing him in prison.

In the opening passage Dasch’s ulterior motive is apparent. He begins “I first fell in love with the United States thirty-nine years ago...” Dasch recounts how, as a boy, he was in a field where American Occupation troops played baseball. A baseball accidentally hit him in the head and knocked him out. The American troops not only carried the young Dasch to the doctor, but they fed him well. He believed their care, concern and generosity convinced him that he should come to America. Eventually, Dasch followed through on this thought and left Germany for America.

In describing his voyage to America as a young man and his love for his adopted homeland, Dasch mentioned the various jobs he held after coming to the United States and his strong desire to travel throughout the country. In addition, Dasch notes the
friendliness of the American people. After seeing the country Dasch tells the reader that he “never thought of [him]self as a German anymore.”

Although Dasch apparently loved his adopted homeland, he would eventually return to Germany. Dasch explains he left the United States because, despite living here for almost twenty years, he never amounted to anything more than a waiter. Reports of good paying union jobs in Germany convinced him that Germany was a land of opportunity. However, he characterizes his decision to move back to Germany as “poorly calculated.”

In contrast to the warm and friendly Americans, Dasch depicted Germans as cold and arrogant. The expatriated German found his home country uncomfortable due to the constant stream of Nazi propaganda and the large numbers of uniformed military men he saw everywhere.

Upon arriving in Germany, Dasch obtained his first job translating American radio broadcasts. He confessed, that after everyone left the office, he would often cry while listening to President Roosevelt’s speeches, hoping to follow his directive and oppose the Nazis. Throughout his autobiography he claims to have always harbored, and sometimes uttered in the company of trusted friends and family, anti-Nazi party sentiment.

During the course of Eight Spies Against America, Dasch discussed his involvement with Operation Pastorius. During his tenure as a radio monitor, Dash claimed he would often tell people that he came to Germany to fight for Hitler, not to work as a translator. Although in his heart Dasch claimed to abhor Hitler and the Nazi party, he felt impelled to make these statements in order to maintain appearances.
Apparently, someone took notice of Dasch’s comments and his intimate knowledge of America. Members of the German army and intelligence community made sure that he was interviewed for the operation. Dasch describes both the intensity of the screening process and life under the ever watchful eye of the Gestapo. In the end, the mission planners not only selected Dasch for the mission, they expected him to lead it.\(^{13}\)

One must stop to question Dasch’s veracity in describing the events leading up to the operation. It is difficult to imagine that a man who claimed such anti-Nazi and pro-American sentiment could have made it through an intensive screening process without ever divulging his true feelings. Dasch even boasted in the book that he planned from the beginning to use the mission as a means to return to America and betray the group.\(^{14}\)

Either Dasch skillfully hid his true sentiments and plans from the Gestapo, the interviewers and other German officials, or he only formulated his betrayal plans once in America.

Dasch’s claims about his true allegiance are difficult to determine. In his statements to the FBI, Dasch described preparing a detailed memorandum for the sabotage instructors. This memorandum provided Dasch’s assessment on how best to sabotage the American war effort.\(^{15}\) Dasch claims that this thorough and detailed work was all part of a clever ruse designed disguise his true motives. Beyond offering this advice to the instructors, Dasch also advised his fellow saboteurs. For instance, Dasch told them:

…”to make up a story concerning [their] identity. I suggested at that time that everyone should try to stick to his first name and use a last name beginning with the first two letters of his real last name. In the identity of
every man he had to make it clear where he was born. I, for instance, was born in San Francisco during or before the fire, so that that story would have some form of verification. It was also my suggestion that when the men arrived in the United States, their first step should be to go to the towns of their birth to check up on the schools and so on in order to be able to back up their statements. I made those suggestions merely for the purpose of showing that I had my heart and soul in it.\(^\text{16}\)

This passage best illustrates the conundrum one faces when examining Dasch. On one hand he claims to provide thoughtful advice and guidance that would help the saboteurs succeed. On the other hand, he simultaneously claims that the advice itself was only used to prove his loyalty so that he would be allowed on the mission, not because he had any designs of actual sabotage.

Heinrich Heinck and the other participants

After their arrest, the saboteurs each gave statements to the FBI. These extensive statements provide more background information on each of the participants. Heinrich Heinck’s statement serves as a good proxy for the rest of the group members.

Born in Germany in 1907, Heinrich Heinck served as one of the saboteurs in Dasch’s group. Like the other men, Heinck had lived in America prior to the mission. Arriving in America in 1926, Heinck lived in a boarding house and held a number of different jobs. Heinck worked for several different restaurants as a waiter and a busboy.
However, he worked most extensively with the American District Telegraph Company. While working for the company, Heinck specialized as a machinist on electrical devices.

In 1933, Heinck married. Soon after, Heinck began work for the Norden Company in New York City. Heinck worked for the company’s defense branch helping to make gears, pins and screws for use in bomb sights.

While working for Norden, Heinck met a man named Albert Schneider who put him into contact with an unidentified man from the German Labor Front. Through this contact at the Labor Front, Heinck arranged for a return to Germany with his wife in 1939. Members of the local German Labor Front greeted Heinck upon his arrival and obtained from him his life history. The local members arranged for Heinck to take a job at a Volkswagen factory starting in 1939. Sometime in 1942, Kurt Laas, a manager in charge of tools at the factory, approached Heinck about the possibility of returning to America. Heinck contended Laas only hinted that his return might hinge on his willingness to act as sabotage agent for the Germany. Despite these hints, Heinck later claimed he only saw the offer as a good opportunity to return to America.\textsuperscript{17}

While working at the Volkswagen factory Heinck also met Richard Quirin, another member of the eventual sabotage party. Laas also approached Quirin about the possibility of returning to America. Heinck, who claims to have had misgivings about returning to America as a member of a sabotage squad, discussed the issue with Quirin. Quirin told Heinck the mission sounded like an excellent opportunity. After conferring with Quirin and learning that he would participate in the mission, Heinck accepted the offer. About one week after agreeing to participate in the mission, Heinck received an
unmarked letter telling him to report to a farm near Quentz Lake in Brandenburg. In April 1942, Quirin and Heinck left for the farm.\textsuperscript{18}

Once all the participants arrived at the farm, they were given a tour of the facility. In addition to the eight men who would land in America, the initial training group consisted of a few others. One of these men, Scotty, sensed the other members disliked him and consequently left after only a few days. Another, Jerry Swensen, made it through the training with the rest of the men. However, he contracted a venereal disease just before the group left for America and had to be hospitalized.\textsuperscript{19} Dasch noted in his statement's to the FBI that some other German officers participated in the planning and training. However, they were not directly involved with the mission. Dasch later learned that these men came to the facility in order to learn the training techniques in order to set up other sabotage schools.\textsuperscript{20}

The biographies of the remaining six follow a similar arc: they all spoke some English, worked mostly at small jobs, and lived and worked in America before eventually returning to Germany and beginning sabotage training some time in 1942. At the time of the landing, two of the eight saboteurs, Haupt and Burger, held American citizenship. Burger came to America in 1927 and worked in machine shops, eventually becoming a naturalized citizen in 1933. Burger served in the National Guard in both Michigan and Wisconsin and received an honorable discharge. According to the \textit{New York Times}, Burger returned to Germany to work as a “writer and propagandist.”\textsuperscript{21} After arriving in Germany, Burger became actively involved in the Nazi party. Burger served as an active member in the Sturmabteilung (SA), a paramilitary organization of the Nazi Party, and had some connection with Ernst Röhm, the head of the SA. However, the SA fell out of
favor with the other elements of the Nazi party, eventually leading to Röhm’s assassination. Due to Burger’s ties with the organization, he became a target of Gestapo surveillance. After working on some secret mission for Germany in the Eastern front, the Gestapo arrested Burger. Following his arrest, Burger severed over eighteen months in a Gestapo internment camp. During this period his wife miscarried their child, possibly because of the stress she suffered from her own harassment at the hands of the Gestapo.

After his release, Burger volunteered to put his experiences in America to use as an intelligence officer. Instead, the Nazis brought him to Brandenburg, Germany, where they interviewed him and asked him to join the others at the sabotage school. He accepted the invitation and, like the others, received three weeks of training in early 1942.

Training

The training took place in a nondescript farmhouse near Quentz Lake, Brandenburg. A rural region at the time, the farm did not stand out amongst the numerous other estates and surrounding farms. The farmhouse stood two stories; the first served as a garage and storage facility. The real training took place in the farm’s second story which served as both a classroom and a laboratory. To the east of the two story structure stood a working farm with animals and a hot house for growing vegetables. Beyond the hot house to the east, there stood a two story gymnasium which the men used for training. In addition to the classroom and gymnasium, the men used a 1,000 foot diameter testing area for explosives and incendiaries. Heinck reports that none of the men used the
facility’s rifle range during their training. The farm also had a pistol range that the men used once or twice during their training. The men used a nearby field to play soccer and other sports.²⁵

The saboteurs received three weeks of training while on the farm. This agenda included information on how to construct and use bombs effectively. The men learned how to use incendiary pens, construct time bombs and sabotage machinery. Instructions from the German commanders ordered the men to carry out their mission against important war industry facilities and transportation hubs.

Equally important, the men received instructions on means of assimilating into American society. The instructors told the men to remain vigilant and keep an eye out for those speaking out against the war. If they heard any talk against the war, their instructions encouraged the men to support such sentiment. These orders included stressing to the populace that America had no reason to fight Germany as, “Germany wanted nothing from America.”²⁶

Sabotage seminars were conducted by the German intelligence officer, Walter Kappe. Kappe had previously operated a spy ring in America. As an active member of the German Bund, Kappe played an instrumental role in constructing the German’s espionage network in the years leading up to America’s entrance into the war. However, in the summer of 1941 the US government, led by the FBI, dismantled the network with a series of arrests and raids aimed at the secret agents.²⁷

After their three weeks of training ended the men rested for a week off. Heinck stated that of the four men in his group only one, George Dasch, seemed to have
information about the exact nature of the mission. Heinck would later state that he
believed Dasch had received more training than any of the other group members. 28

A radically audacious plan emerged. The two groups would board separate U-
boats that would then take them close enough to their landing beaches so that the
invaders could use rafts to row to shore. Importantly, all eight wore clothing that
identified them as German soldiers during the landing phase. 29 Under the articles of the
Geneva Convention, if caught wearing regular military uniforms they were to be treated
as prisoners of war, not as spies or saboteurs. Under the Convention, prisoners of war are
generally safe from execution. 30 After landing, they would then take their supplies and
bury them along the beach, along with the clothing that identified them as Nazis. Their
orders instructed them to change into civilian clothes and assimilate into the population.
They would then use these explosives and their training to destroy pre-designated targets
in hopes of disrupting the American war effort. The eight men arrived with enough
explosives and money to continue their mission for up to two years.

At least part of the blame for the mission’s eventual failure stems from the pre-
operation preparation and training. These men hardly seemed like ideal candidates for
such an important mission. Part of the impetus for getting the mission off the ground so
quickly can be traced to the FBI raids in 1941. An enraged Hitler demanded that German
intelligence rebuild its network in America. The saboteurs were to be the first step in this
rebuilding process. This may account for the sparse training that the men received before
departure. After all, none of the men, perhaps excepting Burger, had previously engaged
in any mission involving the degree of cunning, subterfuge and deception required for the
mission. For most of their lives the men had only worked as laborers and service staff.
One would think that this lack of experience would have necessitated more training before such a difficult and daring mission could be undertaken. The German admiral who signed off on the departure orders must have sensed the futility of the mission. Upon signing the orders the admiral supposedly commented that he had just signed the saboteurs’ death warrants.\textsuperscript{31}

\textbf{The Plan and the Landing}

According to Dasch, in his statement to the FBI:

our object of attack was at first the light metal industry of America and the other object the railroad system of the Chesapeake & Ohio, the new Pennsylvania railroad depot at Newark, New Jersey, and the Hell Gate bridge which connects Long Island with the Bronx. Furthermore, another object of attack was the canal system, the inland waterways and especially the Siusas between Cincinnati and St. Louis. Outside of that we were to enact any form of small sabotage as we as an individual thought of being necessary.

It was also our job to plant detonating bombs into the locker rooms which are to be found in all great railroad stations with the sole purpose of exciting the people. Further, this type of attack was also to be used in all Jewish Department stores. We have implements such as pens and pencils, time fuses set to the minute, etc. The attack of the light metal industry
was divided into two groups: Group #1, under my own leadership, had the job to attack the aluminum factory of East St. Louis, in Alcoa, Tennessee, and all those which are to be built or are being built in the Tennessee River Valley.

Group #2 had its job to lay low the plant of Niagara Falls. Group #2 also had as an object to lay low the plant of the Creolite Company of Philadelphia. Creolite is being used in the electrolysis bath in the manufacture of aluminum after the beauxite has been purified and added to the electrical power with creolite. It was stated that the Creolite Shipping Company of Philadelphia has the monopoly of this raw material.  

Dasch goes on to describe in detail how each of these attacks would be carried out. He describes in great detail the precise sequencing these acts required. Dash elaborates on what the Germans viewed as America’s most vulnerable weak spots.

After landing near Amagansett, Long Island on June thirteenth, Dasch’s group met unexpectedly with Coastguardsman John Cullen. Following the attacks on Pearl Harbor and the U-boat attacks offshore, the Coast Guard stepped up patrols along beaches due to the possibility of a Nazi attack or invasion. Dash and his men proved ill-prepared to deal with this encounter. When Cullen found them they had just landed on shore; two had yet to change out of their bathing trunks. Cullen approached and asked if the men needed any help. Dasch responded that they were “a couple of fishermen from Southampton who had run aground.” Cullen realized something was amiss. He saw one of the other three dragging what appeared to be a very heavy bag and heard someone
speaking in a foreign language. In attempt to bring them in, Cullen offered to let the men spend the night at the Coast Guard station. Dasch responded by saying: “Wait a minute – you don’t know what’s going on. How old are you? Have you a father and mother? I wouldn’t want to have to kill you.”

The saboteurs’ cover had been blown almost instantly. The invaders, perhaps realizing at this point some action had to be taken, offered Cullen a $100 bribe. At first he declined, they then raised their offer to $300. Cullen accepted, and they told him to “forget the whole thing.” Dasch asked “Would you recognize me if you saw me again?” Cullen promised he would not remember and he was allowed to go on his way. He promptly rode off and alerted his superiors to the saboteurs’ presence.

Coastguardsman Cullen reported these events under direct questioning at trial. In his statements to the FBI, Dasch provided a completely different interpretation of what transpired between the two that night. Dasch’s interpretation of the event is far less sinister. The following is Dasch’s description of his interaction with Cullen:

You have got a father and a mother at home boy. You would like to see them wouldn’t you? You have undoubtedly given your oath to do your duty, and I am telling you by taking this money which I am offering you, you are doing nothing else but your duty so please take it. You will hear from me from Washington. My name is George John Davis.

According to Dasch, Cullen appeared more frightened by the encounter than anyone. Clearly there is a discrepancy between the two accounts. Dasch’s reporting suggests that he had already formulated his plan to turn in the other saboteurs. Cullen’s report suggests
that Darch acted in a frantic and panicked manner belying his position as group commander.

In the final assessment, the encounter could not have been more of a disaster. In the dead of night, four German soldiers are confronted by a lone, unarmed American. Their goal is secrecy, but almost immediately upon landing they are spotted. They panic, making their presence known and arousing suspicion. The group seemed both nervous and unprepared; at first they go with a cover story, then a death threat and finally a bribe in an effort to get Cullen to leave. Had they been more cunning and clever, the incident might have passed without any suspicions being raised. Had they been more ruthless they might have taken Cullen’s life. The reaction is especially surprising giving Darch’s FBI statement, where he claims part of the training consisted of developing a believable cover story. Obviously, this training did not adequately prepare the men for this encounter.

Even those within the group realized they should have handled the situation differently. Quirin reportedly told Darch “You should have killed that guy on the beach, or we should have done it.” The group’s inept handling of this event turned out to be good news for Cullen and for America. It launched a nationwide manhunt for the saboteurs and, at the very least, provided additional motivation for Darch to turn in the others.

The reaction also supports the viewpoint that the group hardly consisted of well trained, hardened and disciplined spies and saboteurs capable of improvising and dealing with unexpected developments. The panicky reaction to the guardsman’s presence ultimately foreshadowed the events that would eventually lead to the arrest of all eight men.
That night however, Dasch and his men eluded capture and made their way to New York City. Cullen and several comrades headed back to where the Coastguardsman encountered the Nazis. The Coastguardsmen spotted what appeared to be the U-boat that brought the four on shore. The commander feared a full-force Nazi invasion and ordered his men to defensive positions. The submarine eventually trailed off into the night. In the morning the men found “German cigarettes and clothing, an overseas cap with a swastika and a pair of wet bathing trunks.” They dug into the sand and discovered the explosive supplies that the Nazis left buried on the beach. The Nazis had disappeared into the night. The Coastguard alerted the Federal Bureau of Investigation and informed them of Cullen’s encounter. That nationwide manhunt was afoot.

Meanwhile, the other group of four saboteurs, led by Kerling, landed along Ponte Vedra Beach, Florida, on June seventeenth. Their landing experience went as well as could be expected. The landing area consisted of miles of desolate beaches. The only signs of life consisted of a few summer cottages built in the area. They landed in complete secrecy, and stashed their equipment and uniforms on the beach. Kerling and the others then headed for the bus station in search of a ride into Jacksonville. Once there, they made arrangements for the next leg of their mission. Two of the four headed to New York City while the other two proceeded to Chicago.

Meanwhile, in New York City, George Dasch grew anxious; the moment of truth had arrived. Would he follow through on his orders or would he turn traitor? The other men, while originally shaken by their encounter with Cullen, regained their composure. They began shopping for new clothes and adapting to the American lifestyle. They went
Dasch assured his men that as long as they followed orders, nothing more could go wrong.

The Betrayal

It is difficult to say with certainty what motivated Dasch to betray his mission and his men. One can argue persuasively that he acted out of fear, a premonition that the group would be caught, tried, and executed as spies. Dasch possibly wanted to preempt not only the prospect of being caught but of having one of the other seven betray him first. One can also argue that as a vainglorious man, Dasch sought the attention such a betrayal would surely bring. This argument rests on Dasch’s delusional belief that he would be treated as a hero in America for exposing the secret Nazi plot. Whatever his reasoning, Dasch contacted the FBI office in New York on June 14, 1942, calling himself Pastorius.

He told them he had “recently arrived from Germany and would call the FBI Headquarters when he was in Washington, D.C., the following week.” On June 19 he phoned the FBI and told them the name of his hotel in the D.C. area. They quickly located and apprehended him. Prior to the apprehension, Dasch secretly arranged with Burger a plot to turn the remaining group members over to the FBI. Dasch would go to the FBI to inform them of the plot and of how to get into contact with Burger. Burger then led the FBI to the locations of the other men. By June 27 all eight of the saboteurs were captured.
Initially Dasch found it difficult to prove to the FBI that he was part of a German sabotage group. Only after the FBI saw how much money Dasch had in his possession (approximately $80,000) did they begin to believe him. Dasch spent the next several days telling agents about the plot. Agents also questioned why Dasch waited several days to report to the FBI. In his defense, Dasch stated he wanted to give the others an opportunity to turn themselves in.45

Why allow others the opportunity to be the hero? Why risk your own life if you intended to betray the mission anyway? Several viable alternatives explain this course of action. For one, Dasch may have used the time to decide whether he wanted to betray the mission or not. In making the decision, Dasch may have used the time to reflect on what exactly he wanted to tell the US government. Interestingly, Dasch allowed enough time to lapse between the initial phone call and the in-person meeting for the second group of saboteurs to arrive. Later, Dasch claimed that he wanted to give the youngest member of the team, Haupt, and opportunity to meet with his parents and prove his innocence.

US Government Actions

On July 2, 1942, five days after the last saboteur’s capture, President Roosevelt issued a Presidential Order that helped decide the fate of the eight saboteurs. The Order can be broken down into two main parts. In the first part Roosevelt cited the U.S. Constitution and the Thirty-eighth Article of War as providing him the express power to establish a military commission to try the eight saboteurs. The second part of the Order
discussed how cases of a similar manner would be treated going forward. In this section it states that:

all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States...⁴⁶

This second part of the order is just as crucial as the first part. Simply put, it does not allow those who are accused of sabotage, espionage, etc. to seek a trial in civilian courts.

In essence, this Order rescinds the writ of habeas corpus.

In preparation for the trial by tribunal, the Department of Justice released an extensive historical background on the use of military commissions in American history. The Department provided this information to newspapers in order to give them some perspective on the use of military tribunals. The section on the history and use of military tribunals in this paper covers largely the same material. The Department’s guide does provide some additional case histories that are pertinent to this case.
The briefing provided by the Department of Justice provides a summary of the differences between a tribunal trial and courts-martial. The briefing states:

Military-commissions differ from courts-martial in several important respects. The jurisdiction of general courts-martial is customarily exercised in cases of members of the military forces and to certain offenses defined by code. It does not include many criminal acts, especially of civilians, peculiar it times of war. Hence in order to subject non-military persons to military authority in wartime, another tribunal was established to cover violations of the law of war and civil crimes which cannot be handled by the civil authorities. Its jurisdiction ends with the declaration of peace or the revocation of martial law. Courts-martial, on the other hand, exist in peacetime to try offenses within the armed forces.

Note that the briefing specifically calls attention to the fact that military tribunals can be used in cases involving civilians. In order for the case to succeed, the administration and the prosecution needed these eight men to be viewed as non-military personnel. In order to avoid any public debate about the necessity of following or not following the Geneva Convention with regards to the treatment of captured military persons, the administration got in front of the issue by portraying the men as non-military prisoners who unlawfully and illegally attempted to wage war on United States soil.

The briefing mentions that during the First World War, the government did not conduct any trials by military tribunal. According to the briefing all spies captured between 1917 and 1918 were tried under courts-martial. The briefing states that the spies
captured during the First World War did not commit any “special crimes under the international laws of war” that warranted the use of a tribunal trial. The briefing states that no World War I spy engaged in “belligerent acts behind enemy lines without being in uniform.” According to the briefing, this is the key difference between the World War I cases and the case involving the Nazi saboteurs.

The crux of the Administration’s argument rests on the commission of belligerent acts committed by these eight men while out of uniform. Determining whether or not the men did anything to constitute a belligerent act would therefore be a key for both the prosecution and the defense. After all, the men had not accomplished any on their intended mission objectives with regards to actual sabotage. As we will see the defense and the prosecution both argued skillfully in favor of their positions.

The reference to the World War I cases offers an intriguing precedent. In particular, the briefing refers Pablo Waberski (real name Lothar Witzke) a German lieutenant captured after crossing the Mexican border into Arizona in 1918. Waberski told authorities that he was Russian-American making his way back to America. However, authorities found a cryptogram in his possession that, once decoded, revealed him to be a German spy. The government brought Witzke before a secret courts-martial and sentenced him to death. However, President Woodrow Wilson commuted his sentence to life imprisonment in 1920. After saving the lives of fellow inmates during a fire, President Coolidge pardoned and released Witzke in 1923. Germany awarded Waberski two Iron Crosses upon his return to Germany.49

In many ways this case bears some striking similarities to the one involving the eight Nazi saboteurs. Much like the eight men in this case, Witzke’s capture took place
before he could carry out any of his mission. Similarly, both became defendants in secret trials that ultimately led to guilty verdicts and death sentence recommendations.

One key difference, however, is the reason for the commutation of the sentence. In the case involving the eight saboteurs, two were pardoned because of their integral role in capturing and convicting the other six. In Witzke’s case, some argue that a secret memo from the Attorney General suggesting that the trial should have taken place in civilian court motivated President Wilson’s to commute the sentence. In the case of the eight saboteurs, there are few indications that Attorney General Biddle felt uncomfortable with following the President’s orders. In fact, his direct involvement in both crafting the Presidential order and in spearheading the prosecution serves as a clear indication of his willingness to support a trial by tribunal.

Before the trial by military commission could begin the President needed to appoint the members of the prosecution, defense and the commission. The President took the unusual step of appointing both Attorney General Francis Biddle and Major General Myron Cramer from the office of the Judge Advocate General (JAG) to the prosecutorial side. This was unusual because the normal function of the JAG office is to act as the reviewing body in cases involving trial by tribunal. This, of course created an instant conflict of interest if any future review by the JAG office proved necessary. However, in this case, Roosevelt decided that he would have the final review of the proceedings. It is difficult to believe that Roosevelt would have the time or the expertise to review a tribunal transcript that eventually numbered over 3,000 pages. In addition, such an order clearly violated Articles 46 and 50½ of the Articles of War. These particular Articles call
for the JAG office to review all records from trial by military commission and more broadly require an “examination by a board of review.” 51

The profile and role of the Attorney General in this case has been a much debated topic. Perhaps here we should pause and take a brief biographical look at Attorney General Biddle. Biddle, 56 years old at the time of the trial, practiced law in Philadelphia for over 27 years prior to joining the administration. A Quaker by birth, Biddle’s family roots in America stretch back to the 1680’s. Biddle’s career as Attorney General and beyond is quite interesting. In addition to his direct participation in this case, Biddle served an instrumental role in carrying out President Roosevelt’s interment policies. After the war ended, Truman appointed Biddle to be a judge at the Nuremberg trials. 52

As for the defense, Roosevelt appointed Colonels Kenneth Royall and Cassius Dowell to defend seven of the eight. The eighth man, George Dasch, would be represented by Colonel Carl Ristine. One might be inclined to believe that because the President wanted to see the saboteurs convicted and executed he would choose a sub-par defense team to ensure a victory for the prosecution. Although the President certainly could have done this, he instead selected men who were extremely well qualified to defend the accused.

Colonel Kenneth Royall, who turned 48 on July 24, 1942, would largely serve as the lead attorney for the defense. Royall, a North Carolina native, attended the University of North Carolina at Chapel Hill. Later he attended Harvard University Law School. After graduating from law school, Colonel Royall served as a second lieutenant in the 317th Army Field Artillery during the First World War. Following the trial, Royall would
go on to become the last Secretary of War and, after that position was abolished, the first Secretary of the Army.53

Before the trial began, more members were added both to the prosecution and the defense. In all the prosecution consisted of seven men while the defense consisted of five, with one representing only George Dasch. One of the men added to the defense’s team, Major Lauson Stone, was the son of Chief Justice of the Supreme Court, Harlan Stone.

At the time of the case Major Stone was 37 years old. He had graduated from Harvard with a bachelor’s degree in 1925 and finished law school at Columbia, where he graduated in 1928.54 Although he died over fifty years after the trial ended, Major Stone’s 1999 obituary in the New York Times focused extensively on his participation in the trial.

The members of the military commission consisted of three brigadier generals and four major generals. Major General Frank McCoy served as President of the commission. In selecting the members of the military commission, Roosevelt also granted them broad power in handling the trial. According to the text of the order:

The Commission shall have the power to and shall, as occasion requires, make such rules for conduct of the proceedings, consistent with the powers of military commission under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be submitted as would, in the opinion of the President of the Commission, have probative value to reasonable man. The concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence.55
This order gave the commission a great deal of discretion in deciding how to handle the case. In fact, some have suggested that this order gave the commission such great latitude it forced the defense to learn the rules of the trial as the trial advanced.56

Interestingly, the order also allowed for a death sentence to be carried out with a two-thirds vote in favor of the sentence. This is significant because at a normal courts martial trial it is necessary to have a unanimous decision in order to carry out a death sentence.57 Adding this feature to the Order served as insurance that a death sentence recommendation would be reached.

On July 7, 1942, the day before the trial began; the Commission established some ground rules for the trial, including: “(a) No peremptory challenge shall be allowed. (b) Challenge of members of the Commission for cause may be permitted. The Commission, by a two-thirds vote of those voting – the challenged member not voting – may pass on any challenge.”58 These rules seemed designed to give the Commission wide latitude in conducting the trial.

The final pre-trial step involved the extensive questioning of all eight of the saboteurs by members of the Federal Bureau of Investigation. In fact, as part of his interrogation, Dasch prepared over 250 single spaced, typewritten pages outlining the details of the plan59.

How did Roosevelt feel about the trial? According to Biddle, Roosevelt told him “I won’t give them up … I won’t hand them over to any United States marshal armed with a writ of habeas corpus. Understand?”60 Roosevelt also warned Biddle, “…don’t split hairs Mr. Attorney General.”61 Roosevelt even compared the current case to that of Major André from the Revolutionary War.
From this statement we can clearly see the enormous amount of pressure to both keep this trial out of the civilian courts and to have it result in the death penalty recommendations. For the most part, President Roosevelt sought to avoid trial either by civilian court or courts martial because of the high burden of proof placed on the prosecution and the extensive rules involving evidence and procedures. Instead, both speed and obtaining the harshest penalty possible became the paramount objectives. Certainly the government had other motives for selecting a secret trial. Limiting access to the press and public courts greatly reduced the chances that the real nature of the capture and arrest of the saboteurs would become public knowledge. During the course of the trial and beyond, the government convinced the public that the FBI had quickly captured the saboteurs without any assistance.

The Great Writ and the Use of Military Tribunals

As mentioned in the previous section, in one of his pre-trial orders, the President suspended the defendants' writ of habeas corpus. Why is this of such great significance? Historically, the writ of habeas corpus, or the great writ, provides the most elemental and essential protection of individual rights. In essence the writ states that:

If you are being held, and you demand it, the courts must issue a writ of habeas corpus, which forces those holding you to answer as to why. In application, it is intended to curb abuses of power by the government by forcing governments to justify detaining a person.. The United States Constitution specifically states in Article I Section 9:
The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.  

Of course, one of the most famous cases in American history to deal with the use of military trials and the suspension of the writ of habeas corpus came out of the Civil War. Attorney General Edward Bates argued President Lincoln had the right to suspend the writ out of habeas corpus largely based on his official oath to “preserve, protect, and defend the Constitution.” Bates contended that only by first stopping the armed rebellion could the President adequately preserve the Constitution. In order to stop this rebellion, the President needed certain wartime powers. In September 1861, President Lincoln suspended the writ of habeas corpus in certain regions of the country. The proclamation suspending the writ read in part:

Now, therefore, be it ordered, first, that during the existing insurrection and as a necessary measure for suppressing the same, all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of United States, shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission: Second. That the Writ of Habeas Corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority of by the sentence of any Court Martial or Military Commission.
However, the President sought sanction for his decision to suspend the writ and turned to Congress. In March 1863 Congress passed a bill that gave the President the ability to suspend the writ of habeas corpus “whenever, in his judgment, the public safety may require it.”

President Lincoln allowed for suspension of the writ to try many rebels by military tribunal instead of in civilian courts. This decree was challenged in the famous Supreme Court case Ex parte Milligan. Charged with “[a]ffording aid and comfort to rebels against the authority of the United States” during the Civil War, Milligan faced trial by military tribunal. The tribunal found Milligan guilty and sentenced him to death by hanging. Milligan argued the government illegally suspended his writ of habeas corpus. The Supreme Court reviewed his case and found in favor of Milligan. In its opinion the court stated that:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of it protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

In short, the decision held that as long as civilian courts are able to function properly, defendants are entitled to seek a civil trial. In the case of the eight saboteurs the writ of habeas corpus would again be put under the microscope by the Supreme Court.

Equally important to this discussion is the use of military tribunals in the American history. Roosevelt himself referenced the case of Major André when discussing
the use of tribunals with the Attorney General. The case of Major André serves as an early example of the application of military tribunals in the American legal tradition.

Major André was a British officer who conspired with Benedict Arnold to obtain the plans to West Point. Major André, dressed in civilian clothing and carrying handwritten papers in his boot when captured, faced a military tribunal. André asked to be treated as prisoner of war and not as a spy. André argued that he “came to Arnold under a flag of truce and obeyed orders that Arnold had a right to give.” However, “flags do not sanction treason or spying,” and Major André both changed from his full uniform into civilian clothes and used an assumed name. For these reasons, the Americans considered the officer a spy. The military commission that tried André found him guilty and sentenced him to death. The penalty for spying was hanging, however, the Major requested to be shot, a death befitting an officer. General Washington denied the request and in October of 1780, Major André was executed.

This was not the only connection between the case of the Nazi saboteurs and the American Revolution. As Colonel Dowell pointed out to the Commission during the trial, “one of the points upon which we fought the Revolutionary War, (was) to get away from military domination, to make the civil authority ascendant and operative at such times as the civil authority is able and capable of operating.” In fact, the Declaration of Independence cites the attempt “to render the Military independent of and superior to the Civil Power” as a reason for declaring independence. Major André’s case was not the only case in American history where a military commission would be used in place of a civil trial.
During the War of 1812, General Andrew Jackson declared martial law in New Orleans. After the British defeat, General Jackson refused to rescind the martial law order. One journalist complained, since the battle ended, it was no longer proper for persons accused of a crime to face a trial by military commission. Jackson had the man arrested for "inciting mutiny and disaffection of the army." When U.S. District Judge Augustin Hall requested a writ of habeas corpus on behalf of the journalist, Jackson placed the judge under arrest. After word reached Jackson that a treaty had been negotiated between the British and Americans, both the journalist and the judge were released.

The judge later brought Jackson before the court to account for his actions. Jackson argued that he had emergency powers that allowed him to continue martial law. According to Jackson, it is sometimes necessary to sacrifice sacred peacetime rights in a moment of crisis. When talking about the need to make such sacrifices, Jackson stated:

Whenever the invaluable rights which we enjoy under our happy constitution are threatened by invasion, privileges the most dear, and which, in ordinary times, ought to be regarded as the most sacred, may be required to be infringed for their security. At such a crisis, we have only to determine whether we will suspend, for a time, the exercise of the latter, that we may secure the permanent enjoyment of the former. Is it wise, in such a moment, to sacrifice the spirit of the laws to the letter, and by adhering too strictly to the letter, lose the substance forever, in order that we may, for an instant, preserve the shadow?
This argument challenges the most vital principles in democratic countries. It goes to the very heart of our legal tradition, and poses one of the most fundamental questions: Is it right to condone actions done during a war or crisis that might otherwise be illegal during a time of peace if the action brings, or attempts to bring, back peace and order? All democratic governments face crises where such rights are put to the test and history is replete with examples of democracies sacrificing such rights. Although Jackson may have posed this question well over a century ago, it is one that we continue to grapple with today.

For his actions, the court fined Jackson $1,000. The Senate, many years later, passed a bill to rescind Jackson's fine based upon his service to America. The exact wording of the bill resulted in a contentious debate. Senators debated whether the bill should contain language that explicitly avoided reproaching the judge. According to one author, the Senate engaged in extensive debate over whether "more credit was due to Jackson for defending the city or to Hall for defending the Constitution." Eventually the version of the bill that passed did not contain explicit language avoiding a reproach of the judge.

Colonel Dowell also cited this example in his statements before the Commission.

He pleaded:

I need cite only the case of General Jackson in New Orleans, at the Battle of New Orleans, where he declared martial law and attempted to continue it after the civil courts were able and capable of functioning, to continue it against their will. After the situation was over General Jackson was cited in the Federal court on a charge of Contempt, and was fined $1,000, which
he did not get back for 30 years, and then only by Special Act of Congress and after being twice President of the United States, and only in the year before his death. If we are incapable in a declared military law situation of setting up military courts to try civilians for offenses against the civil law, how can it be contended that in a situation which is not a military situation, or actively a military operation situation, these courts called Military Commissions may be set up for the trial of civilians? 77

Although the cases have clear parallels, there are several distinctions which Dowell notes in his argument. First and foremost among the distinctions, the War of 1812 took place on American soil. The military commissions summoned by Jackson held court in an actual war zone with active military engagements. In the case of the saboteurs, the war itself played out overseas. Therefore, the defense argued, that if military commissions were incapable of trying civilians then they should not be used to try civilians now.

Dowell’s phrasing is also of great interest. Here he specifically calls the German saboteurs civilians.

*Ex parte Milligan* (1866) is perhaps the most famous case that arose during the Civil War that dealt directly with the writ of habeas corpus. Although it may be the most famous, it is not the only case to deal with this issue. In *Ex parte Vallandigham* (1863) the Supreme Court unanimously decided that it did not have the power to issue a writ of habeas corpus to a military commission. Vallandigham, a former congressman from Ohio, violated an Army order that forbid expressing sympathy for the Confederate States. A military commission found Vallandigham guilty and sentenced him to prison for the
duration of the war. In their decision denying Vallandigham a writ of habeas corpus, the Supreme Court stated:

...the petition before us we think not to be within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court. It is not in law or equity within the meaning of those terms as used in the 3d article of the Constitution. Nor is a military commission a court within the meaning of the 14th section of the Judiciary Act of 1789. That act is denominated to be one to establish the judicial courts of the United States, and the 14th section declares that all the 'before-mentioned courts' of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, agreeably to the principles and usages of law. The words in the section, 'the before-mentioned' courts, can only have reference to such courts as were established in the preceding part of the act, and excludes the idea that a court of military commission can be one of them.78

Here the Court relied on a very close reading of the law. Essentially, the Court decided that because military commissions are not expressly mentioned as courts within the Supreme Court's appellate jurisdiction, it could not review the findings of such commissions. Therefore, Vallandigham could not receive a writ of habeas corpus. President Lincoln stepped in and commuted Vallandigham's sentence and instead sent the Army to place Vallandigham beyond Union lines, effectively exiling him.
Many such cases in American legal history involve the use of martial law and military commissions. However, one can easily see that this issue has a long and contentious history and that virtually all usages of military commissions have occurred in times of war and crisis. The case of the eight Nazi saboteurs is no exception to this rule and the contentiousness of the issue would play itself out in the trial.

Members of the administration and the prosecution certainly sensed that a habeas corpus challenge might be forthcoming from the defense. Before the military tribunal trial began, Oscar Cox, the Assistant Solicitor General, requested that Professor John MacDonald, a Cornell law professor who specialized in habeas corpus procedures, be made a special assistant to the Attorney General. According to the memo from Cox the "sole purpose" for this request was so that Professor MacDonald could help the prosecution "out on the habeas corpus aspects of the case."79

Chapter 2: The Trial

Pre-Commission Arguments

On July 8, 1942, the trial by military commission began. Colonel Kenneth Royall and several other Army officers represented the accused. Attorney General Francis Biddle spearheaded the prosecution. The government brought several charges against the saboteurs. In part, one of these charges read:
...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. Simply put, the charges against the eight men deal with violations against the law of war
and focus extensively on what the men planned and not what they accomplished.

The Americans would leave nothing to chance at trial. The archival evidence
shows that they recorded and logged virtually every article of clothing, every document
and every sabotage device they could find. One photograph has a picture of the socks and
shoes worn by the men with handwritten notes as to who wore what item. This suggests
that no detail was too small to escape the notice and attention of investigators. There was
an obvious emphasis on making sure that the case was as well documented as possible.
Clearly, the prosecution and the administration did not want to gamble on achieving
anything less than a guilty verdict.

The arguments in this case started even before the official swearing in of the
officers. Before the oaths, the defense council wished to make a statement. Colonel
Royall wanted to emphasize the defense’s belief that the trial about to take place was
unconstitutional. Colonel Royall argued before the court saying:
It is perhaps sufficient to state that our view is based, first, on the fact that the civil courts are open in the territory in which we are now located and that, in our opinion, there are civil statutes governing the matters to be investigated. In the second place, we question the jurisdiction of any court except a civil court over the persons of these defendants. In the third place, we think that the order itself violates in several specific particulars congressional enactments as reflected in the Articles of War.81

Given a chance to respond to the statement, Attorney General Biddle answered in part by saying:

In the first place, I cannot conceive that a military commission composed of high officers of the Army, under a commission signed by the Commander-in-Chief, would listen to argument on the question of its power under that authority to try these defendants. In the second place, let me say that the question of the law involved is a question, of course, to be determined by the civil courts should it be presented to the civil courts.82

Biddle’s counterargument is quite revealing. Here, Biddle suggests that the civil courts do have a role to play in determining the issues of law related to this trial. However, he is quick to point out that the issues of the laws of war are “not cognizable to the civil courts” and therefore it is right for the trial to be held by military commission.83

Although Biddle certainly realized a challenge in the civil courts might be forthcoming, perplexingly Biddle suggested that the civil courts could play a role in the trial. Clearly the administration realized that the civil courts placed a much higher burden of proof on the prosecution and that obtaining death penalties in civil court might be a tall
order given the evidence in the case. The issues surrounding the case could have led to several legal challenges that would have to be worked out in civilian courts. For instance, the President issued the proclamation denying spies and saboteurs access to the civil courts after the arrest of the eight men. Therefore, trying the men by commission could potentially lead to charges of applying the law ex post facto. Therefore, the mere suggestion by the Attorney General that the civilian courts could help decide matters of law related to this case might best have been avoided from the prosecution’s perspective. However, it is possible that Biddle only raised the suggestion in an attempt to avoid having the commission spend its time discussing the legality of the trial. Clearly, the administration wanted a speedy trial and perhaps the Attorney General felt that broaching the subject of legality would delay the proceedings.

However, Colonel Royall continued to press his case by suggesting that the commission had no jurisdiction in the matter. The defense stated that, aside from the charges related to spying, the civil courts were more than capable of handling the case. As Royall stated, all of the other charges “are covered by specific statutes in the civil law, and the civil courts are open for their enforcement; and we therefore take the position that all the other charges should be dismissed.”84 The argument here is simple. If some United States civil statutes deal directly with saboteurs, then why not use the civil courts to try the case?

Royall also asked whether “any member of the Commission has to any degree the feeling that the circumstances under which the Commission is appointed would make it difficult or embarrassing for him to reach a judgment in favor of the defendants in the event the evidence should so indicate.”85
This is an extremely telling remark. Royall alludes here to the press coverage the case had already received and the general public’s outcry for a guilty conviction with death sentences for all the defendants. It is also appears as a subtle suggestion that a Commission whose members have been hand selected by the President and report directly to him might, at a minimum, have a conflict of interest in favor of a guilty verdict.

The defense continued its objection and argued that the commission had no jurisdiction over these matters, and that furthermore the proceedings were unconstitutional. The prosecution rebutted these remarks arguing that this was neither the time nor the place to argue such matters.

In addition to questioning the legality of the trial, the defense council also objected to the sworn oath it had to take at the beginning of the trial. Feeling that this oath might limit their ability to disclose facts necessary to seek a civil trial, the defense requested to be read an oath similar to the one given to the prosecution but with greater latitude as to disclosure.86

The defense’s interest in seeking a civil trial is clear from the beginning. Of course, this avenue offered the possibility of a much more favorable outcome for the defendants and much stricter rules of evidence. It also offered the opportunity to appeal the decision in the case to a higher court.

Arguments before the Commission
The testimony of the men focused on their training in Germany, their plans for sabotage, and what, if anything, they actually accomplished in America. To varying degrees throughout the testimony, most of the men stated that they never had any real intention of following through with the sabotage plans. This was a key point in Colonel Royall’s defense strategy for both Haupt and Burger.

Only in his early twenties when the trial began, Colonel Royall portrayed Haupt as a confused young man seeking a return trip to America. Born in Germany but a naturalized American citizen, Haupt grew up in the Chicago area. At the age of five, Haupt arrived in America with his parents. Early in 1941 Haupt left America for Mexico after learning of his girlfriend’s pregnancy. From Mexico, Haupt traveled to Central America looking for work. Unable to find work there or obtain an American passport, Haupt sought help from the German consulate. The consulate provided him with a German passport and transportation out of Central America on to Japan and later to Germany. On the trip between Japan and Germany, Haupt’s vessel ran into a British blockade. Serving as lookout, Haupt helped the ship avoid the blockade. For his actions Haupt would be awarded the Iron Cross, second class.87 Fatefully, Haupt arrived in Germany on Pearl Harbor day, December 7, 1941.88

The defense argued that the German Army was suspicious of Haupt, an American arriving in Germany on such a momentous day. The defense contended that “there was no reason for him to go to Germany. He had no folks there. He had not been there since he was five years old”89. Furthermore, the defense contended Haupt never had any intention of carrying out the plan and was simply using it as a means to get back to America. Haupt never stated his supposed intentions to his fellow saboteurs, because, as
the defense argued, “how much chance would he have had to get back to America if he had told anybody that was his purpose? He would not have had any at all, and he did not tell anybody.”

Royall argued that Haupt’s actions after landing showed that he had no intention of following through on his plan. Haupt had been provided with a fake identity and forged documents, including a social security card which he claimed to destroy upon landing. When he registered for a hotel in Jacksonville he did so under his own name. During the closing arguments Royall reminded the commission that Haupt “said in his statement that he went on home and registered for the draft and then went down and applied for a job.” In addition, Haupt dispersed to his friends some of the money that allotted to carrying out his mission. For these reasons the defense argued that Haupt should be treated by the commission as a special case.

Similarly, the defense argued that Burger represented a special case. Burger’s biography has been detailed earlier in this paper, but his story is covered far more extensively in the trial. The defense focuses its attention on two key points.

One point of emphasis related to Burger’s cooperation with both the F.B.I. and the prosecution. The second point emphasized Burger’s relationship with Germany and his fellow saboteurs. Burger left the United States for Germany around 1933. He joined the Nazis and become a “storm trooper” for the party. For his service, the Nazi party awarded Burger several medals. However, as time passed he fell from the party’s good graces. Burger spent over a year in an internment camp, allegedly for remarks he made about the treatment of Polish citizens. Burger pleaded that during his interment the Gestapo and other members of the Nazi party continually harassed his pregnant wife. Burger claimed
in his testimony that the stress placed on his wife during the period caused a miscarriage.\textsuperscript{92}

After release from internment, Burger confessed that he was constantly hounded by members of the Gestapo. Due to his treatment in the internment camp and his wife's miscarriage, Burger testified that he began to look for ways to legally leave Germany. He felt that if he had simply left Germany without approval from the party, he would have endangered the lives of his family members. The defense argued that Burger no longer felt any loyalty to Germany. Like Haupt, Burger was going to use this mission as a means of escape.

In regards to his fellow saboteurs, the defense mentioned during closing that:

They may not like Burger; they may feel that Burger has in part been responsible for their apprehension. The Commission may have observed in this trial some attitude of hostility to him; but in spite of that fact, every one of them corroborates him in every detail except some very minor ones.\textsuperscript{93}

The defense attempts to show that the other saboteurs sensed Burger's lack of loyalty to Germany and for that reason they were distrustful. In Royall's words:

The others suspected him in camp. They thought he was hostile. They said that while he did not say he was hostile, except slipping once or twice, every one of them mistrusted him; and the first thing that two of them said when they were arrested, without knowing anything about it, was "Burger turned us in." They did not know anything about it, but when the F.B.I walked up to them they said, Burger turned us in "-- because they
had known all the time that no man so mistreated could be loyal to that country. 94

Again we see the defenses attempt to show Burger had no malice intent rather that he was only using the plot as a means of escape.

Royall asked that both Burger and Haupt be acquitted of the charges. Overall, Royall sought leniency from the commission for all the defendants, hoping that the commission might see fit to only punish the defendants with prison terms for violation of the rules of warfare.

Throughout the trial, the defense would time and again return to the argument it made before officially being sworn in by the Commission. Colonel Royall continually asserted that the prosecutors and investigators had decided on a verdict long before the trial had ever begun. This sentiment is clearly expressed in the following statement:

May it please the Commission, the prosecution in this case--and I use that term broadly to include the F. B. I. also--has seemed to us to take the position--I may be charging them improperly; if so, they can correct me at the proper time--that the only solution of this case is for all the defendants to be adjudged guilty, leaving any relief which might be afforded them to the question of Presidential discretion. 95

Here the defense is arguing that the trial itself affords the defendants none of the protections in the Constitution. Rather the defense notes that the verdict itself has long seemed a foregone conclusion.

The trial focused extensively on the statements given by the men to the FBI. Both the defense and prosecution covered these statements in great detail with the FBI agents
that originally performed the interrogations. Some of the information revealed by the agents who took these statements could be quite interesting. For example, one agent was asked about Dasch’s explanation for his betrayal. The agents stated that, “He (Dasch) expressed a desire to fight Hitler and to fight Hitler in his own way- not with guns but by propaganda.”

Dasch told the FBI that he wished to use the money he had from the operation to fund a propaganda program where he would broadcast to the German people. However helpful Dasch may have been, the FBI had reason to question the veracity of Dasch’s statements. According to the agent:

One of the things which made me doubt the truthfulness of Dasch’s statements was that when he was in my office and being questioned, he told me that under no circumstances must the German Government learn of his part in this proceeding; otherwise they would immediately kill his mother and father, who are both over 70, I believe he told me, and his other relatives in Germany, and he showed great concern over those people. Later, when he was up in New York City, he changed his mind and decided that it would be perfectly all right for the world to know about his part in these proceedings and that his mother and father and his relatives in Germany would have to look out for themselves; that his mother knew what he was going to do and she had utmost confidence in him and told him to do the right thing. When I found that out, why, I was a little bit doubtful in my own mind as to what was the truth and how much of what he had told me was the truth.
Such evidence clouds any of the statements given by Dasch. Lingering doubts about whether Dasch is being truthful or whether he is simply trying to advance his own agenda pervade the testimony.

In summation for the defense Colonel Royall had this to say:

I say that these men -- some of them -- undoubtedly have violated some rule of law to some extent. Perhaps I should not say that to the Commission, but I should certainly be lacking in frankness if I did not say so. But none of them, in our opinion, has committed a violation which justifies, from the standpoint of justice, from the standpoint of policy, from the standpoint of national defense, the extreme penalty or anything approximating it.99

Challenging the defense’s pleas for mercy and leniency, the prosecution asked for the death penalty for all the defendants, including Dasch. This may seem surprising in light of Dasch’s integral role in both alerting the FBI to the presence of the saboteurs and building the prosecution’s case. However, an internal memo between the Attorney General and the President reveals the rationale behind this decision.

Without the help of either Dasch or Burger, the government may never have found the saboteurs, let alone successfully prosecuted them. However, the Attorney General states in the memo that this cooperation was insufficient to merit consideration during the trial.

The Attorney General proffered the idea that instead of seeking reduced sentences at trial, the President should grant both Dasch and Burger clemency if sentenced to death by the Commission. Within the memo, Biddle also suggested that, for propaganda
purposes, the administration reveal that one of the men betrayed the group after the trial ends. Biddle informed the President that Burger wished to remain out of the spotlight in order to protect his family back home. Biddle seemed willing to oblige this request. However, the Attorney General informs the President that Dasch welcomed the publicity. Biddle even suggested that Dasch be promoted as a hero in order to encourage other turncoats to step forward.¹⁰⁰

Why would Biddle push for the death penalty at the trial only to suggest in the next breath that the President grant the men clemency? Why seek the death penalty when you wish other potential enemy saboteurs or spies to follow in their wake? Perhaps the administration wanted the best of both worlds. On one hand, they could show that the justice system would hand out the stiff penalties that most Americans desired. On the other hand, by granting clemency the administration could show its willingness to deal mercifully with those who helped the government.

This memo also yielded a revealing portrait of both Dasch and Burger. The men possessed contrasting personalities; Dasch as the showman and Burger as the quiet professional. Although never elevated to hero status he desired, Dasch’s autobiography suggests that he viewed his actions as worthy of that mantle. It is supremely ironic that administration officials suggested that Dasch be turned into a heroic public figure. It is exactly the status that Dasch longed for but would never receive.

To this end, Biddle charged that the commission to find each man guilty and leave the issue of clemency to the appointing authority. He argued that each man was guilty of crimes deserving death, but acknowledged that some defendants had been more helpful to the prosecution than others. However, Biddle states that this degree of cooperation was
unknown to the commission and in any event it is not for the commission to pass judgment on this issue.\textsuperscript{101} Why did the prosecution specifically seek the death penalty and not extended prison sentences? To some degree this is addressed by Biddle at the beginning of his closing argument. As he states,

\ldots [the defense] said it was not necessary to punish these defendants as a preventive, because there will be no expeditions of this kind. However, the Commission will remember the story as told by these defendants that this was the first of a series of these schools; that others were coming over here later; that they were going to meet in Chicago; that Burger, if I remember correctly, was to start some sort of a commercial artist establishment and put a notice in the Chicago paper every fifteen days for the benefit of those who were to come later--most probably Kappe and his assistants.\textsuperscript{102}

Kappe was the instructor at the sabotage school that the eight men attended before leaving Germany. Obviously the prosecution focused on the message that this trial would send to any other would-be saboteurs. The government wanted to show that it would respond with force to any threats made upon United States territory. They also want to make certain that anyone else plotting to commit sabotage within the United State knows the price that must be paid for such crimes. The testimony of the defendants shows that some of these fears were well grounded as the German's may have been in the process of establishing other training facilities.

As part of his testimony, Burger admitted that part of his assignment was to establish a front through which future saboteurs could rendezvous with the group. This is referenced in the above quoted statement. Burger was to place ads in the \textit{Chicago}
Tribune on the first and fifteenth of each month beginning in August as a covert signal for newly arriving saboteurs. Haupt mentions in his testimony that part of their assignment was to “attempt to develop contacts and assistants in the United States for the purpose of generally creating terror and panic…”

Whereas Colonel Royall attempted to demonstrate that the defendants did not intend to carry out the plan, the prosecution emphasized the testimony of Quirin and Neubauer. The testimony that Biddle choose to emphasize was particularly striking.

For instance, Quirin stated that:

At the time I entered the United States there was no doubt in my mind that I was violating the law and I consider myself an agent of Germany. I promised my superiors that I would carry out their instructions and intended to do as when I left there. Had I not been apprehended, I might have carried out those instructions. I feel that my loyalty is to Germany and I would be given a better job, and be well cared for.

Neubauer’s testimony appears equally as damaging. He told the commission: “I admit that I came to the United States with this group for the purpose of committing acts of sabotage, and might’s [sic] have done so if the opportunity arose.”

These two pieces of testimony cast a vastly different light on the saboteurs. Obviously, they show that at least these two men still retained some loyalty to Germany. Perhaps more importantly, the testimony suggested that the men were inclined to act as covert operatives for the German army. This is significant because it lends credence to the prosecution’s argument that these men should not be treated as prisoners of war.
The prosecution directly addressed the defense's argument regarding Burger and Haupt. With regards to Burger, Biddle argues that his stay in the internment camp did not involve any serious mistreatment. He argues that there would have been no reason for Burger to give up his loyalty to Germany. Biddle states that

Throughout Burger’s testimony I cannot find where he has said anything about suffering, being beaten up, or anything of that kind. He has testified that he was in an internment camp for 17 months, and the worst that I can find that he testified that his wife had been mistreated. Biddle further states the Kappe was no “dumbbell” and that he never would have accepted Burger, Dasch or any of the other men if he felt that their loyalty had been compromised.

Furthermore, Biddle suggested that volunteering for this mission only to use it as a means of legal escape from Germany is illogical. As he pointed out, would not the family members of these men be subject to even worse treatment and persecution if they had abandoned the plan once they made it to America? There is some validity to this argument. It is difficult to imagine how abandoning a top secret mission such as this would have resulted in better treatment for the family members left behind.

With regards to Haupt, Biddle argued he was not as innocent as the defense would have the commission believe. Arguing that while Haupt registered for the draft in the United States, the next thing he did was look for doctor that could help him evade the draft. He hoped the doctor would help him establish a medical history documenting fake ailments that might prevent his service. Biddle further stated that Haupt’s claims he
never intended to commit an act of sabotage are self-serving and should be viewed with a
great deal of skepticism.

In his closing argument Biddle stated that these men knew exactly what they were
getting into from the beginning. The fact they arrived in military clothing is largely
irrelevant as they switched clothing, of their own free will, soon after landing.
Additionally, he argues that their intent was always to act as clandestine agents and that
they followed through on this intent as soon as they changed into civilian clothes. With
regards to the charges of conspiracy Biddle argues that:

The fact that one man goes into a conspiracy without honestly intending,
we will assume, to go through with it or with the sabotage, makes him still
guilty of the conspiracy, because he is helping the whole program to be
accomplished, getting these other men over, getting them through the
lines, getting them their dynamite and other apparatus there, and, if they
had not been apprehended, letting them go ahead with the sabotage. The
fact that he did not intend to go through with it himself does not excuse
him from the conspiracy.\textsuperscript{110}

The prosecution believes it is pointless to argue whether the men truly intended to
commit any act of sabotage. In their view, each man is guilty of conspiracy, no matter
their true intentions.

\textit{A Discussion of Legal References Made before the Commission}
Both the prosecution and the defense refer to specific laws of war in order to make their case. For instance, both sides cite sections 101 to 105 of Title 50 of the United States Code (USC). Under this section "destroying or injuring war material carries only a thirty-year penalty and a $10,000 fine." The defense argues that while this law may not be binding upon military commission, it reflects the general sentiment of the American people as expressed through Congress. The defense states that at an absolute maximum these men should receive thirty years of prison time. In addition, the defense argued that the thirty year limit was meant only to be applied to those that had actually committed an act of sabotage. Clearly, these men never committed such an act and therefore they should logically receive sentences of less than thirty years.

Royall goes even further with this theory. He stated that these men have not even done enough for their actions to constitute an attempt to commit sabotage. Royall argued that their efforts amount to mere preparation which should be distinguished from an actual attempt.

The prosecution also addressed these specific statutes in their closing arguments. Biddle stated that this section of the USC is not meant to be applied to the exclusion of all other sections. Additionally, Biddle argued that in this case the law must take into consideration the other offences these men committed. In a similar vein, the prosecution brought up and dismissed Section 31 of Title 50 of the USC. This code section states that those "obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States" are subject to penalties not exceeding two years imprisonment, a fine of $10,000 or both. This section also provides an extensive listing of both the ways one
could violate the provision and of information considered elemental to the national
defense. Biddle then cited Section 38 of the code which states that no section of Title 50
limited the jurisdiction of military justice proceeding. The prosecution argued that
these citations are meant to reflect that military tribunals have historically been granted
more latitude in how to addresses these code sections.

In addition to Title 50, both the prosecution and the defense refer to the 82\textsuperscript{nd}
Article of War. This Article of War specifically stated

Any person who in time of war shall be found lurking or acting as a spy in
or about any of the fortifications, posts, quarters, or encampments of any
of the armies of the United States, or elsewhere, shall be tried by a general
court-martial or by a military commission, and shall, on conviction
thereof, suffer death.

Both the prosecution and the defense cited the Manual for Courts-Martial section
regarding proof of an act of spying. The Manual states that:

(a) That the accused was found at a certain place within our zone of
operations, acting clandestinely, or under false pretenses; and (b) that he
was obtaining, or endeavoring to obtain, information with intent to
communicate the same to the enemy.

The defense stated that although the accused may have been getting ready to obtain
information, they never made a concerted attempt. Furthermore, the defense argued that
"endeavoring" requires the accused to make a "serious attempt" to obtain information, an
element missing from this case.
The defense cited page 190 of the Manual for Courts-Martial, which defines the word attempt. Here we find that “soliciting another to commit a crime is not an attempt; nor is mere preparation to do a criminal act.” A substantial part of the defense’s argument rested on the belief that the men have not yet crossed the threshold between preparation and attempt. In light of these facts, the defense believed that the accused should have face reduced penalties. According to the Manual in order to prove an attempt has occurred one must show either:

(a) That the accused committed an overt act which if not interrupted by circumstances independent of the doer's will would have resulted in the commission of the offense, as alleged; (b) that the accused intended to commit that particular offense (this may usually be shown by the facts and circumstances surrounding the act); and (c) the apparent possibility of committing the offense in the manner indicated.

The events of 1942 reverberate today. One could argue that the saboteurs never left the preparation stage. However, one could also cite the covert landing, purchase of civilian clothes, and overall attempt to blend into American society as indicative of intent to commit the crime. Section (a), also has a range of implications if one considers the landing to be an overt act. If Dasch and Burger had not informed the FBI of the whereabouts of the other six, possibly nothing could have stopped them from committing the offence thus one could argue that the landing itself constituted the overt act.

The defense further cited the Rules of Land Warfare published by the Secretary of War in 1940. This document provided the definition of a spy which is based upon the definition given at the Hague Conference of 1917. The definition contained in the
document reads “a person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent with the intention of communicating it to the hostile party.”

This definition is very similar to the one offered under the Articles of War. The defense argued that “zone of operations” refers to an area near the front where actual fighting is taking place. In this case, the argument is that the men were arrested in areas that are not traditionally considered to be part of the zone of operations. The defense stated that if cities such as Chicago are considered to be part of the zone of operations than there is no area of the United States where this law would not apply.

The defense also briefly questioned the appropriateness of bringing the accused before a military commission. In essence they argue that virtually all the legal literature suggests that as long as civilian courts are functioning, martial law should not be imposed. This is an argument the defense covers more fully before the Supreme Court.

In their counterargument, the prosecution questioned many of the defense’s assertions. With regards to the zone of operations debate, the prosecution suggests that areas of the United States, such as the Brooklyn harbor, meld the traditional role of a zone of operations with that of a supply area. This makes it difficult to clearly demarcate an area that is a zone of operation from one which is not.

The prosecution also attempted to counter the defense’s argument that accused committed no crime deserving of the highest penalty. The prosecution cited article 81 of the Articles of War. This article specifically states

Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or
protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct.\textsuperscript{123}

The prosecution asserted that by giving money to each other they violated this particular provision. The prosecution also countered the defense’s argument that a true attempt to commit an act of espionage had occurred.

The prosecution also cited from the \textit{Manual for Courts-Martial}. Their citation involved the \textit{Manual’s} description of espionage, which states “[i]t is not essential that the accused obtain the information sought or that he communicate it. The offense is complete with the lurking or dissimulation with intent to accomplish these objects.”\textsuperscript{124}

The prosecution asserted that the accused have at the very least violated this principle. Biddle argued that, in fact, the accused did engage in actual communication which would classify them as spies. As evidence of this spying Biddle pointed to testimony where members of group acknowledged speaking to one another about defense plants and bridges that could have acted as possible sabotage targets.

As part of its closing the prosecution cited the 1940, Rules of Land Warfare which states that

\begin{quote}
Armed prowlers, by whatever names they may be called, or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or destroying bridges, roads, or canals, or robbing or destroying the mail or of cutting the telegraph wires, are not entitled to be treated as prisoners of war.\textsuperscript{125}
\end{quote}
Again, the prosecution insisted that these men violated the rules of warfare and were therefore guilty of crimes punishable by death. Here the prosecution stated that although they may never have committed an actual act of sabotage, by crossing lines with that very intent they violated the rules of war. The prosecution argues that this intent is implied through their actions. For example, the men have been selected and trained specifically for the mission. This point is best expressed by Attorney General Biddle when he stated that

Perhaps they were soldiers. Perhaps they are young. Perhaps they are neurotic. But, nevertheless, they came over here and went behind our lines as spies and saboteurs. To say that you cannot find that because they now tell you, without any corroboration, that they never intended to do any of this -- it seems to me that if every essential fact is considered all this talk about the details is highly unnecessary.¹²⁶

This quote accurately summarizes the prosecution’s case. The case is centered on the belief that any statements by the defendant’s that they had no intention of carrying out their plan are uncorroborated and that the facts of the case call for the harshest of all penalties.

Applicability of the Geneva Convention

All eight men wore the insignia of the German army as they landed. They hoped that, if captured, wearing these insignias would entitle the men to treatment as prisoners of war, with the full protection under the Geneva Convention this status provided. The
Geneva Convention, as we know it today, is composed of four parts all of which were last revised and refined in 1949. The third part of the Convention relates to the treatment of prisoners of war. This part of the modern Convention is based upon the 1929 Geneva Convention which focused exclusively on the treatment of prisoners of war. The 1929 Convention went into force in 1931 and covered prisoners of war during World War II.

Rules regarding judicial proceedings against prisoners of war are outlined in the 1929 Convention. Article 62 of the Convention states that

The prisoner of war shall have the right to be assisted by a qualified advocate of his own choice and, if necessary, to have recourse to the offices of a competent interpreter. He shall be informed of his right by the detaining Power in good time before the hearing. Failing a choice on the part of the prisoner, the protecting Power may procure an advocate for him. The detaining Power shall, on the request of the protecting Power, furnish to the latter a list of persons qualified to conduct the defense. The representatives of the protecting Power shall have the right to attend the hearing of the case. The only exception to this rule is where the hearing has to be kept secret in the interests of the safety of the State. The detaining Power would then notify the protecting Power accordingly.  

The Convention also states that prisoners of war must be tried by "by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Prisoners of war are also allowed to appeal their sentences in the same manner as persons of the armed forces of the detaining power.
In cases where a sentence of death is passed, the Convention provides further guidance involving the rights of prisoners of war. According to the Convention, the detaining power must first make a communication to the prisoner’s home country outlining the nature and detail of the offence. Further it states that “the sentence shall not be carried out before the expiration of a period of at least three months from the date of the receipt of this communication by the protecting Power.”

Although the Convention clearly outlines what is and is not acceptable treatment for prisoners of war it does not clearly outline how to deal with spies, saboteurs and those not commonly viewed as ‘traditional’ prisoners of war. For this reason, it is easy to see how the Administration could sidestep the Conventions guidelines when trying these eight men. The best way to avoid following the guidelines would be to avoid classifying the men as prisoners of war. As long as the men were treated as “unlawful combatants” there was no need to treat them in accordance with the Convention.

Clearly, the Administration was eager to avoid the restrictions of the Convention. If they had to follow those guidelines to the letter it would have, at the very least, resulted in a prolonged period between the sentencing and the final execution. While waiting for that period to pass, the government opened the itself up to many potential liabilities. For example, it is possible that if the story remained in the headlines more information regarding the true circumstances of the saboteurs’ landing and arrest could have become public knowledge, a scenario the government wanted to avoid.

It is difficult to determine whether the men could have been classified as prisoners of war at the time of the trial anyway. Although they wore German insignias upon landing, the men soon discarded this regalia and made efforts to disguise themselves as
If this constituted an act of spying, then their status as prisoners of war would be void under the Geneva Convention. The Hague Conference of 1917 gave the legal definition of a spy. This conference was a precursor to the Geneva Convention of 1929 which relied on the earlier conference’s definition of a spy.

If we accept the premise that these eight men infiltrated American lines in order to both secretly destroy war industries and communicate with the enemy, then it seems reasonable that they would be denied a prisoner of war status. Being denied this status means that these men would ultimately have to be classified as spies and saboteurs, a classification which carries with it the prospect of a death sentence if captured. If we can accept this premise then the question becomes whether the death sentence should have been applied in this case. That is a question without a definitive and objective answer. Perhaps because questions about how to deal with spies and saboteurs under the Geneva Convention of 1929 the 1949 Convention covered the topic in more specific terms.

According to the 1949 Geneva Convention, spies and saboteurs are granted more protections than in the 1929 Convention. Article Four of the Fourth Geneva Convention states that “persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” This definition is broad and seems to include all persons including spies and saboteurs. In Article Five of the same Convention specifically address the treatment of spies and saboteurs. This Article states

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile
to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention. In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.\textsuperscript{128}

The only thing seemingly prohibited by the Convention seems to be the ability to communicate with the hostile power. Therefore, it seems spies and saboteurs are granted the same protection as all other prisoners of war. Although these passages are brief, had they been added to the Geneva Convention of 1929 the fate of these saboteurs may have been very different.

\textit{Ex parte Quirin}

While the trial by tribunal carried on, lawyers for the accused sought an audience before the Supreme Court. In order to seek a redress in civilian courts, the defense filled a motion for leave to file a habeas corpus petition. Essentially, the defense asked the court for a reprieve from the military trial in order to complete and file the paperwork necessary for a habeas corpus petition.
The filling of a motion for leave did not escape the notice of the administration. Apparently unsure whether filling such a petition would engender legal action against them, the defense sought an opinion from the administration. It seems that the defense council took the President's proclamation as a direct military order which forbid seeking any redress in the civil courts. Therefore the defense felt that filing such a petition could be in direct violation of the order and thus filling would endanger their own military careers and bring possible legal consequences. The White House held some internal discussions to determine the best way to respond to this petition. The Attorney General offered his advice to the President and outlined three potential response options.

The first option was to "affirmatively deny authority to counsel for the defendants to seek redress in the courts." However, Biddle stated that the President should not select this option for two reasons: first this option had the inherent potential to "give the public impression that the prisoners are not being given a fair trial." Secondly, "it cuts back into [the] original order by assuming it is not clear, and, therefore, would in substance amend [the] original order."

The second option suggested that the President maintain that his original order provided all the guidance the defense needed. The option suggested the defense should be informed that they possessed the requisite training and ability to interpret the order in its current form. Biddle informed the President that the defense council could interpret the order as giving them the ability to petition for habeas corpus in the civil court. However, the defense council's hesitancy to file such a petition made this option unviable in the Attorney General's eyes.
Lastly, Biddle suggested that the President maintain that the original order provided the necessary clarity but add that the defense could use “their own best judgment as to whether they should try to petition for habeas corpus” just like they would be able to in any other case. Biddle suggested that the President take the third option.

Overall the memo paints a fairly interesting picture. It reveals how top White House officials approached the thorny legal issues brought forth by this case. The memo sheds some light on the struggles of defending the eight men. The lawyers for the accused attempted to provide the men with the best and most vigorous defense they could muster. However, the team did not wish to disobey a direct order from the President. Therefore they felt the need to reach out to the White House to ascertain whether they could proceed with their motion. While the administration had a vested interest in seeing the trial end in a guilty verdict, they did not want to block the defense’s ability to seek a habeas corpus petition in the civil courts. In addition, the administration did not feel the need to completely deny the saboteurs the ability to seek redress in the civil courts. It seems that the administration was concerned that denying the defendants these rights might play badly with the public.

The defense decided to pursue a redress in civil court. Before the military trial ended, the Supreme Court decided to hold a “rare special session...to pass on habeas corpus writs.” Arguments before the courts took place between July 29 and 30, 1942. The Court issued its per curiam opinion on July 31st. A full opinion would not be released until October 1942.
Before the Supreme Court, the defense, led by Kenneth Royall, argued that the Presidential Order and the military trial were both illegal and unconstitutional. The prosecution, led by Attorney General Francis Biddle, argued that “[e]nemy aliens have no right to sue or enter the courts of the United States under these circumstances.” He argued that all “are enemies of the United States” and furthermore that it was “clear that they have no rights” which provide for a civil trial.132

In a unanimous decision, the Supreme Court decided in favor of the government, finding that the military tribunal trial were a lawful exercise of executive power. The case, known as *Ex parte Quirin*, would ultimately seal the fate of the saboteurs. In its decision the Supreme Court stated that:

...the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be
entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.\textsuperscript{133}

Much of the oral arguments heard before the Court centered on the applicability of the \textit{ex parte Milligan} decision. In the end, the Justices drew a distinction between Milligan, a civilian, and the eight saboteurs whom the Court labeled "enemy belligerents."

Therefore the Justices did not apply the \textit{Milligan} precedent.

In addition the court held that:

entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and war-like act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents.\textsuperscript{135}

In order to best understand the ruling, one must appreciate fully the purpose of the mission and the actions of the men. The Court recognized that the men acted upon orders of the German army to carry out the attack. However, these particular men, by virtue of removing their uniforms in an attempt to conduct covert operations, lost their status as prisoners of war. Instead the Court held that the men must be treated as unlawful belligerents.

As previously discussed, it would be difficult to apply the Geneva Convention to this case because the men discarded their uniforms and donned civilian clothing. The Justices make it plain that conducting, or attempting to conduct, military style operations while out of uniform helped distinguish the lawful from the unlawful combatant.
While the Court presented a united front outwardly, behind the scenes much discussion and internal debate took place amongst the Justices. On one issue all the Justices could agree. Namely they agreed that "Congress had authorized the President to create military commissions." The Justices relied specifically on Article 15 of the Articles of War (1920) to arrive at this decision. Article 15 specifically states, "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions ... of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions." The Justices felt this provision established the necessary legal framework for the President to use military tribunals in order to try all law-of-war violations.

Previously, we discussed the President's decision to personally review the trial transcripts in place of an examination by the Judge Advocate General's office and a board of review. Although these review processes are specifically called for in the Articles of War, the President decided to bypass them in order to maintain secrecy. The Justice's would have a difficult time crafting an opinion that provided the legal backing for this act.

In the original per curiam decision the Justice's did not mention this violation. The reason for this omission: the President had only stated that he would review the case himself without assistance from the JAG or a review board. Therefore, he had not yet violated these sections of the law. In effect, the Justice's sidestepped the issue. The intent of the President's order could clearly be inferred and it should have come as no surprise that such a violation would likely occur. This issue became even more contentious after
the saboteurs' executions as the review by the President had already taken place. The justices had yet to release their full opinion and address this critical point.

Chief Justice Stone had two separate ideas about addressing the issue. The first idea was to simply state that the President had not yet violated the law when the *per curium* was issued, therefore the ruling stands. However, this presented a problem as the two saboteurs serving prison terms could then file *habeas corpus* petitions based on the subsequent violation.\textsuperscript{138}

The second option was a thorough examination and parsing of the law that would legally justify the President’s decision.\textsuperscript{139} Thus, this interpretation would theoretically negate any potential *habeas corpus* petitions from the defendants. After much debate, the Justices settled on the following statement:

\begin{quote}
We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents. For the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ.\textsuperscript{140}
\end{quote}

The internal debate on this issue became quite fierce. In fact, Justice Robert Jackson drafted his own opinion because of his divergent legal interpretation. This opinion, which was never published, expressed Jackson’s belief that the Articles of War were never meant only to be applied to US civilians and military officers “during times of military government.”\textsuperscript{141} In this draft opinion, Jackson stated:

\begin{quote}
The seizure and trial of these prisoners is not in pursuit of the functions of internal government of the country. They are prisoners of the President by virtue of his status as the constitutional head of the military establishment
and their own status as enemy forces captured while conducting a military operation within and against this country. The custody and treatment of such prisoners of war is an exclusively military responsibility.\textsuperscript{142}

Furthermore, Jackson stated, “I see no indication that Congress has intended to confine the President’s discretion in dealing with captured invaders or intended to confer any rights on them.”\textsuperscript{143} These are rather remarkable statements. They give the President nearly unchecked power to conduct such trials without meaningful oversight. It is possible that Justice Jackson’s close personal relationship with the President influenced his views. At the time of hearing Jackson had only been on the Court for one year. Prior to his appointment, Jackson worked directly with Roosevelt as both Solicitor and Attorney General. As a recent advocate for the Executive branch, Jackson seemed predisposed to giving the administration greater latitude in conducting its affairs.

Although drafted, the opinion was never published. Ultimately, Jackson joined the other Justices in agreeing to the opinion by the Chief Justice.

The decision by the Justices to deny the stay would have far ranging legal consequences, reverberating even into the new century. More importantly for the saboteurs, it meant that the trial by Commission would resume immediately.

Defending Democracy

The trial by military tribunal began on July 8, 1942 and ended on August 1, 1942. In the end all eight men were found guilty and sentenced to death. The transcripts from the military tribunal run over 3,000 pages. It is 3,000 pages packed with detailed
information, emotional pleas and compelling legal arguments on both sides. The lawyers on both sides seemed to have earnestly sought a just and fair conclusion. They each fought in their own way to uphold the ideals of a democratic and free nation. There is no question that upholding the ideals of democracy is difficult in such a case. No where is this sentiment more evident than in Colonel Royall’s impassioned words in his closing argument before the Commission:

We want to win this war, and we are going to win it, but we do not want to win it by throwing away everything we are fighting for, because we will have a mighty empty victory if we destroy the genuineness and the truth of democratic government and fair administration of law. That applies all the way through this, and it is mighty hard. You know, the real test of a system of government is not when the sun is shining but is when the weather is stormy. Anybody can administer justice when the sun is shining, things are peaceful, and there is no stress or excitement. It takes a man to administer our system of government when that is not the case.¹⁴⁴

Chapter 3: The Media and the Public

The trial took place in a media blackout, quite literally. Not only were members of the press barred from the trial, officials draped all the windows in the courthouse in black cloth. An internal memo demonstrates the administration’s desire to keep the particulars of the case out of the hands of the media. The memo stated that:
The public should be informed of the reasons why a strict mantle of secrecy has been thrown around the trial of the eight saboteurs. It is of the utmost importance to our national security that no information reach Germany on any of these matters:

- How the saboteurs were so swiftly apprehended
- How our intelligence services are equipped to work against them
- What sources of information we have inside Germany
- Who are the witnesses against the saboteurs
- How are coastal defenses are manned
- How much we learned about German sabotage methods, plans, programs, and the identity of other saboteurs who might be or have been sent to this country
- How much we learned about German submarine methods, intelligence methods, munitions plants and morale

...the testimony given at the trial bears to some degree upon these matters. There is no satisfactory way of censoring and editing this testimony for the press without revealing, by statement or significant omission, the answers to many of these questions which may now be puzzling our enemies. We do not intend to tell our enemies the answers to the questions that are now puzzling them. The only way not to tell them, is not to tell them.

I am confident the American people will not insist on acquiring information which, by the mere telling, would confer an untold advantage on our enemy.
This memo highlights the overall level of secrecy that the administration sought in this case. This memo clearly shows the administration taking a proactive approach to stopping the dissemination of information. It also highlights one of the administration’s most important concerns, that the German’s would discover the true means by which the plot had been foiled. The administration wanted to create and maintain the image that they had supreme control of the coast, not only to abate the fears of American citizens but also to strike fear in to the heart of the enemy.

With little access to the proceedings, how would the media cover the trial? Would there be anger and outrage or would the media accept the government’s premise that the unprecedented level of secrecy was necessary to protect national security interests?

Media Coverage: Pre-Invasion

Even before the actual invasion, America recognized that sabotage posed a threat to the American war effort. In a Wall Street Journal piece from February of 1942 an expert on both sabotage and counter-sabotage measures warns of a potential wave of sabotage in mid-1942. This writer states his belief that a fifth column had already established itself in America. These individuals were hard at work plotting methods to sabotage American production from within. In order to combat the threat, this expert suggests that the FBI be allowed “to take any measures employed by the Axis agents.” This includes employing secret phone tapping.146

In essence, the author suggests fighting fire with fire. The argument rests on the belief that the best way to combat sabotage is to employ some of the same tactics as the
enemy. The author's suggestion that the government employ phone tapping in order to monitor the civilian population reveals just how seriously some took the threat of sabotage.

In early 1942, there must have been a palpable fear that America's enemies could strike at the heart of the country's production and war supplies base at any moment. Published less than two months after the attack on Pearl Harbor, this article reveals some of the insecurities many must have felt with regards to national security. A sense that the country needed to use any means necessary to achieve victory began to develop.

This particular writer was not the only one advising greater vigilance against sabotage. In January of 1942, the Mayor of New York City, Fiorello La Guardia, hosted a closed doors anti-sabotage meeting. Attendees included members of the city's police force, the Army and representatives from the Department of Justice. Reportedly, the meeting covered “measures to protect the city's important buildings and industrial plants against sabotage and to detect and prosecute saboteurs...” The exact nature of these measures were classified “highly confidential” and were not disclosed to the press.

One New York Times article reported that the city of Hartford, Connecticut established a $100,000 fund to compensate those who reported potential sabotage against public utilities and defense industries. Any person who voluntarily reported information leading to the conviction of any person guilty of sabotage would be eligible for the $10,000 reward. However, the sabotage had to result in the death or permanent injury of a worker in one of the two aforementioned industries in order to qualify.

Newspapers were not the only media outlet to cast a light on the threat of sabotage; even American popular cinema covered the topic. In April of 1942, Universal
released the Alfred Hitchcock directed *Saboteur*. The movie chronicles the search for those who sabotaged war production plants. One reviewer in the *New York Times* said that the movie provided the wakeup call that Americans needed.\(^{150}\)

Despite the serious nature of the topic, some found occasion to poke fun at the idea of Hitler sending sabotage troops to America. One joke from the *Wall Street Journal*’s ‘Pepper and Salt’ section read: “We have been warned that Hitler plans to send to this country saboteurs who ‘speak perfect English’ to do mischief on the inside. But they should be easily spotted if they speak perfect English. Only foreigners do that.”\(^{151}\)

Another *Wall Street Journal* article related a real-life tale involving two would-be saboteurs. It seems that the owner of a large industrial company was telling reporters that the company faced “very little” trouble from saboteurs because of the strength of the unnamed company’s internal police force. As evidence of this strength, the man says that this police force detained two suspicious workers. It later turned out that these two men worked for the FBI and that they, too, were on the hunt for saboteurs.\(^{152}\) Interestingly, this humorous tale of potential saboteurs was published well after the landing and capture of the eight Nazis on American soil.

Media Coverage of Sabotage Acts from around the World

During the war years many other counties faced the threat of sabotage. In order to put the case in the proper perspective, it is necessary to examine some instances of sabotage around the world. These attacks served as timely reminders to Americans that this battle would be fought along all fronts. The articles reveal that saboteurs often
targeted production facilities. At the time, many Americans feared that their own production facilities would come under attack.

In April 1942, just two months before the Nazi invasion of America, the New York Times published an article detailing a string of sabotage efforts carried out on behalf of the Allies. The article cited cases in Germany, Czechoslovakia, France, Hungary, Italy, Rumania, Greece, Poland and Yugoslavia. The instances of sabotage in the Germany and Czechoslovakia bear some interest.

The article claimed that Allied saboteurs had successfully targeted an important German power plant. Leading up to this attack, anti-Fascist leaflets had been distributed in the surrounding village. Following the attacks, the Gestapo made several arrests. Although this was the largest such attack reported in the article, other sabotage efforts undermining other German factories were reported. The Nazis arrested several foreign factory workers in connection with these cases.\(^{153}\)

In the Czechoslovakian case, saboteurs carried out an attack on a large munitions plant. The Times reported that Nazi Storm Troopers executed seventeen striking workers from the plant. In another Czechoslovakian factory, the threat of sabotage had grown so great that the Nazi’s stationed a soldier near every fifth machine in order to eliminate the threat.\(^{154}\)

Another article from the New York Times, printed in January of 1942, highlights an act of sabotage in Norway. The article described how saboteurs from Norway destroyed two strategic bridges supplying the German army. Counter-measures against the saboteurs was difficult given the mountainous terrain in the northern area of Norway where the act took place. Unable to reach the actual culprits, the article described a
reprisal by the Germans against the population of Lofoten Islands. The Gestapo and the Norwegian Quisling police burned over forty homes belonging to people who had previously fled to England. The Germans sent the relatives of those that fled, including distant cousins, to concentration camps.\textsuperscript{155}

These articles provided a glimpse of the Germans' response to acts of sabotage. In the Norwegian case, the response was particularly harsh. However, Germany was not the only European country that dealt with saboteurs. The \textit{New York Times} ran an article in February 1942 about the outcome of trial involving Swedish fifth columnists. The accused, Jacob Liebersohm, supposedly played a key role in creating an organization "for the struggle against war and against fascism."\textsuperscript{156} In this case the court found Liebersohm guilty and sentenced him to nine years of solitary confinement.\textsuperscript{157}

Another \textit{New York Times} article from January of 1942 revealed sabotage efforts in South Africa. In this case, the attackers dynamited several power lines in an apparent effort to close the gold mines in the area. Following this act, Minister of Justice Colin Steyn issued an emergency regulation declaring the death penalty for sabotage and the possession of explosives for sabotage. The article reported that several arrests had already been made in the case.\textsuperscript{158}

It is interesting to see the varied responses to sabotage from around the globe and compare that to America's response. In only one case, that of Jacob Liebersohm, was a jail sentence imposed. Although it is not clear what happened to all the individuals arrested by the Germans in connection with the acts of sabotage, the retribution carried out in Norway gives an indication of the German's treatment of such acts. In South
Africa one notes many similarities to the American response as both called for the death penalty in future saboteur cases.

**News Coverage of the Trial**

Although unable to enter the courtroom, newspapers around the country regaled readers with details from the unfolding drama. Articles from the *St. Petersburg Times*, such as “Deep Secrecy Cloaks Trial of Saboteurs” and “Grim Secrecy Thrown About 8 Saboteurs,” typifying the coverage. The latter article, dated, July 6, 1942, two days before the military trial started, discussed how the eight face “almost certain sentence[s] of death…” and continued to discuss the extraordinary measures in place to guard the eight men. These measures included placing the men under twenty four watch in solitary confinement and moving the men to and from the courtroom in heavily armored transports. The other article, from July 10, explained how a “brief statement” was released acknowledging that the trial “was underway.” It also stated that there was real debate between government officials over whether anything at all should be said about the trial.

An article from the *New York Times* informed the public

.....the prosecutors will depend largely on the confessions the men gave to the FBI. In high quarters it was said that these statements were so detailed and conclusive as to defeat any idea of repudiation. In this connection, it is hardly possible that the saboteurs will enter any plea of coercion through a
third degree. In the past the FBI has been scrupulous in avoiding any unduly harsh treatment of prisoners...\textsuperscript{161}

These articles, and others like them, permitted readers a sense of how the media viewed the trial of the saboteurs. Even though the trial had yet to take place, most observers noted that guilty verdicts seemed a foregone conclusion. These articles also served to highlight the relationship between the media and the government. Although not opinion pieces, they showcase an implicit faith in the government, its agents and its methods. Many articles also accepted the government’s request that the trials remain off limits to reporters. Here readers see only hints of the media’s acceptance. Editorial reports explicitly highlight this sentiment.

\textbf{Editorial Coverage}

Editorial sections shed more light on both the media and the public’s sentiment regarding the trial. One editorial cartoon from the pages of the \textit{St. Petersburg Times} entitled “The War Should End in 1942 (For Some People)”, simply depicted a noose with the words “Extreme Penalty for Spies and Saboteurs” written inside the slip knot.\textsuperscript{162} Another editorial cartoon from the \textit{St. Petersburg Times} entitled “His Real Judges” showed the back of a man labeled a saboteur. As he faces a crowd of people, he looks upon the shadow of the gallows.\textsuperscript{163} The cartoons clearly demonstrate the presumption of guilt that hung over the trial. In addition, the cartoons demanded the execution of the eight men. Before the trial had ended, the saboteurs had already been convicted in the
media and calls for the harshest of all penalties had already been made. Cartoons were not the only means of expressing this opinion. Many editorial articles expressed similar sentiments.

One can divide most of the opinion pieces into two broad categories: those dealing exclusively in the proceedings of the trial and those dealing directly with the secrecy that surrounded the trial.

One editorial from the St. Petersburg Times, entitled “There is More at Stake Than Eight Men’s Lives,” provided the editor’s answer to a series of questions posed by a reader. The reader asked:

Why fool around with those Nazi saboteurs? They’ve admitted they’re guilty, haven’t they? Then take them out and shoot them. Hitler would have done that weeks ago. Yet we continue to let them live. I don’t get it.

The Times editor explained that the trial itself served as a beacon onto the world, showing everyone that the principles of law and order shall remain intact. The editor writes that, in holding a trial “we are showing the world that even under the cruel urgency of our greatest emergency, it is possible for civilized people to retain civilized, orderly processes.” The editorial stated that if we send these men to death without a trial we would be no better than Hitler or Hirohito and their “jungle rule”. Furthermore allowing this “jungle rule” to take hold would “simply mean the end of enlightened human progress; a return to the savage code of the Dark Ages in which the law of survival was ‘kill or be killed.’”

This particular article paints a rather stark picture. However, it clearly expresses one of the most interesting aspects of the media’s coverage. While the trial took place in
utter secrecy, the very fact the United States put the men on trial at all showed the world the country’s commitment to the preservation of democratic ideals and of equal and fair justice for all. How could one reconcile the fact that a trial conducted in secrecy by military tribunal and not in an open civilian court represented the highest ideals of a democratic and free nation? One editorial entitled “Safeguarding Nation Security Isn’t ‘Sacrificing’ Our Rights” provides an answer one analyst’s answer to this question.

The article acknowledged that “[s]ecret trials are abhorrent to the American ideals of justice and fair play.” However, the article emphatically defended the current secret trials by saying that “[w]e are at war to the death” and that

[to reveal how much has been discovered, to disclose the methods used to trap these arch-criminals, to announce to the world how deeply the government has ferreted out the secrets of their organizations and activities, would simply be tipping Germany off as to how to proceed in the future.]

This strikes right to the heart of matter, echoing General Andrew Jackson’s contention that, at times, individuals must be willing to temporarily sacrifice rights in order to preserve them in the long run. The St. Petersburg Times editorial writer would clearly agree. In the author’s opinion, the need to provide for national security clearly outweighs the benefits to be gained by conducting the trial in a public venue.

In an editorial for the Wall Street Journal, the intellectual Raymond Moley praised the administration’s decision. Moley, once a close advisor to the Roosevelt administration and a leading proponent of the New Deal had, by the time of the trial, become one of Roosevelt’s leading conservative critics. In 1939, Moley released a
book entitled *After Seven Years*, a highly critical chronicle of his time in the Roosevelt administration. *Time* magazine said of the book, “it could have come only from a bitter, frustrated, able man who once was close to the President.”167 Interestingly, this “bitter” critic favored the administration’s position on this particular issue.

Moley begins his opinion piece by stating:

The President will find no reason to complain about public support for his decision to appoint a Military Commission to try the eight saboteurs captured through the brilliant work of the F.B.I. To have failed to follow through with a military trial would have seriously weakened the outstandingly successful arm of our home-defense machine; and to have permitted the torturous process and possible delays of a civil trial would have been fatal in checking Germany’s bold invasion of our soil.168

The article continued on to describe a threat the Moley views as even “more serious than that of the eight saboteurs.” Moley was alluding to the internal threat posed by those who help to supply German submarines. Moley contended that there was no area under American protection safe from the threat of internal saboteurs and spies. The author concluded that these eight are only the tip of the iceberg. He argues that there needs to be greater vigilance on the part of local law enforcement in preventing future attacks by the agents of the Nazi government.169

Moley concluded his piece by returning to his discussion of the ongoing case of the eight saboteurs:

The forthcoming military trial of the saboteurs will offer many unusual and interesting features. The chief advantage of a military tribunal lies in
the speed with which it can operate. It has vastly more freedom in procedural matters than a civil court. Under the articles of war, the President may prescribe procedure and the rules of proof. Under the law and the President’s grant of authority, the Military Commission...can try both the two American citizens and the six aliens under the law of war, without the complications that would attend a trial of the former for treason and the others for a different offense. What is by no means, least important, the Military Commission has at its disposal a stiffer and more spectacular punishment than any in the books of the Federal civil authority—a firing squad. 170

The language used in this passage is striking; particularly notable is Moley’s description of the “torturous” civilian trial process. Much like the administration, the author focused on the speed at which justice is meted out. Having already assessed the guilt of the eight men, the military trial provided an expedient and surefire means of ensuring that a verdict would be reached within weeks, not months or years. Here the argument for swift justice is cloaked in the issue of national security. Allowing a civil trial would only embolden an already audacious enemy and invite even more serious invasion attempts.

Moley seems unconcerned with the possible abuses of power that this trial affords. In fact, he applauds the idea that the rules of evidence and procedure can be set by the President, without relying on established legal tradition. The piece left little doubt that Moley believes these eight men are guilty and that they should pay the ultimate price for their crime.
This tone of this article is indicative of the coverage of the trial, especially in the editorials. Many seem to have supported the idea of a military trial because of its speed and because the outcome of the case seemed obvious from the beginning. For an article by supposedly one of the administration’s harshest critics, there is absolutely no criticism of how they handled this case. A modern reader might note the stark contrasts between such media coverage then and today’s coverage of modern day uses of military commissions under both the Bush and Obama administrations.

This article, along with many others, praises the work of the FBI and its role in capturing the saboteurs. Obviously, allowing the media to perpetuate the myth of the FBI’s ability to uncover and thwart such plots was a boon for both the agency and the administration. This served two main purposes. First, it served to reassure the American people that their government had the ability to keep them safe from the threat of Nazi invasion. Second, it would serve to deter future attempts because the enemy would never know why the mission truly unraveled. If the Nazis believed that the FBI and been that effective in capturing these saboteurs they might be less inclined to send more waves of such men. Naturally then, the administration found it vitally important to keep both the real circumstances surrounding the arrest and capture of the eight men out of the public spotlight.

Although far outnumbered by supportive articles, some authors did cast a critical eye on the administration’s handling of the case. One Time magazine article, written after the executions had taken place, stated that, one month after “the biggest spy case in U.S. history” ended “the U.S. still [knows] less about the case than about any one of its daily, tawdry crimes of passion.” This article is one of the few that openly criticizes the
administration’s decision to keep the details of the trial from the public. Although written after the trial and execution, the article suggests that at least some members of the press were upset with the lack of access to the proceedings.

Some critics argued that the administration should have immediately sent the men out to be shot. In a letter sent to the President, an editorial member from the *Boston Globe*, John Gibson Bliss, included a copy of the paper’s editorial section with handwritten comments attached. The editorial insinuates that, by having a trial, the government displayed a “tenderness toward wartime enemies captured in flagrant activities aimed at the murder of our own people and the smashing of our industries.” The editorial further suggests that the saboteurs should be summarily executed. Bliss’ note says that “the *[Boston] Globe* is not a bloodthirsty sheet, and when it rears up this way, things are getting bad.” Bliss recommends a method for putting an end to such editorials: “If our Justice Dept. would issue a bald statement that these spies had been shot...we could turn our attention to this talk of a second front.”

The administration sought to strike a fair balance between the politics, public perception and legal principles at play in this case. Although the administration needed to appear strong and capable of defending the country from possible attack from invading saboteurs, they wanted to also appear fair and just by bringing them to trial. Although many called for the immediate executions of the eight, the administration felt it could not abandon all legal precedent and summarily execute the saboteurs without trial.

Some wrote the President to say they did not mind the secrecy surrounding the trial. One member of the public, Solon H. Bryan, wrote a letter to the Columbia Broadcasting System (CBS) to complain about their sarcastic criticism of the trial. It
seems that the radio commentator was speaking about the lack of public disclosures surrounding the trial. Mr. Bryan states that he wrote a letter to CBS emphasizing the fact that as this was a military trial, consequently secrecy constituted a necessary element of the trial. This is one of the few cases where the criticism of the administration seems to stem from the incredible degree of secrecy surrounding the trial.

Bryan stated that he told CBS that the public would only be interested in the verdict and not the particulars of the trial. He expressed his frustration upon learning that Elmer Davis, the head of the United States Office of War Information, had arranged for the President to speak about the ongoing trial. The letter recommended that the President reconsider this decision. Bryan concluded his letter by stating that the press should stop “trying to run this war” and allow the Army and Navy to run the war according to their “supreme authority”. Bryan lumps Mr. Davis in with the other press officials and states his disapproval of Mr. Davis’ handling of his job. Mr. Davis had been a popular CBS news broadcaster before joining the government. 173

Although some disapproval appeared in the press coverage, by and large the reports widely supported the actions of the Roosevelt administration. In fact, even opponents of the administration, such as Raymond Moley, appear to have been in favor of the decision to use a military tribunal. After reading the articles, it certainly seems as though members of the press and the public concluded that all eight of the men would be found guilty. In fact, it appears that many viewed the trial as a mere legal formality before the eight ultimately faced the executioner.

One can only wonder what would have happened if the press and the public knew the truth about the circumstances of the arrest. If word leaked about the true sequence of
event, the press coverage of the trial could have taken on a vastly different tone. It might have changed the way the public perceived both the FBI and J. Edgar Hoover. After all, the public believed that the FBI had been hot on the trail of the saboteurs from the moment they landed. If it became common knowledge that the FBI had not been so alert, it could have affected the Nazi’s decision about attempting to land more saboteurs and spies along the American shoreline. History, however, does not reveal the alternatives so we must analyze the records we have present.

Letters from the Public: Pre-Execution

Like some editorial writers, those private citizens who sent comments to the President often called for the immediate execution of the eight saboteurs. One letter sent to the President suggested that the spies should be shot and that the execution be broadcast live on radio to send a message to German sympathizers in the United States. The letter suggests that hearing “the military orders given and the guns shoot” would be a great deterrent to all potential spies and saboteurs.174

Another letter, sent by a Mr. George J. Sutton, emphasized this point. The letter itself drips with sarcasm and illustrates the difficulty the President had in managing public perception with regards to the case. Mr. Sutton claims to represent a “group of good old American Bond buyers who believe our democratic way of life is worth fighting for and protecting.” While satisfied with the work of the FBI and J. Edgar Hoover, Mr. Sutton expressed the group’s shock and dismay upon learning of the “lenient sentences” handed down by the courts against “enemies of this nation.” Accordingly, the group
believed that while the eight Nazi saboteurs should be shot, they would no doubt end up at resort in White Sulphur Springs. In order to help the eight men during their stay at the vacation destination, the group organized a contribution fund to assist the men in purchasing new golf clubs. The letter states that “on second thought, we would rather buy them neckties, not the Japanese silk we used to buy, but good old manila hemp about twelve feet long.” Along with the letter the group sent four dollars to help cover the purchase price. In his conclusion, Mr. Sutton stated if the court found the men guilty, he would gladly serve as a member of the firing squad charged with executing the saboteurs.  

While the White House returned both the letter and the money to Mr. Sutton, this letter demonstrates how public opinion regarding the event could be quite volatile. The President and his staff certainly took into account the feelings of the public. The administration also demonstrated on several occasions that public perception played a role in determining how they would proceed with the trial. Letters such as these show the public’s outrage and bloodlust. While the administration sought the death penalty in the case, they made a concerted effort to legitimize the process by holding a trial. This stands in contrast to the calls by both the media and public for the immediate execution of the men. These are just two of many letters that the President received on this topic.  

While most of the letters from the public contained cries for the swift execution of the saboteurs, at least one individual, a Mr. Gladfelter, called out for leniency. In the letter, Mr. Gladfelter implored the President to spare the lives of the eight men. According to Mr. Gladfelter, everyone expected the military commission to find the men guilty and sentence them to death. By setting aside the sentencing recommendation the
President would be “blazing an honorable trail for mankind to follow, rising above the standards of those that would subdue us, and inspire all men to look to America for a better way of life.”  

The letters from the public serve another purpose: they demonstrate this case’s ability to generate public interest and inflame passionate responses. The administration did everything in its power to tame this public outcry and take the case out of the headlines. The more public interest the trial generated, the more facts about the true nature of the arrest and capture might emerge. As the letter from Mr. Sutton demonstrates, the public held the belief that the FBI had tracked down the saboteurs shortly after they had landed thanks to the agency’s attentiveness and organizational ability. If this public perception shattered it could have critically affected the credibility and reputation on the agency.

Communication with Congress

Letters even came from members of Congress. One Congressman, J. Buell Snyder from Pennsylvania, wrote to the President to express his views on the public disclosures related to the case. The Congressman’s letter implored the President: “For God’s Sake, and for the good of our country and our War Program, keep the hearings of this saboteur case an absolute secret.” Congressman Snyder goes on to state that:

All of 95% of all the people think newspapers and radios tell too many things that should be secret. All of 95% of all the people want this an absolute secret and when the trial is over – let that be the end – as far as
the News goes. Like the Hess case – where is he? All of 95% of the Members of Congress want this an absolute secret.\textsuperscript{177}

Congressmen Snyder stated that Russia refused to share information with the United States precisely because of the United States’ inability to keep a secret. In close, Congressman Snyder tells Roosevelt this is the “one place Mr. President, where you as Commander in Chief, can say No and you will have nation-wide support --- except for a few newspapers or announcers who think more of getting a story than of the welfare of their country.”\textsuperscript{178}

In his response to the letter the President wrote:

\begin{quote}
There has been great conflict of opinion on this question in official circles. It is one of those cases – they always arise where freedom of the press is concerned – which is hardly susceptible to either simplicity of definition or of solution. There is bound to be great differences of opinion but I am glad to have your views.\textsuperscript{179}
\end{quote}

The President steers clear of offering any specifics in his response. The conflicts of opinion the President refers to in the letter are not documented in the archival records. However, it at least suggests that other members of the government disagreed with the administration’s decision to cloak the trial in secrecy.

This letter demonstrates that at least one Congress member’s willingness to allow the President to exercise strong Executive privilege in dealing with the saboteurs. Although the statistics reported in the letter may be unscientific, one has to wonder how many members of Congress agreed that the trial should remain secret. One also wonders just how much information about the capture and trial of the eight saboteurs the White
House shared with members of the legislature. This letter is one of the few archival communications between the White House and Congress on this issue. In fact there appears to be only one record of a Senator requesting transcripts from the trial. Overall, these records suggest that the President relied heavily on the Department of Justice and the Attorney General in crafting the legal framework that allowed the case to proceed. However, there is no indication of consultations between Congress and the White House on this front. In fact, there is scant information about Congressional involvement with the trial in any form. The evidence suggests that the President wanted to keep the particulars of the case a closely guarded secret. In order to accomplish this it seems reasonable the White House would provide limited information to those not directly involved in the case, sharing the details with only a few hand selected individuals.

Following the trial, one Senator wrote to the Attorney General questioning the patriotism of the defense council. Senator Alexander Wiley of Wisconsin wrote to the Attorney General questioning the integrity of both defense council members because of their spirited defense of the saboteurs. The Attorney General tells the Senator that he finds the suggestion that Royall and Dowell did not act with patriotism and integrity “extremely distressing.” Furthermore, the Attorney General’s office responded to the Senator’s letter by pointing out that the men were assigned to the case. As such, it was the “duty of these officers to defend the accused to best of their ability and to leave unexplored no defense advanced by the accused which counsel in conscience felt justified in presenting.” The letter to the Senator concludes thusly:

The United States is fighting a war not only for our survival as a nation but also for our survival as a democracy. One of our most cherished traditions is that every
person accused of a crime be given a fair and impartial trial at which he be represented by counsel on his behalf. During the time of war, circumstances may require the substitution of military for civil authority, but not the abandonment of this principle.\(^\text{181}\)

Perhaps it is not surprising that some would question why Royall and Dowell pursued such a vigorous defense of the accused when many considered a guilty verdict a foregone, and necessary, conclusion. However, this letter is revealing for another reason. Although one can certainly question the legal reasoning behind the decision to pursue a trial by secret commission, one is also struck by the fact that the administration was not willing to abandon legal tradition altogether. One also finds it admirable that the Attorney General would personally respond to this attack on the character of the defense council members.

**Public Opinion Poll**

As part of its effort to assess the public reaction to the case, the White House commissioned a poll to assess the public’s opinion. The results of the poll are quite interesting and reveal some important insights.

The poll reveals that almost 100\% of the 264 people surveyed had heard about the case. Of those that knew of the trial, 76\% correctly identified the city where the trial was being held. The pollsters then asked the respondents two similar questions about the coverage of the trial. The first question states: “The Army says the trial should be secret for military reasons and will not allow newspaper men to attend it. Do you agree that the
trial should be kept secret or do you think newspaper men should be allowed to attend?” 69% of those asked believed that newspaper men should not be allowed to attend while 27% thought that trial should not be kept secret. The next question asked respondents to pick the statement that best summarized their opinion on whether the trial should be made public. 77% chose the statement that read, “If the Army says the trial should be secret for military reasons, then I think it should be kept secret.” Only 14% chose the statement “The trial should be reported to the public.” The remaining 9% thought that the person in charge of reporting news for the government should be allowed to make the decision whether to report the news or not. 182

The poll’s result suggests that a vast majority of the American people felt comfortable allowing the administration to conduct a secret trial. Without a doubt, the administration would welcome these results. The results show that they had almost the full backing of the American public when it came to conducting the trial in secret.

Public Reaction: Post-Execution

Following the execution of the six saboteurs the President received several letters of congratulations from citizens all across the nation. The president of KLUF Broadcasting Company sent a telegram to Roosevelt commending his decision to approve the execution measure: “In the final analysis history will record your masterful handling of the saboteurs conclusive proof of your wisdom and foresight as America’s greatest leader.” 183 Another interesting letter arrived from the German American Trade Unionists, comprised of members of the AFL and CIO. The letter expresses the Union’s “fullest
approval” of Roosevelt’s actions regarding the eight saboteurs. The union members further stated that “no mercy can be shown any person who obstructs our war effort and works against our victory over the Axis Powers. We know that no loyal German American need have the slightest fear providing he obeys the law of the country.”

The public’s reaction to this case is extremely interesting. A modern reader may be struck by the overwhelming number of letters that called for the immediate execution on the saboteurs. Modern readers may be equally struck by the number of letters that complimented the President on his decision. It is interesting mostly because the letters seems so one sided whereas a modern reader might expect a letters expressing a variety of viewpoints.

Conclusion

On August 4, 1942, all eight of the saboteurs were sentenced to death. The St. Petersburg Times ran an article stating that “[t]he scorn and mockery that marked their attitude in the earlier stages of the 18-day trial was completely wiped out” as the verdict was read. On August 8, 1942 six of the eight men were sent to the electric chair. Dasch and Burger would remain imprisoned for the duration of the war. After the hostilities ended both were sent back to Germany. America would quickly turn its attention to other important wartime developments as the case of the Nazi saboteurs drifted into the background.

In the end, this is much more than just a story of war, sabotage, betrayal, legal drama and execution. It is the story of how we uphold the democratic ideals upon which
this nation was founded. It is a question of how we balance the need for justice and security with the human liberties that we enjoy as a people. As one editorial noted: “[w]ithout those liberties, life loses meaning to free men…we serve notice on the world that human liberties shall endure as long as America, itself.” 186

1 FBI, “Famous Cases”
2 Ibid
3 Ibid
4 Ibid
5 “How Spies were Recruited,” New York Times 28 June 1942
6 Dobbs, Saboteurs, 30
7 Ibid, as quoted from Dash’s FBI statement
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