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Junk history as legal precedent

Bush apologists who cite the 1942 Quirin case as justification for the "USA Patriot Act," neglect to point out that Quirin involved one of the most despicable miscarriages of justice in US history.

By Ernest Partridge

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January 21, 2002—Should terrorists be tried before military tribunals – secretly, and without the constitutional rights and guarantees to legal counsel, habeas corpus, burden of proof and judicial review?

All this is permitted in George Bush's anti-terrorism legislation (i.e., "USA Patriot Act").

Legal precedent for this legislation has been cited repeatedly, both before congressional committees and in media reporting and commentary. In particular, it has been noted that Abraham Lincoln suspended habeas corpus during the Civil War, and that FDR approved the trial of German saboteurs before a military tribunal – a policy that was affirmed by an 8-0 decision of the Supreme Court, in a case named *ex parte Quirin*.

In the December 10 issue of *Newsweek*, Stuart Taylor Jr. wrote:

"Bush's proposed military tribunal has its roots in historical and legal precedents that condone treating enemy spies and infiltrators as "unlawful belligerents," and that give the government virtually unlimited wartime power to detain and deport non-citizens suspected of subversive activities."

Then, Taylor gave us this simple and straightforward account of the oft-cited *Quirin* case:

"In 1942 eight Nazi spies arrived on the East Coast with the mission of committing mayhem and murder. They were quickly caught. FDR ordered them tried in a special military tribunal, and six were executed. In an 8-0 decision, the Supreme Court upheld the tribunal, a precedent Bush's lawyers have used to bolster the legitimacy of any new military courts."

Taylor, along with virtually all reporters, commentators, Senators and hearing witnesses, fails to mention that this case was one of the most despicable miscarriages of justice in the history of Federal jurisprudence. Far from serving as justification-through-precedent of the "USA Patriot Act," *Quirin* should more appropriately stand as an ominous warning.

The crux of this incident turns on that simple sentence, "[The saboteurs] were quickly caught."

The J. Edgar Hoover/FBI version is that the saboteurs were "caught" as a result of diligent and professional investigation by the FBI – "the detective work of the century," as Hoover proclaimed.

In 1980, thirty-eight years after the event, a very different story emerged, thanks to the (late and lamented) Freedom of Information Act and the persistent research of the late Seth Kantor of the *Atlanta Constitution*.

It turns out that the reason that the saboteurs were "quickly caught," was that one of them, Ernest Peter Burger, deliberately betrayed the plot at the outset and another, George Dasch, reported the plot to the FBI at his first opportunity.

Upon landing on Long Island from a German submarine on June 12, 1942, Burger left evidence on the beach with the clear intention that it should be discovered and lead to the saboteurs. When approached on the beach by a Coast Guard patrolman, John Cullen, Dasch disobeyed orders that witnesses be silenced and instead sent Cullen safely on his way, with a promise that he, Dasch, would contact the FBI and tip off the plot.

As good as his word, the very next day Dasch phoned the FBI, stating that it was urgent that he speak with J. Edgar Hoover directly. Later that week, after informing Burger of his plans, Dasch traveled to Washington to press his case to the FBI. Eventually he convinced the Feds, and thus the lives of hundreds of American citizens may have been spared. Both Burger and Dasch claimed that while in Germany they had no intention of engaging in sabotage, but instead had regarded the operation as an opportunity to escape to America. That claim is supported by their behavior which immediately followed upon their setting foot on Long Island.

As a reward for their conscientious acts in behalf of the American war effort, Ernest Peter Burger and George Dasch were condemned to death – sentences commuted, in Burger's case, to life imprisonment, and in Dasch's case to thirty-years. Dasch was told in confidence by the FBI that he would receive a presidential pardon – a promise that was never to be fulfilled. The remaining six Germans were executed on August 8, 1942.

During their six years of imprisonment, Burger and Dasch were in constant mortal danger, first from American prisoners who believed them to be spies, and then by German prisoners of war who correctly regarded them as traitors.

In 1948, Burger and Dasch were released by President Truman, on condition that they be immediately deported to Germany.

All this to protect the inflated reputation of J. Edgar Hoover and the FBI.

The treatment of Burger and Dasch was clearly a moral outrage. But in addition, it was plainly stupid and counter-productive. The simple and enduring lesson is that courageous acts in defense of the United States may, if "inconvenient" to the powers that be, result in imprisonment or even execution.

The best remedy to such official malfeasance is the light of publicity, accomplished at length in the *Quirin* case through the diligence of a reporter and the Freedom of Information Act – a piece of legislation that has now been effectively abolished by executive fiat of the Bush Administration.

Now Ashcroft "invites" the "swarthy aliens" to "volunteer" information. Should they do so? With the *Quirin* (Burger and Dasch) case in mind, would *you*?

That infamous case presents a precedent that ill-serves the "war on terrorism." And yet, it is cited, time and again, in support of "USA PATRIOT" – the "anti-terrorism bill."

George Bush tells us that we have declared war, not only on terrorists, but also "those who harbor terrorists." He has also told us that "either you are with us or against us," thus voiding any middle ground. Unfortunately, both George Bush and John Ashcroft have declined to give us a clear definition of "terrorist." Thus we are led to ask, if a lawyer defends an accused terrorist in court (presumably military), is he "harboring a terrorist?" Is he, *ipso facto* "against us"? Indeed, what of those of us who dare criticize Bush's policies, or for that matter presume to question the legitimacy of the 2000 presidential election or the Supreme Court decision that selected him? Are we thus "against" the administration? Is there a military tribunal in our future?

Nonsense! replies the "USA Patriot." We aren't after dissenting US citizens, we are after Islamic terrorists. That's why we are rounding up all those swarthy aliens. No need for you Americans to be "concerned." Then we are reminded of Pastor Niemüller's warning:

In Germany they came first for the Communists and I didn't speak up because I wasn't a communist. Then they came for the Jews and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics and I didn't speak up because I was a Protestant. Then they came for me -- and by that time, there was no one left to speak up.

Alarmist? Many German Jews refused to be "alarmed," and ended up in the Auschwitz crematoria. Many left-wing intellectuals who refused to take Joe McCarthy's shenanigans seriously, lost their careers.

George Bush is neither a Hitler, a Stalin, or a Joe McCarthy. He is, however, a weakling devoid of intellectual curiosity, empathy, or a controlling moral sense, surrounded by self-serving ideologues to whom he owes his office. He is quite capable of being captured by events and by the unscrupulous concern of those in power to protect their wealth, their influence and their reputations – all to the detriment of the innocent who get in their way.

It happened to Ernest Peter Burger and George Dasch. It can happen to you and me.

Thomas Jefferson gave us fair warning: "Eternal vigilance is the price of liberty."

I fear that if we lose our liberty, it will not be taken from us -- instead, we will have willingly given it away.

(An outstanding account of this case may be found in the current (February, 2002) issue of *The Atlantic Monthly*: "The Keystone Kommandos," by Gary Cohen).

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