

I have said this before, as we look at terrorist activities, as we look at vulnerability, let's look at the Mideast for a moment. Look at Saudi Arabia. Some individuals predict that Saudi Arabia is setting itself up for what happened a few decades ago with Iran, the fall of the Shah, America's ally.

Bin Laden's terrorist activities in the oilfields of Saudi Arabia could wreak havoc. What you would see is the price of oil skyrocketing. A couple of tankers in the Straits of Hormuz taken out by terrorist activities could accomplish the same effect.

These are the real risks associated with our increased dependence. If you look at the terrorists who we can identify with the Trade Center disaster, a lot of them had Saudi Arabia citizenship, including bin Laden. Where does the money come from? You and I are associated with the business community. We know where it comes from. It comes from oil. That is the wealth of the Mideast; it funds terrorism. Make no mistake about it.

A good friend of mine, a Member of this body for many years, Mark Hatfield, is a pacifist. He said: I would vote for ANWR any day than send another man or woman of our Armed Forces to fight a war on foreign soil, a war over oil.

This Senator has been a good soldier. I have been here 21 years. I have lived with this issue for 21 years. I have asked for votes. We passed this bill in 1995 in both the House and the Senate. It was vetoed by President Clinton. It is not going to be vetoed by the White House this time around. The point is, we can't get the leadership to bring it up.

I am going to have to filibuster something around here. There are a few things left to get some kind of a commitment from the Democratic leadership to get a vote on this issue in a timely manner. We have that right. All we want is a vote. We will take our lumps. But they don't want to vote on it.

They don't want to vote on it, even to the point where they are fearful if I were to bring this up in committee and prevail, that somehow it would pass and it would represent a position of strength.

Let me conclude by alerting Members that we are not going to let this issue go away. We are going to force a vote. If I have to force a filibuster, I will. This time this issue is going to come up before this body and be addressed once and for all.

I thank the Chair for the time. I thank my colleague for his indulgence.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, I am pleased to follow my distinguished colleague from Alaska, who has been here for 21 years. I can personally attest to that and take an affidavit to that fact because I came here on the same day that he did. We have worked together

over the years and we have a curious relationship, in the sense that he is senior to me in the Republican caucus because it was done alphabetically, and "M" comes before "S." I am senior to Senator MURKOWSKI in the Senate because I come from a State that is somewhat larger population-wise but not geographically. But it is always a pleasure to follow Senator MURKOWSKI on the floor or any other time.

TRYING TERRORISTS AS WAR CRIMINALS

Mr. SPECTER. Mr. President, I have sought recognition to comment on a couple of subjects today. First is a subject that is very much in the forefront of the news, which is the proposal to try terrorists in military tribunals as opposed to trials in U.S. courts of law.

The Attorney General of the United States is quoted in this morning's press as citing circumstances that the administration believes would require this change in procedure, and it is a matter that I believe ought to be considered by the Congress, because under the Constitution the Congress has the authority to establish military courts and tribunals dealing with international law.

I have written today to the chairman of the Judiciary Committee suggesting that prompt hearings be held on this subject. We are going to be returning after the Thanksgiving recess, and we will have a chance to look into this matter. Events are unfolding very rapidly now in the war in Afghanistan, with major advances being made by the Northern Alliance, with U.S. commandos on the ground, moving in an effort to find Osama bin Laden. I have predicted consistently since September 11 that we would find him and, as President Bush has said, we would either bring bin Laden to justice, or we would bring justice to him. So the issue of military courts is something that may be upon us sooner rather than later.

The Constitution provides that the Congress is empowered to define and punish violations of international law, as well as to establish courts with exclusive jurisdiction over military offenses. Under articles of war, enacted by Congress, and statutes, the President does have the authority to convene military commissions to try offenses against the law of war. Military commissions could be convened to try offenses, whether committed by U.S. service members, civilian U.S. citizens, or enemy aliens, and a state of war need not exist. So there has been a delegation of authority by the Congress. But under the Constitution it is the Congress that has the authority to establish the parameters and the proceedings under such courts.

In World War II, in the case of *Ex parte Quirin*, 317 U.S. 1, eight German saboteurs were tried by a military commission for entering the United States by submarine, shedding their

military uniforms and conspiring to use explosives on unknown targets. After their capture, President Roosevelt proclaimed that all saboteurs caught in the United States would be tried by military commission. The Supreme Court of the United States denied their writs of habeas corpus, holding that trial by such a commission did not offend the Constitution.

In World War II, we obviously faced a dire threat. The decision was made, understandably at that time, to have that kind of a trial procedure and not in regular civil Federal courts. Our current circumstances may warrant such action at the present time, but I do believe it is something that ought to be considered by the Judiciary Committee.

I note the presence of the distinguished chairman of the committee in the Chamber. I just commented, Senator LEAHY, that I have signed a letter to you on this subject. I thought it worthwhile to go far beyond the letter and to talk about this subject because I believe it is a matter of very substantial importance.

Mr. LEAHY. If the Senator will yield for a moment, I haven't seen the letter, but the press described it to me and asked me about it. I told them I totally agree with you on that, that we should have hearings on this—actually a number of these steps. One of the difficult things, as the Senator knows, is getting the Attorney General to come up here and testify. I think the last person to be able to even ask him a question in our committee was the senior Senator from Pennsylvania during the terrorism bill.

I only heard part of what the Senator was saying, but his usual fashion is to lay out the law and the history very clearly. I do believe we should have hearings. I intend to have a meeting with the FBI Director this afternoon. I am also going to talk to the Attorney General on this and a number of other issues, including some about which the Senator has expressed concern to me. He really should come up here before we finish for the year. We should discuss some of these issues.

I think the Senator from Pennsylvania is absolutely right in raising this. I appreciate him doing it. He does us all a service.

Mr. SPECTER. I thank my colleague from Vermont for those comments. I think the Attorney General would come up on an invitation. We are due back here on the 26th. I think it would be in order to make this the first order of business of the committee on the 27th. That would be 12 days' notice.

I note that there is a very extensive Executive Order implementing this procedure. This matter is not something which burst upon the scene yesterday. It has been under consideration.

I noted that a key Member of the House of Representatives was quoted in this morning's press as not having been consulted. I noted the chairman is also

quoted in the press as having not been consulted. That is the President's right. He can take his action, but under the separation of powers we have our own rights. The Congress has the authority to make those determinations. That is what the Constitution says. We have the authority to decide how those trials will be conducted. Of course, we are in a very difficult situation. We face a struggle for survival with what happened on September 11. The executive branch is entitled to great deference, but we are entitled to know the reasons for the President's order and its scope. Such a military tribunal need not have a trial by jury, which would be expected. Not to have a trial by jury is a military court-martial. There is no explicit privilege against self-incrimination. That is something we have to consider.

There is even no right of the defendant to choose his counsel. I don't think that would be the case in every tribunal, but these are powers that are very broad, and just as we found it necessary to take some time on the terrorist bill, our job is to take a look at it. And the executive will be immeasurably strengthened if the Congress backs the President.

Mr. LEAHY. If the Senator will yield further on that point, first off, I could not agree more with him. I think his last point is one that bears emphasis—how they might be strengthened. The Senator from Pennsylvania and I have served here longer than most Members of this body. I think it is safe to say that we have seen more bipartisan—virtually nonpartisan—support for the President in the last 2 months than we have for any President, Republican or Democrat, during the times he and I have been privileged to serve together in this body. That can be very helpful for the President.

However, it raises one certain danger. That support in our common goal to fight terrorism and to protect our fellow citizens in this country is good, but if it goes beyond that, and nobody has a question, ultimately the Presidency is hurt, the Senate is hurt, and the country is hurt. I think we have to ask these questions. You have a question of basic rights such as counsel, jury trial, and whatnot. Obviously, there are exceptions. We understand that. But if the exception becomes the rule, then all of us suffer. We have seen this in efforts to go after organized crime and in other efforts. It is easy to push the envelope because we only need it this time.

We have to ask what are the standards, what is the trigger for using this. I have read the Executive order. It is obvious it was thought about a lot. George Terwilliger, a former prosecutor from Vermont and former Deputy Attorney General, is quoted today as saying a lot of these items have been around the Justice Department in both Republican and Democratic administrations—my words, not his—for a long time and are being dusted off. Some

were not dusted off in the past because cooler heads prevailed.

I think the American public will, as the Congress has, support the President in a fight against terrorism, but the American public deserves having questions aired and answers given. The Senator from Pennsylvania does a service in raising that. I can assure him there will be a time set. The Attorney General will be requested to come before us prior to the Senate adjourning. There has not been consultation with either the Republican or Democratic leadership in the Congress on each of these issues. I do not know how many other shoes will drop between now and the time of the hearing, but whatever is there, we will ask about them.

I do not want to interrupt the Senator from Pennsylvania any further, but I came to the Chamber simply to thank him for raising what is a very valid point.

Mr. SPECTER. Mr. President, I thank the Senator from Vermont for those comments. These are issues of very considerable moment. These are matters which need to be analyzed very carefully.

The war against terrorism is a very vital war. Some suggestions have been made there might be a concern about convicting bin Laden, but I remind them, he has been under indictment since 1998 for killing Americans in Mogadishu in 1993 and the blowing up of our embassies in Africa in 1998, and there evidence against him linking him to the attack on the U.S.S. Cole. So there is considerable evidence. However that may turn out, this is a matter which should receive deliberation by the Judiciary Committee because there are very weighty issues to be considered.

There is not a great deal of time. We are scheduled to have a recess to get a secret briefing later today on what is happening in Afghanistan. So I ask unanimous consent to print in the CONGRESSIONAL RECORD a CRS Report for Congress, dated October 29, 2001, on "Trying Terrorists as War Criminals," which outlines some of the key considerations.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

TRYING TERRORISTS AS WAR CRIMINALS
(By Jennifer Elsea, Legislative Attorney,
American Law Division)

Summary: In the aftermath of the September 11 terrorist attacks on the World Trade Center and the Pentagon, the question of whether to treat the attacks as acts of war or criminal acts has not been fully settled. The purpose of this report is to clarify the rationale for treating the acts as war crimes and the ramifications of applying the law of war rather than criminal statutes to prosecute the perpetrators. The discussion focuses on the trial of alleged terrorists and conspirators by a military commission rather than the federal courts.

In the aftermath of the September 11 terrorist attacks on the World Trade Center and the Pentagon, the question of whether to treat the attacks as acts of war or criminal acts has not been fully settled. The distinc-

tion may have more than rhetorical value. The purpose of this report is to clarify the law enforcement implications of treating the terrorist acts as war crimes and to identify the possible ramifications of applying the law of war rather than criminal statutes to prosecute the alleged perpetrators.

Law Enforcement versus Law of War. Some observers have expressed concern that treating terrorist acts as acts of war may legitimize the acts as a lawful use of force and elevate the status of the Taliban and the terrorist networks to that of legitimate state actors and lawful combatants. However, it may be argued that an application of the law of war to terrorism does not imply lawfulness of the conflict, nor does it imply that perpetrators are not criminals. Terrorists do not, by definition, conduct themselves as lawful combatants. Under this view, they may be treated as war criminals and if captured, are not entitled to prisoner-of-war status under the Geneva Conventions. As suspected war criminals, they may be tried by any nation in its national courts or by a military commission convened by one nation or many.

The Justice Department is reportedly exploring whether to adopt the law of war approach to prosecute those responsible for the September 11 attacks. It appears that there are few legal impediments to adopting such an approach. Other practical considerations that may arise include the following questions: Must war crimes be investigated by military police, possibly implicating the Posse Comitatus Act? If federal or state police are used, must they follow the same standards that they apply to criminal cases? How will it affect the United States' ability to extradite terrorists captured abroad?

Such an approach could also have an impact on civil matters. Will there be any effect on the possible civil liability of terrorists to compensate victims? Would it matter if a particular victim was a government employee or someone located at a "military target" at the time of an attack? Will there be an effect on the liability of insurers? A decision to adopt a law of war approach to the terrorist acts currently at issue, or to all future terrorist acts, could also have significant foreign policy repercussions.

What is the Law of War? As a subset of the law of nations, the law of war is a composite of many sources and is subject to varying interpretations constantly adjusting to address new technology and the changing nature of war. It may also be referred to as *ius in bello*, or law in war, which refers to the conduct of combatants in armed conflict, as distinguished from *ius ad bellum*—law before war—which outlines acceptable reasons for nations to engage in armed conflict. The main thrust of its principles requires that a military objective be pursued in such a way as to avoid needless and disproportionate suffering and damages. Sources of the law of war include international agreements, customary principles and rules of international law, judicial decisions by both national and international tribunals, national manuals of military law, treatises, and resolutions of various international bodies.

At the risk of oversimplifying the concept, three principles derived from the law of war may be applied to assess the legality of any use of force for political objectives.

Military necessity. If the use of force is justified, that use must be proportional in relation to the anticipated military advantage or as a measure of self-defense. The principle applies to the choice of targets, weapons and methods. This principle, however, does not apply to unlawful acts of war. There can be no excuse of necessity if the resort to the use of arms is not itself justified.

Humanity. Lawful combatants are bound to use force discriminately. In other words,

they must limit targets to valid military objectives and must use means no harsher than necessary to achieve that objective. They may not use methods designed to inflict needless suffering, and they may not target civilians.

Chivalry. Combatants must adhere to the law of armed conflict in order to be treated as lawful combatants. They must respect the rights of prisoners of war and captured civilians, and avoid behavior such as looting and pillaging. They may not disguise themselves as non-combatants.

Although these principles leave a great deal of room for interpretation, there can be little doubt, assuming such acts can be viewed as acts of war, that the attacks of September 11 were not conducted in accordance with the law of war. Even if one considers the Pentagon to be a valid military target, the hijacking of a commercial airliner is not a lawful means for attacking it. Acts of bioterrorism, too, violate the law of war, regardless of the nature of the target.

Constitutional Bases for Establishing military Commission. The Constitution empowers the Congress to define and punish violations of international law as well as to establish courts with exclusive jurisdiction over military offenses. United States law recognizes the legality of creating military commissions to deal with “offenders or offenses designated by statute or the law of war.” Under the former Articles of War and subsequent statute, the President has authority to convene military commissions to try offenses against the law of war. Military commissions could be convened to try such offenses whether committed by U.S. servicemembers, civilian citizens, or enemy aliens. A declared state of war need not exist.

Precedent. Although the current crisis does not fit the typical mold associated with war crimes committed by otherwise lawful combatants in obvious theaters of war, there is precedent for convening military commissions to try accused saboteurs for conspiring to commit violations of the law of war outside of the recognized war zone. In the World War II case of *Ex Parte Quirin*, eight German saboteurs (one of whom was purportedly a U.S. citizen) were tried by military commission for entering the United States by submarine, shedding their military uniforms, and conspiring to use explosives on unknown targets. After their capture, President Roosevelt proclaimed that all saboteurs caught in the United States would be tried by military commission. The Supreme Court denied their writs of habeas corpus, holding that trial by such a commission did not offend the Constitution.

Power of the Military Commission. As a legislative court, a military commission is not subject to the same constitutional requirements that apply to Article III courts. Defendants before a military commission, like defendants before a court-martial, have no right to demand a jury trial before a court established in accordance with rules governing the judiciary. There is no right of indictment or presentment under the Fifth Amendment, and there may be no protection against self-incrimination or right to counsel. While Congress has enacted procedures applicable to courts-martial that ensure basic due process rights, no such statutory procedures exist to codify due process rights to defendants before military commissions.

Congress has delegated to the President the authority to convene military commissions, set rules of procedure, and review their decisions. This authority may be delegated to a field commander or any other commander with the power to convene a general court-martial. Statutes authorize prosecuting persons for failure to appear as wit-

ness, punishing contempt, and accepting into evidence certain depositions and records of courts of inquiry.

Procedural Rules. Procedural rules and evidentiary rules are prescribed by the President and may differ among commissions. Courts-martial are conducted using the Military Rules of Evidence set out in the Manual for Courts-Martial; however, these rules need not apply to trials by military commission. Subject to the statutory provisions above, the President may establish any rules of procedure and evidence he deems appropriate.

Although there may be little judicial review available to persons convicted by U.S. military commissions, it is surely necessary to provide for trials that will be fundamentally fair under both U.S. and international standards regarding the application of the law of war. Telford Taylor noted in evaluating World War II war crimes trials: “It is of the first importance that the task of planning and developing permanent judicial machinery for the interpretation and application of international penal law be tackled immediately and effectively. The war crimes trials, at least in Western Europe, have been held on the basis that the law applied and enforced in these trials is international law of general application which everyone in the world is generally bound to observe. On no other basis can the trials be regarded as judicial proceedings, as distinguished from political inquisitions.”

There is some historical precedent from which an international norm regarding procedural rights for accused war criminals might be derived. The Nuremberg Tribunals provide a good starting point, as further refined by the International Criminal Tribunals for Yugoslavia and Rwanda. Perhaps the most recent embodiment of the requirements of the international law of war is to be found in the procedures of the not-yet-operational International Criminal Court established by the Rome Statute.

The evidentiary rules used at Nuremberg and adopted by the Tokyo tribunals were designed to be non-technical, allowing the expeditious admission of “all evidence [the Tribunal] deems to have probative value.” This evidence included hearsay, coerced confessions, and the findings of prior mass trials. While the historical consensus seems to have accepted that the war crimes commissions were conducted fairly, some observers argue that the malleability of the rules of procedure and evidence could and did have some unjust results. For some, the perception is that “victors’ justice” was all that was sought.

Assuming that ordinary procedural and evidentiary rules are unsuitable for the task, it will likely be necessary to adapt or develop a more fitting set. The necessity to protect civil liberties will be seen to require balancing with the need to protect vital national security information and the public safety.

Possible Challenges. Although federal courts do not have jurisdiction to review the decisions of legislative courts, a defendant sentenced by a military commission may file a writ of habeas corpus claiming a violation of the law of war, the Constitution, relevant statutes, or military regulations. A challenge based on an interpretation of the law of war is not likely to succeed. Because of Congress’ power to define and punish violations of international law, and due to national security implication, courts are likely to defer to the political branches. Due process claims are also unlikely to succeed. Case law demonstrates the difficulties such a challenge would face. A U.S. citizen charged with aiding and abetting the foreign terrorists might be able to argue that the charges against him amount to treason, for which

the Constitution contains explicit limitations. Aiding and abetting a hostile (but lawful) force, however, may be distinguishable from conspiring to commit a war crime.

The broad delegation of authority to convene military commissions makes a statutory claim unlikely to succeed. A defendant could argue that Congress, by passing comprehensive anti-terrorism legislation that does not authorize trial by military commission, implicitly withdraws such authority. A similar argument failed in *Ex Parte Quirin*. However, the Supreme Court noted that the Espionage Act of 1917 and the Articles of War explicitly kept open concurrent jurisdiction with military tribunals.

A last option would be to argue that the military commission violated its own rules. For such a challenge to succeed, the court would have to find that the military reviewing authority committed an error which probably affected the verdict. If the appeal were successful, the court would likely remand the case to the military authorities for retrial.

RECLASSIFICATION OF SCRANTON-WILKES BARRE-HAZELTON, WILLIAMSPORT, AND SHARON METROPOLITAN STATISTICAL AREAS

Mr. SPECTER. Mr. President, on another subject of great importance to Pennsylvania, on two amendments which I am considering offering on the stimulus bill, one relates to the reclassification of the Scranton-Wilkes Barre-Hazelton metropolitan statistical area and also the reclassification of the Williamsport metropolitan statistical area, and the reclassification of the Sharon metropolitan statistical area. These areas’ hospitals are in dire straits because the Medicare reimbursement formulas allow them less compensation than that to which they should be entitled.

This matter was considered near the end of the last Congress, and there were quite a few areas which wanted to have a reclassification. All were omitted. The pain for these areas in my State has become more intense. An appropriate vehicle would be the stimulus package because these reimbursement shortfalls have a direct bearing on the economies of these three very important areas.

There has been a great problem which has resulted from the Balanced Budget Act of 1997, and these areas have a much lower reimbursement rate than adjacent areas. For example, if you take the Scranton-Wilkes Barre-Hazelton area, they receive \$6,010 in Medicare payments per case compared to Monroe County, an adjacent county, which receives \$7,390, more than \$1,380 more, an enormous differential.

What is the result? The nurses and the medical personnel go from one area to the higher paid area. The Allentown area, again adjacent, receives \$6,665 compared to the \$6,010 for the Scranton-Wilkes Barre-Hazelton area. The Williamsport area, which is in the same region, is similarly disadvantaged, and so is Sharon, PA.

I ask unanimous consent that a 2-page summary on reclassification of these areas be printed in the CONGRESSIONAL RECORD since there is relatively