

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 withholds 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

little time remaining, and the summary will explain in some greater detail the reasons, and also a copy of the proposed amendment which Senator SANTORUM and I are considering offering when the stimulus package comes before the Senate.

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

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

Many of Northeastern Pennsylvania's hospitals faced operating losses over the last few years, a troubling reality felt all across the country. In addition, the area is one of the most aged communities in the country, therefore the region's hospitals are extremely dependent on Medicare reimbursement.

The region has also seen one of the most rapid and dramatic shifts to managed care in the country: over the last five years, managed care grew from virtually no presence to almost 50% of the commercially insured population and 20% of the Medicare population.

While virtually no hospital in the nation has been left untouched by the cost pressures inflicted by BBA 97 and other factors, hospitals in the Scranton-Wilkes Barre-Hazleton Metropolitan Statistical Area (MSA) and in the Williamsport MSA face a unique situation.

Both of these MSAs contain areas or border on areas from which Geisinger Medical Center, a 437 bed teaching hospital in Montour County, Pennsylvania, draws its patients—and more importantly, its workforce.

Due to the understandably high wage costs of operating its large tertiary care facility, Geisinger has been reclassified to be deemed part of the Harrisburg MSA. (Its original classification was part of the rural area of Pennsylvania.)

Therefore, Geisinger Medical Center is being reimbursed based on a wage index that is currently more than 12% higher than the wage indexes of the Scranton-Wilkes Barre-Hazleton MSA and the Williamsport MSA. This results in unsustainably low Medicare reimbursements within those MSAs, particularly since the costs of living are similar to those in Geisinger's area.

From 11/13/01 Citizen's Voice (Hospitals' Numbers): Medicare Payment per case in Scranton/Wilkes-Barre/Hazleton—\$6,010—compared to: Monroe County: \$7,390; Allentown: \$6,665; and Harrisburg: \$6,359.

The Scranton-Wilkes Barre MSA wage index has been steadily falling, reduced from 0.8578 last fiscal year to 0.8473. The actual wage index for the area is around 0.80, but federal law does not permit an MSA to go below the state's rural rate, which will be 0.8473.

Nursing Shortages Intensifies: the Hospital Association of PA has identified Northeast PA as the area in the state with the worst shortage of nurses. Moreover, other skilled care givers remain in very short supply. These shortages drive up the cost of health care and the need to increase wages—something which these hospitals have done.

Sharon, PA, in the Northwestern part of Pennsylvania, faces similar difficulty hiring skilled workers, due to an unacceptably low reimbursement rate and its need to compete with bordering areas which qualify for higher wage indices.

Sharon Regional Medical Center, UPMC Horizon and United Community Hospital are located in the Sharon MSA. Sharon Regional Medical Center is 1 mile from the Ohio border and 12 miles from Youngstown, OH.

However, further reductions in the wage index will make it impossible for the hos-

pitals to retain or recruit all the caregivers that the communities require. Nearby regions, including Newburgh, Allentown and Harrisburg, continue the Scranton skilled workforce. For Sharon, it must compete with the Erie area to the North and Youngstown to the West.

All of the hospitals in the Sharon MSA compete with Youngstown for nurses, pharmacists, radiology technicians, and other allied health professionals. Youngstown pays nurses \$2-\$3 more per hour than hospitals in Sharon, yet those hospitals receive nearly the lowest area wage index in Pennsylvania (.850). Youngstown is a larger city/region with a much higher area wage index.

An MSA reclassification for Sharon, PA is crucial if its hospitals are to maintain their ability to provide quality health care to its citizens.

A National Solution is Still Years Away: These hospitals cannot afford to wait for this.

The amendment we intend to offer seeks to remedy this disparity. Our language would reclassify for a period of three years the Williamsport MSA to the Harrisburg MSA: all of the counties within Scranton-Wilkes Barre-Hazleton MSA into the Newburgh, NY MSA; and the Sharon MSA into Youngstown, OH.

**AMENDMENT NO.—**

(Purpose: To provide for the reclassification of certain counties for purposes of reimbursement under the medicare program)

At the end of title IX, add the following:

**SEC. —. THREE-YEAR RECLASSIFICATION OF CERTAIN COUNTIES FOR PURPOSES OF REIMBURSEMENT UNDER THE MEDICARE PROGRAM.**

(a) IN GENERAL.—Notwithstanding any other provision of law, effective for discharges occurring during fiscal years 2002, 2003, and 2004, for purposes of making payments under subsections (d) and (j) of section 1886 of the Social Security Act (42 U.S.C. 1395ww) to hospitals (including rehabilitation hospitals and rehabilitation units under such subsection (j))—

(1) in Columbia, Lackawanna, Luzerne, Wyoming, and Lycoming Counties, Pennsylvania, such counties are deemed to be located in the Newburgh, New York-PA Metropolitan Statistical Area;

(2) in Northumberland County, Pennsylvania, such county is deemed to be located in the Harrisburg-Lebanon-Carlisle, Pennsylvania Metropolitan Statistical Area; and

(3) in Mercer County, Pennsylvania, such county is deemed to be located in the Youngstown-Warren, Ohio Metropolitan Statistical Area.

(b) RULES.—The reclassifications made under subsection (a) shall be treated as decisions of the Medicare Geographic Classification Review Board under paragraph (10) of section 1886(d) of the Social Security Act (42 U.S.C. 1395ww(d)), except that payments shall be made under such section to any hospital reclassified into—

(1) the Newburgh, New York-PA Metropolitan Statistical Area as of October 1, 2001, as if the counties described in subsection (a)(1) had not been reclassified into such Area under such subsection;

(2) the Harrisburg-Lebanon-Carlisle, Pennsylvania Metropolitan Statistical Area as of October 1, 2001, as if the county described in subsection (a)(2) had not been reclassified into such Area under such subsection; and

(3) the Youngstown-Warren, Ohio Metropolitan Statistical Area as of October 1, 2001, as if the county described in subsection (a)(3) had not been reclassified into such Area under such subsection.

**REHABILITATION, PRESERVATION, AND IMPROVEMENT OF RAILROAD TRACKS**

Mr. SPECTER. Mr. President, I wish to make one more point before yielding the floor, and that is another amendment which I am considering offering on the stimulus package. That is an amendment which would add \$350 million for capital grants to be made by the Secretary of Transportation for the rehabilitation, preservation, and improvement of railroad tracks, including bridges, roadbed, and related track structures to short-line railroads.

Legislation has been pending in the House of Representatives on this subject which has more than 100 sponsors. Legislation is pending in the Senate which has 7 sponsors. This would be a tremendous stimulus because it would immediately put many people to work on the reconstruction of the short-line railroads in the short run, providing very extensive jobs, and in the long run, by improving the infrastructure which would be enormously helpful to the economy of Pennsylvania and similarly to other areas where there are short-line railroads.

At my request, the McFarren Group prepared an extensive analysis of proposed railroad costs to be included in the Federal stimulus package. Because of the shortage of time, Mr. President, I ask unanimous consent that a limited portion of this report be printed: The executive summary and the third page of the summary, together with a summary of factors in support of this amendment and a copy of the amendment itself.

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

**EXECUTIVE SUMMARY**

**PROPOSED RAILROAD COSTS TO BE INCLUDED IN THE FEDERAL ECONOMIC STIMULUS PACKAGE, OCTOBER 31, 2001**

*Background*

At the request of Senator Arlen Specter, the Keystone State Railroad Association conducted a survey of member and non-member Pennsylvania railroads to ascertain the degree of infrastructure improvements needed across the Commonwealth's rail system. Respondents were asked to provide information related to project readiness, safety and infrastructure conditions, security and insurance cost estimates, and estimates on the number of jobs that could be created if listed projects were undertaken.

*Summary of Findings*

Pennsylvania railroads responding to this survey indicate more often than 60% of the short line and regional railroad infrastructure is in need of extensive rehabilitation, including more than 170 bridges. Excluding the Bessemer & Lake Erie and Delaware & Hudson railroads, both of which have heavy load infrastructures, the short line and regional railroads are capable of handling the heavier 286,000-pound loads on only 70% of their infrastructure. The funds needed to upgrade these lines and the related bridge infrastructure will exceed many preliminary cost estimates. Many customers are beginning to demand the use of 315,000-pound cars, which will dramatically escalate funding needed for these rail lines even further.