Legal Backgrounder

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CRIMINAL OR MILITARY JUSTICE FOR CAPTURED TERRORISTS?

by

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In the aftermath of the monstrous carnage inflicted on September 11, 2001 by a score of hijackers and an unknown number of their henchmen, the country is still struggling to figure out how to classify them and their murderous acts. Are they criminals on a massive scale or soldiers in a self-proclaimed *jihad* —"holy war?" It makes a huge difference to President Bush's power to deal with them.

Thus far, the official reaction is confused. The President as well as the Secretary of State and the Attorney General refer to Osama bin Laden as the "prime suspect," a term usually employed in identifying a suspect in an ordinary criminal case. Meanwhile, scores of federal agents are sifting though the rubble of cordoned off "crime scenes" searching for "evidence," as if they are girding for a criminal trial like the ones that followed the Oklahoma City bombing or the first assault in the World Trade Center in 1993. A grand jury in the federal court in White Plains has been convened to hear evidence.

But at the same time, the President, his senior aides including the Secretary of Defense, and members of Congress have termed the terrorist attacks "acts of war" and declared in response that the United States is "now at war." On September 14, 2001, in authorizing the President to use " all necessary and appropriate force" against the countries, organizations, and people involved in the attacks, Congress expressly ratified such military operations as implementing the War Powers Act.

Furthermore, the Secretary of Defense has authorized the award of the Purple Heart, a medal signifying death or injury in the line of combat duty, to the military victims of the attacks. Secretary Donald Rumsfeld explained: "They were acts of war — military strikes against the United States of

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America.

It may seem to be a mere semantic quibble to distinguish between criminal acts and acts of war, when the toll in blood and treasure reaches the scale it did last month, far exceeding any crime in the nation's history and eclipsing all but a few of the most savage military battles. But much turns on the distinction, including the treatment of the surviving conspirators and basic concepts of civil liberties. For if we are truly at war, the President may use the armed forces not only to chase terrorists through the mountains of Afghanistan and the deserts of Sudan, but may also use the Army to try and even execute terrorist collaborators seized in the United States.

How can this be? We have followed the lengthy public trials held during the past decade involving other terrorist acts. Sometimes the culprits were seized in the United States. Occasionally, with the cooperation of foreign intelligence services, they have been snared overseas and then brought here under guard. In every case, the trial was lengthy, held in a federal civilian court, and open to the public. Often there was wrangling over the "graymail" problem, with the defense lawyers demanding access to sensitive intelligence files in an effort to force the prosecution to reduce or narrow charges in order to avoid publicly revealing the identity of informants or secret intelligence "sources and methods." Ultimately, civilian jurors had to decide guilt or innocence as well as life or death. In the recently concluded trial arising from the first Trade Center bombing, they convicted the conspirators but spared their lives.

If we are at war, though, the President may be able to bypass the entire civilian justice system and may order terrorists tried in secret before a military commission with the power to condemn them to death. President Abraham Lincoln took this course. So did President Franklin Roosevelt. The Supreme Court has unanimously sustained presidential power to proceed by military commission under circumstances that may be similar.

Roosevelt's actions are an eerie precedent, one that President Bush could invoke if he wants to carry the concept of war on terrorism to its ultimate conclusion. In June 1942, eight Nazi saboteurs sneaked into the United States bent on destroying military and civilian facilities. All eight men had lived in the United States for many years before returning to Germany. One was actually a naturalized American citizen. None was a regular soldier. Each had been specially recruited and trained in Germany for terrorist sabotage.

German submarines landed the two parties of four men each on the beaches of Long Island and Florida. When they landed, they were wearing uniforms of the German Marine Infantry, but they immediately buried their uniforms along with their explosives and proceeded in "civilian dress" to New York, Jacksonville, Washington, and Chicago. It was the decision to try to hide among the civilian populace that sealed their doom under the laws of war and that makes them the equivalent of modern-day terrorists.

One of the saboteurs promptly turned himself in to the FBI. Armed with his disclosures the Bureau quickly rounded up the rest. After minimal debate, President Roosevelt decided to order the men tried before a military commission composed entirely of military officers. One reason was to keep secret the fact that both the U.S. Coast Guard and the FBI actually had bungled earlier leads about the saboteurs. Secrecy was necessary to prevent the public from learning that it was only the voluntary surrender of one of the men that had led to their arrests before they actually completed their mission. The President and military authorities decided that it was in the national interest to indulge the FBI's image for effective vigilance and to promote rumors of American intelligence penetration of the Nazi

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high command.

A military commission also made it far more likely that the accused would be promptly convicted and, as the President evidently desired, equally promptly executed.

Their trial by military commission was set to begin less than a week after President Roosevelt established the tribunal, barely two weeks after their arrest. The saboteurs turned to the federal courts for protection but found none. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Supreme Court ruled quickly and unanimously — with Justice Murphy reluctantly disqualifying himself because he was serving as an active duty military officer — that the President had the power as Commander in Chief to order "unlawful belligerents" tried before a military commission for any violation of the laws of war. Thus, they had no right to a public trial or to a trial by jury.

It made no difference that the men were arrested in the United States. Equally beside the point was that the civilian courts were open and functioning. Not even the American citizenship of one of the accused offered any constitutional protection.

What was crucial to the Court's decision was that, for centuries, the protections normally afforded to prisoners of war do not extend to spies and saboteurs who shed identifiable military uniforms, lurk amidst the civilian population, and attempt to inflict damage on military or civilian targets through stealth means. In a well-settled policy reminiscent of Dante's special condemnation of the treacherous, the laws of war grant no quarter to spies, saboteurs or terrorists who plot their evil in the shadows.

Surveying our own history, including the famous Revolutionary War case of British Major John Andre, whom General George Washington had hanged after he was discovered in civilian clothes within the American lines, the Supreme Court wrote: "The spy . . . 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 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."

Indeed, somewhat ominously, the Court commented that, since the President had decided to give the suspected saboteurs a trial, it was unnecessary to consider whether the President "is compelled to afford unlawful enemy belligerents a trial" before subjecting them to "disciplinary measures." The plain implication was that the Constitution might even allow the Commander in Chief to deal summarily with "unlawful belligerents," even though recent practice favored at least a semblance of a formal, military trial.

With this sanction, the military commission sitting in Washington found all the Nazi saboteurs guilty of violating the law of war and sentenced six to death. President Roosevelt immediately approved the sentences. In early August 1942, barely a month after their military trial had begun and less than two months after they were captured, the six were executed.

If he is inclined to do so, a similar course is open to President Bush, at least if the country is really in a state of war. The Geneva Convention on the treatment of "prisoners of war" recognizes that its guarantees apply not just to conventional military units but also to irregular forces and "organized resistance movements," but only if in some way they identify themselves as combatants with "a fixed sign recognizable at a distance" and carry their weapons "openly." In short, the clandestine terrorist, even if he views himself as a holy warrior, can lay no claim to the protection of the laws of war. Rather,

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he is considered an international outlaw and may be dealt with as such.

The United States Government still recognizes this principle. The operative Defense Department policy is reflected in the Field Manual entitled "The Law of Land Warfare." It adopts the Geneva Convention's limited understanding of those entitled to be treated as prisoners of war and excludes terrorists who conceal their true identity and mission. Paragraph 74 expressly declares that anyone intent on waging war against the United States "by destruction of life or property" using civilian clothes as a method of "concealment" forfeits any claim to be a prisoner of war once captured.

The "Law of Land Warfare" also notes with crystalline clarity that, under the Uniform Code of Military Justice enacted by Congress and under the laws of war recognized by civilized nations, persons such as "guerrillas" or others not part of the armed forces of a state who "take up arms and commit hostile acts" without having satisfied the established norms for identified combatants are, when captured, not entitled to prisoner of war status. Instead, they may be tried by military commission and executed. This exposure applies not only to the would-be terrorists themselves but, under Articles 104 and 106 of the Uniform Code of Military Justice, any person who "aids or attempts to aid" or "knowingly harbors or protects" or "conspired" with them is liable to trial before a military commission and to the death penalty.

Finally, there is no question that President Bush could order military trials of Osama bin Laden and other masterminds of terrorist acts. In another significant case arising from World War II, *In re Yamashita*, 327 U.S. 1 (1946), the Supreme Court applied the "command responsibility" doctrine and held Japanese General Yamashita personally accountable for violations of the laws of war committed by his subordinates against the civilian population. The Court recognized and applied the doctrine that a commander who trains and arms subordinates and puts them in the field is accountable for the outrages they commit, whether or not the commander ordered the particular depredations. The Court upheld the decision to try the General before an American military tribunal, which sentenced him to death under these principles.

The Administration is now pressing Congress to grant sweeping and controversial new powers to conduct anti-terrorism investigations within the United States. The President is said to be considering whether to scrap the voluntary restraint imposed by President Ford and followed by intervening presidents forbidding government-sanctioned assassination. In the midst of the ambiguous and diffuse "war" on terrorism, it will be interesting to see whether President Bush will invoke the most far-reaching domestic constitutional power to deal with terrorists as war criminals, not mere felons. That decision involves the most profound clash between protecting civil liberties and enforcing national security.

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