

Francis Biddle Papers
Box 3
War Criminals

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FAMOUS INSTANCES OF THE USE OF MILITARY TRIBUNALS
TO TRY CIVILIANS

Cases which now ordinarily go before military commissions went before courts-martial, performing the same function, until 1847.

I. The Revolutionary War.

(a) Major Andre of the British Army, apprehended behind the American lines wearing civilian clothes and bearing information concerning the defenses of the fort at West Point, was convicted as a spy by a court-martial.

In 1780 a civilian named Joshua Hett Smith was tried by court-martial under resolution of Congress for assisting and conspiring with Benedict Arnold in his acts of treason.

II. The War of 1812.

Andrew Jackson made frequent use of the special type of court-martial during the War of 1812 while he was in command of the American forces at New Orleans.

Among the most famous of these instances was the case of Robert C. Ambrister, who was found guilty of inciting and aiding the Creek Indians to make war against the United States.

III. The Mexican War.

On February 19, 1847, General Scott announced that certain acts committed by civilians or military persons in Mexico, and not

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within the ken of courts-martial, would be tried before two new types of tribunals, the "military commission" and the "council of war" which differed primarily in the type of cases handled. The following General Orders were issued by General Scott, convening military commission and councils of war (1847): Nos. 81, 83, 121, 147, 171, 181, 184, 194, 215, 239, 267, 270, 273, 292, 334, 335, 372, 380, 392; (1848) Nos. 9, 35, 41. General Taylor issued the following General Orders for the same purpose (1847): Nos. 66, 106, 112, 121; and General Wool (1847) issued Orders 140, 179, 216, 463, 476, 514.

IV. The Civil War.

During the Civil War the military commission and the council of war, as used by General Scott, were united into what we now know as the "military commission".

The most widely known use of the military commission arising out of the Civil War was the trial of Mary Surratt, David E. Herold, Lewis Payne, George A. Atzerodt, Edward Spangler, Samuel A. Mudd, Samuel Arnold and Michael O'Laughlin, for conspiracy in the assassination of Abraham Lincoln.

T. E. Hogg and six associates were convicted by a military commission in 1865 for trying to seize a United States merchant ship and its cargo on behalf of the Confederacy.

Clement L. Vallandigham, a congressman from Ohio and head of the Sons of Liberty, was convicted by a military commission in 1863

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for publicly expressing sympathy with the Confederacy.

Lambdin P. Milligan was convicted by military commission of conspiring against the United States Government, and, of course, was later released by writ of habeas corpus.

The General Orders issued during the Civil War contain nearly 150 cases of women tried by military commissions. During that War they were employed in several thousand cases and later were resorted to under the "Reconstruction" Act of 1867.

The principal offenses punished were:

"Unauthorized trading or commercial intercourse with the enemy; unauthorized correspondence with the enemy; blockade-running; mail-carrying across the lines; drawing a bill of exchange upon an enemy, or by an enemy upon a party in a northern city; dealing in, negotiation, or uttering Confederate securities or money; manufacturing arms, etc., for the enemy; furnishing to an enemy articles contraband of war; dealing in such articles in violation of military orders; publicly expressing hostility to the U. S. Government or sympathy with the enemy; coming within the lines of the army from the enemy without authority; violating a flag of truce; violation of an oath of allegiance or of an amnesty oath; violation of parole by a prisoner of war; aiding prisoner of war to escape; unwarranted treatment of Federal prisoners of war; burning, destroying, or obstructing railroads, bridges, steamboats, etc., used in military operations; cutting telegraph-wires between military posts; recruiting for the enemy within the Federal lines; engaging in 'guerrilla' or partisan warfare; assisting Federal soldiers to desert; resisting or obstructing an enrollment or draft; impeding enlistments; violating orders in regard to selling liquor to soldiers or other military orders of police in a district under military government; attempt without success to aid the enemy by transporting to him articles contraband of war; conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy." Davis, A Treatise on the Military Law of the United States (1915), p. 310, fn. 2; Dig. J. A. Gen., 502, par. 3.

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V. Post Civil War.

In 1873 certain members of the Modoc Indian tribe were convicted by military commission for treacherously killing an enemy during a truce. It is questionable whether the Indians who were engaged in armed warfare may be classified as civilians, but this case is at least authority on the use of a military commission for violation of the laws of war by enemies of the United States.

VI. The World War.

During the World War no occasions arose for the use of a military commission. Courts-martial were, however, used to try German spies caught during 1917-1918. The most famous cases involve a German naval officer named Wessels, and one Pablo Waberski. The ~~ser-~~^{latter} ~~was~~^{former} was convicted of violating the 82nd Article of War, and the ~~latter~~ of violating naval regulations.

VII. Recent Cases.

There have been, of course, certain recent instances of the use of military commission to try civilians in Hawaii since the entrance of the United States into the present war.

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MEMORANDUM FOR THE PRESIDENT:

Subject: Trial and Punishment of Nazi War Criminals.

This memorandum deals with ways and means for carrying out the policy regarding the trial and punishment of Nazi criminals, as established in the statements on that subject which are annexed (Tabs A to F).

I. THE MOSCOW DECLARATION

In the Moscow Declaration (Tab D) the United Kingdom, the United States, and the Soviet Union took note of the atrocities perpetrated by the Germans and laid down the policy: (1) that those German officers and men who have been responsible for or have taken a consenting part in these atrocities "will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein"; and (2) that the above declaration "is without prejudice to the case of the major criminals, whose offenses have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies."

II. UNITED NATIONS WAR CRIMES COMMISSION

The United Nations War Crimes Commission is located in London, and consists of representatives of some fifteen of the United Nations. The Soviet Government is not a member.

This Commission has been charged with the collection of lists of the criminals referred to, the recording of the available supporting proof, and the making of recommendations as to the tribunals to try and the procedure for trying such criminals. The Commission has no investigative or prosecuting authority or personnel. It has no authority to try offenders of any kind.

The War Crimes Commission receives its lists of war criminals from the investigating authorities, if any, set up by the respective United Nations. The first unofficial meeting of the Commission was held in London on October 26, 1943, and the first official meeting was held there on January 18, 1944. Up to this time, the cases of approximately 1,000 offenders have been docketed with the Commission. The labors of the Commission have not resulted in any governmental agreement as to the tribunals to try or the procedures for trying war criminals.

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Justice Dept letter 9-21-72
By <i>SPD</i> NARS, Date <i>12-80</i>

The Commission has been widely and publicly criticized for the paucity of the results of its work. In recent months its activities have been marked by dissensions. The British representative, who was also Chairman of the Commission, and the Norwegian member, have resigned.

III. SCOPE AND DIMENSIONS OF THE WAR CRIMES PROBLEM

The crimes to be punished. The criminality of the German leaders and their associates does not consist solely of individual outrages, but represents the result of a systematic and planned reign of terror within Germany, in the satellite Axis countries, and in the occupied countries of Europe. This conduct goes back at least as far as 1933, when Hitler was first appointed Chancellor of the Reich. It has been marked by mass murders, imprisonments, expulsions and deportations of populations; the starvation, torture and inhuman treatment of civilians; the wholesale looting of public and private property on a scale unparalleled in history; and, after initiation of "total" war, its prosecution with utter and ruthless disregard for the laws and customs of war.

We are satisfied that these atrocities were perpetrated in pursuance of a premeditated criminal plan or enterprise which either contemplated or necessarily involved their commission.

The criminals to be punished. The outstanding offenders are, of course, those leaders of the Nazi Party and German Reich who since January 30, 1933, have been in control of formulating and executing Nazi policies.

In addition, the Nazi leaders created and utilized a numerous organization for carrying out the acts of oppression and terrorism which their program involved. Chief among the instrumentalities used by them are the SS, from the personnel of which the Gestapo is constituted, and the SA. These organizations consist of exactly screened volunteers who are pledged to absolute obedience. The members of these organizations are also the personnel primarily relied upon to carry on postwar guerilla and underground operations.

IV. DIFFICULTIES OF AN EFFECTIVE WAR CRIMES PROGRAM

Difficulties of identification and proof. The names of the chief German leaders are well known, and the proof of their guilt will not offer great difficulties. However, the crimes to be punished have been committed upon such a large scale that the problem of identification, trial and punishment of their perpetrators presents a situation without parallel in the administration of criminal justice. In thousands of cases, it will be impossible to establish the offender's identity or to connect him with the particular act charged. Witnesses will be dead, otherwise incapacitated and scattered. The gathering of proof will be laborious and costly, and the mechanical problems involved in uncovering and preparing proof of particular

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offenses one of appalling dimensions. It is evident that only a negligible minority of the offenders will be reached by attempting to try them on the basis of separate prosecutions for their individual offenses. It is not unlikely, in fact, that the Nazis have been counting on just such considerations, together with delay and war weariness, to protect them against punishment for their crimes if they lost the war.

Legal Difficulties. The attempt to punish the Nazi leaders and their associates for all of the atrocities committed by them also involves serious legal difficulties. Many of these atrocities, as noted in your statement on the subject of persecution dated 24 March 1944 (Tab E), were "begun by the Nazis in the days of peace and multiplied by them a hundred times in time of war." These pre-war atrocities are neither "war crimes" in the technical sense, nor offenses against international law; and the extent to which they may have been in violation of German law, as changed by the Nazis, is doubtful. Nevertheless, the declared policy of the United Nations is that these crimes, too, shall be punished; and the interests of postwar security and a necessary rehabilitation of German peoples, as well as the demands of justice, require that this be done.

V. RECOMMENDED PROGRAM

After Germany's unconditional surrender the United Nations could, if they elected, put to death the most notorious Nazi criminals, such as Hitler or Himmler, without trial or hearing. We do not favor this method. While it has the advantages of a sure and swift disposition, it would be violative of the most fundamental principles of justice, common to all the United Nations. This would encourage the Germans to turn these criminals into martyrs, and, in any event, only a few individuals could be reached in this way.

We think that the just and effective solution lies in the use of the judicial method. Condemnation of these criminals after a trial, moreover, would command maximum public support in our own times and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.

We recommend the following:

The German leaders and the organizations employed by them, such as those referred to above (SA, SS, Gestapo), should be charged both with the commission of their atrocious crimes, and also with joint participation in a broad criminal enterprise which included and intended these crimes, or was reasonably calculated to bring them about. The allegation of the criminal enterprise would be so couched as to permit full proof of the entire Nazi plan from its inception and the means used in its furtherance and execution, including the prewar atrocities and those committed against their own nationals, neutrals, and stateless persons, as well as the waging of an illegal war of aggression with ruthless disregard for international law and the rules of war. Such a charge would be firmly founded upon the

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rule of liability, common to all penal systems and included in the general doctrines of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other. Under such a charge there are admissible in evidence the acts of any of the conspirators done in furtherance of the conspiracy, whether or not these acts were in themselves criminal and subject to separate prosecution as such.

The trial of this charge and the determination of the guilty parties would be carried out in two stages:

The United Nations would, in the first instance, bring before an international tribunal created by Executive Agreement, the highest ranking German leaders to a number fairly representative of the groups and organizations charged with complicity in the basic criminal plan. Adjudication would be sought not only of the guilt of those individuals physically before the court, but also of the complicity of the members of the organizations included within the charge. The court would make findings adjudicating the facts established, including the nature and purposes of the criminal plan, the identity of the groups and organizations guilty of complicity in it, and the acts committed in its execution. The court would also sentence those individual defendants physically before it who are convicted.

The above would complete the mission of this international tribunal.

Thereafter, there would be brought before occupation courts the individuals members of the organizations who are charged ~~only~~ with complicity through such membership, ~~and~~ against whom there is ~~no proof~~ of specific atrocities. In view of the nature of the charges and the representative character of the defendants who were before the court in the first trial, the findings of that court, ~~may~~ justly be taken to constitute a general adjudication of the criminal character of the groups and organizations referred to, binding upon all the members thereof in their subsequent trials in occupation courts. In these subsequent trials, therefore, the only necessary proof of guilt of any particular defendant would be his membership in one of those organizations. Proof would also be taken of the nature and extent of the individual's participation. The punishment of each defendant would be made appropriate to the facts of his particular case. In appropriate cases, the penalty might be imprisonment at hard labor, and the offenders could be worked in restoring the devastated areas.

but

Should

not sufficient proof

instead of the death penalty

Individual defendants who can be connected with specific atrocities will be tried and punished in the national courts of the countries concerned, as contemplated in the Moscow Declaration.

VI. NATURE AND COMPOSITION OF TRIBUNALS

We favor the trial of the prime leaders by an international military commission or court, established by Executive Agreement of the heads of State of the interested United Nations. This would require no enabling

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not sent back for trial under the provisions of the Moscow Declaration, etc

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oratory.
legislation. If deemed preferable the tribunal could be established by action of the Supreme Authority (*Central Council for Germany*).

The court might consist of seven members, one each to be appointed by the British Commonwealth, the United States, the Soviet Union and France, and three to be appointed by agreement among the other United Nations who become parties to the proposed procedure.

The court may consist of civilian or military personnel, or both. We would prefer a court of military personnel, as being less likely to give undue weight to technical contentions and legalistic arguments.

The subsequent trials would be had, as noted, in occupation courts; or in the national courts of the country concerned or in their own military courts; or, if desired, by international military courts.

VII. PREPARATION OF CASE

of the basic charges
A successful prosecution will manifestly depend upon early, careful, and thorough compilation of the necessary evidence. This is particularly important with regard to so much of the case as involves the basic criminal plan. Success will depend, further, upon cooperative action in this regard among the interested United Nations, and the early establishment of a competent executive and technical staff to carry out the project.

In our opinion, the United Nations War Crimes Commission cannot be satisfactorily employed for this purpose, and having performed its mission, may now be dissolved.

military We recommend that there be set up ^{*a full time*} ~~an~~ executive group consisting of one representative each of the British Commonwealth, the United States, the Soviet Union, and France. This group should have under it an adequate staff of attorneys and research personnel to search out the available data, analyze them, prepare the charges to conform to the proof, and arrange the evidence for presentation to the international military tribunal.

VIII. SOVIET ATTITUDE

The Soviet attitude, we believe, is indicated in the Note of M. Molotov attached hereto as Tab F. The position taken therein is that the Soviet Union is ready to support all practical measures on the part of the Allied and friendly governments in bringing the Hitlerites and their accomplices to justice, and favors their trial before "the courts of the special international tribunal" and their punishment in accordance with applicable criminal law.

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IX. BRITISH ATTITUDE

In an Aide Memoire from the British Embassy to the Department of State dated October 30, 1944, the British Foreign Office indicates that it is prepared to agree and to cooperate in establishing Mixed Military Tribunals to deal with cases which for one reason or another could not be tried in national courts. This would appear, according to the Aide Memoire, to include those cases where a person is accused of having committed war crimes against the nationals of several of the United Nations.

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Justice Dept. letter, 9-21-72	
By <u>RAP</u>	NARS, Date <u>1-2-80</u>

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