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ARTICLE: Justice For War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism

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SUMMARY:

... The specter of terrorism in the United States has risen in the aftermath of the bombings of the World Trade Center in New York and the Murrah Federal Building in Oklahoma. ... It should be noted, when considering the above precedents and possible application to domestic-source terrorism such as the Oklahoma City bombing, that this original use of the military commission involved the quelling of a domestic insurrection, rather than a foreign threat. ... The downing of Pan Am Flight 103 was a terrorist attack bearing closer examination because it is another war crime the United States is trying to prosecute in the civilian criminal justice system. ... One privilege of the civilian criminal justice system that is denied to the unlawful combatant/terrorist tried by a military commission is a trial by jury, whether or not the accused claims citizenship in the United States. ... There is ample authority in both military and international law recognizing the

aggravated nature of war crimes and the appropriateness of the death penalty as punishment for such crimes. ... In the aftermath of the World Trade Center bombing trials and the Oklahoma City bombing, our society should not need a demonstration so tragically instructive as nuclear terrorism or massive infrastructural devastation to establish that it is illogical and unjust to bring the criminal justice system to bear on such conduct. ...

TEXT:

[*349]

The specter of terrorism in the United States has risen in the aftermath of the bombings of the World Trade Center in New York and the Murrah Federal Building in Oklahoma. The authors fear that the criminal justice system is both an ineffectual and legally inappropriate way to try and punish terrorists. Can the United States afford the risk that a politically motivated terrorist--someone willing to kill innocent civilians--will escape conviction in court on technicalities, and thus be free to pursue an agenda of violence against the nation? Mr. Crona and Mr. Richardson suggest a return to the military tribunal system as an alternative to civilian criminal trials for accused terrorists. They propose that terrorism is properly considered an act of war, and that suspected terrorists [*350] should be treated as suspected war criminals. The Article argues that a return to the military tribunal would not significantly alter the procedural or substantive process due the accused terrorist. The Article also recommends a return to, and even an expansion of, the Ker doctrine of permissive capture of suspected criminals abroad. The authors assert that their response to the increasingly severe consequences of terrorism to the United States is reasonable in light of the risks and costs associated with the domestic criminal justice system.

Introduction: Crime and Punishment

America searches for answers in the aftermath of the terrorist bombing that destroyed a federal office building in Oklahoma City, killing 168 people, n1 including 19 children, and inflicting property damage estimated at \$ 652 million. n2 The day of the bombing, President Clinton promised that the perpetrators would be apprehended and face "swift, certain and severe" punishment. n3 The President's statement compels the question: What justice system would accomplish this purpose? It is our position that it could not be the United States' civilian justice system, which is anything but swift, certain, and severe when dealing with crimes of this magnitude.

Even as the President spoke, the second terrorism "megatrial" arising out of the February, 1993, bombing of the World Trade Center labored into its third month. That proceeding finally ended on October 1, 1995, after over eight months of trial, 200 witnesses, and hundreds of exhibits. Sheik Omar Abdel Rahman and nine of his followers were found

guilty of a conspiracy to commit terrorism. n4 The plotters, however, merely [*351] face lengthy prison terms for their conspiracy and attempted murder of hundreds of people by blowing up underwater commuter tunnels. n5 Thus, they are being punished about as severely as an ordinary robber or drug pusher up for his "third strike."

The prosecutor's opening statements in the second World Trade Center bombing trial, which was the largest terrorism trial ever in an American courtroom, were dramatic. Assistant U.S. Attorney Robert Kuzami tried to define the case for the jury by his first utterance: "This is a case involving a war." n6 He went on to describe the defendants on trial as "soldiers" waging a "jihad," a Muslim holy war, against the United States, and intending to carry out a plan "that would make you shudder" in furtherance of their strategy. n7 Their plan included the demolition of the Hudson River tunnels and the United Nations building, among other crimes. n8

But if this was truly a "war," as the prosecutor said, n9 and it involved a battle plan, by enemy "soldiers" of the Sheik, to target innocent civilian commuters for death in contravention of all international law of armed conflicts, then why was the venue for the war criminals a civilian court instead of a military tribunal? This is the question we take up in this Article because, before America can find the answers it seeks to stop terrorism, America must first ask the right questions.

The progress of the World Trade Center bombing cases present a troubling glimpse of what may lie ahead in the prosecution of those responsible for the bombing of the Alfred P. [*352] Murrah Federal Building in Oklahoma City. The first trial of the New York bombing suspects included nearly five months of testimony, 207 witnesses, 1,003 exhibits, several days of legal argument, and four days of jury deliberations. n10 However, the four convictions were yet another anticlimactic event in the annals of our laborious and dilatory criminal justice system. Now that two trials related to the New York bombing plots are complete, we must look ahead to the expensive and tedious process of second-guesses and second chances by which convictions are reviewed on appeal. It is disheartening to realize that our system has brought the malefactors not "to justice," but merely across the threshold of justice.

In sentencing the terrorists convicted in the initial World Trade Center trial, the judge computed the actuarial life spans of the six victims and added them together to arrive at a sentence of 240 years. n11 He noted evidence at the trial that the plotters had taken steps to enhance the power of their explosives, hoping to maximize the destruction: "You might have succeeded in your nefarious plot to topple the north tower into the south tower," Judge Kevin Duffy said. "That's clearly what you intended. If that happened, we would have been dealing with tens of thousands of deaths." n12

Suppose there had been tens of thousands of deaths? Would the judge then have sentenced the defendants to 24,000 years? The problem is that at the time these offenses were committed there was no provision in ordinary federal criminal law for passing any more severe sentence for these crimes than life in prison without the possibility of parole, nor is there any effectual method for doing so now that the federal death penalty has

arrived. n13 [*353]

Assuming that the convictions and sentences are finally upheld, the defendants will serve life sentences without parole. They will be fed, clothed, and provided for by our taxpayer funded federal correctional system. At its best, our system can do no more than mete out such punishment to an organized cadre of foreign agents who caused incalculable damage to our society. The economic impact of the World Trade Center bombing has been estimated as high as \$ 500 million, n14 but the incalculable portion comprises the six lives lost, n15 the 1,000 people injured, n16 and the additional expense of the increased, and more sophisticated, security measures that will be instituted at all major buildings in the aftermath of this incident and the Oklahoma bombing. n17

The "cost of effective terror," n18 a term coined by the British commentator Lord Rees-Mogg, has been dangerously reduced with the introduction of bombs made out of a mixture of a few thousand dollars worth of chemicals which can cause many times more damage than its price. The recent capture and extradition from Pakistan of Ramzi Yousef, the alleged mastermind of the World Trade Center plot, has also brought home the cost of terror. He was convicted of plotting to blow up American jetliners, after a fourteen week trial. n19 But Ramzi Yousef is not done "costing" us money, for now he will be the defendant in a reprise of the five-month trial which led to the conviction of his alleged co-conspirators in the World Trade [*354] Center bombing. Millions more will be spent to keep him in a maximum security prison for the remainder of his life, if he is convicted. What the "cost of effective terror" compels us to search for is a cost-effective response to the terrorist menace with respect to the kind of due process our system affords to apprehended terrorists.

Since our system never encourages any cost-based bounds on the due process afforded an individual, we hasten to point out that the issue is not only one of cost, but of simple justice. The day before the verdict in the first trial of the World Trade Center bombing defendants, the state of Virginia electrocuted a man convicted of the 1983 murders of two convenience store clerks during two robberies that netted him less than \$ 200. n20 Although afforded similar due process, this man was punished more severely than the bomb plotters in the World Trade Center case, even though the societal impact of his conduct was less.

Reflecting on the above comparison, we see a fundamental discord between the intent and consequences of the recent bombing incidents and the process which our system provides in response. The issue is what response our society can adopt, in the post-Cold-War era, to terrorism--a form of unconventional warfare--being waged against our military, our economic infrastructure, our government and our people by the invisible armies of terror. It is a form of warfare typified by children playing with toys in a day care center one moment, and dying violently the next. The strategy of treating terrorists as ordinary criminals, and placing them into the slow and indifferent mill of our criminal justice system, for acts that far transcend ordinary criminal acts, overlooks the essential difference in the nature of their crimes. Terrorism is a form of warfare in which, by design, innocent civilians are indiscriminately killed and civilian property devastated.

Terrorist acts, therefore, are properly regarded as war crimes or crimes against humanity. They are more appropriately defined by international law and more appropriately punished by a system of military jurisprudence. Throughout the law and history of war, such crimes consistently [*355] have been dealt with in this manner.

In the U.S., terrorist crimes are prosecuted in the civilian system of justice, wherein the charges are based on the mode of transportation or commerce attacked and the particular weapon used, such as explosives. n21 The international system presents a similarly confusing hodge-podge of international legal agreements designed as a law enforcement mechanism against terrorism. Examples include the 1979 Convention on the Taking of Hostages, n22 the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, n23 various conventions on the hijacking and sabotage of aircraft, n24 and the 1973 convention regarding terrorist attacks on "internationally protected persons." n25

Once terrorist acts are understood as constituting war crimes over which there is universal jurisdiction, there is no reason for defining and distinguishing charges, punishments, or causes for extradition based on whether the victims were in an airliner, on a cruise ship, in a government office building, or whether they were being held hostages at the time. Effective enforcement proceeds as a corollary to coherent law. An initial step to a coherent law of terrorism is to treat acts of terrorism according to the essential nature of the acts. They are politically motivated acts of violence, in violation of both U.S. and international law applicable to armed conflicts, regardless of the locations attacked or the weapons or tactics employed.

Various definitions of terrorism seem designed to distinguish between lawful and unlawful uses of force, but they provide neither a clear, practical, nor reliable legal definition upon which a nation may act effectively to counter terrorism. n26 Some avenue of circumvention always exists in the criteria of illegality, based on either the mode of commerce affected, the type of weapon utilized, whether the terrorist involved merely [*356] threatened violence, or what kind of political motivation or objective the terrorist cites. n27

Even if the world community were to settle on a universally applicable and legally plausible basis upon which to prosecute terrorism--such as a definitional construct providing that "insurgent use of force" will be illegal as terrorism absent both the criteria of just cause and just means n28 --the overriding problem remains. As long as nations continue to prosecute terrorism as a class of crime similar to murder or rape, rather than a class of war crime more like ethnic genocide n29 or the execution of civilian hostages, they will fail to eradicate it. Using the approach put forward in this article, nations, including the United States, would have more than a valid, reliable, and universal definition of terrorism--they also would gain the freedom to employ methods of counterterrorism appropriate to the offense. The real challenge would then be to treat terrorism properly, as a war crime, while preserving fundamental civil liberties. As set forth below in Part VI, we conclude that legally proportionate counterterrorism need not conflict with a free society's principles of facilitating, rather than suppressing,

opportunities for peaceful but vigorous dissent.

II. Terrorism Is Warfare, and Should Be Recognized As Such

A. Terrorism as War

In the second World Trade Center bomb plot case, the federal grand jury's indictment accused the Sheik and his accomplices of conspiring "to levy a war of urban terrorism against the United States" n30 Ironically, media coverage of the case failed to note that this portion of the indictment did not constitute a rhetorical flourish, but was a substantive recognition of the essential nature of the perpetrators' acts. n31 The [*357] problem is that the jurisprudential system applied to this case cannot make an appropriate impact on such conduct, no matter how perceptively the system may describe it in the instrument of an indictment.

To take terrorists' target aspirations to a higher level of intensity, imagine detonation of a nuclear weapon (perhaps fashioned from materials acquired from the former Soviet Union through black-market smuggling) n32 in mid-Manhattan at rush hour on Christmas eve. Utilizing what today would be a relatively inexpensive and only moderately complex weapon, such an attack would likely effect the mass murder of hundreds of thousands, totally disrupt a major metropolitan commercial region, and render uninhabitable scores of square miles of densely populated urban land. Under those circumstances, would society actually propose to relegate the perpetrators to the same jurisprudence reserved for ordinary criminals? Would society then seriously expect discouragement of further acts to be the result? Terrorism is not a social problem susceptible to civilian intervention and law enforcement, but a military threat and menace to our civilization appropriate for military repulsion.

In further illustration of the distinction, consider the 1986 incident in which terrorists bombed a Berlin discotheque frequented by American soldiers, killing two servicemen and wounding a large number more. Once the United States developed evidence of Libyan government sponsorship of the attack, the executive branch recognized it for what it was--an act of war--and responded by ordering carrier-based warplanes to strike targets in the Libyan capital of Tripoli. n33 Except for [*358] scant evidence of direct foreign government sponsorship, the World Trade Center bombing was the same kind of hostile act as the Berlin bombing, with the additional objective of inflicting violent destruction upon commerce. At the Murrah building in Oklahoma City, political views energized by the rhetoric of hate motivated a demolition attack on government workers and children. By any reasonable definition, all three incidents were acts of war. The fact that the targets of a U.S. military response may be combatant individuals instead of enemy government agencies or structures should not preclude the "in-kind" military response.

B. Philosophical Underpinnings - The Nature of War

Over the past 25 years, much literature has been published on the subject of terrorism. Many authors begin by grappling with a definition of terrorism. The F.B.I. defines

terrorism as " . . . the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." n34

Intriguing echoes of this terminology are found in the commentary of Count Carl von Clausewitz, in *On War*, regarded as the seminal explication of the concept of war. As Clausewitz construed it, "war is nothing but a continuation of political intercourse . . . by other means." n35 Clausewitz, a Prussian general staff officer turned philosopher, began his chapter "What is war?" by stating, "War therefore is an act of violence intended to compel our opponent to fulfill our will." n36 The F.B.I. definition similarly recognizes that, by means of violence, the terrorist [*359] is attempting to achieve some degree of political influence. n37

Americans are so accustomed to seeing "war" as a metaphorical reference for large-scale programs or determined responses to address a social or political problem--the "War on Poverty," for example--that we fail to recognize the reality of the term when it comes to terrorism. n38 One author on the subject of terrorism observed: "The American experience in war tends to perpetuate a 'Pearl Harbor' mentality." n39 Concomitant with this Pearl Harbor mentality has been the tendency to look on war as a conflict conducted between traditional nationstates, with borders and highly organized military forces, where there is a clearly defined beginning and ending and a clearly identifiable enemy, and where success is measured by the capture of geographical objectives. In Vietnam, the United States saw how this form of tunnel vision of perceiving war as occurring in the traditional model hindered our ability to wage antiinsurgency campaigns. Consider the concept of low-intensity conflict. "Low intensity conflict includes guerrilla war, revolution, insurgency, civil war and coup d'etat. Terrorism, which often is treated as a separate subject, also can be considered as a type of low-intensity warfare." n40

We must begin to recognize this kind of low-intensity warfare as one of the primary military challenges for the United States in the post-Cold-War era, whether it is waged by groups loosely sponsored by nations with whom the United States is not "at war" in any traditional sense, by subnational groups fomenting domestic insurrection, such as anti-government militia, or by groups aspiring to nationhood, such as the various Palestinian organizations. A perfect example of the waging of low-intensity warfare may be found in the case of Ramzi [*360] Ahmed Yousef. He is reportedly a citizen of Iraq--a nation against which the United States, as part of an international coalition, waged a traditional war just two years before the bombing. n41 He is alleged to have been supported financially by a wealthy Persian Gulf businessman opposed to U.S. Forces in Saudi Arabia. It is also believed that he came to the United States for the sole purpose of a terrorist attack in apparent furtherance of the politics of the Persian Gulf War and its aftermath.

C. Inherent and Applicable Constitutional War Powers

To go beyond a theoretical framework, and establish a legal framework for acknowledging that terrorism is an act of war, we must look to our own Constitution.

Inherent in the power of Congress to declare war is the power to define terrorism as war and employ an appropriate military response to it.

The U.S. Constitution provides that the Congress shall have the power to declare war. n42 From the earliest days of the republic, the power of Congress to declare war also has been recognized as the power to define war. In *Talbot v. Seeman*, the Supreme Court recognized the power of Congress to declare a "partial war" targeted at a particular form of enemy aggression, even though we were not at war with the enemy nation in a traditional sense. n43 The Court ruled on measures Congress had adopted to deal with French privateers who were preying on American commercial shipping. Describing the War Power of the Congress, Chief Justice John Marshall wrote:

The whole powers of war being, by the Constitution of the United States, vested in Congress . . . Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial [*361] war, in which case the laws of war, so far as they actually apply to our situation, must be noticed. n44

In *Talbot*, the act of Congress considered by the Court authorized the capture of armed vessels acting either under the authority of the French Government, or under the pretense of authority, for the purpose of committing "depredations" on commercial vessels. n45 A reasonable inference from Chief Justice Marshall's analysis is that the War Powers Clause enabled Congress to authorize hostilities against a particular kind of predatory military activity without declaring a full-scale war against a nation in the traditional sense. n46 An example of similar contemporaneous legislation, where Congress declared war against an enemy which was not a traditional nation, was the authorization of a retaliatory naval expedition against the Barbary Pirates. n47 Both the Oklahoma City bombing and the World Trade Center case serve as modern equivalents of depredation on international and national commerce, committed by a form of paramilitary demolition.

III. Terrorist Acts Are Not Legitimate Acts of War But, Rather, Are War Crimes

Terrorist acts constitute acts of aggression, target innocent civilians and their property for indiscriminate assault, and are conducted by irregular saboteur forces who neither wear uniforms nor openly bear arms. n48 Accordingly, such acts cannot be legitimate acts of war under international law, but rather must be regarded as war crimes or crimes against humanity. n49 Besides the incorporation of customary international law into the United States' federal law, international law also applies directly to cases of domestic terrorism because its norms include the law of war crimes and crimes against humanity. n50
[*362]

A. War of Aggression

International law constructively defines terrorism as a war crime because it constitutes the waging of an "aggressive war." When war is made the means of attainment of a

criminal purpose, it then becomes unlawful war proscribed by customary international law. Further, liability for aggressive war attaches to those who participate at the policy level. n51

For a determination of what criminal intent rises to the level of the intent component in the definition of aggressive war, we may look to the Kellogg-Briand Pact of 1928, n52 which is part of the law of the United States. Under the Kellogg-Briand Pact, aggressive war is renounced as an instrument of national policy.

As a corollary to [the Kellogg-Briand Pact], the changing or attempting to change the international relationships by force of arms is an act of aggression and if the aggression results in war, the war is an aggressive war. It is, therefore, aggressive war that is renounced by the pact . . . and is criminal under international law. n53

Terrorists indisputably employ force of arms for the purpose of changing international relationships. They acknowledge this in statements of responsibility for acts of terrorist violence. After the hostage-taking at the U.S. Embassy in Tehran, for example, Ayatollah Ruhollah Khomeini announced, "We are at war with infidels. . . . I ask all Islamic nations . . . to join the holy war." n54 Those who follow the late Ayatollah's battle cry and participate in this policy of war, at the level of the preparation and instigation of terrorist violence in furtherance of such a policy, commit aggressive war, and thus subject themselves to war-crimes jurisdiction. That the "policy making" required for culpability may occur at a low organizational level and in an informal manner should make the conduct no less culpable. [*363] The indictment against Sheik Rahman in the second New York bombing case focused on his role of policy making in describing his culpable conduct. Abdel Rahman played a key role in articulating the principles and goals of the Jihad organization. The goals were described as the carrying out of terrorist acts, including bombings, murders, and the taking of hostages, in order to oppose the U.S. Government's support for Israel and Egypt. n55 By logical extension, this principle also may apply to domestic terrorists who similarly promote a policy of military destruction of the U.S. Government by civil war when they execute a deliberate and organized military attack on the government or civilian population.

B. Civilian Targets

In 1978, the International Committee of the Red Cross, concerned that the 550 Articles in the four 1949 Geneva Conventions had become too complex as a guiding statement on the laws of armed conflict, condensed the principles into "Fundamental Rules of Humanitarian Law Applicable in Armed Conflicts." n56 Those rules were stated in seven short paragraphs that fit on one printed page. Principle No. 7 states: "Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives." n57

Geneva Protocol II, one of the recent international treaties on this subject, relates to the problem of victims of non-international armed conflicts. It is more explicit in making terrorism an unlawful means of conducting warfare:

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in this paragraph [i.e., all persons who do not take a [*364] direct part in hostilities] are and shall remain prohibited at any time and in any place whatsoever:

. . .

(c) taking of hostages;

(d) acts of terrorism; . . . n58

It is self-evident that acts such as the deliberate bombing of government agencies, civilian office buildings and commercial aircraft--as occurred in Oklahoma City, the World Trade Center and on Pan Am Flight 103, respectively--and the concomitant murder of civilians, including children, are grave breaches of international law and are war crimes. Even if one concedes that an attack on the Bureau of Alcohol, Tobacco and Firearms constitutes an attack on a quasi-military agency, the knowledge that the ATF office, and other government offices inside the Murrah building, contained primarily noncombatant civilians, including children, is a sufficient mental state to qualify the bombing as a war crime.

C. Unlawful Combatants

Another manner in which terrorism violates the laws of war--even if directed toward military personnel or installations--relates to certain requirements promulgated by international law for the outward identification of combatants. n59 In violation of those requirements, the perpetrators of the recent terrorist attacks were neither members of a duly constituted and organized national military force, wearing uniforms or other distinctive insignia, nor bearing arms openly. n60

The Supreme Court had occasion to rule on this issue in the case of *Ex parte Quirin*, n61 decided during the Second World War. The case involved marines of the Third Reich who disembarked from a Nazi U-boat onto several points of the east coast of the United States carrying explosives for sabotage of American war industries and facilities. While landing they wore [*365] uniforms or parts of uniforms of the Reich marines, but they removed and buried the uniforms and adopted civilian dress to carry out their mission. The Supreme Court described their status as follows:

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 to be 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. n62

In support of the foregoing statement, the Court cited "Rules of Land Warfare," a promulgation by the War Department. n63 As quoted by the Court, this publication distinguished the characteristics of lawful belligerents: they carried arms openly and had a "fixed distinctive emblem." n64 Further, "Persons who took up arms and committed hostilities' without having the means of identification [could be punished] as 'war criminals.'" n65

The foregoing rules recently were relaxed by a Geneva Protocol in order to afford guerrilla fighters in so-called "wars of national liberation" a protected status as legitimate combatants, even if they do not wear uniforms and bear arms openly at all times. n66 The President refused to submit this protocol to the Senate for ratification, citing the danger of terrorists concealing [*366] themselves in the civilian population. n67 Nevertheless, it should be noted that the kind of terrorists we are dealing with in the case examples cited do not even satisfy the more liberal standards of the new Protocol. Under those standards, lawful combatants must be organized under a responsible command, must be subject to an internal disciplinary system to enforce compliance with international law applicable in armed conflict (such as the rules protecting civilians from indiscriminate attacks), and must bear arms openly during military deployment and engagement. n68 A casually attired driver of a van carrying a concealed bomb does not fit anyone's definition of a lawful combatant.

IV. A New Military and Legal Response To Terrorism: Establishment and Use of Military Commissions To Try Terrorists

Our country's past military responses to terrorism have been unsatisfactory because they typically have involved a retaliatory military strike on strategic or military targets. An example is the air strike on Tripoli, which was executed after evidence linked the attack at the Berlin discotheque to the Libyan intelligence service. n69 By itself, that attack was not an entirely discriminating response. We believe that the air strike on Tripoli was a justifiable act of self-defense. At the same time, we suggest the addition of a more discriminating military response to our policy options. This response would focus on bringing the individual terrorist or terrorists, including policymaking agents or officials, to trial by military tribunals or "military commissions," instead of trying the terrorists in civilian courts.

Trial of terrorist war criminals by military tribunal may appear to be a novel concept, and suggestive of the way terrorists are handled in less developed democracies such as Egypt and Peru. n70 But the current approach in our system has become extraordinarily fragmented and illogical. Consider the diplomatic [*367] and legal circumstances of the

United States vis a vis Libya in the case of the bombing of Pan Am Flight 103 over Lockerbie, Scotland. Sanctions against Libyan participation in international aviation have already been levied, and the United States and its allies have sought further sanctions to force extradition of officials accused of plotting the bombing of the flight. n71 The current probable venue for trial of this case is Great Britain, but the accused are also under indictment in the U.S. District Court for the District of Columbia n72 and are liable to undergo a criminal trial in the United States by a civilian jury, similar to the trial process had by the World Trade Center conspirators.

The Pan Am bombing case concerns a group of officials of a foreign government, with which our nation was engaged in hostilities proximate in time to the bombing, committing an act of aggression resulting in death by sabotage of nearly 270 civilians. This was a war crime and a crime against humanity by any definition. Yet these individuals, if apprehended and brought within U.S. judicial power, are to be tried in the U.S. District Court on the same docket with, and afforded the same process as, someone who has robbed a federally insured bank. Likewise, the Oklahoma City bombing conspirators will be afforded the same process as someone arrested in a major drug-smuggling case. It is as though we have determined to afford Hermann Goering a civilian criminal trial in the courts of the United States for his part in the Holocaust. The real anomaly here is not our proposal for handling cases of terrorism, but the status quo of the current system.

A. Trial by Military Commission: History

The term "military commission" is applied to describe a military court trial of an enemy belligerent on charges of violation of the laws of war. n73 A panel of military officers typically presides over such a proceeding, but it is distinguishable from a [*368] court martial in that a court martial is a trial of a member of our military forces n74 governed by the Uniform Code of Military Justice. n75

Military commissions first had extensive use during the Civil War. Before the advent of modern terrorism, the last significant case of terrorist sabotage in New York City involved Confederate saboteurs who sought to disrupt the Union war effort. A Confederate army captain named Robert Kennedy adopted a civilian disguise in a scheme to set fire to various buildings in the city. n76 Captured, tried, and convicted by a military commission, Kennedy was sentenced to hanging for acting as a spy and "undertaking to carry on irregular and unlawful warfare." n77 Another Confederate saboteur, John Beall, was adjudged a spy and a guerrilla for seizing a merchant vessel in Lake Erie and for attempting, unsuccessfully, to derail a train in New York. Beall was also sentenced to hanging. n78

The annals of military commission cases from the Civil War are replete with similar cases of Confederate terrorists sentenced capitally n79 for seizure, arson or destruction of transportation, communication or other systems of infrastructure. n80 Their acts parallel modern terrorism's targeting of centers of commerce, airliners, commuter tunnels, various energy production and transmission facilities, and offices of the federal government.

It should be noted, when considering the above precedents and possible application to domestic-source terrorism such as the Oklahoma City bombing, that this original use of the military commission involved the quelling of a domestic insurrection, rather than a foreign threat. [*369]

B. Modern Legal Authority For and Constitution of the Military Commission

After the Civil War, United States Military commissions next had extensive use as tribunals for war crimes at the close of the Second World War. In one of the cases arising out of the Second World War, *In re Yamashita*,ⁿ⁸¹ the Supreme Court broadly interpreted the jurisdiction of military commissions to try war crimes as an adjunct to the war powers delegated to Congress by the Constitution.ⁿ⁸²

The petitioner in the case, General Tomoyuki Yamashita, was Japanese commander in the Philippines. He was charged with permitting his troops to engage in brutal atrocities against civilians and prisoners of war, and wanton destruction of both public and private property, including religious monuments. Yamashita was tried by a military commission convened shortly after the general Japanese surrender. He was convicted and sentenced to hang.ⁿ⁸³

In his petition for a writ of habeas corpus, Yamashita argued to the Supreme Court that the military commission lacked jurisdiction to try him after the cessation of hostilities. In response, the Court stated that it recognized as an important part of the conduct of any war the adoption by the military commander of actions designed not only to repel and defeat the enemy on the field of battle, but also "to seize and subject to disciplinary measures" combatants who have committed war crimes.ⁿ⁸⁴ Indeed, in the war against terrorism the capture and punishment of the terrorists is the most important aspect of the war since the manner in which their "invisible armies" strike leaves little chance to meet them on the field of battle.

In General Yamashita's case, the Court went on to hold that the military commander, as part of the war power delegated by Congress, could administer a system of military justice for the trial and punishment of enemy combatants who have [*370] violated the law of war.ⁿ⁸⁵ Such a system would operate "as a preventive measure," and continue in operation "so long as a state of war exists."ⁿ⁸⁶ The existence of a state of war is defined by the Court to extend from the declaration of war to the proclamation of peace.ⁿ⁸⁷ In applying these principles to explain why the cessation of hostilities does not terminate the authority of military commissions, the Court stated:

The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced.ⁿ⁸⁸

C. Yamashita Principles Applied to Terrorist War Crimes

The downing of Pan Am Flight 103 was a terrorist attack bearing closer examination because it is another war crime the United States is trying to prosecute in the civilian criminal justice system. When reduced to its essential nature, this act was a mass execution of civilian hostages, via a military operation, planned and conducted by officials of a foreign state and their agents. The downing of the aircraft was nothing more than a reprisal against civilians, strictly forbidden by international law, n89 to retaliate for the American air strike on Tripoli (which, the authors assert, was justifiable retaliation aimed at military targets for the earlier terrorist bombing at the Berlin discotheque). n90 The United States and the world community have been seeking to hold the Libyan government accountable by imposing sanctions against Libyan aviation and by threatening further economic sanctions with the aim of forcing the extradition of the perpetrators to stand trial. n91 But what kind of trial? [*371] As previously stated, the suspects are under indictment in the D.C. District Court in the United States, but civilian trial in Britain is also contemplated.

When we compare this scenario to cases that arose out of World War II, the fundamental misconception in our government's legal approach to the Pan Am 103 bombing becomes apparent. It is absurd to think that a Nazi or Japanese officer who ordered the death of innocent civilians during a World War II reprisal should have been indicted in a U.S. District Court rather than being subjected to a trial before a military tribunal.

The only troublesome aspect of drawing a parallel between these two situations is the sporadic nature of the acts of war in which the terrorist engages. The reasoning of Yamashita is helpful in this regard because it supports the idea that it is constitutional for Congress to authorize military commissions to remedy the evils produced by war crimes, regardless of whether there are ongoing hostilities at the time of trial. n92

Further, under *Ex parte Quirin*, n93 it does not matter whether the saboteurs being charged with unlawful warfare are in "the theatre or zone of active military operations," whether they contemplate a collision with the armed forces of the United States, or whether the instrumentalities they are attacking are military or civilian in nature. n94

D. Universal Jurisdiction

Besides posing no jurisdictional obstacles based on timing or continuity of hostilities, a system for prosecution of terrorism through the military commission framework poses no spatial jurisdictional obstacles. "The law of the United States includes international law," n95 and international law authorizes [*372] "universal jurisdiction," or every-nation jurisdiction over war crimes and crimes against humanity. n96 Pursuant to the principle of universal jurisdiction, certain conduct, such as war-criminal conduct, constitutes offenses of a nature so contemptible and abhorrent that the perpetrators must be regarded as enemies of all people. n97 "Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses." n98

The practical effect of this principle is to impose jurisdiction over terrorists regardless of where the acts occurred. Further, citizenship of the accused poses no obstacle. What we are dealing with in the case of modern terrorists, like the saboteurs in *Ex parte Quirin*,ⁿ⁹⁹ are belligerent agents of either foreign powers or domestic insurrectionist groups committing war crimes. The Restatement (Third) of Foreign Relations Law provides, "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps terrorism" n100

Based on universal jurisdiction, the World War II allied nations established the International Military Tribunal at Nuremberg and the occupation-zone military courts. Further, the U.S. Court of Appeals for the 6th Circuit, in a recent case involving an accused war criminal, explicitly noted that the post-war war-crimes tribunals "exercised a much broader jurisdiction [than traditional military courts] . . . which extends beyond the territorial limits of any nation." n101 The universality principle applied to war crimes accordingly affords transnational as well as intranational scope to the power to apprehend and punish war criminals. [*373]

Availability of universal jurisdiction is important because of the inherent limitations on the jurisdiction of the U.S. District Courts, the usual venue for prosecution of terrorist crimes. The acts prosecuted by federal courts must lie within the "special maritime and territorial jurisdiction of the United States," n102 or some special factor would have to be present to make the crime a federal offense.

Unfortunately, this limited federal jurisdiction could produce anomalies in dealing with terrorists. For example, a fanatical group who broke into a local school, then assembled and shot the faculty to draw attention to a political message, would not be subject to prosecution under the federal death penalty law because no weapons of mass destruction would have been used n103 and the property would not fall under federal jurisdiction. Whether they could be sentenced to death if convicted would depend entirely on state law.

E. Proposed Government Policy Arising from War-Crime Principles and Precedents: Declaring War on Terrorism and Granting Jurisdiction to Military Commissions

For an appropriate government policy against terrorism, the foundational step is to recognize that terrorists are levying war against our society in a manner that contravenes international law. Accordingly, Congress must declare war on them. The specific legislation would not have to be a "declaration of war" in so many words. Rather, it could be similar in wording to the de facto declaration of war against Iraq in our most recent military conflict entitled "Authorization for Use of Military Force Against Iraq Resolution." n104 With respect to terrorism, Congress should adopt a joint resolution authorizing the use of military means against terrorism generally, and specify the use of military commissions to try and punish terrorists. The resolution should provide first that the jurisdiction for the commissions, under the universality principle, shall extend to past

or future terrorist acts committed anywhere in the world which target Americans or are designed to oppose American policy. [*374] Second, Congress should declare the state of belligerency existing between the United States and terrorists shall extend from the conspiracy and planning stage of terrorist acts right through to the capture, trial and final punishment of the perpetrators.

The element of retroactivity in providing for the punishment of past and future acts is not only supported by the universality doctrine, n105 but by common sense. How could it be argued that Japanese war crimes occurring in the initial attack on Pearl Harbor and the Philippines (such as initiating a war of aggression) could not be punished because they occurred the day before the formal declaration of war by Congress? Congress should have similar power to define terrorist acts, which are almost invariably in the nature of "sneak attacks," retroactively as acts of war, and provide for their appropriate punishment. This retroactivity principle is important as a way to administer proper punishment for terrorist acts that occurred before there was a viable federal death penalty without running afoul of the constitutional prohibition on ex post facto laws. n106

An ex post facto law is one that imposes punishment for an act not punishable at the time it was committed, or imposes punishment in addition to that prescribed at the time the act was committed. n107 Under the present system, those responsible for the murder of 270 people in the terrorist destruction of Pan Am Flight 103 cannot be punished by the federal death penalty enacted in 1994 n108 for a crime, however heinous, committed in 1988. Under customary international law, though, the Pan Am 103 murders were war crimes punishable by death at the time they were committed. Thus, merely providing a procedure with retroactive application would not constitute a breach of the prohibition on ex post facto laws. n109

The constitutional authority for declaring war on terrorism is found not only in the case law cited, but in the very structure and language of the Constitution. In the sentence immediately preceding the grant of power to Congress to declare war, Congress [*375] is allocated the power "to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." n110 Terrorists are the politically motivated pirates of our age, "hostis humani generis" as the seventeenth century English jurist Sir Edward Coke would phrase it. n111 The definition and punishment of war crimes and crimes of universal jurisdiction are constitutionally the direct responsibility of Congress, not of the judiciary, and the historically and legally approved mechanism for discharging this duty is the military commission, not the federal district courts.

F. Structure of Military Commissions

Congressional authorization for the use of military means against terrorism should include a provision authorizing the President, as Commander-in-Chief of the armed forces, to establish a military commission or tribunal for the formal accusation, trial and punishment of enemy combatants who violate the law of war. This is consistent with the history of U.S. warfare. n112

The military commission with jurisdiction over a particular offense is the one established under the authority of the commander in the particular theatre of war in which the war crime occurred. n113 Since the theatre of combat in the case of terrorism is amorphous and universal, the appropriate military commander to appoint the commission should be the Chairman of the Joint Chiefs of Staff. He would also be empowered to prescribe rules and regulations for the trial of terrorists. However, these rules and regulations would not need to mirror those used for courts martial of members of United States armed forces under the Uniform Code of Military Justice (UCMJ). The UCMJ uses a form of due process almost as elaborate as the civilian criminal justice system. The applicable principle under international law is that enemy prisoners of war who were legitimate combatants in the first place must be afforded the same form of due process as our own soldiers, but [*376] enemy war criminals are not so entitled. n114 Ironically, Oklahoma City bombing suspect Timothy McVeigh allegedly has characterized himself as a "prisoner of war." n115 As more specifically described below, under the law of nations, participants in war charged with the execution of civilians and children in acts of mass murder are not afforded the same level of due-process protection as legitimate prisoners of war.

As opposed to ordinary courts martial, the jurisdiction and practice of military commissions is distinguished not only in World War II era cases on the subject, but also in the subsequent enactment of the UCMJ. n116 On this point, the UCMJ states, "The provisions of this chapter conferring jurisdiction on courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions" n117 Nothing could be clearer than the intent of this section to prevent war criminals from taking advantage of rights afforded to armed services personnel by the Uniform Military Code of Justice.

Instead of a U.S. military commission, one may ask, why not an international war crimes tribunal for these international crimes? In the aftermath of World War II, the prototype international tribunals at Nuremberg and Tokyo were convened to try major military and political leaders whose crimes affected numerous countries. Lesser tribunals, composed of judges from one of the victorious powers, were convened in each of the occupation zones to try the lesser war criminals. n118 Military commissions, like the one in the Yamashita case, n119 were established by the U.S. Armed Forces to deal with crimes involving areas solely under American jurisdiction. Our position is simply that crimes targeting American citizens or their government should be tried by American tribunals. We see no legal or practical reason for resort to an international tribunal which [*377] might result in negotiated punishments for terrorists in the same way that mild sanctions against rogue dictators are brokered in the U.N. Security Council. n120

An example of the problem of relying on judicial processes established by an international body is the international tribunal for the trial of war crimes committed in the former Yugoslavia. n121 Trial by absentia is prohibited n122 and there is no realistic prospect of obtaining custody of the main culprits. n123 Moreover, the death penalty, which is accepted in American but not European culture, is not available for even the

most brutal crimes, and punishment by imprisonment depends on some member state of the United Nations donating prison space. n124 [*378]

V. A Military Commission For The Trial of Terrorists: Practical Application And Comparative Advantages

We do not suggest the trial of terrorists by a military commission based solely on an abstract principle of affording the appropriate kind of due process, but also on the practical benefits of this procedure. We believe that public sentiment in this country, as articulated by the President, favors "swift, certain and severe" punishment n125 for all violent criminals, including terrorists. The best chance for achieving this result is under the system we propose.

A. Certainty of Justice Through Avoidance of a Jury Trial

The primary purpose of any adjudicative proceeding where a person is accused of a crime is to find the truth as to that person's factual guilt or innocence. The search for the truth in the terrorism arena will be enhanced by the military commission framework.

1. Appropriate Factfinder

One privilege of the civilian criminal justice system that is denied to the unlawful combatant/terrorist tried by a military commission is a trial by jury, whether or not the accused claims citizenship in the United States. n126 The latter part of this principle is important in the system we propose. It is needed to ensure that, for example, one of the soldiers in Sheik Rahman's alleged war of urban terrorism is not treated disparately just because the individual is a native U.S. citizen, as in the case of the suspect Clement Rodney Hampton-El, n127 or a naturalized citizen, as in the case of Nidal Ayyad, the engineer [*379] convicted of ordering the chemicals for the World Trade Center bomb. n128 It is the status of being an enemy belligerent bent on hostile acts that determines jurisdiction. n129

In circumstances where a terrorist is factually guilty, there can be no serious argument as to whether a guilty verdict is more likely if the defendant is tried before a court of commissioned military officers, as opposed to a panel of twelve civilian jurors.

The civilian criminal justice system, which entails a trial to a jury of twelve persons who must unanimously agree that a particular defendant is guilty beyond a reasonable doubt, is designed to err on the side of letting the guilty go free rather than convicting the innocent. However, when this nation is faced with terrorist attacks that inflict mass murder or hundreds of millions of dollars of damage in a single instance, we can no longer afford procedures that err so heavily on the side of freeing the guilty. Protection of society and the lives of thousands of potential victims becomes paramount.

While it is our position that one must be willing to accept a greater risk that innocent people will be convicted to prevent the larger harm of terrorist attacks, we nevertheless

do not concede that greater rates of convicting the innocent necessarily would result from such a policy. A panel of trained military officers, selected on a nationwide basis, actually may be less vulnerable to the emotional pressures and prejudices which could tempt a civilian jury to convict a person who is factually innocent. Would any citizen from Oklahoma want to go home after jury service and explain to family or neighbors why he or she voted to find Terry Nichols or Timothy McVeigh not guilty? In changing the venue of the Oklahoma City bombing trial to Denver, Judge Richard Matsch stated, "There is so great a prejudice against these two defendants in the state of Oklahoma that they cannot obtain a fair and impartial trial." n130 [*380]

An example of the civilian jury system gone awry was the seven-month, multi-million dollar megatrial of General Manuel Noriega of Panama for drug trafficking. The trial nearly went for naught because of a single, balking juror, despite the fact that the government gave concessions to numerous other drug traffickers in order to present enough evidence to convince the jury of Noriega's guilt. n131 A hung jury in such a case would lead to the unacceptable result of an expensive retrial before an entirely new jury.

The jury selection process in the civilian courts permits the defense and the prosecution each an opportunity to participate in the selection, or de-selection, of members of the jury who might be sympathetic to their clients or cause. Any opportunity, however subtle, for actualization of a "right" to jurors who sympathize with terrorists defies both logic and justice. Those who sympathize with terrorists endorse the view that presumes that "repression" of peoples by one nation justifies private and indiscriminate acts of violence against the peoples of another nation because of that nation's policies toward the "repressive" nation. The basis of jurisdiction against terrorists--the concept of universal jurisdiction--establishes that terrorism consists of conduct for which no justification exists under any circumstances.

By the same analysis, the presumed, imagined, or even actual misdeeds of federal law-enforcement agencies in the Branch Davidian incident in Waco, Texas, do not justify the indiscriminate killing of people who happen to work for the federal government. Those who have perpetrated such homicides must be properly designated, and prosecuted, as war criminals. Those who argue that "the Oklahoma City bombing was bad, but considering the Waco raid, . . ." assert a value system that comports with neither the law of nations, the historic rules of war, nor rational notions of justice in a civilized society. [*381]

2. Stacked Deck Against the Defense?

Some may condemn a military tribunal of five commissioned and experienced officer-judges, constituted for the express purpose of trying terrorist cases, as inevitably biased against all defendants standing before it. In fact, neither history nor logic supports such reflexive criticism. In the Nuremberg war crimes trials, three of the twenty-two major defendants were acquitted, four were sentenced to twenty years in prison or less, and three received life sentences. n132 Thus, the International Military Tribunal spared nearly half of the accused architects of Nazi policy that led to the Holocaust, World War II, and

other forms of barbarism. These trained jurists sought to make determinations based on the evidence presented to them.

The same was true of the United States military tribunals, composed solely of American judges, which tried 177 other Nazi officials and members of the SS, found 142 guilty of crimes against the law of nations, but executed only twelve. n133 There is no reason to believe that a modern military commission would be less circumspect. In fact, such a commission would likely be less susceptible than civilian jurors to decisions based on "inflamed passions" rather than evidence.

B. Intimidation of the Fact Finder

At the conclusion of the first World Trade Center bombing trial, jurors were startled by an outburst of insults and threatening gestures from the defendants as marshals dragged them from the courtroom immediately after the verdict was returned. n134 It would be more appropriate, in cases of this nature, that the panel subjected to this sort of intimidation be one of trained military officers who entered into their profession [*382] under the assumption that they might have to risk their lives in service. They would have the training and experience, both physical and psychological, to deal with such threats. We question whether it is fair to ask civilian jurors to expose themselves or their families to possible terrorist retribution from foreign agents or members of well-armed domestic militia groups.

C. Certainty of Justice Through Use of All Relevant Evidence

The uncertainty of verdicts in the civilian criminal justice system is attributable to the various rules which result in the exclusion of relevant evidence. The hearsay rule is an example of an evidentiary rule which does not necessarily apply to trial by military commission. The rules prescribed for the admission of evidence in *In re Yamashita* n135 permitted the introduction of such evidence "as in [the Commission's] opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man" n136 The defendant objected to the admission of certain opinion and hearsay evidence under this rule. n137 The Supreme Court held that the military commission's rulings, not being in violation of any act of Congress or military command, were not even subject to review by the courts, but only by military authorities. n138

Hearsay rules are designed to admit evidence of the highest quality before the court. However, the recent adoption of the "residual hearsay rules" n139 acknowledge the danger to the truth-finding process posed by mechanistic bars to the admission of hearsay. Under the system we propose, all relevant evidence would be admitted, but a trained panel of factfinders would judge the weight and reliability of the evidence. We perceive this system as better serving the truth-finding function [*383] than automatically excluding certain categories of relevant evidence solely because hearsay may be given undue weight by a panel of inexperienced lay factfinders, as would serve on a typical jury.

A relaxation of the hearsay rule might become critical in a prosecution for terrorism where it may be impossible to produce live witnesses to an event which occurred years earlier in a foreign country. For example, the indictment in the Pan Am Flight 103 case n140 details the alleged purchase of clothing, by Libyan intelligence agent Abdel Bassett, for placement in the suitcase with the bomb. The clothing was used to disguise the contents of the suitcase containing the bomb, which was placed inside a radio-cassette player. n141 Under the rules of evidence applicable in U.S. District Court, n142 the prosecution would have to produce in person the Maltese shopkeeper to identify Abdel Bassett as the man who allegedly purchased the clothing n143 back in 1988, as opposed to producing the investigator who tracked down the shopkeeper and showed him a photograph of Abdel Bassett. Even if we assume that the shopkeeper could be located six years or more after the fact, we recognize that it is nearly impossible to secure involuntary testimony from a witness who is a citizen of a foreign country, especially one that historically has been less than sympathetic to the United States. The reach of a federal court subpoena simply does not extend to Malta.

A reading of the indictment in the Pan Am flight 103 case reveals the scenario described above repeated throughout the chain of evidence. Assembling the proof in that case from numerous witnesses in several different countries, even if the witnesses were available and cooperative, would be logistically more difficult than reassembling the actual suitcase and the bomb. [*384]

Part of the reason for the large cast of witnesses in the World Trade Center trial was to lay evidentiary foundations. n144 This raises the question of whether U.S. prosecutors would be expected to fly into the United States every Scottish villager and investigator who recovered a shard of the suitcase, including fragments of the bomb and the garments used to conceal it, in order to lay a foundation for the admission of the items into evidence. n145 The investigation of the Pan Am 103 flight has now covered 52 nations and 14,000 witnesses, with numerous forensic techniques used. n146 The logistics of presenting the evidence in such a case under the rules of evidence for civilian trials seem overwhelming. Similar identification and evidentiary-foundation obstacles will certainly face the prosecutors in the Oklahoma City bombing case.

When the issue of whether to use military force against Libya was considered, the government did not impose on the military commanders the prerequisite of showing evidence according to the federal evidentiary rules. In deciding to bomb Tripoli, we did not demand an evidentiary foundation for intelligence information indicating Libyan involvement in the Berlin discotheque bombing. We instead relied on covert intelligence, gleaned from intercepted Libyan cable transmissions, sufficient to persuade the government that there should be no hesitation to act to protect U.S. interests. n147

Thus the issue: Should a hostile foreign agent be acquitted of the murder of 270 innocent people because a Maltese shopkeeper witness "disappears" or becomes recalcitrant at the time of trial? We submit that a general rule admitting all evidence which would be probative in the mind of a reasonable person is essential for trials involving terrorist

incidents, and trial by military commission under a war-crimes theory provides the most effective way to implement such a rule. [*385]

A rule admitting all probative evidence might have another beneficial effect; it would eliminate the various exclusionary rules of evidence based on allegations of a constitutional violation, another common obstacle to successful investigation and prosecution in our justice system. The rules we refer to here prohibit the admission of evidence obtained from an illegal search or confession, or other statement of an accused who did not receive Miranda warnings. n148 Eliminating the exclusionary rules would make the military commission more effective in its truth-finding because of the expanded body of information which it could use to reach findings and conclusions. There has been substantial criticism of the use of exclusionary rules of evidence precisely because of their adverse impact on the truth-finding function of a trial. n149 In *United States v. Janis*, n150 the Supreme Court held that the use of the exclusionary rule would be confined to situations where its deterrent effect was substantial, due to the societal cost inherent in the exclusion of relevant evidence. n151 What deterrent effect should we expect such a rule to have when law enforcement is subjected to the kind of pressures generated by a major terrorist attack? The pressures impelling law officers to get a suspect into custody, to get "the goods" on him and, most importantly, to prevent further catastrophes from occurring, would militate against any deterrent effect.

We question whether these Fourth and Fifth Amendment constitutional guarantees were ever intended to benefit hostile agents engaged in clandestine war against our society on behalf of a foreign power or political cause. Apart from the issue of evidence which may be excluded at trial, there is the issue of what investigative opportunities might be lost in the absence of a thorough interrogation of suspected terrorists. We question, for example, whether the plot to destroy New York's Lincoln and Holland tunnels would not have been discovered sooner if, instead of immediately furnishing the World Trade Center [*386] bombers with lawyers who admonished them to stay silent, the government instead had been able to conduct a proper, noncoercive interrogation and follow up promptly on the leads thereby generated. The societal interest in averting further mass murders by members of terrorist rings not yet apprehended simply outweighs application of the prophylactic Miranda n152 rule to the questioning of one who has been caught.

The Fifth Amendment n153 prohibition on compulsory selfincrimination recognizes the inherent unreliability of coerced confessions and the danger of making the adjudicatory body an accomplice in coercive methods by sanctioning them. Nevertheless, one can see the absurdity of reading Iraqi prisoners of war, in our most recent conventional conflict, a Miranda n154 warning. Military regulations for humane interrogations would accomplish the same purpose as the Fifth Amendment provision without cutting off a source of vital information. There is an increasing recognition in civilized jurisprudence that somewhat more persuasive, but not torturous, methods of interrogation may be appropriate when the object is to prevent the next terrorist attack and the mass casualties attendant to it. n155

Similarly, the purpose of the Fourth Amendment n156 is to prevent the arbitrary exercise of government power for civilian searches and arrests. It would provoke laughter to

suggest that soldiers in Desert Storm should have obtained search or arrest warrants before capturing Iraqi soldiers and their equipment. Those who would criticize our proposals as violative of civil liberties miss the basic point: we are talking about means of waging war, not means of conducting law enforcement.

D. Swiftness of Justice

Jury trials tend to be lengthy both because of the time-consuming process of jury selection and because, at many times during the course of the trial, legal arguments must be presented outside the presence of the jury to avoid prejudice to the [*387] fact finder. It is common knowledge in the legal profession that trials to the court are shorter than jury trials by at least onehalf. It is useful, in this respect, to compare the trial of the Japanese war criminal, General Yamashita, to the first World Trade Center bombing trial. In the proceeding against the terrorists, a jury trial involving 207 witnesses took over five months. n157 In Yamashita, the military commission heard 286 witnesses and over 3,000 pages of testimony in just over five weeks. n158 In the military proceeding, the period of time from when General Yamashita was first served with the charges to when the conviction and sentence were finally upheld on appeal was shorter than the time from the beginning of trial to the jury verdict in the first World Trade Center trial. The second World Trade Center trial was even longer. n159

E. A Penalty Proportionate to the Offense

We do not intend this article to be part of the general debate on the propriety or efficacy of the death penalty for the punishment of ordinary domestic crimes. Congress has passed new terrorism legislation which, from the standpoint of our analysis, obviously does not go far enough. n160 We have categorized [*388] terrorist acts as "acts of war" and when a nation goes to war the question is not whether there will be casualties, but whose side will bear the casualties, and in what number.

Now that Congress has passed new crime control legislation, the death penalty has become available for a host of federal crimes. n161 We believe that, in view of the catastrophic loss of life and economic damage caused by terrorist attacks, the argument that the death penalty for perpetrators of these acts is a reasonable, just, and proportionate penalty becomes even more compelling than the argument for the death penalty for domestic crimes. The trend in the imposition of the death penalty for domestic crimes has been to require that aggravating factors be present to justify the extreme penalty. n162 There can be no more aggravating factor for consideration of capital punishment than intentional murder and destruction of property for the purpose of coercing government policy choices.

There is ample authority in both military and international law recognizing the aggravated nature of war crimes and the appropriateness of the death penalty as punishment for such crimes. On December 11, 1946, the United Nations General Assembly unanimously adopted Resolution 95(I) affirming "the principles of international law recognized by the Charter of the Nuremberg Tribunal," n163 and the

Tribunal's judgment, which included death sentences for a dozen Nazi officials. n164 In this instance, the use of the death penalty was universally accepted by the nations of the world community, regardless of whether they applied the death penalty for domestic crimes.

Further, two hundred and fifty-eight lesser officials of the Third Reich, many of them having been involved in running [*389] concentration camps, were sentenced to death by American Military Tribunals operating under the Nuremberg principles. n165

Colonel Winthrop points out, in his treatise on military common law, that there traditionally has been no restriction on the form of punishment that can be imposed on unlawful combatants by a military commission, and death by hanging was a commonly imposed punishment. n166

The question, then, becomes how to ensure that the legal regime of capital punishment works in the case of convicted war-criminal terrorists, so that the victims, families of victims, and society in general do not have to wait for decades for the penalty to be carried out, as is the case with condemned domestic criminals. Achieving this goal will require more than "tinkering" with the system; it will require the wholesale overhaul represented by our proposal for the use of military commissions to try these crimes.

One advantage of a military system of justice is that a terrorist's status as an unlawful combatant or saboteur renders him liable to punishment, including the death penalty, notwithstanding his success in the particular terrorist enterprise planned. n167 This is as it should be. There is no moral or practical difference, if terrorism is viewed properly as a form of war crime, between terrorists who, on the one hand, succeed in detonating a bomb and killing hundreds and terrorists who, on the other hand, plan the same sort of act, but are interrupted by the authorities as they are mixing the chemicals for the bomb. That is precisely what occurred with the conspirators in Sheik Rahman's organization. n168 Yet, under the recently enacted death penalty provisions for federal crimes, perpetrators of [*390] attempted murders are not eligible for the death penalty, even if they are caught preparing to use a weapon of mass destruction. n169

One reason the last Congress went through the ordeal of legislating a federal death penalty is that prior federal statutes providing for the death penalty have been declared unconstitutional for failure to provide a mechanism for analysis of aggravating and mitigating factors. n170 The only federal death penalty provision that has been in effect in the interim between the old law being declared unconstitutional and the passage of the new provisions in 1994 was the provision for murder committed in connection with a drug enterprise. n171 However, the only person sentenced to death under the "drug kingpin" murder statute is currently enmeshed in the long process of appeal that these cases generate. n172

Unfortunately, the Federal Death Penalty law includes aggravating and mitigating factors for consideration. Those factors were supposed to make application of the law consistent and rational, but will have the practical effect of making it difficult to obtain a capital

sentence after a jury verdict.

If the federal death penalty law had been in effect at the time of the World Trade Center bombing, and the defendants had been charged with homicide with the government seeking the death penalty, the government would have asserted these aggravating factors: destruction of property affecting interstate commerce by explosives, use of a weapon of mass destruction, [*391] grave risk of death to additional persons, and substantial planning and premeditation to commit an act of terrorism. n173 The defendants could have pled as mitigating factors their lack of significant criminal history, impaired mental capacity, minor participation in the offense, and any other factors concerning their background which the defense attorney may have advanced. n174

It is difficult for the government to select a jury of twelve ordinary persons who will not have at least one juror who, when given these factors to balance, will vote against the death penalty, vitiating the unanimity necessary for a death sentence. One of the authors of this article is a prosecutor in an urban jurisdiction where the death penalty has been sought on eleven occasions, yet only approved once by a jury. The offenders sentenced only to life in prison include a multiple, repeat murderer and an habitual criminal who killed a deputy sheriff in the course of an escape attempt. n175

We could be more certain of appropriate sentencing decisions in terrorism cases if they were entrusted to a panel of military officers, trained and accustomed to make life-and-death decisions as a part of their job. Moreover, in the context of a war crimes trial, there is no suggestion in the relevant legal authorities that the court needs to go through any rigid analysis of aggravating and mitigating factors. That the defendant intentionally killed innocent civilians in pursuit of his own geopolitical or anarchistic agenda should be the "aggravating factor" conclusive as against any mitigating factors.

The debate over the death penalty for domestic crimes often bogs down in the question of whether it provides "generalized" deterrence. Obviously, once carried out, the death penalty is 100% certain to deter the specific individual executed. But apart from deterrence, there is a pragmatic reason for use of the death penalty against convicted terrorists that is not a consideration in the case of domestic crime--the elimination of an impetus for hostage taking by the imprisoned terrorists' uncaptured compatriots. [*392]

The history of modern terrorism is replete with examples of hostage-taking terrorists having as their principal demand the release of terrorists imprisoned for prior offenses. An egregious instance of this was the June, 1985, hijacking of TWA Flight 847 in flight from Rome to Athens by terrorists demanding the release of 17 of their colleagues in a Kuwaiti prison. n176 Failing to win the release of their comrades on this occasion, the terrorists hijacked yet another airplane three years later, this time a Kuwaiti aircraft, even though the Kuwaiti authorities once before had refused their demands.

In the piracy of the cruise ship Achille Lauro, the perpetrators demanded the release of fifty convicted terrorists in Israeli jails. When their demands were not met, the hijackers murdered an aged and disabled American tourist, Leon Klinghoffer. n177

But even Israel, with its reputation for being tough on terrorism, has felt compelled on more than one occasion to trade imprisoned terrorists for its own troops being held hostage. n178 The official policy of the U.S. government is to make no concessions to hostage-taking terrorists. However, countervailing pressures have undermined the stated policy, leading to back-door deals and episodes like the illegal arms-for-hostages transaction of the Iran-contra affair. n179 Thus, the danger of these hostage-taking events includes both the danger to the physical safety of hostages and the danger to national credibility when leaders, despite tough official pronouncements [*393] of "no negotiation with terrorists," find themselves compelled by the human dimension of a hostage crisis to grant concessions under the table.

Swift execution of convicted terrorists solves the hostage dilemma by eliminating the chief objects of hostage-taker demands. It is true that putting terrorists to death might also prompt hostage taking or retaliatory attacks. However, the window of vulnerability for such attacks would likely be more restricted to the time period before or shortly after the execution, allowing for heightened vigilance. Further, mere retaliatory attacks without the hostage-taking element do not create the scenario of days of agonizing diplomatic focus as the government tries to find ways of circumventing stated policy in reaction to the humane instinct to "do something" to free innocent people in peril.

The death penalty is, therefore, the appropriate, proportionate and precedential punishment for terrorism. It has practical benefits and will be most swiftly and surely applied in a system of trial by military commissions.

F. Trial in Absentia/Joinder of Defendants

Press reports of the conviction of the World Trade Center bombers after the first trial included a reminder that two alleged conspirators, Ramzi Ahmed Yousef and Abdul Rahman Yasin, were still at large at that time. Yousef, who subsequently was captured in February 1995, emerged as a key figure in the plot, and is accused of entering the United States with the sole purpose of carrying out a terrorist attack. n180 Yousef is also accused of placing a bomb aboard Philippine Airlines Flight 434 in December 1994, which killed one Japanese passenger, and for targeting for bombing eleven other commercial jet flights with destinations in the United States. n181 The question then is whether the government must put on a third multimillion dollar trial for Yousef. The answer is yes, because in our current system there is no provision for trial in absentia. [*394]

To solve the problem of successive trials when some of the terrorists involved in a particular incident are captured after the initial trial, the war crimes model for prosecution again proves useful. There is ample authority under international law for the trial of fugitive war criminals in absentia. Such a procedure was permitted by the Charter of the International Military Tribunal n182 and resulted in a death sentence in absentia for Nazi fuhrer-in-waiting Martin Bormann, who was believed to be at large at the time of his trial, but is now believed not to have survived the war. n183

Another defendant in the World Trade Center case, Bilal Alkaysi, was caught and charged with the other bombers, but was not joined with them for trial. n184 One legal cause for severance of defendants for trial is that jury prejudice will result from grouping a defendant against whom the evidence is sparse with those whose guilt is more obvious. n185 Without a jury, most of the legal reasons for severance would disappear.

G. Appellate Review

The process of appellate review in civilian cases where the death penalty has been imposed is probably the most elaborate provision of due process of law in history. The example cited earlier was an urban jurisdiction where only one out of eleven murderers was given the death penalty. n186 The one condemned man, though he was arrested in 1984, is still alive more than eleven years later, and is not yet near the end of his appeals. n187 Many observers of our legal system have begun to realize that this exhaustive review is nothing less than a stalling tactic by the defense designed to deter the government from seeking the death penalty because of the amount of time and resources which must be committed to seeing the process through. Having a federal death penalty has not yet solved the delay problem. More than five years after his crime, four years [*395] after his trial, and two years after his conviction and sentence were upheld on appeal, David Chandler, the first man sentenced to death as a "drug kingpin" murderer, still has not been executed. n188

In contrast to the current civilian system is the procedure set forth in the Yamashita case. n189 Yamashita involved trial by a military commission, review by the commanding officer under whose authority the commission was set up, and one review by the Supreme Court of the prisoner's writ of habeas corpus. The entire process took just over four months to complete. n190 Part of the reason for the expeditious procedure was the ruling by the Supreme Court that there were only limited grounds upon which they could review the judgment: jurisdictional questions of whether the commission was properly constituted and whether it had jurisdiction over General Yamashita. n191

There is ample precedent in international as well as domestic law for truncated appellate review of war crimes judgments. The Charter of the International Military Tribunal at Nuremberg specifically provided the judgment of the tribunal was final and not reviewable. n192 Thus, the Nuremberg trial resulted in the execution of the remaining Nazi hierarchy only a year and a half after the conclusion of hostilities.

VI. Civil Liberties and The Military Commission

Civil libertarians may criticize our proposal as violating fundamental constitutional guarantees, including the Fifth Amendment guarantee that no one shall be "deprived of life, liberty or property without due process of law." n193 When Coalition forces killed 100,000 Iraqi soldiers in Desert Storm, some critics objected, but none raised the theory of deprivation of life without due process of law. A person raising such an argument [*396] would have missed the basic point: as a war, the Persian Gulf conflict was a military problem, not a law-enforcement problem. Moreover, the pre-eminent question

with due process always is; given the circumstances, what process is due? We assert that the military commission approach provides the process due to those accused of committing terrorist war crimes, regardless of whether they are citizens of the United States or alien agents, and regardless of whether their aims involve domestic insurrection or furtherance of a foreign political cause.

In this regard, we are aware that our proposal for a military tribunal system to try terrorist war crimes may incite controversy based on assertions that it adversely affects civil liberties. Even though military trials for terrorists have been used with success in Peru and Egypt, n194 those societies are viewed by some as less developed democracies than our own, and not as models to which we should aspire.

Civil libertarians may argue that a military justice system for punishment of war crimes might become a means to repress foreign nationals and U.S. citizens engaged in political dissent. As legal authority against our proposal, they may rely on the post-Civil War Supreme Court case of *Ex parte Milligan*. n195

In *Milligan*, the petitioner had been accused of conspiring to establish a secret military organization for the purpose of overthrowing federal authority in the state of Indiana. n196 *Milligan* was not merely engaged in inciting public protest or demonstration against the war. The objectives of his plan were to seize the local arsenal, release Confederate prisoners of war, arm them, and march to join other Confederate forces to invade Indiana, Kentucky and Illinois. n197 At trial before a military commission, *Milligan* was convicted, inter alia, of violation of the laws of war and sentenced to be hanged.

With five justices concurring, the Court held that Congress had no power to authorize the use of military commissions in [*397] states where the civilian courts were available and held that *Milligan* had been deprived of a trial by jury in violation of the Constitution. n198 Four of the justices concurred in the result, but based their decision on construction of a statute suspending the writ of habeas corpus. n199 In a strongly phrased opinion by Chief Justice Salmon P. Chase, the four concurring justices affirmed the power of Congress to provide for trial and punishment by military commission, even in states where civilian courts were open, and concluded that the power superseded any of the amendments in the Bill of Rights. The Court asked the following rhetorical question:

And is it impossible to imagine cases in which citizens conspiring or attempting the destruction or great injury of the national forces may be subjected by the Congress to military trial and punishment in the just exercise of this undoubted constitutional power [of government of the land and naval forces and of the militia]? n200

The concurring justices further stated that martial law could be called into effect by Congress in times of either civil insurrection or foreign invasion where ordinary law no longer secured public safety and private rights. n201

Reflecting on the Milligan concurrence, we note U.S. District Judge Michael Mukasey's statement at sentencing in the second New York conspiracy case. In delivering the maximum sentences at that time authorized, Judge Mukasey said that if the Sheik's conspiracy had not been thwarted, it "would have resulted in the murder of hundreds, if not thousands, of people and brought about devastation on a scale that beggars the imagination, certainly on a scale unknown in this country since the Civil War." n202 To those who discount Civil War and [*398] World War II-era precedents on this subject because of their vintage and the historical contexts, we simply would point to Judge Mukasey's recent observation.

In the World War II-era Quirin decision, n203 the Court shed further doubt on the holding of the narrow majority in Milligan. n204 The petitioners in Quirin were members of the marine infantry of Nazi Germany. Under orders from the Nazi High Command, they secretly disembarked from a U-Boat on the east coast of the United States, carrying with them a supply of explosives, for the purpose of engaging in acts of sabotage against U.S. war materiel and industries. n205 Upon arrival, they doffed their uniforms and proceeded in civilian attire, eventually being apprehended by F.B.I. agents. n206

Relying on the Milligan case, the petitioners objected to their trial by military commission, particularly petitioner Haupt, who was a United States citizen. The Quirin Court constrained Milligan to its own facts by stating that the holding did not apply to penalties imposed on unlawful belligerents--war criminals. n207 The Court effectively defined "unlawful belligerents" as persons in, or in league with, the armed forces of the enemy, who enter, or remain, in the country in violation of the laws of war; in this case, without uniform. n208 For our purposes, unlawful belligerency denotes those who engage in warlike conduct against the government or citizens of the United States in violation of the laws of war and who have allied themselves either to a foreign cause or a domestic insurrection. Reviewing Milligan, the Court noted that Milligan had been a citizen of Indiana for 20 years, had never been a resident of any of the states of the Confederacy, and therefore was not an enemy belligerent. n209 We note that the Quirin Court's description of Milligan actually does not comport with the nature of his activities. However, the issues arising from comparing these two decisions can be resolved simply by Congress declaring terrorism [*399] to be a form of unlawful belligerency, from which ordinary law no longer secures either public safety or private rights, and further declaring terrorists to be enemy armed forces. n210

We share concerns that civil liberties must be preserved and that the military commission system should not be used either to repress political dissent or deprive ordinary criminal suspects of constitutional protections. A bright line must be drawn. One place to draw such a line would be to render the military commission system applicable exclusively to cases where aliens or citizens engage in terrorism on behalf of a foreign cause or power. Such an approach would be fully defensible under the Quirin opinion. n211

However, we suggest drawing the line at a different place, so the system still can be used to address attacks like the Oklahoma City bombing. In cases of domestic insurrection, Congress should provide that the system would apply only where weapons of mass

destruction n212 are used by domestic terrorists, or where groups engage in organized military or paramilitary attacks directed at the government or civilian population. Such a qualification would identify characteristics of unlawful belligerency appropriate for trial of terrorists by military commission.

VII. The Fugitive Terrorist

Terrorist war crimes can never be thwarted or eliminated absent implementation of an effective method to apprehend the fugitive terrorist. Authorities apprehended, tried, and convicted some of the perpetrators of the World Trade Center bombing only after the incident and while they conveniently remained within the borders of the United States. Terrorism cannot be prevented or interdicted unless known terrorists, who have already demonstrated their willingness to commit crimes against humanity, can be stopped.

[*400]

A. License for Interdiction

Gamesmanship continues between Great Britain and Libya over extradition of those accused of bombing Pan Am Flight 103, while a U.S. District Court indictment in the case lies dormant. Libya asserts a right to determine both the procedural and substantive aspects of the trial. n213

In cases involving fugitive terrorists, the free enterprise system can be engaged to prosecute war crimes. For example, a reported \$ 1 million "informant fee" provided the key break in foiling the second New York bombing plot, and a \$ 2 million reward offer helped bring Ramzi Yousef to court. n214 Instead of payment for information leading to the capture of a suspected terrorist, however, payment could be offered to a qualified and approved applicant for the apprehension of a terrorist, or in certain egregious cases, for the summary execution of a sentence already passed. This procedure has precedent in both our history and constitutional law.

Historically, letters of marque and reprisal were licenses issued by a sovereign authorizing the bearer to effect a seizure at sea against ships flying another sovereign's flag. Letters of marque and reprisal therefore authorized a taking against an outlaw or a renegade, or a re-taking of persons or property wrongfully seized. n215 In authorizing seizures against renegades, letters of marque and reprisal were issued to counter the excesses of "privateers" or bearers of such licenses who acted ultra vires. n216 Letters of marque and reprisal were also issued with specific authority to apprehend "pirates," who then were deemed offenders "against the law of nations." n217

In addition to the enumerated powers to define and punish offenses against the law of nations, and declare war, Congress has, as part of its war power and its authority under international law, the authority to grant Letters of Marque and Reprisal. [*401] n218 For all intents and purposes, this is an authority to license or commission a private actor to take custody of a person or property from an oppressor nation, by force of arms if necessary, and redeem that prize for valuable consideration. n219

Congress, through its intelligence committees, should delegate to a military commission the authority to grant letters of marque to qualified applicants for the apprehension of a fugitive terrorist, n220 whether the terrorist is a citizen or alien. n221 To ensure the fugitive a fair opportunity for a defense before the commission, notice of the issuance of the letter of marque, as well as notice of a trial date before the commission, may be published, in newspapers of international circulation. This would provide the suspect with a reasonable time to produce himself before the commission for appropriate proceedings. If the suspect then remains defiantly at large, nothing would preclude the commission from proceeding with a trial in absentia, as in the case of Nazi war criminal Martin Bormann. n222

Until disposition of the case by trial, a holder of a letter of marque could claim the monetary award by apprehending the suspect for trial. Where trial takes place in absentia and the tribunal's verdict is guilty, the tribunal could pass sentence. The holder of a letter of marque could then carry out the sentence for redemption of the reward, with a sufficient showing of proof.

Does this plan constitute establishment of a "bounty hunter" system? Certainly. It does not, however, constitute a vigilante system. Concomitant with the authority to grant licenses, Congress would place in the tribunal the authority to promulgate strict requirements and guidelines for private entities to qualify for such licenses. This authority would be based on whatever parameters Congress chose to enact, just as statutes authorize a government agency to promulgate rules to effect the beneficent purposes of the statute. Therefore, it is incorrect [*402] and simplistic to assert that this control system, in which violators would risk loss of their license and their prize, would spawn gangs of reckless international gunslingers rather than foster an entrepreneurial cadre of trained professionals. Further, in the post-Cold War era, U.S. intelligence assets could probably be employed both to assist in effectuating of letters of marque and in monitoring those select few to whom they are issued. The historical use of letters of marque against pirates and enemies in time of war n223 comports with our proposal for a modern strategy against terrorist war criminals.

B. Toward a Common Law of Capture

International law permits a state's authorities to effect an extra-territorial capture of a suspected offender, particularly in the context of terrorism. n224 This concept dates back to the early 1960s, when Israeli intelligence agents located Nazi war criminal Adolf Eichmann in Argentina. He was captured and "extradited" to Israel, where he was tried, convicted, and executed. n225 As the chief manager of Hitler's "Final Solution," Eichmann was responsible for the torture and mass murder of millions of Jews and others in Nazi death camps. n226

A recent case involved the capture of Dr. Umberto Alvarez Machain by U.S. law enforcement authorities. n227 Machain, a citizen of Mexico, was indicted on charges of deliberately prolonging the life of Drug Enforcement Administration agent Enrique

Camarena-Salazar so others could torture and interrogate him. Machain moved for dismissal of the charges on the ground that he was abducted in violation of an extradition treaty between the United States and Mexico. n228

Reversing both the district court and the 9th Circuit Court of Appeals, the Supreme Court ruled that the treaty could not be interpreted, either by its own terms or by construction according [*403] to international law, as prohibiting abductions of suspects outside its terms. The Court reserved decision on whether Machain should be returned to Mexico, ruling that it was a matter for the executive branch. n229

After determining that the treaty did not preclude the abduction of Machain for trial in the United States, the Court considered *Ker v. Illinois*. n230 In *Ker*, an Illinois court tried and convicted Frederick Ker of larceny after a private bounty hunter had abducted him in Peru and brought him into the court's jurisdiction. n231 The Supreme Court rejected Ker's claim that he had a due process right, under an extradition treaty between the United States and Peru, to be returned to the United States only in accordance with the terms of that treaty. n232 The Court stated that "such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such a court." n233

A U.S. military "abduction" of suspected terrorists occurred in 1985 when U.S. Navy F-14 fighters effected a mid-air apprehension of an airliner suspected of carrying terrorists who attacked the Italian ocean liner *Achille Lauro*. The fighters "escorted" the airliner to an air base in Italy. n234 Upon arrival, U.S. and Italian military forces delivered the suspected terrorists into the hands of Italian law enforcement authorities. n235 Under the system proposed here, they would be held for trial before a military tribunal.

Through more than a century of jurisprudence, the Supreme Court has upheld abduction of criminal suspects outside U.S. borders and beyond the scope of extradition treaties. There is therefore no reason to assume any legal obstacle to abduction of modern suspected war criminals. This view is also [*404] supported in *United States v. Yunis*. n236 In *Yunis*, the D.C. Circuit Court of Appeals rejected an aircraft hijacker's argument that the U.S. District Court lacked jurisdiction to try and convict him because he had been forcibly abducted for trial in the United States. n237

C. "Prize" Money

In the World Trade Center case, the FBI reportedly paid rewards totalling \$ 1 million to an informant, Emad Salem. In July 1993, the State Department was reported to have offered \$ 2 million for information leading to the capture of World Trade Center bombing suspect Ramzi Ahmed Yousef, who was apprehended after allegedly masterminding new crimes in the Philippines. n238 A \$ 2 million reward has been offered for information leading to arrest and conviction in the Oklahoma City bombing case. n239 Thus, whether it may be characterized as a "reward," "informant fee," or a "bounty," prize money rewards are already being employed to nurture the apprehension of suspected terrorists.

Implementation of a letter of marque system, as we have proposed, would merely formalize, regulate, and increase the efficacy of what is now a piecemeal, ad hoc approach to bounty hunting. n240

Conclusion

We have previously alluded to a nation's worst nightmare--a terrorist who has "gone nuclear." While it would be difficult for a terrorist to construct a nuclear weapon from [*405] scratch, obtaining an existing weapon has become easier. n241 Consider that fragments of the former Soviet Union's arsenal have been left in the hands of unstable, possibly corrupt fledgling governments, who might be influenced by well-financed terrorists. Also, Stephen Bowman has pointed out that the power grids supplying the United States with electricity are vulnerable even to a conventional terrorist attack because of their centralization. Such an attack "would gravely endanger national security, and would leave lasting political and economic scars." n242

In the aftermath of the World Trade Center bombing trials and the Oklahoma City bombing, our society should not need a demonstration so tragically instructive as nuclear terrorism or massive infrastructural devastation to establish that it is illogical and unjust to bring the criminal justice system to bear on such conduct. After first being subjected to the immediate impact of the incident itself, the victims--including the American people generally--must then agonize over whether justice will be served while the usual judicial process goes forward at its incremental pace. Then, if the process achieves a conviction against the defendants, the jurors must endure the enraged threats hurled at them by the convicted enemy agents. This constitutes further terrorism against ordinary Americans doing a difficult civic duty. Afterward, the arduous and expensive appellate process of re-evaluation of the entire pre-trial and trial proceedings begins. Thus the final terrorist act is committed on our collective bank account to fund the assurance of more-than-due process, with the ultimate outcome uncertain for perhaps decades.

Neither justice nor reason can survive such procedural abuse. It is legally and intellectually disingenuous to provide terrorists the same rights as persons accused of ordinary crimes against society. Our Bill of Rights was designed to protect individuals in society against the arbitrary exercise of government power. It is not meant to protect commando groups warring on society through arbitrary acts of mass violence. [*406]

We recognize that our proposal may have an adverse impact on the Bill of Rights protections for citizens or aliens who fall into the narrow category of being law-abiding yet having the misfortune of being mistakenly suspected of terrorism. Regrettable as this may be, the demonstrable risk of harm to innocent persons posed by terrorism, and its attendant largescale destruction and loss of life, comparatively outweighs the speculative risk of such an adverse impact.

In response to the Oklahoma City bombing, Congress has considered several measures to reinforce law enforcement capabilities against terrorism. One proposal was to allow use of military intelligence capabilities and equipment by law enforcement agencies. n243

This proposal vividly illustrates the national misapprehension of the essential nature of terrorism as a criminal justice, rather than a military, matter. Congress should debate how to approach terrorism as a military problem, where law-enforcement resources and methods would be employed to assist the armed forces, rather than vice versa. The fact that a small group of conspirators, rather than a foreign organization, perpetrated a terrorist act--which appears to have been the case in Oklahoma City--does not alter the analysis, given such a group's use of weapons of mass destruction.

In our view, it has become a Constitutional responsibility of the U.S. government to transform the system for dealing with these crimes and adopt a more coherent, efficacious, proportionate, and just response to terrorism. Blackstone best captured the nature of this governmental responsibility 225 years ago in a commentary on the terrorists of his age:

Lastly, the crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defense, to [*407] inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property. n244

FOOTNOTES:

n1 Mark Eddy, Bomb Toll Lowered as Leg Identified, *Denv. Post*, Apr. 6, 1996, at 10A.

n2 Mark Eddy, Blast That Shook Nation Remembered, *Denv. Post*, Apr. 14, 1996, at 1A; Ann Carnanan, Bomb Damage Totals \$ 652 Million, *Rocky Mtn. News*, Mar. 12, 1996, at 4A.

n3 Statements By President Clinton and the Attorney General, *N.Y. Times*, Apr. 20, 1995, at A14 [hereinafter statements].

n4 Joseph P. Fried, Sheik and 9 Followers Guilty of a Conspiracy of Terrorism, *N.Y. Times*, Oct. 2, 1995, at A1.

n5 Joseph P. Fried, Sheik Sentenced to Life in Prison Bomb Plot, *N.Y. Times*, Jan. 18, 1996, at A1, B4; Terrorism Plot Nets Jail Terms, *Denv. Post*, Jan. 18, 1996, at 4A. Sheik Rahman received a sentence of life in prison without parole, along with El Sayyid Nosair, who assassinated Rabbi Meir Kahane as part of his participation in the conspiracy. *Id.* Seven other defendants received prison sentences ranging from 25 to 57 years, which were maximum sentences for their crimes under the federal sentencing guidelines, for

their part in "planning what prosecutors called a 'war of urban terrorism' aimed at altering U.S. policy in the Mideast." Id. (Emphasis added.)

n6 Richard Bernstein, Biggest U.S. Terrorist Trial Begins as Arguments Clash, N.Y. Times, Jan. 31, 1995, at A1.

n7 Richard Bernstein, Lawyers Clash Over Witness at Start of Terrorism Trial, N.Y. Times, Jan. 31, 1995, at A1.

n8 Id.

n9 Id.

n10 Richard Bernstein, 4 Are Convicted in Bombing at the World Trade Center that Killed 6, Stunned U.S., N.Y. Times, Mar. 5, 1994, at 1.

n11 Richard Bernstein, Trade Center Bombers Get Prison Terms of 240 Years, N.Y. Times, May 25, 1994, at A1, B4.

n12 Id. at B4.

n13 18 U.S.C.A. <sect><sect> 3591-3598 (West 1985 & Supp. 1996). For a discussion of the ineffectiveness of the death penalty in our current system see infra part V.E. Even though public support for the death penalty has increased, and the number of executions also has increased, there were only 56 executions in 1995, yet 3,046 condemned men and women sat on death rows in the 38 states permitting capital punishment. Thus, at that rate of execution, it will take almost 55 years to execute just those currently on death row. See James Brooke, Firing-Squad Offers Reflect Changing Times, Denv. Post, Jan. 14, 1996, at 9A.

n14 Herbert Shuldiner, Rebuilding the World Trade Center, Popular Mechanics, July 1993, at 41. On September 9, 1996, President Clinton proposed an array of steps to foil terrorism with a \$ 1 billion cost. Much of the proposal involved measures to improve airline security in the wake of the crash of TWA flight 800. Todd S. Purdum, Clinton Suggests an Array of Steps to Foil Terrorism, N.Y. Times, Sept. 10, 1996, at 1.

n15 Id.

n16 Id.

n17 Id.

n18 William Rees-Mogg, Lecture at All Souls College, Oxford, England (1993). The materials for the World Trade Center bomb are estimated to have cost \$ 3,500. Stephen Bowman, When the Eagle Screams: America's Vulnerability to Terrorism 66-67 (1994).

n19 Christopher S. Wren, *A Terrorist, Not a Defense Lawyer: A Genius Trips on His Ego*, N.Y. Times, September 7, 1996, at 18.

n20 *259th Electrocutation Could be Last One in Virginia History*, N.Y. Times, Mar. 5, 1994, at 6.

n21 See 18 U.S.C.A. <sect> 3592(c)(1) (West 1985 & Supp. 1996); 18 U.S.C.A. <sect> 2280 (West 1985 & Supp. 1996) (regarding violence against maritime navigation).

n22 Antonio Cassese, *Terrorism, Politics and Law*, 50-52 (1989).

n23 *Id.* at 10, 144.

n24 *Id.* at 9-10.

n25 *Id.* at 9.

n26 Louis R. Beres, *The Meaning of Terrorism--Jurisprudential and Definitional Clarifications*, 28 Vand. J. Transnat'l L. 239, 240-41 (1995).

n27 *Id.* at 240-44.

n28 *Id.* at 244-46.

n29 See *infra* part VI.

n30 *United States v. Rahman*, 854 F. Supp. 254, 259 (S.D.N.Y. 1994) (emphasis added.)

n31 See Mary B.W. Tabor, *Sheik, in Court, Denies Terror Charges*, N.Y. Times, Aug. 27, 1993, at A1, B2.

n32 Jochen Piest & Matthias Schepp, *Stoking Up the Nuclear Bazaar*, *World Press Rev.*, Nov. 1994, at 10. See also Phil Williams & Paul N. Woessner, *The Real Threat of Nuclear Smuggling*, *Sci. Am.*, Jan. 1996, at 40. Williams and Woessner point out that the amount of nuclear material needed to fashion a weapon could be smuggled in a container the size of one to three soft-drink cans. *Id.* at 41. Further, the "control" over huge stockpiles of these materials in the former Soviet Union suffers from sloppy security and poor inventory management. *Id.* They further point out that the threat from these materials is not just the risk of construction of a nuclear weapon, but the nature of the materials as a concentrated contaminant which could be spread by a conventional blast or some other means of distribution. *Id.* at 44.

n33 David C. Martin & John Walcott, *Best Laid Plans: The Inside Story of America's War Against Terrorism*, 285-315 (1988).

n34 Terrorist Research and Analytical Center, U.S. Dept. of Justice, *Terrorism in the*

United States 1982-1992, at 20 (1992). See also 18 U.S.C.A. <sect> 2331 (West 1985 & Supp. 1996).

n35 Carl Von Clausewitz, *On War*, 402 (Anatol Rapoport ed. & Col. J.J. Graham, Penguin Books 1968). Translation of the German "Der Krieg ist nichts anderes als die Fortsetzung der politik mit anderer Mittelen."

n36 *Id.* at 101. A more recent, apropos statement is: "war is the exerting of violence by one state or politically organized body against another. In other words, it is the implementation of a political policy by means of violence." *United States v. Von Leeb*, reprinted in 11 *Trials of War Criminals* 462, 485 (1950) [hereinafter *Trials*].

n37 See *supra* note 34 and accompanying text.

n38 Nevertheless, the use of military terms is rampant in titles of works on terrorism. See, e.g., Claire Sterling, *The Terror Network: The Secret War of International Terrorism*; Stephen Segaller, *Invisible Armies* (1987); Martin & Woolcott, *supra* note 33.

n39 Sam C. Sarkesian, *Defensive Responses, Hydra of Carnage*, 201, 209 (Uri Ra'anen et al., eds., 1986).

n40 Richard Shultz, *Low Intensity Conflict in Mandate for Leadership II*, 264 (Stuart M. Butler, et al., eds., 1984).

n41 Bernstein, *supra* note 10, at 28.

n42 U.S. Const. art. I, <sect> 8, cl. 11.

n43 5 U.S. (1 Cranch) 1 (1801).

n44 *Id.* at 29.

n45 *Id.* at 28.

n46 *Id.* at 29.

n47 Francis D. Wormuth, et al., *To Chain the Dog of War: The War Power of Congress in History and Law*, 57-58 (1986).

n48 See *infra* notes 51-68 and accompanying text.

n49 *Id.*

n50 See *infra* notes 95-96 and accompanying text.

n51 See *Trials*, *supra* note 36, at 489.

n52 International Treaty Providing for the Renunciation of War, 46 Stat. 2343, 94 L.N.T.S. 57.

n53 Trials, *supra* note 36, at 490.

n54 Yossef Bodansky, *Target America & The West* 2-3 (1993).

n55 *United States v. Rahman*, 854 F. Supp. 254, 259, 264 (S.D.N.Y. 1994).

n56 International Committee of the Red Cross, *Fundamental Rules of Humanitarian Law Applicable in Armed Conflicts*, in *Int'l Rev. of the Red Cross*, Sept. Oct. 1978, at 248-49.

n57 *Id.* at 249.

n58 *Documents on the Laws of War*, 450-51 (Adam Roberts & Richard Guelff, eds., 2d ed. 1989) [*hereinafter Documents*].

n59 *Protocol Additional to the Geneva Convention of 12 August 1949*, at 3032 (1977) [*hereinafter Protocol*].

n60 See *infra* note 61-68 and accompanying text.

n61 317 U.S. 1 (1942).

n62 *Id.* at 31.

n63 *Id.* at 33-34.

n64 *Id.* at 34.

n65 *Id.* See also *United States v. Yunis*, 924 F.2d 1086, 1097-98 (D.C. Cir. 1991). This case involved the trial and conviction of a terrorist who hijacked Royal Jordanian Airlines Flight 402 and advanced, as part of his defense, that he was following military orders of the Lebanese Amal Militia. *Id.* at 1089. The Court affirmed the district court's instruction to the jury that the validity of this defense must be evaluated with reference to whether the Amal Militia was a legitimate military organization, where members, *inter alia*, wore uniforms and openly carried their weapons. *Id.* at 1098-99.

n66 Hans-Peter Gasser, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Convention on the Protection of War Criminals*, 81 *Am. J. Int'l L.* 910, 911 (1987).

n67 *Id.*

n68 *Documents*, *supra* note 58, at 411; *Protocol*, *supra* note 60, at 30-31.

n69 Martin & Walcott, *supra* note 33, at 285-315.

n70 See *infra* notes 193-212 and accompanying text.

n71 Edward T. Pound & Jiham El-Tahri, Sanctions: the Pluses and Minuses, *U.S. News and World Rep.*, Oct. 31, 1994, at 59.

n72 *United States v. Abdel Bassett Ali Al-Megrahi*, Indictment No. 91-645 (D.D.C. 1994).

n73 William Winthrop, *Military Law and Precedents* 831 (2d ed. 1920).

n74 *Id.*

n75 10 U.S.C.A. <sect><sect> 801-941 (West 1985 & Supp. 1996).

n76 *Ex parte Quirin*, 317 U.S. 1, 32 n.10 (1942).

n77 *Id.* at 33 n. 10.

n78 *Id.*

n79 *Id.* at 32-33 n.10.

n80 *Id.* For other examples see Winthrop, *supra* note 73, at 784 nn. 56-57.

n81 327 U.S. 1 (1946).

n82 *Id.* at 11.

n83 *Id.* at 5-6.

n84 *Id.* at 11.

n85 *Id.*

n86 *Id.* at 11-12.

n87 *Id.*

n88 *Id.* at 12.

n89 Protocol, *supra* note 59, at 36.

n90 See *supra* note 33 and accompanying text.

n91 Council Widens Air, Arms Embargo, U.N. Monthly Chron., Mar. 1994, at 60.

n92 *In re Yamashita*, 327 U.S. 1 (1946). A terrorist could not escape the application of war crimes principles by claiming that there were no "ongoing hostilities" between his group and the United States at the time of his trial. Congress would be entitled to provide trial by a military commission as a remedy for the evils his illegal warfare had produced regardless of whether hostilities were ongoing. *Id.*

n93 317 U.S. 1 (1942).

n94 *Id.* at 38.

n95 *Demanjuk v. Petrovsky*, 776 F.2d 571, 582-83 (6th cir. 1985) (citing *In re The Paquette Habana*, 175 U.S. 677, 712 (1900)).

n96 *Id.* See also *United States v. Yunis*, 924 F.2d 1086, 1092 (D.C. Cir. 1991) (applying the principle of universal jurisdiction to an airliner hijacking committed in the Middle East.)

n97 *Demanjuk*, 776 F.2d at 582.

n98 *Id.* (emphasis added).

n99 *Quirin*, 317 U.S. at 1.

n100 Restatement (Third) of Foreign Relations Law, <sect> 404 (1987). Note that several of the specific crimes noted are customarily associated with terrorism.

n101 *Demanjuk*, 776 F.2d at 582.

n102 18 U.S.C. <sect> 7 (1994).

n103 18 U.S.C. <sect> 2332a(b)(2) (1994).

n104 S.J. Res. 2, 102d Cong., 1st Sess., 137 Cong. Rec. 403 (1991) (enacted).

n105 Israel was permitted to assume jurisdiction over war crimes that had been committed prior to its existence as a state. *Demanjuk*, 776 F.2d at 583.

n106 U.S. Const., art. I, <sect> 9, cl. 3.

n107 *Burgess v. Salmon*, 97 U.S. 381, 384 (1878).

n108 See *infra* part V.E.

n109 See discussion *infra* part V.E.

n110 U.S. Const., art. I, <sect> 8, cl. 10.

n111 4 William Blackstone, Commentaries *71.

n112 Ex parte Quirin, 317 U.S. 1, 22 (1942).

n113 In re Yamashita, 327 U.S. 1, 9-11 (1946).

n114 Id. at 18-21.

n115 Picked Up for Speeding, Economist, Apr. 29, 1995, at 28.

n116 10 U.S.C. <sect><sect> 821-941 (1994).

n117 10 U.S.C. <sect> 821 (1994) (emphasis added).

n118 David Lippert, The Eichmann Case and the Nuremberg Trials, 48 A.B.A. J. 738, 738-39 (1962).

n119 327 U.S. 1 (1946).

n120 See Council Widens Air, Arms Embargo, supra note 91, at 60. In the "findings" made in support of the Antiterrorism and Effective Death Penalty Act of 1996, Congress has taken the unusual step of denouncing a decision of the United Nations Sanctions Committee to ease sanctions on airline flights to and from Libya. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C.A. <sect> 2261 (West Supp. 1996)). The U.N.S.C. allowance was apparently for Libyan pilgrims traveling to Mecca. See Facts on File, World News Digest, May 4, 1995, at 315.

n121 Karl A. Hochkammer, Note, The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law, 28 Vand. J. of Transnat'l L. 119, 148 (1995).

n122 Id. at 153-54.

n123 Id. at 172.

n124 Id. at 155, nn. 200-01. See also Charles Trueheart, Croat Sentenced, Denv. Post, Nov. 30, 1996, at 1A.

Not only was death accepted historically by the international community as the appropriate penalty for war crimes, it obviously is regarded by our society as the appropriate penalty for terrorist murders. One day after the Oklahoma City bombing, the Attorney General of the United States announced that the death penalty would be sought, although no suspects were in custody at that time. Statements, supra note 3, at A14. We

believe that the Attorney General's immediate conclusion that the death penalty was appropriate in this incident was echoed in the heart and mind of almost every American.

We question whether an international war-crimes tribunal today could be trusted to regard such a terrorist catastrophe as warranting application of the death penalty. As illustrative examples, we point to two events that are symptomatic of the tolerance with which some foreign governments treat terrorism. First, a terrorist who personally participated in the execution of sixty passengers on an Egyptian airliner bound for Malta, was released in 1993 from a Maltese prison on grounds of "good behavior." Bowman, *supra* note 18, at 40. Most recently, the Italian government decided to grant prison furloughs to three Palestinian terrorists convicted of shooting elderly and disabled American tourist Leon Klinghoffer in the Achille Lauro ship hijacking. Italy has been accused of leniency toward Arab terrorists because of its extensive commercial ties with the Middle East and North Africa. All three of these furloughed terrorists escaped and, incredibly, the third was furloughed after the first two escaped. *Lawsuit Pondered in Furlough of Terrorist*, Rocky Mtn. News, Mar. 17, 1996, at 39A. When one of the escapees was captured in Spain, the Clinton Administration displayed some doubt toward Italian justice in announcing that it was seeking ways to facilitate extradition of the terrorist for trial in the United States. Daniel Williams, *Spain Captures Killer Hijacker*, Denv. Post, Mar. 23, 1996.

n125 Statements, *supra* note 3.

n126 *Ex parte Quirin*, 317 U.S. 1, 38 (1942).

n127 *Arrested in Yesterday's Raid*, N.Y. Times, June 25, 1993, at A1, B3.

n128 Bernstein, *supra* note 10, at 1, 28.

n129 *Quirin*, 317 U.S. at 38.

n130 George Lane & Howard Pankratz, *City Gets Bomb Trial*, Denv. Post, Feb. 21, 1996, at 1A, 2A. Note that defense counsel in the second New York City bombing trial attributed the failure of their case to the New York jury's lack of sympathy and understanding for defendants with different lifestyles. See Joseph P. Fried, *Sheik and Followers Guilty of a Conspiracy of Terrorism*, N.Y. Times, Oct. 2, 1995, at A1, B4.

n131 Bob Cohn & Spencer Reis, *Noriega: How the Feds Got Their Man*, Newsweek, Apr. 20, 1992, at 37; Larry Rohter, *Lone Juror is Apparently Stalling Noriega Verdict*, N.Y. Times, Apr. 9, 1992, at A13.

n132 Peter Calvocoressi, *Nuremberg: The Facts, the Law, and the Consequences* 1, 141 (1948).

n133 Lippert, *supra* note 118, at 738-39.

n134 See Bernstein, *supra* note 10, at 1. The concern about jury intimidation arose during the jury selection phase in Ramzi Yousef's trial on charges of placing a bomb aboard Philippine Airlines Flight 434. "The difficulty . . . became evident when the first 75 prospective jurors were dismissed because of concerns that they would be influenced by the heavy security [surrounding the trial]." Jury Selection in Bomb Trial, N.Y. Times, May 14, 1996, at A16.

n135 327 U.S. 1 (1945).

n136 *Id.* at 18 (quoting regulations).

n137 *Id.*

n138 *Id.* at 23.

n139 Fed. R. Evid. 803(24), 804(b)(5).

n140 United States v. Abdel Basset Ali Al-Megrahi, Indictment No. 91-645, at 11 (D.D.C. 1994).

n141 *Id.* at 9.

n142 Fed. R. Evid. 802.

n143 Al-Megrahi, Indictment No. 91-645 at 9.

n144 See Bernstein, *supra* note 10, at 10.

n145 See Fed. R. Evid. 602 (prohibiting a witness from testifying as to matters beyond his personal knowledge). See also Fed. R. Evid. 802 (rendering hearsay inadmissible unless a specific exception is established).

n146 Michael Wines, Portrait of Pan Am Suspect: Affable Exile, Fiery Avenger, N.Y. Times, Dec. 24, 1989, at A1, A10.

n147 Martin & Walcott, *supra* note 33, at 285-86.

n148 *Miranda v. Arizona*, 384 U.S. 436 (1966).

n149 See *Orozco v. Texas*, 394 U.S. 324, 327 (1969); *Michigan v. Tucker*, 417 U.S. 433, 460 (1974).

n150 428 U.S. 433 (1976).

n151 *Id.* at 454.

n152 Miranda, 384 U.S. 436.

n153 U.S. Const. amend. V.

n154 Miranda, 384 U.S. 436.

n155 See Israeli Court OKs Use of Force, Denv. Post, Jan. 12, 1996, at 14A.

n156 U.S. Const. amend. IV.

n157 Bernstein, supra note 10, at 1.

n158 In re Yamashita, 327 U.S. 1, 5 (1945).

n159 See Fried, supra note 5, at B4.

n160 The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104132, 110 Stat. 1214 (1996) (codified at 28 U.S.C.A. <sect> 2261 (West 1996)). The final, enacted version of this legislation was watered down from the President's original proposal after House and Senate conferees agreed to strip several of the bill's provisions that would have bolstered the power of federal law enforcement to counter domestic terrorism, such as broadened wiretap authority for the F.B.I. Compare <sect> 810, 110 Stat. at 1311 (the final legislation calls for a study of enhancing electronic surveillance laws as an antiterrorism measure). There are moves afoot to reintroduce the wiretap proposal, as well as a requirement for marking common explosives, in the wake of the bombing at the Atlanta Olympic Games and the possible sabotage of TWA flight 800 with explosives. Robin Wright, U.S. Has Long Way to Go in Fighting Terrorism Denv. Post, July 29, 1996, at 6A.

The beneficial aspects of the legislation that did pass include: an easier process for deportation of foreigners with links to terrorist organizations and other criminal aliens, The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 3501-07, 110 Stat. 1214, 1258-68 (1996), requirements that plastic explosives be marked with "taggants" to identify their origin, <sect> 603, 110 Stat. at 1289, prohibition of fund raising by terrorist organizations, <sect> 303, 110 Stat. at 1250-53, and restrictions on the power of federal judges to review the state-court sentences of death-row inmates, <sect> 102-08, 110 Stat. at 1217-26.

While this statute will be an improvement over prior laws, it still ignores the basic flaws in the current system: treating terrorist crimes as ordinary domestic crimes instead of war crimes, and failing to provide a mechanism for adjudicating them as such. The act does little to mitigate the overall inefficacy of death-penalty litigation. Nevertheless, the legislation has attracted criticism from civil liberties groups. See Benjamin Wittes, Clinton Anti-Terrorism Bill Angers Rights Groups, Legal Times, Mar. 13, 1995, at 2.

n161 Federal Death Penalty Act of 1994, 55 Crim. L. Rep. 2358, 2358-65 (1994).

n162 Id. at 2358-59.

n163 U.N.G.A. res. 95(1) (Dec. 11, 1946).

n164 Calvocoressi, *supra* note 132, at 141.

n165 Lippert, *supra* note 118, at 739.

n166 Winthrop, *supra* note 73, at 842-43. Winthrop also reports the sentence of a Spanish military tribunal against an anarchist: "to be shot with his back turned toward the firing party." Id. at 843, n.35.

n167 *Ex parte Quirin*, 317 U.S. 1, 32-34 (1942) (citing with approval John Y. Beall, Dept. of the East, G.O. No. 14, Feb. 14, 1865).

n168 Robert D. McFadden, F.B.I. Seizes 8, Citing a Plot To Bomb New York Targets and Kill Political Figures, N.Y. Times, June 25, 1993, at A1, B2.

n169 See Federal Death Penalty Act of 1994, 55 Crim. L. Rep. 2358-65 (1994). See also 18 U.S.C.A. <sect> 2332-2332a (West Supp. 1996).

n170 See, e.g., *United States v. Kaiser*, 545 F.2d 467 (5th Cir. 1977) (finding 18 U.S.C. <sect> 1111 providing for the death penalty for murder within federal jurisdiction unconstitutional. The Court stated, "Prior to the case at hand, the unbroken assumption of prosecutors and courts has been that the death penalty could no longer be applied under <sect> 1111 consistently with the Eighth Amendment." Id. at 470.).

n171 21 U.S.C. <sect> 848(e)(1)(A) (1994).

n172 *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993). This case involved the trial of David R. Chandler, who was sentenced to death by a federal district court jury for murder by hire motivated by his desire to protect his large marijuana distribution network. Despite the fact that the U.S. Court of Appeals for the 11th Circuit upheld the death sentence, litigation over post-conviction remedies is ongoing and further delay is expected. See Marcia Coyle, Delay Expected for Federal Execution, Nat'l L. J., Mar. 27, 1995, at A14.

n173 Federal Death Penalty Act of 1994, 55 Crim. L. Rep. 2358, 2358-59 (1994).

n174 Id.

n175 *People v. Vialpando*, 788 P.2d 786, 788 n.1 (Colo. 1990).

n176 *Conor Gearty*, Terror 81 (1991).

n177 Martin & Walcott, *supra* note 33, at 239.

n178 See, e.g., Stephen Segaller, *Invisible Armies* 190 (1987). In 1985, Israel released more than 1,000 Palestinian detainees, many of them convicted terrorists, to gain the return of three Israeli soldiers who had become prisoners of war during the war in Lebanon.

n179 In 1985, President Ronald Reagan vowed unequivocally not to bargain with terrorists or sell weapons to Iran, which at that time was holding American hostages. In 1986 and 1987, however, credible and verified reports established that the United States in fact had sold weapons secretly to Iran in an attempt to obtain the release of the hostages there. Proceeds from the sales were paid over to the benefit of the anti-communist rebels in Nicaragua. See William C. Banks, *While Congress Slept: The Iran-Contra Affair and Institutional Responsibility for Covert Operations*, 14 *Syracuse J. Int'l L. & Com.* 291 (1988).

n180 Bernstein, *supra* note 10, at 28. See also text accompanying note 19.

n181 Gail Appleson, *Feds Say Muslim Radicals Planned to Blow Up U.S. Jets, Rocky Mtn. News*, Dec. 14, 1995, at 65A.

n182 Charter of the International Military Tribunal, Aug. 8, 1945, Art. 12, 59 Stat. 1544-48.

n183 Calvocoressi, *supra* note 132, at 62.

n184 Bernstein, *supra* note 10, at 10.

n185 See *Krulewitch v. United States*, 336 U.S. 440 (1949).

n186 See *supra* text accompanying note 175.

n187 *People v. Rodriguez*, 914 P.2d 230, 246 (Colo. 1996).

n188 *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993). See also *supra* note 172.

n189 *In re Yamashita*, 327 U.S. 1 (1946).

n190 *Id.* at 5.

n191 *Id.* at 17.

n192 Charter of the International Military Tribunal, Aug. 8, 1945 Art. 26, 59 Stat. 1544-52.

n193 U.S. Const., amend. V.

n194 Michael Farhang, Terrorism and Military Trials in Egypt: Presidential Decree No. 375 and the Consequences for Judicial Authority, 35 Harv. Int'l L.J. 225 (1994); New York Woman's Life in Peru Prison Harsh, Denv. Post, Jan. 13, 1996, at 12A.

n195 71 U.S. (4 Wall.) 2 (1866).

n196 Id. at 6-7.

n197 Id. at 107

n198 Id. at 122.

n199 Id. at 132, 137-40.

n200 Id. at 139.

n201 Id. at 141-42.

n202 Terrorism Plot Nets Jail Terms, *supra* note 5, at A4 (emphasis added). See also Fried, *supra* note 5, at A1, B4.

n203 Ex parte Quirin, 317 U.S. 1 (1942).

n204 Id. at 45 (discussing Ex parte Milligan, 71 U.S. (4 Wall) 2 (1866)).

n205 Id. at 21.

n206 Id.

n207 Quirin, 317 U.S. at 45.

n208 Id. at 36-37.

n209 Id.

n210 See discussion *supra* parts II-III.

n211 Ex parte Quirin, 317 U.S. 1 (1942).

n212 "Weapon of mass destruction" is defined in 18 U.S.C. <sect> 2332a(b)(2) (1994), which incorporates 18 U.S.C. <sect> 921(a)(4) (1994), and would include the bomb used to destroy the Alfred P. Murrah building in Oklahoma City. The definition includes, for example, explosive devices, poison gas and any weapon utilizing radiation or a biological agent.

n213 Security Council Arms and Air Embargo Stays in Place, U.N. Chronicle, Dec. 1994, at 33.

n214 Bernstein, *supra* note 6 at 1; David Johnston, Plans for Bombing Left by Terrorists, Authorities Assert, N.Y. Times, Feb. 11, 1995, at 1.

n215 Alfred P. Rubin, *The Law of Piracy*, 14, 21-23 (1988).

n216 *Id.* at 34.

n217 *Id.* at 93-95.

n218 U.S. Const., art. I, <sect> 8, cl. 11.

n219 93 C.J.S. War & National Defense <sect> 24 (1956); *Black's Law Dictionary* 876 (5th ed. 1979).

n220 This section constitutes the authors' proposal for a modern-day application of a power of Congress as set forth at U.S. Const., art. I, <sect> 8, cl. 11.

n221 See *supra* part VI.

n222 See *supra* part V.F. and accompanying notes 180-85.

n223 *Privateering and Piracy in the Colonial Period* (John F. Jameson, ed. 1923).

n224 See *infra* notes 227-33 and accompanying text.

n225 *Attorney General of Israel v. Eichmann*, 36 I.L.R. 277 (1968) (Isr. Sup. Ct., 1962).

n226 *Id.*

n227 *United States v. Alvarez-Machain*, 504 U.S. 655, 657-58 (1992).

n228 *Id.* at 658.

n229 *Id.* at 669-70.

n230 *Id.* at 660 (citing *Ker v. Illinois*, 119 U.S. 436 (1886)).

n231 *Ker*, 119 U.S. at 437-38.

n232 *Id.* at 439-40.

n233 *Alvarez-Machain*, 504 U.S. at 661 (citing *Ker*, 119 U.S. at 444).

n234 See Martin & Walcott, *supra* note 33, at 245-52.

n235 *Id.*

n236 924 F.2d 1086 (D.C. Cir. 1991).

n237 *Id.* at 1092-93.

n238 Bernstein, *supra* note 6, at 1; Johnston, *supra* note 214.

n239 David Johnston, *Oklahoma Bombing Plotted for Months, Officials Say*, N.Y. Times, Apr. 25, 1995, at A1, A8.

n240 See, e.g., *Terrorist's Killer 'Paid \$ 1 Million'*, Denv. Post, Jan. 9, 1996, at 8A; *Bomb Suspect Killed*, Denv. Post, Jan. 6, 1996, at 8A. In this incident, a booby trapped mobile phone containing two ounces of explosives was used to kill an individual terrorist, Yehia Ayyash, a demolition expert known as "The Engineer." Authorities attributed at least eight bombings to Ayyash, which killed 75 people (including an American) and wounded more than 350. Israeli officials welcomed the news of the death of Ayyash but declined to say whether Shin Bet, the Israeli security agency, was involved.

n241 See *supra* note 32.

n242 Bowman, *supra* note 124, at 124.

n243 S.J. Res. 761, 104th Cong., 1st Sess., 141 Cong. Rec. 6202 (1995).

n244 4 William Blackstone, *Commentaries*, *71.