STRATEGY RESEARCH PROJECT

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THE TRANSFORMATION OF COUNTER TERRORISM

BY

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The Transformation of Counter Terrorism

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ABSTRACT

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The Transformation of Counter Terrorism is an examination of the changes occurring in counter terrorism using 11 September 2001 as a pivotal date. Before 11 September 2001, the United States dealt with counter terrorism primarily through law enforcement agencies and the civilian courts. After 11 September 2001, the United States declared war on terrorism and dealt with terrorists through the military and law enforcement agencies. United States civilian courts, international courts and military commissions are examined as various methods of determining guilt and the punishments upon terrorists.

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THE TRANSFORMATION OF COUNTER TERRORISM

11 September 2001 was a watershed event for the United States in how it views, defines, and responds to terrorism. The terrorist attacks on the 11th marked the beginning of our country's first war of the 21st century and our country's first war against a non-state entity. After 11 September 2001, the United States moved away from viewing terrorists as a problem for the law enforcement agencies to viewing terrorists as a problem for the military. After 11 September 2001, the United States moved from viewing terrorists as common criminals to viewing terrorists as criminals against humanity.

Whether the pre-11 September 2001 view of terrorism will be forever laid aside, will be re-invigorated in the future or will be once again embraced, remains to be seen. However, what appears clear, is that while this country is "muddling through" the policy questions of how it should respond to terrorism, it is expanding the military's role in counter terrorism as never before seen.

This paper reviews the United States' recent position on terrorists. What are terrorists, are they soldiers, common criminals or criminals against humanity? Second, the paper reviews how 11 September 2001 changed views in the United States and the world--"war" is once again seen as conflict between a state and a non-state, thus moving away from the Westphalian notion of war. Terrorists are now the responsibility of not just law enforcement agencies but also the military. Finally the paper reviews the various mechanisms advanced to try captured terrorists.

BEFORE 11 SEPTEMBER 2001 TERRORISTS WERE CRIMINALS

For the last twenty some years the United States has determined that terrorists were criminals. The country assigned responsibility to the domestic law enforcement agencies for counter terrorism occurring within the United States. The country assigned responsibility to the State Department for counter terrorism occurring outside the United States, and that responsibility appears to have been primarily limited to seeking extradition of terrorists to the United States for trial.

Presidential Decision Directive 39 (PDD 39) approved the lead agency concept for United States counter terrorism responsibility. President Clinton, continuing the policy set by President Reagan in 1983, designated the State Department as the lead agency for terrorist incidents that occur outside the United States. The Department of Justice was designated the lead agency for threats and acts of terrorism within United States territory. The Department of Justice assigned chief responsibility for operational response to terrorism to the Federal Bureau of Investigations

(FBI). The Federal Emergency Management Agency (FEMA) was designated as lead agency for consequence management. [1]

The United States historically has viewed terrorists as criminals, and the corollary to this view is: civilian resources and agencies are adequate and appropriate to deal with terrorists and terrorism. Clearly absent from the three lead agencies is the military, although the military's potential role seems to be added almost as a footnote from time to time.

This view was prevalent before 11 September 2001. The following examples illustrate this viewpoint. Found in the Department of State's Fact Sheet entitled "U.S. Government Views of Terrorism" dated 7 December 1999: "Terrorists are criminals, whatever their ethnic, religious, or other affiliation. We oppose their crimes, not any religious or moral cause they purport to represent. Terrorism is a crime that affects innocent men, women, and children everywhere. All nations should be committed to apply the rule of law in terrorism cases and to bring terrorists to justice."[2] Secretary of State Madeleine Albright's statement for the Record before the Senate on 13 May 1999: "We insist that terrorism is a crime, whatever its motives or causes, and we promote the rule of law to criminalize it and bring terrorists to justice."[3] She reiterated this theme in remarks before the American Legion Convention: "We use the courts to bring suspected terrorists before the bar of justice, as we are trying to do in the case of Pan Am 103, and as we have done in the World Trade Center case, the CIA murders and already in the Nairobi bombing." Although she did add: "Finally, as our recent actions demonstrate, we will employ military force where necessary and appropriate to prevent and punish terrorist attacks."[4] The FBI acknowledged that the criminal approach was not the only approach to deal with terrorists. "There are five traditional ways through which the U.S. Government fights terrorism: diplomacy, sanctions, covert operations, military options, and law enforcement action." Yet, the department appeared to focus upon the law enforcement or criminalization aspects. Director French's remarks were so focused: "During the past decade, the United States has successfully returned 13 suspected international terrorists to stand trial in the United States for acts or planned acts of terrorism against U.S. citizens. . . . Based on its policy of treating terrorists as criminals and applying the rule of law against them, the United States is one of the most visible and effective forces in identifying, locating, and apprehending terrorists in American soil and overseas."[5] The Denver FBI picked up the law enforcement theme. "Terrorists are arrested and convicted under existing criminal statutes. All suspected terrorists placed under arrest are provided access to legal counsel and normal judicial procedure, including Fifth Amendment privileges and a fair trial by judge and jury."[6]

Clearly there was nothing inappropriate for either the State Department or the FBI to emphasize the law enforcement primacy in responding to terrorism. Indeed, given their other missions, one would question any other emphasis. Nevertheless, both the Department of State and the FBI appear not to have fully comprehended all the words of PDD 39. For particularly revealing are these words which spell out the United States' response options to dealing with terrorism. "We shall have the ability to respond rapidly and decisively to terrorism directed against us wherever it occurs, to protect Americans, arrest or defeat the perpetrators, respond with all appropriate instruments against the sponsoring organizations and government and provide recovery relief to victims, as permitted by law."[7] Perhaps, concealed within this statement is notice of a potential military response in these words: "defeat the perpetrators". Secretary Albright did mention the employment of military force against terrorists, but clearly the military option was of last resort. The preferred method of dealing with terrorism was through law enforcement. Given that terrorism is a crime, such a response is expected.

WAR DECLARED AGAINST TERRORISTS

From 1648 until recent times, war has been increasingly the sole province of the nations. Dating from the mid 1800s and continuing through today, various international agreements have been reached that do their utmost to distinguish war from crime. In particular, only uniformed soldiers, openly bearing arms and subject to the control of their commander, and fighting for a state, were authorized to engage in war. Civilians were not to engage in war, but in turn, were to be left alone by the combatants. World War II started the breakdown of the distinction between soldiers and noncombatants. The imprecision of strategic bombing by both sides killed non-combatants by the thousands, and many felt that they (the non-combatants) were the targets of strategic bombing. Additionally, during World War II noncombatants in occupied countries, the partisans, clandestinely at times—took up arms against the military after their governments had surrendered. Indeed the Germans regarded those partisans who attacked the soldiers as murderers because they weren't carrying arms openly or wearing distinctive uniforms or symbols.[8]

WAGING WAR TODAY

However, the nature of war is changing. "The art of using battles in order to achieve the objectives of the war presumes that the two sides have considerable armed forces and that those forces are distinguishable from each other, separated by geography, and at least potentially mobile."[9] However, these non-state combatants are becoming the new warriors. "In the future, war will not be waged by armies but by groups whom we today call terrorists,

guerillas, bandits, and robbers, but who will undoubtedly hit on more formal title to describe themselves."[10] Indeed, today much of the controversy over international terrorism agreements is the position many countries take that the terrorist is a freedom fighter—a soldier that ought to receive protection under International Law.[11]

Nevertheless there are those scholars who continue to insist that we aren't at war with the terrorists. Jordan Paust seemingly bows down to the "definitional god" for his answer, blinding him to what is actually occurring in the real world.

> Under international law, we could not be at "war" with an entity that has a status less than that of an insurgent . . . . If we are fighting insurgents, we would be at "war" in at least one sense-regarding application of certain laws of war. We would clearly be at "war" if we are fighting a "belligerent" (which must have outside recognition as an entity with such a status, as in the case of the U.S. Civil War upon recognition of the Confederate States of America as a "belligerent" by Great Britain), and all of the laws of war would apply to such an armed conflict. We could also be at war with a state (e.g., Iraq) or nation (e.g., a group of people recognizably having such a status even though they have no territorial base and there is no recognition or relevant statehood status, as in the case of certain U.S.- Indian wars in the 18th or 19th centuries). We could not be at "war" with Osama bin Laden, since he and his entourage are in no way representatives or leaders, et. al., of an "insurgency" within the meaning of international law. He is also not a recognized leader of a "nation," "belligerent," or "state".[12]

John Cerone responded to Paust in a less dogmatic manner, but perhaps more interesting manner. Cerone acknowledges that the attacks present novel legal issues to be grappled with. While acknowledging that the law of war, especially as codified in the Geneva Convention of 1949, focuses upon interstate-armed conflict, he points out that the convention itself doesn't define "armed conflict". Then Cerone explains that the United States considers itself to have been the victim of an act of war. Second, NATO invoked Article 5 of its Charter which reiterates the "war" categorization. Third, the UN Security Council in Resolution 1368 and 1373 "recognized the inherent right of individual or collective self-defense in accordance with the charter." It is doubtful that any Security Council Resolution could have been adopted recognizing the inherent right of individual or collective self-defense against "ordinary criminals."[13] Where Cerone faltered was his argument that "ultimately, to determine whether a state of armed conflict has arisen, it may well be necessary to wait and see if the US responds with armed force." The United States quickly acted in a military manner.

11 SEPTEMBER 2001 AS A TURNING POINT

History changed on 11 September 2001. The largely unheeded warnings such as:

> It is no longer a matter of if—but rather when—a weapon of mass destruction will be used against the people and institutions of the United States. [A] fundamental shift in U.S. strategy has become necessary; It will have to be a priority mission of the Department of Defense (DOD) to develop, deploy, and operate a wide range of defensive measures for the protection of the U.S. homeland. Today DOD is not prepared for this mission. It is as if its planning and preparations for armed conflict implicitly assumes that U.S. territory would remain a sanctuary.[14]

The country was not ready for 11 September 2001. Hijackers commandeering commercial airlines filled with civilian passengers flew into the two World Trade Center Towers in New York City while a third plane struck the Pentagon causing massive damage and loss of life and a fourth plane crashed near Pittsburgh.[15]

President Bush in his Address to the Joint Session of Congress used these words: "Tonight we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done."[16]

In this speech, President Bush straddled the crime-war response. He called upon the Taliban regime in Afghanistan to "deliver to United States authorities all the leaders of al Qaeda who hide in your land" presumably for prosecution as criminals. However, President Bush leaned mostly upon the "war" leg.

> On September the 11th, enemies of freedom committed an act of war against our country. Our war on terror begins with al Qaeda, but it does not end there. Americans are asking: How will we fight and win this war? We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network[17].

Congress passed a Joint Resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." This declaration will stand as the first call to war against a non-state in our history. Congress declared that the acts of 11 September 2001 "render it both necessary and appropriate that the United States exercise its rights to self-defense."[18] Clearly this was a call to war—as Congress specifically referenced that the Joint Resolution was specific statutory authority within the meaning of the War Powers Act. Congress declared the war of the future that Martin Van Creveld had predicted.

One may conclude that Al Qaeda had forewarned the United States of its attacks. Mr. Bin Laden and others issued a Fatwa on 23 February 1998 inventorying their grievances against the

United States, and determining that these grievances framed the rationale necessitating a declaration of war. Subsequently, they concluded that it the duty of each Muslim to kill Americans and their allies—whether military members or civilians. "We . . . call on every Muslim. . . to kill Americans and plunder their money wherever and whenever they find it." Thus, the United States some 3½ years later bore their attacks and learned the depth of their hate, and the scope of their organization.[19] President Bush recognized that a state of war existed.

The United Nations Security Council on 12 September 2001 approved resolution 1368 that condemned the terrorists attacks, and while it regarded the attacks as criminal, calling for all states to bring the perpetrators to justice, it also recognized "the inherent right of individual or collective self-defense."[20] Then 16 days later the United Nations Security Council passed another resolution (1373) that reaffirmed the "inherent right of individual or collective self-defense as recognized by the Charter of the United Nations as reiterated in resolution 1368 and reaffirming the need to combat by all means. . . threats to international peace and security caused by terrorist acts." (emphasis added)[21]

The United Nations Security Council has the authority under the United Nations Charter to authorize nations to use lethal force.[22] Thus, whether one views the Terrorism War as self-defense or directly sanctioned by the UN Security Council, in either case it is in accordance with international law, albeit the first of the new state versus non-state wars. "It may be a new concept of 'war', but it builds upon, and extends the classic concept."[23] Nonetheless, many will refuse to recognize this new reality, for instance: "We are not at 'war' with Bin Laden. The U.S. does not go to "war" with individuals, let alone a demented fanatic intent on spending his $300-million inheritance to finance acts of mass terror. To declare war on Bin Laden is to elevate him to the level of a state. He is a criminal and nothing more."[24]

UN Security Council Resolution 1373 that reaffirmed "the need to combat by all means. . . threats to international peace and security caused by terrorist acts" on 28 September 2001 came after President Bush's 20 September 2001 speech to Congress describing the war on terrorism, after the Congressional Joint Resolution that authorized "all necessary and appropriate force" on 14 September 2001 and after the conditional invocation of Article 5 by NATO on 15 September when the North Atlantic Council determined that if the 11 September attack was determined to have been directed from outside the United States, that it would be regarded as an armed "attack against all of them."

There should be no question that the UN Security Council was clearly aware of the war emphasis, as opposed to criminal emphasis, of the United States. No condemnation of that approach is found anywhere in Security Council resolution 1373.

DEALING WITH TERROISTS IN CUSTODY

The world has changed—now that the western world has accepted a non-Clausewitzian concept of war, namely one fought not between states but between states and non-state entity(ies). Such acknowledgement will be vital in conceptualizing a strategy for the United States and its military. Nevertheless, such acknowledgement does not answer the vital question of what do we do with the terrorists that are captured, whether captured in the United States or in Afghanistan as a result of that struggle. In past wars between states, the answers that developed over time were codified in the Geneva Conventions of War. These codes describe what a belligerent state can and can not do with Prisoners of War (POWs). Most importantly, these conventions specify that upon the cessation of hostilities, the captured soldiers are to be returned—unharmed to their own countries.[25]

Furthermore, following World War II, the allies established an additional form of review, namely the trials of war criminals. These international trials reviewed both civilian and military members who were involved in carrying out the orders of their governments in time of war. These trials reviewed actions that allegedly constituted crimes against humanity. Whether some of the terrorists will be treated as POWs or whether they will be treated as war criminals is yet to be seen. However, just as in the World War II, it is foreseeable that not all the terrorists and their supporters will be tried as criminals against humanity, just as not all Nazis were tried in Nuremberg after World War II as war criminals.[26]

On the other hand, should this country revert to its pre-11 September 2001 posture statements, the United States could prosecute the terrorists as criminals and bring them to stand trial before the United States Courts as "common criminals".

Ironically, during the past year, four of Mr. Bin Laden's followers were tried in Federal District Court for their part in the conspiracy that bombed two United States' embassies in Kenya and Tanzania in 1998. The five-month jury trial ended in May 2001 with convictions. The four received sentences of life without parole as the jury declined to impose the death penalty fearing making a martyr of the terrorists.[27]

ARGUMENTS AGAINST USING CRIMINAL COURTS

Unanimous Verdict.

The civilian jury court system requires that all 12 jurors unanimously agree beyond a reasonable doubt upon a guilty finding for each defendant, for each indictment. Clearly the civilian jury court system is designed to err on the side of the defendant—to let the defendant go free, or at the least, for the jury to agree upon a lesser crime, rather than possibly convicting an innocent person.[28]

Outside pressure on juries.

Whether terrorists brought to a jury trial in the United States could ever receive a fair jury trial is questionable. First, the presiding judge would have to ensure that the jury members were not predisposed toward guilt or innocence based upon pre-trial publicity. Second, the jurors may feel compelled to convict the alleged terrorists regardless of the evidence. The juror's identities would be known in the community—one wonders if the jurors could ever face their friends and neighbors with the knowledge that the terrorists were allowed to go free. In the Oklahoma City bombing trial the presiding judge 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."[29]

The notoriety of the11 September 2001 attacks cause one to wonder where in the United States could a jury be impaneled to impartially sit in judgment.

Intimidation.

If a jury was impaneled, it could face intimidation from the terrorists. During the first World Trade Center bombing trial, the defendants (terrorists) subjected the jurors to threatening gestures. Would not jurors sitting in judgment of Al Qaeda terrorists justly fear retribution from other terrorists? Would it even be fair to subject civilian jurors and their families to such possible retribution? Furthermore, could a civilian juror appropriately focus upon the evidence with these disconcerting concerns churning in the back of their minds?[30]

Rules of Evidence.

The Rules of Evidence in civilian criminal trials is designed for the jury to only hear and consider the best quality evidence. For example, hearsay evidence is typically excluded from the juror's ears because of the fear that a juror would not be able to properly adjudge the quality of that evidence and give it due weight in deliberation. Statements of the terrorists or

investigators' findings may well be excluded from the juror's considerations because of the Rules of Evidence. Crona and Richardson present this example to highlight the difficulties.

> For example, the indictment in the Pan Am Flight 103 case 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. Under the rules of evidence applicable in U.S. District Court, the prosecution would have to produce in person the Maltese shopkeeper to identify Abdel Bassett as the man who allegedly purchased the clothing 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 subpoenas simply does not extend to Malta[31].

Perhaps even more troubling is the difficulty of obtaining a conviction without adequate evidence that is admissible in court. In 1996 Sudan offered to turn over Mr. Bin Laden to the United States to stand trial. However, the US declined their offer because Justice Department officials determined that there was insufficient admissible evidence to convict him in the United States District Court.[32]

4th and 5th Amendment Restrictions.

Criminal courts routinely prohibit the admission of evidence that was obtained in violation of *Miranda* warnings, or that was obtained during an illegal search or coerced confession. Although it is questionable whether these protections were intended to shelter those conducting a war against the Untied States, the courts would most likely continue to apply these exclusionary rules. The courts would look at the terrorists as defendants.[33]

Ironically, the defendants in World Trade Center bombing trial were earlier targeted by cruise missiles in August 1998. However, once caught and brought before the criminal courts, they benefited from the constitutional guarantees of a fair trial: counsel, right against self-incrimination, call witnesses, cross examine witnesses, exclude evidence that violated their constitutional rights and have a jury determine their guilt or innocence, as defendants, not as soldiers or spies.[34]

Lessons learned.

Another danger in a public trial is that it could easily reveal information to the terrorists that was best kept confidential. A trial in the civilian courts would expose confidential informants'

identity, and therefore making the recruitment of future confidential informants problematical.[35] Much of the evidence presumably used at such a trial would be highly classified. If that classified evidence was presented in court, then other terrorists sitting in court would have access to it, or if produced during a closed hearing then the terrorist-defendants could pass their newfound intelligence along to fellow terrorists.[36] Furthermore, because of "chain of custody" rules, it is likely that undercover operatives of this country or friendly countries would be required to testify to prove the "chain of custody" of physical evidence for its admissibility in court.[37] The terrorists could easily use the trial as an "intelligence coup" using such information to refine their skills at covering their tracks as well as being able to root out the intelligence agents and the informants in their midst.[38]

Platform.

Another fear is that a public trial would provide an unprecedented opportunity for the terrorists to promulgate their views to the world public and recruit followers for their jihad.[39] Omar Abdal Rahman in 1995 while on trial for conspiracy to blow-up buildings in New York City delivered a 100-minute speech labeling the United States as an enemy of Islam.[40] Given the notoriety of these attacks, coverage of the O.J. Simpson trail would pale in comparison. The propaganda value for the terrorists would be unprecedented—the world would be watching and listening.

ARGUMENTS FOR USING CRIMINAL COURTS

Existing Court System.

Conducting a trial of the terrorists in the United States District Courts would follow past practice. Federal prosecutors have experience in trying terrorist cases. They were able to obtain convictions resulting from the World Trade Center bombing in 1993, as well as the bombings of the United States embassies in Kenya and Tanzania in 1998.[41] The United States District Courts are already established, they have a tremendous developed body of procedural law on how to deal with most issues that will occur during the trial and that reduces the chance of reversible error. Use of the United States District Courts would show the world that the terrorists have not destroyed the "fabric of government" of the United States.[42] Additionally, it would show the world that the United States still clings to the rule of law regardless of the tragedy and the adversity it faces. Finally, Congress has already criminalized international terrorism in Title 18 of the US Code and provided that the Federal District Courts will hear these matters[43]

Death Penalty.

The United States District Courts have the authority to impose the death penalty for acts of international terrorism.[44] A death sentence may arguably act as a deterrent, at least for the mildly committed terrorists.

Common Criminal.

A criminal trial in the United States District Courts would do much to prove that terrorists are nothing more than "common criminals". As Lawrence Barcella, former prosecutor of terrorists while at DOJ, stated: "The terrorists you see on a film clip on CNN holding an AK-47 does not seem quite so terrifying sitting in the dock of a courtroom, with two huge marshals standing next to him."[45] Convicted terrorists may live out their days in a federal penitentiary. Such a fate could easily destroy any hopes of furthering their cause by martyrdom.

Proof to the World.

A United States District Court criminal trial would be open to the public and the government's proof would be accessible to the world. Looking back to the O.J. Simpson trial, then the public was inundated with all the details. Would anyone think that the media would provide any less coverage during a trial of the principal terrorists? Such media coverage would be an extremely effective method to prove to the world the terrorist's guilt, or innocence, if that is the case.[46] Bartram Brown stated: "If you can demonstrate to the satisfaction of the world and public opinion, and particularly to the non-American and Islamic world, that this is a bad person who did bad things, that helps prove that we are after terrorists and not against the Muslim countries."[47]

ARGUMENTS FOR USING AN INTERNATIONAL COURT

Legitimacy.

The international community may perceive a trial in a United States District Court or a trial before a military commission (commonly referred to as a "military tribunal" in the media) as a farce—a Kangaroo Court—one with a preconceived result.[48] Officials at the United Nations have proposed an international court.[49] Such an endorsement, by the United Nations chartering such a body, would go far toward convincing the world public opinion of such a court's legitimacy and impartiality. The United Nations has in the past established international courts such as those that presided over alleged war criminals from Rwanda and the Balkans. Presently, former Yugoslavian President, Slobodan Milosevic is being tried before a United

Nations created court. Finally, if the United States did agree to trial of the terrorists before a United Nations chartered court, that decision could have a tremendous positive influence on the overall perception of fairness of the United States, especially if an Islamic jurist of high stature sat on that court.[50]

International Problem.

Although these terrorists targeted the United States on 11 September 2001, countering terrorism effectively is an international problem. The problem is international in scope because the terrorist network is itself international in scope; the continuing threat these terrorists pose is not confined to the Untied States. The victims of 11 September 2001 were not only United States citizens, but citizens of many countries.[51] Indirectly, the terrorists' attacks affected all nations, thus the community of nations together ought to coalesce and deal with the terrorism problem. United Nations Security Council Resolution 1368 "calls on all states to work together to bring justice to the perpetrators."[52] Indeed, Mary Robinson United Nations High Commissioner for Human Rights said, "No one can argue that this isn't a crime against humanity."[53]

Restricted Court Procedures.

An international court's rules of procedure would probably not be as liberal as the United States District Court rules of procedure. Thus the presiding judge(s) should be able to limit the terrorists' use of the trial as a propaganda platform.[54] In 1995 the terrorist defendant Omar Abdel Rahman delivered a 100-minute speech denouncing the United States as an enemy of Islam while being tried in United States District Court.[55]

Death Penalty.

An international court would probably not be able to impose the death penalty. Many countries refuse to extradite suspects to countries that may impose the death penalty, or the requesting country must provide assurances that the death penalty will not be imposed, in order to get the suspect extradited.[56] Recently the European Court of Human Rights held that Britain could not extradite a German to the United States if he faced the death penalty because such action would violate the European Convention on Human Rights.[57] Thus the probable limited punishment authority of such a court could improve the extradition process and thereby ensuring that the cases were fully investigated and prosecuted.

ARGUMENTS AGAINST USING AN INTERNATIONAL COURT.

Practical Reasons.

No such international court is in existence yet. Some writers have argued that the terrorists should be brought before the International Criminal Court. However, although President Clinton signed the 1998 Rome Treaty establishing that court, the United States Senate has not ratified the treaty.[58] As recently as November 2001, Congress prohibited the United States government from cooperating in establishing the International Criminal Court.[59] Only 42 of the required 60 nations have ratified the Rome Treaty, so regardless of its desirability, the International Criminal Court does not yet exist and thus it could not be used.[60]

As the International Criminal Court does not yet exist, to pursue an ad-hoc International Court would necessitate developing court procedures, rules of evidence, standards of proof (beyond a reasonable doubt, clear and convincing, preponderance of the evidence or some other standard). As different countries have different procedures and traditions, for example the common law adversarial tradition versus the civil law inquisition tradition, establishing the ground rules could consume months if not years in simply creating the court.[61] Furthermore, who would determine the rules and the selection of the judges? Would it be just the United States, or the combatants in the war in Afghanistan, or NATO or the United Nations?

For example, the crime of conspiracy could impose substantial difficulties from the point of view of the United States. It appears clear that the United States government is treating conspiracy to commit the terrorism on 11 September 2001 as a capital crime. However, most countries, including our European allies, would be unlikely to support the notion of conspiracy to commit murder as being a capital crime.[62]

John Keegan has summed it up nicely. "To any practical person, the proposal is wholly untenable. Even within a single jurisdiction, the prevarication and procrastination of the law are notorious. To transfer the opportunities for those delays and disagreements to a multinational body would be to ensure that no wrongdoer was ever convicted or, if convicted, ever punished."[63]

No Death Penalty.

It is unlikely that any International Court established would have the authority to impose death penalties. For example, the United Kingdom only will extradite a criminal to a country that has the power to impose a death penalty when they, the United Kingdom, receive assurances from the requesting country that it will not seek the death penalty.[64] If the United States'

staunchest ally in the war takes this position, the probability of getting the United Nations or even NATO to grant death penalty authority to an international court appear remote. It is probable that neither the United States government nor the majority of United States citizens would be satisfied with a court that does not even have the power to impose a death penalty.[65]

MILITARY COMMISSION.

On 13 November 2001, President Bush issued a military order authorizing the creation of military commissions (tribunals) to try certain alleged terrorists for violation of the law of war. The President's order ended weeks of speculation in the press over which method of adjudication the nation would follow, however, it did not end the debate regarding which method was optimal. Precedent in this country for trying such persons before military commissions dates back to the American Revolution and Major Andre and to as recently as 1942 in *Ex Parte Quirin.*[66]

President Bush restricted the *in personum* jurisdiction of the military commission to non-United States citizens who are alleged to be al Qaeda members, international terrorists or those who knowingly harbored the al Qaeda or other international terrorists. The President charged the Secretary of Defense with developing and issuing explicit regulations for the conduct of these commissions. However, the President did provide: that penalties may include the death penalty, that only a two-thirds vote of the members is required for conviction and sentencing, a lower evidentiary standard (evidence that has a probative value to a reasonable person) and for the protection of state secrets. The Secretary of Defense will determine the standard of proof to be used, i.e., beyond a reasonable doubt, clear and convincing evidence or preponderance of the evidence and the actual rules of procedure.[67]

President Bush designed the military commission's rules of procedure to protect sensitive information.[68] Alberto Gonzales, counsel to the President, argued in an *USA Today* Editorial that if the terrorists were prosecuted in the United States District Court that the government would be faced with the choice between "compromising sensitive intelligence information and letting criminals go free."[69] In particular, the government prosecutors are faced with the dilemma of whether to go to trial with the best evidence, and exposing intelligence methods, undercover agents and informants; or whether to charge the terrorists with less serious crimes in order to protect intelligence methods, undercover agents and informants; or whether to drop the case altogether in order to protect intelligence methods, undercover agents and informants.[70]

President Bush modified the rules of evidence for the military commission. Evidence that has probative value to a reasonable person will be admissible.[71] Thus, the hearsay rule of evidence that requires the actual person to testify as to their previous statements would not be necessarily imposed. The hearsay rule has caused problems in past terrorist trials because the disappearance or inaccessibility (either practically or jurisdictionally to a United States District Court Subpoenas) of direct witnesses.[72]

The court developed exclusionary rule also may be inapplicable. That rule excludes evidence from being used against an accused in court if law enforcement personnel violated a suspect's constitutional rights in obtaining evidence. The exclusionary rule's purpose is to deter police from being over-zealous in their pursuit of criminal suspects.[73] As we are in an armed conflict with combatants—not defendants, the basis for such a rule has been seen as non-applicable. As appeared in the *Wall Street Journal*: "Do we really want to give people bent on destroying the U.S. the right to throw out evidence based on the exclusionary rule?"[74]

ARGUMENTS FOR USING MILITARY COMMISSIONS

Protection of Civilian Courts.

Presidential Counsel Gonzales argues use of military commissions will protect civilian judges, juries, prosecutors and the media from terrorist reprisals. Furthermore, protection of the terrorist defendants would be an immense task, to say noting of the difficulties each day in transporting the defendants from jail to court and back again along public roads.[75]

Disciplined Panel members.

Military members and military commissions have a history of being able to be even-handed in evaluating evidence and finding alleged war criminals "not guilty".[76] Indeed many, if not all of the members selected to sit as members of the military commission will have had experience as either courts marital convening authorities or as previous courts marital members, or both. Douglas Kmiec even argues in the *Wall Street Journal* that the terrorists would have a much fairer trial before a military commission than before a civilian jury.[77]

Unanimous Findings not Required.

The military commission need only have two-thirds of the members concur for a guilty finding and for sentencing.[78] Civilian criminal courts require a unanimous finding of guilt.[79] It almost goes without saying that not needing a unanimous finding will ease the prosecutor's burden.

Standard of Proof.

The Secretary of Defense has been tasked by the President to establish rules and procedures for the military commission. It is unknown at this time whether "beyond a reasonable doubt", "clear and convincing evidence" or "preponderance of the evidence" will be chosen as the standard of proof applied in the military commissions. [80]

ARGUMENTS AGAINST THE USE OF MILITARY COMMISSIONS.

Secondary Effects.

"What I fear is that the rest of the world will look at it and say these military courts are not courts of justice but courts of vengeance. The trials will be a formality preceding execution."[81] Others argue that one should think about how this will look to the rest of the world. For example, Timothy McVeigh killed 168 people in the Oklahoma City Bombing and he received all the constitutional protections and was tried in open court. On the other hand, the terrorists, (mostly or all Muslims) will be tried before a military commission without the constitutional protections accorded United States citizens (mostly Christian and Jewish); with only a two-thirds concurrence by the members to determine guilt; after reviewing evidence that would have been inadmissible at McVeigh's trial. "Presenting evidence in secret will convince no one and will only fortify Mr bin Laden's propaganda. And military executions of convicted terrorists after such trials will create a new generation of martyrs."[82] Or as Robert Levy says: "[T]he new Bush tribunals could unleash an ugly and dangerous breed of justice, lacking the due process guarantees that distinguish us from the barbarians we are fighting."[83]

Civilian Courts Can Handle the Task.

There is no evidence that the civilian courts could not handle the terrorist trials. The Federal Courts have tried and convicted the 1993 World Trade Center bombers and the Oklahoma City bomber. Although some have argued that the logistics of such a trial would be burdensome, no evidence exists that previous trials had to be stopped because of such difficulties. In other words, the federal courts are still open for business.[84] Alan Dershowitz writes: "There is no absolute guarantee that we could pull off a successful trial—if success is defined as not only fair but perceived to be fair. But by taking the case out of our courts and placing it before a military tribunal, President Bush has conceded failure without even trying. He has shown no faith in the ability of our well-tested legal system to endure the most daunting of challenges."[85]

Terrorists as Combatants.

Trying the terrorists before a military commission may advance the terrorists' claim to be soldiers. The terrorists may obtain a symbolic victory in just being brought before a military commission. Regardless that the Untied States will argue that the terrorists are "nonprivileged combatants" or "unlawful combatants"—they are being prosecuted by the military and that gives them the connotations of being soldiers—combatants. The United States may argue in vain before the Islamic world that they are merely criminals, but actions will speak louder than words. "The trials will thus dignify the terrorists as soldiers in Islam's war against America. This is exactly the wrong message to send."[86]

CONCLUSION

The terrorists' attacks on 11 September 2001 mark a pivotal point in how the United States defines and responds to terrorists' acts and terrorism. Before 11 September 2001, the United States defined terrorists as criminals. Because of that definition and viewpoint, law enforcement agencies were assigned the tasks of capturing terrorists and the courts were assigned the task of trying them. Those found guilty were jailed, and those found not guilty were released.

The magnitude of the 11 September 2001 attacks clearly lead the President to acknowledge that a law enforcement response was inadequate. The President declared war upon the terrorists, but in so doing he did not completely abandon the criminal nomenclature. Rather, after a fashion, the terrorists were seen not so much as criminals but as war criminals, namely those who commit crimes against humanity.

The practical question became, "what to do with those captured terrorists?" If they were common criminals, the courts should try them for their crimes. Some writers urged that an international court should try the terrorists, some urged use of the United States District Courts, while others urged use of military commissions. In the end, the President chose to authorize the creation of a military commission that may try some or all of the captured terrorists.

The President's decision has been both vehemently supported as a prudent move and vehemently denounced as an unconstitutional usurpation of individual rights. These voices are loud, but at this point are speculative. The rules of procedure are being drafted by the Defense Department. The United States Supreme Court upheld the use of military commissions during World War II. Whether the current United States Supreme Court would render a similar holding may well depend upon those rules being drafted by the Defense Department and how the commissions actually run. Furthermore, how the military commissions actually work, the

numbers of hearings held, the secrecy or openness of the hearings, the decisions and punishments meted out, and the level of advocacy practiced and level of appellate review will all influence world public opinion of its fairness. The decision to use military commissions to try the terrorists has been made; the real test will be how they operate and how that plays out in world public opinion. The effectiveness of countering terrorism may well rest upon the perceived fairness of these military commissions.

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