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Capital Punishment in the Age of Terrorism

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CAPITAL PUNISHMENT IN THE AGE OF TERRORISM

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Welcome to our program on Terrorism and the Death Penalty. I am Norman Greene, and I chair the Committee on Capital Punishment at the Association. I would like to thank Norman Redlich for his work in conceptualizing and planning this project. I would also like to thank the subcommittee working with him, including our committee secretary and Second Circuit clerk, Maria Pedraza-Perez, Second Circuit clerk Beth Rotman, and Jordana Horn-Marinoff, as well as Steve Greenwald and Jack Hoffinger.

Let me say a few words about our committee. Our commit-

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tee does not limit itself to the question of whether there should be a death penalty or not. Rather, we grapple with important ideas which arise from our current death penalty system. Today, we will study the issue of the death penalty during the time of national emergency and crisis.

No introduction to a program on the death penalty can be complete without a reference to the recent decision of Judge Jed Rakoff of the United States District Court for the Southern District of New York from Thursday, April 25, 2002.¹

Anti-death penalty advocates have recently been highlighting specific events in the struggle against capital punishment. These events, as I define them, are as follows:

Powerful attempts to limit the death penalty from the Governor of Illinois, who declared a moratorium on executions in Illinois.² The report of his commission has been published, recommending numerous reforms in capital punishment cases.³ Governor Ryan's speech before this Association on December 6, 2000, has recently come out in the *St. John's Law Review* and is available now.⁴

¹ See *United States v. Quinones*, 196 F. Supp. 2d 416, 420 (S.D.N.Y. 2002). The court declared its tentative decision to grant defendant's motion to dismiss the death penalty aspects of the case on the basis that the Federal Death Penalty Act is unconstitutional. The court, after careful consideration, conclusively declared the Federal Death Penalty Act unconstitutional in a later opinion, *United States v. Quinones*, S3 00 Cr. 761, 2002 U.S. Dist. LEXIS 11631, *2 (S.D.N.Y. July 1, 2002). Since the date of the program, the Federal Death Penalty Act declared unconstitutional a second time in *United States v. Fell*, No. 2:01-CR-12-01, slip op. at 40 (D. Vt. Sept. 24, 2002). The court said that the act "bases a finding of eligibility for imposition of the death penalty on information that is not subject to the Sixth Amendment's guarantees of confrontation and cross-examination, nor to rules of evidentiary admissibility guaranteed by the Due Process Clause to fact finding involving offense element," relying on, among other cases, *Ring v. Arizona*, 122 S. Ct. 2428 (2002). The court in *Fell* commented that "[c]apital punishment is under siege." *Fell* slip op. at 42.

² See Jodi Wilgoren, *Panel in Illinois Seeks to Reform Death Sentence*, N.Y. TIMES, Apr. 15, 2002, at A1 (stating that Governor Ryan declared a moratorium on executions after innocent men were exonerated from death row in Illinois).

³ See REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (Apr. 15, 2002), http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html.

⁴ See Symposium, *Governor Ryan's Capital Punishment Moratorium and the Executioner's Confession: Views From The Governor's Mansion to Death Row*, 75 ST. JOHN'S L. REV. 401, 407-08 (2001) (discussing the declaration of a death penalty moratorium in Illinois and the work of the Commission appointed by

The other key events are the many Innocence Projects that have been initiated by Peter Neufeld, Barry Scheck, and others,⁵ and the writings of James Liebman and his colleagues on the high rate of reversals in capital cases.⁶

Putting all that aside, there is something new to add as of the week of April 25, 2002: an attack on the constitutionality of the federal death penalty by a federal district court judge, Jed Rakoff, in a straightforward opinion.⁷ The basis for attack is the perception that the federal death penalty system threatens the execution of a meaningful number of innocent persons.⁸ Indeed, the opinion cites, among other things, the Liebman Report itself.⁹

That opinion must, or should, leave some wondering: Why did I not think of that?

We can only imagine what the Second Circuit or Supreme Court will do on appeal; but, for now, this is a thunderbolt thrown into the debate by a federal district court judge and flung in the face of the popularity, although perhaps declining popularity, of the death penalty. It is another reminder of why federal judges receive life tenure.

The program tonight on The Death Penalty and Terrorism shall be moderated by Norman Redlich, who has struggled against the death penalty, and not just its very existence, but where it exists to make it fairer since the 1950s, and who has a magnificent career which only begins to be described by the flyer for this program: Former Dean, NYU Law School. Norman?

Governor Ryan to reevaluate the Illinois Criminal Code as efforts to prevent the execution of innocent individuals).

⁵ See *Fighting the Good Fight*, NAT'L L.J., Dec. 27, 1999, at A10 (noting that Neufeld and Scheck are founders of the Innocence Project at New York's Yeshiva University Benjamin N. Cardozo School of Law, which has helped exonerate individuals through the use of DNA evidence).

⁶ See, e.g., JAMES S. LIEBMAN, et. al, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (June 12, 2000), available at <http://justice.policy.net/jpreport/index.html>.

⁷ See *United States v. Quinones*, 196 F. Supp. 2d 416 (S.D.N.Y. 2002); see also *United States v. Quinones*, S3 00 Cr. 761, 2002 U.S. Dist. LEXIS 11631, *2 (S.D.N.Y. July 1, 2002).

⁸ See *Quinones*, 196 F. Supp. 2d at 417 (noting that, despite safeguards, innocent individuals—mostly of color—are sentenced to death).

⁹ See *id.* at 418.

Norman Redlich

Norman Greene is a great chair of a committee. The minute one suggests a topic, Norman turns around and says, "That is a great idea. Why don't you organize the program?" So, here I am.

Let me just mention that there are two things that we are not going to discuss. So, if you want to leave, you can leave now. Those two things are the merits of military tribunals as such. We are also not going to discuss, unless we arrive at it indirectly, the question of the merits, or the lack thereof, of the death penalty. We are going to discuss the death penalty in an age of terrorism.

The basic purpose of the program is to discuss how governments respond to the type of national, as distinct from individual, crimes that are represented by the terrorist attacks on the World Trade Center and the Pentagon. Our law with regard to the death penalty has been formed through the process of litigating so-called "normal" acts of individual crimes with the resultant taking of individual lives. Conversely, this country and others have sought to invoke the criminal justice system in times of crises only to find that such laws, which were designed for "traditional" crimes, must be twisted, sometimes beyond recognition, in order to cope with times of crises.

We have had an example, those of you who are my age or somewhat my age, during the Cold War.

Terrorist attacks trigger factors that are not present in ordinary first-degree murder cases. The targets are different, as are the levels of premeditation and public response, among other factors. Traditionally, our law of the death penalty has been formed in the context of individual crimes. Thus, we are concerned about such things as competence of counsel; the mental state of the defendant; issues of premeditation; the attitude of jurors toward the death penalty, et cetera. The overarching question is often whether a system that applies a standard of guilt beyond a reasonable doubt can impose a penalty that is based upon guilt beyond any doubt. Nevertheless, some argue that our normal criminal justice system is well equipped to handle trials of terrorists who may be charged with planning, or implementing, the World Trade Center attack.

David Bruck is presently on what he thinks is a quasi-vacation, acting as a scholar-in-residence at the Washington and

Lee School of Law, which in terms of the work that he is doing and the location that he is in, is far different from the courtrooms or the cases that he normally defends. David Bruck is, in the area of the capital defenders system, very much a household name, and I am pleased to introduce him to you this evening.

David Bruck

Well, thank you very much.

I am, as Dean Redlich indicated, speaking to you from the perspective of a practicing trial lawyer and someone whose job includes kibitzing, I suppose one would say, most of the federal terrorism capital cases that have occurred, or are occurring now, in the United States.

The question of whether the death penalty should be applied in terrorism cases is often posed as one of statutory innovation: should we legislate a death penalty for terrorists? But all of that is all water under the bridge. The American criminal justice system already prosecutes terrorist offenses, but not, as a rule, terrorist cases. Rather, it treats them simply as crimes of violence, as ordinary criminal offenses, and as such there has long been federal death penalty jurisdiction over terrorist cases.¹⁰

One aspect of our approach to terrorist prosecutions that could use a lot more reflection than it has received so far is that our jurisdiction over terrorist cases extends worldwide. Ours is the one country in the world in a position to assert such global jurisdiction and make it stick. We can, and do, take people from countries all over the world who have committed crimes against United States interests or against United States citizens, and bring them to the United States for trial. And since the enactment of the Federal Death Penalty Act of 1994, which restored a generally enforceable death penalty in the federal criminal justice system, we claim the right to *execute* such people once we have brought them here and convicted them of murder in our courts.¹¹

¹⁰ See 18 U.S.C. § 3591 (2000) (listing criminal offenses that warrant the imposition of the death penalty).

¹¹ See, e.g., *United States v. Jordan*, 223 F.3d 676, 693–94 (7th Cir. 2000) (holding that because Title 18 prohibits attacks on federal facilities, the United States has jurisdiction to enforce its laws and retain personal jurisdiction over a foreigner who resided in this country when he committed the federal crime); see also *United States v. Rashed*, 234 F.3d 1280, 1282 (D.C. Cir. 2000) (stating that

In that sense, the current war against terrorism in our criminal courts places the United States in a position to become the world's executioner. I use that term advisedly, because this globalization of the American death penalty system occurs at a time when almost the entire democratic world, and certainly the entire Western democratic world, has abolished capital punishment—except for us.¹²

The history of our use of the death penalty for international terrorist cases is still rather short. We all recall the Nairobi Embassy bombing case, in which the two defendants faced, but did not receive, the death penalty at the hands of a New York City jury.¹³ Of course, now the Moussaoui case is pending.¹⁴ One might have thought that the government would draw a sobering lesson about the irrelevance of the death penalty in international terrorism cases from its failure to obtain a death sentence in the Nairobi Embassy bombing case. But it quickly became clear that the government drew a somewhat narrower lesson from the New York verdict: next time, do not let a Manhattan jury make the call. The government will not make that particular mistake again; we have Moussaoui—and probably most other international death penalty cases after his—being tried in Alexandria.

I myself have been appointed to a much more obscure international terrorism case involving a Palestinian member of the Abu Nidal Organization who was involved in the very bloody hijacking of Pan Am flight 73 in Karachi in 1986. This man was initially sentenced to death by the Pakistanis, imprisoned for fifteen years, and then handed over to the Americans after 9/11 for trial in Washington, D.C. His Pakistani death sentence was commuted by Benazir Bhutto as part of the return of democracy

a foreign sovereign may prosecute a defendant for the same offense previously prosecuted for in a different jurisdiction), *cert. denied*, 533 U.S. 924 (2001).

¹² See George Anastaplo, *Penalty of Death Read in a Newlight*, CHI. DAILY L. BULLETIN, Apr. 25, 1998, at 23 (noting that capital punishment has become rare in the industrialized Western world).

¹³ See Benjamin Weiser, *Jury Rejects Death Penalty for Terrorist*, N.Y. TIMES, July 11, 2001, at B1 (stating that a jury deadlocked on whether to impose the death penalty on Mohamed Rashed Daoud al-'Owhali, who bombed the American Embassy in Nairobi, which killed 213 people).

¹⁴ See Robert O'Harrow Jr., *Moussaoui Ordered to Stand Trial in Alexandria*, WASH. POST, Dec. 14, 2001, at A15 (stating that Zacarias Moussaoui, the only living suspect in the United States formally linked to September 11, 2001 terror attacks, was ordered by a federal judge to stand trial for conspiracy).

to Pakistan. Now that particular bit of democratic progress stands to be undone in a courtroom in the District of Columbia, where the United States government is attempting to apply the 1994 death penalty law retroactively to that 1996 hijacking case in Pakistan.

I think the recent case that most clearly suggests where we are headed—that it has not yet actually come to fruition—is the indictment returned in New Jersey in the Daniel Pearl murder.¹⁵ There a New Jersey federal grand jury has returned a capital indictment against a Pakistani terrorist for the murder of an American in Pakistan.¹⁶

This kind of global death penalty jurisdiction is a new phenomenon. The arrest, the prosecution, the bringing of foreigners to the United States to try them for their lives is something that we have never attempted before now, and I think it is something that we should consider a little more deliberately and thoughtfully than we have so far.

It is striking that the two other countries most challenged by terrorism in our lifetime, Israel and the United Kingdom, have taken a different path. Both countries made very hard-nosed and deliberate decisions not to use the death penalty in terrorism cases.¹⁷ Their reasoning was that whatever the merits of capital punishment in general, it was clearly counterproductive in fighting terrorism because the death penalty makes martyrs of terrorists and thus, actually advances the political program of terrorist organizations.¹⁸

We have made a different calculation in this country, if we can call it a calculation, but I think what we have really done for the most part is simply allowed our domestic political death penalty system to bleed over, with very little reflection and analysis, into the international arena. In overseas cases, we are con-

¹⁵ See Seth Mydans, *Trial in Murder of Reporter Begins with Legal Maneuvers*, N.Y. TIMES, Apr. 6, 2002, at A6.

¹⁶ See Dexter Filkins, *Four in Pearl Murder Are Found Guilty in Pakistan Court*, N.Y. TIMES, July 15, 2002, at A1 (Ahmed Omar Sheikh was sentenced to death, typically by hanging, while three other men received life imprisonment).

¹⁷ See Thomas M. McDonnell, *A Potentially Explosive Execution*, NAT'L. L.J., July 7, 1997, at A17 (noting that former Great Britain Prime Minister John Major, former Israeli Prime Minister Yitzhak Rabin, and former West German Chancellor Helmut Schmidt opposed attempts to reintroduce the death penalty to their respective countries).

¹⁸ *Id.*

fronted with ghastly homicides which, by their very logic, impel this sort of reasoning: if we seek the death penalty in a kidnapping case involving one murder, surely we have to seek it in an embassy bombing involving two hundred.

So here we are, following a very different course than England, or Israel, or indeed all of the other Western democracies, and with not a great deal of thought given to where this course is leading us.

Well, where is it leading us? The reasoning that prevailed in the parliamentary debates in England in the 1970s and 1980s, when the death penalty was rejected, and rejected again, and in Israel ever since 1954 (when the death penalty was first abolished by statute), has been driven home by the situation in which we now find ourselves. We face a terrorist enemy who is motivated by martyrdom. This stands entire notion of the death penalty as a deterrent on its head. We are trying to use the threat of death as a means of intimidating people who signed up for death when they became our adversaries.

Having been involved directly, as defense counsel, in one of the al Qaeda prosecutions, I can tell you that in the world of martyrdom it doesn't get any better than to be captured by the United States, brought to New York, or to Alexandria, Virginia, tried on a world stage, and then ritually put to death by the United States. That's the gold standard of martyrdom. For someone who considers blowing himself up on a plane to be a good thing, getting executed by the United States is as good as it gets.

Not only would such a fate be chosen by the defendant, but it would also be the ending selected by the organizers of terrorist attacks, because of the incomparable melodrama of martyrdom that it bestows on the terrorist cause. And this is not nearly so true once the death penalty is taken out of the equation.

So we are learning through experience what the Israelis and the British figured out simply by the use of common sense, without actually having to go through this self-defeating process.

We are also starting to learn that fighting terrorism with the death penalty is a great deal simpler in theory than in practice, because of what we might describe as the "foot soldier problem." This stems from the fact that the closer one is to the actual business of murdering civilians, the more likely one will be a very low-ranking member of the organization. Among terrorists, as

among everybody else, murder is a blue-collar job. The higher up in the organization a defendant is claimed to be, the more attenuated the question of responsibility, and the more difficult the proof.

Then, sometimes, even the foot soldiers themselves are difficult to tie to a particular act. We may soon discover, for example, that prosecuting Zacarias Moussaoui—the so-called “20th hijacker”—is a far dicier proposition on the question of what connection, if any, Mr. Moussaoui actually had to the 9/11 actions than the public has assumed. When we get into the actual details of exactly who did what to whom in international terrorism cases, we find that the proof can be exceedingly hard to come by—much more so than in the ordinary capital prosecution in a domestic court.

I have spoken about the obvious lack of *deterrent* value in using the death penalty against organizations and individuals who are motivated by a desire for martyrdom. The same is true with respect to the *retributive* value of the death penalty. It is a punishment that *we* fear much more than does our terrorist adversary in al Qaeda, and it holds more retributive significance to us than it does to the people on whom we are proposing to use it.

But while the death penalty is not something that our opponents fear, it is demoralizing and extremely disturbing to our allies. In fact, we are finding that our global anti-terrorist coalition is being put at risk by our use of the death penalty.

To take one recent example: the effort of the U.S. Attorney in the Eastern District of Virginia to gather some “countermitigation” evidence by going to France and interviewing Mr. Moussaoui’s family (without, of course, telling them the purpose of their inquiry) turned into a diplomatic incident when it turned out the French government had no idea that the FBI and an Assistant U.S. Attorney were in France to gather penalty phase evidence against Moussaoui.¹⁹ The French have, for the time being at least, withdrawn their cooperation from the case. And such episodes are likely to occur again and again, as we try to enlist the help of democratic allies whose assistance and whose unstinting and reflexive and immediate support we must have in the struggle against terrorism in the world

¹⁹ See Philip Shenon & Benjamin Weiser, *Prosecutors Seek a Death Sentence in Terrorism Case*, N.Y. TIMES, Mar. 19, 2002, at A1.

So the death penalty in international terror cases produces a new crop of problems: on top of the moral and political issues that we have struggled with for generations, we now have some real trade-offs in the area of national security to consider. Is it worth the costs to our anti-terror alliances to have this burr under our saddle? The death penalty is very likely to be a continual irritant between us and the rest of the democratic world, which finds our enthusiasm for this peculiar institution to be increasingly troublesome and embarrassing.

Now, the last point to be made about this is that our own government is not very well set up to consider the trade-off between the diplomatic and the national security costs of the death penalty, as against whatever marginal deterrent or retributive value it may have. For by treating these crimes as ordinary criminal offenses, we vest decision-making in the Justice Department, in the FBI, and in domestic law enforcement agencies. These are government agencies which do not normally consider, and indeed have doctrinal reasons why they normally should not and will not consider, the international political consequences of prosecutorial decisions. So, in a sense, we are institutionally blind.

That is not to say that the State Department or the White House might never weigh in with some countervailing diplomatic or national security reason why the death penalty ought not to be imposed in a particular case. But as a general matter, our system is not set up that way.

On the contrary, it is set up for a kind of consistency: like cases should be treated similarly. So if Attorney General Ashcroft is going to direct the Department of Justice to seek the death penalty in a case in Texas or Missouri or Vermont that involves two murders, the Department certainly has to seek it for a murder like that of Wall Street Journal reporter Daniel Pearl, or for the bombing of an embassy in Kenya in which 220 people are killed.

And thus we have a crude sort of consistency driving policy. This despite the undeniable fact that the complex realities of fighting terrorism should be informed by much more than whether we have a consistent policy about enforcing the death penalty in criminal cases.

This need for consistency—the notion that if we going to impose the death penalty on ordinary domestic criminals, we cannot

very well take a pass on the Nairobi embassy bombing—illustrates how the death penalty itself begins to acquire independent force in decision-making. It is as though the death penalty, because of the belief that it must be applied consistently and predictably if at all, becomes almost a party that makes its own demands, and exerts its own pressures. If we are going to have it—and of course it is always a political given that we *must* have it—we must actually apply it here, and we must apply it there.

That is a great danger, I think, and something that we really must come to terms with as a country. Whether the death penalty is good or bad, it is supposed to be a tool to be used by us. We are not supposed to be *its* tool. But the reflexive and somewhat unthinking way in which the death penalty is being applied in terrorism cases gives us some cause to fear that that sort of inversion of roles may have occurred.

Perhaps the country's growing skepticism about the death penalty at home, and the evident weakening of political support for it,²⁰ will in the fullness of time create the political space we need to begin thinking critically about the use of the death penalty even in these extreme cases. Or especially in these cases. And the sooner the better—for our effort against terrorism, and for our country.

Thank you.

Norman Redlich

Thank you, David.

At some point I am going to ask you to think about, and I will warn you in advance, giving the Israeli example.

The Israelis were smart enough to make genocide a separate crime. Even though they have abolished the death penalty, they did execute Eichmann.²¹ In the 1950s, when I used to spend a lot of time going around to churches and synagogues speaking against the death penalty, someone would invariably raise his or her hand and say, "What about Eichmann?"

After a while I gave my response, "Any time a state wants to abolish the death penalty for any crime except genocide I will be pleased to join in that recommendation."

Of course, when one talks about the Israeli experience, one

²⁰ See Jim Yardley, *Death and the White House*, N.Y. TIMES, Dec. 17, 2000, at 3 (noting that many states are reviewing their capital sentencing schemes).

²¹ See ZVI AHARONI & WILHELM DIETI, OPERATION EICHMANN: THE TRUTH ABOUT THE PURSUIT, CAPTURE AND TRIAL 172 (Helmut Böglér trans., 1996).

has to bear in mind that they dealt with the very problem that we have been dealing with by creating another crime called genocide, and thereby not subjecting Eichmann to the ordinary criminal justice system.

Paul Saunders is an old friend. He is a partner at the law firm of Cravath Swaine & Moore. He is a board member and former co-chair of the Lawyers Committee for Civil Rights Under Law. Perhaps not of great importance, but I have been bothering him for weeks and weeks, and months and months, because I have been teaching a course on separation of powers and the structural constitution and I have been constantly calling him, asking for his wisdom with regard to military tribunals, because he is about the only person I know who has ever had any real experience with military tribunals.

Paul was a JAG officer, served in the Judge Advocate General's Corps from 1967 to 1971. He is a great lawyer, a lawyer in the highest tradition, and somebody who really knows something about how the criminal justice system works within the context of military tribunals and is in a position to tell us the extent to which that system can be applied to what it purports to apply to here, namely the war against terrorism.

Paul?

Paul Saunders

Thank you very much, Norman.

I am delighted that this evening has come, because maybe it will bring an end to Norman's questions, which I get once every other day or so. They are always questions about the laws of war or courts martial or military tribunals. Most of them are questions that I cannot answer. So, I am especially glad that tonight has come, and maybe his questions are going to be answered. I can only pray for the end of Norman's course to come.

Norman started out by saying that we are not going to talk about military tribunals as such or whether they are authorized or constitutional. I do not propose to do that either, although I am going to talk about the death penalty and courts martial and military tribunals, and I am going to talk a little bit about the historical basis for the death penalty in courts martial and military tribunals, and I am going to say something about the most recent military order of the President that establishes military

tribunals.²²

Let me start by articulating a few general principles about capital punishment and courts martial.

First, although today courts martial do have broad authority to impose the death penalty that has not always been the case. Second, it is also true that courts martial today do have authority to prosecute offenses against the laws of war. It is not entirely clear, however, what that means or what the laws of war are. That is especially true if one attempts to define terrorism as a violation of the laws of war.

Third, the United States Supreme Court recently has held that courts martial may impose the death penalty even though the procedures followed by courts martial imposing the death penalty do not fully comply with the Eighth Amendment. That is the *Loving* case.²³ I am not going to go into a great detailed discussion of that. The basis has something to do with whether delegation is really delegation from the Congress or not,²⁴ but in any event the holding of that case is that courts martial are free, perhaps within limits, perhaps not, to impose the death penalty even though all the Eighth Amendment protections have not been met.²⁵

Finally, I guess I would say that putting all of those together, my conclusion is that the use of military tribunals to try terrorists who are not at least traditional combatants, as we have understood the term combatants, for violations of the laws of war and to impose the death penalty on those persons, comes so close to the line that my own view is that that ought not to occur. That is, we ought not to try terrorists by this quite artificial, although long known in history, procedure that we call military commissions or military tribunals.

Throughout history, there has been a deep mistrust of courts martial. I think in part this mistrust goes much earlier than the creation of this country. It goes all the way back to the time of Richard II when there was a real distrust of courts martial or military justice, such as it was, in the early days in England.

In any event, the founders of this country well understood

²² See Military Order of November 13, 2001, 66 Fed. Reg. 57,831 (Nov. 16, 2001).

²³ *Loving v. United States*, 517 U.S. 748 (1996).

²⁴ *Id.* at 769.

²⁵ *Id.*

the distrust that the general populace had for justice by military courts. In fact, although in the beginning courts martial had the power to authorize the death penalty, they could only authorize the death penalty for military type crimes. In the first Articles of War, which in this country were the predecessor to the Uniform Code of Military Justice, in the very first Articles of War during the Revolutionary War, military commanders were enjoined to turn over to civilian authorities members who had committed what were called ordinary capital cases; that is, cases that might qualify for the imposition of capital punishment or the death penalty but that were not military type offenses.

So, even from the very beginning of the establishment of courts martial in this country there was a mistrust of the ability of courts martial to impose truly impartial justice, and especially to impose capital punishment in what were thought to be regular civilian type crimes.

During the Civil War, the Congress did grant courts martial the power to impose capital punishment over non-military or so-called common law capital crimes, but only if they were committed during wartime. In 1916, again by an amendment to the Articles of War, courts martial were given the power to impose the death penalty over civilian common-law type crimes, except—this is in non-wartime—except murder and rape. Courts martial could not impose the death penalty in those cases.

In 1950 the Articles of War became the Uniform Code of Military Justice. The Uniform Code of Military Justice gave courts martial jurisdiction over four types of murder for which they could impose the death penalty. The Supreme Court, as I said, has upheld the authority of courts martial to impose capital punishment in those cases, even though the procedures used do not comply with the procedures that the Supreme Court requires in all other capital cases.

Now, how far that goes is a matter of some debate. There is in fact a statute on the books, it is still on the books—Article 106 of the Uniform Code of Military Justice.²⁶ It preceded the Uniform Code of Military Justice. It was in the Articles of War. It has been in the Articles of War for a long time. That statute prohibits the offense of spying. After a conviction of the offense of spying the death penalty is mandatory. It is the only statute

²⁶ See 10 U.S.C. § 906 (2000).

that I know of in the United States for which the death penalty is mandatory. If you are convicted of spying under Article 106 you must be put to death.²⁷

So, and I must say I have never had any experience with Article 106. I do not know anybody who ever has, but theoretically if you are prosecuted and convicted of the crime of spying, then there is no sentencing procedure whatsoever—it does not matter. There are no mitigating circumstances, or aggravating circumstances; you must be put to death. Whether that is constitutional or not, I have no idea. We may see that tested in the coming days under the so-called military tribunals.

Now, that leads me to the general question of military tribunals. First, what do we know about them?

We know that military tribunals were used during the Revolutionary War.²⁸ We know that there were military tribunals used during the Civil War.²⁹ These are not courts martial. So, to the extent that courts martial come under the judicial branch of our government, military tribunals do not. They are not courts. There is no appeal from the decision of a military tribunals to the civilian courts.³⁰

So, they have been used for a long time in our history. We do not know a lot about them, and the scholarship is actually quite confusing, and I am not going to take the time of this audience to go into the details of the scholarship behind military tribunals except to say that we know a few things about them.

During the Civil War we know that the Supreme Court said they could not be used to prosecute civilians when the civil courts were open. That is *Ex Parte Milligan*.³¹ We do know that they were used in the Second World War, and the most important, interesting case is the case of the Nazi saboteurs, the eight saboteurs who were prosecuted by military commission or military tribunal in Washington.³²

²⁷ *Id.*

²⁸ See Robert H. Bork, *Having Their Day in (a Military) Court*, NAT'L REV., Dec. 17, 2001, <http://www.nationalreview.com/17dec01/bork121701.shtml>.

²⁹ *Id.*

³⁰ See Katharine Q. Seelye, *Government Sets Rules for Military on War Tribunals*, N.Y. TIMES, Mar. 21, 2002, at A19.

³¹ See *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (stating that civilians have the privilege of trial by a jury).

³² See *Ex Parte Quirin*, 317 U.S. 1, 21–22 (1942); see also Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Be-*

What is interesting about that case is that the Supreme Court had great difficulty trying to figure out how or why they could be prosecuted.³³ You may remember that when they landed in Long Island and in Florida the first thing that they did was to bury their uniforms in the sand and then to infiltrate themselves into the civil population.³⁴

Well, when they did that they were no longer lawful combatants. So, the Supreme Court created another category that it called unlawful combatants.³⁵ If they were lawful combatants, they would have been prisoners of war and they would have had all of the rights that prisoners of war normally have.³⁶ In this case, the Supreme Court said they were unlawful combatants, so they did not have any of those rights.³⁷ They were prosecuted. The Supreme Court in *Quirin*, a case on a writ of habeas corpus, held that the military commissions did have jurisdiction to prosecute the saboteurs,³⁸ although the basis for that jurisdiction is far from clear,³⁹ and the opinion has been criticized at great length.

They were prosecuted. The trial lasted a couple of weeks. They were convicted. They were sentenced to death.⁴⁰ Six of them were actually put to death very shortly after they were convicted.⁴¹ So, the second thing that we know about military tribunals is that they, at least historically, have had power to impose the death penalty.

fore Military Commissions, 25 HARV. J.L. & PUB. POL'Y 653, 656–57 (2002) (discussing the eight Nazi saboteurs and the President's order for their trial by military tribunals).

³³ See George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y. 635, 641–42 (2002) (discussing the fact that there was uncertainty in regards to how to prosecute the saboteurs).

³⁴ See *Ex Parte Quirin*, 317 U.S. at 21 (discussing how the Nazi saboteurs landed in America in 1942).

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Orentlicher & Goldman, *supra* note 35, at 657 (discussing the Court's decision to send the combatants to trial in front of military tribunal because they were unlawful combatants).

³⁸ See *Quirin*, 317 U.S. at 46.

³⁹ See *id.* at 46 (noting that the parameters of jurisdiction of military tribunals is not well defined).

⁴⁰ *Id.*

⁴¹ See Maj. Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002, 41, 46.

The next, the other most famous case involving military tribunals of course is the *Yamashita*⁴² case. That is the Japanese general. What is interesting is that he was tried in the Philippines. He was in uniform; he did not bury his uniform. He was in uniform and he was prosecuted for violating the laws of war. The law was that he failed to supervise his troops, who had committed atrocities in the Philippines.⁴³ Yamashita was prosecuted again on very short notice by a military commission in the Philippines and sentenced to death.⁴⁴

So, this now brings me to a discussion of the current Order that creates military tribunals. I want to discuss that in the context of the death penalty and see what we know about it.

The first thing that we know about the military order is that it authorizes the trial of non-citizen civilians.⁴⁵ Now, courts martial on the other hand have extremely limited jurisdiction over civilians. It is possible to prosecute civilians who are with the military in the field overseas in times of war, but except for very narrowly defined categories such as that, courts martial in this country do not have the power to prosecute civilians, but under the Military Order, the military tribunals do.

The second thing we know about the order is that it authorizes the trial of terrorists and those who conspire with them or harbor them. In fact, you have to be declared a terrorist before these tribunals will have jurisdiction over you.

Now, what is curious about that is that being a terrorist is a status. You do not theoretically know whether one is a terrorist unless and until one has been convicted of a crime that we would call terrorism. If you are not a terrorist, military tribunals have no jurisdiction over you.

Now, there is a definition of terrorism in the Patriots Act,⁴⁶ which was passed shortly after the September 11th attacks, but

⁴² *In re Yamashita*, 327 U.S. 1 (1946).

⁴³ *Id.* at 13 (stating the charge against General Yamashita).

⁴⁴ *Id.* at 5.

⁴⁵ See Maj. Timothy C. MacDonnell, *Military Commissions and Courts Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW., Mar. 2002, at 19 (indicating that President Bush's new order authorizes trial of non U.S. citizens for war crimes by military tribunals); see also Diane F. Orentlicher & Robert Kogod Goldman, *The Military Tribunal Order: When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653, 655-56 (2002).

⁴⁶ Pub. L. No. 107-56, § 802, 115 Stat. 272 (2001).

that definition of terrorism is not very satisfactory, and in fact may not even apply to those who were responsible for the September 11th attacks, because the definition has an intent requirement. You have to intend to do certain things. It is unclear whether one could ever prove such an intent in a case against those who were responsible for the September 11th attacks.

The third thing that we know about the military order that is of interest is that it authorized a prosecution for violations of the laws of war and other applicable laws.

You might ask the question that Norman has been asking me for the last month, "What are the laws of war? How do you know when you have violated the laws of war?"

The answer is that throughout history the laws of war have meant different things to different people. Even today it is quite unclear what the laws of war are. There are certain international conventions that purport to define some of the laws of war. For example, the Geneva Convention of 1949 defines how you have to treat prisoners of war.⁴⁷ Presumably, if you treat prisoners of war in a way different from what the Geneva Convention dictates, you have violated the laws of war. The laws of war, generally speaking, are not codified. The Constitution gives the Congress the power to define the laws of nations, which presumably includes the power to define the laws of war, but the Congress really has not done so in a comprehensive way. The perfect example of that would be General Yamashita's offense—for which he was convicted—probably was not an offense that was described anywhere in the then existing Articles of War, or in any existing international convention.⁴⁸ In any event, he was prosecuted and convicted.

The laws of war again have a very long history.⁴⁹ The Greeks thought that the most important thing when you went to war was to have a declared war. The war had to be declared with great formality. The Greek battles were fought typically in open fields, so there was never any question about involving non-combatants in the wars. They just were not there. The Romans,

⁴⁷ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁴⁸ See *Yamashita*, 327 U.S. at 42 (noting that the trial and conviction of an enemy general for actions taken during war is unprecedented in history).

⁴⁹ See generally MICHAEL ELIOT HOWARD, *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* (Michael Howard et al. eds, 1994).

on the other hand, did not follow any such rules. The Romans, as far as anybody can tell, really did not follow anything that one might recognize as the laws of war.

The Crusaders, on the other hand, followed a very strict code of chivalry. Because if you violated the code of chivalry in battle, you might lose your knighthood. The Crusaders were very concerned about following certain rigorous rules in the way in which they conducted wars. They also held prisoners for ransom. There was never any question about mistreating prisoners or killing prisoners of war, because the Crusaders, at the end of the hostilities, wanted to trade the prisoners for ransom.⁵⁰

Well, I am not going to discuss at great length the history of the laws of war, except to say that if we think we are about to prosecute terrorists and to impose the death penalty on terrorists for violations of the laws of war, at least the way they have been articulated in our history of military commissions and military tribunals, it is theoretically possible to prosecute, convict, and execute a terrorist who is not a combatant for violation of some law of war that has yet to be defined in a prosecution in which there will be no appeal to any independent court of the type we are used to seeing.

Now, that would be, I think, a very, very grave misapplication of the system of justice that we have created and that we have spent a long time nurturing and defining. But it is at least theoretically possible.

One last thing on the laws of war. In 1865, after John Wilkes Booth died, the then Attorney General of the United States was asked by the President whether, if he had survived, Booth could have been prosecuted by a military tribunal—not a court martial, a military tribunal—for a violation of the law of war. The Attorney General opined that not only could John Wilkes Booth have been prosecuted for violating the laws of war when he assassinated President Lincoln, but that he had to be prosecuted by military tribunal for violating the laws of war, and that no civilian court could stop such a prosecution.⁵¹

Booth was not a combatant. He was a civilian. He was not a soldier. That was just a detail for the Attorney General because he said, “Well, he must have been a secret belligerent.”

⁵⁰ See BARBARA W. TUCHMAN, *A Distant Mirror* 62, 81 (1978).

⁵¹ *Military Commissions*, 11 Op. Att’y. Gen. 297 (1867).

Then he said, "Well, what was the law of war that he violated in assassinating the President?" The Attorney General said that we know it was a violation of the laws of war because when Booth assassinated the President, you remember his words, "Sic semper tyrannis."⁵² When Booth died, he said to the doctor, "Say to my mother that I died for my country."⁵³

From that evidence the Attorney General concluded that John Wilkes Booth acted as a "public foe", violated the laws of war, and could be prosecuted only by a military tribunal, and then presumably sentenced to death.⁵⁴

Now, that is the history that we are dealing with. It is not a pleasant history. It is a very unsettling and unsatisfactory history, but it is a reality and that is what we are facing when we face the theoretical imposition of the death penalty on non-combatant terrorists by a military tribunal.

Thank you very much.

Norman Redlich

Well, Paul, now I know why I could never get an answer—because there is none.

Our next speaker is a true academic in a world of academics. Richard Weisberg is a professor of law. He is the Floersheimer Professor of Constitutional Law at Benjamin Cardozo School of Law on lower Fifth Avenue in New York.

Now, we asked Professor Weisberg to join this panel because he has written an outstanding book, which has been very favorably reviewed, on "Vichy Law and the Holocaust in France."⁵⁵ There we had an example of a civilian government that was trying to deal with a time of crisis, and we have an example of how that government responded to this time of crisis. That has been the emphasis that Professor Weisberg has placed on his scholarship in recent months and recent years. We thought that the in-

⁵² ASIA BOOTH CLARKE, JOHN WILKES BOOTH: A SISTER'S MEMOIR 99 (Terry Alford, ed., Univ. Press of Miss. 1996).

⁵³ *Id.* See Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President, Op. Att'y Gen. 14 (July 1865), available at <http://207.158.193.20/documents/Bplact16.pdf>.

⁵⁴ See LOUIS J. WEICHMANN, A TRUE HISTORY OF THE ASSASSINATION OF ABRAHAM LINCOLN AND OF THE CONSPIRACY OF 1865 234 (Floyd E. Risvold ed., Alfred A Knopf 1975).

⁵⁵ RICHARD H. WEISBERG, VICHY LAW AND THE HOLOCAUST IN FRANCE (N.Y. Univ. Press 1996).

sights derived from the Vichy experiment and the Vichy experience would be useful to this panel.

Professor Weisberg.

Richard Weisberg

As Norman Redlich has said, the example of France during the period of the Holocaust, known as Vichy, provides a cautionary tale for us today when we ourselves are facing what the government calls the threat of terrorism.

The Vichy period is one that I want to discuss with you actually in terms of two men, three special courts, and two films. I do not think you can really discuss France these days without at least a mention of cinema, and it turns out that these special jurisdictions that I am going to talk to you about tonight have been depicted in films that you may be familiar with. To the extent that a long program may leave you with less of the details that you might have wanted to take out of something like this, you not only have the written proceedings of our panel to come back to in a few months, but you can go out to your neighborhood theater and see a couple of these films, which actually focus on special jurisdictions and special courts.

The two men I want to talk to you about are Robert Badinter and Joseph Barthelemy. One of these men you probably are familiar with. Badinter was the Justice Minister in France under Mitterand, a very courageous individual, and took it upon his own shoulders to get the French in the early 1980s to abolish capital punishment.

Badinter had become depressed and demoralized by the practice of capital punishment in France, a practice that still used the guillotine, just as people on this panel and in this country have become shocked at the various ways in which we inflict and implement capital punishment. (Indeed, some recent progress on capital punishment in United States courts and in a general public revulsion toward capital punishment may have more to do with the methods we have used like the electric chair, which have become increasingly inhumane in their effects, than on the average American's sense of the morality or immorality of capital punishment.)

Badinter, while in private practice, had seen some of his own clients guillotined. While in the government, this experience, plus his own view of French history and jurisprudence, motivated

him to try to convince the National Assembly to abolish the death penalty.

Badinter, though, was also influenced in his feeling about capital punishment by the period of Vichy France, the period from 1940 to 1944, when there was an explosion of new capital crimes administered and implemented by new courts.⁵⁶ About 600 people died at the hands of these courts in France. The procedures were summary in nature. Individuals typically could not appeal and they were typically executed classically at sunrise, the day after the proceedings took place.

They were the result of a felt experience within France, demoralized by the defeat at the hands of the Nazis, but still very much in control of its own criminal procedure and its own courts, a felt experience that they were at risk from what they called terrorism. Terrorism consisted at the time really of a kind of three-headed monster, as they saw it: Gaullists, Jews, and Communists.

We have a different way of thinking and of imaging the terrorists that we are conjuring and dealing with today, but the idea is similar. There are people who, by their very status, by their very nature, create a threat to everyone, and a threat that somehow the ordinary courts and even the ordinary military courts cannot handle. This is the atmosphere in this country post-9/11, as good people on both sides of the issue debate and become more knowledgeable about the executive branch's orders and plans for special jurisdictions and special courts.

The other individual I want to talk to you about is much less well known, I think, to you, although I speak about him quite a bit in my book. His name was Joseph Barthelemy. He is a figure from the period in question, from the Vichy period.

The reason I want to emphasize Barthelemy is the following. He was the second Justice Minister in the Vichy regime, which, as you recall, was a regime set up by Marshall Petain, the octogenarian hero of Verdun, who was called to become the head of this demoralized French country after the defeat, and who set up an autonomous government. The Germans okayed this, in the southern zone, a government that wound up issuing, without much if any German insistence, almost 200 laws that related to

⁵⁶ See *id.* at 114 (N.Y. Univ. Press 1996) (noting the so-called special section courts that denied wrongdoers the right to appeal).

the Jewish population in their midst, an astoundingly fecund period of legislation that the French themselves did, which often exceeded the German models both in terms of the definition of who was a Jew and in terms of the procedures that were set up in order to deal with the problem.

Eventually, as you know, 75,000 Jews died under color of French law in the camps in the east. Three thousand more died on French soil in French-administered special camps. They did not call them concentration camps on French soil. They were not death camps, but they were camps administered with absolutely no attention to hygiene or to humane conditions.

That is not our topic for tonight, because all of those laws were administered by France's ordinary courts in a four-year period. The magistrates and the administrative courts in France managed to take charge of these complex definitional problems and were adjudicating questions of who was a Jew long after D-Day and even when Allied bombs were falling on French courthouses. The French have a particular logical drive; I call it desiccated Cartesianism, which is not dessert, but something to think about, a sense of pushing something through to its logical conclusion, even when it does not make any sense to do it anymore. That is the history of the ordinary courts dealing with the stranger in their midst, dealing with a similar issue, which is the issue of a status group that was threatening to the country.

There is some overlap because in the special courts, the courts that went against terrorists, Jews were one of three components, but there were also the Communists and the Gaullists.

Barthelemy was a pre-war liberal. I want to emphasize this with you today as we think about what is going on in the United States in terms of the debates about special jurisdictions.

The thinking going into these courts, and other emergency measures that are going on, does not pit left-wing and right-wing individuals against each other. There are proponents and opponents on all sides of the political spectrum. Barthelemy was a liberal anti-fascist and anti-anti-Semite before the war, but when Petain called him down to the government to become the second Justice Minister, he rationalized extraordinary measures that, as a law professor which he was before the war, he would have found to be anathema and repulsive under French traditions of equality and due process.

Emergency times do funny things to good people. What is

one person's emergency is another person's commonplace. What makes it necessary for one person to seek a new court, or a new system, or a new set of procedures, to another may seem exactly what the safeguards within the traditional judicial and criminal justice system were designed to protect against. Crisis does not necessarily require innovation.

Barthelemy was the epitome, really, of French pre-war traditional thinking about constitutional law. The French have very similar views as ours about due process. They were way ahead of us when it came to concepts like equal protection. Times of necessity tend to see a disappearance, sometimes in the twinkling of an eye, but it usually really takes more thought on the part of a person of this distinction, a gradual move towards the acceptance of what hitherto would have been completely unacceptable within that person's own mind.

I think a little of this, as we go through the post-9/11 period, a little of this sense of gradualism, of rationalization, is occurring among not only good people, fine people, but extremely respectable individuals who, for example, would not have been caught dead mentioning *Korematsu*⁵⁷ on September 10th in anything but a derogatory way, but who on September 12 were saying in discussions, and important discussions, that maybe *Korematsu* has something to tell us about detention and that the Constitution, after all, was not designed to bring about national suicide.

I want to talk about three courts that were set up specially. I want to set up a model that I think is different from our usual model, both for capital punishment and for punishment generally, a model that we think of, and my colleagues have mentioned this, as being based on some combination of retribution, on the one hand, or deterrence on the other. I think David convincingly showed us that neither of those standard models for capital punishment or for punishment generally applies in a world in which the defendant may be seeking precisely that kind of extreme punishment, well publicized, or the martyrdom that the special courts may indeed be imposing.

I think instead that special jurisdictions, at least if France is our model, adopt a tripartite model or reason for special jurisdictions and for capital punishment that is based on vengeance, morality, and status identification.

⁵⁷ See *Korematsu v. United States*, 323 U.S. 214 (1944).

Now, these three things are not completely opposed to retribution and deterrence, but the language asks us to think a little bit differently about why these courts are set up, why people think about them.

Vengeance, morality, and status identification.

The first special court—and I am going to discuss each of these courts very briefly—that was set up by the French that did not exist ahead of time to handle the question of defeat, to handle the question of terrorism in the country, was the Cour Supreme de Justice, a special supreme court that was set up for one unique case. That was the prosecution of leaders of the Third Republic for dereliction of duty that brought about the defeat of the French.

Leon Blum, who was an outstanding individual and one of the Third Republic Prime Ministers, was put on trial, as well as Edouard Daladier—these are names that are probably familiar to you—who were in charge of the French government at the time of Hitler's increasing power. They were accused somewhat vengefully by this special court, which was set up just to try this unique case, of creating the atmosphere that had led to French defeat and that had placed the country now at risk not only of demoralization and of complete vanquishment by the Germans, but more importantly at risk of Socialist and left-wing forces who were violent and who were threatening terrorism.

That court, to the best of my knowledge, which could have imposed a capital sentence on these Third Republic leaders but did not for reasons that would take too long to explain, but which are implicitly fascinating, that court has not been depicted in any French movie as far as I know, but the other two courts are:

The Tribunal d'Etat is a special court that was set up during those four years, which I think primarily adjudicated morality. The most famous case, which was a capital case decided by the Tribunal d'Etat, does not have much to do with terrorism per se, but does have to do with a very topical component of our subject tonight: morality. That was a court that executed an abortionist, executed a woman who was providing abortions within her small town in France.

I believe that was the last woman executed by guillotine in France. It happened in 1942. Capital punishment and special courts conjoined here to impose on the country a sense of the morality of the leaders. Abortion typically in France had not been

punished severely, if at all, and now you have this woman from a small provincial village being guillotined.

Claude Chabrol, in his film, "Une Affaire de Femmes,"⁵⁸ "A Story of Women," which I very much recommend to you, brilliantly and evocatively describes both the court, the defendant, the religious, moral background that worked against her, and the dark atmosphere of Vichy morality that was at play in the punishment imposed on her.

The third court is the Special Section, the Section Speciale, and here too we have a wonderful film rendition by Costa-Gavras, who brought us "Z." An absolutely brilliant film. He is less well known for this film, which is actually called "Special Section,"⁵⁹ and it is about the French court that was designed to adjudicate the problem of terrorism, and which set up what I call status identification, which associated terrorists with the three groups I have mentioned and killed almost 600 people, in some cases only because they happened to belong to the status group that the country deemed to be threatening.

Costa-Gavras' film captures compellingly the atmosphere of a country that feels itself under threat internally. Remember the way it was from the French point of view. The enemy is not really the Germans, and in the unoccupied zone you have, at least until November of 1942, before which these courts had all been set up, you have an autonomous regime that considered itself to be fully French. The threat was seen from within. The threat was seen to order, to morality. The Special Section courts engaged that particular threat in a manner that I will close briefly by describing in somewhat greater detail.

First, I want to say that there was pressure to set up a court like the Special Section, in part because people distrusted the ability of the ordinary courts, which were doing their work, which were somewhat overburdened, because the question of who was a Jew created a complete explosion of litigation, was a huge business, and in part for other reasons. Jewish judges, for example, could no longer serve, and therefore you had a paucity of judges. So, the ordinary courts were overtaxed.

The reason for the skepticism about the courts in France and why people thought you needed special courts went beyond that.

⁵⁸ UNE AFFAIRE DE FEMMES (New Yorker Video 1988).

⁵⁹ SPECIAL SECTION (Goriz Films 1975).

You have the following charge thrown at the ordinary judges: “We all know that just about every judge in France has linked hands with the Jews and the Freemasons. We could cite you fifty decisions in which the most prestigious judges have tripped up the laws concerning either the Jews or Freemasonry.”

That kind of charge I think, fortunately, has very little currency in this country today, but what is going on in part is a very natural and complex debate about the capacity of ordinary courts. We put it on different grounds, the problems of the openness of the courtroom, problems of evidence that might come out in these trials if they were done the ordinary way, evidence that might give solace to our enemies.

I just want to point out to you the generality that at least in this historic period in France, and I think in many others, skepticism exists in one way or another about the ability of ordinary courts to handle the kinds of situations that deal with terrorism that the special courts were better able to propose.

Barthelemy eventually regretted his signature establishing the Special Sections more than any other law that he signed during his two years as Justice Minister—remember the pre-war liberal, and he signed a lot of pretty terrible laws—promulgated on the 14th of August, 1941, about 14 months after the defeat. The government has been set up in the southern zone. It sees that it can legislate freely. It has already passed its major laws against the Jewish population. Now it is focusing on terrorists. The following law is signed: “There is now instituted as part of each military tribunal or each maritime tribunal one or several special sections to which are referred the perpetrators of all penal infractions, whatever they may be, committed with the intent of Communist or anarchist activity.”⁶⁰

“In the parts of the territory where military or maritime tribunals would not sit, the jurisdiction of the Special Sections provided for in the paragraph above will be transmitted to a section of the Court of Appeals, which rules without announcing its reasons by deciding only on guilt and penalty.”⁶¹

(I’m skipping most of the statute for the operative provisions that I think may interest you tonight.)

Article 7. “Judgments rendered by the Special Section are

⁶⁰ The Vichy Law of 14 Aug. 1941 in RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* 376 (1996).

⁶¹ *Id.*

not amenable to appeal. They are executed immediately.”⁶²

Article 9. “Penalties available to the Special Section are life im-prisonment with or without a fine, hard labor for a term of life, or death, and no sentence can be less than that prescribed for the crime alleged.”⁶³

Then this important jurisdictional Point 10: “All existing bodies of inquiry or judgment of stripped of jurisdiction in favor of the Special Section, which will in addition hear any complaint against judgments made for failure to appear or in absentia.”⁶⁴

This law was procedurally and substantively startling. We have heard a little of this from earlier speakers tonight, or analogous, as it was designed *ex post facto* to punish people unconnected with the actual crime. Often it is a threat to our traditional notions of justice where the crime in fact was not defined, except as a status crime.

One last point that I think is very important. France, like England, and like the United States from the late 18th century, was really the constitutional home of what we think of as due process, although France had tragically done away during these four years with its equally longstanding tradition of equality, which it taught us in the 18th century when we did not have anything like equality in our own country, and, as you know, no mention of equality in our Constitution at all until the Civil War brought about that possibility; the French had been preaching and, indeed, in their legal system until Vichy, practicing equality until 1940. Equality clearly had been done away with by the laws on the Jews.

Due process continued to exist. As we are seeing in the development of regulations about these special courts in our country, it was a point of pride to Barthelemy and others that the defendants were permitted to be represented by counsel.

Now, here I just want to drop a footnote. The footnote is called Lynn Stewart, and I wonder if any of you have been following Lynn Stewart’s case. It is not talked about quite as much. We do not know that much about it, but we do know that an attorney for an alleged terrorist herself has recently been in-

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

dicted.⁶⁵

The French did not do that. The French retained a notion of due Process, as ironic and absurd as it may seem in the context of a Special Section where five out of six defendants were shot the next day, even though they were able to open their mouths in their own defense and they had representation by lawyers. Lawyers were not punished for their representation of these terribly unpopular defendants.

Due process can co-exist in a pattern or development of special procedures, we learn from history, in which, when we look back on that history, nothing else seems right. Barthelemy, who died almost right after the liberation, managed to state, as I said earlier, his regret not for everything else that had happened, but for this complete breach of French tradition that the Special Sections represented.

Yet, it must have been some consolation to him and to other relatively right-minded French thinkers who went along without much protest. Protest was possible during this period and occurred on some levels, but not against these special sections. There was very little protest in the legal community that I studied about the Special Sections.

Perhaps one of the reasons is that there was the aura of due process, which correctly impresses lawyers, but I think in the context of what is developing in this country I would just caution that due process is not the whole ball game.

Thank you very much.

Norman Redlich

Thank you, and you made me very glad we have added to this program someone with knowledge of what happened in Vichy, France.

Our final speaker is Kenneth Roth, who is the Executive Director of Human Rights Watch, and who is going to bring to us an international human rights perspective. He has been Executive Director since 1993. It will surprise you to know that this staunch defender of international human rights was previously with the U.S. Attorney's Office in the Southern District of New

⁶⁵ See *United States v. Stewart*, 02 Cr.395, 2002 U.S. Dist. LEXIS 10530, at *1-9 (S.D.N.Y. June 11, 2002) (describing the facts surrounding Stewart's alleged wrongdoings).

York when our former Mayor Giuliani was the U.S. Attorney. He worked under Judge Walsh in the Iran Contra investigation in Washington. To me what is most significant is that Ken Roth was a Weinfeld clerk. He reminded me that when I was Dean of the NYU Law School on several occasions he served me breakfast, which to normal people would occur at like 7 o'clock in the morning, but to Judge Weinfeld was the equivalent of lunch. So, Ken Roth and I have known each other a long time, although I must admit it was rather blurred in my mind as to who served me breakfast at a quarter to 7:00 in the morning.

I am pleased to present the Executive Director of Human Rights Watch, Ken Roth.

Kenneth Roth

It was humbling to know that I was chosen for my clerkship because of my previous experience as a waiter, but you take what you can get.

When many people think about the human rights movement, they think about political prisoners. That is certainly what I had in mind when I started working in this field over twenty years ago.

What has become clear, though, is that many of the atrocities that we deal with happen in time of war. So, while I entered the field thinking that I would be spending a lot of time dealing with things like the *Universal Declaration of Human Rights*⁶⁶ or the *International Covenant on Civil and Political Rights*,⁶⁷ in fact I have spent a huge amount of my time dealing with international humanitarian law, or the laws of war. We need to sort out what is right and what is not right in the midst of armed conflict. About one-third of the work that Human Rights Watch does in about seventy countries around the world involves trying to sort out those questions: what is legitimate killing in time of war and what is an abuse or a war crime.

Let me just begin by taking issue with something that Paul Saunders said, which is that I actually think that humanitarian law is much more fixed today, much more agreed to, much more codified than is generally understood.

⁶⁶ See UNITED NATIONS, *Universal Declaration of Human Rights*, 1948, in BASIC DOCUMENTS ON HUMAN RIGHTS 21-27 (Ian Brownlie ed., 1992).

⁶⁷ See UNITED NATIONS, *International Covenant on Civil and Political Rights*, in HUMAN RIGHTS: SELECTED DOCUMENTS 48-61 (W.J.F.M. van der Wolf ed., 1994).

By that I do not mean that it has not evolved. I mean, if you are a securities lawyer today and you said, "Well, the Founding Fathers did not know anything about insider trading, but now it is prohibited, therefore, the securities law is infinitely malleable." You know that would not be very good advice.

Similarly, there has been evolution in the laws of war, but it is evolution that has led to a fairly substantial codification of what is and is not permitted. So, for example, the Geneva Conventions of 1949⁶⁸ are a book about an inch thick, filled with rules and regulations. They were updated in 1977⁶⁹ with what are known as the additional protocols that deal with things like air war, things that were not as pervasive, or at least not as generally well regulated during World War II, but were seen as needing updating, particularly after the Vietnam War.

More recently, there were war crimes tribunals set up for Rwanda and the former Yugoslavia, with courts that are widely respected that have issued rulings defining what these prohibitions mean.⁷⁰ Most recently, the Rome Treaty for the International Criminal Court adopted in 1998⁷¹ actually codified what it is to be a war crime, what it means to commit a crime against humanity, and of course, what it means to commit genocide, which has its own separate convention.⁷²

So, while, of course, there are ambiguities in interpretation, as there are in any law, there in fact is quite detailed codification about what these crimes are. Thus, the problem that I have in contemplating applying the death penalty in time of war is not so much the ambiguity of the law. Particularly, the kinds of crimes that we are talking about when we discuss terrorism are not gray area crimes. The idea of deliberately trying to kill civilians, the

⁶⁸ See CENTER FOR HUMAN RIGHTS—GENEVA, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS at 685–865, U.N. Doc. ST/HR/1/Rev.5, U.N. Sales No. E.94.XIV.1 (1994).

⁶⁹ *Id.* at 866–944.

⁷⁰ M. CHERIF BASSIOUNI, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 698–700 (1996); HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH 91–93 (1996) (acknowledging the creation of International Criminal Tribunals by the U.N. Security Council during the 1990s).

⁷¹ See generally COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE (Otto Triffterer ed., 1999) (providing detailed commentary on and analysis of the statute).

⁷² See *id.*

idea of crashing a civilian airplane into the World Trade Center, there is nothing uncertain about the criminality of these acts.

Rather, I question whether it makes sense to apply the death penalty, given some of the very practical consequences that would face not only those of us—and I include myself here—who are simply opposed to the death penalty per se, but also those whose principal concern is, say, the safety of American soldiers on the battlefield, or the safety of American soldiers should they be captured by enemy forces.

These considerations, I think if you look a bit further, suggest that it is not at all a good idea to be applying the death penalty in terrorism or war-related cases.

Let me elaborate. I'll begin by clarifying one point. War is obviously about killing. When you go to war you try to kill the other side's soldiers. It is not nice, but that is what it is about. We should not confuse that with the death penalty.

So, given that, of course, one shoots at the other side's soldiers, that does not automatically give license to capture the other side's soldiers and execute them. Indeed there is something called the combatant's privilege, which is a very basic element of humanitarian law, that says that if the only thing that you have done is to shoot at enemy soldiers, you not only cannot be executed for that, you cannot even be prosecuted. That in essence there is a rule against criminalizing something that your side is permitted to do, if the issue is simply shooting at or trying to kill the other side's soldiers.

The issue of the death penalty comes in only if a soldier goes beyond shooting at the other side's soldiers and commits violations of humanitarian law or war crimes. So, for example, if you deliberately try to kill the other side's civilians, or if you fire indiscriminately at the other side, indifferent to whether you are hitting soldiers or civilians, or if you fire at a military target knowing that, in fact, a hugely disproportionate number of civilians are going to be killed—those are all understood as war crimes. That gets you into the realm of prosecutable offenses where, at least theoretically, the death penalty can be applied.

Even then, international humanitarian law is quite strict about the kind of due process that one must be given. Article 75 of the First Additional Protocol to the Geneva Conventions is un-

derstood as sort of a bottom line list of due process protections.⁷³ For the most part you would be quite comfortable appearing before a court like that. The standards are actually rather high.

So, that is just a bit by way of background, but I still think, nonetheless, there are many good reasons not to apply the death penalty in time of war or in cases of terrorism. Let me just run through them fairly quickly.

First, even though we can fairly readily understand the difference between shooting in combat versus summarily executing or executing with due process somebody who is in custody, that is a distinction that is often misunderstood. Too many people, particularly coming from a system where due process is not the order of the day, do not see a big difference between an execution after trial and an execution in the battlefield after some kind of summary or non-existent procedure.

So, if you are thinking about the welfare of U.S. soldiers, the last thing you want to do is to introduce the idea of executing anybody in custody, whether it is with due process or not. Because too easily the lesson would be drawn that if they're killing our soldiers when they capture them, we should kill the American soldiers, too. That is a big, big risk that any soldier faces in enemy custody.

The death penalty also facilitates torture. If enemy forces are going to execute the American soldier anyway, what is the harm in torturing him and getting some information first. It is too easy to fall into the logic of feeling that if this person is going to be dead, why not make him suffer on the way to being killed.

So, just from the very narrow perspective of what is good for American soldiers on the battlefield, I think we really have to think twice before we get into the business of applying the death penalty in times of war.

Second, is the issue of fallibility, which of course is an issue with respect to the domestic application of the death penalty, but I would suggest it is a much larger concern in time of war for some of the reasons that have been discussed by my co-panelists, especially the passions that tend to exist in time of war and the tendency to resort to more summary procedures.

The two most famous World War II cases are perfect illustra-

⁷³ See CENTER FOR HUMAN RIGHTS, *supra* note 56, Article 75, at 907.

tions of this. One is the *Quirin* case, the Nazi saboteurs.⁷⁴ One theory of the case is that they were executed because of the huge embarrassment that they had caused the FBI. The saboteurs came to shore in Long Island and Florida, and one of them promptly called the FBI and said, "Hey, we'd like to turn ourselves in."

The FBI said, in essence, "Yeah, and the sky is falling," and hung up.

They then called again, and finally somebody took them seriously and they were arrested, but it was a tremendously embarrassing moment for the FBI, not only because the American frontier had been pierced, but also because they had so incompetently handled the initial efforts of the saboteurs to surrender. So, there was a huge incentive on the part of the FBI to get these people executed quickly. That is the sort of unfortunate gloss that stands over the *Quirin* case.

The *Yamashita* case⁷⁵ is also notorious these days for misapplying the concept of command responsibility. In other words, under existing law today it is generally understood that a commander can be responsible for his or her forces, insofar as they are committing war crimes, the commander knew of those war crimes or should have known, and did not take steps within his or her power to stop those atrocities.

Yamashita applied more of a strict liability test. The lower forces were committing atrocities. We do not care whether the commander knew about it or not. He is going to get executed.

So, these show the kinds of miscarriages of justice that can exist even when the Supreme Court is passing judgment on a case. We have all the more reason for concern when we are dealing with something like the military commissions that President Bush has proposed to be used for Guantanamo detainees or others whom he certifies as being terrorists.⁷⁶ Because in these commissions, even with the new regulations that have been promulgated by the Pentagon, there is no appeal to any kind of independent court.⁷⁷ That is to say, the President certifies a sus-

⁷⁴ See *Ex Parte Quirin*, 317 U.S. 1, 2 (1943) (furnishing the details leading to the arrest of German nationals on American soil).

⁷⁵ *In re Yamashita*, 327 U.S. 2 (1945).

⁷⁶ See *A Nation Challenged: President Bush's Order on the Trial of Terrorists by Military Commission*, N.Y. TIMES, Nov. 14, 2001, at B8.

⁷⁷ See *Are Tribunals Fair?* WASH. POST, Mar. 25, 2002, at A18.

pect as a terrorist.⁷⁸ He then names the military judge who will try the case. He then names the review panel that will review whether the trial was fair. All these people are within the military chain of command. There is no Congressional confirmation of oversight. There is no option of appeal at all to anything resembling a civilian court.

If you had a traditional court martial, ultimately you have the option of petitioning the United States Court of Appeals for the Armed Forces, which is an Article I civilian court that stands entirely outside the military chain of command.⁷⁹ From there, petition is permitted to the U.S. Supreme Court. For utterly inexplicable reasons, President Bush chose not to provide those safeguards for people who are prosecuted by military commissions. You are essentially facing a prosecutor and a judge, all of whom are Bush or Bush surrogates. The executive branch is serving as the prosecutor and the judge.

There are other kinds of problems with these military commissions which I will not dwell on, but let me just run through them quickly. There is no habeas corpus review, no opportunity to challenge the legality of your detention. Military defense counsel is the only counsel permitted to see certain classified evidence. Civilian counsel cannot see that evidence and the defendant himself cannot see that evidence. That is the accommodation made to permit prosecution with classified evidence that was chosen for these military commissions—a very different balance than that set in civilian courts under the Classified Information Procedures Act.⁸⁰

We have heard that the Bush administration is contemplating conspiracy prosecutions without necessarily showing any individualized evidence that the suspect to join the criminal conspiracy or attempted to further its objectives in any way. They are at least toying with the idea of status crimes. You are on the battlefield in Afghanistan; you are a foreigner; therefore, you must be per se Al Qaeda; therefore, you must be guilty. While they have not gone forward with this theory yet, they floated it in

⁷⁸ See *A Nation Challenged*, *supra* note 74.

⁷⁹ See *Establishment of the Court*, at <http://www.armfor.uscourts.gov/Establis.htm> (2002) (“[T]his Federal Court is established under Article I of the Constitution which gives to Congress the power to make rules for the government and regulation of the armed forces.”).

⁸⁰ See 18 U.S.C. §§ 1–16 (2000).

The New York Times a week ago just to see how people would react. I am again showing the kind of shortcuts that are being contemplated. Of course, that kind of status offense could get the person executed.

Then, there is the problem of discrimination, that these commissions discriminate on the basis of nationality. If you are an American citizen, you will not be brought before these commissions. If you are a foreigner, even a foreign resident of the United States, you could be brought before them. That kind of discrimination is flatly prohibited by international law, but is written there in black and white in the Bush Military Order.⁸¹

Finally, these commissions do not apply only to offenses on the battlefield, which is the traditional scope of military jurisdictions, but they can apply to anyone anywhere in the world who is a non-citizen who Bush decides to designate a terrorist. This could be someone in Germany whom U.S. forces conceivably could pick up and ship to Guantanamo, completely circumventing existing criminal justice guarantees, and try and execute in this Executive-branch-as-judge-and-prosecutor kind of tribunal, with none of the guarantees that we usually think of as being secure for crimes allegedly committed away from the battlefield.

These are the kinds of procedural shortcuts that we have even after a well-considered military order debated for months by the Pentagon to try to fix the defects and promulgate regulations that were supposed to be acceptable. We still end up with a fatally flawed tribunal.

It is only going to get worse if some kind of quick emergency commission is set up on the battlefield, which was the original justification for military commissions. There is no civilian court to be found so you have to set up an ad hoc court on the battlefield to deal with battlefield offenses.

The due process shortcuts are much, much worse in that battlefield situation. Naturally it will be much worse in other countries that are not as impeded as President Bush is by a legal community that is concerned with these due process guarantees.

We have already seen, for example, Egypt saying, "Well, if you are going to have military commissions, stop criticizing us for the summary military trials that we give to our terrorist suspects before executing them."

⁸¹ See 3 C.F.R. § 4 (2001).

Again, we have to recognize that there is a tendency, as we saw in Vichy France, to ignore basic due process guarantees in time of war, and those should be the last circumstances in which we want to proceed to the ultimate punishment of death.

A few other pragmatic considerations: first, we clearly need the support of our allies if we are going to succeed in the war against terrorism, but there is nothing that inhibits allied cooperation more than the fact that suspects in the United States can face the death penalty. Already, no European country, nor Canada, nor Australia, nor most of our democratic allies around the world will extradite or surrender a suspect to the United States without a guarantee that he or she will not face the death penalty. That is an actual requirement in Europe imposed by the European Convention on Human Rights as interpreted by the European Court on Human Rights.⁸²

Already you get the problem of the inequities between people who happen to be picked up by American troops and people who happen to be in another country facing surrender to the United States. Other countries just will not surrender or extradite someone here and if they are going to face the death penalty.

This leads to particular problems on the battlefield, in Afghanistan, for example, where the U.S. is attempting to cooperate with British and French troops. Imagine the confusion if the French troops pick somebody up and then say, "Well, we cannot hand them over to our American colleague next door because we are going to get in trouble back home for facilitating the death penalty."

Already there is a scandal in Canada, because some Canadian troops were accused of having handed over a suspect in Afghanistan, the kind of ordinary cooperation on the field that should be routine but is interrupted because of the U.S. insistence, against all trends among democracies, in applying the death penalty.⁸³

⁸² See Sam Dillon & Donald G. McNeil Jr., *A Nation Challenged: Spain Sets Hurdle For Extraditions*, N.Y. TIMES, Nov. 24, 2001, at A1 (noting that the U.S. must often negotiate for extradition and European Union policy says that no extradition may occur without reassurance that the death penalty will not be sought).

⁸³ See Clifford Krauss, *A Nation Challenged: Canada's Transfer of Prisoners to U.S. Roils Politicians*, N.Y. TIMES, Feb. 5, 2002, at A12 (acknowledging Canadian political uproar brought about by transfer of Afghanistan captives from Canadian to American forces).

The death penalty also endangers U.S. troops by undermining efforts to achieve surrender. It is clearly always better to get opposing forces to wave the white flag rather than to fight to the death. We saw how dangerous it is when people are fighting to the death, most recently at Tora Bora, where Al Qaeda members put up an incredibly fierce fight because they thought it was a life or death matter, that there essentially was no option of surrender.⁸⁴

Insofar as America applies the death penalty, it facilitates the view around the world that you are going to get killed one way or the other, so you may as well take a bunch of American soldiers with you. That is the last signal that American troops need to be sending when they are facing dangerous adversaries overseas.

There is a formal prohibition against taking no prisoners. It is the prohibition of giving no quarter.⁸⁵ I do not equate the death penalty with that, but many foreign troops who presume they are going to face a kangaroo court if brought before the military commissions are going to assume that essentially it is death now versus death later, so why not face death now while going down shooting, rather than surrender and face death later without having fired a shot.

That is not a very useful message from the perspective of American troops in very dangerous situations in Afghanistan or elsewhere.

I think it is also useful to look at the alternatives, which are obviously long-term or life imprisonment. I would suggest that imprisonment is an adequately bleak future from the perspective of many of these terror suspects to be a sufficient deterrent, to supply sufficient vengeance, to meet the various criminal justice goals that are said to be furthered by the application of the death penalty.

David already discussed the concern of martyrdom. You

⁸⁴ See *US Renews Assault on Tora Bora*, BBC NEWS, (Dec. 13, 2001), at http://news.bbc.co.uk/1/hi/english/world/south-asi/newsid_1705000/1705198.stm ("Bin Laden's most trusted aide. . . told the London-based magazine al-Majallah that he and other senior al-Qaeda leaders . . . do not hide in caves and do not run away from the confrontation. Suicide is our desire and our victory. . .").

⁸⁵ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 6 I.L.M. 1391 (entered into force Dec. 7, 1979).

know many of these people want martyrdom, and you are only facilitating that by applying the death penalty. I do not think all Al Qaeda members want to go down as martyrs. I think there is a noticeable tendency on the part of senior commanders everywhere, including Al Qaeda, to be self-protective. We do not see Bin Laden volunteering for capture and execution. We are not going to see that any time soon. The desire to preserve one's life is pretty intense among many people, even Muslim believers.

I would not overstate this, but I do think that the prospect of facing a life in prison in some ways may be an even larger deterrent, because it does not give the great public platform of an execution. Who remembers Manuel Noriega,⁸⁶ who is just languishing in prison? Noriega at one stage was as notorious as Bin Laden, but he has been condemned to a life of nothingness.

I think that life imprisonment is a sufficient deterrent if we want to apply a penalty to terrorists or would-be terrorists.

There has been concern expressed that imprisoning people for a long time will provide an incentive on the part of terrorists to take hostages in an effort to free them. But I think there is also a danger of retaliation, should terrorist leaders be killed. You are always going to find people who are going to go out and randomly try to kill Americans. There are many Americans around who are easy targets.

It is obviously easier, in a cowardly way, for politicians simply to have Americans killed than to have to face the tough decisions in a hostage situation of whether to give in in a hostage situation by freeing prisoners or whether to try to free the hostages. That is the kind of dilemma that no politician wants to face. I do not think we should be making our decisions about the death penalty out of a desire to make politicians' lives easier. I think there are other more serious concerns at stake.

Finally, let me conclude by noting that not only do most democracies around the world now prohibit the death penalty at home and prohibit any cooperation with the death penalty anywhere else, including extradition or investigative cooperation, but they also, at a very profound level, view the death penalty as utterly inhumane.

Most Europeans view the death penalty as a violation of hu-

⁸⁶ See *Timeline: Panama*, BBC NEWS, Mar. 21, 2002, at http://news.bbc.co.uk/1/hi/english/world/americas/newsid_129000/1229333.stm.

man rights. It is not written that way on the *International Covenant on Civil and Political Rights*. The focus is on arbitrary denial of the right to life,⁸⁷ but most residents of democracies around the world now do equate the death penalty per se with a very severe violation of human rights.

Indeed, the international consensus is so strong that even for the most heinous crimes of genocide, war crimes, and crimes against humanity there is an absolute prohibition on the death penalty on the part of the various international tribunals that have been established to deal with these crimes. So, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Court, none of them permit the death penalty for the most severe human rights crimes imaginable.⁸⁸ That demonstrates how deep the sense of revulsion is worldwide at the application of the death penalty anywhere.

When the U.S. applies the death penalty in fighting terrorism it is seen, in a basic sense, as using the tools of the terrorists. Because for me, the logic of terrorism is, "Anything goes in the name of the cause." You can even kill civilians if that is seen to further your political or religious aims. For many Europeans, when America applies the death penalty it is sending the message that anything goes in the name of fighting terrorism.

Now, I am not going to equate the death penalty with genocide or crimes against humanity or war crimes, but I want to stress that many Europeans view it in comparable terms, as at least a very severe violation of human rights. They view it as using terrorist tools to fight terrorism. And that is a message, whether intended or not, that at a very profound level undermines the moral high ground that I think the United States must maintain if it is going to succeed in waging the war against terrorism.

Thank you.

⁸⁷ See United Nations Association in Canada, *Questions and Answers About the Universal Declaration of Human Rights*, at <http://www.unac.org/rights/question.html>. (2002).

⁸⁸ See Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 *IND. INT'L & COMP L. REV.* 53, 63 (2001).

Norman Redlich

Thank you, Ken.

I would not just like to ask the panelists if they would like to ask questions of each other, and then there is a microphone in the audience if someone would like to stand up and get ready to be recognized after the panelists have asked questions of each other. Anybody?

Okay, let us turn to our audience.

Discussion

AUDIENCE MEMBER: To what extent do any of you find the term non-combatant terrorist an oxymoron?

MR. REDLICH: For the record, could you just identify –

AUDIENCE MEMBER: Jordana Horn-Marinoff I am a member of the Committee on Capital Punishment.

MR. SAUNDERS: I do find it an oxymoron. In the following sense. Let me explain a little bit more what I mean by that.

The notion of a combatant historically is thought to be a member of an armed force. If you are a combatant, there are certain rules that you need to follow. Those are the laws of war. Many of them are codified in treaties; some of them are not, but the laws of war apply to combatants.

Also, if you are a combatant, you are entitled to certain protections. If you are captured, you are required to be treated as a prisoner of war. You are entitled to the protections of the Geneva Convention, for example.

Well, the question is, if you are a terrorist are you a combatant or not? Are you a member of a military force or not? Are you acting on behalf of a nation-state or not? There is an ambiguity, there is a schizophrenia about the way in which we treat the people in Guantanamo Bay, for example? Are they combatants or not?

Let us assume that they are terrorists. Let us just assume they are, whatever that means. They have committed some crime against humanity, but are they combatants or not?

If they are combatants, then they are entitled to the protection, at least as far as we have understood it, of the Geneva Convention and required to be treated as prisoners of war.

We are clearly not treating them that way. So, our government has assumed that they are non-combatants.

So what are they? Who are they? Are they terrorists? If

they are terrorists and if they are not combatants, they can be prosecuted under all the laws that we already have on the books that prohibit the crimes that they committed.

If they are combatants, then we can say that they violated the laws of war, which the military order allows them to be prosecuted for violating. They are also entitled to be treated as prisoners of war under the Geneva Convention.

That was one of the problems that the United States government faced in the trial of the Nazi saboteurs. They were members of the German military. So, why were they not they treated as prisoners of war? Well, because they were thought to be "unlawful combatants." That does not mean that they did something to break the law. It meant that, as I said before, they buried their uniforms. The Geneva Conventions requires that to be a lawful combatant you have to wear a uniform with insignia to designate that you are in the military. If you do not wear a uniform, as the Geneva Convention requires, then you are not entitled to be treated as a combatant.⁸⁹

So, the Supreme Court created this new category that it called "unlawful combatants." It did not mean that they did something unlawful, but they were no longer entitled to be treated as if they were combatants.

They were not prosecuted by court martial. They could have been prosecuted in the civilian courts, because they theoretically committed a crime in the United States, maybe. Instead, they were tried by a military commission, which theretofore had never prosecuted civilians.

So, whether the term unlawful, non-combatant terrorist is an oxymoron or not, the distinction between combatants and non-combatants, lawful and unlawful combatants is an extremely difficult one. When you apply it to terrorists you have to say that they are members of some military force somewhere and that they have taken themselves out of the protections of the Geneva Convention by becoming unlawful or unprivileged combatants.

If they are plain civilians, albeit maybe terrorists, but if they are plain civilians and not otherwise connected with a military or an armed force of a nation-state, at least heretofore we have never treated such people as combatants.

⁸⁹ See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 134.

MR. ROTH: May I try my hand at a quick clarification. This is a complicated area. Let me make two points.

One is, with respect to Guantanamo, it is useful to think in terms of three categories of people: combatants who are entitled to full prisoner of war protection; so-called unlawful or unprivileged combatants who are not entitled to POW protection; and then the third category would just be civilians or non-combatants.

In Guantanamo, the major problem with what the Bush administration has been doing is that the Taliban detainees, that is to say, the members of Afghanistan's regular armed forces, clearly should have been given POW status. You just read Article 4 of the Third Geneva Convention⁹⁰ and it's absolutely straightforward.

The Bush administration, for I think somewhat childish psychological reasons, is refusing to do that, and is blatantly violating the Geneva Conventions.

The Al Qaeda members in Guantanamo probably do not qualify for POW status. They fall more in this unlawful combatant area. The reason it matters is that if you are a POW, you can still be prosecuted for war crimes, but you have to be given the same protections that the detaining power, the United States, would give its own soldiers if prosecuted for similar crimes. That is to say, a court martial, which has a right of appeal to the United States Court of Appeals for the armed forces, the civilian court, and a variety of other protections that the military commissions deny.

By threatening to bring the Taliban detainees before the military commissions, the Bush administration is proposing to circumvent these procedural protections and thus to violate the Geneva Convention.

A second area of controversy surrounds the question of when the detainees must be released. It is generally understood that the detaining power can hold a combatant until the end of the armed conflict, regardless of prosecution. So, the issue is going to come up, "Well, when is the war over?"

In Afghanistan, it is going to be clear at some point, probably within a year or so, that the war will be over. So, Rumsfeld is already toying with this idea of the war on terrorism extends to

⁹⁰ *Id.*

some sixty different countries. A war like that can go on for a long, long time. And the Pentagon is proposing to detain these people until that war is over with.

That is a big problem because at some stage active hostility, soldiers shooting each other, is going to be over with. We may still have a problem of terrorism, but it is not going to be a problem different in kind from other kinds of traditional criminal problems we face.

I think the best analogy is drug trafficking. We have a rhetorical war on drug trafficking, but nobody would propose randomly picking up alleged drug traffickers and detaining them forever until the war on drug trafficking is over with, let alone shooting to kill drug traffickers on the battlefield of whatever urban corner it happens to be, which would be the consequence of treating a rhetorical war as a real war.

So, I think the real difficulty we are going to face is that at some point even members of Al Qaeda are going to be nothing more than common criminals. The war in any realistic sense is going to be over. We are going to be back to a rhetorical war. If the Bush administration then proposes nonetheless to detain people without prosecuting them, it is going to be moving into the realm of administrative or preventive detention, which violates the most basic rules of human rights. It is something you just do not do. But that is at least what they are toying with doing right now. It is a huge danger we are facing down the road.

MR. REDLICH: Next question.

AUDIENCE MEMBER: My name is Robert Blecker. I have two questions actually about two themes that have pervaded this discussion.

The first one was introduced by Norman Greene when he talked about the declining popularity of the death penalty. I am curious to know whether he can cite any poll post-September 11th or even post-McVeigh that will demonstrate that.

Then that theme was further picked up by David Bruck, who, by my count, six times talked about democracy and the death penalty. "Almost the entire Western democratic world has abolished the death penalty except us. Democratic progress has been made by the abolition of the death penalty."

Then we got more of that. Richard Weisberg talked about the general public revulsion toward the death penalty. Kenneth Roth several times talked about our democratic allies, et cetera,

and United States resistance to all trends among democracies.

So, my first question has to do with that theme, and I am curious as to why candor does not force any of you to acknowledge that every one of the Western democracies that you cite which abolished the death penalty, including France, England, Great Britain, and Canada, in the face of public support for it, and in fact took an anti, non-democratic move in the abolition of the death penalty precisely because the governments of those countries thought that they knew better than their own people as to what was right and what was wrong.

Once you acknowledge that, or if you do not, I am curious if democracy is your issue, does public support in the United States entitle us to extraordinary procedures? So, that is the first question.

The second question about the other major theme that has pervaded this conversation tonight is one about emergencies and extraordinary measures.

We heard about that, and again Professor Weisberg it seems to me, developed that. Here I am puzzled about what he means by what he says, and I hope I am quoting correctly, "We are facing what the government calls the threat of terrorism," which implication, it seems to me, is that the government may call it a threat of terrorism but some of us know better that there really is not a threat of terrorism going on now.

I am curious to know from Professor Weisberg whether he is suggesting, contrary to what I understand to be the reality, that we have no threat of terrorism; or instead he is suggesting something more subtle, which is what I suspect he is, which is that contrary to Locke, prerogative now counts for nothing. That is, I am not quite sure what his position is on: a) whether we are in an emergency situation, and b) if we are in an emergency situation, to what does that entitle us in terms of emergency procedures?

I would ask Kenneth Roth the same question. Are we in an emergency, and are we entitled to react toward that emergency in an extraordinary way?

Just one comment, if I might. You mentioned Noriega living a life, how did you put it, living a life of nothingness in terms of life being a sufficient deterrent. Unless Noriega's conditions have changed, and I have not followed them in the last few years, Noriega was spending his life in prison in a two-room suite with

exercise machines and a color television.

MR. REDLICH: Those are several questions. Anyone want to answer them?

MR. BRUCK: To respond quickly to the notion that because the public still supported the death penalty according to opinion polls at the time that democracies abolished capital punishment one should therefore infer that the abolition of the death penalty was anti-democratic I think is only a notion you can sustain if you have a sort of plebiscitary concept of democracy. It is true that political leadership went ahead of public opinion in France, Great Britain, and Canada, indeed virtually every democracy. In Germany and West Germany, the death penalty was abolished in effect at bayonet point by the Allied powers. Eventually public opinion came to favor the most severe punishment that remained on the books. Now, of course, public opinion in Germany is overwhelmingly anti-death penalty and they send money to people out in Texas to help fight against it here.

In the United States, public opinion polls depend entirely on the question that is asked. If you ask people, "Are you for or against the death penalty?", you will get the majority supporting the death penalty. If you ask people a question that encompasses the alternative of life without parole, you have plurality support, or indeed, minority support, that is, lack of support for capital punishment. So, the question of what the public favors is by no means simple.

We nevertheless see a phenomenon throughout the world that wherever democracy advances, the death penalty recedes. For example, the abolition of the death penalty is one of the first orders of business with the liberation of Eastern Europe, the end of Communism. It was likewise one of the first orders of business with the disappearance of apartheid from South Africa, although it was done, if you please, in an undemocratic fashion by a court decision.

Nevertheless, the pattern is quite striking. As democracy advances throughout the world the death penalty disappears. I would suggest that there is something more profound than that which could be elucidated from public opinion polls.

In matters that appear to affect personal safety, the public is always conservative. Whatever the most severe criminal sanction is on the books, whatever it might be, is going to be favored by many or most people until such time it is changed. When it

goes, public opinion eventually adjusts.

The phenomenon that we have seen throughout the world of the relationship, the historic relationship between the extension of human rights, democratic values, and the abolition of the death penalty is too extensive to be a coincidence. For that reason I think it is not unfair to link the two, not to say that a country that has the death penalty is ipso facto non-democratic, but that the relationship is more complex than your question suggests.

MR. REDLICH: Professor Weisberg, do you want to respond to the second question?

PROFESSOR WEISBERG: Right. Because the first point I would make, just as a formal matter, since I mentioned Robert Badinter and the National Assembly under his leadership, and because of the drive and force of his aversion to capital punishment, as I described it, the National Assembly, both houses, and I think we consider that a form of representative democracy, abolished capital punishment.

I think you are right. They were ahead of the curve of probably the polling in that country, although today I think the French—who can be quite wrong about many things—overwhelmingly now support the view that the abolition of the death penalty was a move I would say not so much in the direction of democracy, I do not think I used those words, but in the direction of the development of a civilized criminal justice system.

We feel differently in the United States. I was careful to say about capital punishment in the United States that the methods of capital punishment are in some ways more repulsive to Americans when they learn more about it, when it becomes less privatized, when images of somebody actually being electrocuted—the electric chair being the last such method that has been widely publicized and litigated—goes out over the Web and people see what happens to a person's head. Some of those notions of what constitutes civilized retribution change.

I think only forceful leadership in the context of a society which is ready to continue to be educated about capital punishment, only forceful leadership and we are not necessarily getting that right now, will bring the democratic process to bear if the court does not get out ahead of the curve on Eighth Amendment grounds.

Then very quickly on the point that you made. Yes, I used my words very carefully: what the government calls terrorism.

Part of the theme of my paper, and I certainly do not think that any of us were called up here necessarily to give our own individual perspectives on things, the theme of my paper is that notions of emergency, notions of terrorism, and we have seen in subsequent conversation that it is an ill-defined term, call on every citizen, precisely your call to democracy, I think, call on every citizen to reflect on what the government in fact is saying. That does not mean necessarily that one disagrees ultimately, but like every other democratic and complex issue that we are confronted with, including capital punishment—and the question of terrorism what constitutes terrorism, how do we respond to it as a threat, is it always going to be a threat, what is it, who is causing this threat—is something I think we each have to reflect on and continue to be educated about.

MR. REDLICH: I would like to ask David Bruck to respond to the point that I made, which was namely that the Israelis have managed to separate the crime of genocide from the crime of first degree murder. Why can we not do the same thing? Even if the death penalty were abolished for other crimes, could we retain it for terrorism in the same way that the Israelis have retained the death penalty for genocide?

MR. BRUCK: Well, we can, but I think it maybe highlights a problem in our system of divided powers that makes it exceedingly unlikely that any attempt to segregate a narrower death penalty would remain narrow.

We are all aware, I think, of the recent proposals of the Ryan Commission in Illinois to drastically scale back the death penalty in Illinois by reducing, which is a much less radical but the same sort of reform proposal that you outlined to try to isolate the death penalty to the worst of the worst, to the most extreme and egregious cases and leave the rest for life without parole or some other sanction.

Considering the difficulty we have got, it is very, very hard to imagine the legislative branch in our government actually making a list that included nothing but Eichmann, or nothing but genocide, or nothing but the attack on the World Trade Center, or some other crime against humanity of an ungodly scale and leaving everything else off the list.

I think part of the reason for that has to do with what indeed

may be the primary reason why the United States still has the death penalty at all, and that is the fact that the legislature can respond to political pressure without having the ultimate responsibility for the results in a system where the courts ultimately have to decide who, if anyone, gets executed, and then the executive branch has to actually administer the results at the end of the line, and each branch of government points to the other as responsible. When the courts finally get the cases they say that they cannot really be the ultimate arbiter of this because the legislature has made the considered decision, neglecting, of course, that the legislature made the decision precisely in the confidence that the courts would sort everything out. In the end, the buck gets passed by both branches to the executive to use clemency, which is virtually stillborn in the post-Furman era of the death penalty. The death penalty is back, but clemency, at least until very, very recently, was not.

It is in theory, I think, a very promising idea that the death penalty for terrorism could be restricted extremely narrowly, and in so doing we could simply define out of existence many of the problems that we have been talking about tonight. But it is not going to happen. As legislators, given the great freedom that the Congressmen and Senators have as the political leadership in our system of divided government, begin to make up laundry lists of crimes they are going to penalize and crimes they are going to identify without taking ultimate responsibility for who, if anyone, gets sentenced, the list gets longer and longer and longer.

Indeed that is what we have seen ever since Furman.⁹¹ Each state started with a short list of aggravating factors, and now the aggravating factors have multiplied; year after year there has been this accretion of new capital crimes so that the list of aggravating factors in most states is now pretty much a description of the entire universe of first-degree murder.

That is different than most other—all other—democratic countries, which have faced the music and abolished the death penalty at a moment of truth: when the legislative branch realized that if the vote was for death, there would be execution, and if the vote was against, there would not be. That responsibility

⁹¹ See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1971) (holding that “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments” because the statutes arbitrarily assigned the death penalty).

came to rest on legislators who took what, at the time, I will freely acknowledge, were opinions contrary to the polls.

How come American politicians do not ever take a position that is contrary to the polls on this profoundly difficult issue that calls out for leadership? I think partly because of the fact that our system allows an evasion of responsibility. Whereas in England and Canada and France, in all the other democracies, Parliament, the National Assembly, is supreme; there is no judicial review, there is not this diffusion of responsibility, and the moment of truth never has to be faced by anybody in the system.

MR. REDLICH: Okay. Unless there are any panelists who have anything to say?

MR. SAUNDERS: I would like to comment on that.

Let me choose my words carefully. I think it is intellectually unsatisfying to say that I am opposed to the death penalty except for genocide.

Genocide, I think the Genocide Convention, which, the last time I looked, we have still not ratified.

MR. REDLICH: We have ratified it.

MR. SAUNDERS: We have?

The Genocide Convention defines genocide as certain prohibited acts with the intent to destroy a national, ethnic, racial, or religious group. I do not find any difference between a crime committed with that intent and, for example, the crime committed by Timothy McVeigh. I think that if you are against the death penalty you are against the death penalty for reasons unrelated to the type of crime.

If you admit that the death penalty is permissible for certain types of crimes, i.e. genocide, I find it very hard to distinguish that crime from the World Trade Center attack, which, I have not studied this question, but which probably does not qualify as genocide because there is no evidence that it was carried out with an intent to destroy a national ethnic, racial or religious group.

In any event, I find it somewhat unsatisfying to carve out exceptions for which one would permit the death penalty if one is otherwise opposed to the death penalty on moral or any other grounds. I find that very difficult.

MR. REDLICH: Any further comments?

I want to thank our panel and thank our audience.