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The Time Has Come for a Terrorist Death Penalty Law

Senator Arlen Specter*

I. Introduction

A death penalty provision for terrorists who murder is long overdue. In 1989, the Senate overwhelmingly passed legislation that I sponsored to authorize the death penalty for terrorists who murder United States nationals abroad. This legislation was eventually exercised by a House-Senate Conference that hammered out final passage of the Omnibus Crime Control Act of 1990.¹ Most recently, on February 20, 1991, the Senate once again passed terrorist death penalty legislation. This amendment to the Omnibus Export Amendments Act of 1991 also includes domestic terrorist murders.² As of this writing, that legislation is awaiting action in the House of Representatives.

Passage of a death penalty law will send the clear message that the United States will deal swiftly and harshly with terrorists. The 1970s and 1980s witnessed a rash of terrorist acts abroad. When captured, those terrorists were virtually patted on the back for their heinous acts. Often they received light sentences. Foreign countries shielded them from prosecution. These countries either sought to curry political favor with the responsible groups or were simply intimidated. Consider these illustrations:

- On March 1, 1973, Palestinian gunmen, belonging to the Black September Organization, burst into the Saudi Arabia Embassy in Khartoum, Sudan, during a reception. When their demands were not met, they seized, and then murdered, United States Embassy Counselor George Curtis Moore, United States Ambassador Cleo A. Noel, Jr. and Belgian Charge d'Affaires Guy Eid.³ A Sudanese court tried and sentenced the terrorists to

* R.-Pennsylvania. Senator Specter is a member of the Senate Judiciary Committee, the Appropriations Committee, and the Veterans' Affairs Committee.

Thomas N. Dahdouh, Minority Counsel to the Senate Judiciary Committee's Subcommittee on the Constitution, assisted in the preparation of this article.

1. Pub. L. No. 101-647, 104 Stat. 4789 (1990).

2. S. 320, 102d Cong., 1st Sess. (1991). The Senate passed this amendment on Feb. 26, 1991.

3. Korn, *We Will Not Pay Blackmail: The Khartoum Murders and U.S. Policy on Ter-*

life in prison. President Nimeiry then reduced the sentences to seven years and sent the terrorists to serve that time with the Palestine Liberation Office in Cairo.⁴

- In 1977, Abu Daoud was arrested in Paris for coordinating the murder of eleven Israeli athletes at the 1972 Olympic games in Munich. He was released four days later to be deported to Algeria, where he received a hero's welcome.⁵

- 7 In 1985, Italy released, without explanation, Mohammed Abul Abbas, the suspected mastermind of the Achille Lauro hijacking and murder of an American passenger, Leon Klinghoffer.⁶

Terrorist acts against Americans abroad during Operation Desert Storm and Operation Desert Shield caused American military installations, both at home and abroad, to increase security precautions as terrorist incidents rose to alarming levels.⁷ Despite increased security precautions, from January 18 to March 24, 1991, the State Department documented hundreds of significant security incidents.⁸ In particular, on February 7, 1991, gunmen assassinated a retired American serviceman who was employed at an air base in Adana, Turkey.⁹ This base was used for bombing raids on Iraq. Again, shortly after Allied forces defeated the Iraqi forces, an American military employee in Turkey was shot execution-style.¹⁰

Some foreign countries, however, have demonstrated an inability to confront the terrorist threat. As our forces fought a leader who unleashed terrorist actions against Israeli and Saudi Arabian civilians, two Palestinians convicted in the Achille Lauro hijacking were released early from jail and expelled from Italy.¹¹ Justice was not

rorism, FOREIGN SERVICE J. 28 (Feb. 1991).

4. *Id.* at 31.

5. The French may have yielded to political pressure and fear of reprisals. Hannay, *The Legislative Approach to the Political Offense Exception*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS 115, 116 n.5 (M.C. Bassiouni ed. 1988) [hereinafter Bassiouni, TERRORISM].

6. *PLO Leader Slips From U.S. Grasp in Italy; U.S. Protests Abbas' Departure After Issue of Arrest Warrant*, Wash. Post, Oct. 13, 1985, at A1, col. 3.

7. N.Y. Times, Jan. 19, 1991, at A9, col. 3; N.Y. Times, Jan. 16, 1991, at A15, col. 1; CONGRESS OF THE UNITED STATES, OFFICE OF TECHNOLOGY ASSESSMENT REPORT, TECHNOLOGY AGAINST TERRORISM: THE FEDERAL EFFORT—SUMMARY (1990).

8. These lists are on file with the *Dickinson Law Review*.

9. *American Is Slain in Turkey*, N.Y. Times, Feb. 8, 1991, at A11, col. 1.

10. *American is Slain in Turkey; Leftist Group Cites Gulf Link*, N.Y. Times, March 23, 1991, at 5, col. 1.

11. *Terrorists Get Early Release*, N.Y. Times, Feb. 6, 1991, at A11, col. 5. These terrorists were Issa Abbas, a cousin of the fugitive Palestine Liberation Front leader Abul Abbas, and Youssef Saad. Abbas received a seven year sentence in 1986, while Saad received a six year term. They were released from prison on Christmas Eve under a law allowing a two year reduction during the Christmas season.

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served. A terrorist death penalty law will show individuals that acts of international terrorism against the United States will not go unpunished.

Despite the need for a terrorist death penalty, some of my colleagues have voiced arguments against such legislation. Some question whether the legislation has a sufficiently precise definition of terrorism, especially when the proposed legislation was expanded to include domestic acts of terrorism. Others wonder whether terrorists who are motivated by ideological and religious fervor would be deterred by a death penalty law. Finally, some question whether such legislation will increase problems in extraditing criminals to the United States for trial.

This article begins with an analysis of the evolution of legislation regarding a death penalty provision for terrorists. Part III considers the definitional obstacle present in enacting suitable legislation. Part IV discusses the deterrent effect that death penalty legislation will have on violent terrorist acts. In Part V, the potential problem of extradition is considered in light of death penalty legislation. This article concludes by advocating the adoption of terrorist death penalty legislation.

II. Evolution of Terrorist Death Penalty Legislation

On July 11, 1985, I introduced the Terrorist Prosecution Act (S. 1429).¹² This legislation would criminalize, under United States law, terrorist attacks upon American nationals abroad. On February 19, 1986, the Senate unanimously passed S. 1429.¹³ This provision became law as part of the Omnibus Diplomatic Security and Antiterrorism Act of 1986.¹⁴ The law creates extraterritorial federal ju-

12. 131 CONG. REC. 18870-71 (July 11, 1985) [hereinafter S. 1429].

13. 132 CONG. REC. 2355-60 (Feb. 19, 1986).

14. Pub. L. No. 99-399, 100 Stat. 896, § 1201(a) (1986). At the end of the 101st Congress, Congress passed the Anti-terrorism Act of 1990, which added a civil remedy of treble damages for acts of international terrorism. Pub. L. No. 101-519, 104 Stat. 2240, 2250-53, § 132 (1990). This public law, which was co-sponsored by Senator Charles Grassley (R.-Iowa) and myself, recodified the criminal provisions of 18 U.S.C. § 2331 as 18 U.S.C. § 2332, while leaving them substantively unchanged. It was later discovered that the House-Senate Conferencees intended that the Anti-terrorism Act be deleted from Pub. L. No. 101-59, but the Act was accidentally left in by a clerk and was signed by the President. See 136 CONG. REC. S2500-05 (daily ed. Feb. 28, 1991) (remarks of Senators Byrd (D.-W.Va.), Heinz (R.-Pa.), Specter, and Grassley). Consequently, the Act was repealed on April 10, 1991 by H.R. 1281, 102d Cong., 1st Sess., P.L. 102-27, 105 Stat. 130, 155, § 402. However, the Senate has passed the Act again, see 136 CONG. REC. S4511-12 (daily ed. April 16, 1991), and there is every reason to believe that the House of Representatives will follow suit, so that the Act will once again become law. Thus, throughout this article, I will refer to the provisions of Chapter 113A of Title 18 as if the Anti-Terrorism Act were still in force.

risdiction for specific terrorist acts, including: (1) the murder, voluntary manslaughter or involuntary manslaughter of a United States national outside the United States; (2) attempts or conspiracies to kill a United States national abroad; and (3) physical violence outside the United States committed with intent to cause serious bodily injury or which results in serious bodily injury to a United States national.¹⁵ Paragraph (a) of the section covers homicide. It provides:

(a) **HOMICIDE.**—Whoever kills a national of the United States, while such national is outside the United States, shall—

(1) if the killing is a murder as defined in section 1111(a) of this title, be fined under this title or imprisoned for any term of years or for life, or both so fined and so imprisoned;

(2) if the killing is a voluntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than ten years, or both; and

(3) if the killing is an involuntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than three years, or both.¹⁶

The statute also provides that prosecutions are not to be undertaken unless the Attorney General, or the “highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions,” certifies, in writing, that in his or her judgment the “offense was intended to coerce, intimidate or retaliate against a government or a civilian population.”¹⁷

Even at the time of the original passage of S. 1429, I envisioned adding a provision allowing the death penalty for other crimes committed by terrorists. On July 26, 1985, I introduced S. 1508 to authorize the death penalty for terrorists who commit first-degree murder.¹⁸ Again in the 101st Congress, I introduced S. 36 to provide the death penalty for terrorist murder, as well as for other criminal acts.¹⁹ I also offered the terrorist death-penalty provision, this time

15. See George, *Federal Anti-Terrorist Legislation*, in Bassiouni, *TERRORISM*, *supra* note 5, at 31-33 (providing comprehensive analysis of this statute and other antiterrorist statutes).

16. 18 U.S.C. § 2332(a) (1988 & Supp. 1991).

17. *Id.* § 2332(d) (as recodified from 18 U.S.C. § 2331(e) by Pub. L. No. 101-519, 104 Stat. 2240, 2250, § 132(b)(1) (1990)).

18. I planned to add it to S. 1429 when that legislation reached the Senate floor. However, in the interest of ensuring smooth passage of S. 1429, I did not pursue this avenue. 131 CONG. REC. 20779-81 (July 26, 1985).

19. 135 CONG. REC. 114-18 (daily ed. Jan. 25, 1989).

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standing alone, as an amendment to the 1990 Foreign Relations Authorization Act on July 19, 1989.²⁰ I withheld pushing for that amendment after the Majority Leader agreed to schedule a vote on the terrorist-death penalty legislation for later that year.²¹ The terrorist-death penalty provision, introduced as S. 1798, a free-standing bill, was taken up in the Senate for a vote on October 26, 1989.²²

Senate Bill 1798 (S. 1798) was limited to murders of United States nationals abroad. It simply added a phrase to the paragraph dealing with murder, paragraph (1) of now-subsection of 2332(a). That paragraph in turn referred to 18 U.S.C. § 1111(a) for the definition of first-degree murder.²³ S. 1798, if enacted into law, would have added a phrase that the court "may impose a sentence of death in accordance with the procedures set forth in section 7001 of the Anti-Drug Abuse Act of 1988 (21 U.S.C. § 848)."²⁴

During the debate on S. 1798,²⁵ Senator Joseph Biden, Chairman of Senate Judiciary Committee, pointed out that S. 1798 could also be read to refer to second-degree murder since section 111(a) defines first-degree murder as:

Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killing, is murder in the first degree.²⁶

Section 1111(a) proceeds, however, to state that "[a]ny other murder is murder in the second degree."²⁷ Thus, S. 1798's reference to section 1111(a) was, without more, insufficient to indicate that the death penalty was meant to apply solely to first-degree murder. The ambiguity was clarified and replaced with the following:

(1)(A) if the killing is a first degree murder as defined in section 1111(a) of this title, be punished by death or imprisonment for any term of years or for life, or be fined under this title, or both;

20. Amend. 325 to S. 1160, 101st Cong., 1st Sess., 135 CONG. REC. S8290 (daily ed. July 19, 1989).

21. 135 CONG. REC. 8402-08 (daily ed. July 20, 1989).

22. 135 CONG. REC. 14205-31 (daily ed. Oct. 26, 1989).

23. S. 1798, 101st Cong., 1st Sess. (1991).

24. *Id.*

25. 135 CONG. REC. 14218-20 (daily ed. Oct. 26, 1989)(remarks of Sen. Biden, D-Del.).

26. 18 U.S.C. § 1111(a) (1988).

27. *Id.*

(B) if the killing is a murder other than a first degree murder as defined in section 1111(a) of this title, be fined under this title or imprisoned for any term of years or for life, or both so fined and so imprisoned.²⁸

With this change making it clear that the death penalty would only apply to first-degree murder, this legislation passed overwhelmingly by a vote of seventy-nine to twenty.²⁹

On January 23, 1991, as the 102d Congress convened, I introduced the Terrorist Death Penalty Act of 1991 (S. 245).³⁰ S. 245 was nearly identical to S. 1798 except for a few changes. For example, in S. 245, I incorporated the careful and exhaustive procedural aspects of the death penalty provisions of the Anti-Drug Abuse Act of 1988 into the bill itself. These provisions are designed to ensure that counsel for a defendant meet minimum standards: five years of membership in the bar and three years experience litigating felony cases in federal courts. The bill retained an exclusion for defendants under age eighteen at the time of the crime, the mentally retarded, and the mentally disabled. Another change, designed to make clear that only the most egregious acts of terrorism would result in the death sentence, required the government to prove beyond a reasonable doubt that the murder constituted first-degree murder, and that the defendant:

- (A) intentionally killed the victim;
- (B) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or
- (C) acting with reckless disregard for human life, engaged or substantially participated in conduct which the defendant knew

28. 135 CONG. REC. S14230 (daily ed. Oct. 26, 1989).

29. *Id.* Consideration of this legislation was included in the House-Senate Conference on the Omnibus Crime Control Act of 1990, convened in the waning days of the 101st Congress in October 1990. Because of the press of time and the conferees' inability to come to agreement on several controversial issues — not only the death penalty for terrorists but provisions for the death penalty for many other crimes, *habeas corpus* reform, and a ban on assault weapons — all controversial provisions of the legislation, including the provision for a death penalty for terrorist-murderers, were excised from the final version. *Crime Bill: Tough Talk, Weak Action*, *Newsday*, Oct. 30, 1990, at 17.

30. I requested an early scheduling of a vote on the legislation because of the threat of terrorist incidents during Operation Desert Storm. 137 CONG. REC. S1069-82 (daily ed. Jan. 23, 1991). My colleague from Pennsylvania, Congressman George Gekas (R.-Pa), introduced this legislation in the House of Representatives as H.R. 639, 102d Cong., 1st Sess. (Jan. 24, 1991).

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would create a grave risk of death to another person or persons and death resulted from such conduct³¹

On February 19, 1991, I offered a modified version of S. 245 as an amendment to the Omnibus Export Amendments Act of 1991.³² Because of concerns expressed by Senator Strom Thurmond that domestic acts of terrorism should be included in the legislation,³³ the bill was changed, adding the death penalty for terrorists who murder individuals inside the United States.³⁴ Indeed, domestic acts of terrorism, although fortunately infrequent, are as grave a danger as terrorist acts abroad. The following provide examples of recent terrorist acts that have occurred within our borders: (1) the car bombing of Orlando Letelier, ambassador of the former Chilean Government of Salvador Allende Gossens, and Ronni Moffitt, a United States citizen, on September 21, 1976 on Washington's Embassy Row;³⁵ (2) the 1989 car bombing of Sharon Rogers', wife of the Navy Captain whose vessel accidentally shot down an Iranian civilian airliner;³⁶ and (3) the bombing of the United States Senate in 1983.³⁷ Furthermore, other acts of domestic violence potentially fall under the rubric of terrorism: the murder of Jewish activist Meir Kahane in New York City in 1990 and the murder of Arab-American activist Alex Odeh in California in 1985.³⁸

Accordingly, the modified amendment would read as follows:

(a) HOMICIDE.—Whoever kills a person while such person is inside the United States, *or kills a national of the United States, while such national is outside the United States*, shall—

(1)(a) if the killing is a first degree murder as defined in section 1111(a) of this title, be punished by death or imprisonment for any term of years or for life, or both

31. S. 245, 102d Cong., 1st Sess., 137 CONG. REC. S1069-82 (daily ed. Jan. 23, 1991).

32. Amend. 3 to S. 320, 102d Cong., 1st Sess., 137 CONG. REC. S1902-03 (daily ed. Feb. 19, 1991).

33. 137 CONG. REC. S1905 (daily ed. Feb. 19, 1991) (remarks of Sen. Thurmond, R.-S.C.).

34. 137 CONG. REC. S1902-03 (daily ed. Feb. 19, 1991).

35. *Chile Agrees to Pay Reparations to U.S. in Slaying of Envoy*, N.Y. Times, May 13, 1990, at 1, col. 6.

36. *Personal Vendetta Is Seen as the Motive for Bombing of Van*, N.Y. Times, Oct. 2, 1989, at B11, col. 6; *Blast Wrecks Van of Skipper Who Downed Iran Jet*, N.Y. Times, March 11, 1989, at 1, col. 2; see also S. Res. 214, 101st Cong., 1st Sess., 135 CONG. REC. S16106 (daily ed. Nov. 20, 1989) (A resolution calling for a reward for the arrest of individuals responsible for the bombing of Sharon Rogers' car).

37. *Capitol Security Is Tightened After Bombing*, N.Y. Times, Nov. 9, 1983, at A1, col. 4.

38. *Suspect in Kahane Slaying Kept List of Prominent Jews*, N.Y. Times, Dec. 1, 1990, at 29, col. 5; *Israel Holds Couple Sought by U.S. Since 1989 in Letter-Bomb Killing*, N.Y. Times, March 26, 1991, at A13, col. 2.

so fined and so imprisoned; and

(b) if the killing is a murder other than a first degree murder as defined in section 1111(a) of this title, be fined under this title or imprisoned for any term of years or for life, or both so fined and so imprisoned

. . . .³⁹

The addition of domestic acts of terrorism created the need for a definition of terrorism in the statute itself. As the statute now reads, the Attorney General need only certify that the offense "was intended to coerce, intimidate, or retaliate against a government or a civilian population."⁴⁰ As will be explained shortly,⁴¹ however, there was a concern that a definition of terrorism that was too narrow would unduly restrict prosecutors. Consequently, during Senate debate in February 1991, a compromise was reached whereby the first portion of section 2332(a) would be changed as follows:

(a) HOMICIDE.—

(A) Whoever kills a person, with the intent to commit an act of terrorism, which is any act which appears to be intended to intimidate, retaliate against or coerce a civilian population; to influence the policy of a government by intimidation, retaliation or coercion; or to affect the conduct of a government by assassination, kidnapping, hostage-taking or other violent act, while such victim is inside the United States; or

(B) Whoever kills a national of the United States, while such national is outside the United States; shall⁴²

After a motion to table the amendment failed, the amendment passed by voice vote.⁴³ The Omnibus Export Amendments Act of 1990 passed by the Senate by voice vote later that same day and, as of this writing, is awaiting action by the House of Representatives.

III. The Definition of Terrorism

Definitional problems plague legislation on terrorism. As Robert A. Friedlander, former Minority Chief Counsel of the Senate For-

39. Amend. 3 to S. 320, 102d Cong., 1st Sess., 137 CONG. REC. S1921-23 (daily ed. Feb. 19, 1991) (modifications to S. 245 are italicized). Other modifications to S. 245 deleted provisions that excluded the death penalty for the mentally retarded and the mentally disabled.

40. 18 U.S.C. § 2332(d) (as recodified from 18 U.S.C. § 2331(e) by Pub. L. No. 101-519, 104 Stat. 2240, 2250, § 132(b)(1) (1990)).

41. See *infra* notes 56-61 and accompanying text.

42. 137 CONG. REC. S1948 (daily ed. Feb. 20, 1991).

43. *Id.*

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ign Relations Committee, notes, "definition is the rock upon which many anti-terrorism legislative proposals have foundered."⁴⁴ When I first introduced S. 1429 in 1985, the definition of terrorism contained in the bill was the only definition of terrorism in the United States Code.⁴⁵ That definition found in the Foreign Intelligence Surveillance Act (FISA) of 1978,⁴⁶ defined "international terrorism" to mean activities that:

- (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
- (2) appear to be intended—
 - (A) to intimidate or coerce a civilian population;
 - (B) to influence the policy of a government by intimidation or coercion; or
 - (C) to affect the conduct of a government by assassination or kidnapping; and
- (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.⁴⁷

The Justice Department, which opposed the incorporation into law of any terrorism definition, persuaded the Judiciary Committee's Subcommittee on Security and Terrorism to remove the FISA definition from S. 1429.⁴⁸ When S. 1429 reached the floor, it had no definition of terrorism. Senator Hatch noted that some definition was necessary.⁴⁹ Before the legislation was passed by the full Congress, a provision was inserted to provide that

[n]o prosecution for any offense described . . . shall be undertaken except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that . . . such offense was intended to coerce, intimidate, or retaliate against a govern-

44. R. Friedlander, *The U.S. Legislative Approach*, in Bassiouni, *TERRORISM*, *supra* note 5, at 11.

45. Last year, the President signed into law the Anti-terrorism Act of 1990, *see supra* note 14. That Act uses the definition of international terrorism found in the FISA. *See* Pub. L. No. 101-519, 104 Stat. 2240, 2250, § 132(b)(2) (1990) (creating newly-codified section 2331(1) defining "international terrorism").

46. 50 U.S.C. § 1801(c) (1988).

47. *Id.*

48. Friedlander, *supra* note 44, at 18.

49. 132 CONG. REC. 2359 (Feb. 19, 1986) (remarks of Sen. Hatch, R-Utah).

ment or a civilian population.⁵⁰

This compromise recognized the President's broad, albeit not unlimited, constitutional authority in foreign policy⁵¹ by giving him needed flexibility in determining which violent acts constitute terrorist incidents. At the same time, it also constrained the Executive's discretion by including a sufficiently circumscribed definition of terrorism.

The Justice Department argued that a definition of terrorism would place the government, at trial, in the awkward and embarrassing position of having to explore and explain the defendant terrorist's cause.⁵² But as Friedlander has pointed out, this argument loses much of its persuasiveness in the case of first-degree murder prosecutions. For first-degree murder, the government has the burden of proving motive in order to establish the essential elements of premeditation and malice aforethought, and thus it must delve into the defendant terrorist's cause regardless.⁵³ Certainly, whether or not there is a definition of terrorism in the statute, the government must show that the terrorist believed in a cause and acted pursuant to those beliefs.

The government, in particular the State Department, also argued that codification of a definition of terrorism would make it almost impossible to negotiate international agreements on terrorism. It further argued that the Executive needed flexibility in determining which acts of violence abroad were terrorist incidents.⁵⁴ Friedlander rejects this argument as "wooly-headed thinking" that is "exactly the kind of mind-set which makes possible the absurd notion that one person's terrorist is another person's freedom fighter."⁵⁵ Although I understand these criticisms, I believe that the compromise reached on S. 1429 was the best possible result under the circumstances: it incorporated a sufficiently precise definition of terrorism, while recognizing the President's constitutional powers to regulate foreign affairs.

These definitional concerns were again brought to the forefront when the terrorist death penalty amendment to the Omnibus Export Amendments Act of 1991 was modified to cover domestic acts of

50. 18 U.S.C. § 2332(d) (as recodified from 18 U.S.C. § 2331(e) by Pub. L. No. 101-519, 104 Stat. 2240, 2250, § 132(b)(1) (1990)).

51. See *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318-19 (1936); U.S. CONST. art. II, § 2.

52. Friedlander, *supra* note 44, at 11-12.

53. *Id.*

54. *Id.*

55. *Id.* at 12-13.

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terrorism. Since section 2332 left the decision of whether an offense constituted an act of terrorism to Attorney General, or his subordinates, Senator Metzenbaum rose to question whether the death penalty could now apply to any domestic act of violence:

D[o] I understand that this whole measure . . . has to do with terrorism, and yet we do not have terrorism defined in any place that I can find? But what we do have is . . . the judgment of the . . . Attorney General, or a subordinate, to prove that the offense was intended to coerce, intimidate, or retaliate against the Government or civilian population [Y]ou could very well have somebody go into a school yard and mow down a number of children, as we know happened in [California]. Or you could have somebody with an Uzi or one of these semi-automatic guns mow down a number of police officers who were meeting in a group, or a group of civilians. And the question that I have is, when is a terrorist a terrorist? And does the fact the Attorney General or his subordinate — does his certification that the offense was intended to coerce, intimidate, or retaliate against the Government or civilian population make the defendant a terrorist *per se*?⁵⁶

Senator Metzenbaum raises a meritorious point. Without a definition of terrorism, the legislation could apply a federal death penalty to common acts of domestic violence that would be more appropriately the province of state law enforcement officials. Moreover, section 2332 left to the Attorney General the decision of what constituted a terrorist incident, primarily in recognition of the constitutional authority granted to the President to regulate foreign policy. No such deference is accorded the President in the area of domestic criminal violence.

On the other hand, proponents of a more restrictive definition may go too far in unduly restricting federal prosecutors from seeking the death penalty for actual terrorist acts occurring in the United States. For example, the Comprehensive Counter-Terrorism Act of 1991, a bill introduced by Senator Biden, limits the death penalty for domestic terrorism to acts by “agents of a foreign power,” a definition derived from the FISA.⁵⁷ That definition, however, excludes

56. 137 CONG. REC. S1947 (daily ed. Feb. 20, 1991) (remarks of Sen. Metzenbaum, D.-Ohio).

57. S. 266, 102d Cong., 1st Sess., § 1201; 137 CONG. REC. S1190-96 (daily ed. Jan. 24, 1991) (employing definition of agent of a foreign power from FISA for criminal provisions on domestic terrorism). The definition of “agent of a foreign power” in FISA is codified at 50 U.S.C. § 1801(b) (1988), and states that an agent of a foreign power is:

(1) any person other than a United States person, who—

acts of terrorism conducted by indigenous terrorist groups not connected to a foreign power.⁵⁸ There have been several acts of domestic terrorism committed by wholly-domestic terrorist groups. For example, the 1983 bombing of the Capitol building was conducted by a group of militant members of the Black Liberation Army with no connection to any foreign power.⁵⁹ This definition would also exclude Puerto Rican nationalist groups, like the clandestine Fuerzas Armadas de Liberacion Nacional (F.A.L.N.) and the terrorists who sprayed the House of Representatives floor with gunfire in 1954,

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;

(B) acts for or on behalf of a foreign power which engaged in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or

(2) any person who—

(A) knowingly engaged in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statute of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage, or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power; or

(D) knowingly aids or abets any person in the conduct or activities described in subparagraphs (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraphs (A), (B), or (C).

58. Although 50 U.S.C. § 1801(b)(2)(C) (1988) refers to persons engaging in "international terrorism," any possibility that this language is not strictly limited to individuals committing acts of terrorism on behalf of a foreign power or foreign-based terrorist group is clearly foreclosed by the language restricting it to acts "for or on behalf of a foreign power." It is also foreclosed by the fact that the definition of "international terrorism" in section 1801(c)(3) limits it to activities "occurring totally outside the United States, or transcending national boundaries in terms of the means by which they are accomplished, the person they appear intended to coerce or intimidate, or the locale in which the perpetrators operate or seek asylum." See also S. REP. NO. 604, 95th Cong., 2d Sess. 26-27, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 3973, 3995-96 ("The rare case might arise where a U.S. person is acting for or on behalf of a foreign-based terrorist group that is substantially composed of U.S. persons. In such a case, the judge must examine the circumstances carefully in order to determine whether the organization[] is a foreign-based terrorist group and not a domestic group with some foreign aspects to it."); H.R. CONF. REP. NO. 1720, 95th Cong., 2d Sess. 19-20, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 3904, 4049.

59. *Terms Levied in Bombings of Government Buildings; 'Freedom Fighters' Given Additional Ten Years*, Wash. Post, Nov. 17, 1990, at B4, col. 1; *Capitol Security Is Tightened After Bombing*, N.Y. Times, Nov. 9, 1983, at A2, col. 4.

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wounding and killing several Members of Congress.⁶⁰ Just as importantly, there are many kinds of hate groups, like the Ku Klux Klan and Aryan Nation, which fall into a "gray" area: many Americans would justifiably consider them to be terrorist groups. Finally, the definition of "agent of a foreign power" may not cover terrorists committing acts who, although motivated by support of foreign forces, have insufficient connection with a foreign-based group.

Faced with this problem, a compromise was reached with Senators Biden and Thurmond. The compromise required that, for domestic acts of terrorism only, the government must also prove that the offender committed the killing

with the intent to commit an act of terrorism, which is any act which appears to be intended to intimidate, retaliate against or coerce a civilian population; to influence the policy of a government by intimidation, retaliation or coercion; or to affect the conduct of a government by assassination, kidnapping, hostage-taking or other violent act.⁶¹

Under this definition, the prosecution would have to prove beyond a reasonable doubt that the domestic act of violence was intended to be an act of terrorism. This would be in addition to the requirement in section 2332(d) that the Attorney General certify that the acts committed were acts of terrorism.

Therefore, the decision of whether the act constituted an act of terrorism is placed before a jury. Under this definition, prosecutors receive sufficient flexibility to prosecute domestic varieties of terrorism, without giving them carte blanche for prosecuting violent acts that are simply not terrorist-inspired.

IV. Deterrent Effect on Terrorists

Based on many years of experience as a prosecutor, I believe that the death penalty has a general deterrent effect on violent crime, including terrorism. The evidence amassed by California Supreme Court Justice McComb in his dissent in *People v. Love*⁶² is very persuasive. This evidence demonstrates that, on a number of occasions, criminals were deterred from committing more violent acts because they feared the death penalty.

Three examples illustrate this proposition. Margaret Elizabeth

60. Chicago Tribune, Aug. 8, 1985, Temp Sec. at 1, Zone C; *Guerrillas*, Reuters Newswire Service, April 11, 1980 (NEXIS, Archives files).

61. 137 CONG. REC. S1948 (daily ed. Feb. 20, 1991).

62. 56 Cal. 2d 720, 363 P.2d 33, 16 Cal. Rptr. 777, 784 (1961).

Daly was arrested on August 28, 1961 for assaulting an individual with a knife. She told investigating officers: "Yeh, I cut him and I should have done a better job. I would have killed him but I didn't want to go to the gas chamber."⁶³ Louis Joseph Turck did not carry a gun on a robbery as he had in the past because, "I knew that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber."⁶⁴ Oreluis Matthew Stewart was arrested on March 3, 1960 for attempted bank robbery. He later stated: "The officer who had arrested me was by himself, and if I had wanted, I could have blasted him. I thought about it at the time, but I changed my mind when I thought of the gas chamber."⁶⁵ These cases, and many more like them, demonstrate that the death penalty does have deterrent effect on violent crimes.

Some Senators, however, have questioned whether imposition of the death penalty for terrorist-murderers would have any deterrent effect. Many argue that terrorists are motivated by fanaticism and would not be deterred by the death penalty. This point was made by Senator Hatfield during the 1989 debate on the death penalty legislation:

There are those who claim that a death penalty for terrorists will deter future terrorist acts. Deterrence, however, presupposes rational conduct on the part of the person to be deterred. Terrorists, calculating as they may be, are fanatics who are not afraid to die — and members of terrorist organizations view their comrades who die in support of the cause as martyrs. Execution of terrorists in this country will only serve to give terrorist organizations the publicity they so ravenously seek — and offer martyrdom as a reward for their brutality. In fact, Mr. President, it is all together possible that the execution of terrorists will increase acts of terror rather than stop them.⁶⁶

Concededly, some terrorists are clearly suicidal; nothing will deter them. This criticism, however, does not recognize the considerable evidence that terrorists often receive light sentences and that would-be terrorists know that their groups will see to it that they will be freed. Would-be terrorists know that Abu Daoud, Mohammed Abul Abbas, the terrorists who killed the United States Ambassador to the Sudan, and, most recently, several hijackers of the Achille

63. 16 Cal. Rptr. at 785.

64. *Id.*

65. *Id.*

66. 135 CONG REC. S14212-13 (daily ed. Oct. 26, 1989) (remarks of Sen. Hatfield, R.-Oregon).

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Lauro, for all practical purposes, got off scot-free.⁶⁷

There is evidence that, even without a death penalty for violations of United States anti-terrorism laws, these laws have a deterrent effect. Terrorists fear extradition to the United States precisely because justice in United States courts is decisive and swift. For example, after Sheik Obeid was captured in Lebanon by the Israelis in 1989, he told his captors that he was "terrified" of being extradited to the United States for the murder of American hostages in Lebanon. This was because the United States would not bend to political pressure and would exact swift punishment.⁶⁸ The terror is not imaginary. As long as even one terrorist is dissuaded from attacking an American because of the death penalty statute, the statute will have saved precious lives.

Critics fail to recognize that the imposition of the death penalty for a terrorist would remove that individual as a target for release through further terrorist acts.⁶⁹ For example, the terrorists who held hostage the United States Ambassador to the Sudan did so in order to obtain the release of Sirhan Sirhan, the killer of Senator Robert Kennedy, and Abu Daoud, a PLO operative in jail in Jordan.⁷⁰ Many, if not most, of the hostages currently held in Lebanon, plausibly were seized in order to trade for the release of Shiite terrorists held in jail in Kuwait.⁷¹

Finally, regardless of its deterrent value, the death penalty for terrorists expresses our society's moral revulsion toward terrorism. In *Gregg v. Georgia*,⁷² Justice Potter Stewart, joined by Justice Powell and Justice Stevens, wrote as follows: "Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."⁷³ He continued: "[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many,

67. See *supra* notes 3-6 and accompanying text (describing terrorist acts for which perpetrators were not held accountable under law).

68. *Israelis Report Sheik Told Them Marine Was Still Alive Last Week*, N.Y. Times, Aug. 3, 1989, at A2, col. 2.

69. Bassiouni, *A Policy-Oriented Inquiry of "International Terrorism"*, in Bassiouni, *TERRORISM*, *supra* note 5, at xiv.

70. Korn, *supra* note 3, at 28.

71. The release of the Shiite terrorists after the Iraqi invasion of Kuwait, however, has not yet led to the release of American hostages in Lebanon. *Islamic Jihad Repeats Offer to Trade U.S. Hostages for 17 Jailed Muslims*, L.A. Times, Oct. 25, 1989, at A8, col. 5.

72. 428 U.S. 153 (1976).

73. *Id.* at 184.

but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."⁷⁴ Passage of a death penalty law will send a clear message to terrorists: the United States will punish terrorists swiftly and invoke the death penalty when appropriate.

V. Extradition of Terrorists to the United States

Another potential problem that death penalty opponents raise is that a death penalty law for terrorists would complicate extradition of terrorists to the United States. During the October 1989 debate on the terrorist death penalty legislation, Senator Kennedy noted that extradition treaties currently in effect with twenty countries permit those countries to refuse to extradite criminals, unless the country requesting extradition refuses to seek the death penalty.⁷⁵

When a country refuses to extradite a criminal unless the United States agrees not to seek the death penalty, the United States has no choice but to agree to such terms. To use the extradition problem as an argument against the death penalty, however, merely obscures the issue. The addition of the death penalty option does not *require* United States law enforcement officials to seek the death penalty, it merely affords them the *option* of invoking the death penalty.

Furthermore, there are many cases of terrorism in which the death penalty can be utilized when extradition is not at issue. As shown in the case of Fawaz Yunis, the Lebanese hijacker of a Royal Jordanian airliner in Beirut in 1985, United States law enforcement officials have the extraterritorial jurisdiction to apprehend terrorists when possible.⁷⁶ In that case, the Lebanese terrorist was lured aboard a private yacht off the coast of Cyprus by a friend who promises a drug deal and a party.⁷⁷ Yunis's challenge to the assertion of extraterritorial jurisdiction was dismissed by the United States Court of Appeals for the District of Columbia Circuit on Jan-

74. *Id.* at 183.

75. 135 CONG. REC. S14213-14 (daily ed. Oct. 26, 1989) (remarks of Sen. Kennedy, D. Massachusetts, and table of 20 countries with extradition treaties giving those countries the right to refuse to extradite criminals unless the United States agrees to forego invoking the death penalty).

76. See generally George, *Federal Anti-Terrorist Legislation*, in Bassiouni *TERRORISM*, *supra* note 5, at 25 (detailing various criminal statutes affording federal law enforcement officials extraterritorial jurisdiction over terrorist actions).

77. *Friend Led Terror Suspect to FBI, Lawyer Says*, N.Y. Times, Sept. 19, 1987, at 3, col. 3.

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uary 29, 1991.⁷⁸ The court found that Congress's decision to give antiterrorism laws extraterritorial reach is justified by two jurisdictional theories of international law. First, it is justified under the "universal principle," whereby any state may prosecute terrorism regardless of where it occurred because it is a crime of universal concern.⁷⁹ Second, it is justified under the "passive personal principle," whereby a state may punish non-nationals for crimes committed against its nationals outside of its territory when the state has a particularly strong interest in the crime.⁸⁰

Yet, the critics rightly note that extradition is a serious problem today. Indeed, even when the possibility of the death penalty is not at issue, extradition is a thorny problem. For example, there is the problem of Columbia's refusal to extradite drug kingpins to the United States to face trial.⁸¹ Sovereignty concerns, political pressure, and bold threats of violence sometimes force foreign countries to refuse to extradite criminals to the United States. That is why I, along with international leaders such as Prime Minister Manley of Jamaica and President Gaviria of Colombia, and distinguished international law scholars, advocate the creation of an international criminal court. This court would be used to try violations of international law, including international drug trafficking and international terrorism.⁸² Last year, Congress passed, and the President signed into law, an amendment I introduced to the 1991 Foreign Operations Appropriations Act. The amendment⁸³ for the President to report to Congress by October 1, 1991 the results of his efforts to establish an international criminal court.⁸⁴ The amendment also calls for the Judicial Conference of the United States to report to Congress by the same date on the feasibility of an international criminal court and its

78. *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

79. 924 F.2d at 1091. See generally Blakesley, *Jurisdictional Issues and Conflicts of Jurisdiction*, in Bassiouni, *TERRORISM*, *supra* note 5, at 131.

80. *Id.*

81. Although Colombia's Supreme Court had earlier halted all extraditions to the United States on a technicality, Colombia's President resumed extraditing drug traffickers to the United States after drug traffickers assassinated a Presidential candidate, Luis Carlos Galan, in August 1989. *Colombian Candidate Murdered; President Sets Moves Against Drug Lords, Reinstates Extradition*, Wash. Post, Aug. 20, 1989, at A1, col. 6.

82. See generally M.C. BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987); Bassiouni, *Effective National and International Action Against Organized Crime and Terrorist Criminal Activities*, 4 EMORY INT'L L. REV. 9 (1990); Bassiouni, *Critical Reflections of International and National Control of Drugs*, 18 DEN. J. INT'L L. POL. 311 (1990).

83. Amend. 3068 to H.R. 5114, 101st Cong., 2d Sess., 135 CONG. REC. S16216-17 (daily ed. Oct. 19, 1990); Pub. L. No. 101-513, 104 Stat. 1979, 2066-67, § 599E (1990). The President recently released his report. (Copy on file at the Dickinson Law Review office).

84. See *id.*

proposed relationship to the federal judiciary.⁸⁵

Problems of extraditing criminals are compounded when the death penalty is a potential punishment. There is some evidence, however, that even countries that have banned the death penalty will extradite those who have allegedly committed heinous crimes, like terrorism, *without* requiring an assurance that the death penalty will not be used. Of course, in many of those situations, such individuals are able to utilize domestic, and even international, court procedures to challenge the decision not to invoke the treaty option. For example, in the case of Charles Ng, who is charged with a series of grisly slayings in Northern California, Canadian authorities decided not to invoke their treaty option.⁸⁶ Lawyers for Ng, however, unsuccessfully sought a ruling from the Canadian Supreme Court that would require Canadian authorities to invoke their treaty option.⁸⁷ By contrast, despite a similar provision in the United States 1978 extradition treaty with Mexico, Mexican authorities dispensed with extradition proceedings and immediately deported Ramond Salcido. Salcido was sought by California authorities for a 1989 rampage in Redwood City, California, where he allegedly killed his wife, two daughters, and four other people.⁸⁸

In a far more troublesome case, Jans Soering, who was sought by Virginia authorities on charges of the cruel murder of his girlfriend's parents, fled to the United Kingdom. Although British officials sought and received an assurance from Virginia authorities that the death penalty would not be used, Soering's lawyer's appealed to the European Court of Human Rights. The court adopted the view that long delays in habeas corpus appeals of death sentences in the United States was itself violative of the European Convention on Human Rights ban on inhuman or degrading treatment.⁸⁹ Extradition was only permitted when the Virginia authorities dropped the

85. The Judicial Conference is currently studying the issue and has not yet released a report on the international criminal court concept. Most recently, on March 14, 1991, the Senate unanimously passed S. Res. 76, a resolution I introduced, to encourage the President to confer with the sovereign state of Kuwait, countries of the Coalition allied against Iraq, or the United Nations to establish an International Criminal Court or Military Tribunal to try Iraq's President Saddam Hussein and other Iraqis responsible for war crimes, crimes against peace, and crimes against humanity as defined under international law.

86. *Murder Suspect's Bid to Stay in Canada Tests Pact*, N.Y. Times, Feb. 13, 1991, at A18, col. 1.

87. *Id.* See also *Canada Sends U.S. a Murder Suspect*, N.Y. Times, Sept. 27, 1991, at A15, col.1.

88. *Id.*

89. Soering Case, 161 Eur. Ct. H.R. (Ser. A) (1989); see generally Naldi, "Death Row Phenomenon" Held Inhuman Treatment, 43 REV. OF THE INT'L COMM. OF JURISTS 60 (1980).

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capital murder charge.⁹⁰

Although we should ensure that those countries which do choose to extradite without assurances are rewarded, we must remember that those foreign countries opposed to the death penalty are opposed for sincere moral, religious, and ethical reasons. We must also respect the court systems of other countries and the rights of defendants to litigate these issues in those court systems. As such, the United States must be sensitive to these concerns in order to remain a successful actor on the world scene and not invite retaliation by other countries. The problem of extradition, however, in no way undermines the need for a death penalty for terrorists. Such a death penalty would give federal prosecutors an added tool in prosecuting terrorists. They can use it or, if a foreign country objects to extradition, they can agree not to seek the death penalty.

VI. Conclusion

For far too long we have allowed the terrorist menace to fester without any coherent and sustained response. Five years ago, at a February 1986 Senate Subcommittee hearing, I stated that “[a]lthough we have had some tough talk on terrorism, we have had very little tough action on terrorism”⁹¹ Those words are as true now as they were then. Attention and resources are often devoted to terrorist issues only after a major terrorist incident, and are not usually sustained. The threat of terrorism unleashed by Iraqi President Saddam Hussein and the heightened concern with security have once again brought the issue of terrorism under public scrutiny. A terrorist death penalty will send a clear message to terrorists everywhere that the United States will punish severely any action taken against Americans, anywhere. Let us hope that this time we will not allow the moment to pass without concrete action.

90. *Naldi, supra* note 89, at 62.

91. *Libyan-Sponsored Terrorism: A Dilemma for Policymakers, Hearing before the Subcomm. on Security and Terrorism of the Comm. on the Judiciary, U.S. Senate, 99th Cong., 2d Sess. 9 (Feb. 19, 1986) (statement of Sen. Specter).*

