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Introduction: The Need for Careful Legal and Political Analysis of Terrorism

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Terrorism is, today, a major preoccupation of Western society. We read about it on a daily basis in the press; and television reports it to such an extent that many people fear such coverage gives unintended encouragement to terrorists. Documentaries inform the public about the long history of terrorism and about terrorist profiles and methods. Conferences are conducted on various aspects of terrorism.¹ The fear of terrorism constantly affects our quality of life by limiting entry to public buildings and access to public officials and by inhibiting our choice of places to travel.

The attention of lawyers, also, is being focused on terrorism. At the Annual Meeting of the American Bar Association in August 1986, a Presidential Showcase Program was presented on terrorism, the speakers including Attorney General Meese, Director Webster of the Federal Bureau of Investigation, and several prominent legal and public-affairs commentators. Similarly, in 1986 my own Court's Annual Homer Ferguson Conference devoted extensive time to legal issues posed by terrorism.

Much of the current discussion and reporting of terrorism, though, has lacked an analytical framework. Consequently, there has been a failure to make important distinctions about motives and methods and a willingness to accept uncritically such misleading propositions as, "One person's terrorist is another's freedom fighter." Fortunately, the timely legal and political analysis which appears in the following pages will help remedy this situation by differentiating "terror" from "terrorism" and by comparing and criticizing various definitions of the latter term. Appropriately, this much needed symposium appears in the publication of a law school whose faculty includes Dr. Robert A. Friedlander, the legal scholar who in recent years has been premi-

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1. For example, in January 1987, a Washington conference on the threat of terrorism to our high-technology society [Terrorism in a Technological World], was beamed by satellite to several college campuses.

ment in the study of terrorism.

The topics covered in this symposium were well selected, as were the authors. Senator Hatch, a leader in efforts to control terrorism, describes recent legislation that has been enacted to this end; and he points to the need for further action by Congress. Senator Denton discusses activities of his Senate subcommittee, which pioneered development of United States policy against terrorism. Elsewhere in the symposium, leading commentators examine the use of extradition and other means to obtain jurisdiction over terrorists, and they give consideration to the legal aspects of controlling transnational terrorism. Also, Professor Friedlander offers a provocative proposal for punishing terrorists by public execution.

Hopefully these articles will stimulate further discussion of many issues involved in suppressing terrorism. For example, to what extent should the United States seal its borders in order to limit the access of alien terrorists? What human and material resources should be employed by the armed forces in combatting terrorism — perhaps at the expense of other important national security objectives? What means should be used to prevent terrorists from obtaining financial support by means of drug trafficking or other crimes? To what extent must civil liberties be curtailed in preventing terrorism?

In addition, this symposium should prompt further review of treaties and executive agreements to assure that the United States has gone as far as possible to cooperate with friendly nations in preventing terrorism. Certainly, the recent revision of the extradition treaty with the United Kingdom — discussed extensively in one of the articles — is a good step in this direction. Hopefully, the symposium will also induce legal scholars to investigate thoroughly the "broad and novel questions about the definition and application of the 'law of nations'" where terrorist activity is involved.² In my view, such activity — like piracy in earlier centuries³ — should be treated as contrary to "the customs and usages of civilized nations."⁴

Some recent changes in Federal statutes will aid in preventing terrorism. For example, preventive detention is authorized under some circumstances by the Bail Reform Act of 1984.⁵ Another law enacted

2. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring).

3. Piracy was recognized as a violation of the law of nations at the time the United States Constitution was adopted. *Cf. id.* at 779. Article I, § 8, cl. 10 of the Constitution empowers Congress to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."

4. See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

5. See 18 U.S.C.A. § 3142 (West 1985); *United States v. Perry*, 788 F.2d 100 (3rd Cir. 1986); *United States v. Acevedo-Ramos*, 755 F.2d 203 (1st Cir. 1985). Perhaps the offenses which authorize preventive detention under 18 U.S.C.A. § 3142 (West 1985) should be expanded to include some other crimes associated with terrorist activity.

in 1984, authorizes the Attorney General to reward persons who furnish information leading to arrests or convictions for certain terrorist acts;⁶ it also makes such persons eligible for identity protection by authorizing their inclusion in the witness security program.⁷

Federal penal statutes should be further reviewed to determine whether extraterritorial criminal jurisdiction has been granted over any terrorist acts, wherever committed, which the United States might wish to punish. In this connection, as I have suggested elsewhere, it might be desirable to expand the jurisdiction of courts-martial under Article 18 of the Uniform Code of Military Justice⁸ in order to allow such tribunals to try and punish anyone who has violated the law of war or *any other standard of conduct required by the law of nations*.⁹

State laws also need review. Some states enacted emergency-powers legislation in the wake of civil disorders in the 1960's.¹⁰ Further legislation along these lines may be desirable to deal with emergency situations which might result from terrorist activity, and I have recently suggested to the National Conference of Commissioners on Uniform State Laws that they consider drafting uniform or model legislation to deal with such situations. Search and seizure, stop and frisk, arrest, and preventive detention are among the areas which legislators should examine.¹¹ Likewise, consideration should be given to the circumstances under which martial law may be invoked to deal with disruptions caused by terrorists and the limitations which should be imposed on the exercise of military authority under martial law.

In the consideration of anti-terrorist measures, a caution is in order: They must not be taken in a mood of hysteria. Instead, they should be preceded by extensive and deliberate study. Moreover, the fear of terrorism must not be manipulated to provide an excuse for unnecessary suppression of civil liberties. As in times past,¹² there

6. 18 U.S.C.A. §§ 3071-72 (West 1985). Perhaps, these rewards should not be limited to information about "acts of terrorism primarily within the territorial jurisdiction of the United States." 18 U.S.C.A. § 3071 (West 1985). In view of the expansion of Federal extraterritorial penal jurisdiction, it might be desirable for the Attorney General to have express authority to offer such rewards even as to terrorist acts not "primarily within the territorial jurisdiction" — whatever that phrase encompasses.

7. 18 U.S.C.A. §§ 3073, 3076 (West 1985).

8. 10 U.S.C.A. § 818 (West 1983).

9. Remarks at the Seminar on the Armed Services and the U.S. Courts which was conducted by the Center for Law and National Security of the University of Virginia on September 26-27, 1986. The chief objection to my proposal seems to be that use of military tribunals to punish terrorists might imply that they are military combatants and therefore entitled to certain rights and immunities not otherwise available.

10. See Pye & Lowell, *The Criminal Process During Civil Disorders*, 1975 DUKE L.J. 1021, 1023-30.

11. Pye & Lowell, *supra* note 10, at 1030-81. Another possible area for legislative activity might be in connection with terroristic threats. See Annotation, *Validity and Construction of Terroristic Threat Statutes*, 45 A.L.R. 4th 949 (1986).

12. For example, in *Duncan v. Kahanamoku*, 327 U.S. 304 (1945), the Supreme Court ruled that martial law could not be enforced for more than a short period after

must be alertness to the danger of governmental restrictions extending beyond the scope of any necessity on which they purport to be based.

The analysis presented hereinafter provides sound guidance in seeking answers to the problems posed by terrorist activity. Also, the symposium makes clear that the need for these answers is urgent. For the service they have rendered by publishing this symposium, the editors of this law review should be thanked and congratulated.

the attack on Pearl Harbor, because civil authority had been reestablished. In *Sterling v. Constantin*, 287 U.S. 378 (1932), the Court held that martial law could not be used as the legal basis for enforcing a Texas oil proration program.