

# **Terrorism and the Constitution**



# Terrorism and the Constitution

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In September 1982, innocent men, women, and children were slaughtered in the refugee camps at Sabra and Shatila, Lebanon, by Lebanese-Christian forces dependent on Israel.<sup>1</sup> On 15 June 1985, Robert Stethem was shot and killed aboard the hijacked TWA flight 847.<sup>2</sup> On 7 October 1985, the Italian cruise-liner *Achille Lauro* was hijacked, and Leon Klinghofer was killed and thrown overboard.<sup>3</sup> On 2 July 1986, Rodrigo Rojas was mortally wounded when he was doused with gasoline and set afire while walking with protesters in Santiago, Chile.<sup>4</sup> The Soviets are alleged to leave booby-trapped dolls for Afghan Mujahadeen children.<sup>5</sup> The United States government has given both direct and indirect support to the Nicaraguan Contras, who allegedly have killed innocent Nicaraguans in conjunction with their guerrilla warfare.<sup>6</sup> It is also alleged that the Sandinistas have killed innocents in maintaining their power.<sup>7</sup> These tragic episodes continue the ugly saga of terrorism, this modern *mal du siècle*.

At the closing of the Iran-Contra hearings session with Lieutenant Colonel Oliver North, Senator Inouye addressed the issue of illegal superior orders and a soldier's legal and moral obligation to disobey them. Senator Inouye alluded to the Nuremberg trials and appeared to suggest that we, through that tribunal, made it abundantly clear that failure to disobey illegal superior orders may be criminal and, if so, should incur punishment. Brandon Sullivan, Colonel North's attorney, objected vociferously to the allusion to the Nuremberg trials and noted that he found the allusion personally and professionally distasteful. The objection succeeded in diverting Senator Inouye from his tack.

The line of questioning and the allusion, however distasteful, appears apt. The evidence suggests that orders may have been given which a reasonable soldier would have known were illegal. They related to possible illegal funding of groups that were known to have committed violence against innocent noncombatants in Nicaragua—conduct that, when committed by other, “less acceptable” groups, is condemned as terrorism. If the groups were known to have been committing criminal acts, those supporting them may be considered guilty as aiders and abettors. It is ironic that funds to support the allegedly terroristic acts of the Contras should have been raised by the sale of weapons to Iran, which is alleged to have connections to those who attacked the U.S. Marine barracks in Lebanon as well as to the perpetrators of many of the acts of terrorism noted at the beginning

of this article. These orders were apparently given and obeyed in secrecy, allegedly to save lives. The line of questioning and the conduct that gave rise to it raise significant issues of international and domestic criminal law, which, in turn, prompt serious questions of constitutional law in relation to the international arena. The conduct of the Reagan administration in this and other instances also poses serious questions about the constitutional separation of powers and checks and balances, when questions of important foreign policy are concerned. These events and our reaction to terrorism provide a vehicle for studying the role and relationship of Congress, the executive, and the judiciary in matters of war and foreign affairs at a point where constitutional, international, and criminal law converge.

How do terrorism and the Iran-Contra hearings relate to the Constitution? My thesis is that there is a tendency for the executive of this or any nation to eschew even constitutionally mandated avenues of problem solving considered to be cumbersome, inefficient, or inimical to the executive's vision of the national interest in foreign affairs. There is also a tendency to consider one's own conduct and the conduct of one's allies and friends to be justified when it is directed at goals deemed by the executive branch to be good. Constitutional provisions based on the checks and balances and separation of powers are sometimes cumbersome and inefficient for resolving some pressing problems. Sometimes Congress disagrees with executive policy. Sometimes the judiciary must consider whether conduct in foreign affairs has met legal or constitutional muster.

Today, there appear to be few more pressing problems than terrorism. Because combating terrorism is so important, there is a tendency for the executive branch to eschew the Constitution and constitutional procedures when they get in the way of policy objectives. This tendency is exacerbated when the battle against terrorism is coupled with other pressing and important policies, such as "keeping communism from gaining another foothold in our hemisphere." But we must ask whether, in the name of antiterrorism, we have become terrorists; whether, in the name of anti-communism and antitotalitarianism, we have allowed erosion of antitotalitarian protections in our Constitution and constitutional order.

## **What Is Terrorism?**

We have all heard the simple aphorism, "One person's terrorist is another's freedom fighter." The aphorism, sometimes taken seriously, misses the point. The issue is whether certain conduct, perpetrated by government officials, soldiers, police, freedom fighters, insurgents in a civil war, or dissidents, is criminal. Wars of national liberation—wars of any kind—are, by definition, violent—murderously so. They are akin to murder and probably turn many of the participants on both sides into victims, executioners, or both. Sartre

was correct, but incomplete, in aphorizing that “once begun, it [a war of national liberation] is a war that gives no quarter.”<sup>8</sup> Today, no war does. Killing in war, sadly, is deemed by nations and other groups to be justifiable or acceptable.

Some conduct, however, even within war, and thus, a *fortiori*, during times of relative peace is not justifiable or acceptable. A fight for gaining or retaining power—or even for survival—may cause people to do unspeakable things, but we do not have to justify or even accommodate such behavior. This has long been recognized. For example, in 634 A.D., Caliph Abu Bakr charged the Moslem Arab army invading Christian Syria: “Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman.”<sup>9</sup> Killing of babes in arms, for example, is not acceptable; it is murder. Perpetrators of such murder are prosecutable and have been prosecuted.<sup>10</sup>

Substantive criminal law and customary international law consider certain kinds of conduct criminal, as is evidenced by, among other things, the complex of international treaties on such subjects as hijacking, hostage taking, human rights, and the laws of war. We may call such crimes terrorism, but it is not necessary to do so.<sup>11</sup> What makes this conduct different from straightforward domestic criminal law is that the conduct is perpetrated in pursuit of some political, military, ideological, or religiose end,<sup>12</sup> including anarchy or nihilism as well as rebellion or oppression, and the fact that it has an international impact or has been condemned by international customary or positive law. The political, military, religiose, or ideological purpose is not necessary to render the conduct criminal, but it is helpful in determining conduct that may be considered an international crime and that should therefore trigger universal jurisdiction. If the child of a head of state or a tribal leader were murdered in order to intimidate the leader or gain some other advantage, the crime would not only be murder but a crime triggering universal jurisdiction. The same would be true of governmental conduct such as kidnapping, torture, and murder of the population in order to intimidate and quell dissent. It should not matter whether such conduct transcended international boundaries.

Wantonly reckless or intentional killing of noncombatants during war is a war crime. When there is no declared war, the wanton or intentional killing of peacetime analogues to noncombatants (we'll call them “innocents”) is also a crime. To add that it is an international crime should not cause confusion. The conduct becomes internationally or universally prosecutable when it is perpetrated pursuant to political, military, ideological, or religiose aims or when it is otherwise in violation of international customary law, including that protecting human rights.

Affirmative defenses may obtain, but the motive or purpose behind the conduct is not one of them. It may be a defense, however, if a combatant is

killed during war or an equivalent during nondeclared hostilities. In international law, as in criminal law, it is justifiable to kill one's attacker. It is also justifiable to attack or kill opponent combatants or their equivalent in a rebellion, insurrection, or other uprising or guerrilla war. What is not justifiable is the use of noncombatants or their equivalent as targets, no matter how lofty the goal. Self-defense is sometimes asserted as a justification, but it is never self-defense to attack an innocent, even if killing the innocent would preserve the life of the defendant. Self-preservation is not self-defense.<sup>13</sup>

Some have suggested that it is inappropriate to determine what international conduct is criminal by focusing on the object or purpose of the conduct. They argue that, generally, crime is defined by an act, not by motive or object, and that we should delineate a crime by what is done, not *why* it is done or *to whom*. However, a crime requires a *mens rea* as well as an *actus reus*. Culpability is based on the defendant's mental state. One's motive may not be relevant, but one's knowledge or intent regarding the object will be. For example, if someone knows he is killing a person, rather than a deer, he has a mental state that will establish criminal homicide. On the other hand, if someone kills a deer sincerely believing it is a person, he may not be convicted of criminal homicide. Similarly, a war crime is committed when violence is perpetrated, intentionally or wantonly, against noncombatants, even though the same conduct is not criminal if committed against combatants. A homicide will be justified if committed against a person attacking with deadly force, but the killing will be murder if intentionally or knowingly committed against an "innocent" (one who is not attacking with deadly force), even if the killing is to save one's own life. Thus it is substantively necessary to take into account the object of the allegedly criminal conduct to determine whether it is criminal. Culpability is often based on the object of the conduct in conjunction with the perpetrator's mental state regarding that object. Therefore, it is perfectly appropriate, even necessary, to define criminal terrorism by taking the object and the mental state about that object into account.

The term *innocent* will be used in this article to mean noncombatants or their peacetime equivalents. There is no justification for killing individuals *hors de combat*. Oppression may be analogized to an attack, allowing for justified revolutions based on a theory of self-defense. The "self-defense" attacks, however, must be directed against individuals holding the status of combatants or their peacetime equivalents. The determination of whether an individual is a "combatant" may be difficult in a given case, but drawing such lines is the job of the judiciary in all nations.

The Reagan administration has argued that it is justifiable self-defense to abduct "terrorists" from abroad and to attack and bomb nations harboring "terrorists." The administration has further argued that a decision

to take such measures is *per se* legal in that no other nation or institution may question it.<sup>14</sup> One danger of this position, of course, is that other nations or groups may use it as well. Could the Soviet Union “justify” a preemptive strike against the United States? Could any group that considers itself violated by U.S. policies “justify” similar conduct? Why not? If self-justification is elevated to the level of legality, there is no rule of law in any crucial context.<sup>15</sup> If one has the power to succeed, one is justified.

One danger in such a self-defining vision of self-defense lies in what it might cause one to do or to become. The old German notion of *das Recht* combined with that of “necessary defense” (*Notwehr*) and the Soviet version of the same notions (*neobkhodimaya obrona*) are very similar to the current U.S. administration’s view of self-defense. These notions hold that any right or defendable interest, from life to personal honor, is entitled to the same degree of protection and privilege. The only question is whether a right or interest is threatened. If so, whatever force is required to prevent the invasion of the right or interest is justified.<sup>16</sup> In both the German and the Soviet conceptualization of “necessary defense,” the notions of legal order (*die Rechtsordnung*) and social danger (*protivopravnyi*) identify necessary defense with protection of the legal order itself.<sup>17</sup> Thus the Germans justified attacks on the Sudetenland and Poland at the beginning of World War II and the elimination of such “threats” to the legal order as Jews, deviates, the insane or other “mental deficient,” and the Stalinist USSR justified the liquidation of enemies of the state in the name of “necessary defense.”

Even if killing innocents is deemed effective to promote an end considered by the actors to be good—even if it actually is an efficient means to intimidate a government or dissident group, or to render a population insecure—it does not need to be accepted as morally justified or legal. The claim of the oppressed that a child is the enemy because she will inherit the benefits of the oppressors is unacceptable, just as it is unacceptable to oppress or to allow other governments or other groups to oppress. It is not acceptable for combatant forces to hole themselves up and use innocent noncombatant civilians as shields. This is a form of oppression or terrorism. Similarly, however, it is not acceptable to bomb villages because one wishes to prompt a coup d’état or because one believes that some enemy or “terrorist” forces may be hiding or interspersed therein.

We and our real or perceived enemies are in the habit of justifying conduct that, if it were perpetrated against us, would be considered criminal. We all seem to be caught up, as Albert Camus said, in some “infernal dialectic that whatever kills one side kills the other too, each blaming the other and justifying his violence by the opponent’s violence. The eternal question as to who was first responsible loses all meaning then.” But Camus goes on to say, “We can at least . . . refrain from what makes it unforgiveable—the

murder of the innocent.”<sup>18</sup> I trust that Camus was right when he said that humanity generally does not want to be victim or executioner.<sup>19</sup> When we participate in or accept oppression or the slaughter of innocents, however, no matter how lofty the articulated end, we simply become oppressors or slaughterers of innocents. There is a common core of values that condemns this oppression and slaughter.

It is easy to slip into Camus’s “infernal dialectic.” From the perspective of those who are oppressed, it is easy to believe that all law, including that prohibiting violence against innocents, works to continue the oppression. Children of the oppressors can be seen as enemies, as they will inherit the fruit of oppression. Jean-Paul Sartre put the argument well:

A fine sight they are too, the believers in non-violence, saying that they are neither executioners nor victims. Very well then; if you’re not victims when the government which you’ve voted for, when the army in which your younger brothers are serving without hesitation or remorse have undertaken race murder, you are, without a shadow of doubt, executioners. . . . Try to understand this at any rate: if violence began this very evening and if exploitation and oppression had never existed on the earth, perhaps the slogans of non-violence might end the quarrel. But if the whole regime, even your non-violent ideas, are conditioned by a thousand year-old oppression, your passivity serves only to place you in the ranks of the oppressors.<sup>20</sup>

Thus, the oppressed perceive international law as fostering and promoting their oppression.<sup>21</sup> They argue accurately that the oppression is a form of violence against innocents—theirelves. The violence and oppression against them began ages ago and still continues, so they determine to strike out with similar violence against the oppressors through those who will inherit the fruits of the oppression. Alternatively, they argue that since the rules of today’s international society foster oppression—terror-violence against the oppressed—the oppressed are not bound to obey the rules. Thus, as a means to break the yoke of oppression and terror, they sometimes opt for violence. Violence is justified under certain circumstances, but sometimes the oppressed group will opt to reject the rule prohibiting violence against noncombatants or their equivalent as a means to break the yoke of oppression. Why, they argue, should we abide by rules that provide for others at our expense, that function to oppress and do violence to us?

However valid the arguments of the oppressed in today’s world, any violence they direct against noncombatants works only to allow the oppressors to feel justified in their oppression, or at least to sell to their constituents the view that they are justified in using violence to maintain their power. When innocent civilians are attacked by those claiming to represent the oppressed citizens of the oppressing power, they naturally side with their government. The government, feeling the support of the people, tends to increase its own oppression or counterviolence against the originally

oppressed. Oppression and counterviolence both increase, rather than decrease, in a frightening cycle.

Thus, we seem to have slipped quite easily into the ancient mentality of the blood feud. *Lex talionis*, “an eye for an eye,” calls the victims or the victims’ proxies to carry out the sanction against the victimizers.<sup>22</sup> Retaliation is aimed at the collectivity of the actual or perceived oppressors. Any member of the opposing group (call it the family, clan, tribe, people, nation-state) is fairly subject to retaliation. The retaliator is not viewed by his or her own group as a criminal or terrorist because he or she is an instrument of the group’s need to avenge itself. Once this occurs, the other group feels justified in a counter-reprisal, and the vendetta rages.

We must escape this cycle. No end justifies oppression or violence against innocents. We must condemn it. It violates domestic and international law. The best way to combat terrorism is to work at eliminating the oppression and depredation—forms of terrorism themselves—that are at its root. Domestic and international law provide a means to combat both aspects of terrorism; they provide a means to keep pressure on perpetrators of oppression and to prosecute and punish all violence against innocents, whether committed for intimidation or other military, political, ideological, or religiose ends. Attempts to circumvent the rule of law only lend impetus to the cycle of violence and terror. When these attempts are combined with efforts to avoid congressional participation in policy-making or oversight, or to prevent the judiciary from reviewing conduct that might be in violation of law or constitutional provisions, they also pose a serious threat to our constitutional republic, no matter what justification is claimed.

If our government, by its policy and action, promotes or condones terroristic conduct by the Contras in Nicaragua (or other groups elsewhere) in the name of democracy, it is rejecting the rule of law. Unfortunately, some ideologues believe that terrorism is inevitable and that the rule of law must be pushed aside to combat it. These people are also likely to argue that, just as there is no law when it comes to international relations, there is no appropriate legal definition of terrorism: “One person’s terrorist is another’s freedom fighter.”

To be sure, difficulties arise in trying to combat terrorism by means of international law. States often refuse to extradite or prosecute perpetrators of terror-violence when it is committed for a cause they deem good.<sup>23</sup> While such failures are unfortunate, they do not affect the legal definition of terrorism. Violation of the law or failure to enforce it does not negate the law itself.<sup>24</sup> If consistent enforcement is the essence of law or is necessary for law to exist, there is no law at all.<sup>25</sup> International law has been and will continue to be a means among others that are effectual in combating terrorism. The point is, however, that to eliminate the rule of law in order to

combat terrorism more efficiently may be more dangerous than terrorism itself. Without the rule of law, power alone becomes the keystone of relations. Substantive and procedural constitutional protections are left aside.

In order to establish a consistent policy and means to protect humanity against terror-violence, it is necessary to provide a legal definition of the crime or crimes that we condemn as terrorism. To do this, we must distinguish “justifiable” violence, perpetrated against an enemy in war or insurgency, from acts of terrorism. It is necessary to determine who constitutes “an enemy” and who, among “the enemy,” may be subject to legal violence. Given the rhetoric of the day, this may not be an easy task. It may be that because the law condones violence in certain circumstances, the key to objectively identifying terrorism will be the law of war and substantive criminal law.

The late Professor Richard Baxter articulated the commonly felt sense of futility in trying to define terrorism: “We have cause to regret that a legal concept of ‘terrorism’ was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose.” In fact, however, no legal definition of anything makes any sense, except in terms of the purpose for which it is applied. If we can decide what our purpose is in preventing the violence most people fear and call terrorism, we will have the working definition we need.

I agree with what I believe is the sense of Baxter’s statement of regret and frustration. It is not good to have a legal definition of terrorism, or even to use the term, if it is to be used for legalistic quibbling and obfuscation or as a rhetorical device to achieve ulterior ends or to justify one’s own counterconduct which may, in itself, be criminal or violative of civil liberties or other aspects of the Constitution or international law. For example, consider the so-called Shultz Doctrine to apply military force to preempt terrorism or to retaliate against terrorists or states supporting, harboring, or training terrorists.<sup>26</sup> Caspar Weinberger, as Secretary of Defense, opposed such responsive military strikes because they “kill women and children.”<sup>27</sup> In addition, one can agree with Baxter in another sense. The term *terrorism* is, perhaps, not necessary if the conduct that constitutes it falls within a common core of criminality that is universally condemned anyway.<sup>28</sup>

Without participating extensively in the debate over what the properly complete legal definition of terrorism might be, it is appropriate to determine what sort of conduct clearly is terrorism. There may be no need for an abstract, all-encompassing definition, but there is a need to establish the elements of the offense(s) we consider as terrorism, or whatever else we may wish to call it. To convict, an *actus reus* and *mens rea* must be proved. For the purpose of this article, at least, I will adopt a very limited definition: Terrorism is the application of violence against innocent individuals for

the purpose of obtaining some military, political, ideological, or religiose end.<sup>29</sup> Terrorism is conduct wherein the perpetrators do violence to innocents, including taking them hostage, in order to intimidate a nation or population or to reap some other political, ideological, or military advantage or benefit. An innocent is a person who is not an attacker or an aider and abettor of an attacker. To be an aider or abettor, one must have the same intent or criminal mental state as the attacker. In this sense, terrorism can be committed by the military even during a war when the state allows, or ignores, purposeful or reckless killing of innocents.<sup>30</sup> A crime against humanity, such as genocide, torture, or apartheid, is a form of terrorism.<sup>31</sup> What we call it does not really matter. It is all illegal and immoral terror-violence.

Violence is justified in self-defense or when it occurs in revolution or breaking the yoke of oppression. Some ideologues would extend this justification to violence against innocent civilians when it is committed for a just cause. But violence against innocents is never justified. Self-defense does not comprehend the killing of innocents (those not in a mode of attack upon us) or the use of innocents as a means to self-preservation. One is not justified in slitting a weaker person's throat and drinking his blood or eating his flesh because one will starve otherwise.<sup>32</sup> A nation may not justifiably starve, or attack and destroy, or otherwise oppress a group or nation, inside or outside its borders, to benefit the majority of the population or the power elite. Any group that adopts such a tactic—that oppresses or commits terror-violence, or promotes or condones its use, whether in the name of God, or in the name of communism, or democracy, or any other piety—has no room to complain about the other side doing the same. Condemnation of terrorism by those who use it or condone its use by other states or its favorite freedom fighters is hollow. Terrorism committed by a group against a nation or its nationals should not be an excuse to commit the same against innocents of that group. We should be beyond the blood-feud mentality of using innocent, noncombatant members of our enemies' population as proxies for our vengeance or expiation or as tools for promoting our interests through intimidation.

Whether the terror-violence occurs in a setting where it should be called a war crime, a crime against humanity, or state or group terrorism, it is condemnable terror-violence. Terrorism from this point of view is simply violent crime, and so it has traditionally been considered by Anglo-American, Continental, Islamic, and other systems of jurisprudence.<sup>33</sup> International law condemns this conduct and provides for jurisdiction to be asserted over each of these types of terrorism on the basis of at least three legal theories: the universality theory, which would allow the state obtaining jurisdiction over the person to prosecute; the protective principle; and the territorial theory.<sup>34</sup> Prosecution is called for and appropriate. Perhaps

this presents a phenomenological vision of law. It is submitted that most, if not all, peoples consider violence against their own noncombatants, whether done by powers that are over them or by outsiders, to be evil and illegal. Violence against innocents triggers the justification for revolution and for violence, but not for violence by proxy against the evildoers' noncombatants. If a thing is evil or illegal when committed against one's own, it is illegal when done against others, even against the original evildoers. Such conduct should be, and is, a crime, whether committed by a government, by a soldier during a war or civil insurrection, or by a member of a political or guerrilla group. A United States District Court noted in the Letelier murder case:

there is no discretion to commit, or to have one's officers or agents commit an illegal act. . . . Whatever policy options may exist for a foreign country, it has no "discretion" to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.<sup>35</sup>

International and domestic law equip us to extricate ourselves from the "infernal dialectic" of violence; they provide the means whereby we may avoid accepting or participating in, even by acquiescence, oppression or the slaughter of innocents. For this means to be effective, however, we must accept the rule of law at every level and not be misled by public relations techniques designed to obfuscate or to justify conduct when no justification is appropriate. It is the responsibility of our executive and legislative branches to ensure that no policies promoting violence against innocents to advance goals of any kind are adopted. It is the responsibility of us all not to acquiesce in the perpetration or support of terrorism and to subject its perpetrators to appropriate prosecution. It is the responsibility of the Justice Department to prosecute other members of the executive branch just as it must prosecute other individuals who commit terrorism. If the Justice Department fails to prosecute or if there is significant conflict of interest, it is necessary to appoint a special prosecutor. It is the responsibility of our judiciary not to hide behind the political question doctrine and to decide when illegal and unconstitutional conduct occurs.

### **Terrorism, Communism, Cabals, and the Constitution**

The framers of the Constitution left no doubt about their intention to protect our liberty by scrupulous separation of powers and significant checks and balances. Alexander Hamilton, for example, declared, "there is no liberty, if the power of judging be not separated from the legislative and executive powers."<sup>36</sup> The Constitution is clear that policy development in foreign affairs is to be a joint effort. The executive and legislative branches make the policy for the people, and the judiciary decides whether the policy, even

though it relates to foreign affairs, is constitutional. The executive branch, even with the advice and consent of the Senate, cannot constitutionally enter into a treaty with another nation that would, for example, promote slavery or apartheid, or that would eliminate due process for those found in the United States and charged with terrorism. Clearly, the judiciary has a role to play in matters of foreign relations.

The executive branch has had a tendency to want to rid itself of the inconvenience of having to deal with Congress and the judiciary in matters of grave importance in international relations. Some have argued, in defense of this policy, that Congress only has the power to "declare war."<sup>37</sup> Congress seems often to have acquiesced in executive arrogation of power in matters of foreign affairs and especially in the area of war powers. Moreover, the Senate has recently acquiesced in elimination of the judicial role in a matter quintessentially and traditionally judicial—of deciding questions of law and fact relating to human liberty, at least when one of our close allies charges that a person has committed a terrorist act. The executive branch negotiated a treaty with the United Kingdom, whereby requests for extradition based on specified terrorist conduct will allow only the executive branch to consider the legal and factual issues of whether the conduct constituted a "political offense" and is, therefore, not extraditable.<sup>38</sup>

Extradition is the means by which one nation may seek the return of fugitives who have escaped to another country.<sup>39</sup> Extradition treaties provide for extradition on a showing of probable cause that the fugitive committed an extraditable offense. This means that a decision must be made as to whether the treaty applies to the circumstances alleged to have occurred and whether the evidence suggests that there is probable cause to believe the person accused committed the prohibited acts. Thus, it is a question of law, the application of the treaty, and of fact. Because the decision to extradite deprives an individual of basic liberties, it is, as a matter of due process and separation of powers, a question for the judiciary to decide.<sup>40</sup>

The political offense exception developed from principles of asylum and sovereignty.<sup>41</sup> It allows one nation to refuse to extradite a fugitive if the offense charged in the extradition request is of a political nature. It is designed for those situations wherein the fugitive is a defeated partisan in an insurrection or civil war or for those individuals charged with crimes after having been defeated in an attempted revolution or war for self-determination. It recognizes the right to revolt and to use violence to escape oppression and applies to those situations in which a person or group commits violence against the military or combatant political forces that have imposed the yoke of oppression on them.<sup>42</sup> Although the political offense exception recognizes that violence is justified in certain circumstances, it does not include violence and terror against innocents. These, no matter

how they may be glorified, are immoral and criminal, even when perpetrated by those claiming to defend democracy or by those claiming to fend off oppression. The political offense exception does not apply to this criminal terror-violence.

The political offense exception has been part of our extradition law since the beginning of modern extradition practice in the mid-nineteenth century. It is part of the extradition law of virtually all nations except those in the Soviet orbit.<sup>43</sup> The exception presents issues of mixed law and fact (was there an insurrection? was violence used against innocents or non-combatants?) and issues of law (were the people attacked noncombatants? what is an insurrection for purposes of the political offense exception?). Its resolution impacts on human liberty. Thus, the Constitution calls for this determination to be made by the judiciary. Even though one may infer from article 3, section 1, that the Constitution allows the legislative branch to determine the jurisdiction of the judiciary, it is fair to say that the legislature may not define jurisdiction so as to eliminate the judiciary from deciding questions at the intersection of due process and human liberty.<sup>44</sup> Article 3, section 2, provides that “trial of all crimes . . . shall be by jury,” implying that some sort of court will consider such matters.

The current administration has claimed that the political offense exception promotes terrorism. It does not. While courts have made, and will make in the future, some errors, most of the time they correctly decide political offense cases.<sup>45</sup> Congress could draft legislation that could provide sufficiently clear guidelines and standards for application of the political offense exception to eliminate most of what is left of the possibility for judicial error. Indeed, the State and Justice departments had drafted such legislation and presented it to Congress. Then the Reagan administration found it expedient to withdraw their support of this legislation because they found it preferable to remove the issue from the realm of law and the courts altogether.<sup>46</sup>

The Supplementary Convention on Extradition between the United States and the United Kingdom was ratified, effectively removing the judiciary from the process of deciding whether conduct fits the political offense exception to extradition. Since terrorism as defined in this article would not fit the political offense exception anyway, the only impact the Supplementary Convention has is to eliminate the judiciary from considering the issue and applying the exception in situations in which it ought to apply. The Supplementary Treaty with Great Britain effectively eliminates the political offense exception, except for the offenses of sedition, treason, and espionage. It is another example of the executive branch, this time with the advice and consent of the Senate, attempting to arrogate power to itself in the arena of foreign affairs, especially when terrorism or war is involved.

There has been a tendency for the Congress and even the judiciary to accept the erroneous proposition that the arena of foreign affairs ought to be exclusively within the executive prerogative.<sup>47</sup> The so-called political question doctrine has allowed the Supreme Court to eschew decision making in the arena of foreign affairs. It would seem, however, that the Court ought not evade its responsibility to decide a case wherein constitutional values are at issue. Just because the issues are also related to foreign affairs and have been the subject of a treaty provision ratified by the Senate, it does not follow that the courts cannot hear them. Agreement in a treaty coupled with the advice and consent of the Senate is not a mechanism for avoiding constitutional scrutiny or removing the judiciary from its constitutional mandate to decide questions of fact and law relating to human liberty. The Supplementary Convention on Extradition is an attempt to do just that. The creation of a secret cabal to sell arms to Iran and to finance the Contras without legislative input *or* oversight is an even more ominous attempt to evade the constitutional separation of powers.

The Constitution reflects the concern of the Founding Fathers about the tendency of the executive to try to consolidate power and to weaken checks on its pursuance of its goals. James Madison warned against attempts by the executive branch to appropriate Congress's war powers, for example:

Every just view that can be taken of this subject admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the Constitution, that the power to declare war, including the power of judging of the causes of war, is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not a cause for declaring war; that the right of convening and informing Congress, whenever such a question seems to call for a decision, is all the right which the Constitution has deemed requisite or proper; and that for such, more than for any other contingency, this right was specially given to the executive.<sup>48</sup>

Abraham Lincoln understood the wisdom of the founders in providing constitutional checks on the war powers of the executive:

Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our [delegates to the constitutional] convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression upon us.<sup>49</sup>

Henry Clay noted that this aspect of the United States Constitution was unique: "Everywhere else the power of declaring war resided with the Executive. Here it was deposited with the Legislature."<sup>50</sup>

The executive branch has a tendency to suggest that since matters of foreign affairs, such as the war powers, for example, are subject to the

power of the executive in other nations, they should belong exclusively to the executive in the United States, as well. Article 1, section 8, of the United States Constitution provides unambiguously that “Congress shall have power . . . to declare war.” Only Congress has the authority to establish a state of war or to approve or ratify an act of war.<sup>51</sup> Today, however, declaration of war virtually never occurs.<sup>52</sup> Some have argued that Congress only has power to declare war, leaving the executive with full discretion over the use of military forces in any situation where a formal declaration of war has not been made.<sup>53</sup> Rostow argues that the term *to declare war* is unique to international law and that it must be understood pursuant to international law. He further asserts:

The international powers of the United States are conferred and defined by international law. Internationally, the government of the United States possesses all the powers possessed by any other state under international law, including the sovereign power to violate international law. The Constitution commits these powers to the political discretion of Congress and the President in accordance with the principle of functional necessity.<sup>54</sup>

Rostow argues that functional necessity requires that the president alone sometimes have the power to make war, that is, to commit acts of war.<sup>55</sup>

It is a strange view of law to consider it as sanctioning the notion that one may violate it at will if one has the power. No doubt, the power to do so sometimes exists, but does power equal law? It seems more accurate to say that although nations in the international arena, like individuals in a domestic arena, sometimes have the power or the luck to avoid sanction when they violate a law, this does not mean that the law validates its own violation. What Germany did during World War II was arguably “legal” under Germany’s domestic positive law, but it was not legal under international law. This would have been true whether Germany “got away with it” or not. Furthermore, just because some Allied nations and their officials committed war crimes during World War II or other wars and were not prosecuted or punished, it does not follow that there was no international law in operation.

Behind this notion of sovereignty and functional necessity, there lies the assumption that there is no international law except that based on consent. Moreover, this functional necessity view of international law is also thought sufficient to overcome constitutional mandates or, at least, to control the definition and application of constitutional principles and terminology, when foreign affairs are concerned. Thus, according to this school of thought, we are to read our Constitution in accordance with notions of functional necessity and in the same fashion that other nations would read theirs. And since the sovereign power in the international sphere is generally controlled by the executive, it follows for the functional necessity advocates that the president alone must have this power and constitutional

authority. This is really nothing more than the reductionistic view that the power of sovereignty includes unbridled freedom to act, even in violation of norms recognized by all peoples and nations, and even against the thrust of constitutional language and history. It is a view that the executive branch can function with impunity in the realm of war, fighting terrorism, and perhaps even generally in the arena of foreign relations. This argument from sovereignty and functional necessity in foreign affairs rings suspiciously like that totalitarian executive power about which so many of the Founding Fathers and President Lincoln warned.

There is no doubt that when the nation is attacked, the president may call out the troops and may commit our forces in self-defense. Even this, however, must be ratified by Congress.<sup>56</sup> Not only must Congress ratify acts of war, it also has the power to establish basic policy goals and strategies relating to war and foreign affairs. It has the power to provide for the common defense, to regulate commerce among nations, to declare war, to grant letters of marque and reprisal, to provide and maintain a navy, to raise and support armies, and to provide for organizing and calling out the militia.<sup>57</sup> Congress also has the power to make all laws necessary and proper to accomplish these constitutional objectives.<sup>58</sup> These powers explicitly provided Congress by the Constitution demonstrate the speciousness of the “functional necessity” argument.

The functional necessity argument denigrates the Constitution by placing it on the same plane as international law, even though the constitutional division of powers is the superior norm in our constitutional republic. Moreover, the international law described by the notion of functional necessity is not international law at all but merely the rule of superior power. Ironically, then, the “functional necessity” view posits a lawless international order to warrant adoption of a construction of the Constitution that eviscerates traditional limitations—all to the proclaimed end of furthering goals perceived to be required by a dangerous world. But a dangerous world is not rendered less dangerous if we adopt totalitarian practices in order to fight totalitarianism, or when we use terrorist means to fight terrorism. Indeed, the constitutional checks and balances provide the wherewithal to ensure that we do not violate international law or destroy our constitutional republic through precipitous executive action.

The conduct I have described as terrorism poses a vicious threat to human dignity. It must be condemned whether it emanates from states against inhabitants of their own territory, in violation of human rights law, or against noncombatants extraterritorially. It is criminal whether perpetrated by groups of insurgents or those struggling for independence or freedom from oppression. Its criminality can be determined by customary international law and domestic substantive criminal law.

The greatest danger posed by terrorism to our democracy and constitutional republic may be our executive branch's overreaction to it and use of terrorism as an excuse to erode the constitutionally mandated sharing of powers in the realm of foreign affairs, war powers, and combating international crime. If we are to avoid manifest hypocrisy, the destruction of the rule of law, and erosion of our primary democratic and constitutional values, we must be vigilant and avoid participating in criminal conduct, either directly or as alders and abettors. We must not allow hysteria to cause us to accept an arrogation of power by the executive branch at the expense of the other two branches. Although Congress is sometimes cumbersome and the judiciary may make mistakes, these institutions are set in the Constitution as checks and balances for our domestic protection against autocracy. Whether combating terrorism is accomplished by means of extradition and prosecution of alleged perpetrators or by a decision to initiate acts of war, the constitutional order must be preserved.

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1. Leslie C. Green, "War Crimes, Extradition and Command Responsibility," chap. 10 of Leslie C. Green, *Essays on the Modern Law of War* (Dobbs Ferry, N.Y.: Transnational Publishers, 1985), 215, 228-37.

2. *New York Times*, 15 June 1985.

3. *New York Times*, 12 October 1985. When U.S. fighter planes intercepted an Egyptian jetliner carrying the later-to-be-convicted (by the Italian judicial system) hijackers of the *Achille Lauro*, they either committed kidnapping or hijacking of their own, or they have a claim of justification. The only justification would be that the Egyptian government or the jetliner pilot consented to the taking, or that the Egyptian government or jetliner pilot were participating in the escape of the alleged hijackers (see Gerald P. McGinley, "The *Achille Lauro* Affair—Implications for International Law," *Tennessee Law Review* 52 [Summer 1985]: 691; also see Letelier vs. Republic of Chile, 488 F. Supp. 6654, 673 [D.D.C. 1980]; and Eric H. Singer, "Terrorism, Extradition, and FSIA Relief: The Letelier Case," *Vanderbilt Journal of Transnational Law* 19 [Winter 1986]: 57, 69).

4. J. Gordon, "Rodrigo Rojas—Murdered in Chile," *Sacramento Bee*, 7 September 1986.

5. Senate Committee on Foreign Relations and House Committee on Foreign Affairs, *Country Reports on Human Rights for 1984*, 99th Cong., 1st sess., 1985 Joint Committee Print, 1159-69 (State Department report presenting the atrocities and abuses of human rights committed in Afghanistan by the Soviet-backed regime).

6. See, for example, Aryeh Neier, "There's a Contra-diction," *Sacramento Bee*, 5 April 1987.

7. *Ibid.*

8. Jean-Paul Sartre, Preface to Froritz Fanon, *The Wretched of the Earth*, trans. Constance Farringon (New York: Grove Press, 1963), 18; see also Raymond Aron, *History, and the Dialectic of Violence: An Analysis of Sartre's Critique de la Raison Diaec-tique*, trans. Barry Cooper (Oxford: Blackwell, 1975), 185–93; and Robert Friedlander, "Terrorism and National Liberation Movements: Can Rights Derive from Wrongs?" *Case Western Reserve Journal of International Law* 13 (Spring 1981): 281.

9. Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins Press, 1955), 102; see also Sun Tzu, *The Art of War*, trans. Samuel B. Griffith (Oxford: Oxford University Press, 1963), 75–76.

10. See Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York: Bantam Books, 1971); United States vs. Calley, U.S. Court of Military Appeals, 1973, 22 U.S.M.C.A. 534, 48 C.M.R. 19 (1973). Calley, unfortunately, was not tried as a war criminal, but for violation of domestic laws. Unfortunately, the United States military has participated in terrorism in the past. Atrocities in Vietnam turned out not to be sporadic but endemic to the atrocious military situation there. For example, D'Amato notes, "By 1969, American aircraft had engaged in thirty-nine distinct bombing attacks on the internationally renowned leper sanatorium in Quyuh Lap, North Vietnam. The roofs of the buildings in the sanatorium were painted with the Red Cross. Nevertheless, this humanitarian, non-military target was a favorite among United States pilots" (Anthony A. D'Amato, "Public International Law as a Career," *American University Journal of International Law and Policy* 1 [Spring 1986]: 5, 13; see also Anthony A. D'Amato, Harvey L. Gould, and Larry D. Woods, "War Crimes and Vietnam: 'The Nuremberg Defense' and the Military Service Register," *California Law Review*, 57 [June 1969]: 1055, 1086). D'Amato cites an interview with one of the pilots at the time, which indicates and explains the "psychology" of this kind of bombing mission: "When you hit school buildings, or hospitals, or especially dams, you have a feeling of accomplishment. You see the effects below in terms of scattering adults and children, or water bursting and knocking down houses, or buildings caving in." Indeed, when one adopts as a tactic or strategy the slaughter of innocents for whatever end, one truly becomes simply a slaughterer of innocents. Others have also participated in the same kind of slaughter. Note the atrocities of the Soviet Union in Afghanistan, cited in n. 5. It is no excuse for one side to say the other side participated in such conduct. That just means that both were slaughterers of innocents.

11. Positivistic evidence for the existence of these crimes is presented in Christopher L. Blakesley, "Jurisdiction as Legal Protection against Terrorism," *Connecticut Law Review* 19 (Summer 1987): 895, 911–20.

12. I use the term *religiose* advisedly to distinguish it from *religious*.

13. United States vs. Holmes, 26 F. Cas. 360, 1 Wall Jr. 1 (C.C.E.D. Pa. 1842); Regina vs. Dudley and Stephens, Queen's Bench Division, 14 Q.B.D. 273 (1884); Michael J. Mallin, "In Warm Blood: Some Historical and Procedural Aspects of Regina v. Dudley and Stephens," *University of Chicago Law Review* 34 (1967): 387; Frederick C. Hicks, *Human Jettison: A Sea Tale from the Law* (St. Paul: West Publishing Co., 1927); Benjamin Nathan Cardozo, *Law and Literature* (New York: Harcourt Brace and Co., 1930), 110–14: "There is no right on the part of one to save the lives of some by the killing of another. There is no rule of human jettison."

14. See, for example, the *New York Times*, 19 January and 28 January 1986 (wherein Abraham Sofaer, legal adviser to the Department of State, defends the legality

of abducting terrorists). For a different point of view, see John F. Murphy, "The Future of Multilateralism and Efforts to Combat International Terrorism," *Columbia Journal of Transnational Law* 25, no. 1 (1986): 83–84 (suggesting that except for rare occasions of anarchy abductions would be illegal).

15. Oscar Schachter, "Self-Judging Self-Defense," *Case Western Reserve Journal of International Law* 19 (Winter 1987): 121–22.

16. George P. Fletcher, "Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory," in *Studies in Comparative Criminal Law*, ed. Edward M. Wise and Gerhard O. W. Mueller (Springfield, Ill.: Thomas, 1975), 123–27.

17. *Ibid.*, 140.

18. Albert Camus, "Appeal for a Civilian Truce in Algeria," in *Resistance, Rebellion, and Death*, trans. Justin O'Brien (New York: Alfred A. Knopf, 1961), 135–38 (lecture given in Algiers in February 1956). In another essay in this volume, Camus remarks that even "If murder is in the nature of man, the law is not intended to imitate or reproduce that nature" ("Reflections on the Guillotine," 198).

19. Albert Camus, *Neither Victims nor Executioners*, trans. Dwight MacDonald (Berkeley: World without War Council, 1968), 27; see also Robert Friedlander, "Terrorism and National Liberation Movements," 281, 282 n. 3. But we must still try to overcome, by rectifying wrongs done in the past or currently being perpetrated, the tendency to allow inertia to make executioners or victims of us all.

20. Sartre, preface to *The Wretched of the Earth*, 25.

21. And it is true that some oppressing nations justify their conduct by claiming it is consistent with international law. Others simply suggest by their actions and their cynical excuses that there is no international law. But the reality is that oppression violates international law, no matter what the excuse given and no matter whether some nations "get away with it" for a time.

22. Exodus. 21:24; Yoram Dinstein, "International Law as a Primitive Legal System," *New York University Journal of International Law and Policy* 1 (Fall 1986): 11.

23. See Cory F. Oliver, "Reflections on Two Recent Developments Affecting the Function of Law in the International Community," *Texas Law Review* 30 (October 1951): 820–21; D'Amato, "International Law as a Career," 5; Anthony A. D'Amato, "Is International Law Really 'Law?'" *Northwestern University Law Review* 79 (December and February 1985): 1293.

24. See Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970), noting tendency not to prosecute violations that occurred in the Vietnam War; Daniel H. Derby, "Duties and Powers Respecting Foreign Crimes," in supp. to *American Journal of Comparative Law* 30 (1982): 523; Oscar Schachter, "In Defense of International Rules on the Use of Force," *Chicago Law Review* 53 (Winter 1986): 113.

25. See D'Amato, "International Law," 1293–94; Roger Fisher. "Bringing Law to Bear on Governments," *Harvard Law Review* 74 (April 1961): 1130, excerpted in Burns H. Weston, Richard A. Falk, and Anthony A. D'Amato, *International Law and Worm Order: A Problem-Oriented Coursebook* (St. Paul: West Publishing Co., 1980), 125–30; and Roger Fisher, *Improving Compliance with International Law* (Charlottesville: University Press of Virginia, 1981), 19–72, 236–300.

26. Jordan J. Paust, "Responding Lawfully to International Terrorism: The Use of Force Abroad," *Whittier Law Review* 8, no. 3 (1986): 711; "Task Force Supports U.S. Policy on Global Terrorism, Official Says," *Houston Post*, 2 March 1987; see also Christopher L. Blakesley, "The Evisceration of the Political Offense Exception to Extradition," *Denver Journal of International Law and Policy* 15 (Summer 1986): 1, and "An

Essay on Executive Branch Attempts to Eviscerate the Separation of Powers—Thoughts Prompted by F. Wormuth and E. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law*, *Utah Law Review*, no. 2 (1987), 451.

27. "Task Force," *Houston Post*.

28. See Robert A. Friedlander, "The Enforcement of International Criminal Law," *Case Western Reserve Journal of International Law* 17 (Winter 1985): 79, 80. See also, R. R. Baxter, "A Skeptical Look at the Concept of Terrorism," *Akron Law Review* 7 (Spring 1974): 380-81.

29. This "rough and ready" definition may not stand up under sustained critical scrutiny, but it is useful for the purpose of establishing jurisdiction and providing for extradition and prosecution (see Baxter, "A Skeptical Look," 380-81). Note that the definition is broad enough to include conduct that would be a war crime during armed conflict or common criminal violence if perpetrated domestically. It is certainly appropriate to differentiate these types of violence and to recognize that they may belong in separate categories. Nevertheless, the core concept of my definition is that *it is criminal to use innocents (noncombatant, civilian population) as a means to achieving a political, military, or religiose end*. This principle holds in any context: whether in wartime or during a period of relative peace, whether perpetrated by a state government against persons within its borders or by persons within a state's borders against other persons within a state's borders, or whether perpetrated across national boundaries. In any case, it is criminal. See, generally, Leslie C. Green, "War Crimes, Extradition and Command Responsibility," and "The Law of Armed Conflict and the Enforcement of International Criminal Law," chaps. 10 and 11 of *Essays* (Dobbs Ferry, N.Y.: Transnational Publishers, 1985). For further discussion of the definition of terrorism, see Ali Khan, "A Legal Theory of International Terrorism," *Connecticut Law Review* 19 (Summer 1987): 945-72.

30. See Taylor, *Nuremberg and Vietnam*; United States vs. Calley.

31. See Blakesley, "Jurisdiction as Legal Protection," and accompanying text, for extensive analysis of this issue and several pages of authority, including treaties, cases, doctrinal writings, and other evidence that such conduct is universally condemned.

32. See Baxter, "Skeptical Look," 380; John F. Murphy, *Punishing International Terrorists: The Legal Framework for Policy Initiatives* (Totowa, N.J.: Rowman and Allanheld, 1985), 3; and Jordan J. Paust, "A Definitional Focus," in *Terrorism: Interdisciplinary Perspectives*, ed. Yonah Alexander and Seymour M. Finger (New York: John Jay Press, 1977), 18.

33. Robert Friedlander, "Mere Rhetoric Is Not Enough," *Harvard International Review* 7, no. 6 (1985): 4, 6, noting that the acts that go into what is called terrorism are crimes and have been recognized and punished as such in Anglo-American and Continental jurisprudence; Abu Bakr, quoted in Khadduri, *War and Peace*, 102-7; compare Deut. 20:17-19; 1 Sam. 14:3, 33 and 18:27. Friedlander, "Enforcement," 88; chap. 204 of Title 18, United States Code, provides for rewards for information concerning terrorist Acts, and 18 U.S.C. 3077 defines an *act of terrorism* as an activity that:

(A) involves a violent act or an act dangerous to human life that is 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; and (B) appears to be intended—

- (i) to intimidate or coerce a civilian population;
- (ii) to influence the policy of a government by intimidation or coercion; or
- (iii) to affect the conduct of a government by assassination or kidnapping.

34. For extensive analysis of these theories, see Blakesley, "Jurisdiction as legal Protection," 895.

35. *Letelier vs. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980); see also Eric H. Singer, "Extradition and FSIA Relief," 57, 69.

36. Alexander Hamilton, no. 78 of *The Federalist*, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961), 523.

37. See W. Taylor Reveley, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?* (Charlottesville: University Press of Virginia, 1981), 32, 140–41, 144, 171; Eugene Victor Rostow, "Once More into the Breach: The War Powers Resolution Revisited," *Valparaiso University Law Review* 21 (Fall 1986): 1, 2, 6; see also Charles Coleman Thach, *The Creation of the Presidency, 1775–1789: A Study in Constitutional History* (New York: Da Capo Press, 1969), advocating a strong executive and pointing out Congress's inability to make vigorous decisions; but see Blakesley, "Separation of Powers."

38. Supplementary Extradition Treaty, 25 June 1985, United States–United Kingdom, reprinted in S. Treaty Doc. no. 8, 99th Cong., 1st sess. 1 (1985); but see Blakesley, "Evisceration," 109.

39. See, generally, Christopher L. Blakesley, "Extradition between France and the United States: An Exercise in Comparative and International Law," *Vanderbilt Journal of Transnational Law* 13 (Fall 1980): 653, discussing extradition in light of the U.S.–French extradition treaty and practice.

40. See Blakesley, "Evisceration"; Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* (Dallas: Southern Methodist University Press, 1986), 229–46.

41. See Christopher L. Blakesley, "Extradition from Antiquity to Modern France and the United States: A Brief History," *Boston College International and Comparative Law Review* 4 (Spring 1981): 39.

42. See Blakesley, "Evisceration." 116–17 and nn. 30, 33.

43. Yugoslavia, not really within the "Soviet orbit," although sometimes considered to be, does have a political offense exception in its extradition treaties. The other Warsaw Pact nations sometimes allow for such an exception although it is not found in any of their extradition treaties. The exception is not allowed, however, when the conduct has been perpetrated against other socialist or "friendly" states (see Lech Gardecki, "The Socialist System," in *International Criminal Law: A Guide to US. Practice and Procedure*, ed. Ved P. Nanda and M. Cherif Bassiouni [New York: Practicing Law Institute, 1987], 133, 140–41).

Perhaps this "double standard" for political offenses was seen as appealing by the Reagan administration, as it is strikingly similar to the position taken in the United States–United Kingdom Supplementary Extradition Treaty (see Abraham D. Sofaer, United States and United Kingdom Supplementary Extradition Treaty: Hearings on Treaty Doc. 99–8 before the Senate Comm. on Foreign Relations, 99th Cong., 1st sess. 2–6 [1985], statement of Abraham D. Sofaer, legal adviser, Department of State; Abraham D. Sofnet, "The Political Offense Exception and Terrorism," *Denver Journal of International Law and Polity* 15 [Summer 1986]: 125, 132, arguing that the political offense exception should not apply to extradition requests by democratic allies but should remain applicable to those made by "unstable" and "undemocratic" regimes. This convention allows the executive and legislative branches to use treaties to choose which alleged terrorists will be "protected" and which will not). While this may be a common occurrence in the practice of international affairs, it is unfortunate and unwise to allow our law to promote the notion that terrorism is a political, not a legal, issue.

44. United States Constitution, article 3, section 1; *Brotherhood of Railroad Trainmen vs. Toledo, P. & W. R. Col.*, 321 U.S. 50, 63–64 (1944), U.S. Supreme Court clearly recognizing congressional “plenary control over the jurisdiction of the federal courts”; but see Telford Taylor, “The Unconstitutionality of Current Legislative Proposals,” *Judicature* 65 (October 1981): 198–200, arguing that though Congress may have the power and right to restrict federal court jurisdiction it cannot use that power to abrogate fundamental constitutional rights.

45. See the discussion of this in Blakesley, “Evisceration,” 109; M. C. Bassiouni, “The Political Offense Exception Revisited: Extradition between the U.S. and U.K.—A Choice between Friendly Cooperation among Allies and Sound Law and Policy,” *Denver Journal of International Law and Policy* 15 (Winter, Spring 1987): 265–66.

46. See Christopher L. Blakesley, Abraham D. Sofaer, and Victoria Toensing, Testimony in Hearings on H.R. 4292, Before the Committee on the Judiciary, Subcommittee on the Constitution, relating to the Anti-Terrorism Act of 1986, 99th Cong., 2d sess. 88–95 (1986), statement of Christopher L. Blakesley in favor of legislative standards on the political offense exception.

47. U.S. vs. Barrigan, 238 F. Supp. 336 (D. Md. 1968), *arr'd* 417 F. 2d 1009 (4th Cir. 1969), *cert. denied* 397 U.S. 909, 90 S. Ct. 907, 25 L. Ed. 2d 90 (1970), “Certain clearly defined areas have traditionally and necessarily been left to other departments of the government, free from interference by the judiciary. One such area is foreign relations” (citing *Baker vs. Carr*, 369 U.S. 186, at 211, 82 So. Ct. 691 [1962]); U.S. vs. Sisson, 294 F. Supp. 515, 517 (D. Mass. 1968), “a domestic tribunal is entirely unfit to adjudicate the question whether there has been a violation of international law during a war by the very nation which created, manned, and compensated the tribunal seized of the case”; *Switkes vs. Laird*, 316 F. Supp. 358, 365 (S. D.N.Y. 1970), quoting Judge Wyzansky’s above-noted statement. But see *Reid vs. Covert*, 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957), constitutional questions related to foreign affairs will be heard by the Court; Blakesley, “Eviscerate”; and Wormuth and Firmage, *To Chain the Dog of War*.

48. James Madison, *Letters and Other Writings*, 4 vols. (Philadelphia: J. B. Lippincott and Co., 1864), 1:642–43, quoted in Wormuth and Firmage, *To Chain the Dog of War*, 30–31.

49. Abraham Lincoln, *The Writings of Abraham Lincoln*, ed. Arthur Brooks Lapsley, 2 vols. (New York: Lambs Publishing Co., 1905–6), 2:51–52, quoted in Wormuth and Firmage, *To Chain the Dog of War*, 56.

50. Annals of Congress 1500 (1818).

51. William Patterson, delegate to the Constitutional Convention and later an associate justice of the Supreme Court, noted: “It is the exclusive province of Congress to change a state of peace into a state of war” (*United States vs. Smith*, 27 F. Cas. 1192, 1230 [C.C.N.Y. 1806] [No. 16, 342]).

52. In over two hundred years, Congress has declared war only eleven times unconditionally and only four times conditional (Wormuth and Firmage, *To Chain the Dog of War*, 53, 56).

53. See Reveley, “War Powers of the President and Congress,” 32, 140–41, 144, 171; E. Rostow, “Once More into the Breach,” 5. See also Thach, *Creation of the Presidency*.

54. Rostow, “Once More into the Breach,” 3, 6. But see Jordan J. Paust, “The President Is Bound by International Law,” *American Journal of International Law* 81 (April 1987): 377–90.

55. Rostow, “Once More into the Breach,” 5.

56. See Wormuth and Firmage, *To Chain the Dog of War*, 12–31.

57. U.S. Constitution, article 1, section 8.

58. *Ibid.*