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Justice for Terrorists: New York's Interest in Deterrence and Punishment

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On 8:30 p.m. in the evening of September 11, 2001, President George W. Bush addressed the nation from the oval office.¹ In his remarks he stated:

“Today our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts. The victims were in airplanes or in their offices: secretaries, business men and women, military and Federal workers, moms and dads, friends and neighbors. Thousands of lives were suddenly ended by evil, despicable acts of terror. ...

Immediately following the first attack, I implemented our Government’s emergency response plans. Our military is powerful, and it’s prepared. ...

The search is underway for those who are behind these evil acts. I’ve directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbor them. ...

America and our friends and allies join with all those who want peace and security in the world, and we stand together to win the war against terrorism. ...

This is a day when all Americans from every walk of life unite in our resolve for justice and peace. America has stood down enemies before, and we will do so this time. None of us will ever forget this day. Yet, we go forward to defend freedom and all that is good and just in our world.”²

As can be seen from the above quotation, in the aftermath of the September 11, 2001 terrorist attacks, the President of the United States pronounced two fundamental commitments on behalf of the federal government. First that it would seek out and find the terrorists responsible for the attacks which took the lives of nearly 3000 Americans, and second, that it would bring those responsible to justice.

Indeed, these sentiments were reiterated nine days later, in the September 20, 2001 address of President Bush to a joint session of Congress:

“Tonight we are a country awakened to danger and called to defend freedom. Our grief has turned to anger and anger to resolution. Whether we bring our enemies to justice or bring justice to our enemies, justice will be done. ...

On September 11th, enemies of freedom committed an act of war against our country. Americans have known wars, but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war, but not at the center of a great city on a peaceful morning. Americans have known surprise attacks but never before on thousands of civilians. All of this was brought upon us in a single day, and night fell on a different world, a world where freedom itself is under attack. ...

I will not forget this wound to our country and those who inflicted it. I will not yield; I will not rest; I will not relent in waging this struggle for freedom and security for the American people.

The course of this conflict is not known, yet its outcome is certain. Freedom and fear, justice and cruelty have always been at war, and we know that God is not neutral between them.

Fellow citizens, we’ll meet violence with patient justice, assured of the rightness of our cause and confident of the victories to come. In all that lies before us, may God grant us wisdom, and may He watch over the United States of America.”³

Seven and a half years later, newly inaugurated President Barack Obama, pronounced his own commitment to bring terrorists to justice, when he addressed a joint session of Congress on February 24, 2009, declaring:

“To overcome extremism, we must also be vigilant in upholding the values our troops defend, because there is no force in the world more powerful than the example of America. And that is why I have ordered the closing of the detention center at Guantanamo Bay and will seek swift and certain justice for captured terrorists.”⁴

Pursuant to these pronouncements, each of the past two administrations have established a policy to bring terrorists to justice. Just exactly what these policies mean, however, can be best understood by the actions of each President. Under the Bush administration, justice for terrorists was seen primarily as a function of war. Under the Obama administration, justice is seen primarily as a function of diplomacy, law enforcement and criminal justice. These are vastly different concepts, and have vastly different consequences. This report will examine those differences, and the legal foundations and consequences for each.

Part One - Justice

A. The Meaning of Justice

The Anglo-American concept of justice derives from Roman law. Indeed, the Roman term “jus” (meaning the law) was the root of their term “justitia” (meaning the art of what is good and fair).⁵ Our concept of “justice” is built upon these Roman meanings, with “justice” being defined as “the resolute and constant purpose to render to every man his due”.⁶ Embodied within this concept, are the fundamental elements of fairness, impartiality and righteousness.⁷

Modern legal commentators have held that today’s concept of “justice” is not only what remains of these ancient principles, but is also a concept inherently linked to a society’s morality.⁸ Moreover, although most often simply described as the appropriateness of the punishment for misconduct against society, the primary reasons a society needs justice include:

- To build faith in, and respect for, the law;
- To provide for the protection of society;
- To provide for the appropriate, proportionate administration of punishment; and
- To effectively assure deterrence.⁹

One need only look to the pictorial illustration of lady justice (depicting the Roman Goddess Justitia), to gain a true understanding of the concept of justice under Anglo-American law. Pictured above countless courthouses, and even prominently displayed as a part of the Great Seal of the State of New York, this image contains a blindfolded, statuesque woman, holding a set of scales in her left hand, and a double edged sword in her right.¹⁰

The symbolism depicted by this illustration, with respect to the values we hold within our concept of justice, is powerful.

The Blindfold: This symbolism represents the fundamental element of impartiality. Under this element, justice does not care about who the person is, that commits the act against society. Nor is justice concerned out the person’s heritage or status. The only issues, are what act was which was allegedly committed. and the reasons for the commission of the same.

The Scales: This symbolism represents the fundamental element of fairness. Under this element, justice balances the evidence in the act alleged, and seeks to find the truth in who committed the offense.

The Sword: This symbolism represents the fundamental element of righteousness. Under this element, justice can be enforced with the power of punishment, dispersed through reason, to achieve deterrence and protect society.

It is through these fundamental elements of justice, that respect for the law, and the decisions rendered thereunder, are based. It is upon these principles, that the disposition of its punishment, is determined.

As a result, in a free society, justice is the cornerstone of all law. It is a foundational attribute, and actions taken under its name, are measured in the light of its fundamental elements.

B. The Purpose of Justice

The purpose of justice is deterrence.

Society demands that punishments be just. For just punishments actually deter the conduct for which the punishment was administered.

Without justice, there can be no respect for the punishment imposed. Without such respect, and with out the understanding that the punishment was derived from a fair and reasoned determination, there can be no perception of a repeated certainty of outcome. It is this certainty of outcome, as determined in the light of the facts before justice, that provides deterrence.

Society needs to deter harmful conduct. In our Anglo American system, justice is the means by which we achieve this goal. In this manner, justice is not only an aspirational goal, but a useful tool as well.

It is through this perspective of deterrence that the punishment administered by justice must be seen.

It is through this goal of deterrence, and not vengeance, that justice is founded.

For from the days of George Washington, our legal system has long recognized that justice and vengeance (the purposeful infliction of injury, harm, humiliation on a person for the purpose of revenge) are not the same thing. ¹¹ Accordingly, a punishment enacted for the purposes of attaining vengeance, is not just.

As a result, when President Bush and President Obama announce that they will seek justice for terrorists, it is this goal of deterrence, which they seek.

Deterrence and punishment are the inseparable purpose and implementation of justice.

I. Deterrence

Deterrence is the act or process of discouraging certain behavior, which is harmful to society, by means of fear of punishment.¹² This legal concept is divided into two subpurposes.

Specific deterrence is the dissuasion of a specific offender from repeating the misconduct once again.

General deterrence is the dissuasion of other possible offenders from repeating the same misconduct the offender committed, by means of making an example of the offender.¹³

II. Punishment

Punishment is the instrument of justice through which deterrence is achieved.

It is the means by which in specific deterrence is enforced against the offender, or the example upon which general deterrence is provided to dissuade others from committing a similar offense.

Under the principles of justice, punishment is apportioned to fit the offense, and without being either cruel or unusual, is accomplished in the manner which is deemed to be the most effective to accomplish its goal of deterrence.¹⁴

C. The Prosecution of Justice

The prosecution of justice is performed pursuant to those methods, which under its principles, proves most effective to accomplishing its goal for deterrence. These methods are most frequently divided into two categories: Just War and Criminal Justice.

I. The Prosecution of Justice by Means of Just War

By the time of the early middle ages, a number of European authors, most of whom were theologians, began to develop the legal doctrine known as "Just War".¹⁵ This doctrine provided that a war waged for the enforcement of right, and the eradication of evil, was justified.¹⁶ Accordingly, under the principles of international law, justice can be prosecuted by just war.

To qualify for this doctrine, five factors must be satisfied:

- **Actoritas:** That the war must be waged upon the command of a sovereign. In so doing, the just warrior must hold a commission from his community's ruler, in order to justify the shedding of blood, for the just cause.
- **Personae:** That the sovereign can only engage certain categories of persons to fight in the armed conflict. Women, children, elderly or the infirmed, are prohibited from being impressed to fight for the just cause.
- **Res:** That the war must have a well defined objective or purpose.
- **Justa Causa:** That the war must have a just cause, and waged for a valid legal claim. According to St. Augustine and St. Thomas Aquinas, this condition specifically may be to punish those who have wronged the state by their misconduct.
- **Animus:** That the war must be fought with a rightful intention. This means that the war must be waged for the purpose of addressing the misconduct, correcting evil and bringing the enemy to the path of righteousness.¹⁷

As this doctrine continued to evolve from the middle ages to the present day, the idea of fighting a "just war" for the purposes of a law enforcement operation, became (and remains) a primary reason to wage such.¹⁸ Indeed, at the very essence of the legal concept of just war, in its most general sense, is a law enforcement operation.¹⁹ Moreover, an offensive war is perfectly morally permissible, if waged for such a just cause.²⁰

As can be seen, pursuant to this long standing doctrine of international law, justice can be prosecuted through a just war.

The War Against Terrorism meets all the legal criteria for such a just war. As a law enforcement operation, it was launched with the just cause of protecting and preserving the people and institutions of the United States from unlawful and unjustified, murderous, terrorist attacks, directed against its civilian populous. Waged by a sovereign, and fought by volunteers, for the well defined objective and purpose of ending terrorist attacks, thereby seeking to correct the evil of these terrorist attacks, and bring those who would launch or support such terrorist attacks, or those who would harbor them, to justice, the war on terrorism easily satisfied each of the criteria for a just war. In so doing, it is an instrument of justice, and international law, upon which the people of the United States can avail themselves. (3)

Perhaps most importantly, however, the prosecution of a just war against those who would foster, promote or commit acts of terrorism against the United States, also satisfies the deterrence purpose of justice.

Pursuant to an armed military conflict, waged under just war principles, the United States can provide for both general and specific deterrence.

For by means of just war, the United States can justly dispense a punishment, which serves as an effective example to those who might consider engaging in acts of terrorism against the United States in the future, as well as dispensing an effective punishment to those who actually did engage in such misconduct.

II. The Prosecution of Justice by Means of Criminal Justice

From the time of the Roman Empire, the prosecution of justice by means of criminal justice in courts of law, has been the standard and accepted methodology.

Accordingly, many terrorist acts, which are also crimes under state and federal law, have been prosecuted both in state criminal courts, and in Article III, Federal Courts. Under such circumstances, terrorists have been provided with the same Constitutional and criminal procedure protections as are afforded to any United States Citizen, accused of a crime, and brought to justice by means of the same methods.

This fact, however, raises a substantial question of justice.

Although justice is blind and impartial, should a terrorist, from a foreign nation, who is not a United States Citizen, and who has taken action to promote, support or conduct a terrorist attack against the United States, and its civilian populous, enjoy the same Constitutional and criminal procedure protections as a citizen of the United States? Does the need for deterrence, the very purpose of justice, demand in some cases, where such Constitutional and criminal justice protections would prevent the discovery of information from the accused necessary to stop an imminent attack, override the need to afford such protections?

Accordingly, pursuant to custom, case law and statute, justice can be prosecuted in certain circumstances, against foreign terrorists, in Military Commission Tribunals.²¹ These Tribunals, pursuant to the Military Commissions Acts of 2006 and 2009, and the case law decided thereunder, afford many similar protections to the accused as Article III Federal Courts, including:

- The presumption of innocence;
- A requirement for proof of guilt beyond a reasonable doubt;
- Representation by an independent military defense counsel free of charge, and an option to retain civilian defense counsel;
- Presence of the accused at all proceedings of the military commission, other than those for deliberations and voting (The military judge may only exclude the accused if they are disruptive or threaten the physical safety of individuals);
- An opportunity to present evidence and call witnesses;
- A requirement that the accused be provided, in advance, evidence to be introduced against him or her at trial;
- Protection from self-incrimination, and most common law evidentiary privileges;
- The appropriately qualified right to self-representation;
- Suppression of statements obtained by torture or in violation of the Detainee Treatment Act of 2005;
- Prohibition against drawing an adverse inference if an accused chooses not to testify; and
- A thorough, comprehensive and independent appellate system, including appeals to U.S. Civilian Federal Courts; and
- A sentence of death requires a unanimous vote of at least twelve members.²²

These Military Commission Tribunals, also however, provide for the ability to exercise the additional deterrence that cases involving accused terrorists, who have information regarding an imminent terrorist attack, need, in order to have federal authorities obtain such critical information, without violating the rights of the accused, or prejudicing the case against the accused.²³ Such Tribunals further permit the ability to admit evidence from secure sources, such as individuals engaged in the covert intelligence service of the United States, without having to expose the identity or cover of such individuals, or the classified information which they are authorized to know.²⁴ Moreover, these Tribunals can be conducted at secure locations, within the protection of the United States Military, thereby not providing an additional civilian target for terrorist attacks.

As a result, whether by civilian criminal court, or in the cases which warrant the use of Military Commission Tribunals, justice can be prosecuted by means of criminal justice. Pursuant to such prosecution, deterrence can be attained.

Whether, however, justice is best attained by means of just war, or by means of criminal justice, or by both, is a public policy decision facing the United States. The Bush administration took the view that all three methods should be used. The Obama administration appears to prefer primarily the use of the criminal justice system by means of civilian criminal courts. In seeking to provide for the maximum deterrence that justice will afford, the limitation of options the current Obama administration is imposing, could have serious consequences for the public safety of the American people and their institutions.

Part Two - The Threat We Face

In order to truly understand the issue of justice for terrorists, and the deterrence and punishment which is most effective and appropriate, it is necessary to understand the threat our nation faces from terrorism. To fully comprehend that threat, it is further necessary to understand the motivation of the people who pose the threat, the people who have called or acted upon such motivation, the attacks such people have perpetrated, and the targets they find attractive.

1. *The Motivation of Those Who Seek to Cause Acts of Terrorism*

The events of September 11, 2001 came as a surprise to most Americans but they shouldn't have.

The intentions of those who attacked us, were repeatedly announced. Through words and deeds, they telegraphed what was to come, and who would be responsible.

Americans, a kind and respectful people, however, chose not to listen. We could not believe that the surreal hateful ideology, and movie like murderous attacks, that we saw all too often on the nightly news, in far off countries, with strange sounding names, could ever visit itself upon the peaceful homeland of America. We could not appreciate how people, against whom we bared no ill will, would ever target us for attack. We could not see how our good intentions would be misconstrued as weakness and vulnerability. We simply could not understand the mind set of those who would commit an act of terrorism, or who view the unprecedented mass murder of civilians as a justified act.

Today, in the light of hindsight, it is easy to see now, what we should have known was coming on September 11, 2001. But as the days and months pass away from that horrible day, such hindsight begins again to blur. It becomes easier to forget that the threat we faced that day, is still continuing and real. That the ideology that drove those attacks, and killed so many, still remains a meaningful and growing danger. That New York and its people remain a continuing and irresistible target. That within an ever increasing technological and mobile world, the death toll of the next attack, could prove far worse. That those who wish to attack us, haven't changed their minds.

Despite our weariness, our longing for a hoped for, safer world, we still must be ever vigilant. That vigilance can best be maintained by remembering. Remembering the attacks of September 11th and those who were responsible. Understanding the threat we faced that day, and that we still face. For our safety is in large part dependant upon that memory. For it is only upon that memory, that we can build a jurisprudence, and public policy, that will benefit our nation, and help to keep it safe.

The principal and most serious terrorist threat we face is driven by the philosophy of radical Islam. Although on April 7, 2009, the new Secretary of Homeland Security, Janet Napolitano, tried, for rather transparent political reasons, to promote a dangerous and baseless contention that those who espouse conservative political beliefs, and returning American combat veterans, posed a significant threat for terrorism.²⁵ Such misplaced contentions were immediately and thoroughly refuted by nearly every respected terrorism expert and veterans organization in the nation, and the Secretary was forced, within hours, to apologize for her mischaracterization, and recant her statements, admitting that there was no specific information that domestic right-wing groups or veterans were ever planning acts of violence.²⁶ Indeed, the Secretary's contentions were even directly contradicted by another Obama Administration official, John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, at a speech at the Center for Strategic and International Studies, on August 6, 2009, when he said that the radical Islamic organization known as ***"Al Qaeda has proven to be adaptive and highly resilient and remains the most serious terrorist threat we face as a nation."***²⁷ Accordingly, the understanding of the terrorist threat, begins, and is dominated by, an understanding of radical Islam.

The terrorist precepts of radical Islam date back to a time before the crusades, and continue today with expanded resources, personnel, technology and mobility. As its faithful expands into the Billions, with significant growth in the Middle East, Indonesia, Africa, Europe and even in the Americas, the threat that faces all free people is real, meaningful and immediate.

The only major religion which is yet to undergo a reformation, Islam's foundational principle of a direct relationship between the faithful and their God, prevent the universal recognition of an accepted clergy, which could place restraints on radical and extreme elements.²⁸ Accordingly, those who wish to cite the religions precepts to advance jihad for the purpose of establishing the hegemony of the Islamic religion, within the context of an extreme, radical, fundamentalist culture and philosophy, have no ecclesiastical check against their dangerous interpretation of the meaning of the Quran and its ancillary writings.

With no real check against radical Islam from within, the purveyors of radical Islam are left free to pursue their ideals and methods without any significant resistance. The radical Islam they pursue is far more than a religious belief. It is a religious, military, legal, political and cultural philosophy, which precludes all aspects of individual freedom and liberty, commanding total submission to the precepts it proscribes, and those who pronounce them.²⁹ This convert, submit or die philosophy, together with the belief that the hegemony of Islam should rule the world, and a racist hatred for those of the Jewish faith, provided a strong attraction to the principles espoused by the political ideology of the Nazi Party, in the early part of the last century (with such groups as the Muslim Brotherhood, and the Baath Party of Iraq's Saddam Hasein, finding their antecedents, political structure and sympathies in Germany's Nazi party).³⁰

The ultimate goal of the subscribers to this radical Islamic philosophy, is world domination, the universal conversion to their religion, and the total submission of every person to their view of Shariah law, culture and philosophy.³¹ Worse yet, these radical Islamic subscribers feel divinely empowered to commence jihad, and use whatever means of terrorism, war or deceit they need to accomplish their goals.³² Such belief was directly pronounced from the lips of Osama bin Laden, when he said that jihad warriors the world over are fighting “so that Allah’s word and religion reign supreme”.³³ Under this radical outlook, the jihadists, and their leaders, seek the worldwide establishment of full Islamic law, and above all, the restoration of the Caliphate (a supreme and infallible Islamic ruler with unlimited power over all people).³⁴

Such a philosophy and outlook is so foreign to Americans that they simply can’t believe that it could possibly be true. For the people of the United States are ingrained with a wonderful inherent respect for all religions, and our nation itself was founded upon such a principle. We exhibit a natural transference of our beliefs towards all people, regardless of how different their cultures and philosophies actually are, affording even those with this jihadist philosophy, the benefit of the doubt, that no person in the modern world could actually ever hold such warped and intolerant beliefs.

Pursuant to this natural transference, Americans conceptualize that we know people of the Islamic faith, and that because they aren’t like these extreme characters of wild murders and oppressors, that terrorists are always portrayed to be, such characterizations must be either untrue, or so unusual as to prove of little consequence. For we think of the many Muslims we know, who are our friends and neighbors, who are good, honorable and loving people, who care about their family, their religion and their country. The problem is, those are not the Muslims of radical Islam.

Americans perceive, that surely there must be some misunderstanding or mischaracterization of what these radical Islamic followers, so many of whom live so far away and in such impoverished circumstances, actually believe. We want very badly to equate their belief system to ours. The problem is, that the tolerance, respect and understanding we afford to those who adhere to the radical Islamic call for jihad, is not reciprocated, and will not, and can not, under the very philosophy they espouse, be returned in kind.

As September 11th proved, our nation and its people have not listened to what these radical Islamic jihadists have said. Moreover, other than the events of September 11, 2001, Americans have also not paid attention to, and really do not know, what they have done. Worse still, we, as a people, are simply not aware, of what they intend to further do.

This is the case, even despite the fact that these radical Islamic terrorists repeatedly tell us what they have done and what they have planned. Despite this, September 11, 2001 came as a surprise. But if for no other reason for the dangers we face, we need to awaken as a people. For we can’t afford to say again, like we now do about September 11th, that it was a surprise in hindsight, that we should have seen coming.

2. The Terrorists and Their Facilitators

Section One - The Muslim Brotherhood

Aside from the philosophical underpinnings that can be found from the time of the foundation of radical Islam, and the crusades, the true road to September 11, 2001 began in 1928.

For that was the year of the founding of the organization known as the Muslim Brotherhood.³⁵

Established by an Egyptian by the name of Hassan al Banna, the Muslim Brotherhood was founded upon the radical Islamic concepts that:

- The Quran and Sunna constitute the only and perfect way of life for religious, social and political organization,
- The manifest destiny of the past Islamic Empire must be reclaimed, and
- A universal Islamic state under Shariah principles must be established under the leadership of a Caliphate.³⁶

It is through these fundamental principles, that the Muslim Brotherhood has thus become the ideological springboard for all modern terrorist organizations.

Its founder, Hassan al Banna was a fervent Islamic nationalist. He was a proponent of radical Islam. Born in 1906, and a school teacher by trade, al Banna proved to be a strong organizer and charismatic leader, and quickly built the Muslim Brotherhood into a powerful, international, ideological organization.³⁷ A strong Nazi sympathizer and supporter, al Banna was frequently cited as praising Hitler and his cause.³⁸

Although officially, the Muslim Brotherhood has never declared itself to be a terrorist organization, its foundational beliefs have long proven a magnet for those who promote and propagate terrorist jihad and the commission of violence in pursuit of their ideology. Accordingly, by the time of al Banna’s death in 1949, the Muslim Brotherhood had grown to become the ideological home for radical Islam.

A. Sayyid Qutb - A Modern Spiritual Leader of Radical Islam

Upon al Banna's assassination in 1949, the spiritual and intellectual reins of the Muslim Brotherhood were assumed by Sayyid Qutb.³⁹ A slight, frail, middle aged Egyptian educator, who was also born in 1906, and who had studied extensively for years in the United States, Qutb was a strong willed, intellectually passionate, religiously devoted radical.⁴⁰ Author of 24 books, including the foundational Islamic commentaries on religious and social perspectives in view of the Quran, entitled Social Justice (1949),⁴¹ In the Shade of the Quran (1954) and Milestones (1964), Qutb would become the intellectual father of modern radical Islam.

Although not always in agreement with the new General Guide (head leader) of the Muslim Brotherhood, Hassan al-Hudaybi, Sayyid Qutb was strongly accepted by the Arab world for his intellectual advancement of Islamic ideals. A man with serious political views, which could not be separated from the precepts of his Islamic faith, Qutb viewed Islam as a complete system of morality, justice and governance, whose Shariah laws and principles should be the sole basis of governance and everything else in people's lives.⁴²

With his works quickly becoming the foundational basis for radical Islamic beliefs (Osama Bin Ladden has cited him as one of his principle spiritual guides), Qutb openly described military jihad as a necessary measure to protect the Islamic faith.⁴³

When called upon to discuss issues with respect to governance under Shariah law, Qutb directly dismissed reformist Muslim scholars who claimed democracy and elections were comparable with Islam, arguing that the Shura chapter of the Quran, which such scholars cited for their support for Democracy, actually makes no reference to Democracy or elections, and merely calls for the ruler to consult some of the ruled, under certain circumstances.⁴⁴ Accordingly, Qutb argued that a 'just dictatorship' would be far more Islamic than Democratic rule with elections.⁴⁵

Sayyid Qutb further wrote that any system of government which contains the lack of Islamic law (Shariah) results in a lack of Islam, because obedience is worship, and when Muslims obey non-Islamic law, they are violating the fundamental precepts of the Quran by worshiping such laws, and worshiping anyone or thing besides God is a fundamental and serious violation of the Quran.⁴⁶ As a result, Qutb commented that all Muslims should resist any legal system other than Shariah.⁴⁷

Throughout his literary works, Sayyid Qutb argued that the way to bring about this vision of Islamic governance was for a revolutionary vanguard, to fight with a twofold approach:

- By preaching, and
- By abolishing all organizations and authorities, through physical power and Jihad, of the non Shariah system.⁴⁸

Under Qutb's vision, this vanguard movement would grow, deploying preaching and Jihad, until it formed a true system of Islamic governance, spread across the entire world, attaining leadership of all humanity.⁴⁹

But more than the intellectual passion of his ideas, it was Sayyid Qutb's martyrdom that has prompted his place of honor amongst radical Islamic terrorists. In 1952, Qutb began to write and speak out in open opposition to the government of Gamal Nassar, the President of Egypt, for failing to fully institute Shariah law.⁵⁰ From 1954 to 1966, he was repeatedly imprisoned and tortured for his writings and beliefs.⁵¹ After President Nassar had finally had enough of his dissidence, in 1966, he arranged to have Qutb appear before a show trial.⁵² In August 1966, Sayyid Qutb was found guilty by the court, of a failed conspiracy to assassinate Nassar, and was executed by hanging.⁵³

Since that time, Sayyid Qutb has become a legend to those who support the principles of radical Islam.⁵⁴ Stories of Qutb's suffering in prison, and unfounded execution, have formed a kind of passion play for Islamic fundamentalists.⁵⁵

Qutb's brother Muhammad, a professor of Islamic Studies, helped to keep his brother's legend alive and growing, by publishing, editing and promoting his late brother's works, and proliferating stories of his bravery, suffering, torture, and martyrdom.⁵⁶ Ayman al Zawahari, the man who would come to lead Sayyid Qutb's vanguard of preaching and jihad, and form with Osama bin Laden the organization that would come to be known as Al Qaeda, was a student of Muhammad's, and grew up with stories of Sayyid Qutb's purity of character, suffering and torture, at the hands of those who did not accept the true Islam.⁵⁷ In tribute to his hero, al Zawahari would pay homage to Qutb in his work, The Knights under the Prophet's Banner, which outlines the ideology, and has become the manifesto, of Al Qaeda.⁵⁸

B. Ayman al Zawahari - The Founder of Al Qaeda

Dr. Ayman al Zawahiri was born in 1951 into a prominent upper middle class Egyptian family. Pious and political, he became a devotee to the teachings of Sayyid Qutb.⁵⁹

At the age of 14, al-Zawahiri joined the Muslim Brotherhood, where the following year he watched as the Egyptian government executed his hero Qutb. Outraged by the injustice, al-Zawahiri, helped form an underground cell devoted to overthrowing the government and establishing an Islamist state (the Egyptian Islamic Jihad). It was at time, at the early age of 15, that al-Zawahiri devoted his life to put Qutb's vision into action and to head his vanguard.⁶⁰

In 1974 Ayman al-Zawahiri graduated from Cairo University. After serving three years as a surgeon in the Egyptian Army, in 1978, he earned a master's degree in surgery, and thereafter opened a Cairo based medical practice. The organizer of numerous cells, al-Zawahiri was implicated in, and arrested for, his involvement with respect to, the October 1981 assassination of Anwar Sadat. Allegedly tortured at the hands of the police, and while in prison, al Zawahiri served a three year sentence and was then released in 1984.⁶¹

In 1985, Ayman al-Zawahiri traveled to Peshawar, Pakistan where he worked in a Red Crescent hospital treating wounded Mujahideen refugees who had been injured in the Soviet-Afghan war. There he began reconstituting his old cell, becoming even more radicalized, and embracing the idea of takfir (execution of non believers). While in Peshawar, he met Osama Bin Laden, who was running a base for Mujahideen, named the Maktab al-Khidamat (the Office of Services), an organization founded to raise and channel funds and recruit foreign Mujahideen to fight the Soviet Afghan occupation. In 1988, al-Zawahiri, Osama Bin Laden, and Abdullah Yusuf Azzam, expanded the idea of the Office of Services to promote world wide Islamic Jihad, forming a new organization, which would become known as Al-Qaeda (the Base).⁶²

In 1993, al Zawahiri reportedly traveled to the United States, visiting several California mosques, under his credentials from the Red Crescent, to allegedly raise money for Afghan children who had been injured by Soviet land mines. A few months later, in 1994, he left Sudan where he had been living, and reportedly traveled to Switzerland, Sarajevo, Malaysia, Taiwan, Singapore, and Hong Kong. By 1996, al Zawahiri and several other Egyptian Islamic Jihad members found refuge in Jalalabad, Afghanistan, where many Al-Qaeda families (about 250 people) had settled.⁶³

The next year, in 1997, he spearheaded the Luxor Massacre in Egypt, where six men dressed in police uniforms, succeeded in machine-gunning and hacking to death 58 foreign tourists and four Egyptians, including a 5 year old British child and four honeymooning Japanese couples. The attack had al Zawahiri's desired effect, devastating the Egyptian tourist industry for a number of years. In 1999, al Zawahiri was tried in absentia by an Egyptian military tribunal and sentenced to death.⁶⁴

After working with Muslim extremists in Iran, in 1998, al Zawahiri formally merged his Egyptian Islamic Jihad into Al Qaeda. That same year, on February 23, 1998, al Zawahiri, Osama Bin Laden and three other Islamist leaders, co-signed and issued a Fatwa (a religious edict), "Claiming that America had declared war against God and his messenger, they called for the murder of any American, anywhere on earth, as the 'individual duty for every Muslim who can do it in any country in which it is possible to do it.'" ⁶⁵ Although neither Osama Bin Laden nor Ayman al-Zawahiri possessed any of the traditional Islamic scholarly qualifications to issue a Fatwa, they simply disregarded such restrictions, and took it upon themselves to do so.⁶⁶

Often described as the "brains" and "operational head" of Al Qaeda", al Zawahiri, and has written numerous Al Qaeda statements, books and proclamations, including the December 2001 "The Knights under the Prophet's Banner", which outlines the ideology, and has become the manifesto, of Al Qaeda. Fluent in Arabic, English and French, he serves as a senior member of the Al Qaeda's ruling Shura council. A confident, and advisor to Osama Bin Laden, al Zawahiri has been described as one of the persons responsible for the September 11, 2001 attacks on America, and in some ways a more formidable adversary to the United States than is Osama Bin Laden.⁶⁷

Since the commencement of United States military operations in Afghanistan and Iraq, there have been numerous reports of al Zawahiri, being the subject of, or killed, or injured by air strikes. With the release of numerous videos depicting him as still alive and uninjured, intelligence sources have assessed that he is presently residing somewhere in Northwest Pakistan, and still planning and directing Al Qaeda operations.

Section Two: Al Qaeda - The Base

As aforementioned, in 1988, fresh off their experience in the Soviet-Afghan War, and seeking to now finance, recruit and promote world wide Islamic Jihad, Ayman al-Zawahiri, Osama Bin Laden, and Abdullah Yusuf Azzam, expanded the idea of the Office of Services, to form a new organization, which would become known as Al-Qaeda (the Base).⁶⁸

These Al Qaeda leaders, taking the teachings of Qutb to heart, view themselves and their followers as the "armed vanguard of an international Islamist movement" to end non-Muslim "interference" in Islamic affairs, and to institute Islamic societies according to radical interpretations of Sunni Islam and related Islamic law (Shariah). Ardent Islamo-nationalists, members of Al Qaeda seek expulsion of U.S. and foreign military forces from "Islamic lands", the overthrow of "corrupt" middle eastern leaders, the creation of Shariah ruled governments, military confrontation with Israel, and direct conflict with Shiite Muslims.⁶⁹

Established as what they called a base or foundation, Al Qaeda seeks to provide a potential general headquarters for world wide Islamic jihad. The structure of this organization includes an intelligence component, a military committee, a financial committee, a political committee, and a committee in charge of media affairs and propaganda. It also had an Advisory Council (Shura) made up of al Zawahiri and Bin Laden's inner circle.⁷⁰

Operating in dozens of countries, the foremost target of Al Qaeda's wrath is the United States. Al Qaeda and its members believe they must carry their "battle to American soil" and attack the United States with an unwavering single mindedness. Osama Bin Laden, Ayman al Zawahiri, and their organization view themselves as being called "to follow in the footsteps of the Messenger and to communicate his message to all nations." This message seeks to serve as the rallying point for all those who subscribe to the radical Islamic ideology, and provide an organization to facilitate "a new kind of war to destroy America and bring the world to Islam".⁷¹ They are a serious, continuing and unrelenting threat to America's national security.⁷²

A. Osama Bin Laden - Zealot, Financier and Founder of Al Qaeda

Osama Bin Laden was born in 1957, the 17th of 57 children of an extremely wealthy Saudi construction magnate. Six feet five and slender, in his youth he was known to be quite athletic, and skilled as a horseman, runner, climber, and soccer player. A devoted disciple of Qutb, he had attended Abdul Aziz University in Saudi Arabia, concentrating in religious studies.⁷³

In 1980, he was 23 years old when he arrived in Pakistan to assist in the Afghan Soviet War effort. Renowned among the volunteers who had flooded into the region to participate in the jihad, Osama Bin Laden was not looked to for his religious learning, but rather because of his family's huge fortune. Although he reportedly fought in at least one actual battle, his reputation was primarily developed as a generous financial benefactor of the anti-Soviet jihad.⁷⁴

He understood better than most, the extent the continuation and eventual success of the jihad in Afghanistan depended on an increasingly complex, almost worldwide organization. Accordingly he helped organize a financial support network, funded by financiers in Saudi Arabia and the Persian Gulf states, with donations flowing by means of selected charities and other nongovernmental organizations. The Mujahideen used these funds raised by this network to buy arms and supplies.⁷⁵

In 1988, when Moscow declared it would pull its military forces out of Afghanistan, the jihad's leaders debated what to do next. Osama Bin Laden used this opportunity to create a new organization, to provide support for world wide jihad. Such organization would become known as Al Qaeda.⁷⁶

Osama Bin Laden's creation of Al Qaeda was evidence of his growing self-confidence and ambition. He soon made clear his desire for unchallenged control to prepare Islamic forces to fight anywhere in the world.⁷⁷

Upon founding Al Qaeda, Osama Bin Laden, then infused his resources, and organizational skill, to promote its operations. Recruiting terrorists, planners, financiers, arms procurement specialists, bomb makers, and technical specialists, Bin Laden then commenced running of operations all over the world.⁷⁸ Such operations included:

- The attacks on United States Forces in Somalia in 1992 to 1994;
- The First World Trade Center Bombing in 1993;
- The attack on U.S. Air Force personnel at the Kobar Towers complex in Saudi Arabia;
- The attacks on United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania in 1998; and
- The attack on the USS Cole while it was harbored and refueling in Aden, Yemen in 2000.

Then, to strike a serious, devastating blow to the United States, that would result in mass casualties, and perhaps even the decapitation of its government, Osama Bin Laden, with the help of his entire network, including Khalid Sheikh Mohammed, the Kuwaiti born, United States Educated, member of the Muslim Brotherhood, to organize a "planes operation" to attack buildings and civilians in America's largest cities. This operation, planned and organized for years, resulted in the September 11, 2001 terrorist attacks against the United States.⁷⁹

Since September 11, 2001, Osama Bin Laden has been in hiding, most likely in the Mountainous region of Northern Pakistan. Together with al Zawarhiri, he is believed to still continue to head Al Qaeda, and plot further and additional terrorist attacks against the United States and its interests.

B. Other Al Qaeda Associated Terrorists

Since the time of the September 11, 2001 terrorist attacks, several other terrorists have become known and recognized by our intelligence assets. Some of the more prominent ones include:

i. Khalid Sheikh Mohammed (Detainee Scheduled to be Tried in Federal Civilian Court in New York City):

Khalid Sheik Mohammed is widely believed to be the principal architect of the 9/11 attacks. After growing up in Kuwait, he joined the Muslim Brotherhood at the age of 16. In 1983 he came to America and earned a bachelor's degree in mechanical engineering at North Carolina A&T in 1986. The uncle of convicted terrorist Ramzi Yousef, he is thought to have helped mastermind of the 1993 World Trade Center bombing, and the subsequent Bojinka plots to blow up commercial airliners in mid flight.⁸⁰

Credited with conceiving, designing and organizing the "planes operation", which would become the September 11th attacks, in 1996 he presented a portfolio of the plans for attacking the United States, and was seriously disappointed when such plans were scaled back by Al Qaeda leaders to accommodate operational realities. Known to be a brutal, zealous, individual, he is also allegedly personally responsible for the televised decapitation execution of Wall Street Journal Reporter Daniel Pearl, by sawing off his head and then holding it up bleeding for display before the cameras.⁸¹

A tireless and committed terrorist, he has been further implicated in the Richard Reed (Shoe Bombing) attack and the 2002 Bali nightclub bombings. He has also been suspected as providing operational direction to Al Qaeda in Iraq for attacks upon United States Forces, during the second gulf war.⁸²

ii. Wallid Muhammed Bin Attash (Detainee Scheduled to be Tried in Federal Civilian Court in New York City):

Wallid Muhammed Salih Mubarak Bin Attash is the son of a prominent Yemeni family who grew up in Saudi Arabia. A longtime friend of Osama Bin Laden, he helped to train and select the 9/11 hijackers. In the early 1990's he had several brothers who fought in Afghanistan, and at the age of 15, he joined the Jihad himself, losing a foot in a battle against the Northern Alliance (a condition for which he wears a prothesis). Considered the mastermind behind the USS Cole bombing, he long served as a member of the Al Qaeda security team and the personal body guard of Osama Bin Laden.⁸³

iii. Ramzi Bin Al Shibh (Detainee Scheduled to be Tried in Federal Civilian Court in New York City):

Ramzi Bin al Shibh was born in the Yemen to a working class family. After high school, and a brief stint working for the International Bank of Yemen, in 1995 he went to Germany and lived in Hamburg, where he met, and become the roommate of, Mohamed Atta, (the terrorist pilot of Flight 11) and the leader of the infamous Hamburg cell, at a local mosque. In late 1999, Ramzi Bin al Shibh traveled to Afghanistan, where he attended a terrorist training camp sponsored by Al Qaeda. There he met others involved in planning the September 11, 2001 attacks. Reportedly, original plans called for Bin al Shibh to become one of the hijacker pilots, but he was moved from operational to facilitator status.⁸⁴

iv. Mustafa al-Hawsawi (Detainee Scheduled to be Tried in Federal Civilian Court in New York City):

Mustafa al Hawsawi was born in Saudi Arabia in 1968. A member of Al Qaeda, he is reportedly an organizer and financier of the September 11, 2001 attacks. Coordinating with Mohammed Atta to bring hijackers into the United States, he worked for Al Qaeda's media committee in Afghanistan and then later as an operative in the United Arab Emirates. Sharing a credit card with Khalid Sheikh Mohammed, he allegedly transferred several hundred thousand dollars to the 9/11 terrorists to permit them to complete their operations.⁸⁵

v. Ali Abdul Aziz Ali (Detainee Scheduled to be Tried in Federal Civilian Court in New York City):

Ali Abdul Aziz Ali was born in Yemen, and is a nephew of Khalid Sheikh Mohammed, and a cousin of Ramzi Yousef. Fluent in English, he worked for Mohammed in Pakistan before becoming a computer technician for Modern Electronics Corporation in the United Arab Emirates. In 2000, using his uncle's contacts, he allegedly procured Boeing Flight Simulator Programs and Aircraft operations manuals. Working with Mustafa al Hawsawi, he reportedly assisted in the facilitation of wire transfers of funds to terrorist cells in the United States. Allegedly married to Al Qaeda member Aafia Siddiqui, in February 2010, she was convicted of attempting to kill soldiers and assaulting FBI agents with a deadly weapon.⁸⁶

vi. Mohammed Atta - September 11 Terrorist, Hijacker and Pilot

Mohammed Atta was born to a prominent Egyptian family in 1968. The leader of the Hamburg cell, and Al Qaeda member, he became the hijacker and pilot of American Airlines Flight 11, which intentionally crashed into the North Tower on September 11, 2001.⁸⁷

vii. Marwan al Shehhi - September 11 Terrorist, Hijacker and Pilot

Marwan al Shehhi was born the a son of a Muslim Cleric in the United Arab Emirates in 1978. A member of the Hamburg cell, and Al Qaeda member, and friend of Mohammed Atta, he pledged his life to martyrdom and became the hijacker and pilot of United Airlines Flight 175, which intentionally crashed into the South Tower on September 11, 2001.⁸⁸

viii. Ramzi Yousef - First World Trade Center Bomber

Ramzi Yousef is the nephew of Khalid Sheikh Mohammed. Born in Kuwait in 1968, he studied electrical engineering in Wales, and English in Oxford. A graduate of Al Qaeda Terrorist Training Camps in Afghanistan, Yousef arrived in the United States in 1992. Establishing a Cell with mosque connections, he is considered the mastermind of the 1993 World Trade Center bombing. After traveling to the Far East to meet with other terrorists, including reportedly Oklahoma City Bomber Timothy McVeigh, Yousef designed elaborate plots to assassinate the Pope, and to blow up eleven American airliners simultaneously. Captured in Pakistan in 1995, in 1997 he was convicted in United States Federal District Court for his part in the 1993 World Trade Center Bombing. He is presently serving a 240 year life sentence in Federal Supermax prison.⁸⁹

ix. Sheikh Omar Abdul Rahman: The "Blind Sheikh"

Omar Rahman was born in Egypt in 1938. After losing his sight at a young age due to diabetes, he read the Quran in Braille, and became a disciple of Qutb. Imprisoned with al Zawahiri and other Egyptian militants following the assassination of Anwar Sadat in 1981, Rahman, a friend and associate of Osama Bin Laden in Afghanistan, emigrated to New York City in 1990. Involved in the first World Trade Center Bombing in 1993, as well as a plot to blow up New York City Landmarks, he was convicted with Ramzi Yousef and is now serving a life sentence in Federal Prison.

3. Terrorist Attacks Against America and Its Interests

A. Pre September 11, 2001 Attacks

i. The 1992 attacks on American forces in Somalia

In the last few remaining days of the administration of George H. W. Bush, he ordered United States Military Forces to the troubled country of Somalia, on a humanitarian mission. This African nation had been decimated by poverty and anarchy, and being controlled by a collection of warlords, saw unprecedented starvation and death.⁹⁰

Upon the deployment of United States Forces, despite the fact that the reason for their being there was to provide food, water and supplies to the starving and suffering populous, Al Qaeda leaders formulated a fatwa demanding their eviction. In December 1992, they initiated a terrorist attack upon United States troops, exploding bombs at two Aden hotels where troops routinely stopped en route to Somalia. The terrorists reportedly belonged to a southern Yemeni group headed by a member of Osama Bin Laden's Islamic Army Shura, who had trained at an Al Qaeda camp in Sudan.⁹¹

Soon thereafter, Al Qaeda leaders reportedly set up a Nairobi cell, to send weapons, supplies and trainers to the Somali warlords battling American forces. On orders of Al Qaeda leadership, dozens of trainers flowed to Somalia over the ensuing months, including most of the senior members and weapons training experts of Al Qaeda's military committee. Such Al Qaeda personnel later boasted that they helped organize the October 1993 attack of two U.S. Black Hawk helicopters, by members of a Somali militia group, which led to the withdrawal of American Armed Forces in early 1994.⁹²

ii. The 1993 attack on the World Trade Center

In 1992, after studying electrical engineering in Wales, and English in Oxford, and after graduating from Al Qaeda Terrorist Training Camps in Afghanistan, with a special aptitude for bomb making, Ramzi Yousef, the nephew of Khalid Sheikh Mohammed, at the age of 24, came to the United States to launch terrorist attacks. Establishing a Cell in the New York Metropolitan Region, with a connection in the Farouq Mosque in Brooklyn, he began to implement a plan which was reportedly designed with the help of his uncle, to destroy the World Trade Center complex, and kill 250,000 New Yorkers.⁹³

The Farouq Mosque was being used as a center for terrorist recruitment. There, Sheikh Omar Abdel Rahman, an extremist Sunni Muslim cleric, who had moved in 1990 from Egypt to the United States, was preaching the message of Sayyid Qutb. Characterizing the United States as the oppressor of Muslims, the "Blind Sheikh", as Rahman was known, told followers that it was their religious duty to fight against God's enemies.⁹⁴

Using the Mosque as a base of operations, recruitment and planning, Yousef formalized his plan to attack the World Trade Center. Enlisting the help of other Mosque members (Ahmad Ajaj, Mohammed Salameh, Nidal Ayyad, and Mahmoud Abouhalima) Ramzi Yousef developed a plot whereby the group would place a van, loaded with high powered explosives, in the basement of the World Trade Center Complex's parking garage. Upon a timer, the bomb would detonate, with the intention of compromising the structural integrity of the Trade Center Tower above the garage, and causing it to topple into the adjoining tower, and thus in a domino like effect, bringing down several adjoining structures. It is unknown whether the explosion also intended to destroy the nearby seawall, which could have flooded much of lower Manhattan causing additional casualties.⁹⁵

Renting a Ryder Van in New Jersey, the team packed it with explosives and drove it to level B-2 of the World Trade Center Parking Garage as planned. Shortly after noon, on February 26, 1993, the enormous bomb exploded. The resulting explosion destroyed most of the parking facility and opened a hole seven stories up above the blast site. The explosion killed 6 people and injured more than a thousand. Although the structural integrity of the building was maintained, and the sea wall was left in tact, the World Trade Center was evacuated of all personnel, with the resulting damage taking years to repair.⁹⁶

Al Qaeda, with many of its personnel having engineering degrees, including Khalid Sheikh Mohammed, took notice of what went wrong and what went right with respect to this bombing of the World Trade Center, and used it as an educational probing mission for the later September 11, 2001 attacks. Ramzi Yousef immediately fled to Pakistan after the terrorist bombing, and would remain at large for nearly two years. Fellow terrorists Salameh, Abouhalima, and Ayyad were captured, indicted and prosecuted in the Federal District Court for the Southern District of New York, after the plot was uncovered as a result of Salameh returning to the Ryder truck agency to seek the return of his \$400 deposit he had placed on the van.⁹⁷

iii. The Plots to Blow Up New York City Landmarks and Airlines in Flight

After federal authorities uncovered the Farouq Mosque link to the 1993 World Trade Center Bombing, they also unearthed a further plot to bomb major New York landmarks, including the Holland and Lincoln tunnels. Disrupting this "landmarks plot," in June 1993, the FBI arrested Sheikh Rahman and several other conspiracy members. Such individuals were prosecuted and convicted in 1997 in Federal District Court for the Southern District of New York.⁹⁸

Upon fleeing the United States after the 1993 World Trade Center Bombing, Ramzi Yousef, in consultation with his Uncle Khalid Sheikh Mohammed, crafted several more terrorist plots (known as the Bojinka Plots). These plots, allegedly crafted while Yousef was in Cebu, Philippines, included a non executed scheme to assassinate Pope John Paul II and President William Clinton, and a partially executed scheme to detonate bombs aboard passenger aircraft in a certain seat location so as to ignite the jet's fuel tank, causing the planes to explode in mid air. In 1994, Yousef successfully detonated his timed bomb aboard a Philippines Airline bound for Tokyo, but due to misplacement of the device, it did not ignite the fuel tank of the airliner, but did force the landing of such aircraft, and killed one passenger after ripping a gapping hole in the side and ceiling of the plane.⁹⁹

Intelligence also suggests that in addition to the 1993 World Trade Center Bombing, and the Mania Air Explosion in 1994, Ramzi Yousef may have also had a hand in planning the 1995 Oklahoma City Bombing at the FBI headquarters building. Convicted terrorist Timothy McVeigh was in Cebu, Philippines at the same time as Yousef, and reportedly consulted with him and other Al Qaeda agents on the making of fertilizer/fuel explosives. Additionally, there is also evidence that the unsolved explosion of TWA Flight 800, in 1995 over Long Island Sound, may also have been an operation planned by Ramzi Yousef and Khalid Sheikh Mohammed, in that the explosion which ignited the plane's fuel tanks, occurred at the exact location planned by Mohammed and Yousef in their 1994 Bojinka Plot.¹⁰⁰

In 1995 Ramzi Yousef was captured in Pakistan and returned to United States custody. In 1997 he was convicted in United States Federal District Court for the Southern District of New York for his part in the 1993 World Trade Center Bombing. He is presently serving a 240 year life sentence in Federal Supermax prison.¹⁰¹

iv. The 1995 attack at the Riyadh Training Facility

In November 1995, a terrorist attack was launched against a joint Saudi-U.S. training facility in Riyadh, Saudi Arabia. The car bomb, which was detonated outside the facility, killed 5 Americans and 2 officials from India. The Saudi government quickly arrested four alleged perpetrators and promptly executed them. Under Saudi interrogation, these suspects reportedly stated that they had been inspired by Osama Bin Laden.¹⁰²

Although there is no direct United States intelligence that Osama Bin Laden ordered this attack, reports did subsequently reveal that Al Qaeda leaders had planned, a year earlier, such an attack on a U.S. target in Saudi Arabia, and had shipped explosives to the peninsula for this purpose. Moreover, such intelligence further revealed that some of Osama Bin Laden's Al Qaeda associates later took credit for this bombing.¹⁰³

v. The 1996 attack on U.S. Air Force personnel at the Kobar Towers complex in Saudi Arabia

In June 1996, an enormous truck bomb detonated in the Khobar Towers residential complex in Dhahran, Saudi Arabia. Such terrorist attack, of a facility which housed United States Air Force personnel, killed 19 and wounded 372 Americans. Intelligence reports indicate that this terrorist operation was executed by Saudi Hezbollah, with support from the government of Iran. While the evidence of Iranian involvement is strong, there are also intelligence reports that Al Qaeda also played a supporting role.¹⁰⁴

vi. The 1998 attacks on United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania

On August 7, 1998, two bomb-laden trucks drove into the American Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. These Al Qaeda planned and executed attacks, approximately five minutes apart (at 10:35 a.m. in Nairobi and 10:39 a.m. in Dar es Salaam) were personally overseen and authorized by both Osama Bin Laden and Khalid Sheikh Mohammed.¹⁰⁵

Shortly after the explosions went off at the embassies, a pre recorded telephone call was placed from Baku, Azerbaijan to London, England, by Al Qaeda representatives, taking credit for the bombings. Written copies of these previously prepared messages were then also faxed to London.¹⁰⁶

The terrorist attack on the embassy in Nairobi killed 201 people (12 Americans) and injured nearly 5000, completely destroying the embassy building. Al Qaeda's attack on the embassy in Dar es Salaam killed 11 people (no Americans), injured several others, and also created devastating damage to the embassy building and its surroundings.¹⁰⁷

Later, when interviewed about the deaths of the Africans killed in these terrorist attacks, many of whom were Muslims, Osama Bin Laden responded that "when it becomes apparent that it would be impossible to repel these Americans without assaulting them, even if this involved the killing of Muslims, this is permissible under Islam." When directly questioned as to whether he had indeed masterminded these bombings, Bin Laden replied that the World Islamic Front for jihad against "Jews and Crusaders" had issued a "crystal clear" fatwa (the same fatwa that he himself issued with Ayman al Zawahari). Bin Laden then continued that the instigation for jihad against the Jews and the Americans is to liberate the holy places, and if such "is considered a crime," he said, "let history be a witness that I am a criminal."¹⁰⁸

vii The 2000 attack on the USS Cole while it was harbored and refueling in Aden, Yemen.

Starting in 1998, Khalid Sheikh Mohammed, became an operational coordinator for Al Qaeda. During such time he commenced preparation to launch a terrorist attack of a ship off the coast of Yemen with a boatload of explosives. Although original plans called for the attack of a commercial vessel, such as an oil tanker, Osama Bin Laden rejected the idea and instead urged an attack against a United States Warship. In January 2000, an Al Qaeda team attempted to make such an attack against an American ship in the port of Aden, but the attempt failed upon the unintentional sinking of the attack boat.

On October 12, 2000, Al Qaeda operatives, personally selected by Osama Bin Laden, packed a small boat with explosives, and proceeded to launch a suicide attack against the destroyer U.S.S. Cole, as it sat refueling in the Yemeni harbor of Aden. Piloting the boat alongside the U.S.S. Cole, in a busy harbor, the terrorists made friendly gestures to the American Sailor visible atop the warship, and then proceeded to pull upon alongside the ship and detonate the explosives. Upon detonation, the explosive packed ship caused an enormous explosion, ripping a huge hole in the side of the Cole. This terrorist attack killed 17 American crew members, and wounded 40 additional sailors.¹⁰⁹

According to intelligence reports, the attack on the USS Cole jump started Al Qaeda's recruitment efforts. Immediately following the terrorist attack, upon orders of Osama Bin Laden, Khalid Sheikh Mohammed, produced a propaganda video that included a re-enactment of the attack along with images of Al Qaeda training camps, and Muslim suffering in impoverished locations around the world. Widely disseminated, the video was aired on Al Jazeera, CNN, and other television outlets. Terrorist camps swelled, with young men from Saudi Arabia and Yemen, and all across the middle east, travelling to Afghanistan to join the Al Qaeda jihad.¹¹⁰

B. September 11th - "None of us will ever forget this day"

Tuesday, September 11, 2001, began in New York City as a warm fall day beneath a bright blue, nearly cloudless, sky.¹¹¹ It was primary day in New York. For the first time in eight years, New York City would be selecting a new mayor, since former United States Attorney and current Mayor, Rudolph Guiliani, barred by term limits, was not seeking re-election.¹¹²

As on any other business day, subways, taxis and private cars carried bustling workers into lower Manhattan's financial district, home to such economic institutions as American Express, American International Group, Battery Park City, Bank of New York, Citigroup, Goldman Sachs, JP Morgan Chase, Merrill Lynch, the New York Stock Exchange, Standard and Poor's, and the World Financial Center.¹¹³

Adorned with views of the Statue of Liberty, and vista walkways with skyline views on one side and the flowing waters of the Hudson and the East River on the other, lower Manhattan had once again become the place where businesses, young professionals and entrepreneurs wanted to be.

The centerpiece of the area was dominated by the world renowned World Trade Center Complex. Highlighted by its two twin 110 floor office buildings, and home to such nationally known businesses as Bank of America, Cantor Fitzgerald, Hartford Insurance Group, Kemper Insurance Company, Lehman Brothers Investment Services, Morgan Stanley, Oppenheimer Funds, Salmon Smith Barney, and Turner Construction Company, the complex was a busy, impressive place.¹¹⁴ Known world wide, the World Trade Center Complex was a New York Icon, and represented a prominent symbol of the strength and power of New York City as the financial capital of the world.

First conceived of by Governor Thomas Dewey, and then advanced by Governor Nelson Rockefeller and his Brother David in the early 1960's, the World Trade Center complex was designed in 1962.¹¹⁵ Under the auspices of the Port Authority of New York and New Jersey, construction began in 1966 and was completed in 1973.¹¹⁶ With a total of seven office buildings, and over 10 million square feet of office space, the World Trade Center Complex was the work place of over 50,000 employees.¹¹⁷ Depicted in virtually every vision of New York City, it soon became the most identifiable land mark in an already prominent New York City Skyline.

By 2001, lower Manhattan and New York's financial district, had become the driving force behind New York City's urban resurgence. From its reputation as a crime ridden, sleaze infested, decaying, economic sink hole, in the late 1960's to late 1980's, the City of New York began a major social and economic renaissance in the early 1990's. In no section of the city was that more apparent than lower Manhattan.

Financial Services Businesses were expanding at record rates, cranes, new buildings and construction were omnipresent. Wall Street and its surrounding businesses were seeing growth not experienced since the 1920s. From safer streets, to a booming economy, to a reborn and thriving arts and entertainment district, to a record number of sports world championships (Giants, Yankees and Rangers), New York City was back, as the place to be.¹¹⁸

Although starting in late 2000 the national economy was starting to slow as a result of market uncertainties caused by financial fraud with companies such as EnRon, by late 2001, a recovery appeared on the horizon, due to significant income tax cuts enacted by the Federal Government.¹¹⁹ As Mayor, the outgoing Rudolph Guiliani was being given much of the credit for the overall turn around of the City. As the City of New York approached its new age of prosperity and success, the politics of the Mayoral race was transforming as well, with billionaire, financial magnet, Michael Bloomberg and New York City Public Advocate Mark Green leading the pack for their respective parties.¹²⁰ On the morning of the scheduled primary, no one could have imagined the calamity that all New York was about to face.

As the millions of daily commuters began to travel into Manhattan Island to begin their workday, all they had known before was about to change. For at 7:59 and 8:14, on September 11, 2001, several hundred miles away in Boston, Massachusetts, a series of events began to unfold, which would impact the City of New York, and indeed the entire world, for decades to come.¹²¹

For it was at that time, when two teams of radical Islamic fundamentalists, following plans conceived by the terrorist organization Al Qaeda, boarded two Boeing 767 Jet airplanes at Boston's Logan Airport.¹²² These flights, American Airlines Flight 11 and United Airlines Flight 175, were both fueled and bound for Los Angeles, California.¹²³ Less than a half hour into each flight. each plane was hijacked by these terrorist teams, over New York's Capital District and Eastern Pennsylvania, respectively, and after gaining control of the cockpit, diverted each plane's flight path toward lower Manhattan.¹²⁴

Suddenly and without warning, at 8:46 a.m., 47 minutes after takeoff, American Airlines Flight 11, now piloted by hijacker and Al Qaeda militant Mohamed Atta, traveling in excess of 450 mph, and carrying in excess of 10,000 gallons of jet fuel, was flown into Tower 1 (North Tower) of the World Trade Center, between the 92nd and 99th floors, killing all 92 persons aboard and dozens of others inside the Trade Center Building. ¹²⁵

Just 17 minutes later, at 9:03 a.m., 49 minutes after takeoff, United Airlines Flight 175, now piloted by hijacker and Al Qaeda militant Marwan Al Shehhi, traveling at nearly 550 mph, and again carrying in excess of 10,000 gallons of jet fuel, was flown into Tower 2 (South Tower) of the World Trade Center, between the 77th and 85th floors, killing all 65 persons aboard and hundreds of others inside the Trade Center Building. ¹²⁶

The crashes ignited extremely high temperature fires, which were highly accelerated by the enormous amounts of jet fuel contained within each plane. ¹²⁷ Accordingly, the World Trade Center Towers began to have all nearby combustible materials inside the building begin to ignite, bursting out windows, and causing a plume of smoke so large as to be seen from outer space via satellite.

As the fires continued to burn, reaching temperatures of 1800 degrees Fahrenheit, the steel skeleton of the building was softened to 10 percent of its normal strength, thereby eroding the structural integrity of each World Trade Center Tower, and causing it to fail and collapse in a pancake manner. ¹²⁸

At 9:59 a.m., only 56 minutes after impact, Tower 2 (South Tower) began to collapse, (taking between 9 and 25 seconds to fall). ¹²⁹ Shortly thereafter, at 10:28 a.m., 102 minutes after impact, Tower 1 (North Tower) began to collapse as well (taking between 11 and 25 seconds to fall). ¹³⁰

Several hours later, World Trade Center Building, 7 due to uncontrollable ancillary fires, collapsed after a similar structural integrity failure. Several other buildings in the vicinity were also brought down shortly thereafter, due to collateral structural damage suffered as a result of being struck with falling debris from the collapse of the two main towers. ¹³¹

Due to the intentional terrorist attack on the World Trade Center Complex, New Yorkers watched in horror as 2,750 of their friends, neighbors, co-workers, public servants and fellow citizens lost their lives. ¹³² Some from the plane crash, some from being forced to jump or be burned alive from the burning building, and many from being trapped and unable to escape the collapse of the towers. ¹³³

In addition to the employers and visitors at the World Trade Center Complex, 396 New York City Firefighters, Police Officers and Emergency Medical Technicians lost their lives in an attempt to save the victims trapped inside the buildings. ¹³⁴

Property estimates indicated an approximate 120 Billion dollar loss, which at the time, was equivalent to the size of the total annual New York State Budget. ¹³⁵

New Yorkers and all Americans were shocked at the horrific casualties caused by this surprise attack against their city, the American homeland and its civilian population. When the day was over, nearly 3000 Americans had lost their lives in New York, Washington D.C. and Pennsylvania.

New Yorkers in particular took the events of that day deeply personally. A people known for their toughness and harshness, the attacks of September 11th pierced their normally hardened exterior, and caused deep concern and heartfelt emotion.

For it was their friends and neighbors who had lost their lives and who would not return home to their families. It was their city's proudest landmark that had been purposely and permanently destroyed. It had been their firefighters, and police officers and EMTs that had bravely sacrificed their lives in an effort to try to save others. It was their Mayor who the whole nation watched, as he bravely faced the adversity, and reminded everyone how great their community really was. It was their city that now suffered a smoldering scar as a horrific reminder of all that had been lost. It was there homeland that was attacked, and which would prove a continuing and irresistible target, to those intent on causing further acts of mass death, destruction and terrorism.

No one would ever forget September 11th. The day created heroes and villains in the minds of Americans and its policy makers, and it left an indelible mark upon the psyche of all New Yorkers.

4. Targets for Terrorism

Since the founding of Al Qaeda, New York has been the primary target for terrorist attack in the United States of America. In addition to the 1993 World Trade Center Bombing, and the September 11, 2001 attacks, New York has been the target of dozens of unsuccessful and thwarted attacks, seeking to kill thousands of people, and damage countless dollars in property. As recently, as May 1, 2010, an Al Qaeda linked attack sought unsuccessfully to detonate a truck bomb in Times Square which could have killed thousands and injured many more.¹³⁶

A. New York as a Terrorist Target

On February 2, 2010, the Director of National Intelligence, Dennis C. Blair, testified before the United States Senate Select Committee on Intelligence to deliver his Annual Threat Assessment of the United States Intelligence Community.¹³⁷

In such testimony Director Blair clearly stated that a terrorist threat to the Homeland of the United States still remains. In his testimony for the record, the Director stated:

“we have been warning since 9/11 that al-Qa’ida, al-Qa’ida-associated groups, and al- Qa’ida inspired terrorists remain committed to striking the United States and US interests. ...

Again, important progress has been made against the threat to the US Homeland over the past few years, but I cannot reassure you that the danger is gone. We face a persistent terrorist threat from al-Qa’ida and potentially others who share its anti-Western ideology. A major terrorist attack may emanate from either outside or inside the United States. Enhanced offensive and defensive counterterrorism efforts have certainly interrupted or deterred some plotting against the Homeland, but actionable intelligence on the key details of terrorist plots—dates, specific targets, and the identity of operatives—are often fragmentary and inconclusive thanks to the terrorists’ stringent operational security practices. ...

We judge that al-Qa’ida maintains its intent to attack the Homeland—preferably with a large scale operation that would cause mass casualties, harm the US economy, or both.

In April 2009, Abu Yahya al-Libi, the official spokesperson and head of al-Qa’ida’s religious committee, publicly advocated blowing up US military, political, economic, and financial institutions. While he did not specifically address attacking the Homeland, in a videotaped message in June 2009 Usama Bin Ladin warned the American people to be prepared to continue reaping what the White House sowed. In the same month al-Qa’ida’s third-incommand, Shaykh Sa’id al-Masri, said that the organization’s strategy for the future is similar to its strategy in the past—namely ‘hitting Americans’.

In our judgment, al-Qa’ida also retains the capability to recruit, train, and deploy operatives to mount some kind of an attack against the Homeland. Counterterrorism efforts against al-Qa’ida have put the organization in one of its most difficult positions since the early days of Operation Enduring Freedom in late 2001. However, while these efforts have slowed the pace of anti-US planning and hindered progress on new external operations, they have not been sufficient to stop them. ...

Targets that have been the focus of more than one al-Qa’ida plot include aviation, financial institutions in New York City, and government targets in Washington, D.C. Other targets al-Qa’ida has considered include the Metro system in Washington D.C., bridges, gas infrastructure, reservoirs, residential complexes, and public venues for large gatherings. ...

We assess that at least until Usama Bin Ladin and Ayman al-Zawahiri are dead or captured, al-Qa’ida will retain its resolute intent to strike the Homeland. We assess that until counterterrorism pressure on al-Qa’ida’s place of refuge, key lieutenants, and operative cadre outpaces the group’s ability to recover, al-Qa’ida will retain its capability to mount an attack.”¹³⁸

Accordingly, as can be seen from the above remarks of Director Blair, an Al Qaeda Terrorist Attack still remains a serious threat, and New York, and its institutions, still remain a primary target.

A further acknowledgment of this fact was echoed by New York City’s Mayor and Police Commissioner, with respect to the May 1, 2010 attempted Times Square Bomb attack by Pakistani Faisal Shahzad, an alleged terrorist reportedly trained by Al Qaeda and Taliban affiliated groups.¹³⁹

Such a threat assessment, of New York being a primary target for terrorists, was directly made by Raymond Kelly, Police Commissioner of the City of New York, when with respect to such attempted Times Square bombing he said:

“Clearly it was the intent of whoever did this to cause mayhem, to create casualties. It’s a sober reminder that New York is clearly a target of people who want to come here and do us harm.”¹⁴⁰

Kelly went on to further say that:

“This case’s nexus to New York city serves as another reminder that we remain vigilant to the possibility of supporters of al-Qaida returning to New York.”¹⁴¹

Also in commenting on the May 1, 2010 attack, New York City Mayor Michael Bloomberg expressly stated that his city was always a top terrorism target, declaring:

“These things invariably ... come back to New York.”¹⁴²

With respect to the same incident, Congressman Peter King, of New York’s Third District, and the Ranking Republican Member on the House Homeland Security Committee, directly recognized New York’s high target profile for terrorism, stating:

“We are the number one terrorist target in the world”¹⁴³

These assessments provide a direct indication as to why New York, as a primary target for a terrorist attack, has a legitimate and realistic concern, and legal nexus for objection, with respect to prospective hosting of Federal Civilian Court trials of accused terrorists. Such trials would provide an additional magnet for terrorism, in a location which all admit is already a primary target. By so doing it places the court, the attorneys, the jurors, and the citizens themselves, at greater risk.

Part Two - War, Courts or Tribunals

Section One - The Bush Policy - Terrorism as War

Shortly after the second World Trade Center Tower collapsed upon itself, at 11:41 a.m. on September 11, 2001, former Speaker of the House, Newt Gingrich appeared on Fox News Channel, and described that morning's national emergency as an "act of war".¹⁴⁴ The first major news figure to so characterize the day's events in such context, he further stated that such acts were on the par of "Pearl Harbor" or worse.¹⁴⁵

Later that evening, when asked by Fox News Commentators what actions he would suggest the United States take to respond to the worst act of Terrorism America has ever seen, the former speaker responded that our nation should look back at history and remember the Jeffersonian experience with the Barbary Pirates. America, New Gingrich continued, should have Congress meet in joint session, and swiftly pass a Declaration of War against radical Islam.

What former speaker and long time historian Newt Gingrich understood, is that it has long been recognized under Anglo-American jurisprudence, that certain long standing war powers are conferred to the Executive Branch by the Legislative, upon the formal declaration of war. When such powers are sought through an argument of construction, pursuant to congressional resolutions that do not on their face expressly declare war, the legal footing of the President is less assured. Accordingly, had the Bush administration taken the former speaker's advice, and actually sought an official declaration of war, instead of a congressional authorization to use the military forces of the United States, perhaps many of the legal issues which challenged the War on Terror during the next few years, may not have proven so formidable.

But that does not mean that President George W. Bush, from the start, did not view the events of September 11, 2001, and the incumbent response America would be required to wage, as war. From the first day, President Bush characterized both as war, and viewed the conflict in those terms. In so doing he set the stage for a deterrence response, to bring the terrorists to justice under the principle of "just war".

A. The Bush Philosophy: The Terrorist Attacks of 9/11, and the United States Response Thereto, are War.

On the evening of September 11, 2001, as he addressed the nation from the oval office, President George W. Bush remarked that **"America and our friends and allies join with all those who want peace and security in the world, and we stand together to win the war against terrorism"**.¹⁴⁶

The very next day, on September 12, 2001, when the President addressed his National Security Team, he stated that the **"deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war. This will require our country to unite in steadfast determination and resolve. Freedom and democracy are under attack"**.¹⁴⁷ Later that same day, in accordance with his view that America must view the terrorist attacks of September 11, 2001 in terms of war, President Bush forwarded to Congress, for their consideration, a proposed joint resolution to **"authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States"**.¹⁴⁸

The following day, on September 13, 2001, President Bush, in a telephone conversation with Mayor Rudolph Guiliani and Governor George Pataki, further solidified his position that the Terrorist attacks constituted a state of war for the United States, when he stated, **"make no mistake about it, my resolve is steady and strong about winning this war that has been declared on America. It's a new kind of war. And I understand it's a new kind of war"**.¹⁴⁹ Later that same day, in an interview with the press, President Bush reiterated this position when he declared, that with the attacks of September 11, 2001, **"we have just seen the first war of the 21st century"** and **"now that war has been declared on us, we will lead the world to victory"**.¹⁵⁰ Lastly, on that same day, in the opening paragraph of his September 13, 2001 Proclamation for a National Day of Prayer and Remembrance, President Bush wrote: **"On Tuesday morning, September 11, 2001, terrorists attacked America in a series of despicable acts of war"**.¹⁵¹

In his remarks for the National Day of Prayer, the next day, on September 14, 2001, President Bush made it even more clear that America was at war with those who perpetrated the terrorist attacks, stating that: **"War has been waged against us by stealth and deceit and murder. This Nation is peaceful, but fierce when stirred to anger. This conflict was begun on the timing and terms of others. It will end in a way, and at an hour, of our choosing"**.¹⁵²

Four days later, on September 18, 2001, when signing the joint resolution passed by both houses of congress, providing congressional authorization for him to use the United States Armed Forces against those responsible for the recent attacks, President Bush declared that such historic resolution **"recognized the authority of the President under the Constitution to take action to deter and prevent acts of terrorism against the United States"** and that in signing the resolution, **"I maintain the longstanding position of the executive branch regarding the President's constitutional authority to use force, including the Armed Forces of the United States"**.¹⁵³

Finally, two days later, on September 20, 2001, in a nationally televised address before a joint session of Congress, President Bush, expressly declared his policy that America was at war with the terrorists who attacked our nation on September 11th when he pronounced:

“On September 11th, enemies of freedom committed an act of war against our country. Americans have known wars, but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war, but not at the center of a great city on a peaceful morning. Americans have known surprise attacks but never before on thousands of civilians. All of this was brought upon us in a single day, and night fell on a different world, a world where freedom itself is under attack. ...

Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated. ...

Americans are asking, how will we fight and win this war? We will direct every resource at our command, every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war, to the disruption and to the defeat of the global terror network. ...

And tonight, a few miles from the damaged Pentagon, I have a message for our military: Be ready. I've called the Armed Forces to alert, and there is a reason. The hour is coming when America will act, and you will make us proud.” ¹⁵⁴

This perspective, of viewing the September 11, 2001 terrorist acts, and our nation's response thereto, as war, was justified by the 9/11 Commission in the official report which they issued three years later in 2004. For in such report, the Commission albeit with the perspective of hindsight, criticized previous administrations for their failure to recognize that we had actually been at war with Al Qaeda for a long time before September 11th.¹⁵⁵ Such Commission further criticized such previous administrations for placing unjustified restrictions on the American Intelligence Community, on constructing unjustified impediments to the sharing of information between intelligence officials and civilian law enforcement, and for viewing terrorism as only a law enforcement issue to be handled in civilian courts rather than a comprehensive issue to be dealt with a broad spectrum of American assets.¹⁵⁶

The Commission noted that despite repeated warnings, the United States had failed to act. The 1992 attacks on American forces in Somalia, the 1993 attack on the World Trade Center by Ramsey Yousef, the 1996 attack on U.S. Air Force personnel at the Kobar Towers complex in Saudi Arabia, the 1998 attacks on United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, and the 2000 attack on the USS Cole while it was harbored and refueling in Aden, Yemen, were all terrorist acts of war that the United States choose to ignore.¹⁵⁷

According to the 9/11 Commission, the only way to effectively combat terrorism, is by means of an all fronts, comprehensive all out war strategy, through military operations, financial operations, national intelligence, homeland security, and domestic interdiction (law enforcement).¹⁵⁸ As a result, although they levied substantial criticism of the Bush administration's execution of parts of the “War on Terrorism”, the 9/11 Commission essentially endorsed President Bush's philosophy that an effective strategy to combat and prevent terrorism was through the prism of war, and not simply through the perspective of criminal prosecutions with law enforcement.¹⁵⁹

The Bush administration's philosophy, that any effective War on Terrorism would require an all out war on all fronts, also permeated and formed the basis for their legal strategy as well. From the forward deployment of America's Armed Forces, to the improvement and expansion of our intelligence community, to the establishment of the Department of Homeland Security and the Director of National Intelligence, to the improvement and expansion of the Justice Department (and all its legal and law enforcement assets), to the interaction and intergovernmental cooperation of state governments, President Bush devoted his presidency to fighting a total War on Terrorism, in an effort to protect the American people and their institutions.

This philosophy was based upon the two fundamental means of justice: Deterrence and Punishment. Deterrence to provide effective strategies, methods and means to help prevent another terrorist attack from occurring, and punishment to deliver justice to those who had effectively carried out a terrorist attack against America, its people or its institutions.

B. Presidential Powers Exercised by President Bush in the War on Terrorism

To prosecute the War on Terrorism, and bring the Terrorists who committed the Acts of September 11, 2001 to justice, President Bush used every power available to him as President. From exercising his military authority as Commander in Chief, to his Executive Authority under Article II of the Constitution, to working with Congress to enact new laws in this area, to bringing and defending legal actions before the Article III Federal Courts, George Bush's presidency was singularly focused on this issue.

i. The Bush Cabinet - Experienced and Diverse

One advantage that President Bush had in facing the War on Terrorism was a highly experienced and talented cabinet. Indeed, on January 3, 2001, the Los Angeles Times commented on their editorial page:

“This much can be said about George W. Bush’s Cabinet-in-Waiting: Its members will have more experience--both inside and outside of Washington--than those who advised any of his immediate predecessors. And it will be more diverse than the Cabinets of all the Republican presidents before him.”¹⁶⁰

Such Cabinet included:

Richard Cheney - Vice President. Mr. Cheney was a former Chief of Staff to President Ford, a former Congressman from Wyoming and former Secretary of Defense under President George H. W. Bush.

Donald Rumsfeld - Secretary of Defense. Mr. Rumsfeld was also a former Chief of Staff to President Ford, a former Congressman from Illinois, and former Secretary of Defense under President Gerald Ford.

Colin Powell - Secretary of State. Mr. Powell was a former four star general, former National Security Advisor to President Ronald Reagan, and former Charman of the Joint Chiefs of Staff under President George H. W. Bush.

John Ashcroft - Attorney General. Mr. Ashcroft was the former Attorney General of the State of Missouri, former Governor of the State of Missouri, and former United States Senator from the State of Missouri.

Thomas Ridge - Secretary of Homeland Security. Mr. Ridge was the former Governor of the State of Pennsylvania, a former Congressman from the State of Pennsylvania, and a highly decorated combat veteran in the Vietnam War.

Condoleezza Rice - National Security Advisor. Ms. Rice was the former Security Advisor for Soviet Affairs for President George H. W. Bush, a former fellow to the Counsel on Foreign Relations, and a former Special Assistant to the Director of the Joint Chiefs of Staff.

In the days after the September 11, 2001 attacks, President Bush tasked his experienced cabinet to take all measures necessary to provide justice to terrorists, through deterrence and punishment.

ii. Total War - Determining What Legal Actions Needed to Be Taken

After making the public policy decision to deploy the total war concept against terrorism (From the forward deployment of America’s Armed Forces, to the improvement and expansion of our intelligence community, to the establishment of the Department of Homeland Security and the Director of National Intelligence, to the improvement and expansion of the Justice Department (and all its legal and law enforcement assets), to the interaction and intergovernmental cooperation of state governments) President Bush and his administration had to take several legal steps to accomplish his goal.

a. Military Actions

As aforementioned, one of his first steps was to seek authorization from congress to deploy the Armed Forces against those responsible for the recent attacks launched against the United States. Three weeks after this resolution was enacted and signed into law, on October 7, 2001, the President commenced military action in Afghanistan, against the Taliban and Al Qaeda, pursuant to the just war doctrine, to begin the process of bringing the terrorists who attacked the United States to justice.¹⁶¹ Throughout the remaining years of his presidency, President Bush would continue to utilize combat operations against the terrorists in Afghanistan, in Iraq (2003 to 2008), and (by means of joint multinational operations) in Pakistan and Yemen. These actions supported by his powers as Commander in Chief, as well as by authorizations (resolutions) enacted by Congress, comprised the military response to the War on Terrorism.

b. Executive Orders

Due to the fact that President Bush took the issue of protecting America from terrorism very seriously, he was often required to quickly act using his executive authority under Article II of the United States Constitution. After the September 11, 2001 attacks, he executed 38 Executive orders concerning homeland security and the war of terror. Such Executive Orders, in sequence, included Executive Orders Nos:

13223 - Ordering the Ready Reserve of the Armed Forces to Active Duty;
13224 - Blocking Property / Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism;
13228 - Establishing the Office of Homeland Security and the Homeland Security Council;
13234 - Presidential Task Force on Citizen Preparedness in the War on Terrorism
13236 - Waiver of Dual Compensation Provisions of the Central Intelligence Agency Retirement Act of 1964;
13239 - Designation of Afghanistan and the Airspace Above as a Combat Zone;

13253 - Amendment to E.O. 13223, Ordering the Ready Reserve of the Armed Forces to Active Duty;
13260 - Establishing the President's Homeland Security Advisory Council;
13262 - 2002 Amendments to the Manual for Courts-Martial, United States;
13267 - Establishing a Transition Planning Office for the Department of Homeland Security;
13268 - Termination of Emergency With Respect to the Taliban and Amendment of E.O. 13224
13269 - Expedited Naturalization of Aliens Serving in an Active-Duty Status During the War on Terrorism;
13273 - Amending E.O. 10173, on Regulations for Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities;
13284 - Amendment of E.O.'s, in Connection With the Establishment of the Department of Homeland Security;
13286 - Amendment of E.O.'s, in Connection With the Transfer of Functions to the Department of Homeland Security
13289 - Establishing the Global War on Terrorism Medals;
13292 - Further Amendment to E.O. 12958, as Amended, Classified National Security Information;
13311 - Homeland Security Information Sharing;
13328 - Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction;
13353 - Establishing the President's Board on Safeguarding Americans' Civil Liberties;
13354 - National Counterterrorism Center;
13355 - Strengthened Management of the Intelligence Community;
13356 - Strengthening the Sharing of Terrorism Information To Protect Americans;
13365 - 2004 Amendments to the Manual for Courts-Martial, United States;
13381 - Strengthening Processes in Determining Eligibility for Access to Classified National Security Information;
13407 - Public Alert and Warning System;
13408 - Amending E.O. 13381, As Amended, To Extend Its Duration by One Year;
13416 - Strengthening Surface Transportation Security;
13425 - Trial of Alien Unlawful Enemy Combatants by Military Commission;
13430 - 2007 Amendments to the Manual for Courts-Martial, United States;
13434 - National Security Professional Development;
13436 - Amending E.O. 13381, As Amended, To Extend Its Duration by One Year;
13440 - Interpretation of the Geneva Conventions Common Art 3 as in the CIA Program of Detention and Interrogation;
13442 - Amending the Order of Succession in the Department of Homeland Security;
13447 - Further 2007 Amendments to the Manual for Courts-Martial, United States;
13468 - 2008 Amendments to the Manual for Courts-Martial, United States;
13470 - Further Amendments to E.O. 12333, United States Intelligence Activities;
13475.- Further Amendments to E.O.s 12139 and 12949 Regarding Foreign Intelligence Surveillance Act of 1978, 2008; ¹⁶²

One of the first Executive Orders concerning the War on Terrorism executed by President Bush was signed the day after commencing combat operations in Afghanistan. Such Executive Order, signed on October 8, 2001, established the Office of Homeland Security and the Homeland Security Council.¹⁶³ Such Office would later be elevated to a Department of Homeland Security, pursuant to a federal statute enacted on November 25, 2002 (Homeland Security Act of 2002) combining 22 pre-existing federal homeland security agencies into one new department.¹⁶⁴ In so doing, it showed the Bush administration's commitment to the total war concept, adding defensive to its already deployed offensive operations.

Other Executive Orders issued by President Bush of serious consequence on the war on terrorism, included orders establishing the National Counter Terrorism Center,¹⁶⁵ permitting the trial of unlawful enemy combatants (terrorists) by Military Commission Tribunals,¹⁶⁶ (which would be enacted into federal statute pursuant to the Military Commissions Act of 2006),¹⁶⁷ and authorizing the CIA Program of Detention and Interrogation of unlawful enemy combatants (terrorists).¹⁶⁸

As will be seen, many of these actions taken by executive order, concerning the war on terror, would later require either legal defense, or legislation, or both. Accordingly, a significant body of law would be developed on these issues, during the seven remaining years of the Bush administration.

c. Legislation

Effective prosecution of the war on terrorism required the enactment of significant new legislation by Congress. The multitude of issues concerning the bringing terrorists to justice, and the deterrence and punishment concepts that arose from that policy, presented many legislative issues and challenges.

Additionally, President Bush would further need Congress to act to make historic appropriations to pay for the cost of everything from recovery and reconstruction of the attack sites to personnel and material for combat and intelligence operations to new federal agencies and programs relating to fighting the war on terrorism. Sadly, like any major war, the war on terrorism did not come cheap and required the United States and its taxpayers to make a significant financial sacrifice. Indeed, some estimates placed the total cost during the seven year, four month period, at one trillion dollars.¹⁶⁹

During the War on Terror, President Bush served with mixed political parties in Congress. During the first two years of his administration, the 107th Congress consisted of a House with 212 Republicans and 211 Democrats, and a Senate with 49 Republicans and 51 Democrats.¹⁷⁰ From 2003 to 2004, the 108th Congress consisted of a House with 229 Republicans and 206 Democrats and a Senate with 51 Republicans and 49 Democrats.¹⁷¹ From 2005 to 2006, the 109th Congress consisted of a House with 231 Republicans and 203 Democrats, and a Senate with 55 Republicans and 45 Democrats.¹⁷² Lastly, from 2007 to 2008, the 110th Congress consisted of 233 Democrats and 202 Republicans and a Senate with 51 Democrats and 49 Republicans.¹⁷³

Due to the shifting party allegiances of Congress during the time from September 11, 2001 to the last day of the Bush administration, it proved a challenge in the partisan atmosphere of Washington, to enact the all the new body of law that President Bush sought to fight a total war on terror. Notwithstanding such fact, however, the administration was able to work with Congress to provide for the enactment of a significant number of new statutes, programs and appropriations.

Accordingly, a significant new body of law developed from the enactment of such legislation, and the judicial interpretation of the same thereafter. Such legislation included:

The USA PATRIOT ACT

One of the first and most controversial new statutes enacted of the war on terror, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, was signed into law by President Bush on October 26, 2001.

With most of its provisions deriving from criminal justice laws which had been placed on the books to fight suspected drug dealers, and their trade in illegal narcotics, the USA PATRIOT Act applied such principles to suspected terrorists, and their attempts to commit terrorist acts.

The law, which amended ten preexisting titles of federal law and added one new one, was comprehensive.¹⁷⁴

By significantly reducing the restrictions on law enforcement and intelligence agencies to intercept and examine telephone, fax and e-mail communications, and gather financial, educational, medical and other records of suspected terrorists, this act sought to permit the gaining of critical intelligence to stop a terrorist attack. By expanding the Secretary of the Treasury's power to regulate financial transactions, it sought to empower the federal government to prosecute the war on terror by means of financial issues, cutting off the flow of money to the terrorists and their organizations and freezing their assets and financial means to attack. By extending the circumstances under which law enforcement and immigration authorities could detain and deport immigrants suspected of terrorism-related acts, it sought to protect the United States homeland from those most likely to perpetrate an act of terrorism.¹⁷⁵

Passed by Congress with broad support, of both Republican and Democrats, it later would prove to become a partisan springboard for the attacks of the partisan left and civil liberties groups. Extended with revisions in 2006 (USA PATRIOT Improvement and Reauthorization Act), it would prove a touchstone of the war on terror.¹⁷⁶

The Homeland Security Act of 2002

This statute would codify President Bush's executive order creating a new federal entity for homeland security. It was signed into law by President Bush on November 25, 2002.¹⁷⁷

Pursuant to its provisions, it created a new federal Department of Homeland Security, combining 22 pre-existing federal homeland security agencies into one new department.¹⁷⁸

Providing for the largest departmental reorganization since the creation of the Department of Defense, this newly created Department of Homeland Security would maintain 208,000 non uniformed civilian employees (with tens of thousand additional uniformed employees) and would include such subagencies as the United States Citizenship and Immigration Services, the U.S. Customs and Border Protection, the U.S. Immigration and Customs Enforcement, the Transportation Security Administration, the United States Coast Guard, and the United States Secret Service.¹⁷⁹

The Intelligence Reform and Terrorism Prevention Act of 2004

This statute would codify several executive orders signed by President Bush to administratively update intelligence collection and provide for a sweeping reorganization of the American Intelligence Community and its relationships to its ancillary law enforcement partners was signed into law by President Bush on December 17, 2004.¹⁸⁰

This 236 Page Comprehensive Act, whose many provisions were recommended by the 9/11 Commission, created the Director of National Intelligence, codified the National Counterterrorism Center (an information sharing clearing house), provided for improved accountability and information sharing of federal intelligence, law enforcement and homeland security agencies, established civil liberty protocols, and improved procedures for security clearances and the handling of classified information.¹⁸¹

Enjoying wide spread bipartisan support, this act passed in the House of Representatives on 12/07/04, with a vote of 336-75, and passed in the Senate on 12/08/04, with a vote of 89-2.¹⁸²

The Military Commissions Act of 2006

Enacted in after the United States Supreme Court decision in Hamdam v. Rumsfeld, 548 U.S. 557 (2006), this statute would codify the executive orders and administrative actions of President Bush to establish Military Commission Tribunals for the prosecution of unlawful enemy combatant terrorists.¹⁸³ Signed into law by President Bush on October 17, 2006, it codified procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission (see the previous discussion in section one, c, ii regarding the specifics of such provisions).¹⁸⁴

In 2009, the provisions of this act were amended to provide for certain changes in nomenclature and extend certain due process rights to accused terrorists.¹⁸⁵

d. Court Actions Concerning Detainment, Interrogation and Prosecution of Terrorists

One of the most controversial and politicized areas of the War on Terror came in the area concerning the detainment, interrogation and prosecution of terrorists.

The war on terror is a unique conflict in the history of war, in that the people who have chosen to attack us do not have a geographical affiliation but rather an ideological one. In their attacks they do not wear uniforms or carry identifiable banners. They target civilian populations and have an amorphous and constantly changing command and control structure, and hide amongst their own civilians. As a part of their own philosophy, they launch attacks with the very purpose of inflicting the greatest loss of life possible, including their own.

As a result, under the doctrine of bringing these terrorists to justice, to provide deterrence for future attacks, certain new tactics have had to be developed which have not been necessary in past conflicts. For no war was ever as dependent upon intelligence as the war on terror. As this is not a war where great armies often confront each other on the field of battle (although such did sometimes occur in Afghanistan and Iraq), to provide for the deterrence that justice demands, it is necessary to discover the plans and operations of the enemy before they can act. Such requires the ability to capture terrorists, interrogate them to extract relevant information that will prevent attacks from occurring, and a forum to prosecute them where such intelligence, and the assets used to obtain it, will not be exposed or compromised.

As any program to detain, interrogate and prosecute individuals will require the weighing of civil liberties against the importance of security, there have arisen many opponents who question the decisions regarding the extent of the procedural protections and balances selected. This has resulted in substantial litigation in all three areas of the federal government's program for the detainment, interrogation and prosecution of suspected terrorists.

1. A Cottage Industry of Cause Based Pro Bono and Foundation Lawyers

As the War on Terror progressed, and the memories of September 11, 2001 began to fade, the litigation of constitutional rights for accused terrorists has become a cottage industry for pro bono and foundational lawyers (such as those from the Center for Constitutional Rights - a self proclaimed progressive legal defense organization known before the war for suing public museums to display the work of artist Andres Serrano, whose photograph "Piss Christ" showed a crucifix in a jar of urine).¹⁸⁶

In 2004, such advocates for terrorist rights won a major legal victory, in *Rasul v. Bush*, 542 U.S. 466 (2004), when the Supreme Court ruled that captured Afghan foreign enemy combatants could challenge their detention in United States Civilian Federal Court.¹⁸⁷ This seriously criticized decision, burst a floodgate of habeas corpus litigation, and suddenly the Center for Constitutional Rights found itself coordinating the work of hundreds of pro-bono lawyers, from top flight law firms, filing suit on behalf of terrorist detainees.¹⁸⁸

Founded by William Kunsler, and now headed by Michael Ratner (the Brother of New York City Developer Bruce Ratner) the Center for Constitutional Rights proudly declares that:

"CCR has led the legal battle over Guantanamo for the last six years – sending the first ever habeas attorney to the base and ... has been responsible for organizing and coordinating more than 500 pro bono lawyers across the country in order to represent the men at Guantanamo"¹⁸⁹

The Center for Constitutional Rights has used its involvement in terrorist representation to double its operational fund raising, from total reported revenues of \$2.4 million in 2002, to total reported revenues of \$4.9 million in 2007.¹⁹⁰ Such revenues, however, do not include the tens of millions of dollars of "in kind" contributions, from more than 600 law firms, which annually donate pro bono time to represent the Guantanamo detainees as part of the Center's "Global Justice Initiative."¹⁹¹

Perhaps most interesting is the fact that the law firm which received the Center for Constitutional Right's Pro Bono Law Firm of the Year Award, for their work related to the illegal detention of Muslim Immigrants (suspected terrorists), was none other than the Washington D.C. firm of Covington and Burling, the same law firm at which now Attorney General Eric Holder was a partner, during the preceding eight years before he returned to public service.¹⁹²

2. Cases Involving Detainment, Interrogation and Prosecution of Terrorists

After the September 11, 2001 attacks, President Bush asked Attorney General John Ashcroft, Secretary of Defense Donald Rumsfeld and CIA Director George Tenet, to develop a legal strategy to detain, interrogate and prosecute terrorists, captured in the war on terror.

Pursuant to such directive, a strategy was developed whereby suspected terrorists upon capture, would be declared as foreign unlawful enemy combatants, and detained in a secure facility maintained by the Central Intelligence Agency.¹⁹³ Once in the custody of such secure facility, expertly trained CIA personnel would conduct interrogation and debriefing, under strict humanitarian and non injurious protocols.¹⁹⁴ After the terrorist suspect provided all relevant information which debriefers believed such suspect was capable of providing, such terrorist suspect would be remanded over to Military authorities to be tried pursuant to a Military Commission Tribunal, with all the rights and privileges incumbent therewith.¹⁹⁵

This strategy was developed in accordance with past case law, federal statutes concerning Military Commission Tribunals and the Military Code of Justice, and was instituted by President Bush pursuant to his power as commander in chief by means of Executive Order and Military Command.¹⁹⁶ The purpose of this strategy was to keep America safe, provide justice to terrorists by means of deterrence, obtained through intelligence, and punishment, achieved through lawfully obtained convictions.¹⁹⁷

The difficulty in crafting this strategy was that as President Bush had declared to the nation, this was a new kind of war, and there was very little law upon which to craft procedures to accomplish what needed to be done. Accordingly Justice Department Attorneys, as well as those working for the Department of Defense and the Intelligence Community, sought to extrapolate from the limited body of law that did exist, and build procedures which would hopefully sustain all challenges they could foresee coming from such organizations as the Center for Constitutional Rights.

Ex Parte Milligan

The first case the Bush administration attorneys examined was Ex Parte Mulligan, 71 U.S. 2 (1866).¹⁹⁸ This case arising out of the United States Civil War, involved Lambdin Milligan, a citizen of Indiana, who was accused of planning terrorist like actions against the United States, by planning to steal Union weapons and invade prisoner-of-war camps, for the purpose of overthrowing the Government of Indiana, and inciting it to join the Confederacy. Arrested by Union Forces, and then charged and convicted by a Union Military Commission Tribunal, Milligan appealed to the Supreme Court of the United States for a writ of habeas corpus.¹⁹⁹

The Supreme Court in Ex Parte Milligan, finding that Lambdin Milligan was a citizen, and that the civilian courts of the State of Indiana were open and functioning, invalidated the determination the Military Commission made pursuant to Martial Law, and thereby granted the writ of habeas corpus. In so doing, the Court held.

“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority. ...

it is said that the jurisdiction is complete under the ‘laws and usages of war.’ It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.

This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service.

One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.”²⁰⁰

Although one of the very few cases on record, the Milligan case provided little guidance for the Bush administration in crafting its policy for the detention, interrogation and prosecution of Terrorists. For the one of the essential elements of the case was the fact that Milligan was a citizen of the United States.

As the very foundation of the Bush detention, interrogation and prosecution program applied to foreign, alien, unlawful enemy combatants, who were not citizens of the United States, the Supreme Court’s holding in Milligan was clearly distinguishable. Accordingly, it was decided that when a suspected terrorist was captured that the United States knew was an American Citizen, the policy was (although not exclusively) to have such individual tried before an Article III, Federal Civilian Court. Such a policy was implemented with John Walker Lindh, the notorious American Taliban, who as an American Citizen, after being captured in Afghanistan, was promptly returned to the United States for trial before a Civilian Federal Court in Alexandria, Virginia.²⁰¹

Ex Parte Quirin

In crafting the legal arguments for their detention, interrogation and prosecution program for suspected terrorists, the case upon which the Bush administration could, and did, heavily rely, however was Ex Parte Quirin, 317 U.S. 1 (1942).²⁰²

The Quirin case occurred in 1942, during the Second World War, and involved the case of eight Nazi saboteurs, brought to the United States in the dark of night by means of German U-Boats, and landing on the beaches of Long Island and Florida.²⁰³ The mission of these men was to conduct what we would call today as terrorist operations, including the destruction of domestic, non military assets such as power stations and fuel depots, as well as seeking to intentionally inflict massive civilian casualties by detonating powerful explosives during shopping hours at the Jewish owned Macy's Department Store, as well as bus stations and railroad offices.²⁰⁴

The eight saboteurs all had received firearms and demolition training in Germany by Nazi military personnel. Many had spent considerable time in the United States, each spoke English and two were American Citizens.²⁰⁵

Soon after their arrival in the United States, all were captured before they could accomplish their mission. Absent uniforms, in civilian clothes, and operating among the civilian populous, they were treated as unlawful enemy combatants and three days after they were all in custody, on June 30, 1942, President Roosevelt ordered that a Military Commission Tribunal be convened before which they could be brought to justice.²⁰⁶

Pursuant to military order, President Roosevelt, acting under "the authority vested in me as President and as Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States," empowered the military commission to establish its own rules for the conduct of the proceedings "consistent with the powers of Military Commissions under the Articles of War ... for a full and fair trial."²⁰⁷ The same order appointed Attorney General Francis Biddle and Judge Advocate General Myron Cramer as prosecutors, and career army lawyer, Colonel Cassius Dowell, and a volunteer, Colonel Kenneth Royall, as defense counsel.

Procedural rules for the tribunal, allowed the presentation of a defense and a reduced evidentiary standard. Upon the conclusion of the cases of both the prosecution and defense, but before the delivery of the summations by counsel, Defense Counsel Royall petitioned the Supreme Court for a writ of Habeas Corpus, challenging the lawful ability (citing Milligan) of Roosevelt to convene the Military Commission and try the eight accused saboteurs before a military court.²⁰⁸

After adjourning to allow the presentment of two days of argument before a nine member Supreme Court, of which eight were appointed by Roosevelt, the Military Commission once again convened the next day to hear closing arguments by all parties.²⁰⁹ After the parties delivered their closing arguments before the commission in the morning, on the afternoon of July 31, 1942, Chief Justice Stone of the Supreme Court read a unanimous, preliminary per curium decision from the bench²¹⁰, which said:

"The Court has fully considered the question raised in these cases and thoroughly argued at the bar, and has reached its conclusion upon them. It now announces its decision and enters its judgment in each case, in advance of the preparation of a full opinion which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the Clerk.

The Court holds:

(1) That the charges preferred against petitioners on which they are being tried by military commission appointed by order of the President of July 2, 1942, allege an offense or offenses which the President is authorized to order tried before a military commission.

(2) That the military commission was lawfully constituted.

(3) That petitioners are held in lawful custody for trial before the military commission, and have not shown cause for being discharged by writ of habeas corpus.

The motions for leave to file petitions for writs of habeas corpus are denied. . . . The mandates are directed to issue forthwith."²¹¹

Three months later, on October 29, 1942, the Supreme Court issued a full opinion.²¹² By this time the Military Commission had rendered its verdict of guilty and sentence of death, with six being executed by electrocution on August 8, 1942, and two John Dasch (having his death sentence commuted to 30 years in prison) and Ernst Burger (having his death sentence commuted to life in prison) escaping such fate.²¹³

In the final opinion the Supreme Court held:

"From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.

Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law.

By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war. ...

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.” ²¹⁴

As a result of this decision, which expressly distinguished Milligan as an anachronism of the special circumstances surrounding the American Civil War,²¹⁵ the Supreme Court expressly recognized an ability of the Commander in Chief, at time of war, to detain, question and prosecute unlawful, foreign, combatants, in Military Commission Tribunals. The Bush administration relied heavily on this case in establishing their detention, interrogation and prosecution program for accused terrorists. Until 2006, this case was not only good law for such a proposition, it was the only law. That is, of course until the Supreme Court decided to clarify or change its mind in *Hamdan v. Rumsfeld*.

Hamdan v. Rumsfeld

On June 29, 2006, the Supreme Court issued a decision overruling the Bush administration's reliance on *Quirin*, in the case *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).²¹⁶ Holding that since the program the Bush administration had established for the detention, interrogation and prosecution of suspected terrorists, never received express Congressional authorization, it was therefore violative of both the Uniform Code of Military Justice and Common Article 3 of the Geneva Convention (which requires expressly designated criminal court procedures) as ratified by United States treaties.²¹⁷

This case involved a suspected terrorist by the name of Salim Ahmed Hamdan, the Yemeni bodyguard and chauffeur for Osama Bin Laden. Captured by militia forces during the Operation Enduring Freedom (the Military Incursion led by the United States against Al Qaeda and the Taliban in Afghanistan after the September 11, 2001 attacks) and turned over to United States Forces, Hamdan was enrolled in the administration's detention, interrogation and prosecution program, and eventually transferred to the United States Military Detention Facility at Guantanamo Bay Naval Base in Cuba.

In July 2004, Hamdan was charged with conspiracy to commit terrorism, and arrangements were made to try him before a Military Commission Tribunal authorized under Military Commission Order No. 1 of March 21, 2002. Hamdan filed a petition for a writ of habeas corpus.²¹⁸

In ruling that the president's military commission order was insufficient, in that it did not have the requisite Congressional authorization, the Supreme Court did not grant the writ of Habeas Corpus to free the detainee Hamdan. This decision thereby merely required the president obtain the requisite Congressional authorization before he could proceed with military commissions. In making such decision the court held:

“We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge-viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the rule of law that prevails in this jurisdiction.” ²¹⁹

It is interesting to note, that the *Hamdan* Court made specific mention that, due to the fact that the war on terror, under which President Bush issued his order for the establishment of the Military Commission, did not have a declaration of war, and that the resolution enacted by congress on September 14, 2001 did not contain any reference to Military Commissions, they viewed no Congressional authorization to have taken place. Once again, an indication that the approach of a declared war against radical Islam may, as suggested by Speaker Gingrich, have had some benefit.

As a result of the *Hamdan* decision, on September 6, 2006, President Bush addressed the nation describing the his administration's detention, interrogation and prosecution program, and the life saving intelligence it has provided in the war on terrorism.²²⁰ Upon that speech President Bush submitted to Congress, and it thereupon enacted for his signature only six weeks later, on October 17, 2006, the Military Commissions Act of 2006 (see the previous discussion in section one, c, ii regarding the specifics of such provisions).²²¹

Boumediene v. Bush

In the most recent case involving the Bush administration's program for detention, interrogation and prosecution of suspected terrorists, *Boumediene v. Bush*, 553 U.S. 723 (2008), the United States Supreme Court held that:

- That the Military Commissions Act of 2006, by its terms, expressly denied federal courts the jurisdiction to hear habeas corpus actions that were pending at the time of its enactment;
- That such clause, which suspended such jurisdiction has full effect at Naval Detention Station at Guantanamo Bay;
- That irrespective of the provisions of the Military Commissions Act of 2006, the aliens detained as enemy combatants at Naval Detention Station at Guantanamo Bay were entitled to privilege of habeas corpus to challenge legality of their detention;
- That the provision of Military Commissions Act of 2006 denying federal courts of jurisdiction to hear habeas corpus actions that were pending at the time of its enactment effected an unconstitutional suspension of writ of habeas corpus; and
- That such detainees were entitled to prompt habeas corpus hearing, and could not be required to first exhaust other review procedures.²²²

In their decision, the court expressly held:

"We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. The MCA [Military Commissions Act] does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention. [Emphasis Added]."²²³

Accordingly, what this effect this decision has is to keep the door open for all suspected terrorist detained at the Guantanamo Bay Naval Detention Center to challenge their detention with a writ of Habeas Corpus, despite the intent of Congress, in passing the Military Commissions Act to not afford this remedy. Although the Court appears to leave open a legislative fix, by means of more express language which provides an alternate remedy to Federal Court review of Habeas Corpus, to date such legislative fix has not been even attempted by Congress.

It should be noted, however, that although the Court in *Boumediene* did complain about the duration of the detention experienced by some of the detainees, it expressly refused to overrule the federal government's ability to maintain such facility and to detain such detainees for the entire duration of the conflict, however long that may be.²²⁴

Section Four - The Obama Policy - Terrorism as a Criminal Justice Issue

The Obama administration, unlike its predecessor Bush administration, appears not to take the view that the threat of terrorism should be handled by the United States as an all out war. Their actions would present the position, which was the policy of administrations before September 11, 2001, that terrorism is primarily a law enforcement matter which should be handled primarily through the criminal justice system (law enforcement and the courts).

Indeed, to signal this change in policy, on the week of March 25, 2009, the Obama administration had the Department of Defense issue a memorandum to ask all federal employees to no longer use the term "War on Terror" and instead refer to any overseas military operation as an "Overseas Contingency Operation".²²⁵ Perhaps stranger still, contemporaneously, Homeland Security Secretary Janet Napolitano also announced that the Department would be rebranding the term "terrorism" to now be called "man caused disaster", stating that the change in such terminology "demonstrates that we want to move away from the politics of fear toward a policy of being prepared for all risks that can occur"²²⁶ All this is on top of the nomenclature changes that the Obama administration just signed into law in the Military Commission Law of 2009 which changes the historic term of "Unlawful Enemy Combatant" to now read "Unprivileged Enemy Belligerent"²²⁷

With the Obama administration's actions:

- In causing foreign enemy combatant Umar Farouk Abdulmutallab (the Christmas day underwear bomber who tried to take down a jet over Detroit) to be read his Miranda Warnings before taking him into custody;
- In declaring the closure of the Guantanamo Bay Naval Base Detention Center so as to have to bring suspected terrorists back to United States soil; and
- In unilaterally ceasing the enhanced interrogation program of suspected terrorists with critical information necessary to stop a terrorist attack;

some are publically wondering whether this administration is reverting back to a pre September 11, 2001 mentality and not taking the threat of terrorism seriously. Indeed, Senator Kit Bond of Missouri, on February 2, 2010, expressly stated that:

"my real beef is with the Administration that seems to be going back to a pre-9/11 mentality, where they treat terrorists as ordinary criminals. That was deadly in the past, and I'm afraid it will be again."²²⁸

The 9/11 Commission expressly warned about resuming a pre September 11, 2001 mentality and slipping back into a program, not of total war against terrorism but merely treating it as a law enforcement matter when they said:

“The law enforcement process is concerned with proving the guilt of persons apprehended and charged. Investigators and prosecutors could not present all the evidence of possible involvement of individuals other than those charged, although they continued to pursue such investigations, planning or hoping for later prosecutions.

The process was meant, by its nature, to mark for the public the events as finished—case solved, justice done. It was not designed to ask if the events might be harbingers of worse to come.

Nor did it allow for aggregating and analyzing facts to see if they could provide clues to terrorist tactics more generally—methods of entry and finance, and mode of operation inside the United States.”²²⁹

A. The Terror Trials in New York

One of the most significant concerns, however, which has reflected President Obama’s apparent change in policy against the War on Terrorism, and toward a primarily criminal justice perspective, is his decision to possibly try five September 11th terrorists in Civilian Federal District Court in the Southern District of New York, just feet away from the former World Trade Center site, instead of bring these individuals to justice by means of a Military Commission Tribunal.

This change in policy raises serious questions, for multiple reasons and deserves examination.

On January 20, 2009, only minutes after his inauguration, President Barack Obama ordered Secretary of Defense Robert Gates to cease referring all terrorism cases to military commission tribunals and to move for a stay of all pending cases for 120 days.²³⁰ Pursuant to such order, that same day, Defense Secretary Gates issued a Memorandum to the Convening Authority for Military Commissions and the Chief Prosecutor of the Office of Military Commissions as follows:

“Pursuant to the Military Commissions Act of 2006 and the authority vested in me as the Secretary of Defense, I hereby direct the Convening Authority for Military Commissions to cease referring cases to military commissions immediately, I direct the Chief Prosecutor of the Office of Military Commissions (OMC) to cease swearing charges, to seek continuances for 120 days in any cases that have already been referred to military commissions, and to petition the Court of Military Commission Review to hold in abeyance any pending appeals for 120 days.

This is to provide the Administration sufficient time to conduct a review of detainees currently held at Guantanamo, to evaluate the cases of detainees not approved for release or transfer to determine whether prosecution may be warranted for any offenses these detainees may have committed, and to determine which forum best suits any future prosecution.

This order does not preclude continued investigation or evaluation of cases by the OMC.”²³¹

To further solidify his policy position, on January 22, 2009, President Obama issued Executive Order 13492, section four of which provided for the immediate review of all Guantanamo detentions by a panel consisting of the Attorney General, who would be charged with coordinating the Review, the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and other necessary federal officers and employees.²³²

This order further provided that among the duties of the review participants would be the Determination of Prosecution, whereby, in accordance with United States law, the cases of individuals detained at Guantanamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.²³³

Moreover this Order further required a review with respect to the Determination of other disposition, whereby, with respect to any individuals currently detained at Guantanamo whose disposition is not achieved under transfer, release or prosecution, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals, whereby the appropriate authorities shall promptly implement such dispositions.²³⁴

Lastly, such executive order additionally provided that the Secretary of Defense must immediately take steps sufficient to ensure that during the pendency of the Review, no charges are sworn, or referred to a military commission, and that all proceedings of such military commissions to which charges have been referred, but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.²³⁵

In order to comply with such executive order, and the order of the secretary of the department of defense, department of justice lawyers moved in all cases pending with unlawful foreign enemy combatants before a military commission tribunal for an immediate stay of the proceedings for 120 days. In nearly all cases such stay was granted, but in the case involving the prosecution of Abd al-Rahim al-Nashiri, the alleged mastermind of the Al Qaeda attack on the U.S.S. Cole, the Military Judge, James Pohl, refused to grant such stay on the grounds that such would unlawfully violate the accused's right to a speedy trial.²³⁶ As a result, on February 5, 2009, rather than violate the Executive Order, the Justice Department dismissed its case against Nashiri, making him now eligible to file an effective Habeas Corpus petition under the Boumediene case, for any continued detention without charges.²³⁷

In May 2009, as the President's Panel for Review of the Guantanamo Detainees had not completed its work, Justice Department Attorneys moved for an additional stay of all prosecutions pending before the Military Commission Tribunals.

On November 13, 2009, United States Attorney General Eric Holder, held a press conference to publically announce that the Presidents Panel had completed its review with respect to certain suspected terrorists, and that the federal government, was going to remove the prosecutions five Al Qaeda foreign enemy combatant terrorists, Khalid Sheikh Mohammed, Walid Muhammed Salih Mubarak Bin Attash, Ramzi Bin Al Shibh, Ali Abdul-Aziz Ali, and Mustafa Ahmed Al Hawsawi, all of whom have been directly linked to the attacks of September 11, 2001, from prosecution under military commission tribunal, to be instead tried in Civilian Federal District Court in Manhattan.²³⁸

In making his announcement the Attorney General said:

"For the past several months, prosecutors at the Department of Justice have been working diligently with prosecutors from the Pentagon's Office of Military Commissions to review the case of each detainee at Guantanamo who has been referred for prosecution. Over the past few weeks, I have personally reviewed these cases, and in consultation with the Secretary of Defense, have made determinations about the prosecution of ten detainees now held at Guantanamo, including those charged in the 9/11 plot and the alleged mastermind of the Cole bombing.

Today, I am announcing that the Department of Justice will pursue prosecution in federal court of the five individuals accused of conspiring to commit the 9/11 attacks. ...

The 9/11 cases that will be pursued in federal court have been jointly assigned to prosecutors from the Southern District of New York and the Eastern District of Virginia and will be brought in Manhattan in the Southern District of New York. After eight years of delay, those allegedly responsible for the attacks of September the 11th will finally face justice. They will be brought to New York to answer for their alleged crimes in a courthouse just blocks from where the twin towers once stood. I am confident in the ability of our courts to provide these defendants a fair trial, just as they have for over 200 years. The alleged 9/11 conspirators will stand trial in our justice system before an impartial jury under long-established rules and procedures.

I also want to assure the American people that we will prosecute these cases vigorously, and we will pursue the maximum punishment available. These were extraordinary crimes and so we will seek maximum penalties. Federal rules allow us to seek the death penalty for capital offenses, and while we will review the evidence and circumstances following established protocols, I fully expect to direct prosecutors to seek the death penalty against each of the alleged 9/11 conspirators."

This change in policy immediately came under assault from all directions. New York's Democratic Governor Patterson, New York's Democratic Senator Schumer, Former Mayor Guiliani, Current Mayor Bloomberg, and the Democratically Controlled New York State Senate have all gone on record opposing the idea of a civilian Federal Criminal Court Trial of these 9/11 terrorists in New York City. Still, as recently as April 14, 2010, speaking for the Obama administration, Attorney General Holder insists that such trials in New York are still under consideration, and may well be held at the Federal Courthouse in lower Manhattan.²³⁹

Part Five Conclusion

The Bush administration's commitment to fight terrorism as a concept of total war, was a difficult but effective strategy for the self defense and protection of the American people. As can be seen from the foregoing, terrorism is still an on going, dangerous threat, especially in New York. With groups such as Al Qaeda, the poster child of radical Islam, seeking ever more extreme measures to heighten casualties, and with nations like Pakistan already possessing nuclear weapons, and countries like Iran racing to achieve them, the risk to our nation, and its people is real and growing.

President Bush's dedication to a total war strategy, using just war military operations, expanded and improved intelligence, the development of defensive homeland security, enhanced law enforcement with improved communications, and a program of bringing justice to terrorists through a program of detention, interrogation and prosecution, proved highly effective and successful.

Since September 11, 2001 to the end of President Bush's administration there was not one single terrorist attack successfully executed against our nation. If someone had asked if such would have been possible immediately after th 9/11 attacks no one would have believed it. Indeed this strategy worked so very well, that many people in our nation felt so safe, and forgot about the horrors of September 11th so much, that they began to question why we should even bother to worry about terrorism at all. When citizens like Michael Ratner feel so free and so safe, that they can actually build their career on litigating for the rights of the terrorists, it is apparent that the strategy of total war on terrorism worked. For there was a threat and the threat continues. No political leader is perfect, but President Bush's total war terrorism strategy kept America safe, and kept us free.

But like many victims of their own success, the Bush policies of public protection now appear to be being cast aside as unnecessary and an archaic relic of the distant past. Such is a very treacherous move. In a dangerous world, with very dangerous people with extreme ideology, to let you guard down for hope of a better future is both unrealistic and unsafe.

The well intentioned actions of the Obama administration, hoping for an end of the natural fatigue that nearly a decade on a war footing has caused, will not serve our nation well, but rather place it at risk.

Scraping the detention center at Guantanamo Bay will place committed terrorists on our soil with the proximate ability to hurt our nation and its institutions, or leave them free and released to return and complete their acts of terror.

Ending the enhanced interrogation program developed by the Central Intelligence Agency, will limit our access to the actionable intelligence our nation needs to learn about and prevent the next terrorist attack, without improving the human rights of the terrorist in the slightest.

All of these measures lessen the very valuable deterrence aspect of the policy which the former War on Terror produced.

But the worst possible pre 9/11 strategy that President Obama could deploy, would be to follow through on his administration's idea to switch the September 11th terrorists from Military Commission Tribunals to Civilian Federal Criminal Courts and try them in New York.

For this ill advised decision, announced by Attorney General Eric Holder last November, represents an enormous policy change, designed to appease the far left wing, protect terrorists, and raise the President's stature in the world at the expense of our homeland security and the concerns of families who have lost everything on 9/11.

From a legal perspective - the president's decision is a colossal blunder which breaks with over two centuries of legal, public safety and military precedent. Giving foreign, enemy combatants the same constitutional rights as United States citizens is not only an insult to all Americans, but it also sets a deadly precedent for future terrorist prosecutions, and will seriously compromise our intelligence gathering methods and tactics.

By providing terrorists Article 17 Geneva Convention equivalence, a policy advanced by Yassar Araft and the former USSR, and rejected by President Ronald Reagan to the praise of the New York Times Editorial Board, places terrorists on an equal legal footing with Prisoners of War, which they are not. Prisoners of war do not target civilians, or use them as a human shield. POW's fight for their nation, not a warped submit, covert or die ideology. They are not a threat to anyone but other soldiers, terrorists are.

In the future, captured terrorists, empowered by the 9/11 trials, would demand to be tried in civilian court just like Khalid Sheikh Mohammad, the very mastermind of the September 11th attacks, and the man that brutally cut off the head of reporter David Pearl on Television. There is no going back once we open the Pandora's box of a civilian trial.

Since the founding of our Nation, the United States has recognized that foreign enemy combatant terrorists who commit provable war crimes must be tried by military commission tribunals. For numerous reasons, such remains the only appropriate venue to bring these terrorists to justice.

It is a shame that President Obama lacks the courage of President Franklin D. Roosevelt, who in the 1942 Quirin case approved a military commission tribunal for saboteur terrorists who came ashore on Long Island from a German U-Boat with a mission to commit acts of terrorism against civilian targets (including blowing up the New York icon of Macy's Department Store and murdering the men, women and children shopping inside).

FDR recognized that to try these non uniformed foreign enemy combatants in a civilian federal criminal court, would not only prevent the implementation of justice, and compromise intelligence assets and methods, but would also provide a public platform for the encouragement and recruiting of additional similar attacks. Roosevelt's brave decision, to instead try these foreign enemy combatant terrorists by a military commission tribunal, where justice could be obtained while still giving due processes and a fair hearing for the accused, caused Hitler to be deterred from ever sending such terrorists to our shores again.

In reviewing Roosevelt's decision, the United States Supreme Court, in Ex Parte Quirin, recognized that both the president, and the department of justice, have an obligation to protect a nation at risk, from those who wish to perpetrate acts of terrorism against civilian populations. That fact is as true today as it was in 1942.

That is why Congress in 2006, enacted a federal statute which codified the principles of the Quirin decision and expressly authorizes the president and department of justice to try foreign enemy combatants before military commission tribunals, instead of in the federal civilian courts.

This federal law (known as the Military Commission Act of 2006) established procedures to strengthen the military justice system, expressly acknowledging certain defendant's rights (including a right to counsel, a right to present a defense, a right to call and cross examine witnesses, a right to offer exculpatory evidence, and a right against double jeopardy). An amendment to this act passed in 2009 expands defendant protections even more (limiting introduction of hearsay evidence and extending provisions currently available for court martials to these proceedings). This federal statute makes these military commission tribunals an even more appropriate venue to try these hardened terrorists, so as to securely prosecute them in a forum which will guarantee justice without danger, risk or over burdensome cost to the American public.

The Obama administration's present misplaced disregard of past presidential decisions which effectively protected the American people, and his dismissal of the sound reasoning behind trying hardened terrorists in the military commission system, represents a naivety or a misplaced political ideology which places the people of New York and America at serious risk.

The consequences of his policy to try these hardened foreign enemy combatant terrorist assumes that all terrorists who commit atrocities on American soil are nothing but common criminals. The 9/11 terrorists are not ordinary thieves who knocked off the corner liquor store.

The attack on September 11, 2001 was an act of war, committed with military tactics, by foreign enemy combatant terrorists, designed to inflict devastating casualties, and caused unprecedented harm to the American people, economy and government. Planned and executed by some of history's most hardened and ferocious terrorists, it was not just a criminal justice offense.

Those who wish to treat it as such, learned nothing from the deaths of 3000 of our neighbors, and threaten us by sending the message to our enemies that we are not serious with respect to either their actions or their intent. Remembering who these foreign enemy combatant terrorists that the Obama administration wishes to give the same rights to as United States Citizens accused of stealing a postal truck, might help to clarify how ill advised his policy really is.

Imagine how a trial in federal district court, under civilian rules, would play out for these individuals. Given constitutional rights, the terrorists and their defense lawyers would be able to poll the jury. It is hard to estimate the level of jury intimidation that would take place when face to face with a defendant who has proven he has no problem beheading an American on television.

Evidentiary protections afforded in civilian court would allow the terrorists to confront their accusers, exposing U. S. intelligence personnel, methods and sources to the world and other terrorists. This would cripple our ability to gather intelligence against terrorists in the future.

Given the elevated standards of evidence in civilian Federal Criminal Court, any evidence obtained through enhanced interrogation methods, or obtained without a Miranda warning (which next to none of these unlawful foreign enemy combatants were given) all such evidence, and all evidence obtained from such evidence, would be thrown out as inadmissible - making any conviction nearly impossible.

Moreover, the President and Attorney General Eric Holder have already said that the terrorists would not be freed if a conviction could not be obtained. Such makes a mockery out of our court system, and begs the question as to why our nation should conduct a show trial at great cost and risk to New Yorkers and all Americans.

And finally, any trial will surely provide a world forum for the views of terrorists and their warped ideology. It will also provide a magnet to attack further acts of terror to occur on the world stage as such forum is displayed. Hasn't America in general and New York in specific suffered enough, to have to be placed at such great physical risk and emotional torment.

A trial before a Military Commission Tribunal would be fair, safe and without any of the risks associated above. There is a reason they have been constituted under American Law in the past. They need to be again. They were successful.

If we go down this road and bang the gavel to open this trial, we open Pandora's box, which will never be closed. We need to think better of it.

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