

Drexel University Thomas R. Kline School of Law

From the Selected Works of Daniel M. Filler

August, 1996

Values We Can Afford: Protecting Constitutional Rights in An Age of Terrorism

Daniel M Filler



Available at: https://works.bepress.com/daniel_filler/8/

VALUES WE CAN AFFORD—PROTECTING
CONSTITUTIONAL RIGHTS IN AN AGE OF TERRORISM:
A RESPONSE TO CRONA AND RICHARDSON

DANIEL M. FILLER*

Conjuring images of invisible armies, Spencer Crona and Neal Richardson tap a rich vein of American anxiety. The fear of foreign infiltration and attack is hardly new to the United States. From Joseph McCarthy's Senate investigation of Communism to the "unsolved" assassination of John F. Kennedy, foreign conspiracy theories surface again and again in the national dialogue. It is unsurprising, then, that Americans would be particularly concerned about the growing threat of international terrorism on American soil. Mining these fears, the authors offer the seemingly reasonable proposal that these suspects be tried before military tribunals.¹ We are at war with terrorism, the authors argue, so Congress might as well issue a formal declaration of war and treat terrorists as war criminals. On closer inspection, however, it becomes evident that Crona and Richardson are primarily in favor of declaring war because this will allow terrorists to be tried without the full panoply of

* Assistant public defender, Defender Association of Philadelphia. A.B. Brown University, 1984, J.D. New York University, 1990. All ideas expressed are the author's and do not reflect the views of the Defender Association. The author wishes to thank Jennifer Brown, Elizabeth McCormick, and Philip Simon for their comments on earlier drafts of this essay and Caroline Goldner for her crash course in military justice.

1. In this essay, I will use the terms military tribunal and military commission interchangeably.

Other proposed solutions to the problem of terrorism include creating an international criminal court for terrorists, see Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73 (1995), and reforming the political asylum process within the United States, see David C. Marshall, Comment, *Political Asylum: Time for a Change—The Potential Effectiveness of Reforms to Prevent Terrorist Attacks in America*, 99 DICK. L. REV. 1017 (1995).

Constitutional protections. Because the Constitution requires that all defendants tried in civilian court be provided grand juries, juries, and due process rights, the authors see military tribunals as an opportunity to limit these protections legally.

Rather than addressing the Constitutionality of their proposed declaration of partial war against these terrorists,² this Essay will focus on the arguments Crona and Richardson offer to Congress in support of their proposal.³ These arguments are, at a minimum, unconvincing and in some ways deeply troubling. First, this Essay will classify the authors' arguments into two groups: practical (or utilitarian) claims and moral (or normative) claims. Second, this Essay will discuss why military commissions offer no panacea: they do not guarantee substantial practical benefits in preventing terrorism, vis-à-vis a civilian justice system. Third, this Essay will explain why the assumption underlying Crona's and Richardson's moral claim is particularly disturbing. Finally, this Essay will suggest that if their arguments are accepted, there will be few, if any, limits on Congressional efforts to circumvent the Bill of Rights through tactical use of the war powers clause. If there is a need to change the rules for prosecuting terrorists, these changes should be made in a straightforward way—through Constitutional amendment—rather than by declaring a specious war.

2. In this brief response, I will not address Crona's and Richardson's controversial claim that Congress may constitutionally declare war on terrorism. Crona and Richardson can cite no precedent indicating that Congress may legally declare a "partial war" against a class of crimes, or a class of individuals untethered to a particular nation. Nor is there precedent that this oddly defined partial war on terrorism, or terrorists, would empower the military to try terrorism suspects before military commissions.

3. If enacted, the authors' proposal is likely to face a stiff challenge in the courts. However, because the Supreme Court is loathe to second-guess Congress with respect to issues of "war", the proposal might survive this judicial attack. Crona and Richardson make it clear, though, that they believe Congress should adopt use of these commissions not because the nation is at war, within the traditional meaning of the word, but as a potentially Constitutional method of funneling terrorism trials away from defendant-friendly juries, while at the same time denying these suspects other Constitutional protections.

I. THE NATURE OF CRONA'S AND RICHARDSON'S ARGUMENT

At its core, Crona's and Richardson's argument is best summarized as "we can no longer afford to prosecute those charged with domestic terrorism in civilian courts."⁴ This claim, however, is susceptible to several interpretations. Crona and Richardson use the word "afford" in the classic economic sense. The authors say we cannot afford to spend the money it takes to prosecute these matters in civilian court. They propose we save money by prosecuting terrorism suspects before military tribunals. In addition to the economic argument, the authors also suggest that we cannot afford civilian prosecutions because they are ineffective at deterring future terrorism. This argument has several components. First, the authors say that civilian courts do not prosecute terrorism suspects fast enough to create a realistic fear of swift justice. Second, they argue that the current civilian justice system does not insure a high enough rate of conviction for these suspects; civilian courts, in this argument, lean too heavily in favor of acquittal. Finally, they argue that once convicted, these suspects do not face sufficiently certain execution.

Both the economic and the deterrence arguments can be seen as utilitarian claims. Both rely on a fundamental belief that the civilian system cannot achieve the essential end of swift, efficient, certain, and tough justice. These claims presumably would be refuted if one could show either that the civilian system could be improved, or that military commissions would themselves offer little improvement over the status quo.

The authors offer a third moral argument, however, somewhat different than these two utilitarian concerns. Crona and Richardson claim that terrorism suspects are not worthy of the expense and protections that attend civilian criminal prosecutions. Fundamentally, this argument is not that we *cannot* af-

4. Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349 (1996). The authors offer a scattershot approach to justifying their proposal. They are not always precise about what problems infect the present regime and how use of military commissions will ameliorate these problems. This Essay will attempt to crystallize their analysis and, at times, imagine how the authors would contend that military commissions will solve the problems they identify.

ford to prosecute these suspects civilly; rather, the claim is that we *should* not afford these suspects the benefits of a civilian trial: grand juries, due process rights, a jury, and full confrontation guarantees. Unlike the utilitarian arguments in favor of change, this third claim is purely normative and may be restated as follows: those charged with terrorism are such bad people that, as a society, we should not give them the right to a civilian trial. Thus, even if one could create a civilian system that addressed all of Crona and Richardson's practical concerns, the authors would nonetheless deny these suspects the full panoply of criminal procedural rights.

How does one respond to these claims? With respect to the practical complaints, I will suggest that Crona and Richardson fail to establish that the use of military commissions will improve matters much. With respect to their moral objections, the troubling assumption that underlies their argument suggests that Crona's and Richardson's true purpose, far from being practical, is antithetical to central values in American justice.

II. WHY CRONA AND RICHARDSON'S ARGUMENTS FAIL

A. *Cash Savings Would Not Be Appreciable*

The authors' first claim is the most basic: civilian trials cost too much. They suggest that because civilian trials take a long time, and require accumulation of substantial evidence, they are unjustifiably expensive. Presumably, the small number of factfinders on a military commission panel would process evidence more quickly. In addition, because these panels are unlikely to be swayed by irrational arguments, and will be less skeptical of prosecution evidence, the government will perhaps be able to truncate its investigation somewhat. Finally, Crona and Richardson suggest that the truncated appeals process available after a military commission trial will be quicker and cheaper than a civilian appeal.

These claims look good, on paper. Instinctively, one assumes that a panel of three or five smartly dressed military men and women would make short work of even the most sophisticated prosecution case. Yet on further inspection, Crona and Richardson's argument rests on a weak foundation.

What are the true costs associated with prosecuting terrorists, or anybody else for that matter? The first and biggest cost appears to be investigatory expenses.⁵ As Crona and Richardson point out, investigations of these incidents take months and investigators must sometimes be dispatched long distances (particularly in cases involving foreign terrorists) to unearth details of the crime. Vast quantities of physical evidence must be gathered and analyzed. Put simply, the crime must be solved. Yet it seems unlikely that these costs would be substantially reduced if jurisdiction was shifted to military commissions.

Solving a complicated crime takes time, effort, and money. No matter who will hear the case, the prosecution must first find suspects. Prosecuting attorneys then must meet their own ethical obligations, assuring themselves that they have at least probable cause to believe that the suspects actually committed the crime.⁶ Before proceeding to trial, the prosecution will want to garner all available evidence to offer the factfinder.⁷ And if the military factfinder is more prosecution oriented than a civilian factfinder, this will only spur the defense to expend more money and time on its own investigation.⁸

5. It is difficult to predict the investigation costs for any future terrorist incident, but the Oklahoma City bombing investigation has cost in excess of \$11.5 million, and the World Trade Center bombing investigation cost slightly less than that. See Charles Zehren, *FBI's \$11.5M on Whitewater*, *NEWSDAY*, Apr. 24, 1996, at A35 (indicating that investigation of the Oklahoma City bombing cost more, and the World Trade Center bombing slightly less, than the \$11.5 million spent on Whitewater investigation.)

6. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980).

7. It is highly unlikely that a prosecutor would intentionally cut short an investigation likely to yield useful evidence at trial. As a matter of professional duty, a prosecutor will want to garner all the available evidence to assure a positive outcome at trial. But a prosecutor also faces personal pressure to marshal all available evidence. If the prosecutor shuts down the investigation early, counting on a sympathetic factfinder, and then loses, he or she will be subject to significant second guessing by both supervisors and the public. This is particularly true in a high profile case, a career maker, where the prosecutor will want to insure that nobody can come back later, after an acquittal, and ask "why was this stone left unturned?"

8. Shifting the bias of a factfinder towards the prosecution may alter the outcome of cases, over time, but it is unlikely to reduce the overall costs involved in investigation. If the burden of proof is shifted away from the prosecution, to the defense, the defense is likely to step up its own investigation. To some extent, pre-trial investigation is a zero sum process. If, as in the present system, the burden of proof lies solely on the prosecution, the defense may theoretically spend nothing

The trial itself is likely to cost about the same in either venue. Crona and Richardson suggest that bench trials are faster than jury trials, and they may be correct, but they fail to recognize that military tribunals more closely resemble jury trials.⁹ Although minimal jury fees will be saved by eliminating civilian juries,¹⁰ the members of the military panel will have to be paid their full military stipends. Indeed salaries, maintenance, rent, and all the other costs involved in conducting a trial will not disappear. Even though military tribunals are subject to more limited appeals,¹¹ the only significant savings which will result from these limits is a reduction in attorney office time. It is hard to imagine changing the entire system of justice to save a few hundred billable hours.

In sum, Crona's and Richardson's claims of major cash savings are somewhat difficult to accept. Complex prosecutions cost a lot of money, wherever they occur. And given the relative infrequency of terrorism trials, the overall savings of their proposal will almost certainly be minimal.

B. Military Commissions Won't Offer Substantially Improved Deterrence

Many of Crona's and Richardson's arguments in favor of military tribunals can be subsumed under the title "deterrence." They argue that justice, in a civilian system, is not swift, sure or severe. Crona and Richardson believe that if a potential terrorist sees that he will face certain, swift execution, he will be less likely to break the law and commit his heinous crime.

and still win. If the burden was reversed, of course, the prosecution could theoretically spend nothing and win; the defense would effectively bear the burden of investigation. Reality is somewhere in between. Both parties typically conduct investigation under the current formulation, but except in the rare case, the prosecution will conduct the bulk of the investigation because it bears the legal burden. If that burden were to shift, and the defense were forced to spend more time and money investigating the crime, expenses would simply shift to the defense. They would not disappear.

9. See *infra* notes 17-20 and accompanying text.

10. Federal jurors are paid forty dollars per day. 18 U.S.C. 1871 (1994). The average juror in state court receives twenty dollars per day. Claire Cooper, *Jurors' Verdict: Make Reforms*, SACRAMENTO BEE, Jan. 29, 1996, at A1.

11. Habeas corpus attacks on Federal death sentences are already limited by statute. See *infra* note 28.

As a primary matter, capital punishment has not been proven an effective deterrent of crime, generally.¹² There are several reasons to think that young, blooming terrorists would be particularly unlikely to be deterred by any form of criminal prosecution. First, terrorists are typically engaged in community—rather than self—improvement.¹³ That is, if a thief is put in jail for thirty years, he will never enjoy his riches. But if a terrorist delivers a bomb which agitates an existing regime, his constituency has been well served (and his own name memorialized).¹⁴ His work therefore may be successful despite his subsequent arrest. Second, to the extent that many terrorists are simply foot soldiers of these insurgent militias, they are under the same pressure to kill (regardless of the personal consequence) as any soldier would be in time of war. Although many Americans seek to avoid active duty during time of war, America has consistently managed to find thousands, even millions, of individuals willing to fight wars despite the deterring knowledge that they may die in combat. For members of terrorist groups, conducting a terrorist attack—with all its inherent risks—remains less dangerous disobeying the orders of a superior within the organization.¹⁵ Finally, many terrorists working to promote a religious agenda may believe that if they do die as a result of their acts, it will only make them more ho-

12. The literature on deterrence indicates that, with respect to most crime, the death penalty does not have a substantial deterrent effect. See RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 217-245 (1991); Johnathan S. Abernathy, Note, *The Methodology of Death: Reexamining the Deterrence Rationale*, 27 COLUM. HUM. RTS. L. REV. 379, 380 n.4 (1996).

13. See Mangus Ranstorp, *Terrorism in the Name of Religion*, 50 J. INT'L AFFAIRS 41, 47 (1996) ("[i]n its most violent form, [Islamic terrorism] is justified as a means of last resort to prevent the extinction of the distinctive identity of the Islamic community against the forces of secularism and modernism.")

14. In the West Bank, for instance, Hamas terrorists were lionized as martyrs with songs and poems. "Videos of the exploits and last testaments of the 'martyrs' circulate like Hollywood movies. Street vendors sell portraits of the young men, and parents name their children after the latest to die." Michael Parks, *Ready to Kill, Ready to Die, Hamas Zealots Thwart Peace*, LOS ANGELES TIMES, Oct. 25, 1994, at A1.

15. See Marshall, *supra* note 1, at 1019 n.11 (members of terrorist groups like IRA who go against their organization may face kneecapping or execution); see also Ranstorp, *supra* note 13, at 51-52 (many religious groups require strict adherence to rules of the collective and any deviation or surrender of faith can be punished by death).

ly.¹⁶ Thus, the threat of conviction and execution is unlikely to deter terrorists working to advance both their religious beliefs and their own personal chances for a good and fruitful afterlife. A rational deterrence theory cannot account for irrational actors; it is hard to calculate the "value" of martyrdom to an individual terrorist.

Even assuming, for the sake of argument, that the magic troika—speed, certainty, and severity—do have a deterrent effect, it is not at all clear that using military commissions will provide substantial improvements in these areas over what already exists, or could exist, in civilian courts. With respect to swiftness, for instance, there is little reason to believe that military tribunals will work all that much faster than civilian courts. For reasons previously discussed, extensive investigations will still be required for trials before military panels. Nor are trials themselves likely to proceed from beginning to end more quickly before a military commission. Crona and Richardson assume that, because bench trials run more quickly than jury trials, military commissions will operate at a similarly brisk pace.¹⁷ The authors fail to understand, however, that military commissions are more similar to jury trials than bench trials in terms of actual procedure. The Manual for Courts-Martial¹⁸ provides that trials before military commissions are to be heard by either three or five members.¹⁹ Lawyers for both parties

16. For some Muslims, dying as a result of acts of terrorism is seen as a "beginning, a passage from a transient and grim existence to the pleasures of eternal life." Joel Greenberg, *Palestinian "Martyrs: Defiant and So Willing"*, NEW YORK TIMES, Jan. 25, 1995, at A8.

17. Crona and Richardson cite *In re Yamashita*, 327 U.S. 1 (1946), as evidence that bench trials are quicker than jury trials, noting that the case involved 286 witnesses and lasted five weeks. Crona & Richardson, *supra* note 4, at 369. The World Trade Center case, on the other hand, lasted five months. It goes without saying that one cannot compare the speed of trials simply by counting raw numbers of witnesses. In addition, the trial procedure used in *Yamashita* may not reflect those procedures which would be employed today.

18. UNITED STATES, MANUAL FOR COURTS-MARTIAL (1996).

19. R.C.M. 501. The procedural rules for military commissions are the same as those for court martials. R.C.M. Preamble 2(b)(2). Theoretically, Congress could preclude use of the Rules of Court Martial and the Uniform Code of Military Justice in military commissions. Such a change would, however, further limit the integrity of the factfinding process. Indeed, to the extent that Congress eliminates use of military "jurors," voir dire, for cause and peremptory challenges, and other procedural protections, the commissions are far less likely to provide the fair trials

select the factfinding panel and may utilize both for cause and peremptory challenges.²⁰ During the course of trial, legal arguments are made out of the hearing of commission members,²¹ requiring sidebar conferences.

Two other sources of delay in the civilian system are docket overcrowding and the filing of appeals. With respect to docket problems, Congress adopted the Speedy Trial Act²² to address these delays. If Crona and Richardson believe this legislation is inadequate, Congress could work harder to address delays by, for instance, appointing more trial judges. Similarly, if Congress wants to expedite appeals in terrorism cases, it could easily take action short of declaring war. In addition to the appointment of more judges, Congress might consider adopting a special accelerated appeal process in certain criminal cases. To the extent that the authors are concerned about delays attendant to death sentence appeals, these issues were addressed by Congress in 1996.²³ Again, if the current law remains inadequate, Congress can take legislative action short of truncating defendants' trial rights through use of the war power.

Crona and Richardson also advocate military commissions because they believe that justice will be more "sure." The authors contend that civilian juries err too far on the side of acquittal and that a greater percentage of terrorism defendants ought to be convicted.²⁴ The authors do not suggest that military commissions adopt any lower standard of proof than the "beyond a reasonable doubt" standard already in place.²⁵ Instead, their article suggests that military panels will be less susceptible to spurious defense theories. In addition, the au-

Crona and Richardson insist will be available.

20. R.C.M. 912.

21. 10 U.S.C. § 839 (1994).

22. 18 U.S.C. § 3161-74 (1994).

23. There is a one year time limit for habeas corpus challenges to federal convictions. 28 U.S.C.A. § 2255 (West 1985 & Supp. 1997). While there has been much made about delays relating to habeas corpus attacks on death sentences, these complaints relate almost exclusively to sentences imposed by state courts.

24. Crona & Richardson, *supra* note 4, at 379-80.

25. Since its inception, the American constitutional system has functioned on the premise that it is better to have a guilty man acquitted than an innocent man convicted. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). The standard of proof in civilian trials is, short of a Constitutional amendment, a non-negotiable consideration. *Id.* at 361.

thors argue that otherwise inadmissible hearsay can be used to assure conviction before military tribunals.²⁶

Crona and Richardson make conflicting claims about whether military panels will actually convict more defendants. On the one hand, they see these panels as being more skeptical of defense theories. On the other hand, the authors suggest that these panels may be immune to the pressure civilian jurors feel to convict. Nobody can successfully predict the result, in terms of verdict, of this shift in factfinders. It is fair to say, however, that thus far federal prosecutors have a 100% conviction rate on domestic terrorism cases.²⁷ Crona and Richardson do not explain how military commissions will improve on that level of success.

Perhaps the most troubling component of the authors' utilitarian argument is that military commissions, immune to basic human empathy, will be more likely to order execution than the bleeding-heart jurors who dot the American landscape. Just as with verdicts, it is impossible to predict the number of death sentences that a military tribunal would hand down vis-à-vis a federal jury. What is clear, however, is that in 1997, a person who commits terrorism is subject to the federal death penalty.²⁸ Creation of a death penalty is not enough for these authors. Fundamentally, the article seems to advocate revising death penalty law while throwing out certain protections, such as a defendant's right to present mitigating evidence.²⁹ With this argument, the authors' intentions become most evident. They do not believe we need military commissions because we are in a state of war; they believe we should declare war as a pretext for authorizing military commissions. They want military commissions used because civilian jurors are (em)pathetic souls, incapable of doling out the only penalty Crona and Rich-

26. Crona & Richardson, *supra* note 4, at 382-83.

27. The two significant domestic terrorism cases which reached trial—the World Trade Center bombing and the foiled New York tunnel bombings—both resulted in convictions.

28. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., 22 U.S.C., 28 U.S.C., 40 U.S.C., & 42 U.S.C.).

29. A defendant has a constitutional right, at a civilian trial, to present mitigating evidence at a capital sentencing. See *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

ardson believe is appropriate. If you cannot change the Constitution, the authors imply, find a way to avoid it.

C. The Moral Argument

If Crona and Richardson offer dubious claims about why we can no longer afford the luxury of a civilian justice system, their final argument is far darker. In essence, the authors suggest that those charged with domestic terrorism should not receive the benefit of criminal procedural rights because they are unworthy of these protections.

Without question, terrorism is a heinous crime. Few would disagree that, if convicted, terrorists should receive severe punishment. But Crona and Richardson take this argument one unusual step further. Their article suggests that those *charged* with terrorism have committed a heinous crime. Thus, those charged with terrorism ought not have the benefits of a full panoply of Constitutional rights.

With this argument, the authors shred the presumption of innocence, announcing that this most fundamental American precept is just one more right we cannot afford. Indeed, a persistent theme throughout their article is an unstated presumption that most, if not all, people charged with terrorism are in fact guilty. But this premise is an anathema to American history and American criminal law.

In fact, implicit in this contention is that because suspects are guilty, we can begin punishing them right away—even before conviction—by first diminishing their trial rights. Seen as a ruse to shift the presumption from innocence to guilt, this argument in favor military commissions is cynical indeed. Of course, it is more than cynical since the cost of false conviction, should the authors presuppositions about terrorism suspects prove wrong, would be death.

III. THE WRONG WAY AND THE RIGHT WAY

It may be true, as a matter of fact, that the Supreme Court would allow the Congress to declare war against all people (or at least all foreigners) who perpetrate terrorism against the United States. But if this approach is approved, where does this extension of military power—and consequential diminution of

individual freedom—end? Crona and Richardson offer an argument rooted in semantic, rather than substantive, distinctions. The authors argue that the battle against terrorism is a “war.”³⁰ They quote eloquent prosecutors as evidence of the existence of this war.³¹ But a war on terrorism is not the only war in town. Other examples of undeclared wars include the war on drugs,³² the war on graffiti,³³ the war on rape,³⁴ the war on prostitution,³⁵ and the war on burglary.³⁶ If mere invocation of the word “war” is sufficient to shift jurisdiction to military courts and to strip individuals of the right to full due process, grand jury, and a jury trial, then there will be more and more incentive to characterize all crime as part of a “war.” By this method, it will be possible for a bare majority of Congress to bypass these essential Constitutional guarantees. Surely, this is not the purpose of the war power clause. If the concept of “war” is to have any intrinsic meaning, other than as a designation authorizing a Constitutional bypass, we must use care to limit the term “war” to those situations that history and experience suggest is, in fact, war. Because we have a domestic problem, does not mean we have a war. Congress should be very reticent to declare war simply to assist in criminal prosecutions.

There is, of course, an alternative—one that the article pointedly fails to suggest. Congress and the states may vote to amend the Constitution. If Americans truly believe that we are no longer served by grand juries, jury trials, due process, and a host of other Constitutional protections that have developed over the last two hundred years, then the Constitution is open to change. Change is not easy to effect, of course, and the au-

30. Crona & Richardson, *supra* note 4, at 356-60.

31. *Id.* at 351.

32. *See, e.g.*, Dick Feagler, *New Drug War Sounds A Lot Like Old Drug Wars*, THE PLAIN DEALER, May 1, 1996, at 2A.

33. *See, e.g.*, Christopher McDougall, *Phila. Graffiti War Spreading*, PITT. POST-GAZETTE, Aug. 25, 1996, at B7.

34. *See, e.g.*, George James, *Lawyers Say Man's Guilty Verdict in Marital Rape Case is Rare*, DALLAS MORNING NEWS, Dec. 10, 1995, at 13A.

35. *See, e.g.*, *Southeast Anti-Prostitution Measure Considered*, L.A. TIMES, Nov. 20, 1996, at B5.

36. *See, e.g.*, Richard Cowen, *War Declared on Burglary*, THE RECORD, N. N.J., Feb. 19, 1994, at A03.

thors fear that most Americans are not ready to swallow their proposed medicine. Those bleeding-heart jurors are, after all, voters as well. If these citizens cannot, or will not, convict or execute evil terrorists, how can we expect them to tighten Constitutional rights in ways that might affect these same citizens personally? We cannot, of course, and there is the rub. Crona and Richardson share a new vision of America, one with fast, rough justice. But this vision is not the American Constitutional vision. As Justice Murphy explained in his *Duncan v. Kahanamoku*³⁷ concurrence:

From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised. The right to jury trial and the other constitutional rights of an accused individual are too fundamental to be sacrificed merely through a reasonable fear of military assault. . . .

It does take time to secure a grand jury indictment, to allow the accused to procure and confer with counsel, to permit the preparation of a defense, to form a petit jury, to respect the elementary rules of procedure and evidence and to judge guilt or innocence according to accepted rules of law. But experience has demonstrated that such time is well spent. It is the only method we have of insuring the protection of constitutional rights and of guarding against oppression.³⁸

In 1946, Justice Murphy contemplated a threat not dissimilar to that described by Crona and Richardson. Now, with "some other type of warfare"³⁹ upon us, Justice Murphy's arguments resonate as loud as ever.

37. 327 U.S. 304 (1946).

38. *Id.* at 330-31 (Murphy, J., concurring).

39. *Id.* at 330.

