Reflections on Russia's Revival of Trial by Jury: History Demands That We Ask Difficult Questions Regarding Terror Trials, Procedures to Combat Terrorism, and Our Federal Sentencing Regime

Hon. John C. Coughenour*

"It means, first of all, that we have made a big step in placing the interests of the individual higher than the interests of the state."

Twentieth-century politics irrevocably joined the United States and Russia as two sides of the same coin; the history and culture of each became defined, in many respects, in terms of the other. In the mid-1980s, I attended a first-of-its-kind conference of twenty American jurists and twenty Soviet jurists at Dartmouth College to explore this duality in the context of our respective judicial systems. For me, the most memorable portion of the conference was a mock jury trial conducted for the Soviet visitors. My Cold War perspective and ignorance of Russian juridical history led me to expect the Soviet jurists to react to this program with defensive hostility. I was wrong. Their hunger for new ideas was palpable; the jury trial proved to be the highlight of the conference. Less than a decade later, following the collapse of the Soviet Union, that hunger became the genesis for Russia's most comprehensive criminal justice reforms since Tsar Alexander II's celebrated 1864 Reforms. These new reforms include the revival of the right to trial by jury for serious criminal offenses.

* Chief United States District Judge, Western District of Washington. Over the past twenty years, the author has traveled extensively in Russia and the former Soviet Union and participated in numerous exchange programs sponsored by the American Bar Association's Litigation Section, Central and East European Law Initiative, and the U.S. State Department. The author thanks his law clerk, Cory J. Albright, for assistance with this Article.

1. Dmitri N. Kozak, Deputy Chief of Staff to President Vladimir Putin, commenting on Russia's reinstitution of jury trials for serious criminal offenses. Steven Lee Myers, Russia Glances to the West for Its New Legal Code, N.Y. TIMES, July 1, 2002, at A1.

2. Tom Gonser, former executive director of the American Bar Association, and Weyman Lundquist, former chair of the American Bar Association Section of Litigation and Soviet Dialogue Committee, were instrumental in garnering support for this American Bar Association/Association of Soviet Lawyers conference and similar subsequent exchanges.
Historians have aptly documented both Russia’s use of jury trials during what is known as the Golden Age of Russian Law—the period from Tsar Alexander II’s 1864 Reforms until the October 1917 Revolution—and the subsequent Soviet inquisitorial criminal justice system. Likewise, legal scholars have comprehensively analyzed Russia’s 1993 revival of jury trials and its other monumental criminal justice reforms. This Article employs those analyses as a mirror for reflections on current challenges facing the United States criminal justice system. Twenty years ago, I believed such challenges, which demand careful scrutiny of the rights of individuals and the interests of the state, were reserved for my Soviet peers. Times have changed. Specifically, this Article seeks to stimulate a historically grounded discussion by asking what Russia’s experience with jury trials, the development of alternative judicial rules and procedures for political crimes, and jury nullification may teach us about terror trials, procedures to combat terrorism, and our federal sentencing regime. By asking these questions, Russia’s experiences may offer the benefit of both hindsight and foresight.

This Article begins by discussing the nineteenth-century origins of trial by jury in Russia and the changes the system endured until the October 1917 Revolution, focusing particular attention on both the progressive exclusion of political crimes from the jurisdiction of the jury and use of alternative judicial procedures for such crimes. Next, the Article outlines the fundamental principles of the inquisitorial criminal justice system, which defined and dominated Soviet jurisprudence. Part I concludes by addressing Russia’s revival of trial by jury in 1993, the specific characteristics of its new jury system, the other monumental criminal justice reforms of the 1990s, and the struggles that Russia now faces with respect to the implementation of those reforms. After developing Russia’s juridical history as a historical lens, Part II uses this lens to focus reflections on terror trials, procedures to combat terrorism, and the federal sentencing regime in the United States.

---

3. I predominantly rely upon the definitive work, SAMUEL KUCHEROV, COURTS, LAWYERS AND TRIALS UNDER THE LAST THREE TSARS (F.A. Praeger 1953).


I. THE HISTORY OF TRIAL BY JURY IN RUSSIA

A. The Golden Age of Russian Law

An intellectual wave, premised on the rights of the individual, swept across Europe and into imperial Russia in the mid-nineteenth century.\(^6\) In 1861, less than ten years into his reign, Tsar Alexander II emancipated the serfs.\(^7\) Next, he tackled the judicial system. The Reforms of November 20, 1864 created an independent judiciary and professional bar, instituted public trials, and granted rights of appeal.\(^8\) However, the most radical reform provided the right to trial by jury with respect to all "crimes or misdemeanors for which the law prescribed punishment involving deprivation of, or restriction in, civil rights."\(^9\) For the first time, a panel of citizens could decide, according to their conscience, the guilt or innocence of the individual accused.\(^10\) The 1864 Reforms mandated twelve-person juries with two alternates; prospective jurors faced no literacy, education, or property requirements.\(^11\) As in France, juror unanimity was encouraged, but was not required.\(^12\) Instead, the jury determined guilt or innocence by simple majority.\(^13\) The 1864 Reforms' recognition of individual rights led them to be labeled "Russia's first constitutional charter."\(^14\)

Nevertheless, the 1864 Reforms faced fierce opposition. Opponents, including prominent lawyers and intellectuals, objected that the masses, including emancipated serfs, lacked morality, elementary education, or juridical sense.\(^15\) They warned that the public's resentment of law and authority would lead to rampant jury nullification.\(^16\) In response, reformers argued that jury service would educate the public,

---

6. EDWARD L. JOHNSON, AN INTRODUCTION TO THE SOVIET LEGAL SYSTEM 18, 24 (Methuen Press 1969). Considering Russia's long history of autocracy, the notion of individual rights was radical. KUCHEROV, supra note 3, at 53.
7. JOHNSON, supra note 6, at 17.
8. KUCHEROV, supra note 3, at 104–05; JOHNSON, supra note 6, at 18.
9. KUCHEROV, supra note 3, at 64; JOHNSON, supra note 6, at 24. Those without the right to trial by jury remained tried by courts with class representatives, or people's assessors. KUCHEROV, supra note 3, at 53–54; JOHNSON, supra note 6, at 18–19. Courts with class representatives included one judge, one member of the nobility class, one member of the bourgeoisie class, and one member of the peasant class who decided all questions of fact, law, and sentencing. KUCHEROV, supra note 3, at 18–19.
10. KUCHEROV, supra note 3, at 54.
11. Id. at 58–59.
12. Id. at 61–63.
13. Id. at 61–63. A jury divided six to six resulted in the defendant's acquittal. Id.
14. Id. at 302–07.
15. Id. at 54.
16. Id. at 56.
teach juridical sense, and foster respect for the law.\textsuperscript{17} Further, the reformers believed the jury system would inject a degree of popular compassion into a criminal justice system characterized by frequent whippings, banishment, and a highly restrictive doctrine of formal evidence.\textsuperscript{18} After thorough debate, the State Council agreed with the reformers. Interestingly, the Council concluded that a defendant's peers would better understand the relevant facts, customs, frames of mind, and morality than the judge, who was usually a member of a vastly disparate social class than the defendant.\textsuperscript{19}

Two additional provisions of Russia's jury system demand attention. First, despite opponents' distrust of the masses, juries had explicit authority to nullify the law. As in continental Europe, the jury could acquit the defendant of all crimes charged despite concluding that the defendant committed the acts alleged, and even when the defendant confessed to committing those acts.\textsuperscript{20} Thus, the jury's collective conscience always controlled.\textsuperscript{21} It is also relevant to note that jury nullification served as the only means available for public disapproval of Draconian mandatory sentencing guidelines, which the 1864 Reforms did not address.\textsuperscript{22} In fact, by 1887, approximately half of all acquittals stemmed from the jury's distinction between perpetration and guilt.\textsuperscript{23}

The second provision of the 1864 Reforms that demands attention is the exclusion of political crimes from jury consideration.\textsuperscript{24} That is, any crime that was allegedly motivated by political beliefs, that was a challenge to government authority, or that threatened the security of the state was excluded from the jurisdiction of the jury.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} at 54–56.
\item \textsuperscript{18} \textit{Id.} at 54–55. The doctrine of formal evidence is a mechanistic procedure for determining guilt based on a hierarchy of specific classes of evidence, without recourse to conscience. For example, if the defendant confesses to the crime, a doctrine of formal evidence might demand conviction regardless of whether the judge believes the confession was false or involuntary. For a colorful example of formal rules of evidence, see MICHEL FOUCAL'T, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 36–38 (Alan Sheridan trans., Vintage Books 1979).
\item \textsuperscript{19} KUCHEROV, supra note 3, at 55–56.
\item \textsuperscript{20} \textit{Id.} at 65. The Department of Cassation of the Senate, which operated as the supreme appellate body, issued a number of interesting opinions regarding jury nullification. See id. at 66.
\item \textsuperscript{21} Prior to 1864, the formal rules of evidence precluded this result. \textit{Id.} at 302–07.
\item \textsuperscript{22} \textit{Id.} at 70. These guidelines prescribed precise penalties for each category of crime and granted very limited discretion to judges to modify these penalties. Because Russia's executive and legislative powers remained autocratic, acquittal served as the only democratic means to correct these sentencing guidelines. For example, despite undisputed evidence that a stolen wallet contained 500 rubles, a jury might conclude that the wallet contained only 300 rubles, simply because it determined the 500-ruble penalty was unduly harsh.
\item \textsuperscript{23} \textit{Id.} at 66–67.
\item \textsuperscript{24} \textit{Id.} at 64.
\item \textsuperscript{25} JOHNSON, supra note 6, at 24.
\end{itemize}
Courts with class representatives tried all such cases, or such cases were supervised by a special government department.  

The significance of jury nullification and alternative judicial procedures for political crimes converged in the infamous Vera Zasulich case. While never criminally convicted, Ms. Zasulich had spent most of her young adult life imprisoned, banished, or otherwise persecuted on political grounds. After learning that the governor of St. Petersburg had severely whipped a political prisoner for failing to doff his cap, Ms. Zasulich became determined to avenge the injustice. She fired a single shot at close range, wounding the governor. In 1878, on undisputed facts, Ms. Zasulich stood trial for attempted murder. Although the 1864 Reforms did not provide Ms. Zasulich the right to trial by jury because it was a political crime, the prosecutor chose a jury trial for political reasons, which included the desire to make a public example of this revolutionary. Ms. Zasulich's defense counsel devoted considerable argument to his client's past persecution and the state's repressive treatment of political criminals. The jury, with substantial public support, acquitted Vera Zasulich.

A tremendous backlash followed. Opponents of the jury system—including the relentless conservative press—saw their deepest fears realized through this expression of resentment toward the state. Within months, additional classes of so-called political offenses were removed from the jurisdiction of the jury. Thereafter, no politically motivated crimes were tried before a jury, but rather were tried before courts-martial or courts with class representatives. The March 1, 1881 assassination of Tsar Alexander II by anti-tsarist domestic terrorists further fueled the backlash against his own democratic judicial institutions, which sought to elevate the rights of individuals over the interests of the state. Thereafter, Tsar Alexander II's son, Tsar Alexander III, cemented alternative law enforcement and judicial procedures to combat political unrest in the Law of August 14, 1881, enti-

---

26. See id. at 24.
27. KUCHEROV, supra note 3, at 222.
28. Id.
29. Id. at 79-80.
30. Id. at 222; GORDON B. SMITH, REFORMING THE RUSSIAN LEGAL SYSTEM 19 (Cambridge University Press 1996).
31. KUCHEROV, supra note 3, at 218–21.
32. Id. at 222. This case demonstrates the jury system's operation as a political avenue for citizens to challenge an autocratic regime that stifles and eradicates political dissent. W.E. BUTLER, SOVIET LAW 23 (Butterworths' Press 1988).
33. KUCHEROV, supra note 3, at 79.
34. Id. at 80 n.206.
35. JOHNSON, supra note 6, at 19.
tled "Measures for the Preservation of State Order and Public Tran-
quilility."\textsuperscript{36}

The Law of August 14, 1881 granted local provincial executives profound authority, including the following powers: (1) to transfer to courts-martial the trials of political crimes, the more important of which to be tried according to war-time laws; (2) to order closed, non-
public criminal trials; (3) to arrest persons on mere suspicion of having committed a crime against the state, being involved in such a crime, or belonging to an unlawful association; and (4) to search dwellings with-
out definite suspicion.\textsuperscript{37} Individuals convicted in such trials faced in-
definite confinement or banishment to remote locales.\textsuperscript{38} Each provin-
cial commander in chief could unilaterally order whole categories of criminal offenses to be tried by courts-martial\textsuperscript{39} under military law.\textsuperscript{40} The government utilized these alternative procedures in part because military law provided the death penalty for far more offenses than the standard criminal justice system.\textsuperscript{41} In short, the Law of August 14, 1881 created a distinct parallel criminal justice system available for any crime the provincial chief executive unilaterally determined to have a political character that threatened state security.\textsuperscript{42}

Although this "extraordinary but temporary measure" was lim-
ited to three years, it was repeatedly extended until the October 1917 Revolution.\textsuperscript{43} Nevertheless, these reactionary measures, which served to circumscribe the independence of the judiciary and increase the use of military courts to try civilians, did little to quell Russia's growing revolutionary movement.\textsuperscript{44} A turning point was an 1894 state-
sponsored study that concluded that Russia did not, as opponents to the jury system relentlessly charged, have an artificially high acquittal rate.\textsuperscript{45} Thereafter, many of the cases previously removed from the ju-
risdiction of the jury returned.\textsuperscript{46} During this period, the Duma, Rus-

\begin{footnotesize}
\begin{enumerate}
\item KUCHEROV, supra note 3, at 201–02.
\item Id. at 203. See also id. at 79–80; JOHNSON, supra note 6, at 18–19; Duncan DeVille, 
Combating Russian Organized Crime: Russia's Fledgling Jury System on Trial, 32 GEO. WASH. J. 
\item KUCHEROV, supra note 3, at 201–03.
\item Within a span of seven months during 1906 and 1907, over one thousand people were 
executed as a result of this process. Id. at 206.
\item Id. at 203. Whether the government charged a defendant pursuant to military law or 
the standard criminal code carried important consequences with respect to the defendant's 
procedural rights, including the right to counsel. See id. at 232.
\item Id. at 204, 209, 211.
\item Id. at 211–12.
\item Id. at 203.
\item Id. at 202; BUTLER, supra note 32, at 23.
\item KUCHEROV, supra note 3, at 81.
\item DeVille, supra note 37, at 76–77.
\end{enumerate}
\end{footnotesize}
Russia's legislature, sought to introduce trial by jury in all provinces, and did so by 1914. Over time, the fifty-plus years between 1864 and 1917 became known as the Golden Age of Russian Law. Despite imperial rule and a fully autocratic executive and legislative regime, the judiciary was largely premised on democratic principles during this time.

B. The Soviet Inquisitorial Criminal Justice System

Russia's imperial government fell in February 1917. In the months following the October 1917 Revolution, the Bolsheviks abolished the professional bar and trial by jury. At that time, Russian juries had rendered over 7.5 million verdicts. Ironically, in 1901 Vladimir Lenin, who was later the leading signatory of the decree abolishing the jury, had defended the democratic and egalitarian nature of Russia's jury system, which he called the "court of the street." There would be no jury trial in Russia for over seventy-five years.

The Bolsheviks replaced juries with "people's courts" comprised of one judge and two to six people's assessors. Although elected, all people's assessors were screened by local Communist Party officials and committees. In short, the Party controlled the assessors. The judge and assessors heard all evidence, questioned all witnesses, decided all questions of law and fact, and determined guilt or innocence. Despite holding equal voting power, assessors became known

47. KUCHEROV, supra note 3, at 82.
48. BUTLER, supra note 32, at 23.
49. KUCHEROV, supra note 3, at 307. The jury system fostered uniform respect for the law and a sense of equity and justice previously unknown between Russians of disparate social strata. Id. at 85–86.
50. Id. at 307.
51. DeVille, supra note 37, at 77.
52. KUCHEROV, supra note 3, at 83.
53. The Statute of October 21, 1920 directed that six people's assessors participate in all serious criminal offenses. ZIGURDS ZILE, IDEAS AND FORCES IN SOVIET LEGAL HISTORY: A READER ON THE SOVIET STATE AND LAW 98–99 (Oxford University Press 1992). However, people's courts of one judge and two people's assessors became the norm. Thaman, The Resurrection, supra note 4, at 67. As was the case before the Revolution, offenses allegedly against the security of the state came under the supervision of a special government department. JOHNSON, supra note 6, at 24.
54. Statute of October 21, 1920 (Russ.); DeVille, supra note 37, at 77; Thaman, The Resurrection, supra note 4, at 67.
55. RUDOLF SCHLESINGER, SOVIET LEGAL THEORY: ITS SOCIAL BACKGROUND AND DEVELOPMENT 65 (Oxford University Press 1945). The Bolsheviks construed the law and criminal justice system simply as another means to facilitate the economic changes necessary to create a pure communist state. Diehm, supra note 4, at 22–23.
as "nodders" for simply nodding in agreement with the judge.\textsuperscript{57} Judges, for their part, answered to telephonic instructions from Party officials.\textsuperscript{58} Indeed, one Soviet judge told me that he always stood at attention when answering such calls from Party officials. The whole system became known sarcastically as "telephone justice."\textsuperscript{59} People’s assessors virtually always agreed with judges; acquittals were virtually nonexistent.\textsuperscript{60}

These procedures reflect the fact that the Soviet criminal justice system was fundamentally grounded in the inquisitorial tradition.\textsuperscript{61} In the inquisitorial system, the judge is a "truth-seeker" who directs the criminal investigation and judicial inquiry, including introducing evidence and questioning witnesses.\textsuperscript{62} Under the Soviet system, the judge could initiate new criminal charges at trial, proceed with the prosecution if the prosecutor failed to appear, or proceed despite the prosecutor’s motion to dismiss.\textsuperscript{63} Moreover, if the judge determined at trial that insufficient evidence existed to convict the defendant, the judge would usually return the case for "supplemental investigation," thus providing the prosecutor multiple bites at the apple.\textsuperscript{64} In sum, unlike our adversarial system, the Soviet inquisitorial criminal justice system neither prioritized nor emphasized the rights of individual defendants, but instead paid homage to the interests of the state.\textsuperscript{65}

\textsuperscript{57} DeVille, supra note 37, at 77; Thaman, The Resurrection, supra note 4, at 67. A people’s assessor reported to the same courtroom everyday during his or her term of service, which lasted several months or longer. DeVille, supra note 37, at 82. As a result, the assessors became dedicated to their respective judge in the same way grand juries are said to become dedicated to a prosecutor with whom they regularly work. \textit{Id.} In the 1950s and 1960s, Soviet legal scholars advocated reforming the system to have an expanded number of people’s assessors given exclusive responsibility for deciding guilt. Thaman, The Resurrection, supra note 4, at 68. This they considered tantamount to trial by jury. \textit{Id.}

\textsuperscript{58} Thaman, The Resurrection, supra note 4, at 68; Diehm, supra note 4, at 23–25.

\textsuperscript{59} Diehm, supra note 4, at 23–25.

\textsuperscript{60} \textit{Id.}; Thaman, The Resurrection, supra note 4, at 81.

\textsuperscript{61} The inquisitorial system shares roots with the practice of religious clerics conducting inquiries into wrongdoing. See Diehm, supra note 4, at 6–7.

\textsuperscript{62} \textit{Id.} The inquisitorial system makes no use of case law precedent. Rather, each case is evaluated independently with reference to the relevant legislative code or materials. \textit{Id.} at 9.


\textsuperscript{64} Thaman, The Resurrection, supra note 4, at 101.

\textsuperscript{65} Critics of the adversarial system object to the abandonment of a truth-seeking inquiry in favor of a persuasion contest between skilled lawyers. \textit{See}, e.g., Fyodor Dostoyevsky, \textit{The Diary of a Writer} (C. Scribner's Sons 1949) (1877).
C. Russia’s Revival of Trial by Jury

In October 1991, the Supreme Soviet of the Russian Federation approved Boris Yeltsin’s proposed blueprint for judicial reform. This blueprint led to the passage of the Jury Law of July 16, 1993, as well as the first jury trial in seventy-five years, held on December 15, 1993. The criminal code now provides defendants the right to trial by jury for serious criminal offenses, such as cases where the possible punishment is at least ten years imprisonment or death. These offenses are distilled into approximately thirty-five serious felonies. However, the initial Jury Law called for jury trials in only nine of Russia’s eighty-nine regions. Thus, in eighty regions, courts with people’s assessors retained jurisdiction over all criminal offenses.

Then, in December 2001, President Vladimir Putin signed monumental criminal justice legislation, including approximately 3,500 reforms to the criminal code. This legislation mandated jury trials in all eighty-nine regions for serious criminal offenses beginning on January 1, 2003. Overcoming staunch resistance, the legislation

66. Thaman, The Resurrection, supra note 4, at 70. Although former-President Mikhail Gorbachev proposed the revival of jury trials in May 1989 as part of perestroika, the attempted coup of 1991 halted implementation of any such legislation. DeVille, supra note 37, at 78.


68. DeVille, supra note 37, at 78–79; Thaman, The Resurrection, supra note 4, at 85. The initial blueprint proposed jury trials for all crimes punishable by one year imprisonment or more. Thaman, The Resurrection, supra note 4, at 85. A defendant may waive the right to trial by jury and proceed before a people’s court of one judge and two people’s assessors. Thaman, New Jury Systems, supra note 63, at 238; The Honorable Steven R. Plotkin, The Jury Trial in Russia, 2 Tul. J. INT’L & COMP. L. 1, 2–3 (1994). People’s courts retain jurisdiction over the vast majority of criminal offenses. Id.


70. Vlasihin, supra note 69, at 3. The Jury Law mandated jury trials in only nine regions because, for political reasons, the re introduction of jury trials was labeled an “experiment.” See Thaman, The Resurrection, supra note 4, at 78–81. Staunch opponents—including politicians, prosecutors or procurators, and judges—vigorously defeated any proposal mandating jury trials nationwide or in the local courts of general jurisdiction. See id. The nine regions were chosen based on their moderate size, economic stability, and diversity, as well as the absence of political or nationalist tensions. See id. at 81.

71. In people’s district courts—the local courts of general jurisdiction—cases are tried by one of the following three methods: (1) a professional judge and two people’s assessors, (2) three professional judges, or (3) a single professional judge. Vlasihin, supra note 69, at 2–3.

72. Myers, supra note 1.

73. Id. However, in December 2002, citing financial and technical impossibilities, the Russian Duma (the lower house of parliament) approved amendments postponing the January 1, 2003 deadline for the introduction of jury trials. Duma Puts Jury Trials on Hold, IPR STRATEGIC BUS. INFO. DATABASE, Dec. 22, 2002. The amendments call for gradual introduction of jury trials over the next four years: approximately twelve regions will begin jury trials in
will transfer the right to issue arrest and search warrants from prosecutors to judges on January 1, 2004. The prior Jury Law of July 16, 1993 and these subsequent December 2001 criminal justice reforms implement principles articulated in Russia’s 1993 Constitution.

These principles include the right to trial by jury, the right to counsel, the presumption of innocence, the privilege against self-incrimination, an adversarial procedure, and the exclusion of illegally gathered evidence. In conjunction with these *Miranda*-type protections, courts have begun applying the “fruit of the poisonous tree” doctrine to exclude confessions and other evidence gathered in violation of these constitutional rights. Finally, the reforms require an initial court appearance within forty-eight hours and significantly reduce pretrial detention.

Russia’s revived jury system shares many similarities with the jury system instituted by Tsar Alexander II’s 1864 Reforms. For example, a jury is comprised of twelve jurors, with two alternates who observe the trial. In addition, although a jury must strive for unanimity, a simple majority controls if the jury fails to reach unanimity after deliberating three hours. Moreover, as it did over a century earlier, Russia’s revived jury system allows for explicit jury nullification.

Reformers considered nullification a necessary democratic
measure to correct unpopular laws and state oppression.\textsuperscript{82} This drama plays out in three specific questions on every special verdict form.\textsuperscript{83} (1) whether the prosecution proved the corpus delicti; (2) whether the prosecution proved defendant's identity as the perpetrator; and (3) whether the defendant is guilty of committing a crime.\textsuperscript{84} If six jurors vote "no" on any of these three questions, the defendant is acquitted. Thus, even if the jury concludes that the defendant committed the acts charged, it may acquit. A fourth question, which asks whether the defendant deserves leniency or special leniency, provides the jury with yet another corrective measure.\textsuperscript{85} Following closing arguments, the judge summarizes the range of penalties for each crime charged so that the jury may deliberate with a complete understanding of the ramifications of its decisions.\textsuperscript{86} In reaching its verdict, the jury is not constrained by formal rules of evidence; it may freely evaluate the persuasiveness of all evidence.\textsuperscript{87}

Once again, jury-system opponents—predominantly prosecutors and political and judicial conservatives—argued that the public's lingering resentment of government authority would result in a high acquittal rate.\textsuperscript{88} Once again, statistics suggest that this high acquittal rate is mythical. Between 1994 and 1997, juries acquitted approximately fourteen to twenty-two percent of criminal defendants.\textsuperscript{89} In-

\textsuperscript{82} Thaman, The Resurrection, supra note 4, at 114. Considering Russia's long history of autocratic rule, this sentiment is not surprising.

\textsuperscript{83} This form includes myriad factual questions relevant to affirmative defenses, degree of culpability, and lesser included offenses. Plotkin, supra note 68, at 15. As in our system, questions of law are not submitted to the jury; the jury receives only pure questions of fact. Thaman, New Jury Systems, supra note 63, at 250. However, the Supreme Court of the Russian Federation has removed questions of mens rea from the jury, holding that mens rea is not a pure question of fact. Id. at 253. This conclusion has seriously circumscribed the role and power of the jury because mens rea is so essential in murder cases (and other cases serious enough to get the jury). Id. at 257.

\textsuperscript{84} Thaman, New Jury Systems, supra note 63, at 250.

\textsuperscript{85} Thaman, The Resurrection, supra note 4, at 102.

\textsuperscript{86} Id. at 124.

\textsuperscript{87} Thaman, New Jury Systems, supra note 63, at 233. The ability to freely evaluate all of the evidence includes a defendant's guilty plea. Thaman, The Resurrection, supra note 4, at 103. In Russia, plea bargaining does not exist and all cases go to trial. Therefore, even if a defendant pleads guilty at the outset of trial before the jury and the judge employs an abbreviated trial procedure as a result, the jury must nevertheless deliberate and reach a verdict. Thaman, New Jury Systems, supra note 63, at 245-46. Thus, the jury's power of nullification still exists, despite a plea of guilty.

\textsuperscript{88} DeVille, supra note 37, at 97-99; Thaman, The Resurrection, supra note 4, at 78-81 (discussing jury opponents).

\textsuperscript{89} DeVille, supra note 37, at 99. This number is comparable to the 15-20% acquittal rate in the two decades following the 1864 Reforms. Thaman, New Jury Systems, supra note 63, at 257. In sharp contrast, in cases tried without a jury, the conviction rate hovers steady at approximately 99%. Id. It is important to note that Russia has no plea-bargaining system; all cases proceed to trial.
terestingly, juries in the United States, which lack any explicit ability to nullify, acquit felony defendants at a rate of approximately sixteen percent in federal court and twenty percent in state court.\(^\text{90}\) Despite this reasonable acquittal rate, the Supreme Court of the Russian Federation has overturned acquittals with alarming frequency: the rate of overturned acquittals has increased steadily from seventeen percent in 1995 to forty-eight percent in 1997.\(^\text{91}\) Moreover, the Court may reverse on any grounds, including the exclusion of evidence, the admittance of character evidence, and issues not briefed by the parties.\(^\text{92}\) This trend indicates a reluctance both to truly embrace democratic judicial reform and to prioritize the rights of individuals over the interests of the state.

Accordingly, despite these sweeping reforms the jury trial remains "a peculiar appurtenance on an otherwise inquisitorial criminal process."\(^\text{93}\) For example, despite the presumption of innocence, the defendant spends the entire trial in the courtroom caged behind bars,\(^\text{94}\) and the judge largely retains an inquisitorial role. At a preliminary hearing, the judge determines if sufficient evidence exists to proceed to trial; if not, the judge generally returns the case to the prosecutor for further investigation, without any double-jeopardy implications.\(^\text{95}\) At trial, the judge actively questions witnesses and may seek to elicit essential factual evidence—already revealed to the judge at the preliminary hearing—that the prosecutor neglected to elicit.\(^\text{96}\) Moreover, because the judge must review all of the evidence and the parties' respective positions before dismissing the jury for deliberations, the risk of expressing opinion or identifying testimonial inconsistencies is high.\(^\text{97}\) Finally, despite the guarantee of an adversarial procedure and the presumption of innocence, the victim of the alleged crime enjoys

---

\(^{90}\) DeVille, supra note 37, at 99.

\(^{91}\) Thaman, New Jury Systems, supra note 63, at 258; Thaman, The Resurrection, supra note 4, at 129.

\(^{92}\) Thaman, New Jury Systems, supra note 63, at 247–58.

\(^{93}\) Thaman, The Resurrection, supra note 4, at 138; Diehm, supra note 4, at 4. Many judges are holdovers from the Soviet system who spent their entire careers protecting state power and state interests in preference to individual rights. Diehm, supra note 4, at 17–21. In addition, because these judges have historically been equally responsible for determining questions of both law and fact, they may have difficulty properly crafting interrogatories for the jury on the special verdict form that distinguish these questions, particularly in the context of elements of the crime, burdens of proof, and affirmative defenses. Thaman, The Resurrection, supra note 4, at 118–23.

\(^{94}\) DeVille, supra note 37, at 73.

\(^{95}\) Thaman, New Jury Systems, supra note 63, at 241.

\(^{96}\) Id. at 246.

\(^{97}\) Plotkin, supra note 68, at 15.
procedural rights equal or superior to those of the prosecutor and defense.  

Nevertheless, Russia's Jury Law and other recent criminal justice reforms are its most important steps toward an independent judiciary and the protection of individual rights since the 1864 Reforms. President Putin celebrates the reforms as creating a "dictatorship of law." No longer shall the judiciary merely function to execute the policies of the dominant political party. Yet critics complain that the reforms fail to correct fundamental flaws in the inquisitorial system, such as judges' ability to overturn jury verdicts acquitting criminal defendants and the lack of any truly adversarial process. Likewise, President Putin concedes that a "big gap" remains between paper and practice with respect to individual rights articulated by the 1993 Constitution, the Jury Law, and the recent reforms. The hurdles of politics and history are further exacerbated by inadequate funding. Despite guaranteeing the right to counsel and trial by jury, the reforms failed to earmark funds for public defenders, who receive less compensation than jurors for their service. Similarly, the judiciary's lamentable physical infrastructure will have difficulty accommodating twelve-person juries.

II. HISTORICALLY GROUNDED REFLECTIONS ON TERROR TRIALS, PROCEDURES TO COMBAT TERRORISM, AND OUR FEDERAL SENTENCING REGIME

The constitutional and judicial heritage of the United States is remarkably strong. This heritage guarantees the right to trial by jury in all criminal cases and offers other important legal protections that elevate the rights of individuals over the interests of the state. In contrast, today Russia struggles against its deeply embedded autocratic

98. Thaman, The Resurrection, supra note 4, at 101. For example, the victim may be represented by counsel, participate in the preliminary hearing, veto the prosecutor's motion to dismiss, veto the prosecutor's motion to return for supplemental investigation, question all witnesses, and make closing arguments. Id. at 101-12; Thaman, New Jury Systems, supra note 63, at 243; Plotkin, supra note 68, at 14-15.


100. Thaman, The Resurrection, supra note 4, at 63.


102. Myers, supra note 1.

103. For example, President Putin pledged $1.5 million to support the reform, which provided for the hiring of more judges. Myers, supra note 1. However, whether such funding will actually occur is unclear. See, e.g., Judicial Reform, supra note 79 (the 2002 Russian federal budget earmarks only 111 million rubles—approximately $3.5 million—for judicial reforms).

104. Myers, supra note 1; Thaman, The Resurrection, supra note 4, at 87.

and inquisitorial traditions in order to implement such institutions. Nevertheless, this general contrast is neither absolute nor grounds for historical myopia. For example, juxtapose Tsar Alexander II's 1861 emancipation of Russian serfs with President Lincoln's 1863 emancipation of American slaves. Despite our revered constitutional heritage, we denied the most fundamental liberties to four million individuals for a century. Moreover, freed serfs sat as jurors alongside their former masters generations before African-American freemen did the same. Put simply, the United States has no monopoly on progressive legal reform, and we must examine the strength of our institutions at every opportunity.

Russia's revival of trial by jury and implementation of criminal justice institutions that elevate the rights of individuals over the interests of the state has triggered renewed interest in its juridical history. Russia's experiences offer both an important opportunity and a unique historical perspective to reflect on the challenges confronting our own criminal justice system. In the United States, today's terror trials and efforts to combat terrorism reveal state strategies to confront threats to the state. Critics protest that these strategies sacrifice the rights of individuals. Regardless of one's viewpoint, a principal strategy has been the use of alternative law enforcement and judicial procedures—106—with respect to surveillance,107 access to counsel,108 detention,109 and secrecy110—for a category of criminal activity threatening national security, generally defined as terrorism. Russia's juridical history, particularly its development of alternative law enforcement and judicial procedures for political crimes,111 demands that we ask difficult ques-

106. I intend this phrase to include quasi-judicial procedures employed with respect to the detention of enemy combatants, who are removed from the standard criminal justice system.

107. See infra notes 145-153 and accompanying text.

108. See infra notes 124-130 and accompanying text.

109. See infra notes 127-130 and accompanying text. The Immigration and Naturalization Service's arrest, detention, and deportation of Muslim men following the September 11, 2001 attacks, via nonpublic proceedings, is well beyond the scope of this Article. However, for a noteworthy example of challenges to and rulings on such practices, see Ali v. Ashcroft, No. 02-2304, 2003 U.S. Dist. LEXIS 2042 (W.D. Wash. Jan. 17, 2003) (order enjoining INS from categorically deporting Somali nationals on vague basis of identifying population as political or terrorist threat).

110. See, e.g., Global Relief Found., Inc. v. O'Neill, 315 F.3d 748 (7th Cir. 2002). Following the Seventh Circuit's decision in O'Neill, plaintiffs' counsel complained, "[T]he key issue in the case is the question of whether we supported terrorism and [whether] the government can rely upon secret evidence to make its case. How do you go about proving your innocence when the government can rely on secret evidence that you can't even see?" Josh Meyer, Court Upholds Terrorism Law Secrecy, L.A. TIMES, Jan. 1, 2003, at A1.

111. At the outset, I note that the threat to the state perceived by late-eighteenth and early-nineteenth century Russia was domestic revolt, which was aimed at overthrowing the Tsar. In contrast, the threat posed to the United States today is from predominantly foreign sources. De-
tions regarding the employment of such procedures and the consequences of doing so. Further, Russia’s past and present jury systems merit renewed discussion of jury nullification in the context of our federal sentencing regime.

A. The Need to Diligently Monitor the Use of Alternative Law Enforcement and Judicial Procedures in the War on Terrorism

On January 1, 2003, Russia inaugurated the celebrated jewel of its 3,500 criminal justice reforms: the nationwide right to trial by jury for serious criminal offenses. Our criminal justice system had been the leading model for these reforms. Ironically, on that New Year’s Eve, Washington, D.C.’s leading newspaper offered the following cautionary words about our own system:

The broad danger, in our view, is that a kind of alternative legal system has come into existence for an ill-defined category of offenses involving national security. For suspected terrorists, the government has its choice of the surveillance regularly used for criminal suspects or the less-regulated regime designed for foreign intelligence. It can try suspects in courts or in military tribunals or—if it chooses to designate them as enemy fighters—not try them at all. It can give them lawyers or deny them lawyers and can, if it chooses, monitor lawyer-client communications. While the government makes a case for each of these authorities (for some more convincingly than for others), the environment they create cumulatively is troubling. This is particularly true because the war they are intended for may prove a near-permanent state of affairs, and victory may be difficult to recognize. It is an environment in which the president has nearly unbridled authority to pick the legal regime most advantageous at every step of an investigation or a proceeding against an individual—in which a person can be plucked out of the protections of the Bill of Rights at the whim of the executive branch of government . . . . The administration too often acts as though there is no useful discussion to be had . . . .

I seek to contribute to this discussion by articulating an analytical framework contextualized by Russian history. Through the lens of Russian history, this “ill-defined category of offenses involving na-

---

8pite this fundamental distinction, history has applied the label of terrorism to both of these threats, and I believe Russia’s historical experience is worthy of reflection.

112. See supra notes 66–78 and accompanying text. As discussed above, financial and technical problems have delayed the implementation of jury trials in some regions.

113. Myers, supra note 1.

tional security” is reminiscent of the notion of political crimes and the Law of August 14, 1881.115

1. Articulating and Illustrating an Analytical Framework

Conceptualize a continuum of crime. At one end of the continuum fall crimes with no evident political motivation.116 At the opposite end of the spectrum lie crimes driven by intense political beliefs, including the heinous acts of conspiracy and murder committed on September 11, 2001. Such political crimes have come to be labeled acts of war117 due to their explicit challenge of and perceived threat to the state, regardless of explicit state sponsorship.118

Now conceptualize a second continuum superimposed on the first. This second continuum represents law enforcement and judicial procedures for investigating, adjudicating, and punishing crime. All of these procedures vary depending on the political nature of the crime. Article III courts, trial by jury, and the constitutional protections of the Fourth, Fifth, and Sixth Amendments lie at one end of the continuum. At the opposite end of the continuum are military tribunals—entirely outside of the traditional criminal justice system—historically employed by the executive branch in rare circumstances.119 Together, these continuas embody a balance between the rights of the individual and the interests of the state.

As specific criminal cases arise in our struggle against terrorism and breathe life into the various law enforcement and judicial procedures falling along these continuas, we must ask difficult questions regarding how this process occurs. The place where a case falls along the continua may profoundly affect the law enforcement and judicial procedures employed and thus the balance of the rights of the individual and the interests of the state in that case. Therefore, we must first recognize the profound significance of where a case is placed along

115. See supra notes 36–49 and accompanying text.
116. However, to the extent that every crime offends a rule enforced by state power, that crime is political. See FOUCAULT, supra note 18, at 90 (analogizing a state’s reaction to crime through a display of power to the state’s reaction to first signs of rebellion or civil war).
117. Similarly, in Russia, the Law of August 14, 1881 provided that “more important” political crimes should be tried before courts-martial according to war-time laws. See supra notes 36–49 and accompanying text.
118. In our system of government, the invocation of war carries profound constitutional and statutory implications with respect to executive power and discretion.
119. See Belknap, supra note 5, at 433. For example, German saboteurs who were put ashore from submarines off of Long Island in World War II were determined to be unlawful combatants who were not protected by the rules of war, and were instead subject to trial before military tribunals. Ex parte Quirin, 317 U.S. 1 (1942). It is important to note that trials before military tribunals are not actually criminal trials, and constitutional protections do not apply. See, e.g., Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).
these continuia, and the effect such placement has on judicial rights, rules, and procedures. Then, we must ask the following questions: Who defines a crime?; What is the extent of that authority?; and, To what extent can alternative procedures be invoked? Finally, we must be wary of whether, over time, law enforcement and judicial procedures traditionally reserved for one end of these continuia will begin to bleed outward, permeating other procedures and shifting the fulcrum that preserves our constitutional balance.

Several current cases help frame these issues. When judicial rules, rights, and procedures vary based on a crime's political nature, the mere definition of that crime becomes vital. For example, in late 2002, Virginia prosecutors charged 17-year-old John Lee Malvo—who allegedly shot and killed thirteen victims in the Washington, D.C. area—under a new anti-terrorism provision of Virginia's death penalty statute that was enacted after the September 11, 2001 attacks. Prosecutors invoked this provision because they believe it authorizes the death penalty without proof that Malvo pulled the trigger, in contrast to the other death penalty provision under which he was charged. Despite the apparent absence of any political motivation for the killings, prosecutors argue that Malvo's alleged demand for $10 million after nine of the killings satisfies the statutory definition of terrorism. Therefore, the state's interest in the outcome of the prosecution plays an essential role in the definition of the crime. However, the Malvo case exemplifies only the most subtle gradation along the continua outlined above.

The case of José Padilla more starkly illustrates the significance of defining one's criminal status along these continuia. Padilla, a

120. See VA. CODE ANN. § 18.2-31(13) (Michie 2002) ("The willful, deliberate and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism as defined in § 18.2-46.4."); Maria Glod & Josh White, Malvo Case Prosecutors Begin Bid for Death Penalty, WASH. POST, Jan. 14, 2003, at A1. VA. CODE ANN. § 18.2-46.4 defines an act of terrorism as "an act of violence ... committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation."

121. See Burlile v. Virginia, 544 S.E.2d 360, 365-66 (Va. 2001) (under multiple-slayings provision, VA. CODE ANN. § 18.2-31(8), defendant must be triggerman in principal murder charged); Glod & White, supra note 120.


123. Of course, this process occurs in all criminal prosecutions, particularly under our federal sentencing regime, discussed infra.
United States citizen, was detained in May 2002 upon arrival in Chicago from Pakistan for his alleged role in a conspiracy to detonate a bomb laced with radioactive material.124 On June 9, 2002, President Bush designated Padilla an "enemy combatant," and the Department of Defense assumed his custody.125 Because no criminal charges were filed, Padilla's constitutional right to counsel and his right against self-incrimination did not attach.126 Padilla challenged his detention and lack of access to counsel by means of a habeas corpus petition.127 On December 4, 2002, the Honorable Michael B. Mukasey held that the military128 could detain Padilla for the duration of the war on terrorism if the President presented "some evidence" that Padilla "engaged in a mission against the United States on behalf of an enemy with whom the United States is at war, and . . . that evidence has not been entirely mooted by subsequent events."129 In this case and in others, the government has taken the position that no enemy combatant detainee, regardless of citizenship, has either the right to counsel or the right to challenge their detention.130 As the number of cases grow with the duration of the war on terrorism, we must scrutinize the reasoning behind these decisions, as well as their consequences.

The Zacarias Moussaoui trial provides an important opportunity to ask additional questions regarding the definition of crimes along the continua and the ability to invoke procedures in the alternative. Moussaoui, the alleged twentieth hijacker, was charged under the federal criminal code in United States District Court.131 On January 31, 2003, the Honorable Leonie M. Brinkema ordered the government to provide Moussaoui's defense counsel access to Ramzi Binalshibh, the


125. Padilla, 233 F. Supp. 2d at 569. The phrases "enemy combatant" and "unlawful combatant" are used interchangeably throughout this order. Id.

126. Id.

127. Id.


129. Padilla, 233 F. Supp. 2d at 608. However, Judge Mukasey exercised his discretion in the habeas corpus context and ordered that Padilla have access to counsel. Id. It appears the government may appeal that request. See Swanson, supra note 124.

130. See Hamdi v. Rumsfeld, 296 F.3d 278, 282–83 (4th Cir. 2002) (finding these rights not available to person who was born in the United States yet was captured in late 2001 by U.S. forces in Afghanistan).

131. Moussaoui, an admitted member of Al Qaeda, denies any involvement in the September 11, 2001 attacks. At the time of his arrest, he was training at a Minnesota flight school.
self-proclaimed coordinator of the September 11, 2001 attacks. Pursuant to the Classified Information Procedures Act (CIPA), the government immediately appealed the order and moved to stay all district court proceedings. The district court granted the stay in part, and vacated the trial date to allow the appeal to be heard. Administration officials suggest that if the Fourth Circuit declines to reverse Judge Brinkema's order, or if it does reverse and Judge Brinkema concludes that Moussaoui's ability to mount a defense is unconstitutionally compromised, the President may unilaterally designate Moussaoui an enemy combatant and remove his prosecution from federal court to a military tribunal. This virtually unreviewable designation, as discussed above, would strip Moussaoui of the constitutional rights and procedures that he has enjoyed for over a year with respect to the same acts. In addition, the government has not articulated how Moussaoui, who was arrested in Minnesota in August 2001—prior to the declaration of the war on terrorism—satisfies the definition of enemy combatant. Moreover, reports suggest that the military has yet to define the elements of the crimes that would be charged. Although these remain only questions, Russian history suggests that we must consider them carefully in order to ensure that the interests of the state do not swallow the rights of individuals, even those individuals who directly challenge the state.

Finally, the hastily enacted Patriot Act, which dramatically extended the Foreign Intelligence Surveillance Act (FISA), demonstrates


133. 18 U.S.C. app. §§ 1–16 (2002). Pursuant to the Act, the right of interlocutory appeal exists for any orders “authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.” *Id.* § 7(a). Classified information means “any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security . . .” *Id.* § 1(a). Because Judge Brinkema’s order is sealed, it is unknown what the government has identified as classified information or whether the government has identified Binalshibh himself as classified information. Likewise, it is unknown what level of access Judge Brinkema ordered.


135. *Id.* at **2-3.


137. *See supra* notes 127–130 and accompanying text.


the need to closely monitor whether alternative law enforcement procedures and alternative judicial procedures located on one end of the continua, which seek to repel threats to the state, are gradually enveloping procedures prioritizing the rights of individuals. FISA, enacted by Congress in 1978, created a single seven-judge court that reviews ex parte government applications for electronic surveillance (predominantly wiretaps) and search warrant applications to obtain foreign intelligence information. FISA reduces probable cause standards, authorizes highly intrusive intelligence gathering techniques, and gives this authorization for extended periods of time. Due to concerns about the constitutionality of these provisions, the FISA court historically ensured that intelligence activities were not directed toward domestic criminal prosecutions. In sharp contrast, the Patriot Act now provides that the government may employ FISA procedures primarily for domestic law enforcement purposes.

In March 2002, United States Attorney General John Ashcroft submitted for the FISA court’s approval new procedures to facilitate the “acquisition, retention, and dissemination of information involving the FISA between FBI counterintelligence and counterterrorism offi-

140. Russia is also presently confronted with this debate. There, although prosecutors vehemently opposed surrendering their right to issue search and arrest warrants, that surrender will occur January 1, 2004. See supra note 74 and accompanying text. Yet, because prosecutors successfully retained authority to issue search and arrest warrants in “emergency cases,” the judiciary has a duty to closely monitor the use of that authority.

141. 50 U.S.C. §§ 1803, 1822 (2002). Foreign intelligence information means:
(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States.

Id. § 1801(e).

For a detailed discussion of FISA and the impact of the Patriot Act, see Alison A. Bradley, Comment, Extremism in the Defense Of Liberty?: The Foreign Intelligence Surveillance Act and the Significance of the USA Patriot Act, 77 TUL. L. REV. 465 (2002).


143. See In Re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d at 611.

144. See 50 U.S.C. § 1823(a)(7)(B) (2002) (foreign intelligence need only be a "significant purpose" of the surveillance). Reports suggest that the Justice Department has been drafting a "Domestic Security Enhancement Act of 2003" that would further expand FISA to the realm of "domestic terrorism." For more information, and for a link to the full text of the draft, visit http://www.publicintegrity.org.
cials on the one hand, and FBI criminal investigators, trial attorneys in the Justice Department’s Criminal Division, and U.S. Attorney’s Offices on the other hand.”145 In reviewing these procedures, the court discussed a pattern and practice of government abuse of FISA, including the submission of materially false statements and omissions.146 Furthermore, the executive branch has repeatedly violated the court’s orders regarding “unauthorized disseminations to criminal investigators and prosecutors.”147 Due in part to this past abuse, the court unanimously rejected the Attorney General’s proposed procedures, which intended that criminal prosecutors “have a significant role directing FISA surveillances and searches from start to finish in counterintelligence cases having overlapping intelligence and criminal investigations or interests, guiding them to prosecution.”148 That is, the court concluded that the Attorney General’s interpretations of FISA and the Patriot Act fundamentally contradicted the spirit of FISA by allowing prosecutors to circumvent constitutional safeguards with respect to foreign intelligence information—an interpretation encompassing a broad category of potential criminal activity.149

The three-judge FISA court of review had never heard a government appeal in the Act’s twenty-five year history.150 However, in this case, the Attorney General appealed, and the court of review reversed.151 In fact, the court of review suggested that the lower FISA court had exceeded its Article III power by purporting to “govern the internal organization and investigative procedures of the Department of Justice which are the province of the Executive Branch (Article II) and the Congress (Article I).”152 By reversing the lower court’s order, the court of review granted the executive branch explicit authority to employ otherwise unconstitutional law enforcement procedures while

145. In Re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d at 615.
   It is self-evident that the technical and surreptitious means available for acquisition of information by electronic surveillances and physical searches, coupled with the scope and duration of such intrusions and other practices under the FISA, give the government a powerful engine for the collection of foreign intelligence information targeting U.S. persons.
   Id. at 617.
146. Id.
147. Id. In fact, at the time of the Patriot Act, the executive branch was internally investigating these ethical abuses and misconduct. Id.
148. Id.
149. See supra note 141 (defining foreign intelligence information).
150. In re Sealed Case, 310 F.3d at 719.
151. Id.
152. Id. at 731.
investigating broad classes of potential criminal activity,153 which shall be defined over time by means of *ex parte* government applications.

2. The Relevance of Russian Juridical History to These Cases and This Analytical Framework

Russia’s juridical history, as a foundation for critical analysis, teaches that it is paramount to monitor the continua outlined and illustrated above. In Russia, despite Tsar Alexander II’s celebrated 1864 Reforms, political crimes were removed from the jurisdiction of the jury.154 As the Russian state sought to protect itself from domestic terrorist threats, the continua of political crimes and law enforcement and judicial procedures expanded. That is, new law enforcement and judicial procedures were developed to confront this threat. For example, the Law of August 14, 1881, enacted soon after the acquittal of Vera Zasulich and the assassination of Tsar Alexander II, authorized local executive authorities to unilaterally invoke such procedures.155 These procedures included relaxed search-and-seizure standards, nonpublic criminal trials, military courts-martial for Russian citizens, and the application of war-time laws.156 Further, the right to counsel varied based on whether one was charged under the standard criminal code or military law.157 The Russian continua reached its greatest extreme over a seven-month period in 1906 and 1907, when Russia executed one thousand individuals.158 As the threat grew, the fulcrum balancing the rights of individuals and the interests of the state continued to shift. Despite these procedures, violent revolution soon followed. Subsequently, the Soviet era was marked by a staunchly inquisitorial criminal justice system and a system of “nodders” and “telephone justice.”159

Therefore, in the context of terror trials and ongoing strategies to combat terrorism, we must continue to debate the delineation and movement of specific cases, law enforcement, and judicial procedures along these continua. We should ask questions regarding how federal and state executive authorities define the political nature of crimes, how judicial review of those decisions will be conducted, and what are the procedural and constitutional implications of those decisions. In addition, we should ask whether the government may unilaterally

---

153. *See supra* note 141 (defining FISA scope).
154. *See supra* notes 36–49 and accompanying text.
155. *See supra* notes 36–49 and accompanying text.
156. *See supra* notes 36–49 and accompanying text.
158. *Id.* at 206.
159. *See supra* notes 53–60 and accompanying text.
make such designations at any time in the criminal justice process. Furthermore, the Patriot Act's extension of FISA to the realm of domestic law enforcement activities raises important questions regarding the encroachment of procedures designed to combat foreign threats to national security upon the constitutional rights of American citizens. For example, do district courts have a constitutional obligation to exclude FISA-gathered evidence from domestic criminal prosecutions? Thus far in the war on terrorism, the executive and legislative branches of government have largely placed the burden of answering these questions on the judiciary.

In an era of increasingly threatened state interests, Russian history teaches that a vigilant debate with respect to these continua is necessary to preserve confidence in both law enforcement and in judicial institutions themselves. Historian Samuel Kucherov reflected on Tsar Alexander II's 1864 Reforms and the exclusion of political crimes from the jury, which the state did not trust the people to adjudicate fairly:

[I]t is impossible to deprive the accused of this guarantee in cases of crimes against the state without committing an injustice. The guarantee provided by trial with jury has an especially great importance precisely in cases of criminal offenses against the state, because in these cases the state, which prosecutes the crime, is at the same time the legal entity offended or harmed by the crime. That is why no matter how impartial or independent the judges appointed by the state may be, their decision in cases of offenses against the state will never enjoy the confidence of society.

Approximately fifteen years after those reforms, the state chose to try Vera Zasulich before a jury for attempted murder. Ms. Zasulich's acquittal represented the public's resentment of both a criminal justice system that excluded political criminals and detainees from public review and an autocratic regime's relentless eradication of po-

160. See 147 CONG. REC. S10,591; S10,593; S10,992; S11,004; and S11,021 (daily ed. Oct. 25, 2001) (statements of various Senate Judiciary Committee Members). "In the American system, the national legislature is primarily responsible for determining what the law should be. If, through inaction, it effectively cedes that power to the [P]resident, the new rules will reflect the presidency's interests at the expense of all others." The Stakes for Liberty, WASH. POST, Dec. 31, 2002, at A16.

161. In a historically autocratic state such as Russia, the concept of checks and balances between various branches of government—specifically intended to limit the power of the other—is foreign. Diehm, supra note 4, at 27-28 (2001).

162. KUCHEROV, supra note 3, at 64.

163. See supra notes 27-32 and accompanying text.
political dissent.\textsuperscript{164} Tsar Alexander II's assassination led to additional law enforcement and judicial procedures to combat political crimes: relaxed search and seizure standards, nonpublic trials, military court-martial, and the application of war-time laws to citizens.\textsuperscript{165} In 1907, V.A. Makalov, one of Russia's greatest trial lawyers, argued that

[w]here there is no law equally applicable to everybody, where there are three laws, there is no legality at all. . . . There are two pillars of the state: the law as a general rule, obligatory for all, and the court as the defender of the law. When these pillars—law and court—are intact, the state itself stays firm.\textsuperscript{166}

Today, Russia can proclaim its revival of trial by jury and the resurrection of judicial institutions to elevate the rights of individuals over the interests of the state.

A government may test its citizens' confidence in law enforcement and judicial procedures by granting disparate rights, rules, and procedures to individuals depending on how the government chooses to define criminal offenses. Therefore, citizens must carefully question how their government makes these decisions and whether those questions are subject to judicial review. These questions, for which history provides ample fodder for reflection, are no less important in times of war and national crisis. In actuality, these questions are essential to protecting the constitutional balance between the rights of individuals and the interests of the state, regardless of the political climate in which they are raised.\textsuperscript{167}

\textsuperscript{164} See Butler, supra note 32, at 23; KUCHEROV, supra note 3, at 222.
\textsuperscript{165} See supra notes 36--49 and accompanying text.
\textsuperscript{166} KUCHEROV, supra, note 3, at 208--09.
\textsuperscript{167} It is essential to note that the rights of the individual and the interests of the state are not mutually exclusive. For example, the United States prosecuted Ahmed Ressam in my courtroom in 2000--01. Ressam tried to enter Washington State from Canada with a load of explosives destined for the Los Angeles International Airport. Ressam, a foreign citizen and member of a terrorist cell tied to Osama bin Laden, was tried before a jury and afforded full constitutional protections. On April 6, 2001, the jury unanimously convicted him on nine counts that were brought under the United States Criminal Code. See United States v. Ressam, No. CR99-666C, 2002 U.S. Dist. LEXIS 25594 (W.D. Wash. Apr. 6, 2001). Following the trial, Ressam has provided assistance to the United States and to foreign governments with respect to the details of terrorist cells, training camps, networks, and practices. Although his crime was highly political and he was a foreign terrorist, protecting Ressam's individual rights did not, in the end, threaten the interests of the state. In fact, the judicial process operated effectively to further those interests.
B. Reconsidering the Role of Jury Nullification Under Our Federal Sentencing Regime

A jury has the power to nullify the law. The jury may disregard the law and rule according to its collective conscience by acquitting a defendant despite the absence of doubt that the defendant committed the crimes charged. However, our criminal justice system traditionally allows the jury to realize this inherent power only through its own deliberations. That is, the court does not instruct the jury as to its nullification power, and lawyers may not cite that power in argument. In contrast, the Russian jury system actively educates the jury with respect to its nullification power by means of a special verdict form that explicitly distinguishes between perpetration and guilt. Moreover, the Russian judge summarizes the range of penalties applicable to each crime charged before dismissing the jury for deliberations. By way of these procedures, the jury remains ever-cognizant of its ability to decide a case according to its conscience.

I do not advocate the Russian jury nullification system. Nor do I embrace the various state and national jury nullification movements, which seek to legislate rules mandating an instruction regarding (or defense counsel’s ability to argue) the jury’s power to nullify the law in every case. However, I believe a trial court judge should have discretion, in rare and exceptional circumstances, to provide the jury limited instructions to educate it with respect to factors relevant to its power to nullify the law. The rare cases to which I refer are those where the mandatory minimum penalty under our federal sentencing regime is grossly disproportionate to the alleged criminal acts.

The notion that neither the parties nor the judge may instruct the jury as to the sentence for a crime is premised on the rule that the jury decides the facts and the judge decides the law and sentence. For example, Ninth Circuit Model Criminal Jury Instruction 7.4 reads: "The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable

169. See supra notes 81–85 and accompanying text.
170. See supra note 86 and accompanying text.
172. For example, I recently contemplated instructing the jury with respect to a ten-year mandatory minimum sentence in a case charging conspiracy to possess with intent to distribute methamphetamine. The ten-year sentence was grossly disproportionate to defendant’s alleged role in the case: providing a ride to an acquaintance who intended to purchase a small quantity of drugs.
173. See, e.g., KUCHEROV, supra note 3, at 201.
Although, Congress began to circumscribe district judges' authority and discretion to tailor an appropriate sentence based on the facts and circumstances of each particular case when it passed the Sentencing Reform Act of 1984. Through this Act, Congress created a Sentencing Commission to "prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories." For example, "An offense behavior category might consist, for example, of 'bank robbery/committed with a gun/$2500 taken.' An offender characteristic category might be 'offender with one prior conviction not resulting in imprisonment.' This transfer of authority and discretion away from the judge to a faceless sentencing grid—subject to unreviewable manipulation by the prosecutor's charging decisions—is a fundamental reason for educating the jury, in exceptional cases, with respect to mandatory minimum sentences. In such cases, the jury effectively decides the punishment through the act of conviction.

As discussed in detail below, jury nullification—allowing the public to correct unjust laws—has historically played a vital role in our criminal justice system. Similarly, Russia's past and present jury systems provide empirical support for limited instructions regarding mandatory sentences in exceptional cases. Even in initial debates over Tsar Alexander II's 1864 Reforms, the government recognized the importance of allowing the public to democratically correct law, policy, and penalties that offend popular morality and value systems. This was particularly true given the otherwise autocratic nature of the Russian government. Jury nullification became prominent in Russia in the nineteenth century because Tsar Alexander II's 1864 Reforms failed to address Russia's Draconian mandatory sentencing provisions. Despite the infamous acquittal of Vera Zasulich in 1878

---

175. 28 U.S.C. §§ 991–998. The fundamental goal of the sentencing guidelines is to mandate, in a sort of mathematical fashion, specific ranges of sentences based on specific offense characteristics and specific offender characteristics. This system inherently erodes the discretion of the district court judge to make his or her own determination as to an appropriate sentence for the specific individual.
176. Id.
178. See supra note 18 and accompanying text.
179. See supra note 49 and accompanying text.
180. For example, because criminal penalties varied so vastly on bright-line factors, such as a monetary sum stolen, the jury might make unsupported findings of fact to ensure a lesser sentence. See supra note 22 and accompanying text (despite undisputed evidence to the contrary, jury makes factual finding of 300 ruble theft because penalty for 500 ruble theft deemed too severe).
that might have led to a rejection of jury nullification, the Russian jurists and legislators who crafted the Jury Law of 1993 recognized the important role of jury nullification and integrated it into the revived jury system.

Furthermore, statistics suggest that despite the procedures discussed above, Russian acquittal rates, both past and present, are not artificially high. In the nineteenth century, studies revealed an acquittal rate fluctuating between fifteen and twenty percent.181 Similarly, in the mid to late 1990s, Russia’s acquittal rate varied between fourteen and twenty-two percent.182 American juries, in both state and federal court, acquit criminal defendants at a rate in precisely the same range as their Russian counterparts.183 This is particularly interesting given Russia’s long history, as contrasted to that of the United States, of autocratic rule and public resentment toward state power. Accordingly, instructing the jury with respect to mandatory sentencing provisions in exceptional cases would not be likely to artificially inflate the overall acquittal rate.184

In sum, the jury holds inherent power to nullify unjust laws, regardless of whether the court informs it of its ability to do so. Both Russia’s and our own185 juridical history reflects the vital role of this power. Today, in exceptional cases, district judges should have discretion to instruct the jury with respect to mandatory minimum sentences under our federal sentencing regimes. Knowledge of mandatory punishment may be essential to a jury’s informed decision of guilt or innocence. I share these sentiments with the late Honorable William L. Dwyer. United States District Judge Dwyer, an ardent champion of the jury system throughout his career, possessed both a

181. See supra note 89 and accompanying text.
182. See supra note 89 and accompanying text.
183. See supra note 90 and accompanying text. However, it is important to note again that because Russia has no plea-bargaining system, all cases proceed to trial. Therefore, Russia’s acquittal rate may, in fact, be significantly higher than that in the United States because such a small percentage of cases in the United States proceed to trial.
184. Although a thorough discussion of this issue is beyond the scope of this Article, consider what role jury nullification may have today in the context of mandatory sentencing guidelines and the economy of punishment. Based on my twenty years of experience on the bench, I believe that our federal prison populations are fueled by drug addiction. Incarceration rarely cures this disease, which plays a prominent role in recidivism and demands, under our federal sentencing regime, progressively longer periods of incarceration. In essence, as a result of these mandatory sentencing provisions, we devote millions of dollars annually to incarcerate an addiction without curing it. This creates an inefficient economy of punishment, ill-suited to the criminal population, and an ineffective exercise of state power, expending scarce state resources. See FOUCAULT, supra note 18, at 989–90 (discussing theory of economy of punishment and pull between principles of codification and individualization).
pion of the jury system throughout his career, possessed both a judge's and an historian's perspective on the role of jury nullification. What follows is the transcript of a ruling by Judge Dwyer that discusses the role of jury nullification in our judicial tradition and summarizes its relevance under our current federal sentencing regime. I concur fully in the opinion, which is far more eloquent than any I could now offer:

I can give you a ruling now on this. Defense counsel has asked for leave to argue the mandatory minimum sentence to the jury. I have decided to cover that subject in an instruction which will form part of the instructions given to the jury tomorrow. I've done this for two reasons.

The first is that the jury has heard evidence about the mandatory minimums. This was brought out without objection during the cross-examination of Ms. Gilbert. Ms. Gilbert is a critically important witness in this case. The jury's assessment of her credibility may be affected by knowledge of the mandatory minimum sentence she would face if she did not cooperate by engaging in drug transactions with Mr. Martin and then testifying against him.

That subject will be left in a foggy and uncertain state if the jury hears nothing about it except the testimony of Ms. Gilbert, who is not only a lay witness but one whose credibility is questioned to start with. Therefore, it is appropriate to tell the jury by way of an instruction exactly what the situation is under the mandatory sentencing laws.

The second basis for the proposed instruction is the one argued for by defense counsel in making the request. There is no doubt that the jury in any criminal case has the right to acquit on the basis of higher justice; in other words, on the basis of conscience.

Jury nullification, as it is sometimes called, is a fundamental principle of our system. The founders expected it to continue in full force and effect when the Sixth Amendment was adopted, and it has been reaffirmed by the Supreme Court ever since.

It has, in some ways, a distinguished history. One episode occurred in the colonial period when the thirteen colonies were protesting and resisting unjust taxing and tariff laws imposed by Great Britain. A famous period of jury nullification came during the enforcement of the Fugitive Slave Law in the middle of the nineteenth century. Other examples came during the Viet-
Reflections on Russia's Revival of Trial by Jury

In the Vietnam War in which, in some of the prosecutions of protestors, jury nullification again appeared.

And it has quite a history also in connection with excessive sentencing laws, or at least laws that the community at large and juries have deemed to be unduly cruel and extraordinary and beyond any legitimate expectations.

That, in fact, is one way—oddly enough—in which the jury gained its measure of strength and independence to start with, by nullifying in many capital cases. Particularly in England, when there were a couple of hundred different capital offenses on the books, the jury gained a measure of strength and independence it might not otherwise have achieved.

It's a fundamental duty of the courts to protect this part of our constitutional heritage. And to do that, the judge in rare cases—certainly not as a matter of routine, but in rare cases—should relax the rule of relevancy to permit matters to come before the jury, even if they would not make out a legal defense. This was done, for example, in some of the Vietnam war protestor cases in which courts allowed defendants to testify to their motives and purposes in protesting the war, even though these would not constitute a defense to the specific charges.

I did it recently in a case where the defendant was charged with violating an asbestos control statute. He was allowed to testify that he thought what he was doing was legal, even though that would not have made out a defense. The defendant, by the way, was nevertheless convicted.

The precise question here is whether the jury should be told of an extraordinarily harsh mandatory minimum sentencing law. There is an eloquent district court decision that supports this. That is United States v. Datcher, 830 F. Supp. 411 (M.D. Tenn. 1993). And the proposition is also well supported by a lengthy, thorough and scholarly article found at 95 COLUMBIA L. REV. 1232 (1995).

Of course, there are cases that have come out the other way in various district courts. But a number of judges, including judges in this circuit—district judges—have taken a course similar to the one I'm taking today in letting the jury know that certain mandatory minimum penalties would apply.

186. FOUCAULT, supra note 18, at 36–38 (Blackstone reference).
There is no Ninth Circuit or Supreme Court authority that prohibits this being done. The United States Attorney has cited Shannon v. United States, 114 S. Ct. 24 (1994), [sic] which does indeed contain some broad language about sentencing not being the business of the jury and about the usual practice being that juries are not told what the sentencing consequences of a guilty verdict will be.

No one quarrels with those general propositions. But the Shannon case is really not on point, because it does not concern any claim of a right to present information to the jury necessary to possible jury nullification or to prevent government oppression, which is, of course, the main legal and jurisprudential underpinning of jury nullification. What it did concern was a request that an instruction be given to avoid possible juror confusion. So Shannon is not truly on point.

And as I say, there is no authority from a higher court that would prohibit the imparting of the information that I propose to impart in this instruction—which does include a statement, by the way, that sentencing is a matter for the court and not for the jury. And indeed, it would be surprising if any appellate court tried to prohibit trial judges from making discretionary rulings that relax the relevancy standard so as to allow the jury to have information that is clearly important to the legitimate function of jury nullification.

Anyone interested in this subject and in the jury’s role generally would do well to read a recent scholarly book by Professor Jeffrey Abramson entitled We, the Jury.

Sometimes a formula is expressed that the jury finds the facts, and that’s all. In other words, that the jury then just mechanically applies the law given to it. All trial lawyers know and all trial judges know that that falls far short of describing the full reality of what the jury does. And it certainly falls far short, indeed, of describing what juries have historically meant and were intended to mean and still mean and should mean in our system.

In this case it is important that the jury know about the mandatory minimum, subject to these qualifications: The jury will also need to be advised of the defendant’s opportunity to avoid the mandatory minimum, either before or after sentencing, on the basis of cooperation resulting in a motion by the United States
Attorney. There will be no instruction given on jury nullification, and counsel may not argue jury nullification to the jury.187

III. CONCLUSION

Today, the questions I receive from Russian jurists do not bear the same reverence toward our judicial system that they once did. As they struggle against Russia’s autocratic past to revive the jury system and implement other democratic criminal justice reforms, they wonder whether our criminal justice system reflects an opposite trend. They question whether an over-empowered executive branch may injure the state it purports to protect and whether our independent judiciary can withstand its authority. I sense that my Russian peers hope our history does not come to mirror their own. We cannot be blind to the reflections Russia’s history casts. The jury system, regardless of the society in which it operates, fundamentally represents an elevation of the rights of individuals over the interests of the state. With respect to this principle, Russia provides a foundation for historically grounded consideration of the challenges we face today. As Russia aspires to replicate the criminal justice institutions and respect for individual rights we have modeled for generations, Russia may be our conscience, providing both context and caution. Russia’s history should help us ask those questions that are difficult to ask: How do we properly balance constitutional rights and national security in the war on terrorism? Do we risk elevating the interests of the state over the rights of individuals by employing alternative law enforcement and judicial procedures to combat threats to national security? Over time, will those procedures, which vary markedly according to a crime’s definition, swallow more traditional procedures as definitions blur? Do we risk crippling the democratic force of the jury by unduly dis-

187. Tr. of Trial, Vol. III at 2–6, United States v. Martin, No. 98-278 (W.D. Wash. Feb. 25, 1999). Judge Dwyer then proposed the following jury instruction:

During the testimony of Ms. Gilbert, you have heard evidence regarding what the federal sentencing laws require in cases of this nature. Sentencing is a matter for the court, not for the jury. A federal statute requires that a person convicted of crimes of distributing cocaine, or possessing it, with intent to distribute, be sentenced to at least ten years imprisonment if the amount involved was five kilograms of powder cocaine or fifty grams of cocaine base. If the person has a prior conviction for a felony drug offense, the mandatory minimum term is twenty years imprisonment. These mandatory minimums can be avoided if the person cooperates with the government in the investigation or prosecution of another person, and the prosecutor files a motion seeking a lower sentence. This may be done before the sentence is imposed, or within one year afterward. Without such a motion being made by the prosecutor, the Court ordinarily has no ability to reduce the mandatory minimum sentence.

Id.
couraging its power to correct unjust laws? Most importantly, as a re-
sult, do we risk eroding public confidence in the institutions and prin-
ciples we trumpet and treasure? Only history will truly provide the
answers to these questions. However, history can only do so if we
have the courage to ask.