Connecticut Debate Association

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Resolved: All accused terrorists should be tried by military tribunals.

Military tribunal

From Wikipedia, the free encyclopedia

A ***military tribunal*** is a kind of military court designed to try members of enemy forces during wartime, operating outside the scope of conventional criminal and civil proceedings. The judges are military officers and fulfill the role of jurors. Military tribunals are distinct from courts-martial.

A military tribunal is an inquisitorial system based on charges brought by a military authority, prosecuted by a military authority, judged by military officers, and sentenced by military officers against a member of an adversarial force.

Jurisdiction

A military tribunal or military commission is generally used to refer to bodies who assert jurisdiction over persons who are held in military custody and stand accused of being enemies in a conflict in which the military is engaged who as combatants have violated a law of war.

Military tribunals also, generally speaking, do not assert jurisdiction over people who are acknowledged to be non-combatants who have committed ordinary civil crimes. But, military tribunals are sometimes used to try individuals not affiliated with a national military who are nonetheless accused of being combatants acting in violation of the laws of war.

Controversy

Time constraints and the inability to obtain evidence can greatly hamper a case for the defense. Others have tried to use this argument in favor of commissions, as issues such as chain of evidence and hearsay, which are applied in civilian and criminal trials, could preclude conviction if such rules were applied (e.g., how to claim a bomb was in proper custody from a battlefield to a courtroom?) Civilian trials must be open to the public, while military tribunals can be held in secret. Because conviction usually relies on some sort of majority quota, the separability problem can easily cause the verdict to be displeasing not only to the defendant but also to the tribunal.

Decisions made by a military tribunal cannot be appealed to federal courts. The only way to appeal is a petition for a panel of review (which may or may not include civilians as well as military officers) to review decisions, however the President, as commander-in-chief, has final review of all appeals. No impartial arbiter is available.

Although such tribunals do not satisfy most protections and guarantees provided by the United States Bill of Rights, that has not stopped Presidents from using them, nor the U.S. Congress from authorizing them, as in the Military Commissions Act of 2006. All U.S. Presidents have contended that the Bill of Rights does not apply to noncitizen combatants.

Civilian, military trials prosecute terrorism suspects differently

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WASHINGTON (AP) — The U.S. federal courts and military tribunals that will prosecute suspected terrorists vary sharply in their independence, public stature and use of evidence. The Obama administration so far has offered no clear-cut rationale for how it chooses which system will try a detainee.

The administration has said similarly situated suspects can be tried in either system, while others may still be held without trial because there is insufficient evidence for either proceeding, but they are considered too dangerous to release.

"I think the Obama administration is trying to straddle this debate between whether we should approach al-Qaeda as a problem of massive-scale criminality or as a problem of war," said Matthew Waxman, a former Bush administration State Department and Pentagon official now at Columbia University law school.

Indeed, in Congress last Wednesday, Attorney General Eric Holder testified, "The 9/11 attacks were both an act of war and a violation of our federal criminal law, and they could have been prosecuted in either federal courts or military commissions."

The administration is sending professed Sept. 11 mastermind Khalid Sheikh Mohammed and four alleged henchmen to a civilian trial in New York, while a suspect in the USS Cole bombing in 2000 and four other terror suspects will be tried by military commissions.

The major differences between the systems are the federal judiciary's independence, rooted in the Constitution and lifetime appointments of judges, and the relaxed rules for admitting evidence in military tribunals.

Federal courts bar evidence obtained by coercion. And the new law regarding military commissions that President Barack Obama signed last month forbids evidence derived from torture and other harsh interrogation techniques. But the commissions still have rules that allow greater use of hearsay testimony and, in some instances, could permit the introduction of coerced testimony.

Military judges ultimately will decide what evidence can be admitted, but the new law allows statements made by defendants to be used even if they are not given voluntarily in certain circumstances, including in combat situations. Written witness statements, rather than live testimony that is subject to cross-examination, also can be admitted by military judges.

The larger issue, for some civil libertarians, is what the American Civil Liberties Union's Jonathan Hafetz called a "legitimacy deficit."

The commissions set up under President George W. Bush to try terrorism detainees have been revised several times based on Supreme Court decisions and acts of Congress that moved their rules and procedures closer to federal courts.

"But they just don't have the credibility and never will have the credibility that federal courts have," Hafetz said.

Joanne Mariner, director of the terrorism and counterterrorism program at Human Rights Watch, said another indication of the reduced stature of the commissions is that, by law, they can never be used to try U.S. citizens.

"The federal courts are a co-equal branch of government and judges are constitutionally protected from interference. That is really important in politically charged and high-profile cases," Mariner said. "Military commission judges and prosecutors have no such protection."

On the other hand, supporters of the military tribunals say they provide sufficient protections for accused terrorists. Moreover, they say, the Sept. 11, 2001, attack is a classic war crime — the mass murder of civilians — for which military tribunals have traditionally been used.

"Other things being equal, you would think that targeting civilians makes the crime more grave," said Gregory G. Katsas, a Bush Justice Department official. "If you don't try Khalid Sheikh Mohammed by military commission, I don't know who you try."

A host of leading Republicans, including Bush's last attorney general, Michael Mukasey, and former New York Mayor Rudy Giuliani, have said the 9/11 defendants should be tried by military tribunal.

The administration appears to have made pragmatic and political choices after determining that it is likely to win convictions in a civilian trial of the alleged Sept. 11 plotters, but seems less sure of its prospects if suspects from other attacks were tried in federal court.

Holder hinted at this balancing act in his Senate Judiciary Committee testimony.

"I am a prosecutor, and as a prosecutor my top priority was simply to select the venue where the government will have the greatest opportunity to present the strongest case in the best forum," he said, while rejecting senators' assertions that convictions are easier in military commissions.

But he also said those who attacked a civilian target on U.S. soil were being sent to a civilian federal court and those who attacked or plotted against military targets abroad were going before tribunals.

Holder's formulation puts the U.S. in the position of distinguishing between American interests based on which government agency was attacked. The attack on a Navy warship, the Cole, is to be handled by military commission, while the bombings of U.S. embassies in Africa in 1998 have been prosecuted by successive administrations in federal court.

Waxman said that it is unlikely al-Qaeda makes that distinction. "We're talking about a transnational terrorist network whose criminality extends across borders," he said. "The scene of the crime is global."

The lack of a clear explanation of the administration's choice has led some legal experts to conclude federal courts will be used when convictions seem assured and commissions will handle cases where evidence is weaker or more difficult to get past a federal judge.

"It somewhat supports the idea that if we can't make the case, we'll send them to a second-class system, which is the military commission," said Laura Olson, senior counsel at The Constitution Project, which objects to using military tribunals.

This two-tiered system may not entirely satisfy civil libertarians who want the administration to abandon the commissions or the Republican-led opposition in Congress that objects to giving Mohammed and the others their day in federal court.

But it could prove a viable approach that both avoids the credibility problems of using commissions for the highest visibility cases and the risk of acquittals if less devastating attacks were tried in civilian courts, said University of Chicago law professor Eric Posner.

"This moderate view that avoids the two extremes may be very appealing to people in the long run," Posner said.

Two Ground Zeroes

A site of mourning became a symbol of defiance and then a metaphor for incompetence.

By BRET STEPHENS, The Wall Street Journal, NOVEMBER 16, 2009, 10:35 P.M. ET

I have long thought it would be a good idea to bring 9/11 mastermind Khalid Sheikh Mohammed and his accomplices to lower Manhattan. In my concept, the men would be taken by helicopter to a height of about 1,000 feet over Ground Zero and pushed out the door, so that they, too, could experience what so many of their victims did in the awful final flickering seconds of their lives.

This, however, is not Eric Holder's concept. In announcing his decision last week to send KSM and four other defendants to stand trial for their crimes in a federal courthouse just a few blocks from Ground Zero, the attorney general said the trial would offer the bereaved of 9/11 "the opportunity to see the alleged plotters of those attacks held accountable in court," adding that he was "confident" the legal system would "rise to that challenge." We'll see about that.

There are a few ways to predict the course of the trials. One is to consult what al Qaeda itself advises its members to do in the event that they are brought before a judge. "At the beginning of the trial . . . the brothers must insist on proving that torture was inflicted on them by state security before the judge," goes a line in what is known as the Manchester Document, a 180-page al Qaeda how-to obtained by British police in 2000.

This is, of course, a prescription for lying, though it shouldn't be a tough sell with the jury given that KSM was in fact waterboarded by the CIA some 183 times. If anything, it provides a perfect opening for him to turn the tables on his accusers and put the U.S. government on trial, while embellishing any which way he pleases. No small number of potential New York City jurors would find KSM a more credible

witness than any number of Bush administration officials—think Alberto Gonzales or Dick Cheney—who might be called to the stand.

A second way to predict how the trials might go is to look back at the trial of al Qaeda's Zacarias Moussaoui, often described as the "20th hijacker." Moussaoui's case has been cited by defenders of Mr. Holder's decision as an example of how civilian courts have succeeded in dealing with some of the most hardened terrorists.

Really? Moussaoui was arrested in August 2001, and indicted that December. It would take until May 2006 before a jury would sentence him to life in prison, a single juror having spared him a death sentence. Assuming a similar time frame for the KSM trials, that means we can expect verdicts in 2015. That's a long time to keep lower Manhattan in a perpetual state of red alert.

Yet the Moussaoui trial wasn't merely interminable. It was also incompetent. Moussaoui did everything he could to turn it into a circus, at various times entering contradictory pleas on the view, as he put it, that "you're allowed to lie for jihad." Lawyers for the government were repeatedly accused of malfeasance, leading Judge Leonie Brinkema to observe at one point that "I have never seen such an egregious violation of a rule on witnesses." The judge herself came close to dismissing the entire case, even as the Fourth Circuit had to step in to reverse one of her rulings.

And this was a comparatively clean case, unlike, say, those of El Sayyid Nosair, acquitted in 1991 of the murder of Jewish fanatic Meir Kahane; or of Omar Abdel Rahman, the blind sheikh at whose trial for the 1993 World Trade Center bombing critical intelligence information was disclosed that gave Osama bin Laden clues as to what the U.S. knew about his network.

The third way to consider the trials is to look at Ground Zero itself. After eight years of deliberation, planning, money and effort, what have we got? The picture nearby is the answer.

Let me be more precise. After eight years in which the views and interests of, *inter alia*, the Port Authority, NYPD, MTA and EPA, the several governors of New York and New Jersey, lease-holder Larry Silverstein, various star architects, the insurance companies, contractors, unions and lawyers, the families of the bereaved, their self-appointed spokespersons, the residents of lower Manhattan and, yes, even the fish of the Hudson river have all been duly consulted and considered, this is what we've got: a site of mourning turned into a symbol of defiance turned into a metaphor of American incompetence—of things not going forward. It is, in short, the story of our decade.

Barack Obama, energetic and smart, was elected largely to change all that. But the thrust of his presidency so far has been in the direction of bloated government, deficits and health-care bills; paralysis over Afghanistan and Iran; the convulsions over Gitmo and the CIA torture memos. And now this: An effort to demonstrate the purity of our methods and motives that is destined, as all these things have been, to wind up as the legal equivalent of Ground Zero. Khalid Sheikh Mohammed, for whom no real justice will ever be meted, understood his targets well.

Criminals and Warriors

by Matthew Yglesias, Nov. 15, 2009

http://yglesias.thinkprogress.org/archives/2009/11/criminals-and-warriors.php

Alongside the various nonsensical efforts to convince people that KSM is too scary to be put in trial, the right objects to bringing him to justice on the grounds that this represents a problematic “law enforcement” approach to terrorism. I think it’s pretty clear that international terrorism has some dimensions that go well-beyond ordinary law enforcement, but if you have to put the whole thing in either the “crime” box or the “war” box, there’s a pretty strong case for erring on the side of crime.

In political terms, the right likes the war idea because it involves taking terrorism more “seriously.” But in doing so, you partake of way too much of the terrorists’ narrative about themselves. It’s *their* conceit, after all, that blowing up a bomb in a train station and killing a few hundred random commuters is an act of war. And war is a socially sanctioned form of activity, generally held to be a legally and morally

acceptable framework in which to kill people. What we want to say, however, is that this sporadic commuter-killing isn't a kind of war, it's an act of murder. To be sure, not an ordinary murder—a mass murder—but nonetheless murder. It's true that if al-Qaeda were something like the "blowing up train stations" arm of a major country with which we were otherwise at war, it might make the most sense to think of al-Qaeda as fitting in with spies and saboteurs; criminal adjuncts to a warrior enterprise.

After all, do we really want to send the message to the world that a self-starting spree killer like Nidal Malik Hasan is actually engaged in some kind of act of holy war? It seems to me that we don't. A lot of people in the world are interested in glory, and willing to take serious risks with their lives for its sake. Insofar as possible, we want to drain anti-American violence of the aura of glory. And that means by-and-large treating its perpetrators like criminals.

A battlefield in the courtroom

By Eugene Robinson, The Washington Post, Friday, November 20, 2009

Critics of Attorney General Eric Holder's decision to bring the self-proclaimed mastermind of the Sept. 11 attacks and four other accused terrorists to New York for trial can't seriously believe the city will have trouble handling the expected "trial of the century" hoopla. The critics can't really think a judge is going to give Khalid Sheik Mohammed an open microphone to spew his jihadist views, or fear that a jury -- sitting just blocks from Ground Zero -- will look for reasons to let an accused mass murderer off on some technicality.

Everyone knows that the bloodthirsty blowhard -- whom officials often refer to by his initials, KSM -- is never going to see the light of day. The uproar is really about the word "war." Outrage is being voiced by those who worry that Holder and President Obama are abandoning the Bush-era doctrine of a "war on terrorism" that must at all times be conducted by military means.

Those critics are wrong. The problem is that we can vanquish al-Qaeda and its affiliated groups, but still be left with a larger enemy: a militant, fundamentalist perversion of Islam. We can and should go after Osama bin Laden and his collaborators with relentless determination and, yes, that fight should be led by our armed forces. But to achieve a meaningful victory, we also have to win the war of ideas -- and in that philosophical and theological struggle, the concept of justice is a key battlefield.

It's amazing that so many people who insist on the "war on terrorism" framework apparently have such little interest in understanding the enemy, which seems to me the only way to find the enemy's vulnerabilities. The jihadist narrative is largely about justice, or rather what radical imams and their followers perceive as injustice.

In the enemy's version of history, the West -- meaning the United States, Israel, Britain and what used to be called Christendom -- has a long history of exploiting the Muslim world. We occupy Muslim lands to steal their resources. We install corrupt lackeys as their rulers. For all our high and mighty talk about fairness and justice, we reserve these luxuries for ourselves. In this warped worldview, we deserve any atrocities that jihadist "warriors" might commit against us.

Protesting that all this is absurd and obscene does not make it go away. And our troops' military success actually helps to *further* the jihadist narrative about a "crusade" against Islam.

It's ironic that many of the officials and commentators who are so upset about the decision to give KSM a civilian trial were also quick to call the Fort Hood killings an act of terrorism. If the suspect, Maj. Nidal Hasan, is indeed a terrorist -- and not just a deranged man who snapped -- then his awful rampage helps demonstrate my point. Hasan reportedly considered the U.S. military deployments in Iraq and Afghanistan a war against Islam, at one point arguing that Muslim soldiers should be excused from combat as conscientious objectors. In other words, he apparently bought at least part of the jihadist line. If killing a terrorist in Kandahar creates one in Killeen, we'll never make progress.

In this context, putting KSM and the others on trial in a civilian proceeding on U.S. soil is not just a duty but also an opportunity. It's a way to show that we do not have one system of justice for ourselves and

another for Muslims, that we give defendants their day in court, that we insist they be vigorously defended by competent counsel -- that we really do practice what we preach.

Even if a military tribunal would be just as fair -- and a military court might be even more offended than a civilian one by the fact that KSM was subjected to waterboarding -- a trial by men and women in uniform would be seen as an extension of the "war on Islam."

Holder's choice is not without risk. The biggest question I have is whether an impartial jury could be impaneled in New York. And while I believe the chance of an acquittal is incredibly remote, if it happened, KSM would be kept in indefinite detention anyway -- a nightmare scenario.

But there's one more huge benefit to a civilian trial: It would show the preachers of hatred and their followers that we're not afraid of them or their poisonous ideas. It would show that they haven't changed us or our ideals -- and that they never will.

Why Terrorists Don't Deserve A Court Date

Dan McLaughlin: Nine Reasons Why the New York Terror Trials Are A Bad Idea

CBSNEWS.com, Nov. 18, 2009

To quickly summarize the case against the trials:

1. The trials are wholly unnecessary; the Administration is holding some enemy combatants without trial and trying others through the military commission system, thus conceding that it has alternatives. As a result, any risks, expenses or other downsides of the trials are being undertaken solely for the purpose of empty symbolism.
2. The trials risk disclosure of sensitive intelligence information and sources. This is the most significant objection of all.
3. The trials create a heightened risk or incentive for a terrorist attack/jailbreak effort in Manhattan.
4. The additional security required to guard against #3 will cost the federal and city governments a fortune, interfere with the administration of justice in a busy federal district and busy federal prison, add to the traffic and delays already extant in lower Manhattan, and place a great burden on the jurors, judge, and prosecutors.
5. The detainees, as they have shown in the past, are especially dangerous to guards, a problem that's more acute when in transit or in civilian prisons than in a facility like Guantanamo that's designed to house them.
6. The trials will give these extremists the opportunity to grandstand.
7. There is, inherent in civilian criminal trials and given the likelihood that the defense will seek to play politics with the trial, some risk of one or more acquittals or hung juries that would give a propaganda victory to the terrorists and destroy what little symbolic value the trials have if the defendants are remanded to custody after being acquitted.
8. There is a risk that, to guard against #7, rules and precedents governing criminal procedure will be distorted in ways that have lingering effects on the regular justice system.
9. Trying terrorists in civilian courts perversely rewards their war crimes; they have not earned the rights of either American citizens nor lawful combatants under international law, and should not be granted them.

Hasan, Not KSM, Is Our Real Problem

By DANIEL HENNINGER, The Wall Street Journal, NOVEMBER 19, 2009

If it accomplished nothing else, the Obama administration's announcement last Friday to try 9/11 mastermind Khalid Sheikh Mohammed in lower Manhattan blew the Nidal Hasan murders out of the news. The KSM fiasco deserves all the attention it gets. What Hasan represents, however, is a more immediate concern.

Khalid Sheikh Mohammed is an old-school jihadi. They sit in far-off redoubts, assembling terror teams of foreign nationals who now must figure out how to get themselves and their plot inside the U.S. Not impossible, but harder than before 9/11.

Hasan is new school. He is what's known as a homegrown terrorist. Virtually all the Islamic terrorist plots thwarted here in recent years were homegrown, not designed from afar by a KSM.

Najibullah Zazi, the Colorado airport-shuttle driver arrested in New York this September and charged with conspiring to detonate bombs, came to the U.S. in 1999.

The Fort Dix Six, convicted in December of conspiring to attack U.S. military personnel, were mainly ethnic Albanians whose family came to New Jersey in the 1980s.

Zakaria Amara, the leader of the Toronto 18, who were planning to blow up skyscrapers in Canada, was born in a Toronto suburb.

In testimony to Congress in September, the director of the U.S. National Counterterrorism Center, Mike Leiter, said the Somali terrorist group al-Shabaab includes "dozens of recruits from the Unites States," mostly ethnic Somalis.

How do individuals sitting in Colorado, New Jersey, Toronto or Texas suddenly transform into mass murderers for jihad? Most of the time, they become radicalized by spending vast amounts of time viewing violent Islamic Web sites run from abroad.

Two years ago, Lawrence Sanchez of the New York City Police Department's intelligence division told the Senate Homeland Security Committee that the Internet is "the most significant factor in the radicalization that is occurring in America." Mr. Sanchez described this process as "self-imposed brainwashing."

In New York Times reporter David Rohde's account of his captivity by the Taliban, he wrote that "watching jihadi videos" was his guards' favorite pastime. He describes them as "little more than grimly repetitive snuff films" of executions.

If you sit in the United States and watch this stuff 'round the clock—self-brainwashing—it is fully protected activity. It qualifies as "speech," protected by the panoply of First Amendment law. These protections exist nowhere else in the world.

The biggest controversy surrounding Maj. Hasan is that the Army knew about his radical Islamic sympathies, from the Walter Reed lecture and the monitored emails to the English-speaking, American-born Yemeni imam Anwar Awlaki, whose Facebook page, with a reported 4,800 "friends," is depicted nearby.

The argument is that the Army should have mustered him out of the service and thereby avoided the 13 murders. Really? After kicking him out of the Army, there was no probable cause for authorities to surveil a civilian Nidal Hasan. In time he as easily could have killed 13 Americans in a suburban Texas mall.

Former Attorney General Michael Mukasey, as the judge presiding over the 1995 trial of the "blind sheikh," Omar Abdel Rahman, for the 1993 World Trade Center bombing, had to instruct the jury that the sheikh's violent, "holy war" sermons at New York mosques were legal, protected activity (he was convicted of conspiracy).

There is a mosque in Manhattan at 96th Street and Lexington Avenue, on whose sidewalk one can hear adherents spouting support for violence against the U.S. That, too, is protected.

A violent ideology is just an ideology, and that is protected speech. It requires acts to put in motion aggressive surveillance, such as wiretapping.

I think the Hasan case shows this is wrong, or at least too dangerous. First Amendment law has never dealt with a widely distributed ideology that has as its raison d'être the mass murder of Americans and destruction of American property.

For now this is the way it is: Future Hasans can get jacked up all day on kill-the-Americans Web sites, and we have to wait until they put in motion a conspiracy like Fort Dix or the Colorado jihadists. Or until they start shooting.

Politics is the only recourse.

This is what the political fight was through the Bush years—fights over the Patriot Act, warrantless wiretaps of conversations between U.S. citizens and foreign suspects, using the SWIFT financial data system to track terrorist transfers (or, with KSM, military tribunals versus civil courts). The argument against these policies was that "our values" require that judges review and approve virtually all such activity.

The problem with this view is that "our values" were *already* protected to an unprecedented degree. Raising the bar higher is asking too much of the people assigned to catch all these self-radicalizing jihadists.

The Democrats have cast their lot with tighter restrictions. The past six years and a presidential campaign proved that. In the wake of Hasan's 13 dead people, revisiting the limits of our vulnerability has to be on the table in next year's congressional elections, and then a presidential election.

The KSM Trial Will Be Fair Enough

And military detention is legit, too.

Slate: jurisprudence, By Jack Goldsmith, Posted Tuesday, Dec. 1, 2009, at 10:38 AM ET

The Obama administration's decision to prosecute Khalid Sheikh Mohammed in a civilian court has brought charges from across the political spectrum that his trial will be unfair and thus illegitimate. Critics have articulated three separate concerns. With care, the government can overcome them all. In three acts:

Impartial Jury

Some people worry that Mohammed will not get the "impartial jury" that the Sixth Amendment guarantees him. The Sixth Amendment does not require a jury ignorant of 9/11. It requires only that Mohammed's jurors not prejudge his guilt and that they be guided only by the law set forth by the judge and the evidence presented in court.

The president and attorney general did not help ensure an impartial jury when they commented on Mohammed's trial two weeks ago. Asked whether he understood why Americans might be offended by Mohammed's trial, President Obama responded, "I don't think it will be offensive at all when he's convicted and when the death penalty is applied to him." (Our lawyer-president quickly backtracked, saying, "I'm not prejudging it, I'm not going to be in that courtroom. That's the job of the prosecutors, the judge and the jury.") The attorney general said he would not have brought the prosecution unless he was "confident that our outcome would be a successful one" and later added that "failure is not an option."

These statements by the nation's two top legal officers are unfortunate. The rules of the New York federal court where Mohammed will be tried presume that a "government agent" has likely interfered with a fair trial when he publicly offers "any opinion as to the accused's guilt or innocence or as to the merits of the case."

Mohammed's lawyers will no doubt reference all of this in a motion to dismiss on the basis of prejudicial pretrial publicity. But the statements' actual impact is marginal at most, coming against the background of 9/11 itself and Mohammed's own public acknowledgment of his role in the attacks.

For better or worse, the usual remedy for statements of this sort is not to dismiss the case but rather to redouble efforts to ensure that jurors don't consider the statements. (In a more extreme case, sanctions can also be brought against government officials who utter prejudicial statements, but that will not happen here.) The statements are nonetheless harmful because they diminish the appearance of fairness that is a major advantage of choosing a civilian trial over a military commission.

But they're not a deal breaker. As in the criminal prosecution of Zacarias Moussaoui (who was prosecuted in federal court for the same conspiracy Mohammed will likely be charged with), the impartiality of hundreds of potential jurors will probably be assessed with lengthy questionnaires, approved in advance by the judge and the lawyers for both sides. With patience and skill during jury selection, cautionary jury instructions, and careful jury supervision during trial, a judge should be able to find a dozen people and other alternates who can credibly stick to the facts and law presented at trial.

Detention After Trial

Embracing a position of the Bush administration, Holder recently claimed the power to detain Mohammed as an enemy combatant even if he is acquitted. The Department of Defense's general counsel, Jeh Johnson, made the same claim last summer. This "heads I win, tails you lose" strategy has led critics on the left and the right (Glenn Greenwald and Charles Krauthammer) to charge that Mohammed's prosecution will be a "show trial." It certainly seems contrary to the purposes of a trial to announce that the defendant will not be set free no matter what. But as both Bush and Obama lawyers have now concluded, military detention of a wartime enemy combatant, following criminal acquittal or the termination of a criminal sentence, is lawful.

One possible constitutional objection is the double jeopardy clause, which states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." It might seem that Mohammed would twice be put in jeopardy if he were detained as an enemy combatant after being acquitted at trial. But the Supreme Court has determined that the double jeopardy clause applies only if the second basis for detention is itself punishment. It does not apply, for example, to civil sanctions (including civil detention) that follow criminal punishment or acquittal, even if the civil sanction is predicated on the same facts that were in issue at trial.

The Nuremberg Tribunal noted that military detention is "neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war." The purpose of military detention is not retribution or deterrence, but rather, as Justice Sandra Day O'Connor explained in the *Hamdi* case, "to prevent captured individuals from returning to the field of battle and taking up arms once again." Because military detention is not criminal punishment, the double jeopardy clause would not ban such detention following acquittal or the end of a criminal sentence.

The Obama administration must better explain the distinction between trial and detention. It should make clear that the purpose of trial is to ascertain guilt and (if the defendant is found guilty) to assess punishment, including, potentially, the death penalty. It should acknowledge that Mohammed can in theory be acquitted at trial, and that any post-acquittal detention would involve a separate process designed not for punishment but rather to prevent Mohammed from returning to battle. Criminal exoneration would not make Mohammed any less dangerous and thus would not affect the government's independent authority to detain him until the end of the conflict—though the administration might acknowledge that a military detainee should receive better conditions of confinement than a convicted felon.

A different constitutional concern about detention following acquittal is rooted in the due process clause, which guarantees fundamental fairness when the government deprives someone of liberty. But as the Supreme Court has held in cases involving sexual predators, the mentally insane, and deportable aliens, due process, too, permits detention of a dangerous person, even following an acquittal or the end of a criminal sentence. The court has issued some cautionary notes. It has expressed concerns about indefinite civil detention in some contexts, but it has also pointedly distinguished detention related to terrorism. And it has insisted in some contexts on high or clear degrees of dangerousness before permitting detention.

Whether a terrorist is detained in the first instance or following a trial, the government's current terrorist detention program should surmount these and other due process hurdles. In fact, the justices have already held that due process permits the detention of an American Taliban until the war in Afghanistan is over, as long as certain very basic procedures are followed. Lower courts have extended this reasoning to the detention of al-Qaida members until the end of the conflict with that group. Congress could strengthen

these precedents by enacting a statute with contemporary standards for detention. But for now, the White House seems to think, probably correctly, that it can get by without a new law.

Different Systems for Different Terrorists

While Mohammed gets a criminal trial in federal court, the Obama administration has made clear that at least five other suspected terrorists will be prosecuted before a military commission that uses more government-friendly rules, and that other terrorists will be detained without trial based on an even lower standard. Critics claim it is unfair for the government to pick and choose among these systems. Such "forum shopping" shows a "lack of principled consistency," charges Andy McCarthy, that might go against "the bedrock American principle of equal protection under the law."

But there is no constitutional objection to forum shopping of this sort. In fact, it happens all the time. In 1942, President Franklin D. Roosevelt insisted on military commissions for Nazi saboteurs rather than a civilian trial so he could seek the death penalty. Maj. Nidal Hassan could be prosecuted in a civilian or a military court for the Fort Hood shootings; the government chose military jurisdiction, perhaps to have military jurors hear the case. After federal and state prosecutors from several states fought to prosecute sniper John Allan Muhammad, the Department of Justice released him to Virginia officials, in part because the jury pool and procedural law in that state favored conviction.

The government traditionally has great leeway to choose among legally available justice systems based on all kinds of factors: policy goals, litigation strategy, resource allocation, ease of proof, severity of offense, and the like. The choice between civilian trial, military trial, and military detention is an application of this old principle in a new context. Over time, there may be political pressure to move all terrorists into a single trial system. But we're not there yet. For now, the government is on safe enough legal ground.

Jack Goldsmith, an assistant attorney general during the Bush administration, teaches at Harvard Law School and is a member of the Hoover Institution's Task Force on National Security and Law.

Rights of the accused, From Wikipedia, the free encyclopedia

In the United States, these rights are guaranteed in the Bill of Rights (the first ten amendments to the United States Constitution), particularly in the Fourth, Fifth, Sixth, and Eighth Amendments.

The rights of the accused always comes into conflict with promotion of victims' rights.

Rights

- right of due process
- protection from illegal search and seizures
- the right to indictment by a grand jury
- protection from double jeopardy
- protection against self-incrimination
- right to a fair and speedy public trial
- right to trial by jury (to be judged by one's peers)
- notice of accusations (to be informed of the nature and cause of the accusation)
- right to confront one's accuser
- right to counsel
- protection from excessive bail and fines, and from cruel and unusual punishment

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Terrorism, From Wikipedia, the free encyclopedia

Terrorism is the systematic use of terror especially as a means of coercion.[1] At present, there is no internationally agreed definition of terrorism.[2][3] Common definitions of terrorism refer only to those violent acts which are intended to create fear (terror), are perpetrated for an ideological goal (as opposed to a lone attack), and deliberately target or disregard the safety of non-combatants. Some definitions also include acts of unlawful violence and war.