

Trying Al Qaeda: Bringing Terrorists to Justice

by Joshua T. Bell

Abstract

Shortly after the World Trade Center and the Pentagon were attacked, the United States embarked on a mission to bring those responsible for the terrorist attacks on 11 September 2001 to justice. A tremendous effort ensued to find and capture the individuals who were responsible or associated with these events. Many of the individuals who were captured have remained imprisoned for an indefinite amount of time due to the political debate regarding what is the most appropriate venue to try suspects arrested and charged with acts of terrorism. The choices come down to trial either by a trial by a Military Commission or a U.S. Federal District Court. There are unique challenges for effective prosecution in both venues. Which venue the Obama Administration will deem appropriate to try the terrorists captured by the former administration remains uncertain at this point in time.

Introduction

In the aftermath of the 9/11 terrorist attacks on the World Trade Center and the Pentagon, the question of how to punish those responsible and ultimately bring them to justice became the focus of a heated public debate in the United States. Most would think that it would be an easy task to convict a suspected terrorist. However, it is actually quite a complex undertaking, requiring a tremendous amount of political and legal maneuvering as well as forethought if the United States and the international community wish to be satisfied with the end result – that justice is done in fair trials.

The world watched with great interest this past spring when U.S. Attorney General Eric Holder revealed the Department of Justice's intent to prosecute Khalid Sheik Mohammed (KSM) - the alleged mastermind of the 9/11 attacks - in U.S. Federal District Court in New York City. Almost immediately questions began to mount as to whether this was the most appropriate venue for such a high profile terrorist figure. Among the questions that followed the announcement was whether or not the Department of Justice and the Attorney General could guarantee that KSM would not be acquitted of the charges and potentially go free. Attorney General Holder vehemently concluded that KSM would not be acquitted; however, the nagging possibility remained that he would be. Shortly thereafter, prominent political figures and law enforcement personnel throughout New York began to express doubts whether or not KSM's trial should be held in New York. The Department of Justice stepped back slightly and the issue remains unresolved.

The debate as to how to try extremist detainees comes down to a choice between the only two realistic possibilities: a trial by a U.S. District Court or by Military Commissions. There have been further calls for the possibility of holding the trials in an international court of law; however, given the complexity and lack of political will to do so in the United States, it seems highly unlikely that such a venue will be chosen. The purpose of this article is to compare and contrast the two most likely scenarios for future terrorist trials given the presently available data, to hopefully contribute to a constructive debate.

Military Commissions

Some two months after the attacks, President George W. Bush, issued a Military Order that authorized the detention and trial by Military Commission of non-U.S. citizens who were deemed to be members of al-Qaeda, who engaged in international terrorism, or who had knowingly harbored individuals in either category. [1] The use of Military Commissions is not without precedent; the Bush Administration reportedly relied heavily on *Ex parte Quirin*, the case of Nazi saboteurs who landed from a German submarine on Long Island and Florida in 1942 and were subsequently tried by a Military Commission. [2] President Roosevelt, at the time, authorized the Military Commission only for saboteurs and spies who had entered the country on behalf of "...any nation at war with the United States." [3]

Applying the same principle to the 9/11 attacks is a bit trickier because the laws of war, a subset of the law of nations, apply only to state actors, not to autonomous terrorist organizations. [4] The common argument to counter such a claim is that the 9/11 attacks were, in effect, so provocative an act that they constitute de facto a violation of the laws of war; thus giving the president valid authority to convene such commissions. [5] According to President Bush's military order "it allows the president to subject a non-citizen to trial by military tribunal if he determines that person is or was a member of Al Qaeda or committed, participated, aided and abetted, or conspired in any terrorist act, even those unrelated to Al Qaeda's campaign of terror against the United States." [6]

There is no question that the Bush Administration's basis for the establishment of the commissions is controversial. However, proponents argue that there are very valid reasons why trial by Military Commission is a viable option for prosecuting terrorism suspects.

Why Military Commissions Make Sense

With all the prevailing controversy surrounding Military Commissions and their establishment, there are valid reasons why such a venue would be the proper place to prosecute terrorism suspects. A Military Commission is 'portable', i.e. it can be held anywhere, thereby limiting the security risks of holding the trials in New York, Washington DC, or other locations. [7] There is

little doubt in anyone's mind that such a trial would be quite a spectacle. However, given that a Military Commission would be held on a military facility, a location already operating under a strict security posture, the military would be able to provide a level of security virtually impossible in a civilian setting. [8] As an example, the Presiding Officer in a Military Commission has the option of keeping the selection and identity of jurors secret, an option federal judges generally do not have. [9] This certainly is an important consideration in light of the fact that terrorist groups might well undertake actions to disrupt the proceedings, including directly targeting jurors.

A secondary reason why Military Commissions are perhaps the best option is the fact that they are especially proficient venues for prosecution. There is seldom any period of lengthy delay between a conviction and the decision on sentencing since attorneys for both sides must be prepared at the outset to proceed through the findings and sentencing phases of the trial. [10] This ability to move expeditiously through the entire process is critical because of the sheer number of terrorists that would most likely be going through this process. The American public in general has a very low tolerance for protracted endeavors, especially when it comes to terrorist trials that stretch into multi-year undertakings.

A third reason why Military Commissions present such an attractive proposition is the way that they are able to deal with classified material and sources. Terrorism is founded on the notion of secrecy and as a result, the ability to counter it also relies heavily on classified collection methods and sources. This presents a problem when it comes to presenting certain incriminating materials in the course of the trial of a terrorist. Divulging classified collection methods and sources might present a tremendous threat to national security if that information were to be made public - either intentionally or through negligence. This is why Military Commissions are important, because the members of the jury in a Military Commission are all military personnel who are exposed to classified material on a regular basis and are familiar with procedures for its handling. The same cannot be said for the jury pool in most federal district courts. [11] As one legal commentator remarked: "Release of such information may also discourage essential cooperation from foreign intelligence services that are sympathetic to the country's anti-terrorism efforts yet unwilling to have their assistance revealed." [12] Given the United States' often contentious footing with the international community regarding its conduct in foreign policy, it is critical that every effort is made to maintain positive relations with those nations and their respective intelligence services. Losing that support inevitably damages the United States' ability to continue to wage war on terrorism.

Lastly, Military Commissions are a viable option because of the great level of control over the process. As noted by Jennifer Elsea, the "...President may set the rules of procedure and evidence for Military Commissions and need only apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district court

where he considers it practical to do so.” [13] Such controls would be valuable given the overall complexity of the process. However, this level of control is also a major reason why the Military Commission option has proven so controversial.

Why Military Commissions May Not Make Sense

Almost immediately following the Bush Administration’s announcement that it intended to try terrorism suspects via Military Commissions, concerns began to surface as to whether or not this was the correct venue to do so. Critics focused on several key issues that make the Military Commission option so contentious. As previously mentioned, the Military Commissions option affords the President a great deal of flexibility in setting forth the procedural rules. However, critics argue that if these commissions are going to be accepted as both valid and fair, then it is vitally important that those procedures not appear to unfairly “stack the deck” against the defendant. Even the mere impression of such a partiality would raise the specter of a “kangaroo court” with a predetermined outcome, the results of which would be disastrous to standing of the United States in the eyes of the outside world.

Another common critique of the Military Commission system is that they are not truly independent bodies. Harold Hongju Koh narrows the issue down more specifically in that:

“The President directs his subordinates to create Military Commissions, to determine who shall be tried before them, and to choose the finders of fact, law and guilt. Furthermore, commissioners are not independent judges, but usually military officers who are ultimately answerable to the Secretary of Defense and the President, who prosecute the cases.” [14]

Koh’s analysis further highlights the problems in presenting the Military Commission system as a fair and unbiased entity that is capable of rendering decisions that are palatable for all those concerned.

A third critique of the Military Commission system revolves around the controversy of the U.S. Naval Base at Guantanamo Bay, Cuba, and the rights of those detained there. When the Bush Administration established Military Commissions, the intention was to provide a forum whereby “enemy combatants” suspected of violating the Presidential Order would be detained, interrogated and tried. [15] The designation as an “enemy combatant” has subsequently allowed the U.S. to hold individuals in a “prisoner of war” status, which - according to applicable military statutes - allows the government to hold them until the cessation of hostilities. The lack of a foreseeable, agreed upon end to the conflict with Al-Qaeda directly affects the detainee’s present and future status, since those detained will not be released in the foreseeable future. [16] The murkiness of the “enemy combatant” label, whether corrected in subsequent legislation or

not, has tainted the credibility of the Military Commission system and any eventual outcome will be met with a considerable level of skepticism.

U.S. District Courts

After Military Commissions, the other most logical option for bringing terrorism suspects to justice is through the U.S. Federal District Court system. The system is comprised of 11 circuits, which are further broken into 94 federal judicial districts. Like Military Commissions, the Federal District Court system has its proponents and opponents. Both feel strongly about using the system for trying terrorism cases. As above with the Military Commissions, I will briefly examine the pros and cons of why this system may or may not be best suited to deliver the justice sought in these terrorist cases.

The Case for U.S. District Courts

Among the most prominent reasons why district courts are the best avenue for terrorist prosecution is that it is a well-established system with a long track record of clear procedures and oversight. More specifically, the foundations of the district Court system were established by the country's founding fathers; these have essentially gone through a very rigorous vetting process and have been continually refined over the years.

The success of the district Courts has been well documented; several trials of individuals associated with the Al Qaeda network have already taken place in U.S. federal courts in connection with the 1993 World Trade Center bombing and the 1998 U.S. embassy bombings in Kenya and Tanzania. Convictions have been rendered in all of these trials, which produced significant evidence implicating Al Qaeda and Osama bin Laden in terrorist crimes. [17] In May 2008, James Benjamin and Richard Zabel released a white paper titled *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, in which they reported about a comprehensive review of more than one hundred and twenty actual terrorism prosecutions dating back to the 1980s. On the basis of an analysis of their data collection they concluded that the federal system was well equipped to handle the prosecution of terrorism cases. A subsequent 2009 update to the report provided further supporting evidence:

Statistical highlights included a 91.1% conviction rate for terrorism cases commenced after 9/11 and sentencing data showing that 89% of convicted terrorism defendants since 9/11 have been sentenced to imprisonment, including eleven life sentences and an average sentence of 100.98 months.[18]

The ability to sustain such a high success rate will inevitably present a much stronger case for continuing to utilize the District Court system to prosecute future terrorism cases - a success rate that the Military Commission system cannot claim for itself.

A federal criminal trial would also be a more prudent tool because it would guarantee the defendant due process rights that might not exist in a venue outside the United States. [19] Such due process rights help to ensure that a fair trial can take place under considerable public and international scrutiny. The U.S. Constitution guarantees such due process rights and any deviation from those rights would have to pass the examination of the Supreme Court before changes are made. Adhering to such rights would demonstrate to the world that the United States takes its obligations under international anti-terrorism conventions and protocols seriously. [20]

Another reason in favor of the Federal District Court system is due to its track record of fairness and impartiality. As a result, the court system would most likely have better success in obtaining the cooperation of foreign authorities in matters relating to the extradition of suspects, or in obtaining witnesses or evidence. [21] The international controversy surrounding the detentions at Guantanamo Bay and the use of Military Commissions has made other countries increasingly reluctant to be party to a venue with such negative connotations. The Federal District Court system has shown to the international community through past prosecutions of international criminals that justice can be delivered in a fair and impartial way.

A common complaint of the U.S. District Court system is its inability to protect classified information. However, the courts have decades of experience in dealing with confidential materials. Most notably, the Classified Information Procedures Act (CIPA) allows courts to filter out any classified information that is not strictly necessary to the resolution of the disputed issues in the case. [22] CIPA has further proven to be a successful instrument for enabling prosecutions that involve national security information to proceed in a manner that is both fair to the defendant and protective of the sensitive national security intelligence information. [23] The use of U.S. District Court is, however, not without its own challenges and these cannot be dismissed from consideration when examining which is the best venue.

The Case against U.S. District Courts

The manner in which many of the terrorism suspects were taken into custody and their subsequent interrogations might dissuade someone from being in favor of choosing the U.S. District Court as the most appropriate venue. There may be difficulties translating what may have originally been obtained as intelligence information (which is often based upon rumors and hearsay) into evidence that would be admissible in court. The United States court system enables constitutionally mandated safeguards that ensure a defendant's rights. As a result, terrorism suspects must be afforded those protections to the same extent as to any other defendant in a

criminal trial. There is, however, apprehension that individuals such as KSM might stand the chance of being found not guilty and potentially set free - a result that would likely produce a tremendous backlash from the American public.

In an October 2009, in a *Wall Street Journal* article, former U.S. Attorney General Michael Mukasey highlighted some additional challenges in trying terrorism suspects in a U.S. District Court. He specifically referred to the 1995 prosecution of Sheik Omar Abdel Rahman (a.k.a. the Blind Sheik) as an example of potential difficulties. Specifically, he stated that in this instance, the government was required to disclose the identity of all known conspirators, regardless of whether they were charged as defendants. [24] As Mukasey goes on to point out, one of those co-conspirators was Osama bin Laden; the subsequent release of that information would have alerted him of the U.S. interest in his activities and those of some of his colleagues. [25]

Mukasey also highlighted in the article his concern over public testimony in the court. He related that under diligent questioning by a defense counsel,

They could elicit evidence about means and methods of evidence collection that have nothing to do with the underlying issues in the case, but which can be used to press government witnesses to either disclose information they would prefer to keep confidential or make it appear that they are concealing facts.” [26].

The proper safeguarding of intelligence collection sources and methods is of paramount concern given the United States’ difficulty in cultivating valuable intelligence sources within various terrorist networks. Even the slightest possibility that such sources would be compromised certainly gives pause for concern.

Among the other issues that give pause for concern are those surrounding the security that would potentially be required to safeguard the court proceedings. It is not just the physical security of the building and surrounding area but also the potential safety concerns surrounding the judge and jurors. There would be the distinct possibility that those individuals would be at risk of future attack by terrorist organizations or individuals. The resulting requirements for their safety would be daunting to an already overburdened criminal justice system. There is no disputing that the local, state and federal law enforcement agencies would be quite capable of pulling it off. However, the strain it would place on their resources would be extreme. Certainly in terms of manpower, the military would have the edge in its ability to provide adequate protection for an extended period of time at a fraction of the costs.

The U.S. District Court system has so far been very successful in prosecuting terrorism suspects; however, their true test would be the trial of individuals such as KSM and other top al Qaeda

leadership. One issue that has not been discussed here – and which would merit a separate discussion – is the problem of evidence allegedly obtained from suspects by means of torture. Especially civilian courts might find this issue hard to deal with.

Conclusion

In the end, only time and hindsight will tell which venue is the most appropriate to try terrorism suspects. The Obama Administration intends to try its first subject before a Military Commission in the near future and that trial of Omar Khadr, a now 23 year old man, captured at the age of 15 in Afghanistan and held at Guantanamo Bay for the past 8 years, will be an interesting test case in which the international community will surely be watching as this case involves a child soldier and prosecuting children for serious crimes is controversial. [27] Yet the U.S. government cannot afford to falter in the eyes of the American public and its foreign allies and all those whose support it needs to continue the fight against terrorism. It is important that the country adheres to its founding principles and does not compromise its ideals in the pursuit of justice. Whichever venue is chosen, no one can dispute that the United States must ultimately succeed in bringing justice upon those who brought such harm to this country.

The stage is set for a historic series of events to unfold, the ramifications of which will likely be felt for years to come. The importance of these trials is unprecedented as they also represent the voices of the victims of 9/11 and their families. As a nation, we cannot afford to fail them.

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Notes

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