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New York trial of September 11 mastermind: On law and terror

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Editor's Note. *As the trial of Khaled Sheikh Mohammed, the alleged mastermind of the September 11 atrocities starts in a US federal court in Manhattan, the debate is raging over the decision of the Obama administration to close Guantanamo and transfer all the files to regular courts within the United States. Hosts of legal questions will arise in these trials. In the following two articles, different perspectives are presented: are such trials in the US condemned to produce bad law, as argued by David Feige? Will the courts prove that there is no need for "special procedures," as defended by Friedman and Hansen? Another question arising this past week concerns the collateral victims of terrorism laws, those who are accused of supporting groups designated by the US government as "terrorist." This is being challenged in the US by various prominent human rights groups, as reported in the third article.*

Terrorism trial in US federal courts

Bad law for Khalid Sheikh Mohammed?

By David Feige

Sometime in the next few months, a small group of experienced criminal-defense lawyers will be assigned to what is likely to be the case of a lifetime: the defense of admitted September 11 mastermind Khalid Sheikh Mohammad (KSM), or, to those enamored of sinister acronyms, KSM. Their work will not be easy, obviously. No jury on this continent is going to acquit their client, the government is certain to insist on the death penalty, and KSM will almost certainly try to put the government on trial. So what's a team of hardworking criminal defense attorneys to do?

Everything they can, which, in this case, will mean a lot of futile maneuvering that will generate a tragic flood of bad law, rendering the defense team's valiant service not merely unsuccessful but actually hostile to the interests of all their other clients.

The defense in KSM's case has two major weapons: persuasive evidence of torture that should result in the suppression of a great deal of evidence and use of the discovery process to uncover facts that embarrass or discomfit the government. These tactics work – if the government will come to the table to work out a deal. Take, for example, the prosecution of the "American Taliban" John Walker Lindh, currently serving the eighth year of his 20-year sentence. Lindh was captured by the Northern Alliance in Afghanistan in 2001 and charged in the eastern district of Virginia in 2002 with conspiracy to provide material support to a terrorist organization. At the center of his case was a confession he made to interrogators from the FBI and US Marines.

Lindh's defense team turned up evidence to support the claim that Lindh was duct-taped to a stretcher, placed in a metal shipping container, and, with a bullet still inside him, interrogated without a lawyer, despite a warning from a Justice Department ethics adviser that such a move was unethical. The defense lawyers obtained graphic photos of an emaciated Lindh as well as confidential and internal Justice Department emails that seriously undermined Attorney General John Ashcroft's public statements about the legitimacy of the interrogation. All of which led the government to make an offer: Instead of the three life sentences he was facing, Lindh could have 20 years, as long as he abided by a gag order and dropped all claims of torture and mistreatment against the government.

This time, however, the government isn't going to make an offer to KSM, and even if prosecutors did, it is hard to imagine that a zealot like him would prefer to plead guilty than take advantage of the forum a trial affords. Thus the defense's tools won't work. Which brings us to the making of bad law.

Good criminal defense attorneys are seldom deterred by futility, so it's reasonable to expect that KSM's lawyers will make all the arguments there are to make: They'll allege a violation of KSM's right to a speedy trial, claiming that the years he spent in CIA detention and Gitmo violated this constitutional right. They'll seek suppression of KSM's statements, arguing (persuasively) that the torture he endured – sleep deprivation, noise, cold, physical abuse, and, of course, 183 water-boarding sessions – make his statements involuntary. They will insist that everything stemming from those statements must be suppressed, under the Fourth Amendment, as the fruit of the wildly poisonous tree. They will demand the names of operatives and interrogators, using KSM's right to confront the witnesses against him to box the government into revealing things it would prefer to keep secret – the identities of confidential informants, the locations of secret safe houses, the names of other inmates and detainees who provided information about him, and a thousand other clever things that should make the government squirm. The defense will attack the CIA, FBI, and NSA, demanding information about wiretapping and signal intelligence and sources and methods. They'll move to dismiss the case because there is simply no venue in the United States in which KSM can get a fair trial.

All of these motions and three dozen more will be either denied or denuded of any significant impact on the disposition of the case. The speedy-trial argument will fail. Important documents will be scrubbed and redacted to the point of unintelligibility or will be ruled irrelevant. The motions to dismiss will all be denied. And though some of KSM's statements will be suppressed in order to preserve the appearance of impartiality and integrity, plenty of the most damming ones will remain admissible. While condemning in stern language the terrible treatment of KSM and denouncing water-boarding as beneath the high standards of our justice system, the trial judge will nonetheless admit into evidence statements made by KSM in subsequent military tribunals, along with those made to a so-called "clean team" of interrogators, rendering all the suppressed evidence utterly insignificant.

In an idealized view, our judicial system is insulated from the ribald passions of politics. In reality, those passions suffuse the criminal justice system, and no matter how compelling the case for suppressing evidence that would actually effect the trial might be, given the politics at play, there is no judge in the country who will seriously endanger the prosecution. Instead, with the defense motions duly denied, the case will

proceed to trial, and then (as no jury in the country is going to acquit KSM) to conviction and a series of appeals. And that's where the ultimate effect of a vigorous defense of KSM gets really grim.

At each stage of the appellate process, a higher court will countenance the cowardly decisions made by the trial judge, ennobling them with the unfortunate force of precedent. The judicial refusal to consider KSM's years of quasi-legal military detention as a violation of his right to a speedy trial will erode that already crippled constitutional concept. The denial of the venue motion will raise the bar even higher for defendants looking to escape from damning pretrial publicity. Ever deferential to the trial court, the US Court of Appeals for the Second Circuit will affirm dozens of decisions that redact and restrict the disclosure of secret documents, prompting the government to be ever more expansive in invoking claims of national security and emboldening other judges to withhold critical evidence from future defendants. Finally, the twisted logic required to disentangle KSM's initial torture from his subsequent "clean team" statements will provide a blueprint for the government, giving them the prize they've been after all this time – a legal way both to torture and to prosecute.

In the end, KSM will be convicted and America will declare the case a great victory for process, openness, and ordinary criminal procedure. Bringing KSM to trial in New York will still be far better than any of the available alternatives. But the toll his torture and imprisonment has already taken, and the price the bad law his defense will create will exact, will become part of the folly of our post-September 11 madness.

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A Risk worth taking: Civilian trials for Guantanamo terror suspects

By Lawrence Friedman and Victor Hansen

Even before President Obama announced that Khalid Sheikh Mohammad and four other terrorist suspects currently being detained at Guantanamo would be prosecuted in federal court in New York City, the administration suffered fierce criticism for proposing that these prosecutions should be conducted in Article III courts – civilian courts – in the United States.

In an op-ed he recently wrote for the National Law Journal, Senator Mitch McConnell outlined several reasons why, in his view, we should not consider trying terrorist suspects on our soil. He argued that such trials might result in the disclosure of sensitive information and that there will be logistical issues with securing the courthouse. He also voiced concern over, in his words, "the additional legal rights terrorists will receive if they are brought here."
None of these reasons for declining to try terrorist suspects in Article III courts withstands close scrutiny.

First, the notion that a civilian trial means that sensitive information will be at risk of disclosure is chimerical. Federal judges have many tools available to them that can be used to ensure that no sensitive information is disclosed during the course of these prosecutions beyond what is necessary for the lawyers to do their jobs. The judges of the federal district court in Washington D.C., have proved themselves quite capable of protecting sensitive information in habeas proceedings brought by terrorist detainees. It is not clear why their counterparts in New York could not do the same.

Second, the logistical aspects of securing courtrooms and protecting all individuals who may be involved in these trials do not present insurmountable problems. There already exists a high level of security in all federal courthouses. We can enhance that security knowing these courthouses might become even more attractive targets. We can close streets, deny access to unaffiliated personnel, cordon off air traffic, and so on. Though burdensome, none of these steps are impossible, and – equally importantly – none necessarily entails closing the proceedings to members of the press, who in a very real sense will be representing all of us as witnesses to the administration of justice in respect to these defendants.

Third, there is the fear that these terrorist suspects will receive additional legal protections. This is a curious argument. Its validity depends upon acceptance of the premise that, as a matter of course, they should receive fewer legal protections. That premise is faulty: it suggests that because of their legal status these individuals are different from ordinary criminal defendants. Apart from what they have been charged with, however, they are not. The premise assumes guilt when in fact that is what the government must prove.

Further, if the prosecution of these defendants in civilian court presents evidentiary problems because proof of their crimes was obtained through torture and other coercive techniques, then the question of guilt necessarily becomes more complicated. To put it bluntly, these detainees were deemed enemy combatants. They have not been proved in any judicial proceeding to be terrorists. However much we believe in our good hearts and with good reason that they are terrorists, the whole point of our criminal justice system is to provide an opportunity for an objective determination of that fact. That determination is what makes the verdict lawful and just.

Senator McConnell also maintains that there is the risk that if the government cannot prove its case – because, for example, the evidence has been tainted – these defendants will be released into the United States. This is a remote possibility. This term the US Supreme Court is reviewing a case, Kiyemba v. Obama, in which the district court, later overturned by the DC Circuit Court of Appeals, ordered the release of a group of Uighers from Guantanamo into the United States. Even if the Supreme Court overturns the Appeals Court and affirms the authority of district court judges to affect this kind of release, Congress has the authority to enact rules to regulate that power. Indeed, Congress likely has the authority to create a system of civil confinement for individuals who cannot be repatriated or released into the United States. It may be that, despite President Obama's wishes, the nation will not soon be abandoning the confinement of individuals at Guantanamo.

We are not suggesting that there is no risk associated with trying Guantanamo detainees in civilian courts. We are simply saying that those risks can be managed. And, more importantly, those risks should be managed. To determine the guilt or innocence of these individuals in civilian courts makes a powerful statement about just how seriously the United States takes the Rule of Law. These trials may be another testament to why, at the end of the day, the terrorists will never win.

Lawrence Friedman teaches constitutional law and state constitutional law and Victor Hansen teaches criminal law and criminal procedure at New England School of Law. Their book, The Case for Congress: Separation of Powers and the War on Terror, was recently published by Ashgate. This article appeared on Jurist.com, directed by Professor Bernard Hibbitts,on November 16, 2009

US rights groups back high court challenge to terrorism support laws

By Jonathan Cohen, Jurist.com

The American Civil Liberties Union, (ACLU), the Constitution Project (CP), and the Rutherford Institute filed "amici curiae" briefs Tuesday backing a challenge to a federal law [18 USC 2339B(a)(1)] that prohibits providing material support to terrorism. The groups supported a Humanitarian Law Project (HLP) argument that the law defines "material support" too broadly. In a press release that accompanied the filings, ACLU staff attorney Melissa Goodman summarized that group's view on the law: "The material support law is so vague and broad that peace, human rights and aid groups are left hopelessly guessing whether their constitutionally-protected speech could land them in jail...Cutting off aid to terrorism is undoubtedly an important government interest, but criminalizing legitimate peace-building and humanitarian work – including advocacy to end terrorism and violence – does nothing to further that interest and actually makes it more difficult to achieve."

The case, Holder v. Humanitarian Law Project, was granted certiori (i.e. was allowed to be considered) by the US Supreme Court in September after the US Court of Appeals for the Ninth Circuit struck down parts of the law while upholding others. Earlier this month, the Constitution Project issued a report calling for the reform of the material support laws which they claim criminalize protected speech. HLP has also challenged Executive Order 13224, which prohibits unlicensed US groups and individuals from providing services to certain terrorist organizations designated by the government.