Terrorism and the Law: Military Tribunals

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Terrorism’s primary objective is to create terror. It accomplishes this, and is different from our traditional view of war, in that it is usually directed against civilians, is random and scattered geographically, and is not conducted by a nation/state, although nation/states may provide financing, equipment and refuge for terrorists and terrorist organizations. It is a criminal activity in which criminals may voluntarily kill themselves in the act of committing their crimes. Terrorists cannot be the object of negotiations, diplomatic exchanges or treaties.

Terrorism is of increasing concern as the knowledge and possibly the capability for mass destruction and death are widely available globally. Thus the majority of people who are not criminals and who value and cherish life, peace and security are faced with the need to prevent a form of international criminal activity that may pose a threat to their lives. That need has already created a tension with accepted domestic and international legal principles.

The United States is holding approximately 600 prisoners at Guantanamo Bay, Cuba and perhaps more in Afghanistan. It has interned suspected terrorists in the United States. It is not clear who most of these prisoners are, or the grounds on which they are being held. To the extent that many of them may be members of the Taliban, they would appear to be prisoners of war, and according to the Geneva Conventions should be “released and repatriated without delay after the cessation of active hostilities.” Assuming that we were involved in a war in Afghanistan, while “mopping up” operations continue, it would appear that “active hostilities” have terminated. The Taliban government has been defeated and a new government installed. Prisoners of war may continue to be detained if they are charged with war crimes or other offenses. However as of August 2002, no such charges have been brought.

Assuming that many of the detainees will be charged with a crime, the question remains what forum or fora will be used to try them. There are four possibilities: military tribunals, military court martials, the federal court system or an international tribunal.

The Geneva Conventions provide that prisoners of war accused of war crimes and other offenses must be tried before the same courts and with the same procedures (including appeals) as members of the armed forces of the detaining power.7 If a member of the U.S. armed forces is court-marshaled, there is a right of appeal to the United States Court of Appeals for the Armed Forces – a civilian court. It would appear that if members of the Taliban army are to be tried, they should be tried by a military courts martial.

A “Rule of Law” – the application of a predictable, fair and evenly applied body of rules to govern the behavior of a society – is a primary building block of civilization. Critical aspects of such a “Rule of Law” are the definition of criminal activity and the trial and treatment of those accused of criminality. In the United States the fundamentals of such treatment and trial have evolved since its founding. Many were incorporated in the U.S. Constitution, particularly the Fifth and Sixth Amendments, over two hundred years ago.

Other provisions of the Constitution apply to criminal proceedings, such as the Eighth Amendment’s prohibition against “cruel and unusual punishment.” These Constitutional provisions regarding the trial and treatment of those accused of crime are supplemented by state statutes, and many aspects of well established Anglo-American common law, such as those regarding the admissibility of evidence and the right of appeal.

More recently, basic concepts of fairness in the treatment of prisoners taken during armed conflict and the trial and treatment of criminals who have violated international norms of conduct have been addressed on an international level, incorporated in various treaties and conventions and have resulted in the creation of international tribunals.8 Notwithstanding such Constitutional, statutory and common law provisions to protect the accused, the criminal justice system has many flaws, and its implementation has been criticized.9 Since 1973, 100 men duly convicted and sentenced to death have been exonerated, recently through the use of DNA evidence.7

The Supreme Court has ruled that the rights of an accused in the United States are granted only to citizens.9 However, some constitutional protections, including Fourteenth Amendment due process, apply to resident aliens.10 This is probably why the Afghanistan prisoners are being held in Guantanamo, Cuba, rather than in the United States.

The attacks of September 11, 2001 had immediate human and economic impacts. They have resulted in shifts in the foreign and domestic policies of many nations and will also have long-term effects on international and domestic law.

On November 13, 2001, President George W. Bush issued an executive order entitled “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.”10 The order made clear that it was in response to the terrorist attacks on the World Trade Center in New York City, and on the Pentagon in Washington, D.C. A primary finding was that such attacks “…created a state of armed conflict that requires the use of the United States Armed Forces.”11 Its purpose was to provide for the trial of certain individuals “…for violations of the laws of war and other applicable laws by military tribunals.”11

The use of military tribunals, while rare, is not unique. Similar commissions were used to try British Major Andre during the American Revolution and those involved in President Lincoln’s assassination after the Civil War. The most recent use was 60 years ago by President Franklin Roosevelt for a group of German saboteurs who were apprehended after landing on Long Island from a German submarine. The action was upheld in
The secretary of defense is charged with issuing orders and regulations for the appointment of the necessary commissions and the conduct of the trials, which are to include a full and fair trial, with the military commission sitting as the triers of both fact and law. Such evidence is to be admitted as would, in the opinion of the presiding officer, have probative value to a reasonable person. Access to evidence and its admission, as well as the access to and closure of proceedings would be in a manner consistent with the protection of classified or classifiable information.

Conviction and sentencing would require a two-thirds vote of the members of the tribunal present at the time of the vote (a majority being present) and the record of the trial, including any conviction or sentence, would be submitted for review and final decision by the president or by the secretary of defense. Finally, the president’s order provides that military tribunals shall have exclusive jurisdiction of individuals subject to the order and that there shall be no other remedy or right of appeal from an order of the tribunal.

It is apparent that considerable discretion in framing the work of the military tribunals was left to the Secretary of Defense Donald Rumsfeld. The rules that he promulgated on March 21, 2002, were a major step in creating the format for a fair trial. Amid other safeguards they provided the accused with a presumption of innocence and various rights related to the conduct of the defense, the right to choose counsel, to see the prosecution’s evidence, to have a public trial (subject to the protection of classified information), and to remain silent with no adverse inference to be drawn. In addition, the prosecution must prove guilt beyond a reasonable doubt. Decisions to impose the death penalty must be imposed by a seven member commission and must be unanimous, and a “not guilty” verdict cannot be changed. It should be noted, however, that a guilty verdict (other than in a death penalty case) only requires a two-thirds vote.

While the Department of Defense order resolved many of the issues that were the subject of controversy in the president’s order and go far toward including the elements of a fair trial, some substantial issues remain. The tribunal will be composed of military officers appointed by the secretary of defense or his designee. The members may find it difficult to be objective when judging a person whose purpose was to kill their military comrades, even when such a wartime goal may be normal and legal.

Although defense counsel will be assigned, that counsel will be a military officer. The defendant may select civilian
counsel of his choice (providing that cer-
tain criteria are met), but no provision is
made for the payment of such counsel.30

The most difficult issue is clearly the
need to protect the sources of evidence.
Thus the presiding officer determines what
evidence may be admitted and has the
authority to close any portion of (or the
entire) proceedings. Grounds for closure
include the protection of information “and
other national security interests.” The
accused and civilian defense counsel may
be excluded from the proceedings, and if
excluded may not be informed of any infor-
mation presented in the closed session.31

Witnesses are subject to cross exami-
nation. However, the witness may not be
physically present, may be heard in a closed
proceeding, and may use a pseudonym.32 If
the proceeding is closed, civilian defense
counsel will be unable to cross examine.
Almost any evidence may be admitted,
whether sworn or unsworn.33

While there is no appeal from a deci-
sion of a military tribunal, the regulations
provide for the establishment of a “review
panel” of three military officers to review
trial records and deliberate “in closed con-
ference.” The panel must either forward
the case to the secretary of defense with its
recommendation or “return the case to the
appointing authority for further proceed-
ings” if a majority of the panel has a “defi-
nite and firm conviction that a material
error of law occurred.”34 The secretary of
defense can also return the case for further
proceedings or forward it to the president
with a recommendation.35

In many respects the failure of the
United States to bring charges against
those it is holding (both outside and
inside the United States) is the most trou-
blesome aspect of the situation. As indi-
cated, if the members of the Taliban
armed forces are not accused of specific
crimes, and are being held solely because
they were defending their country, they
should be repatriated.

Members of al Qaeda pose a more dif-
ficult problem. If they intend to pursue ter-
norist activities when released, they will
pose a continuing threat. Even though they
may not have committed or aided in the
commission of a crime prior to being cap-
tured, assuming that it can be proven that
they intend to commit crimes if released,
they are entitled to a trial to determine
their intent. However, is intent without an
action a crime? The answer to this question
will lie to some extent in a conspiracy the-
ory—that al Qaeda is a criminal enterprise
and that those joining knew its criminal
purpose and had the intent of furthering its
criminal objectives. Broadly viewed, under
this theory any member of al Qaeda could
be guilty of conspiracy.

Many questions are inherent in the
issues surrounding those detained at
Guantanamo. The members of al Qaeda
must be charged with a crime in order to
justify their continued detention. They
may be tried, if they are tried, by a mili-
tary tribunal, and that is the assumed
purpose of the president’s executive
order. If members of the Taliban are
charged with a crime, they should be
tried by a military court martial which
follows similar rules concerning the
admissibility of evidence and openness
as those in federal criminal courts, and
which includes the right to appeal to a
higher civil court.

Terrorists could also be tried under the
U.S. Uniform Code of Military Justice by a
courts martial. A more likely forum, if a
military tribunal is not used, is a federal
court, where the 1993 bombers of the
World Trade Center (none of whom were
U.S. citizens) were tried and convicted. Two
non-citizens accused of terrorism are now
being tried in the federal courts (Zacarias
Moussaoui and Richard C. Reid). Ironically,
as of September 2002, two American citi-
zens are being held in the United States
without being charged with any crime and
with no access to counsel (Jose Padilla and
Yasser Esam Hamdi).

Finally, an international tribunal
could be established to try terrorists, or
they could be tried in the International
Criminal Court. While such an approach
would have some advantages, it would be
the least likely forum to protect confiden-
tial sources of information, and appears
highly unlikely in the context of current
United States foreign policy.

As indicated, holding prisoners for
many months without charging them
with a crime and without access to coun-
sel is contrary to fundamental elements
of constitutional and domestic law and
international treaties. It contradicts our
claim to being a nation governed by and
respecting the rule of law. After the 1993
Trade Center bombing and in the past

Approximately 600 prisoners, captured during fighting in Afghanistan, are currently being detained at a military base in
Guantanamo Bay.
year, we have shown that the federal courts are a forum capable of trying terrorists while protecting sources of evidence. The use of military tribunals will raise questions, both here and abroad, about the integrity and fairness of the process and its results.

**End Notes**

4. The appeal is not a right, in the sense that the Supreme Court has determined that it “is a matter of grace and not a necessary ingredient of justice.” (Frankfurter, J. in Cobbydick v. United States, 309 U.S. 323, 325 (1940). See also Frankfurter, J. in NLRB v. Donnelly Garment Co., 330 U.S. 219, 229 (1947).
8. United State v. Cruikshank, 2 Otto (92 U.S.) 542, 549, 23 L.Ed 588 (1875). This case has been cited in 939 subsequent decisions.
10. 66 FR 57833.
11. Id. Section 1 (e).
12. Quirin et al v. Cox, 317 U.S. 1; 63 Supr. Ct. 2; 87 L.Ed.3 (1942).
13. 66 FR 57833 Section 1 (f) and (g).
14. 66 FR 57834 Section 2. (a). The provision also requires that “such acts have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy.”
17. 66 FR 57834 section 3.
18. Id. Section 4(a). The terms “military tribunals” and “military commissions” appear to be used interchangeably. While there is no requirement that the accused be found guilty prior to punishment being imposed, such a requirement is implicit in the language quoted.
19. 66 FR 57835-6 Section (b) (1) and (2).
21. Id. Section 4 C. (3).
22. Id. Section 5. E.
23. Id. at O.
24. Id. at F.
25. Id. Section 6. F.
26. Id.
27. Id. at H. (2)
28. Id. Section 6 F
29. Id. Sections 2 and 4 A. (3).
30. Id. section 4 C. (2) and (3).
32. Id. at D. (2) b. and c.
33. Id. at (3).
34. Id. at H. (4).
35. Id. at (5).

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Professor Ginsberg’s interest in military tribunals was stimulated by President Bush’s issuance of an executive order on November 13, 2001, “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,” in response to the terrorist attacks on the World Trade Center in New York City and on the Pentagon in Washington, D.C.

Professor Ginsberg earned a B.A. from Antioch College and a J.D. from Yale University. He has published, lectured and consulted on a variety of subjects in environmental, property and governmental fields and is the co-author of *Environmental Law and Regulation in New York* (West Publishing, 1996).

Prior to joining the faculty at Hofstra, Professor Ginsberg practiced law as a partner in the New York City law firm of Ginsberg, Schwab & Goldberg. He was general counsel and director of research of the New York State Temporary Commission on the Powers of Local Government, commissioner and first deputy administrator for the New York City Parks, Recreation and Cultural Affairs Administration; and deputy and acting executive assistant to the president of the New York City Council. -SK