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."[1] 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.[2] 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.[3] 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.[4]

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.[5]

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.[6] 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.[8] However, some constitutional protections, including Fourteenth Amendment due process, apply to *resident* aliens.[9] 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." 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

1942 by the U.S. Supreme Court.[12] It should be noted, however, that the 1942 executive order promulgated by President Roosevelt was made during a war declared by the United States Congress and applied only to persons who were acting for "any nation at war with the United States" — a limitation not contained in President Bush's order.

Because the use of military tribunals raises fundamental legal and practical issues, President Bush's order was immediately controversial and stimulated considerable discussion and opposition. It was rationalized on several grounds, among them that evidence would, in most instances, come from intelligence sources that could be compromised if disclosed, and that included disclosure to the defendants against whom the evidence would be used.

The legal rationale for the use of military tribunals is that "an extraordinary emergency exists for national defense" and "… that it is not practicable to apply – the principles of law and the rules of evidence generally recognized in the trial of criminal cases" in federal courts.[13] The president's order applies to any non-citizen who the president determines "is or was a member of al Queda" or "has engaged in, aided or abetted, or conspired to commit acts of international terrorism, or acts in preparation therefore …" or has knowingly harbored such an individual.[14]

There is no definition of "acts of international terrorism" or any definition of or further reference to "al Queda." It is estimated that there are approximately 20 million non-citizens who live in the United States[15]—and approximately 6.2 billion who do not.[16] Any individual identified by the president in accordance with the order is put under the jurisdiction of the secretary of defense who is given the authority to detain such an individual in or outside the United States.[17]

The secretary of defense is given authority to try the individuals designated by the president subject to the order. The trial is to be by a military commission (the term is used interchangeably with military tribunal), and the individual may be punished "with the penalties provided under applicable law, including life imprisonment or death."[18]

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.[19]

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[20], the right to choose counsel[21], to see the prosecution's evidence[22], to have a public trial (subject to the protection of classified information)[23], and to remain silent with no adverse inference to be drawn.[24] In addition, the prosecution must prove guilt beyond a reasonable doubt.[25] Decisions to impose the death penalty must be imposed by a seven member commission and must be unanimous[26], and a "not guilty" verdict cannot be changed.[27] It should be noted, however, that a guilty verdict (other than in a death penalty case) only requires a two-thirds vote.[28]

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.[29] 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 certain 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 information presented in the closed session.[31]

Witnesses are subject to cross examination. 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 decision 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 conference." 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 proceedings" if a majority of the panel has a "definite 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 troublesome aspect of the situation. As indicated, 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 Queda pose a more difficult problem. If they intend to pursue terrorist 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 captured, 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 theory—that al Queda 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 Queda could be guilty of conspiracy.

Many questions are inherent in the issues surrounding those detained at Quantanamo. The members of al Queda must be charged with a crime in order to justify their continued detention. They may be tried, if they are tried, by a military 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 admissability 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 citizens 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 confidential 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 counsel 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

1. Geneva III, Art. 118.
2. Geneva III, Art. 119; Geneva IV, Art. 133.
3. Geneva, Arts. 102 and 106.
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 Cobbledick 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).
5. For example, Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (revising the Convention of the same name dated July 27, 1929), International Criminal Tribunal for the Former Yugoslavia, The International Court of Justice, The European Court of Human Rights, The International Criminal Court.
6. *See*, Borchard, Edwin, *Convicting the Innocent*, Yale University Press 1932; Frank, Jerome, NOT GUILTY, Doubleday, 1932. More recently, see Dwyer and Wilgoren "The System Dances With Death" section 4, P.1, *The New York Times*, April 21, 2002.
7. Death Penalty Information Center, 1320 Eighteenth Street, NW Washington, D.C. 20036.
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.
9. Yick Wo v. Hopkins, 118 U.S. 356, 6. S.Ct. 1064; 30 L.ed. 220 (1886).
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."
15. Lewis, "Dust in Our Eyes" P. A21, *The New York Times*, December 4, 2001.
16. Ch. 6, p. 127, *State of the World 2002*, The World Watch Institute, Washington, D.C. 2002.
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).
20. Department of Defense, Military Commission Order No. 1, March 21, 2002, Section 5.
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).
31. *Id.* Section 6 B. (3). *See*, generally, "Protection of Information" section 6 D. (5).
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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During the summer 2002 program, Hofstra University School of Law and the University of Nice School of Law also co-hosted a conference, *War, Crimes and Terrorism: The Role of International Courts and Tribunals.* Professor Ginsberg participated in the conference and presented on military tribunals, from which this article is derived.

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).

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