

# A Federal Terrorism Court

The Answer to the Legal Quagmire on Terrorism,  
Detainees, and International Norms

by *Harvey Rishikof*

Modern terrorism raises myriad questions for our traditional institutions of government and justice: Is a terrorist action a criminal violation or a political act? Should terrorism be prosecuted under the laws of armed conflict or the criminal-justice system? Is terrorism primarily a domestic or foreign issue? Do international conventions govern the process of confinement and interrogation of terrorists? Does it make a difference if the victims of terrorism are combatants or non-combatants? What is the appropriate “due process” for different categories of detainees, unlawful belligerents, and terrorists?

The current administration, Congress, and the federal courts have struggled with these questions—and many others like them—for the last six years. The answers they have come up with so far have satisfied neither the American public nor the international community.

As I pointed out in a *New York Times* editorial in June 2002 and in a subsequent 2003 law review article,<sup>1</sup> terrorism cases are compromising our traditional court structures. Our current court system is ill equipped for the difficult task of trying quasi-international conflicts with non-state actors who plot, abet, and carry out attacks against civilian targets. We need to consider new approaches that fit the challenges of our times.

## The Merits of a Federal Terrorism Court

One such approach would be the establishment of a secure and specialized Federal Terrorism Court dedicated to these cases. The thrust of the idea is to have a dedicated set of federal trial judges working with an expert bar of federal and military prosecutors and defense counsel—all with high-level security clearances. Such a court could accommodate the particular challenges of prosecuting terrorism cases in a manner wholly consistent with the Constitution, the common law, and relevant statutes. This would be no sealed-off Star Chamber; trials would be open to the public

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unless there were truly compelling reasons to limit access in a particular case. Such openness would help give our people and our allies the necessary proof that the United States is reasserting its national identity as a champion of human rights and due process.

We already have specialized courts in the federal system for particularly complex issues requiring unique knowledge, including bankruptcy, patents, copyrights, tax, and international trade. In short, we have ample precedent for a court dedicated to vital, complicated issues requiring the development of substantive and procedural expertise.

A specialized court for terrorism cases would allow our system to handle not only the unique legal complexities of terrorism, but the physical risks as well. Such a court could be situated in a designated courthouse with security measures that are more stringent than those found in most federal courts, with state-of-the-art facilities and procedures for holding and transporting suspects; storing evidence; protecting judges, jurors and witnesses; and transmitting or receiving televised testimony. The court could be established anywhere in the United States, probably in a location far removed from such potential targets as New York or Washington, D.C.

Ultimately, however, the rationale for establishing a Federal Terrorism Court lies less in the need for physical security than in the need for a more effective, more open, more credible means of trying accused terrorists. The current adjudicative framework for the post-9/11 terrorism detentions and prosecutions has undermined American credibility at a crucial juncture; weakened national confidence in our political institutions; and called into question our commitment to the letter and spirit of our laws.

## **The Current Flawed Institutional Approach**

General dissatisfaction was reflected in a fall 2007 *Atlantic Monthly* poll of foreign-

policy experts, in which 87 percent of the respondents agreed that the Guantanamo Bay prison system has hurt the United States in its fight against global terrorism. Said one, "Our strongest asset internationally was our reputation and credibility on human rights. We've squandered that."<sup>2</sup>

The root of the problem lies in an unwillingness to think constructively about the different possible legal responses to terrorism. In asserting primarily a war-footing approach with an expansive definition of executive privilege, the constitutionally defined roles of the other two branches of government were muted. Denying the applicability of the Geneva Conventions for the trials of accused terrorists; arguing against the jurisdiction of the courts for judicial review of decisions; and asserting presidential authority for "coercive interrogation" without consulting Congress all represent a policy of expediency at the expense of the rule of law.

The Supreme Court has rejected the exclusionary assertions of executive power and the denial of the applicability of international conventions. The question remains, however, as to what constitutes "due process" for detainees under U.S. and international law. The Supreme Court has yet to determine this issue. As a result, our procedures for trying suspected terrorists remain uncertain after six years of prosecution and litigation.

The Congress, for its part, eventually passed the Detainee Treatment Act of 2005 and the Military Commission Act (MCA) of 2006. These measures, however, remain controversial. They afford neither the protections of the American criminal-justice system nor those of the traditional military code of justice. The trial procedures of the MCA have received substantial criticism, including provisions for the handling of evidence and testimony. The result of this legislation is an ungainly civil-military hybrid process overseen by judges with limited expertise in terrorism and security matters.

As critics such as U.S. attorney general and former district court judge Michael B. Mukasey have pointed out, even the supposedly successful prosecution of José Padilla under traditional criminal prosecutorial rules displayed the flaws of our system, because the confession he made in military custody without legal counsel was inadmissible. Thus far, the domestic criminal prosecution of terrorists has strained the resources of federal courts and garnered only about three dozen convictions. In addition, the existing approach has put at risk future operations through disclosure in open court of methods and sources of intelligence, despite the Classified Information Procedures Act, and it has caused distortions by applying criminal-law rules of evidence to national-security cases that may sometimes require different standards of admissibility.

So what is the solution to this legal quagmire? The answer, one that many of our allies have employed, is a new adjudicatory framework focused on terrorism—a national Federal Terrorism Court.

## Lessons From Abroad

The French, under the legendary magistrate judge Jean-Louis Bruguière, have created a terrorism-court system that, while not wholly applicable to the American system, might still offer some ideas for how to proceed. As explained by Marc Perelman in the pages of *Foreign Policy* magazine (January 2006), in 1986 France established a comprehensive anti-terrorism law, establishing a centralized unit of investigating magistrates in Paris, with jurisdiction over all terrorism cases.<sup>3</sup>

In the French system, an investigating judge is the equivalent of a special prosecutor in charge of a secret, grand jury-like inquiry through which he can file charges, order wiretaps, and issue warrants and subpoenas. Judges can request the assistance of the police and intelligence services, order the preventive

detention of suspects for six days without charge, and justify keeping someone behind bars for several years pending an investigation. The judges have international jurisdiction when a French national is involved in a terrorist act, be it as a perpetrator or as a victim.

The combined role of judge and prosecutor is not something we can or should seek to install in the United States. In addition, a non-jury system such as the one the French have established for terrorism cases would run afoul of U.S. constitutional principle and raise the specter of replicating the infamous Diplock courts that Britain employed to try suspected terrorists in Northern Ireland.

It is worth noting, however, at least one benefit of the French system that we could readily emulate: It has produced a pool of specialized judges and investigators adept at prosecuting terrorist networks.

In building a Federal Terrorism Court, some basic issues need to be addressed: How would such a court fit into the existing judicial system? How would the judges be assigned? What would be the scope of the court's power, and who would oversee it?

Naturally, there are a variety of policy responses to such questions. The court could be similar in structure to a federal trial court, as provided for under Article III of the Constitution, with appeals to a designated circuit. This is the approach taken in the MCA.

The court could, however, also be established under the authority of Congress as defined in the Constitution's Article I, with a 10-year or 14-year appointment for the judges. The precedent here would be federal bankruptcy court, in which an expert bench decides cases that fall within its specialized area of expertise, and appellate cases proceed to a federal circuit. The new court could have jurisdiction for terrorist cases both domestic and international, involving either American or foreign defendants. The court would need to craft flexible rules of procedure

to accommodate the nuances of the cases presented, and the development of such rules would be yet another benefit of a specialized terrorism court.

A further wrinkle that needs to be ironed out is the relationship of the new terrorism court to the court established by Congress in the Foreign Intelligence Surveillance Act (FISA). One approach would be to expand the jurisdiction of the present FISA trial court to become a new terrorism court. Clearly, however, some modifications would be needed for the appointment of FISA judges, which currently is the sole prerogative of the Chief Justice of the United States. In addition, the *in camera* (closed chamber) nature of FISA proceedings would need to change in order to accommodate a broader class of terrorism cases.

To appropriately explore and resolve all these critical issues, a Federal Terrorism Court Commission should immediately be established, with the mission to create a model legislative proposal within six months. The commissioners should be representatives drawn from the executive branch, the legislative branch, the military, the private defense bar, the non-governmental

organization community, and other knowledgeable parties. The report might be structured to include an objective analysis of the advantages and disadvantages of various proposals for the scope and structure of a specialized terrorism court.

Scholars from both sides of the political spectrum are supporting the idea of a terrorism court. The proponents range from Neal Karlen, a defense counsel for detainees, to Jack Goldsmith, a former Department of Justice official in the Bush administration. Attorney General Mukasey himself has indicated his support for such a proposal.

Terrorists do not fit into our traditional legal classifications. We can continue to improvise, compromising our federal criminal procedures, trespassing upon our constitutional values, and alienating our allies. Alternatively, we can demonstrate our commitment to the rule of law by creating an institution that can handle new challenges without damaging our principles. Samantha Power, a Harvard social theorist, has called “for new tools, new rules, and new mindsets” for the problems of the 21st century. A Federal Terrorism Court meets all three requirements.<sup>4</sup>

## Endnotes

<sup>1</sup>Rishikof, Harvey, “Is It Time for a Federalist Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes,” Volume VII, *Suffolk Journal of Trial & Appellate Advocacy*, 2003.

<sup>2</sup>“Guantanamo’s Shadow,” *Atlantic Monthly*, October 2007, <http://www.theatlantic.com/doc/2007/10/guantanamo-poll>.

<sup>3</sup>Perelman, Marc, “How the French Fight Terror,” *Foreign Policy*, January 2006.

<sup>4</sup>Power, Samantha, “Our War on Terror,” *The New York Times*, July 29, 2007, [http://www.nytimes.com/2007/07/29/books/review/Power\\_t.html?\\_r=18&oref=slogin](http://www.nytimes.com/2007/07/29/books/review/Power_t.html?_r=18&oref=slogin).