

# TRYING FOREIGN TERRORISTS IN CIVILIAN COURTS IS BOTH DANGEROUS AND CONTRARY TO OUR TRADITIONS

By William R. Coulson

**T**HE FUNDAMENTAL POLICY TENSION which lies at the heart of our debate is whether foreign terrorism is more a criminal law/deterrence issue, or an intelligence/prevention issue? I suggest that the traditional criminal law prosecution-as-deterrence-and punishment model is ill-equipped to effectively deal with foreign-

wars under President Jefferson, during the Indian wars, and during the Korean War under President Truman. A "declaration of war" by Congress includes "functional equivalents" such as the Tonkin Gulf Resolution of 1964, and the Authorization for Use of Military Force Against Terrorists" of 2001. So every battlefield capture in Iraq or

didn't belong in the POW camp. These claims were also adjudicated internally by Military Tribunals; no Ukrainian brought a habeas corpus petition to ask a federal court to decide the issue, there was little authority to do so.

Second, so called "enemy combatants" or "unlawful combatants" under international law are persons captured during war who do not qualify for POW status because they have violated the "laws of war" (an oxymoron, to be sure). Included in this category are spies out-of-uniform, or soldiers (like the Nazi-SS Einsatzgruppen) who willfully murder civilians. Punishment of such "enemy combatants" is up to the individual countries and their militaries. Again, it has not historically been a function entrusted to a civilian judiciary.

The third category of offenders present, to me, a more difficult classification.



based terrorism, and that our emphasis must be toward intelligence and prevention of foreign-based terrorism. This latter emphasis is an executive-branch and military function, and not a function for which the civilian judiciary is at all competent.

First, some history. Enemy soldiers captured on the battlefield by our military are all prisoners-of-war. As POWs, under international law, they can be held by the military (part of our Executive Branch) for the duration of the conflict, and even thereafter until the signing of a peace treaty. This captivity, of course, prevents their return to enemy service and incapacitates them. POW status exists whether or not a conflict is "declared" or not. The U.S. held POWs during the "undeclared" Barbary Coast

Afghanistan or Pakistan is a POW, and can be held in custody by the Executive Branch indefinitely. POWs can be interrogated, and possess certain rights such as basic food, shelter, clothing, and humane treatment, under the *Geneva Convention*.

Historically, POWs have had no access to U.S. Civilian Courts, even when they are housed in the United States. Grievances are handled internally within the Executive Branch. My Dad was chief Legal Officer over the German POWs at Camp Grant, Rockford and at Fort Lewis, WA during WWII. Some of the German Army POWs claimed to be Ukrainians who were forced into the German Army, and there was a historical basis for these claims. These POWs claimed that they should be released and

Those are the 9/11 type terrorists, who are foreign nationals sent from abroad to attack our shores. The crime is committed within the United States, but the attack is analogous to a foreign army attacking the U.S. The German saboteurs during WWII who landed on Long Island with explosives, and the Japanese midgeet-submarine sailor captured at Pearl Harbor in 1941, illustrate this category. These foreign attackers were dealt with by the Military Tribunals, not civilian courts. There are compelling reasons to keep these prosecutions within the Executive Branch as well.

## The Focus Must be on Detecting and Preventing Acts of Terror

The civilian criminal justice system is based

on the concepts of punishment and thus deterrence. The system commences to operate only *after* a crime has been committed, and safeguards have evolved to try to ensure that the determination as to who committed the crime is an accurate one. This system is wholly inadequate to deal with our current emergency: foreign-based terrorism. Terror bombers intending to kill themselves during their crime cannot be deterred by a mere threat of arrest, prosecution, and jailing. Rather, prosecution gives these captured terrorists a public platform they otherwise lack and the prison martyrdom they cherish.

If a foreign terrorist ignites a nuclear bomb and destroys Boston, what good would a subsequent criminal prosecution accomplish? Obviously it is more important for our military and intelligence community to detect such a heinous act before it occurs, and thus prevent the act.

The intelligence needed to *detect* the plans of these nefarious groups of terrorists is different from the relatively genteel notions of evidence-gathering and evidence-introduction we cherish in our civilian courts. To detect planned acts of terror, we need *information*, which is not necessarily *evidence* admissible in a court. It may involve international wiretaps, satellite and drone surveillance, hearsay, audio and internet interceptions, liberal use of questionable informants, and harsher interrogation techniques than should be used in a domestic police station. Some of this information may come directly from battlefield areas, some in secret from foreign government, both friendly and unfriendly. If we do not avail ourselves of all of these techniques (and others), to detect terror plots before they are committed, we face a horrific future, in which our precious domestic rights and freedoms surely will be threatened, as will our physical safety.

Obviously, our military and intelligence communities face a daunting task. We should not burden them further by demanding that their *information* must also be clothed in the form of admissible *evidence* presented in a public courtroom.

Once a foreign terror plot is detected, then it must be disrupted by the apprehension of those involved. At this point, these individuals could be held as POWs, pros-

ecuted by a Military Tribunal, turned over to a foreign government, or indicted and tried in a civilian court. As between prosecution in a Military Tribunal or a civilian court, which makes more sense? Both are constitutionally permitted, so it becomes a policy question.

### It is Recklessly Dangerous to Try these Cases in Civilian Courts

As noted, civilian courts apply the Federal Rules of Evidence, adherence to which should not further burden our intelligence gathering. Do we really expect the military to preserve a pristine chain-of-custody for battlefield evidence? Do we really want to disrupt our military focus by flying soldiers back from the fronts to testify? Do we really want to disclose in a public courtroom our often secret sources? Do we really want to handcuff our interrogators by letting foreign arrestees "lawyer up" just so that their words would be admissible in a civilian courtroom? (And no, I am not advocating torture—just aggressive questioning free from *Miranda*, etc.) Do we really want terrorists to receive the generous discovery of witness and co-conspirator statements that the Federal Rules require?

As I write this, a civilian federal judge in New York has just banned the Government's main witness from testifying in an "enemy combatant" case because the Government "learned of his existence" via "coercive questioning." This ruling is ludicrous. The greatest danger from using civilian courts to try foreign "enemy combatants" thus is the lessening of our ability to gather the *information* needed to detect planned acts of terror, while *information* is not always *evidence*, it can be as accurate in the context of *prevention*. And the threshold of facts for intervening to stop a threatened act of terror surely must be lower than the admissible evidence needed to convict in a civilian court.

There are other costs and dangers in trying foreign terrorists in civilian courts. The expense of security at such past trials is staggering. I was on trial at Foley Square in New York during one such terrorism prosecution—lower Manhattan was an armed camp, and the taxi had to drop me and my boxes off five blocks from the courthouse.

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## FOR MORE INFORMATION

Some of the history in this article is taken from *The Guantánamo Lawyers*, edited by Mark P. Denbeaux and Jonathan Hafetz, New York University Press 2009. A review of the book appeared in the October issue of the **CBA Record**.

It took over an hour just to get into the Courthouse. Why would we inflict such costs and burdens on the taxpayers and people of New York when we don't have to? The Federal Judge presiding at the terrorism trial still requires a full-time bodyguard. The prison housing the convicted defendant has had to ratchet up its security.

And what will happen if an accused foreign terrorist is not proved guilty beyond a reasonable doubt, the civilian standard, and is acquitted? Does he walk out the front door of the courthouse? Or is he still a POW and can be held, in which case there was no point to the civilian trial. This problem induced the Attorney General to declare (improperly, in my mind) that "failure is not an option."

Art Gold says that Military Tribunals are not fair because they do not comport with all the Article III Court protections.

First, the Constitution has never been read to require all the civilian safeguards for Article I Military Tribunals. Moreover, such tribunals, historically, are fair for their purpose—to punish illegal combatants, not domestic criminals. The thresholds of evidence needed are quite different. Most urgently, civilian trials and their strict rules damage the ability of our country to defend itself from foreign attacks—a major element of our very sovereignty. The Constitution is not a death sentence; terrorism threatens to compromise our essential liberties far more than do the legalistic imperfections of Military Tribunals.

One more observation: Guantánamo seems like the perfect place to house these "enemy combatant" terrorists. (I refuse to use the administration's term: "man-caused disasters" instead of the word "terrorism"). It is outside our country and avoids those obvious security issues. It is in the middle of a U.S. military base, so it is secure from any acts of escape or hostage-taking. It is reassuring that, once actually in office, President Obama fully realized the folly of his campaign promise to close the Guantánamo prison.

Numerous Presidents have recognized the utility of Military Tribunals—including Abraham Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Harry Truman. More recently, both Presidents Bush and Obama have accepted the need for Tribunals in foreign terror cases. The U.S.

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Congress has also repeatedly affirmed their appropriateness. Military Tribunals are thus a part of our history and our legal traditions. They are needed now more than ever. ■

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chamber proceedings. Justice cannot be dispensed on an ad hoc basis.

We cannot afford to eliminate habeas corpus. If there exists evidence to establish that an "enemy combatant" has engaged in prior terrorist acts or is planning future terrorist acts, a writ of habeas corpus would be of no help. But no reason exists to eliminate habeas corpus to determine whether or not a detainee should remain in custody for years without being charged. If the "enemy combatant" does not prevail at the habeas corpus proceeding, an arms length, military trial according to the Uniform Code of Military Justice might be appropriate. ■

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Dr. Ngai has been conducting research in biomechanics for nearly a decade, including five years of research conducted for the Department of Orthopedic Surgery at Rush University Medical Center. Dr. Ngai provides investigations, reports, and testimony toward the resolution of disputes and litigation involving traumatic injuries, including medical implants and devices; motor vehicle crashes; premises liability, workplace and sports injuries.

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