

The Right Place to Try Terrorism Cases

By John C. Coughenour
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I have spent 27 years on the federal bench. In particular, my experience with the trial of Ahmed Ressaam, the "millennium bomber," leads me to worry about Attorney General Michael Mukasey's comments last week, urging Congress to pass legislation outlining judicial procedures for reviewing Guantanamo detainees' habeas petitions. As constituted, U.S. courts are not only an adequate venue for trying terrorism suspects but are also a tremendous asset in combating terrorism. Congress risks a grave error in creating a parallel system of terrorism courts unmoored from the constitutional values that have served our country so well for so long.

I have great sympathy for those charged with protecting our national security. That is an awesome responsibility. But this is not a choice between the existential threat of terrorism and the abstractions of a 200-year-old document. The choice is better framed as: Do we want our courts to be viewed as another tool in the "war on terrorism," or do we want them to stand as a bulwark against the corrupt ideology upon which terrorism feeds?

Detractors of the current system argue that the federal courts are ill-equipped for the unique challenges that terrorism trials pose. Such objections often begin with a false premise: that the threat of terrorism is too great to risk an "unsuccessful" prosecution by

adhering to procedural and evidentiary rules that could constrain prosecutors' abilities. This assumes that convictions are the yardstick by which success is measured. Courts guarantee an independent process, not an outcome. Any tribunal purporting to do otherwise is not a court.

Critics raise more-legitimate concerns about whether judges have sufficient expertise over the subject matter of terrorism trials and whether the courts can adequately safeguard classified information. The truth is that judges are generalists. Just as they decide cases as varied as employment discrimination and bank robbery, they are capable of negotiating the complexities of terrorism trials. Last month in *Boumediene v. Bush*, the Supreme Court confirmed its confidence in the capability of federal courts. The justices explicitly rejected an attempt to carve away an area of federal court jurisdiction in service of the war against terrorism, saying: "We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible. . . . These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance."

As for protecting classified information, courts are guided by the Classified Information Procedures Act, which played a prominent role during the trial of Ressam in my courtroom in 2001. I found the act's extensive protections to be more than adequate, but I also think that any shortcoming in the law can and should be addressed by further revision rather than by undermining the judiciary.

At the heart of this issue is the U.S. courts' insulation from the political branches. The courts' fidelity to legal precedent ensures that no matter which way the political winds blow, decisions pitting the interests of community safety against individual liberty will be circumspect and legitimate. Specialized terrorism tribunals, governed by separate rules, could respond to the perceived exigencies of the moment. If politically vulnerable actors start redesigning courts, it is conceivable that popular pressure would soon demand the admission of statements obtained by harsh interrogation techniques, or dictate that defense counsel cannot access information needed to mount a defense or cannot represent a defendant without undergoing a background check of undefined scope. Such practices are not without recent precedent at Guantanamo.

I also worry that special terrorism courts risk elevating the status of those who target innocent people. Despite the supposed grandeur of their aims, terrorists should surrender their liberty just like any other criminal.

At a time when our national security is so intimately linked with our ability to forge alliances and secure cooperation from countries that share or aspire to our fundamental values, we can ill afford to send the message that those values are negotiable or contingent. I recently participated in a seminar in Russia, where I have worked for 20 years to promote judicial reform. The seminar culminated in a mock trial with law students serving as jurors. Sharing the virtues of our independent judiciary and Constitution with those who represent Russia's future felt like a personal privilege. But I know this is also in our country's

strategic interest. I cannot help wondering if I will be able to speak with the same authority in the future if we lose confidence in the institutions that made us a model of reform in the first place.

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