

Jose Padilla Makes Bad Law: Terror trials hurt the nation even when they lead to convictions.

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The apparently conventional ending to Jose Padilla's trial last week--conviction on charges of conspiring to commit violence abroad and providing material assistance to a terrorist organization--gives only the coldest of comfort to anyone concerned about how our legal system deals with the threat he and his co-conspirators represent. He will be sentenced--likely to a long if not a life-long term of imprisonment. He will appeal. By the time his appeals run out he will have engaged the attention of three federal district courts, three courts of appeal and on at least one occasion the Supreme Court of the United States.

It may be claimed that Padilla's odyssey is a triumph for due process and the rule of law in wartime. Instead, when it is examined closely, this case shows why current institutions and statutes are not well suited to even the limited task of supplementing what became, after Sept. 11, 2001, principally a military effort to combat Islamic terrorism.



Padilla's current journey through the legal system began on May 8, 2002, when a federal district court in New York issued, and FBI agents in Chicago executed, a warrant to arrest him when he landed at O'Hare Airport after a trip that started in Pakistan. His prior history included a murder charge in Chicago before his 18th birthday, and a firearms possession offense in Florida shortly after his release on the murder charge.

Padilla then journeyed to Egypt, where, as a convert to Islam, he took the name Abdullah al Muhajir, and traveled to Saudi Arabia, Afghanistan and Pakistan. He eventually came to the attention of Abu Zubaydeh, a lieutenant of Osama bin Laden. The information underlying the warrant issued for Padilla indicated that he had returned to America to explore the possibility of locating radioactive material that could be dispersed with a conventional explosive--a device known as a dirty bomb.

However, Padilla was not detained on a criminal charge. Rather, he was arrested on a material witness warrant, issued under a statute (more than a century old) that authorizes the arrest of someone who has information likely to be of interest to a grand jury investigating a crime, but whose presence to testify cannot be assured. A federal grand jury in New York was then investigating the activities of al Qaeda.

The statute was used frequently after 9/11, when the government tried to investigate numerous leads and people to determine whether follow-on attacks were planned--but found itself without a statute that authorized investigative detention on reasonable suspicion, of the sort available to authorities in Britain and France, among other

countries. And so, the U.S. government subpoenaed and arrested on a material witness warrant those like Padilla who seemed likely to have information.

Next the government took one of several courses: it released the person whose detention appeared on a second look to have been a mistake; or obtained the information he was thought to have, and his cooperation, and released him; or placed him before a grand jury with a grant of immunity under a compulsion to testify truthfully and, if he testified falsely, charge him with perjury; or developed independent evidence of criminality sufficiently reliable and admissible to warrant charging him.

Each individual so arrested was brought immediately before a federal judge where he was assigned counsel, had a bail hearing, and was permitted to challenge the basis for his detention, just as a criminal defendant would be.

The material witness statute has its perils. Because the law does not authorize investigative detention, the government had only a limited time in which to let Padilla testify, prosecute him or let him go. As that limited time drew to a close, the government changed course. It withdrew the grand jury subpoena that had triggered his designation as a material witness, designated Padilla instead as an unlawful combatant, and transferred him to military custody.

The reason? Perhaps it was because the initial claim, that Padilla was involved in a dirty bomb plot, could not be proved with evidence admissible in an ordinary criminal trial. Perhaps it was because to try him in open court potentially would compromise sources and methods of intelligence gathering. Or perhaps it was because Padilla's apparent contact with higher-ups in al Qaeda made him more valuable as a potential intelligence source than as a defendant.

The government's quandary here was real. The evidence that brought Padilla to the government's attention may have been compelling, but inadmissible. Hearsay is the most obvious reason why that could be so; or the source may have been such that to disclose it in a criminal trial could harm the government's overall effort.



In fact, terrorism prosecutions in this country have unintentionally provided terrorists with a rich source of intelligence. For example, in the course of prosecuting Omar Abdel Rahman (the so-called "blind sheik") and others for their role in the 1993 World Trade Center bombing and other crimes, the government was compelled--as it is in all cases that charge conspiracy--to turn over a list of unindicted co-conspirators to the defendants.

That list included the name of Osama bin Laden. As was learned later, within 10 days a copy of that list reached bin Laden in Khartoum, letting him know that his connection to that case had been discovered.

Again, during the trial of Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing, an apparently innocuous bit of testimony in a public courtroom about delivery of a cell phone battery was enough to tip off terrorists still at large that one of their communication links had been compromised. That link, which in fact had been monitored by the government and had provided enormously valuable intelligence, was immediately shut down, and further information lost.

The unlawful combatant designation affixed to Padilla certainly was not unprecedented. In June 1942, German saboteurs landed from submarines off the coasts of Florida and Long Island and were eventually apprehended. Because they were not acting as ordinary soldiers fighting in uniform and carrying arms openly, they were in violation of the laws of war and not entitled to Geneva Conventions protections.

Indeed, at the direction of President Roosevelt they were not only not held as prisoners of war but were tried before a military court in Washington, D.C., convicted, and--except for two who had cooperated--executed, notwithstanding the contention by one of them that he was an American citizen, as is Padilla, and thus entitled to constitutional protections. The Supreme Court dismissed that contention as irrelevant.

In any event, Padilla was transferred to a brig in South Carolina, and the Supreme Court eventually held that he had the right to file a habeas corpus petition. His case wound its way back up the appellate chain, and after the government secured a favorable ruling from the Fourth Circuit, it changed course again.

Now, Padilla was transferred back to the civilian justice system. Although he reportedly confessed to the dirty bomb plot while in military custody, that statement--made without benefit of legal counsel--could not be used. He was instead indicted on other charges in the Florida case that took three months to try and ended with last week's convictions.



The history of Padilla's case helps illustrate in miniature the inadequacy of the current approach to terrorism prosecutions.

First, consider the overall record. Despite the growing threat from al Qaeda and its affiliates--beginning with the 1993 World Trade Center bombing and continuing through later plots including inter alia the conspiracy to blow up airliners over the Pacific in 1994, the attack on the American barracks at Khobar Towers in 1996, the bombing of U.S. embassies in Kenya and Tanzania in 1998, the bombing of the Cole in Aden in 2000, and the attack on Sept. 11, 2001--criminal prosecutions have yielded about three dozen convictions, and even those have strained the financial and security resources of the federal courts near to the limit.

Second, consider that such prosecutions risk disclosure to our enemies of methods and sources of intelligence that can then be neutralized. Disclosure not only puts our secrets

at risk, but also discourages allies abroad from sharing information with us lest it wind up in hostile hands.

And third, consider the distortions that arise from applying to national security cases generally the rules that apply to ordinary criminal cases.

On one end of the spectrum, the rules that apply to routine criminals who pursue finite goals are skewed, and properly so, to assure that only the highest level of proof will result in a conviction. But those rules do not protect a society that must gather information about, and at least incapacitate, people who have cosmic goals that they are intent on achieving by cataclysmic means.

Khalid Sheikh Mohammed, the mastermind of the 9/11 attacks, is said to have told his American captors that he wanted a lawyer and would see them in court. If the Supreme Court rules--in a case it has agreed to hear relating to Guantanamo detainees--that foreigners in U.S. custody enjoy the protection of our Constitution regardless of the place or circumstances of their apprehension, this bold joke could become a reality.

The director of an organization purporting to protect constitutional rights has announced that his goal is to unleash a flood of lawyers on Guantanamo so as to paralyze interrogation of detainees. Perhaps it bears mention that one unintended outcome of a Supreme Court ruling exercising jurisdiction over Guantanamo detainees may be that, in the future, capture of terrorism suspects will be forgone in favor of killing them. Or they may be put in the custody of other countries like Egypt or Pakistan that are famously not squeamish in their approach to interrogation--a practice, known as rendition, followed during the Clinton administration.

At the other end of the spectrum, if conventional legal rules are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, those adaptations will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law.



What is to be done? The Military Commissions Act of 2006 and the Detainee Treatment Act of 2005 appear to address principally the detainees at Guantanamo. In any event, the Supreme Court's recently announced determination to review cases involving the Guantanamo detainees may end up making commissions, which the administration delayed in convening, no longer possible.

There have been several proposals for a new adjudicatory framework, notably by Andrew C. McCarthy and Alykhan Velshi of the Center for Law & Counterterrorism, and by former Deputy Attorney General George J. Terwilliger. Messrs. McCarthy and Velshi have urged the creation of a separate national security court staffed by independent, life-tenured judges to deal with the full gamut of national security issues, from intelligence gathering to prosecution. Mr. Terwilliger's more limited proposals address principally the

need to incapacitate dangerous people, by using legal standards akin to those developed to handle civil commitment of the mentally ill.

These proposals deserve careful scrutiny by the public, and particularly by the U.S. Congress. It is Congress that authorized the use of armed force after Sept. 11--and it is Congress that has the constitutional authority to establish additional inferior courts as the need may be, or even to modify the Supreme Court's appellate jurisdiction.

Perhaps the world's greatest deliberative body (the Senate) and the people's house (the House of Representatives) could, while we still have the leisure, turn their considerable talents to deliberating how to fix a strained and mismatched legal system, before another cataclysm calls forth from the people demands for hastier and harsher results.

Mr. Mukasey was the district judge who signed the material witness warrant authorizing Jose Padilla's arrest in 2002, and who handled the case while it remained in the Southern District of New York. He was also the trial judge in United States v. Abdel Rahman et al. Retired from the bench, he is now a partner at Patterson Belknap Webb & Tyler in New York.