

The following text may be printed, copy/pasted, or downloaded and emailed.

The Moussaoui Effect

Editorial
Los Angeles Times
April 16, 2006

FOR ALL ITS IMPERFECTIONS and absurdities, and they are legion, the death penalty trial of Al Qaeda conspirator Zacarias Moussaoui has been an object lesson in how the U.S. judicial system should deal with accused terrorists. It also demonstrates that following the law and fighting terrorism are not incompatible.

The trial in a federal court in Alexandria, Va., also has exposed an inconsistency bordering on hypocrisy in the Bush administration's treatment of so-called enemy combatants. Two years after the Supreme Court warned that the war on terrorism does not provide the president with a "blank check," the executive branch is in some cases -- but not, strangely, in Moussaoui's -- still insisting on the right to be judge, jury and executioner.

Admittedly, the trial of Moussaoui, a French citizen who pleaded guilty to conspiracy in the 9/11 attacks, has at times been an unedifying spectacle.

The prosecution's effort to secure a death sentence for Moussaoui was almost derailed when it was revealed that a government lawyer had improperly coached potential witnesses. The defendant's insistence on taking the stand and spewing hatred of the United States gave his own lawyers cause to object that their client, whom they portray as deranged, was turning the courtroom into a circus.

Yet, warts and all, the trial is important, and not because it provides the loved ones of 9/11's victims with closure and a flesh-and-blood villain who insisted that he had "no regrets, no remorse" for the loss of nearly 3,000 human lives. Harsh as it may sound, the point of the trial is not to provide catharsis to 9/11 families, though one might have thought otherwise when the prosecution played a chilling cockpit recording from United Flight 93, which crashed in Pennsylvania after passengers tried to wrest control of the plane from their hijackers.

The real value of the Moussaoui trial is that the defendant is having his day in court -- and not just any court. He has received a public trial presided over by an independent judge who not only enforced rules of evidence approved by Congress but punished the prosecution when it failed to abide by her orders.

Most important, the burden in the trial is on prosecutors to convince a jury of ordinary citizens that Moussaoui -- who was in a jail cell on 9/11 -- deserves the death penalty.

That Moussaoui undermined his own defense by boasting that he had planned to fly another plane into the White House on 9/11 is not the court's fault. Nor can his lawyers be blamed for the seeming death wish that moved the defendant to insist that he was not only sane but also determined to kill Americans if he were released. What matters is that a man charged with one of the most heinous crimes in U.S. history has nevertheless received the protections for which the U.S. judicial system is renowned.

Now contrast the Moussaoui trial with the skimpy and selective "due process" the Bush administration has provided other suspected terrorists.

From the beginning, President Bush essentially has argued that the post-9/11 war on terrorism authorized him to act as judge, jury and executioner of enemy combatants, including U.S.

citizens. In 2004, the Supreme Court pointedly rejected this assertion of power, ruling that both U.S. citizens and foreigners detained at the Guantanamo naval base in Cuba could challenge their confinement.

"A state of war is not a blank check for the president when it comes to the rights of the nation's citizens," Justice Sandra Day O'Connor wrote in holding that Yaser Esam Hamdi, a Louisiana native, was entitled to a hearing before a neutral decision-maker. Hamdi was later allowed to leave the United States for Saudi Arabia, a tacit admission that his prolonged confinement was unnecessary.

Despite having its knuckles rapped by the Supreme Court, the administration has continued to play by its own rules.

Take the tangled tale of Jose Padilla, a Brooklyn-born convert to Islam who was arrested in Chicago and held as an enemy combatant for more than three years on suspicion of being part of an Al Qaeda plot to detonate a radioactive "dirty bomb" in the U.S. Only when it looked as if the Supreme Court would hear Padilla's appeal did the Justice Department decide to have him indicted on factually different charges and transfer him to a civilian detention facility.

Last month, the high court declined to hear Padilla's appeal of enemy combatant status, noting that he now faces criminal charges. But three members of the court, including Chief Justice John G. Roberts Jr., issued an unusual opinion warning the administration that Padilla was entitled to a speedy trial and that if the president decides to reclassify him as an enemy combatant, Padilla "retains the option of seeking a writ of habeas corpus in this court."

They might have added that should the administration reclassify Padilla, it might find it difficult to prosecute him, given that much of the evidence against him would probably be inadmissible. The rule of law benefits accusers as well as the accused.

In another case, the court is likely soon to rule on whether Bush can try inmates at Guantanamo for violations of the "law of war" even though the administration does not recognize them as prisoners of war under the Geneva Convention. During arguments in a case brought by Salim Ahmed Hamdan, Osama bin Laden's former driver, Justice David H. Souter honed in on that contradiction, telling the U.S. solicitor general, "I don't see how you can have it both ways."

It's more accurate to say that since 9/11, the administration has tried to have it one way -- its own way -- even if today's theory about what constitutes a fair trial for suspected terrorists conflicts with yesterday's. A better alternative would be to try suspected terrorists in federal court (where most defendants are unlikely to have Moussaoui's death wish) or in military tribunals authorized by Congress and conducted in accordance with international law.