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Q&A: Prosecuting Terrorists

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Introduction

The legal front in the war on terrorism is marked by controversy. Several cases against alleged terrorists are now in the U.S. court system--in civilian criminal courts and military tribunals established by President Bush in November 2001. But they are not all proceeding smoothly, and questions about how terrorists should be prosecuted persist. The unconventional nature of the "war on terror" raises new questions about the laws of war, particularly whether or not those that exist even apply. The legal handling of suspected terrorists occupy is a complicated matter; they're not exactly prisoners of war, but they're accused of crimes in a war. The administration has detained hundreds of these "enemy combatants" in Guantanamo Bay, and has indicted others in civilian and military courts. The case of Hamdan v. Rumsfeld, set to be heard by the Supreme Court on March 28, challenges the legitimacy of the post-9/11 military tribunals and the jurisdiction of the courts.

Has the U.S. government been successful in prosecuting alleged terrorists?

The exact number of terror-related prosecutions and convictions is difficult to ascertain. U.S. Attorney General Alberto Gonzales said in December 2005 that many cases "highlight both the extent of our success and the reality of the continuing threat. They show that we're doing the right thing, and doing it to great effect." But critics argue indictments have been slow in coming, and convictions are often not based on direct acts of terrorism, but rather on lesser charges. Furthermore, prosecutorial misconduct has hindered or even overturned convictions, notably in the case of three Arab immigrants who were part of a Detroit sleeper cell. In 2004 the judge threw out that case, once considered a major victory in the war on terrorism. Many alleged terrorists remain detained in Guantanamo Bay, which some see as helping to prevent future terror attacks on the United States and others view as a violation of international law.

What are some of the major cases in the "war on terror"?

a) Suspected terrorists tried in civilian criminal court

Zacarias Moussaoui. Moussaoui, a French national, was indicted in December 2001 for various counts of conspiracy, including conspiracy to commit acts of terrorism and murder. He was arrested on immigration charges in August 2001, indicted in relation to the September 11 attacks, and eventually pled guilty (though he said in court he was not a part of 9/11, but had rather conspired in a future al-Qaeda attack) in 2005. The sentencing trial is now underway in a civilian criminal court, and Moussaoui could get the death penalty. The case, however, has not followed many traditions of a civilian trial--for example, the government had witnesses in custody inaccessible to the defense--and the judge in the case expressed concerns about prosecuting Moussaoui in a civilian court. Recent accusations of prosecutorial misconduct have made an appeal likely.

John Walker Lindh. Lindh, a U.S. citizen often referred to as "the American Taliban," was arrested in Afghanistan in 2001, where he was fighting for the Taliban against the Northern Alliance. He was there before September 11 but denied being part of al-Qaeda and conspiring to kill

Americans. He was indicted on ten counts in 2002, but ended up signing a plea agreement admitting to supplying services to the Taliban. Lindh was sentenced to twenty years. Richard Reid. Reid, a British citizen, is known as the "shoe bomber" because of his attempt to blow up an American Airlines flight with explosives hidden in his shoe in December 2001. He pled guilty in 2002 and is serving a life sentence in a Boston prison.

Jose Padilla. Jose Padilla, the U.S. citizen arrested in 2002 for planning to build a dirty bomb, was originally detained as an enemy combatant and only recently indicted in Miami on different criminal counts: conspiracy to murder U.S. nationals, conspiracy to provide material support to terrorists and providing material support to terrorists. The Supreme Court was deciding whether or not to hear his appeal for habeas corpus when the government transferred him from military to civilian custody.

b) Suspected terrorists tried in military tribunals

Hamdan v. Rumsfeld. Salim Ahmed Hamdan, a Yemeni national and former driver for Osama bin Laden, is a Guantanamo detainee who was indicted in July 2004--after the decision that detainees deserved some kind of hearing--on the charges of "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism." He was supposed to face these charges in a military tribunal, but Hamdan challenged the legitimacy of these tribunals. Since the case was last heard by the lower courts, the Detainee Treatment Act was signed into law, and the Supreme Court must now determine its relevance

c) Cases of uncharged terror suspects

Hamdi v. Rumsfeld. Yaser Esam Hamdi, a U.S. citizen captured in Afghanistan, was detained in Guantanamo for several years. The case, which went before the Supreme Court in 2004, determined that U.S. citizens classified as enemy combatants could challenge their detainment in U.S. courts. However, the court ruled that detainment itself was legal. Critics, such as attorney Elaine Cassel in an article titled "Who Really Won?" argue the burden of proof falls wrongly and impossibly on the detainee. After this decision, instead of giving Hamdi a hearing, the government released him to Saudi Arabia, once he renounced his U.S. citizenship.

Rasul v. Bush. Complementing Hamdi, this case determined that foreign nationals could also challenge their detainment in U.S. courts. David Golove, professor of law at New York University says these decisions were rather startling in that in past wars, civilian courts had not claimed such jurisdiction during a war. This new direction, he suggests, is due to the ambiguity of the detainees' status.

What is the Detainee Treatment Act?

The Detainee Treatment Act became law in December 2005, after Hamdi and Rasul. It asserts, among other provisions, that detainees can only appeal to U.S. courts once they have been convicted by a military commission or designated as an enemy combatant. There is much debate as to whether the act applies to pending cases or only to future ones. The first issue the Supreme Court must decide in Hamdan, then, is whether the Detainee Treatment Act prevents it from hearing the case to begin with. The McCain amendment, attached to the act, prohibits cruel treatment, which some have said contradicts the act itself.

Why do some cases go to civilian courts and others to tribunals?

Golove says what determines whether a case goes to a military tribunal or criminal court is "almost entirely arbitrary. It's dependent on momentary considerations that arise." Some experts say U.S. officials chose to try Moussaoui and Reid in federal court because prosecutors were confident of the strength of each case in those venues. Incentives for prosecuting alleged

terrorists in tribunals include more lenient rules on evidence and how it is obtained, such as through coercive interrogation. (The Bush administration recently announced a new rule that prohibits statements made under torture; that a statement was made under torture, however, is easy to deny.)

Proponents of the tribunals argue that trying suspected terrorists in civilian courts would flood the system and could expose intelligence essential for national security. Golove counters that national security, while a valid concern, is not a new problem; there has always been tension between the need for national security and the need for a fair trial, which requires the defendant has access to all information. U.S. Appellate Court Judge Richard Posner, law professor at the University of Chicago, says it's important to distinguish between commissions held during and after a war, however. With the Nuremberg trials, held after WWII, security was not the concern it is now.

Prior to September 11, the U.S. government had prosecuted all terrorists in civilian criminal courts. After 9/11 and the beginning of the "war on terror," Congress granted President Bush war powers and he soon ordered the establishment of military tribunals. Writing in *Foreign Affairs*, Human Rights Watch executive director Kenneth Roth argued that applying war rules--including the use of military tribunals--to the "war on terror" has dangerous implications, since this conflict appears open-ended and its boundaries are unclear. International law expert Ruth Wedgwood responded in the same journal issue that "a war is in fact waging, and criminal law is too weak a weapon."

Why are military tribunals so controversial?

Military tribunals are not new; they are traditionally used to try war crimes. But even critics who concede that there are valid concerns about prosecuting suspected terrorists in criminal courts--and that military tribunals do have a place in the war on terrorism--find fault with these commissions, which are different than those held in the past. This is the first time, for example, that defendants do not have access to all evidence against them. Noah Feldman, a CFR adjunct senior fellow and professor of law at New York University, suggests this produces a Kafkaesque scenario--a prisoner could be asked if he remembers meeting "person X," for example, without hearing who that person is. He argues that the United States should follow the principle of due process.

Gary Solis, visiting professor of law at the U.S. Military Academy at West Point, expresses doubts about whether detainees in the war on terrorism are eligible for full legal rights. "Why should they benefit from the United States Constitution that Americans have fought and died for for 200 years?" he asks. At the same time, Solis emphasizes the need to follow international law. The government argues that someone determined to be an "enemy combatant," as opposed to a prisoner of war, is not protected by the Geneva Conventions or other international treaties. But Solis says that even if suspected terrorists are not prisoners of war, they are entitled to the same basic humane treatment as "protected persons" under the Geneva Conventions' Common Article III, which applies to all armed conflicts.

What are the implications of these cases?

Golove says the Bush administration's "basic claim is there is no law that governs what they do," and that such a claim is dangerous. Feldman says Hamdan "has major constitutional implications," and it also reflects to the world the U.S. commitment to the rule of law. In a 2004 amicus brief, Feldman--who advised the Coalition Provisional Authority (CPA) and later members of the Iraqi Governing Council on the Interim Iraqi Constitution--argued that the military commissions would set a bad precedent for tribunals abroad, particularly the Iraqi Special Tribunal trying Saddam Hussein. The Iraqi Special Tribunal, like the current U.S. military commissions, does not allow access to all evidence. Several experts suggest these cases may signal the end of the military commissions. Golove doubts the Supreme Court will find these

military tribunals illegal, since establishing tribunals could be construed as exercising war power. But it might decide "these tribunals have been constituted in a way that's not proper," and as a result, be deemed "without jurisdiction to act."