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AT LAW

The Case for Military Tribunals

Don't force courts to choose between the Constitution and American lives

BY KENDALL COFFEY
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The use of military tribunals and civilian courts in the war on terror is about to face its most important examination yet. On May 15 Attorney General John Ashcroft indicted two al Qaeda terrorists for the bombing of the USS Cole. Their case has been assigned to a federal court in the Southern District of New York. But as other pending terrorism cases have illustrated, everyone might be better served if they were tried elsewhere.

The Cole suspects are the latest to be added to the docket sheets of our criminal-justice system, but they won't be the last. More al Qaeda terrorists are captured all the time, and as the trial of alleged Sept. 11 conspirator Zacarias Moussaoui illustrates, they are bringing unexpected complications to the justice system.

District Court Judge Leonie M. Brinkema recently ruled that Moussaoui's defense team is entitled to use information taken from U.S. captive Ramzi Binalshibh, a self-proclaimed coordinator of Sept. 11, despite the potentially sensitive nature of the information. With the capture of Khalid Sheikh Mohammed, the alleged mastermind of the World Trade Center attack--and Binalshibh's putative boss--the issue is about to get even thornier. Mohammed has reportedly indicated to interrogators that Moussaoui was not slated for Sept. 11, but for a different attack.

There is little question that the information these men possess is both highly sensitive and critical to U.S. national security. But as long as the trial remains in civilian court, access to them and their statements is required by constitutional principles the Supreme Court established in 1963, in *Brady v. Maryland.* There, alleged criminals were granted the right to government-held evidence that could assist the defense.

The Classified Information Procedures Act tries to minimize the exposure of sensitive materials, but if Binalshibh or Mohammed has made statements that downplay Moussaoui's role, the constitutional right to that evidence cannot be erased. The defense camp for Moussaoui is expected to seek the same access to Mohammed that was granted regarding Binalshibh. (The Binalshibh ruling is now on appeal in the Fourth Circuit.)

There's an easier way. Rather than moving to an appellate phase, the competing interests of national security and constitutional safeguards might be better served by transporting Moussaoui from federal court to a military tribunal. Although civil libertarians would likely decry his relocation to Guantanamo, the reality is that taking Moussaoui out of the civilian justice system would both better address security concerns and create a firewall so that existing constitutional principles in civilian trial don't start to bend under the weight of the war on terror.

Despite the furor that has surrounded the question of military tribunals, the alleged terrorists have remained in the civilian justice system for one reason: The prosecutors preferred it. Until recently, prosecutors had a strong preference for civilian courts, bred of familiarity and successful experience. After all, they used the system effectively in the first World Trade Center bombing case against Ramzi Yousef. But whatever the original institutional preference, it has become clear that the game is different now. Back then, there wasn't a concern that other al Qaeda operatives might land in the hands of defense attorneys.

Up to this point, the convolutions of Moussaoui's defense--including his short-lived attempt to plead guilty and his exploitation of the constitutional right of self-representation--have caused distraction, but little harm, mostly due

to patient judicial oversight. But the shattering collisions between Moussaoui's constitutional rights as a defendant and legitimate security concerns are only just beginning.

For now, the battle has been joined in the appellate process. The right under *Brady* to government-held evidence that could prove innocence may be overridden by security issues when Moussaoui's case reaches the conservative Fourth Circuit Court of Appeals. Other constitutional concerns in terrorism cases--ranging from electronic eavesdropping to *Miranda*--also confront risk factors that could ascend from yellow to red if a new wave of terrorist attacks is launched against Americans.

Historically, the executive has won such duels--internment of Southern sympathizers in the Civil War and Japanese-Americans 80 years later--but there are constitutional and human consequences to security-driven court decisions. This dilemma could be avoided in a military tribunal. Rather than a denigration of the rights of an accused, this method could shield noncombatants during times of peace from the starker justice accorded agents of foreign enemies during conditions of war.

There is precedent: In 1942, the U.S. Supreme Court approved military tribunals for Nazi saboteurs who, as alleged with Moussaoui, were agents of foreign enemies who entered this country for the purpose of inflicting destruction upon civilians. As the Supreme Court observed in *In re Quirin,* "Unlawful combatants . . . are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." The deep roots of this tradition, the court found, were planted "before the adoption of the Constitution and during the Mexican and Civil Wars."

In a military tribunal, the executive branch could more flexibly address the security issues by, if necessary, limiting disclosure of the most sensitive evidence to the tribunal members themselves. Although *Miranda* is not an issue with Moussaoui, aggressive questioning by military and intelligence operatives could be treated more suitably in tribunals without the potential reconfiguration of Fifth Amendment rights that could result if terrorism is lodged in judicial proceedings. Other security issues, ranging from the personal safety of judges and jurors to utilization of electronically intercepted communications, are also much more manageable with tribunals.

Judge Brinkema's ruling on the Ramzi testimony could well go to the Supreme Court. But it is ultimately inappropriate for our civil justice system to be forced to choose between protecting the Constitution and protecting citizens from foreign enemies. Tribunals may turn out to be the ally of civil liberties, insulating the constitutional traditions in our civilian courts from the pressures of foreign terrorism.

Mr. Coffey, a former U.S. attorney, is a Miami lawyer.