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Where could the 9/11 terrorist trials go next?

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Where could the 9/11 terrorist trials go next?

Abstract

The criminal trials of the 9/11 terrorists may finally be coming to the punch line. Last Friday, the criminal trial of the architect of the 9/11 terrorist attacks, Khalid Sheik Mohammed, together with four others commenced in the Military Commission at Guantánamo Bay.

Yet this might be another variation on previous suspended prosecutions. In February 2008, criminal charges were first pressed against Khalid Sheik and his alleged co-conspirators in the Military Commission under the administration of president George W Bush. The trial began in June 2008. Five months later the accused indicated that they would plead guilty.

In January 2009, president Barack Obama was elected with a promise to close down the Military Commission at Guantánamo Bay and to proceed with criminal trials under civil law. The new US attorney-general, Eric Holder, announced in November 2009, that the trials would be transferred from the military jurisdiction to the US federal district court. All charges were withdrawn in the Military Commission in January 2010 and the US Federal Court took over.

The Federal Court in Manhattan, for the Southern District of New York, has become the main US court for prosecution of terrorists, although other districts have also since met the challenge. There's now a substantial body of successfully prosecuted cases in the civil courts

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By Rose and Bergin

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The Federal Court in Manhattan, for the Southern District of New York, has become the main US court for prosecution of terrorists, although other districts have also since met the challenge. There's now a substantial body of successfully prosecuted cases in the civil courts.

Specialised procedures have facilitated protection of intelligence sources and avoidance of public spectacle in most instances. The civil courts have done a fine job in over 100 cases. But lengthy delays, intelligence leakage, defendant grandstanding, and exploitation of procedures have posed problems.

Guantanamo wasn't closed. It still remains essential for detentions outside of regular criminal processes of clandestine combatants who aren't entitled to be legitimate prisoners of war.

In April 2011, the US attorney-general announced that the 9/11 trial would return to the Military Commission. What led the Obama administration to the embarrassment of taking the prosecution back to Guantanamo? In a word: Congress. Under last year's National Defence Authorisation Act, it prohibited the use of funds for transfer of detainees from Guantánamo Bay to the US or to other countries.

The prosecution is now proceeding again in the Military Commission. Only three cases were previously decided by it. Most delays in hearings were due to legal challenges to its authority. Last week, the 9/11 accused adopted a strategy of non-cooperation with the proceedings, such as refusing to listen or to answer questions. Their lawyers supported them by defying the judge and resisting the commission's procedures.

A counsel for the accused, Cheryl Bormann, chastised the commission for allowing women to be present in business suits. She claimed this could distract her client: she was dressed in a hooded cloak, an abaya.

Military and civil jurisdictions overlap: war crimes can usually also be characterised as other violent crimes, such as conspiracy and murder, and can be prosecuted in each jurisdiction.

So why not just prosecute in civil courts? That may be sufficient in most cases. But standard criminal procedures in the civil courts don't always lend themselves neatly to the prosecution of terrorist warfare: there's the need to protect intelligence sources and international relations, prevent spectacle and excessive delays, and to avoid exploitation of the legal mismatch between peacetime and warfare procedures.

Prosecutions of captured warriors engaged in networked warfare by criminal means may sometimes require special tools and protections. Cobbling together additional procedures for confidential communications and restricted public access is only a partial and slipshod approach that actually threatens reputational damage to those civil courts.

In 2009, the Military Commissions Act was substantially amended to improve guarantees of its impartiality, transparency and fairness. It follows the same procedures as a civil trial, with variations along the lines of a court martial, such as regarding the composition of a military jury panel, physical security of proceedings, and accepting some hearsay evidence.

Its officials are familiar with humanitarian law concerning war crimes. Nevertheless, it has become a badge of honour among the civilian legal fraternity to disrespect this jurisdiction.

The bottom line seems to be that, in the space where armed conflict and law enforcement intersect, there's a role for an independent court. An appropriately crafted specialist national security jurisdiction would complement the current civil-military dual approaches for dealing with terrorism detainees, and could resolve the argument between them.

Its design fundamentals are already familiar from the amended US Federal Court and Military Commission procedures, which could be enhanced. It should be fair and impartial, and protect intelligence networks and sources. It should avoid procedural manipulation and be established directly by legislation pursuant to public debate.

A national security jurisdiction located within the civil court system would have to work within the restrictions on criminal trials set out by the US constitutional bill of rights. Although some of these pose barriers, the Obama administration's official statements have indicated its own preference against terrorism trials within the Military Commission. Consequently, it has not promoted any specialised national security jurisdiction.

But it has designed its own legal Catch 22. Where could the 9/11 terrorism trials be transferred next?

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