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THE TRIALS OF AL QAEDA: FEDERAL COURT VS. MILITARY COMMISSION*

Toni Locy[†]

Since the September 11, 2001 attacks, I have focused my reporting on the Bush administration's legal war on terrorism. In doing so, I have covered the federal courts' attempts to bring terrorism suspect Zacarias Moussaoui to trial, in addition to covering the rocky debut of a separate military system of justice that the administration has created for non-U.S. citizen terrorism suspects. The title of this article, "The Trials of al-Qaeda: Federal Courts vs. Military Commission," suggests that one may be better than the other. However, at this point, their performances in handling terrorism cases make it difficult to project a winner.

Back in November 2001, when President Bush announced that his administration would use military commissions to try foreign terrorism suspects, his advisers claimed that a key characteristic of the tribunals would be control of the proceedings. No defendant facing trial before a military commission would get away with the antics that Moussaoui, a French citizen facing terrorism conspiracy charges, was pulling in federal court in Alexandria, Va., by acting as his own lawyer, they said. Yet, that hasn't turned out to be the case.

For observers, the military commission's first hearings—nearly three years in the making—created a sense of déjà vu. The military commission fell prey to Moussaoui-like moves by Ali Hamza Ahmad Sulayman Al Bahlul, a Yemeni accused of producing an al-Qaeda recruitment video that glorified the October 2000 attack on the U.S.S. Cole that killed seventeen sailors. In less than three hours, the slightly built Al Bahlul exposed weaknesses in the new military system of justice by challenging the authority of the commission's presiding officer, the use of secret evidence and limitations on defendants' rights.

Like Moussaoui, Al Bahlul admitted being a member of al-Qaeda. Also like Moussaoui, Al Bahlul demonstrated an uncanny grasp of American justice and used that understanding to send the commission, and especially its presiding officer, into a tailspin by rejecting appointed military counsel and demanding to represent himself. Administration officials, such as Attorney General John Ashcroft, would say that the Moussaoui and Al Bahlul cases illustrate al-Qaeda's sophistication. They

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would point to al-Qaeda's training manual, which urges its members to use the American courts and rights to their advantage to tie proceedings in knots and embarrass the United States.

However, there is more to it than that. The new military commission system and the federal courts are being shown up by more than a couple of savvy al-Qaeda members. In large part, the problems stem from the administration's desire to control the flow of information in the name of protecting national security.

The efficiency that the administration wanted for trials of foreign terrorism suspects has so far been elusive because the new system has rules that military law experts say revert back to pre-World War II courts-martial and ignore the advances of the Uniform Code of Military Justice. During its sessions in August, the commission's presiding officer and members stumbled in implementing the new rules that clearly were as foreign to them as they were to the defendants.

The federal courts are struggling with the Moussaoui case because of the enormous amount of secrecy surrounding the government's massive investigation of the Sept. 11, 2001 terrorist attacks. It took a three-judge panel of the 4th Circuit Court of Appeals several months to sort out whether prosecutors misled the judges on how much—or, more accurately, how little—U.S. intelligence agencies are telling the Justice Department about what al-Qaeda captives are saying about Moussaoui and his role, if any, in the 9/11 plot. The reason: the mountain of classified information that the court had to climb to reach its decision that Moussaoui probably hasn't been harmed by the prosecutors' lack of knowledge about what wound up "on the cutting room floor" when intel officers put together their reports on what captured al-Qaeda operatives Khalid Shaikh Mohammed, Ramzi Bin al-Shibh and others have said about 9/11 and Moussaoui.

There is so much classified information in the Moussaoui case that the classifiers—or "magic marker men," as I like to call them—can't remember from one footnote to the next what is secret and what's not. Recently, the 4th Circuit issued an amended opinion of a ruling it had made in April regarding Moussaoui's request for access to three captured al-Qaeda operatives.¹ By reading the original and amended rulings side-by-side, I noticed passages that appeared in the first ruling were blacked out, or redacted, in the second version, and vice versa.

For example, the magic marker men blacked out a passage that said that one of the captured al-Qaeda operatives had indicated that "Moussaoui's operational knowledge was limited, a fact that is clearly of exculpatory value as to both guilt and penalty." But the line appears for all to read in the September 13 version.

The April version of the opinion contained statements by the al-Qaeda captives that indicated that "Moussaoui had no contact with any of the

¹ U.S. v. Moussaoui, 382 F.3d 453 (4th Cir. 2004).

hijackers,” and a discussion by the court about whether the enemy combatants are in U.S. custody. Both statements are blacked out in the September opinion.

This may not sound like a big deal. However, it shows an obsessive, inconsistent approach toward secrecy. Perhaps more significantly, this strategy is making anonymous bureaucrats—who are members of the executive branch—more powerful than federal judges in deciding what evidence can and cannot be used at trial. As one Republican-appointed federal judge has told me, there’s always a way to come up with a de-classified version of classified evidence. He says you just need to roll up your sleeves and make it happen. But in the Moussaoui case, the judge and prosecutors don’t know what they don’t know.

The cases against four detainees held at Guantanamo Bay are not far enough along yet to see whether the magic marker men will tie the military commission in similar knots. But secrecy likely will be a major issue. Key questions that remain unanswered are: Can the military conduct “full and fair” trials for foreign terrorism suspects, as the president promised? Or will the commissions collapse under the weight of the administration’s emphasis on secrecy to protect national security, with defendants tried and convicted with evidence presented largely behind closed doors?

Even before being called to order, the commission’s initial session was rife with drama, discord, and confusion. The presiding officer, Army Colonel Peter Brownback, had clashed with military-appointed defense lawyers over how much authority he has. Once the session got underway, the participants appeared to have difficulty adjusting to a brand new system of justice. When in doubt on how to proceed, Brownback, a former military judge, appeared to rely on his instincts to protect defendants from themselves. When Al Bahlul confessed to being an al-Qaeda member, Brownback cut him off. But the colonel incorrectly said that the incriminating statement could not be used against the defendant. Under the military commission rules, it can, and the military prosecutor told Brownback that.

Another difficulty that some legal experts say may be insurmountable is the commission’s lack of an independent judge. Brownback clearly is caught between a system he knows and one he doesn’t. He is trying to assume duties that give him power on one hand but take it away with the other. In the end, Brownback acted more like a judge, possibly assuming more authority than the military commission rules appear to provide.

The other commission members also struggled with their dual roles as judges and jurors. Brownback repeatedly told the other panelists—all of whom are non-lawyers—that they were to rely on him to give them the law. And they repeatedly looked to him, even though the rules say the panel members and presiding officer are equals in interpreting the law.

Because there is no independent judge, there is no one to referee disputes over what should or shouldn’t remain secret. Instead, the

commission's members decided on their own whether defense attorneys could question them in public or secret session about their prior military duties. It is possible that career military officers, who are not trained in the law, could be mistaken about what should or shouldn't be made public. Especially if the questions are being asked in an adversarial setting as *voir dire* was for the commission members. All of the panelists were on the defensive. An independent judge could have ensured that secret sessions weren't held unnecessarily.

When the Pentagon was drafting the rules for the military commissions, officials suggested that each defendant would face trial before separate panels. But for reasons the Pentagon has not given, the first four detainees facing trial in the new system will have their cases heard by the same group of all white men. This raises concerns among some legal experts about the ability of the non-lawyer panelists to keep the cases and complex legal issues straight.

The panelists also appeared unprepared for the intensity of the media's attention to the commission's opening proceedings. With the exception of Brownback, Marine Col. Jack Sparks Jr., Marine Col. R. Thomas Bright, Air Force Lt. Col. Timothy Toomey, Air Force Col. Christopher Bogdan, and alternate Army Lt. Col. Curt Cooper wanted to keep their identities secret. Because of a gaffe by the Defense Department, their names were revealed in documents posted on DOD's Web site. Similarly, prosecutors' names were revealed in court filings but were later redacted when someone at the Pentagon realized they had been made public.

Keeping such secrets is unheard of in civilian courts, where well-known prosecutors routinely bring charges against mobsters and drug dealers. Jurors' names have been kept secret in trials of violent gangs. But that does not happen with judges or prosecutors, many of whom run for office at the state and local level. It is true that these military officers are serving as jurors. But they are simultaneously serving as judges, interpreting the law in a historic event.

Pentagon officials are making it hard on history by also barring a media sketch artist from drawing faces of commission members, prosecutors and defendants. And the Pentagon's promised transcript of the preliminary hearings has yet to materialize. The transcript took on increased importance during the commission's opener when it became clear to observers that the military's translators were having trouble providing accurate translations of what was transpiring. That could be an issue when the federal courts consider habeas petitions filed by the detainees.

During a briefing at the Pentagon the week that the commission kicked off its first hearings, Air Force Brig. Gen. Thomas Hemingway, the legal adviser to the appointing authority, said he believes the new system will work. But he seemed to give ground on the administration's initial predictions that the commissions will be faster and more efficient than

civilian courts. "These are important cases. They are complex cases," Hemingway said. "So they are not going to be . . . tried overnight."²

There could be more delay in the trials because of defense challenges to all but one of the commission members. The chief prosecutor, Army Col. Robert Swann, said last month that prosecutors do not object to removal of three of the members being challenged by the defense over the appearance of bias. Swann also urged Brownback to take a hard look at his ability to serve as presiding officer. Brownback is very animated. He apparently did not realize that the media would take note every time that he sighed, rubbed his eyes or held his head in his hands while deciding thorny legal issues. But his behavior was not the basis of the defense challenges. It is the appearance of bias raised by his relationship with the appointing authority, John Altenburg, a retired Army lawyer. Altenburg and Brownback played key roles at each other's retirement parties.

The Altenburg-Brownback friendship raised questions about the depth and quality of the vetting process used to select the commission's members. One panelist was in charge of transporting detainees from Afghanistan to Guantanamo Bay. Another was an intelligence officer in Afghanistan when the detainees were captured. And the alternate member admitted that he had once expressed an opinion that the Gitmo detainees were terrorists.

The commission's preparation for the initial hearings also came under fire. Al Bahlul's request to represent himself should not have been the big surprise that it appeared to have been. His military counsel informed the appointing authority and other Pentagon officials in April that Al Bahlul wanted to go it alone.

But in court, Brownback appeared befuddled by Al Bahlul's request. He told Al Bahlul that the tribunal's rules say that defendants "must be represented at all relevant times" by appointed military lawyers, and told the defendant that he was not allowed to represent himself.³ Minutes later, Brownback appeared to have forgotten what he had just said. When Al Bahlul reminded him, Brownback denied it.

The preliminary hearings illustrated that a brand new military system of justice for foreign terrorism suspects is not immune from the same type of aggressive work by defense attorneys found in civilian courts and especially in the Moussaoui case. The military lawyers who have been appointed to represent the four Gitmo detainees have done exactly what defense attorneys do every day in the civilian courts. Several legal experts have said that if there is a bright spot in the way the United States is dealing

² Air Force Brig. Gen. Thomas Hemingway, News Conference at the Pentagon and audio-conferenced into Guantanamo Bay, Cuba (Aug. 26, 2004) (notes on file with the author).

³ News Release, U.S. Dep't of Def., Third Military Commission Interrupted by Yemeni Detainee Request (Aug. 26, 2004) *available at* <http://www.defenselink.mil/releases/2004/nr20040826-1174.html>.

with terrorism suspects, it is the work of the military defense counsel before the military commission.

So which is better, federal courts or military commissions? History will judge the winner by determining how the administration's legal approach to terrorism affected the reputation of the United States and its civilian and military justice systems.