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HOW WILL THE 9/11 HIJACKERS BE BROUGHT TO JUSTICE?

by BRIAN PATIENT

Almost a decade after 9/11, the alleged mastermind behind the Twin Tower attacks, Khalid Sheikh Mohammed, and four alleged accomplices will stand trial in federal court.¹ The accused face criminal charges and are therefore entitled to the protections of the U.S. Constitution.² But is criminal court the way to bring the accused to justice?

Debate over the method of justice the defendants should face has been reignited in the wake of a recent decision to hold the trials in a location other than New York City.³ Some, such as conservative Washington lawyer David B. Rivkin, Jr., want the accused to face military tribunals.⁴ Specifically, Rivkin has called for the Obama administration “to accept the Bush administration’s

thesis that terror suspects should be viewed as warriors, not as criminals with all the rights accorded them in American courts.”⁵

Others are in favor of allowing the accused to be tried in federal court with Constitutional protections.⁶ According to Bruce Fein, a former senior official in the Justice Department under President Ronald Reagan, “the entire structure of military commissions is flawed.”⁷ Fein further opines, “It combines judge, jury, and prosecutor in the same branch - the very definition of tyranny according to *The Federalist Papers*.”⁸

MILITARY TRIBUNALS: ARE THEY EFFECTIVE?

Military tribunals have been a part of American history prior to the founding of the republic.⁹ The U.S. armed forces run these legal tribunals, or military commissions.¹⁰ Traditionally, military tribunals have been used to prosecute captured enemy combatants.¹¹ The accused 9/11 terrorists are considered such enemy combatants.¹² However, in November 2009, the U.S. Justice Department made the decision to try the accused in federal court.¹³

The decision to hold the trials in federal court sparked debate among former terrorist prosecutors and political commentators.¹⁴ One of the most outspoken critics of a criminal trial is former federal prosecutor Andrew C. McCarthy.¹⁵ Fifteen years ago, McCarthy prosecuted a terrorist group plotting to blow up the United Nations along with various other New York landmarks.¹⁶ Those terrorists were convicted and sentenced in criminal court.¹⁷

Ironically, McCarthy, who is known for asking the jury in his closing argument, “Are you ready to surrender the rule of law to the men in this courtroom?” has recently changed his position.¹⁸ Today, he is no longer working for the government and is an outspoken critic of using anything but a military tribunal to prosecute terrorists.¹⁹ In his opinion, international terrorism is “a military problem, not a criminal justice issue.”²⁰

On the other hand, human rights lawyer Joanne Mariner argues that the “outcome of military tribunals will enjoy none of the legitimacy of results reached in normal civilian trials.”²¹ “Rather than being stigmatized as terrorists, defendants. . . may be seen as political prisoners - victims, not perpetrators.”²² Similarly, William Elward, Loyola University Chicago School of Law Adjunct

Professor and former Assistant State's Attorney in Dade County, Fla., believes that the rights of the accused need to be protected.²³ He states, "We are not going to scare anyone into changing their attitudes towards us, but what we can do is show the next generation of people that whoever you are, regardless of what you have done you will get your day in court. This is what sets us apart . . . , a system that provides for all to have a fair day in court."²⁴

MILITARY TRIBUNALS: A PATH TO MARTYRDOM?

The accused have a different view on how to best prosecute those involved in the fight against America and its allies.

Despite the criticism of military tribunals, Khalid Sheikh Mohammed and his accomplices want to stand trial in front of a military tribunal.²⁵ Mohammed believes he is a warrior and not a criminal.²⁶ Evidence of this is found in the transcript from his combatant status review tribunal proceedings where he compared himself to George Washington.²⁷ Mohammed stated, "Gentlemen, we're all men of war. We understand that sometimes the death of civilians is a necessary incident to getting our goals accomplished. We understand each other."²⁸

According to ACLU Attorney Ben Wizner, however, the United States should not treat the accused as enemy combatants.²⁹ Wizner believes, "there's nothing military about Khalid Sheikh Mohammed."³⁰ In a recent interview he labeled the accused as mass murderers who should be tried as common criminals.³¹

The debate over the prosecution of the accused continues. Sen. Lindsay Graham, R-S.C., introduced legislation in February 2010 to prevent government funding for the civilian trials.³² Supporters of the strengthened Bush military tribunals argue that "the United States is at war with terrorists and in times of war, enemy aliens are never afforded the protections of the U.S. legal system."³³ Meanwhile, the U.S. Justice Department remains committed to having the accused face trial in federal court with the full protections and guarantees of the U.S. Constitution.³⁴

While there are compelling arguments on both sides of the debate, there is no easy solution for dealing with those accused of orchestrating the greatest act of

terrorism on U.S. soil. Despite the debate, those accused of the destruction on 9/11 are set to face the American justice system in the near future.³⁵

NOTES

1 Terry Frieden & Chris Kokenes, *Accused 9/11 Plotter Khalid Sheikh Mohammed Faces New York Trial*, CNN.com, Nov. 13, 2009, <http://www.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/index.html>.

2 See Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, THE NEW YORKER, Feb. 15, 2010, available at http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer.

3 *Id.*

4 William Fisher, *Lawyers, Rights Groups Outraged by Gitmo Decision*, INTER PRESS SERV, May 17, 2009, <http://ipsnorthamerica.net/news.php?idnews=2243>.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 Richard Allen Greene, *Analysis: Military Tribunals*, BBC NEWS, June 29, 2006, <http://news.bbc.co.uk/2/hi/americas/1701789.stm>.

10 *Q and A: Military Commissions Act of 2006*, HUMAN RIGHTS WATCH, <http://www.hrw.org/legacy/backgrounder/usa/qna1006/2.htm> (last visited Mar.28, 2010).

11 *Id.*

12 *Id.*

13 Naftali Bendavid & Jess Bravin, *Republicans Step Up Protests of Civilian Terror Trials*, N.Y. TIMES, Feb. 1, 2010, available at <http://online.wsj.com/article/SB10001424052748703762504575037550051072986.html>.

14 See Mayer, *supra* note 2.

15 Benjamin Weiser, *Top Terror Prosecutor Is a Critic of Civilian Trials*, N.Y. TIMES, Feb. 19, 2010, available at <http://www.nytimes.com/2010/02/20/nyregion/20prosecutor.html>.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 Weiser, *supra* note 15.

21 Greene, *supra* note 9.

22 *Id.*

23 Interview with William Elward, Former Assistant State's Attorney, Dade County, Fla. & Adjunct Professor of Law, Loyola Univ. Chi. School of Law, in Chi., Ill. (Mar. 18, 2010).

24 *Id.*

25 Joshua Durkin & Ray Storez, *ACLU's Wizner: There Is Nothing Military about Khalid Sheikh Mohammed*, THE PUBLIC RECORD, Mar. 21, 2010, available at <http://pubrecord.org/law/7255/aclus-wizner-theres-nothing/>.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 Durkin & Storez, *supra* note 25.

32 Bendavid & Bravin, *supra* note 13.

33 Greene, *supra* note 9.

34 *See* Mayer, *supra* note 2.

35 At the time of publication, the Obama Administration was in the process of re-evaluating where to hold the prosecution and the proper trial format.