

The New York Times¹

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A Return to American Justice

Editorial

Attorney General Eric Holder Jr. took a bold and principled step on Friday toward repairing the damage wrought by former President George W. Bush with his decision to discard the nation's well-established systems of civilian and military justice in the treatment of detainees captured in antiterrorist operations.

From that entirely unnecessary policy (the United States had the tools to detain, charge and bring terrorists to justice) flowed a terrible legacy of torture and open-ended incarceration. It left President Obama with yet another mess to clean up on an urgent basis.

On Friday, Attorney General Holder announced that Khalid Shaikh Mohammed, the self-described mastermind of the Sept. 11 attacks, and four others accused in the plot will be tried in a fashion that will not further erode American justice or shame Americans. It promises to finally provide justice for the victims of 9/11.

Mr. Holder said those prisoners would be prosecuted in federal court in Manhattan. It was an enormous victory for the rule of law, a major milestone in Mr. Obama's efforts to close the detention camp at Guantánamo Bay, Cuba, and an important departure from Mr. Bush's disregard for American courts and their proven ability to competently handle high-profile terror cases. If he and Vice President Dick Cheney had shown more faith in the laws and the Constitution, the alleged mass murderers would have faced justice much earlier.

Republican lawmakers and the self-promoting independent senator from Connecticut, Joseph Lieberman, pounced on the chance to appear on television. Despite all evidence to the contrary, they said military tribunals are a more secure and appropriate venue for trying terrorism suspects. Senator John Cornyn of Texas, a former judge who should have more regard for the law, offered the absurd claim that Mr. Obama was treating the 9/11 conspirators as "common criminals."

There is nothing common about them — or Mr. Holder's decision. Putting the five defendants on public trial a few blocks from the site of the former World Trade Center is entirely fitting. Experience shows that federal courts are capable of handling high-profile terrorism trials without comprising legitimate secrets, national security or the rule of law. Mr. Bush's tribunals failed to hold a single trial.

The fact that defense lawyers are likely to press to have evidence of abuse aired in court — Khalid Shaikh Mohammed was tortured by waterboarding 183 times — is unlikely to derail the prosecutions, especially given Mr. Holder's claim to have evidence that has not been released yet.

Regrettably, the decision fell short of a clean break. Five other Guantánamo detainees are to be tried before a military commission for the 2000 bombing of the Navy destroyer Cole, including Abd al-Rahim al-Nashiri, who is accused of planning the attack.

The rules for the commissions were recently revised to bring them closer to military standards. And Mr. Holder cites the fact that the Cole bombing was an attack on a military target to justify a military trial. But that does not cure the problem of relying on a new system outside the regular military justice system. Nor does it erase the appearance that the government is forum-shopping to

win convictions. Most broadly, it fails to establish a clear framework for assigning cases to regular courts or military commissions going forward.

Still, this much is clear: the Obama administration has yet to completely figure out how to rectify the disgraceful Bush detention policies, but it is getting there.

The Washington Post²

Friday, November 20, 2009

Travesty in New York

By Charles Krauthammer*

For late-19th-century anarchists, terrorism was the “propaganda of the deed.” And the most successful propaganda-by-deed in history was 9/11 — not just the most destructive, but the most spectacular and telegenic.

And now its self-proclaimed architect, Khalid Sheik Mohammed, has been given by the Obama administration a civilian trial in New York. Just as the memory fades, 9/11 has been granted a second life — and KSM, a second act: “9/11, The Director’s Cut,” narration by KSM.

September 11, 2001 had to speak for itself. A decade later, the deed will be given voice. KSM has gratuitously been presented with the greatest propaganda platform imaginable — a civilian trial in the media capital of the world — from which to proclaim the glory of jihad and the criminality of infidel America.

So why is Attorney General Eric Holder doing this? Ostensibly, to demonstrate to the world the superiority of our system, where the rule of law and the fair trial reign.

Really? What happens if KSM (and his co-defendants) “do not get convicted,” asked Senate Judiciary Committee member Herb Kohl. “Failure is not an option,” replied Holder. Not an option? Doesn’t the presumption of innocence, er, presume that prosecutorial failure — acquittal, hung jury — is an option? By undermining that presumption, Holder is undermining the fairness of the trial, the demonstration of which is the alleged rationale for putting on this show in the first place.

Moreover, everyone knows that whatever the outcome of the trial, KSM will never walk free. He will spend the rest of his natural life in U.S. custody. Which makes the proceedings a farcical show trial from the very beginning.

Apart from the fact that any such trial will be a security nightmare and a terror threat to New York — what better propaganda-by-deed than blowing up the courtroom, making KSM a martyr and turning the judge, jury and spectators into fresh victims? — it will endanger U.S. security. Civilian courts with broad rights of cross-examination and discovery give terrorists access to crucial information about intelligence sources and methods.

That’s precisely what happened during the civilian New York trial of the 1993 World Trade Center bombers. The prosecution was forced to turn over to the defense a list of 200 unindicted co-conspirators, including the name Osama bin Laden. “Within 10 days, a copy of that list reached bin Laden in Khartoum,” wrote former attorney general Michael Mukasey, the presiding judge at that trial, “letting him know that his connection to that case had been discovered.”

Finally, there’s the moral logic. It’s not as if Holder opposes military commissions on principle. On the same day he sent KSM to a civilian trial in New York, Holder announced he was sending Abd al-Rahim al-Nashiri, (accused) mastermind of the attack on the USS Cole, to a military tribunal.

By what logic? In his congressional testimony Wednesday, Holder was utterly incoherent in trying to explain. In his Nov. 13 news conference, he seemed to be saying that if you attack a

*letters@charleskrauthammer.com

civilian target, as in 9/11, you get a civilian trial; a military target like the Cole, and you get a military tribunal.

What a perverse moral calculus. Which is the war crime — an attack on defenseless civilians or an attack on a military target such as a warship, an accepted act of war that the United States itself has engaged in countless times?

By what possible moral reasoning, then, does KSM, who perpetrates the obvious and egregious war crime, receive the special protections and constitutional niceties of a civilian courtroom, while he who attacked a warship is relegated to a military tribunal?

Moreover, the incentive offered any jihadist is as irresistible as it is perverse: Kill as many civilians as possible on American soil and Holder will give you Miranda rights, a lawyer, a propaganda platform — everything but your own blog.

Alternatively, Holder tried to make the case that he chose a civilian New York trial as a more likely venue for securing a conviction. An absurdity: By the time Barack Obama came to office, KSM was ready to go before a military commission, plead guilty and be executed. It's Obama who blocked a process that would have yielded the swiftest and most certain justice.

Indeed, the perfect justice. Whenever a jihadist volunteers for martyrdom, we should grant his wish. Instead, this one, the most murderous and unrepentant of all, gets to dance and declaim at the scene of his crime.

Holder himself told The Post that the coming New York trial will be “the trial of the century.” The last such was the trial of O.J. Simpson.

The Washington Post³

Friday, November 20, 2009

A battlefield in the courtroom

By Eugene Robinson[†]

Critics of Attorney General Eric Holder’s decision to bring the self-proclaimed mastermind of the Sept. 11 attacks and four other accused terrorists to New York for trial can’t seriously believe the city will have trouble handling the expected “trial of the century” hoopla. The critics can’t really think a judge is going to give Khalid Sheik Mohammed an open microphone to spew his jihadist views, or fear that a jury – sitting just blocks from Ground Zero — will look for reasons to let an accused mass murderer off on some technicality.

Everyone knows that the bloodthirsty blowhard — whom officials often refer to by his initials, KSM — is never going to see the light of day. The uproar is really about the word “war.” Outrage is being voiced by those who worry that Holder and President Obama are abandoning the Bush-era doctrine of a “war on terrorism” that must at all times be conducted by military means.

Those critics are wrong. The problem is that we can vanquish al-Qaeda and its affiliated groups, but still be left with a larger enemy: a militant, fundamentalist perversion of Islam. We can and should go after Osama bin Laden and his collaborators with relentless determination and, yes, that fight should be led by our armed forces. But to achieve a meaningful victory, we also have to win the war of ideas — and in that philosophical and theological struggle, the concept of justice is a key battlefield.

It’s amazing that so many people who insist on the “war on terrorism” framework apparently have such little interest in understanding the enemy, which seems to me the only way to find the enemy’s vulnerabilities. The jihadist narrative is largely about justice, or rather what radical imams and their followers perceive as injustice.

In the enemy’s version of history, the West — meaning the United States, Israel, Britain and what used to be called Christendom — has a long history of exploiting the Muslim world. We occupy Muslim lands to steal their resources. We install corrupt lackeys as their rulers. For all our high and mighty talk about fairness and justice, we reserve these luxuries for ourselves. In this warped worldview, we deserve any atrocities that jihadist “warriors” might commit against us.

Protesting that all this is absurd and obscene does not make it go away. And our troops’ military success actually helps to further the jihadist narrative about a “crusade” against Islam.

It’s ironic that many of the officials and commentators who are so upset about the decision to give KSM a civilian trial were also quick to call the Fort Hood killings an act of terrorism. If the suspect, Maj. Nidal Hasan, is indeed a terrorist — and not just a deranged man who snapped — then his awful rampage helps demonstrate my point. Hasan reportedly considered the U.S. military deployments in Iraq and Afghanistan a war against Islam, at one point arguing that Muslim soldiers should be excused from combat as conscientious objectors. In other words, he apparently bought at least part of the jihadist line. If killing a terrorist in Kandahar creates one in Killeen, we’ll never make progress.

In this context, putting KSM and the others on trial in a civilian proceeding on U.S. soil is not just a duty but also an opportunity. It’s a way to show that we do not have one system of justice for

[†]eugenerobinson@washpost.com

ourselves and another for Muslims, that we give defendants their day in court, that we insist they be vigorously defended by competent counsel — that we really do practice what we preach.

Even if a military tribunal would be just as fair — and a military court might be even more offended than a civilian one by the fact that KSM was subjected to waterboarding — a trial by men and women in uniform would be seen as an extension of the “war on Islam.”

Holder’s choice is not without risk. The biggest question I have is whether an impartial jury could be impaneled in New York. And while I believe the chance of an acquittal is incredibly remote, if it happened, KSM would be kept in indefinite detention anyway — a nightmare scenario.

But there’s one more huge benefit to a civilian trial: It would show the preachers of hatred and their followers that we’re not afraid of them or their poisonous ideas. It would show that they haven’t changed us or our ideals — and that they never will.

I say bring it on.

The Wall Street Journal⁴

NOVEMBER 20, 2009

'Failure Is Not an Option'

Obama and Holder's assault on due process

By JAMES TARANTO

On Wednesday we noted that President Obama defended his decision to try Khalid Sheikh Mohammad as a civilian by declaring that the outcome is preordained: KSM will be convicted and put to death. This appears to be not just bluster but the administration's actual position. Power Line's John Hinderaker notes that Attorney General Eric Holder, testifying before the Senate Judiciary Committee, made a similar statement under questioning from Sen. Herb Kohl, a Wisconsin Democrat:

Kohl: Mr. Holder, last week you announced that the department will bring to Guantanamo [sic in transcript] detainees accused of planning the 9/11 attacks to trial in federal court in New York, as we've talked about this morning. On Friday you said that you'd not have authorized prosecution if you were not confident that the outcome would be successful. However, many critics have offered their own predictions about how such a trial might well play out.

One concern we have heard from critics of your decision is that the defendants could get off on legal technicalities, in which case these terrorists would walk free. Does this scenario have any merit? If not, why? And in the worst case scenario that the trial does not result in a conviction, what would be your next steps?

Holder: Many of those who have criticized the decision—and not all—but many of those who have criticized the decision have done so, I think, from a position of ignorance. They have not had access to the materials that I have had access to.

They've not had a chance to look at the facts, look at the applicable laws and make the determination as to what our chances of success are. I would not have put these cases in Article III courts if I did not think our chances of success were not good—in fact, if I didn't think our chances of success were enhanced by bringing the cases there. My expectation is that these capable prosecutors from the Justice Department will be successful in the prosecution of these cases.

Kohl: But taking into account that you never know what happens when you walk into a court of law, in the event that for whatever reason they do not get convicted, what would be your next step? I'm sure you must have talked about it.

Holder: What I told the prosecutors and what I will tell you and what I spoke to them about is that failure is not an option. Failure is not an option. This—these are cases that have to be won. I don't expect that we will have a contrary result.

“Failure is not an option”? Is Eric Holder attorney general of the United States or some unctuous motivational speaker?

Kohl’s question is highly pertinent, and Holder simply evaded it. No one is suggesting that failure to win and sustain a conviction is an “option,” but it is a contingency for which it is shocking that the administration is, or at least claims to be, unprepared.

Further, Obama’s and Holder’s assurances that KSM will be convicted (and, according to the president, “put to death”) make a mockery of due process. Nothing is more fundamental to America’s criminal justice system than the presumption of innocence, and if terrorist detainees are to be treated as criminal defendants, they are entitled to that presumption.

For the sake of political expediency, Obama and Holder are refusing even to make a pretense of respect for due process. If KSM & Co. are convicted and put to death, America’s critics and enemies will point to Obama and Holder’s assurances in arguing that the defendants were subjected to sham justice. Nice work restoring America’s moral standing, Mr. President.

Notes

¹<http://www.nytimes.com/2009/11/14/opinion/14sat1.html>

²<http://www.washingtonpost.com/wp-dyn/content/story/2009/11/19/ST2009111903464.html>

³<http://www.washingtonpost.com/wp-dyn/content/article/2009/11/19/AR2009111903433.html>

⁴<http://online.wsj.com/article/SB10001424052748704888404574547933018090304.html>