Justice for Terrorists

J. Andrew Kent

No aspect of the Bush administration's policies since 9/11 has presented a more enduring source of controversy than its treatment of accused terrorists in its custody. The President's first response, in the immediate wake of the attacks, was to authorize the creation of military tribunals to try those captured in the campaign in Afghanistan against al Qaeda and the Taliban regime. After more than two-and-a-half years, however, the administration has yet to use these tribunals, and has slated just six detainees for trial before them, only two of whom have been formally charged.

Instead, in the dozens of terrorism-related indictments that the Justice Department has brought over this period, the administration has turned to civilian courts, often asking judges to relax the ordinary rules of procedure in light of the intelligence and national-security concerns at stake. But at every turn, whether with the military tribunals or in civilian courts, the Bush administration's efforts to restrict the usual workings of legal due process have prompted howls of outrage from both the Left and the libertarian Right.

The charges made by these critics are serious indeed. Such legal shortcuts, they argue, defy not just the best traditions of the United States but the actual guarantees imposed by federal law and the Constitution. In their view, compromising these longstanding protections puts the liberties of all Americans at risk. Moreover, they insist, whatever one's interpretation of the relevant laws, riding roughshod over the rights of accused terrorists only serves to advance their cause, reducing the standing of the U.S. in the world and putting the lie to our claims of openness and freedom.

For the most vociferous opponents of these policies, the Bush administration's basic mistake is conceptual. Heinous as our captured enemies may be, their deeds (it is said) are not acts of war but crimes, and should be handled as such, with the full force—and ordinary safeguards—of criminal law. The refrain of these critics is simple: give the courts a chance.

Since 9/11, the case of *United States* v. *Zacarias Moussaoui* is undoubtedly the best known example of using civilian courts to try an accused terrorist. A French national of Moroccan descent, Moussaoui was picked up on immigration charges in Minnesota prior to 9/11 and was indicted in late 2001. He was charged with conspiracy to commit international terrorism, to hijack an aircraft, to use the aircraft as a weapon of mass destruction, to kill U.S. government employees, and to destroy U.S. property—in short, with being a member of al Qaeda and intending to act as the twentieth hijacker on 9/11.

For the prosecution, the case has been difficult from the outset. Part of the problem is Moussaoui himself, who appears mentally unbalanced and has

J. Andrew Kent, *a new contributor, previously worked as a law clerk for two federal judges and is now a lawyer in private practice in New York.*

insisted at times on acting as his own lawyer, deluging the court with lengthy, ranting pleadings and demands. Moussaoui has confessed in court to membership in al Qaeda and to owing his allegiance to Osama bin Laden—but he has vehemently denied any involvement in the attacks of 9/11.

More vexing to prosecutors than the spectacle of the defendant himself, however, has been the burden placed on their case by the standard rules of disclosure, rules dictated by various federal statutes and Supreme Court rulings. In civilian trials, the government must make available to the defense a great deal of information—not just documents but also witnesses who are in custody. In Moussaoui's case, prosecutors have reluctantly complied with this obligation by providing his lawyers with written reports describing in great detail the interrogations of captured al-Qaeda operatives, including (as we can guess from various sources) such key figures as Khalid Sheikh Mohammed, Ramzi bin al-Shibh, and Abu Zubaydah. What the prosecutors have repeatedly rejected is Moussaoui's demand to question al-Qaeda detainees. Indeed, the proceedings in the case have been stopped and started several times by sharp disputes between the government and the judge about whether Moussaoui's lawyers, in the interest of bolstering his defense, should be allowed this privilege.

In an ordinary criminal trial, none of this would be an issue; both the defendant and his lawyers would have access to all relevant documents and witnesses. Cumbersome as this requirement may be at times, it is the cornerstone of any fair system of criminal justice. Here, however, it is essential to keep in mind the peculiar character of the case. The men whose testimony Moussaoui has sought are not petty criminals or mobsters. Khalid Sheikh Mohammed is thought to have been the master strategist of the 9/11 attack, Ramzi bin al-Shibh the operational planner. In the middle of a vicious, unfinished war with al Qaeda, it is problematic, to say the least, to make known the details of their lengthy interrogations.

THE RULES governing such disclosures in federal courts are extremely broad. They require prosecutors to share any evidence that is "favorable to the accused" or "exculpatory," or that is even "material" to the defense. Prosecutors and law-enforcement agents working on a case are also required to take the additional step of searching their files for *any* information (not just evidence, in the strict sense) that might meet these criteria; such materials must be turned over to the defense as well. Nor is that all. According to various court rulings on these matters, any government agency that becomes "aligned" or "actively involved" with the prosecutors, or functions in some way as part of the "prosecution team," must similarly search its files and, upon request, disclose information to the defense.

In law-enforcement lingo, this issue is referred to simply as "alignment." Over the years, courts have found alignment—and hence a duty to search for and disclose information—between federal prosecutors and such far-flung agencies as the United States Postal Service, the Internal Revenue Service, the Food and Drug Administration, a state environmental testing laboratory, and even foreign governments. In terrorism cases, the demands for transparency point to all those parts of the government holding our most sensitive secrets, including the Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency.

Under these rules, indeed, the disclosure of reams of information gathered by the military and intelligence communities has become a routine part of terrorism prosecutions. A February 2001 decision in the case of Wadih el-Hage—Osama bin Laden's personal secretary, who helped coordinate the 1998 embassy bombings in Africa—ordered the government to hand over a virtual encyclopedia of anti-terrorist intelligence: materials "relating to the alleged al-Qaeda terrorist training camps in the Sudan"; "information that led the government to believe that . . . associates of Mr. bin Laden visited [the defendant's] former residence in Nairobi"; "items which indicate that al Qaeda operated under a 'cell' structure in which participants were informed of plans and activities only on a 'need-to-know' basis"; and any documents containing "information that impeaches statements that the government intends to use that were uttered by . . . Osama bin Laden" and other al-Qaeda members. As Andrew C. McCarthy, a former prosecutor who tried Islamist terrorists in federal court during the 1990's, recently noted in these pages, such disclosures "illuminate not only what the government knows about terrorist organizations but the intelligence agencies' methods and sources for obtaining that information."*

ENTER, HERE, an additional complication, and one paradoxically engendered by the intelligence reforms instituted since 9/11. These altogether necessary and long-overdue reforms have, in themselves, significantly increased the risk that our anti-terrorism efforts will be compromised by disclosures in court.

As various commissions and commentators have

* "The Intelligence Mess: How It Happened, What to Do About It," April 2004.

concluded, legal "walls" erected in the past between law-enforcement and intelligence agencies prevented the sharing of crucial information that might have averted the attacks. Fortunately, the most prominent of these barriers have already come down. The USA Patriot Act, for instance, undid rules limiting the dissemination of grand-jury materials and the fruits of law-enforcement wiretaps. And a November 2002 decision by the special federal appeals court that handles foreign-intelligence surveillance overturned a lower-court decision that had limited the sharing of information between, on the one hand, those prosecutors and FBI agents working on intelligence and, on the other hand, those conducting law-enforcement investigations.

Combined with other changes in process even before 9/11, all this has helped break down the institutional and cultural divides between intelligence and law enforcement, especially in the realms of information technology and personnel. Though much remains to be done, there is more cooperation now than ever before between these crucial and complementary agencies of the federal government.

And that is the problem. To a defense lawyer with a client who is an accused terrorist, these reforms represent a giant neon billboard flashing the word "alignment." In the future, defense counsel will be able to argue that the files of our intelligence agencies should be subject to ever more extensive search and disclosure obligations, for the simple reason that the agencies themselves will be acting ever more cooperatively. Significant parts of the federal intelligence apparatus, it can be claimed plausibly, will now be the "prosecution team."

THE PERNICIOUS effects of such courtroom disclosure are likely to extend well beyond tipping the government's hand to our enemies. *Foreign* intelligence services, as well as freelance sources in the field, are already leery of working with the U.S. for fear that their secrets—and their identities—will show up in congressional hearings or press leaks; heightened concern about exposure in court can only make matters worse. The same is true of cooperation within the federal government, especially in light of longstanding fears at the CIA that joint ventures with the FBI will draw the agency into potentially damaging legal proceedings.

There is also the very real possibility that revelations in court will increasingly interfere with ongoing intelligence operations. As R. James Woolsey, the former Director of Central Intelligence, has observed about the gathering of national-security information, the "only way you will know in the future something that you may need to know is if you can stay with an asset for a long time." Law enforcement, by contrast, demands a faster timetable, pushed along by statutes of limitation and the requirement for a "speedy trial." To the extent that the two functions are further combined, the needs of intelligence-gathering are likely to suffer.

Worse, the record-keeping practices that are needed to comply with—and limit the damage caused by—the disclosure standards set by courts tend to inhibit the wide-ranging analysis and prediction of national-security threats. The FBI's information-management system has come under harsh criticism for segregating—"stovepiping," in current Washington parlance—information and preventing the salutary "connecting of dots." According to U.S. Senator Richard Shelby, a frequent critic of our intelligence efforts, the FBI still suffers from a "tyranny of the case-file" because it stores and reviews information with an eye to proving "elements of crimes against specific potential defendants in a court of law." Rather than rectifying this problem, we risk generalizing it across *all* of our intelligence agencies, making it more likely that we will repeat the errors of oversight leading up to the attacks of 9/11.

A related difficulty is that intelligence agencies are far more likely than their counterparts in law enforcement to generate information that is arguably "exculpatory," and therefore subject to disclosure in court. As Stewart Baker, former general counsel of the National Security Agency, observed some years ago in *Foreign Policy* magazine, law-enforcement agencies "have learned to live with" these rules by assuming that any internal document "will be read by a defense attorney at the end of the day." Intelligence agencies operate very differently. Their uses of information "are more diverse," Baker noted, "the process more fluid"; much of the information they collect consists of "casual speculation or fragments of data." But the unreliability of this raw intelligence has no bearing in court. Because it might be useful to the defense, it may well have to be searched and disclosed.

SO HOW can we render justice to someone like Zacarias Moussaoui while at the same time prosecuting the war on terror and protecting vital intelligence operations? How can fair adjudication be combined with a due regard for secrecy? Officials in all three branches of government have struggled with this question for years, and no one has come up with a wholly satisfactory answer.

Some protections for sensitive information are already in place. The Justice Department, for example, has long had rules to limit and monitor contacts between prosecutors and intelligence agencies like the CIA, so as to avoid pretexts for dragging agents and analysts into court. Judges have the discretion to rule that certain information will be disclosed only to defense lawyers who have security clearances, and not to their clients. (This is what has occurred in the Moussaoui case.) And the Classified Information Procedures Act (CIPA, passed in 1980) allows prosecutors to request the disclosure of a nonclassified version of sensitive information.

But these safeguards go only so far. In a civilian trial, any limitation on disclosure must be guided, according to the congressional report accompanying CIPA, by a "presumption that the defendant should not stand in a worse position, because of the fact that classified information is involved." As the Court of Appeals for the Fourth Circuit stated in its recent decision in the Moussaoui case, the prosecution's "interest in protecting classified information does not overcome a defendant's right to present his case." In practice, competent defense counsel can always argue—as they have done in the Moussaoui case—that specific details about the alleged offense, the investigation of it, and the background of the government's witnesses must be disclosed.

Congress could try, of course, to create additional protections. To prevent defense attorneys from going on fishing expeditions in sensitive intelligence files, new laws might define disclosure obligations in such a way as to apply only to the specific files at "aligned" intelligence agencies that are directly involved with a given case. Or Congress could simply grant a broad exemption to intelligence agencies, making their files off-limits except in certain very narrow circumstances. But the problem with such measures, especially the last, is that they almost certainly would be struck down in court. Though some of the existing disclosure requirements are purely statutory, others spring from Supreme Court cases, especially the landmark ruling in *Brady* v. *Maryland* (1963). "*Brady* obligations" (as they are commonly called) are now a deeply entrenched part of American legal culture, and there is no reason to think the Supreme Court would accept any effort to curtail them.

DESPITE THE hue and cry of libertarian critics, the least objectionable solution to these dilemmas is the one with which the Bush administration started: military tribunals. Civilian courts are simply not equipped—nor should they be equipped—to deal with the likes of Zacarias Moussaoui. Terrorism and terrorist conspiracy demand a different set of rules.

The tribunal procedures announced by the Bush administration in November 2001 may not satisfy the ACLU, but they strike the right balance between due process and due concern for the nation's security. Even under these rules, prosecutors are required to disclose "all information intended for presentation as evidence at trial," especially that which might "exculpate the accused." But these disclosures can be limited in ways that would never be possible in a civilian trial. Any sensitive piece of evidence can be presented in a declassified summary fashion, for example, and the tribunal can close its proceedings to anyone—including the accused and his civilian defense counsel—except the judges, the prosecution team, and a Department of Defense lawyer assigned to represent the accused.

The Bush administration's disinclination to use military tribunals is understandable (though one wonders why the President wasted so much political capital to establish them). No one can be pleased at the idea of denying the fullest possible hearing even to a would-be terrorist like Moussaoui. But, as all Americans have had occasion to learn in recent years, our elected officials have duties that are even more urgent than ensuring perfectly fair trials, especially when the country is faced with threats that no mere criminal could ever pose.