SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Journal of International Law

Volume 42 | Issue 1

2009

In Pursuit of Justice Prosecuting Terrorism Cases in the Federal Courts - 2009 Update and Recent Developments

James J. Benjamin Jr.

IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS

2009 UPDATE AND RECENT DEVELOPMENTS

James J. Benjamin, Jr. [*]

As the U.S. strives for a vigorous response to the problem of radical Islamist terrorism, it seems self-evident that we must have a stable and effective forum for prosecuting accused terrorists when such prosecutions are appropriate in light of the evidence and the law. In a recent study, we found substantial data to support the proposition that the federal courts are capable of handling terrorism cases fairly and effectively without disclosing classified information or jeopardizing national security. Our research shows that although federal-court terrorism cases often present significant challenges, judges and lawyers have generally managed to address and overcome these problems and that the criminal justice system has proved itself capable of handling a broad variety of terrorism prosecutions.

In May 2008, Human Rights First released *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, a White Paper which I co-authored with my then-law partner, Richard B. Zabel.[1] Based on a comprehensive review of more than one hundred and twenty actual prosecutions dating back to the 1980s, *In Pursuit of Justice* concluded that the criminal justice system is well-equipped to handle a broad variety of criminal cases arising from terrorism that is associated—organizationally, financially, or ideologically—with self-described "jihadist" or Islamist extremist groups like al-Qaeda. The roster of cases chronicled in *In Pursuit of Justice* ranges from blockbuster trials against hardened terrorists who planned or committed grievous acts around the world to complex terrorism-financing prosecutions and "alternative" prosecutions based on non-terrorism charges such as immigration fraud, financial fraud, and false statements. Many of these cas-

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[*] Mr. Benjamin is a partner at Akin Gump Strauss Hauer & Feld LLP and a former Assistant United States Attorney in the Southern District of New York.

[1] *See* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf. In Pursuit of Justice is also referred to herein as the "White Paper." In the fall of 2009, Mr. Zabel returned to government service as the Chief of the Criminal Division of the U.S. Attorney's Office for the Southern District of New York. The views expressed in this article are mine alone and are not the views of Akin Gump Strauss Hauer & Feld or of other current or former Akin Gump attorneys.

es were preemptive prosecutions focused on preventing and disrupting terrorist activities. *In Pursuit of Justice* acknowledged that terrorism prosecutions can present difficult challenges, and that the criminal justice system, by itself, is not "the answer" to the problem of international terrorism, but it found that the federal courts have demonstrated their ability, over and over again, to effectively and fairly convict and incapacitate terrorists in a broad variety of terrorism cases.

In the year after *In Pursuit of Justice* was issued, there were a number of important developments. On his second day in office, President Obama issued Executive Orders mandating the closure of the Guantánamo Bay detention facility within one year and establishing a Detention Policy Task Force to examine U.S. policy regarding the detention, interrogation, and trial of individuals suspected of participating in terrorism.[2] The effort to close Guantánamo has proved to be fraught with difficult policy and political choices and, more generally, our country continues to wrestle with the complex problems posed by the scourge of terrorism. Apart from Guantánamo, our military forces remain deployed in Iraq and Afghanistan; the situation in Pakistan is unstable; and radical Islamist groups continue to threaten our national interests in many corners of the globe.

In this environment, there is broad consensus that the government must continue to deploy all available resources—including military, intelligence, diplomatic, economic, and law enforcement tools—to address the threat of international terrorism. It seems self-evident that, as an important part of an integrated counterterrorism strategy, the government must have a reliable, stable system in place for prosecuting accused terrorists when such prosecutions are appropriate in light of the evidence and the law. The question remains as to where, and under what set of rules, terrorism prosecutions should occur.

President Obama has expressed a preference for trying accused terrorists in federal court whenever possible, but in two separate public statements in May 2009, he signaled that the government expects to prosecute some detainees in reconstituted military commissions with revised procedural rules.[3] The President also noted that the government intends to develop "clear, defensible, and lawful standards" for longer-term detention of

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[2] *See* Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009); Exec. Order No. 13,493, 74 Fed. Reg. 4,901 (Jan. 22, 2009).

[3] See Barack Obama, U.S. President, Statement of President Barack Obama on Military Commissions (May 15, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions; Barack Obama, U.S. President, Remarks by the President on National Security at the National Archives (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09.

individuals who cannot be prosecuted but who the government believes pose an unacceptably high risk to release.[4]

The President offered these remarks against the backdrop of a vigorous and ongoing debate about how the government should prosecute terrorists. Some commentators have agreed with the conclusion of *In Pursuit of Justice* that the justice system is equal to the task of handling a broad swath of terrorism prosecutions, while others have posited that the federal courts are unable to do so effectively—or that the risk of a prosecution that does not yield a conviction is unacceptable—and that, as a result, Congress should authorize a new "national security court" with lower evidentiary standards or other prosecution-friendly features that would supplant the Article III courts in some terrorism cases.[5]

In July 2009, Mr. Zabel and I co-authored a supplement to *In Pursuit of Justice*, entitled *2009 Update and Recent Developments* ("2009 Re-

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[4] Remarks by the President on National Security, *supra* note 3.

[5] *Compare* THE CONSTITUTION PROJECT, LIBERTY AND SEC. COMM. & COALITION TO DEFEND CHECKS AND BALANCES, A CRITIQUE OF "NATIONAL SECURITY COURTS" (June 23, 2008), *available at* http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf (arguing in favor of capability of criminal justice system to handle terrorism cases); Hon. Leonie Brinkema, Address at the American University Washington College of Law/Brookings Institution Conference: "Terrorists and Detainees: Do We Need A New National Security Court" (Feb. 1, 2008), *available at* http://www.wcl.american.edu/podcast/ audio/20080201_WCL_TAD.mp3 (same); *with* Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87 (2008) (arguing in favor of national security courts); Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court*, (Series on Counterterrorism and American Statutory Law, Working Paper No. 5, 2009), *available at* http://www.brookings.edu/~/media/files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf (same); BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008) (same); Amos N. Guiora & John T. Parry, *Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356 (2008) (same). In a forthcoming symposium essay, Professor Robert Chesney concludes that many of the leading criticisms of the capability of the criminal justice system regarding terrorism are overstated, but notes "three sets of procedural safeguards that do tend to limit the reach of the criminal justice system in comparison to existing or proposed alternatives" and discusses modest steps Congress might take to optimize the criminal justice system for the task of prevention-oriented prosecution. Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 715 (2009). For a useful summary and trenchant critique of national-security-court proposals, *see* Stephen I. Vladek, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505 (2009). Benjamin Wittes and Colleen A. Peppard of the Brookings Institution have recently issued a detailed procedural blueprint for new statutory detention authority that would supplement existing legal grounds for detaining alleged terrorists. *See* BENJAMIN WITTES & COLLEEN A. PEPPARD, DESIGNING DETENTION: A MODEL LAW FOR TERRORIST INCAPACITATION (Governance Studies at Brookings 2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/0626_detention_wittes/0626_detention_wittes.pdf.

port") and available at http://www.humanrightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf. The 2009 Report takes a renewed look at the capability of the federal courts to handle terrorism cases based on developments in the year since the White Paper was written. As was the case with the original White Paper, the 2009 Report is grounded in actual data and experience rather than abstract or academic theories. The 2009 Report identifies, examines, and analyzes the terrorism cases that were prosecuted in federal court up through June 2009, including cases that were pending when *In Pursuit of Justice* was issued in May 2008. In addition, outside the body of traditional criminal prosecution case law, the 2009 Report examines emerging case law sketching the contours of permissible law-of-war detention in the terrorism context. Although the 2009 Report might have missed some cases, it continued the development of substantial data that provides a foundation for examining the adequacy of the court system to cope with terrorism cases.

The 2009 Report begins with an updated presentation of data about terrorism prosecutions, including statistics through June 2, 2009. Statistical highlights include a 91.1% conviction rate for terrorism cases commenced after 9/11 and sentencing data showing that 89% of convicted terrorism defendants since 9/11 have been sentenced to imprisonment, including eleven life sentences and an average sentence (excluding life sentences) of 100.98 months.[6] The 2009 Report then addresses some of the key legal and practical issues that were presented in international terrorism cases between May 2008 and June 2009. As was the case with the original White Paper, the 2009 Report addresses topics as diverse as the scope and adequacy of criminal statutes to prosecute alleged terrorists, the sufficiency of existing legal tools to detain individuals suspected of involvement in terrorism, and means of dealing with classified evidence. It also addresses the courts' experience with evidentiary issues in terrorism cases, recent developments regarding the applicability of the Miranda rule in overseas interrogations, observations about sentencing proceedings in terrorism cases, and information confirming that the federal prisons have been able to maintain a high degree of security over the accused and convicted terrorists confined within them.

The 2009 Report concludes that the experience with terrorism cases in the past year shows that prosecuting terrorism defendants in the court system generally leads to just, reliable results and does not cause serious security breaches or other problems that threaten the nation's security. As a result, the 2009 Report supports the view that the need for a new "national

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[6] *See* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS: 2009 UPDATE AND RECENT DEVELOPMENTS 9, 11 (2009), *available at* http://www.humanrightsfirst.org/us_law/prosecute/.

security court" is not apparent, especially given the numerous false starts and problems associated with the prior failed effort to establish military commissions at Guantánamo. Nor is it evident that the case has been made for a brand-new legal regime to preventively detain individuals without charge—especially when one considers the potentially damaging effects such a momentous step could have on our legal system and culture. At the same time, as in the White Paper, the 2009 Report acknowledges several important qualifications on the conclusion about the efficacy of the Article III courts to handle terrorism cases—namely that the justice system is not, by itself, "the answer" to the problem of terrorism; that terrorism cases can pose significant burdens and strains on the courts; and that the court system is not infallible and will stumble from time to time.

As the 2009 Report emphasizes, the efficacy of the criminal justice system in any particular case ultimately depends on the evidence. The 2009 Report commends the government for undertaking a detailed case-by-case review of the evidence regarding each of the Guantánamo detainees, and argues that the disposition of those cases should be guided, first and foremost, by the evidence. For many individuals, it may be the case that the evidence will be sufficient to support federal-court prosecutions; but for some individuals, that may not be the case. It remains to be seen, and may never be known, how much damage to the viability of criminal prosecutions was caused by the years of delay, among other things, that occurred before a comprehensive assessment of admissible evidence took place.

Assuming sufficient evidence is available to bring a prosecution, the 2009 Report observes that the most difficult challenges come up when the potential criminal case arises out of or substantially overlaps with military or intelligence operations. The military services and our intelligence agencies are proud institutions with deeply rooted traditions and practices, and they do not always coexist easily with the norms and legal requirements of the criminal justice system. But experience shows that when the government decides to bring terrorism prosecutions in federal court, the different arms of the Executive Branch are capable of working together in order to ensure that the cases proceed properly. The key is to institutionalize this sort of coordination so that it can be replicated and in effect becomes "muscle memory" among the relevant agencies and departments. The 2009 Report notes that the current Detention Policy Task Force may be able to provide a framework for better coordination in the future among the Department of Justice, intelligence agencies, and the military.

Another significant challenge is that of resources. Managing large terrorism cases is expensive and labor-intensive for all participants, including prosecutors, defense lawyers, the courts, and the prison system. It is critical that sufficient resources be devoted on all sides so that cases are handled correctly.

As in the White Paper, the 2009 Report acknowledges that views on the subject of prosecuting accused terrorists continue to be charged and will vary. The 2009 Report acknowledges the difficulty of finding definitive answers and reaching consensus on a subject that intertwines fundamental questions of security, justice, and what our Nation exemplifies to the world. The 2009 Report proceeds from the idea that a serious and objective analysis of the subject must rely on facts, and that idealized theories and doctrinaire approaches are not useful. The 2009 Report is intended to advance the ongoing—and critically important—debate about how to reconcile our commitment to the rule of law with the imperative of assuring security for all Americans.