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TERRORISM ON TRIAL: THE TRIALS OF AL QAEDA*

Andrew C. McCarthy†

The intersection of international terrorism and the American criminal justice system is a true pressure point on our legal landscape. Much of the discussion, regrettably, is of the "two ships passing in the night" variety. The answer to the question whether the criminal justice system "works" for terrorism varies based on what one is trying to accomplish. That is to say: it depends on whom you ask.

A. The Due Process Perspective

If the question is posed to legal specialists (judges, prosecutors, defense counsel, and academics who watch this area closely), it tends to be taken as an inquiry about due process, to wit: Can we provide trials for accused terrorists that comport with American standards of justice, notwithstanding the complex challenges inherent when national security is at risk? If that is what the "do trials work" question really means, we needn’t speculate. After over a decade of experience, we can say resoundingly that the criminal justice system provides commendable due process and just results.

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† Andrew C. McCarthy is a senior fellow at the Foundation for the Defense of Democracies, an independent, non-profit organization in Washington, D.C., which conducts research and education on national security issues. He is also a contributor at National Review Online and a frequent feature writer for Commentary Magazine. For eighteen years, he was an Assistant U.S. Attorney for the Southern District of New York. In 1995, he led the terrorism prosecution against Sheik Omar Abdel Rahman and eleven others for a seditious conspiracy against the United States that included the 1993 World Trade Center bombing and a plot to bomb New York City landmarks. From 1999 through 2003, he was the chief assistant U.S. attorney in the Office's White Plains Division, responsible for federal law enforcement in six counties north of New York City. Following the September 11 attacks, he supervised the U.S. Attorney's command post near ground zero in lower Manhattan. He is the recipient of numerous awards, including the Justice Department's highest honors: the Attorney General's Exceptional Service Award (1996) and Distinguished Service Award (1988), and has also served as an adjunct professor of law at Fordham Law School and New York Law School.
1. The Trials of Militant Islam – Not Just al Qaeda

Here, it is worth diverting to correct what may be a misconception of some moment in our inquiry. This panel is called “The Trials of al Qaeda.” There has, however, really only been one “trial of al Qaeda.” That was United States v. Usama bin Laden, et al.¹ In that case, out of numerous alleged al Qaeda operatives indicted on charges arising out of the near-simultaneous bombings of the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, on August 7, 1998, a mere six (obviously not including bin Laden himself) were ultimately extradited or otherwise apprehended. Four (Wadih el Hage, Mohammed Sadeek Odeh, Mohammed Rasheed Daoud al-‘Owhali, and Khalfan Khamis Mohammed) were eventually convicted in July 2001 after a seven-month jury trial. All received life sentences, the jury sparing the lives of K.K. Mohammed and al-‘Owhali, the only two capital defendants.²

It is true that there were several sensational terrorism trials between 1993, when the World Trade Center (WTC) was bombed, and the attacks of September 11, 2001, when the nation’s counterterrorism strategy underwent the tectonic shift from a criminal justice to a military approach. But those trials involved terrorist incidents whose connections to al Qaeda were elusive at best.

The first two were a consequence of the WTC attack, in which, miraculously, only six people were killed. In March 1994, four defendants directly implicated in the bombing (Mohammed Salameh, Mahmud Abouhalima, Nidal Ayyad and Ahmed Ajaj) were convicted after a six-month trial. Next came the prosecution I was privileged to lead, which focused on the jihad organization led by Sheikh Omar Abdel Rahman (“the Blind Sheikh”), which was responsible not only for the WTC bombing but also the murders of Egyptian President Anwar Sadat and JDL founder Rabbi Meir Kahane, a conspiracy to murder Egyptian President Hosni Mubarak, and, most frighteningly, a post-WTC plot simultaneously to bomb several New York City landmarks (the United Nations complex, the Lincoln and Holland Tunnels, and the FBI’s Manhattan headquarters)—


² One defendant, Ali A. Mohammed, who was not directly implicated in the 1998 bombings (although he had cased American embassies as potential targets in prior years) pled guilty under an agreement that he would serve 25 years in prison. Another defendant, Mamdouh Mahmud Salim (a/k/a Abu Hajer al Iraqi), who was the most important individual charged given his alleged high rank in al Qaeda, has never been tried for the embassy bombings. He was severed after an audacious escape attempt in 2000, during which he plunged several inches of a shiv through the eye of a prison guard, nearly killing him. He was later convicted of this attempted murder (so in that sense, it might be said that there have been two trials of al Qaeda). His sentencing is currently mired in appellate litigation, and whether he will ever be tried for the embassy bombings remains a question.
stopped only because the FBI’s New York Joint Terrorism Task Force managed to infiltrate the conspiracy with an informant. Abdel Rahman and eleven others were ultimately convicted of seditious conspiracy and other charges after a nine-month trial that ended in October 1995.

While that trial was underway, Ramzi Yousef, the tactical mastermind of the WTC bombing who had eluded capture, was apprehended overseas in the midst of another plot to bomb U.S. airliners over the Pacific. He was ultimately tried twice: the first, a three-month trial in 1996 at which he and two other defendants, Abdul Karim Murad, and Wali Khan Amin Shah, were found guilty of the airliners conspiracy; the second, a five-month trial in 1997 at which he and Eyad Ismoil were convicted of the WTC bombing.

Finally, in late 1999, over a year after the embassy bombings, an attempt to bomb Los Angeles International Airport during the Millennium celebration was thwarted when an alert Customs agent stopped Ahmed Ressam from entering the U.S. through Canada with an explosives-laden suitcase. Ressam was convicted in Seattle after a four-week trial.3 Thereafter, he began to cooperate with the government, resulting in the subsequent convictions on lesser charges of co-conspirators Abdelghani Meskini (by plea) and Mokhtar Haouari (at a relatively short trial).

The ties between al Qaeda and these terror plots are tenuous, to say the least. Abdel Rahman is better understood as a leader from whom bin Laden sought approval. He was the emir of a ruthless terror organization in Egypt (Gama’at al Islamiyah, or “the Islamic Group”) which long predated al Qaeda. Ramzi Yousef is a relative and intimate of al Qaeda operational leader Khalid Sheikh Mohammed, but K.S. Mohammed is not thought to have taken on that role until long after Yousef’s terror spree in 1993-1994. Further, the Millennium plot may have been inspired by al Qaeda, but is not thought to be a hands-on al Qaeda operation.

On our present state of knowledge regarding 1993-2001, al Qaeda is conclusively believed to be responsible for the embassy bombings, the October 2000 bombing of the U.S.S. Cole, and 9/11.4 It may also have had a hand in the 1996 attack on the Khobar Towers in Jeddah, Saudi Arabia, but the evidence with respect to that is far sketchier. As noted above, only one of these incidents has been the subject of a U.S. trial.

Consequently, our panel is probably better understood as assessing the trials of “militant Islam” than merely of al Qaeda.

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3 This was the only one of the significant pre-9/11 federal terror trials that was not held in the Southern District of New York.

4 Bin Laden, of course, has claimed credit for these attacks. In addition, al Qaeda’s orchestration of the embassy bombings was established at trial, and the Cole bombing was the subject of an indictment (on which no one has ever been extradited or tried) in 2003, as well as a trial in Yemen in 2004 at which several conspirators were convicted.
2. Terror Trials Satisfy American Due Process Standards

With that clarification, why can it be said by legal scholars and professionals that the criminal justice system "works"? The answer to this is simply: because it has, repeatedly.

To be sure, the conviction rate in the trials outlined above has been as high as it can be—all twenty-nine of the defendants discussed above were found guilty on almost all of the counts charged. Nonetheless, we can be confident in the verdicts.

To begin with, the evidence in each of the prosecutions was compelling. Contrary to the routine case, indictments were reviewed at the highest level of the Justice Department before being filed. The judges who presided are nationally acclaimed as among the very best in the United States. The quality of representation for defendants was superb (with several of the defendants given multiple, experienced counsel at public expense at trial and on appeal, and most cases featuring very elaborate defense presentations). Juries have been painstakingly vetted before serving and proved highly discriminating in their deliberations.5 Reviewing courts, furthermore, have sustained the results, often with express approbation of the quality of due process afforded.

Thus, it is certainly fair for those whose principal concern is the fairness and legitimacy of legal proceedings to say the system works. As a result of trials that fully comported with American standards of due process, twenty-nine terrorists, all serving severe (and, in many instances, life) sentences, have been permanently neutralized as a threat to public safety. The rule of law has been well served.

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5 In most cases, jury selection took weeks and was an elaborate process in which members of the venire completed an extensive questionnaire (developed by both sides) that probed their knowledge of reporting about the cases, their attitudes about terrorism and Islam, and a host of other relevant issues. They were then interviewed one-by-one, often more than once, before the final selection process. Deliberations generally took many days, and one incident is illustrative. In the Blind Sheikh prosecution, weighty evidence demonstrated that two defendants, El Sayyid Nosair and Ibrahim El-Gabrowny, were guilty of the bombing conspiracy charged in the indictment, alleged and proved to have occurred between 1988 and June 1993. Due to an error in the final instructions, however, the jury was told that guilt could not be found unless the defendants were proved to be complicit in a specific spring 1993 bombing attempt, which neither was. Despite the compelling evidence of guilt on the count as charged, the jury faithfully adhered to the instructions and acquitted the two defendants on the bombing conspiracy count—the only acquittals rendered among the many counts alleged against the ten defendants who remained through verdict.
B. The National Security Perspective

But should that really be our principal concern? The rule of law, after all, is not so much an end unto itself. It is, instead, the indispensable means to the great end of a society that is free, just and secure. Absent national security, neither the rule of law nor freedom and justice can take root. Thus it is apt, when examining whether the criminal justice system "works" for terrorism, to consider the question through the prism of public safety. As was the case with the due process perspective, we needn't speculate about what the view might look like through the national security lens. The empirical verdict is in, and it is not a happy one. As a counterterrorism strategy, criminal trials, at least when they are made the exclusive or predominant enforcement tool, are a national security disaster. The reasons for this are manifold—some obvious, some more nuanced, but all powerful.

1. The Failure to Neutralize and Demoralize Terrorists

To start with the most basic, consider numbers and motivation. We now know that the ranks of militant Islam—al Qaeda, the affiliates in its global network, and other fierce organizations such as Hezbollah (which, prior to 9/11, had killed more Americans than any other terrorist organization in the world)—were swelling into the tens of thousands during the 1990’s. Cumulatively, in an age when weapons of mass destruction had become more accessible than ever before, they may actually have posed an existential threat to the United States. At a minimum, they constituted a formidable strategic threat. And in any event, were galactically more menacing than either a nuisance or such quotidian blights as drug trafficking and racketeering, which a strong society can afford to manage without forcibly eradicating.

Under circumstances where such a profound threat was metastasizing in this manner, it was simply unacceptable to neutralize fewer than three dozen terrorists over eight years—and that at a cost so prohibitive in time and resources (many of these cases even now still being on appellate or collateral review) that one quickly realizes the system could not have tolerated many more.\(^6\) Eliminating such a piddling fraction of a committed enemy was a sure prescription to be hit repeatedly. And so we were.

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\(^6\) Even assuming *arguendo*, and against all indications, that there were appreciably more than three dozen terrorists (a) who could practically have been captured and rendered to the U.S. for trial; (b) as to whom evidence existed that could have been used without irresponsibly compromising national security; and (c) as to whom such evidence would have been sufficient to satisfy the demanding proof hurdles for prosecution; there would of course remain the problem of securing courthouses, jail facilities, and trial participants throughout the United States.
Nothing, moreover, galvanizes an opposition, nothing spurs its recruiting, like the combination of successful attacks and a conceit that the adversary is reacting weakly. For zealots willing to immolate themselves in suicide-bombing and hijacking operations, mere prosecution is a provocatively weak response. No one, for example, was called to account for the 1996 Khobar attack in which nineteen U.S. airmen were killed. In 1998, bin Laden issued repeated threats, including a call for the murder of American civilians and military personnel wherever in the world they were found; there was no response. Later that year, the embassy bombings claimed over 240 lives; the nation responded with one episode of ineffectual cruise missile attacks on dubious targets, and an indictment where it took three years to prosecute a handful of (mostly) low-rung operatives. In the interim, when the Cole was bombed in Yemen, resulting in the deaths of seventeen naval personnel, the nation took no responsive action at all (not even returning an indictment until two years after the 9/11 attacks).

Put succinctly, where they are the sole response to terrorism, trials inevitably cause more terrorism: they leave too many militants in place and they encourage the notion that a nation may be attacked with relative impunity.

2. Confusing Executive Roles and Educating the Enemy

Equally perilous to national security as the general philosophy of combating terror by trials are the nuts-and-bolts of trial practice itself. Under discovery rules, the government is required to provide to accused persons any information in its possession that can be deemed "material to the preparation of the defense" (Rule 16, Fed.R.Crim.P.), or, under current construction of the Brady doctrine, any information that is even arguably exculpatory. The more broadly indictments are drawn, the more revelation of precious intelligence due process demands—and, for obvious reasons, terrorism indictments tend to be among the broadest. The government must also disclose all prior statements made by the witnesses it calls (18 U.S.C. Sec. 3500) and, often, statements of even witnesses it does not call

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7 A terrorist who is acquitted due to insufficient evidence is not a person who will simply return to the commission of crimes; he is a danger to return to acts of war and indiscriminate mass homicide. Thus, the incentive on the Justice Department is to use every appropriate means to ensure conviction. One of the most appropriate is to present elaborate proof of the dangerousness of the terrorist enterprise of which the defendant is an operative, which has the dual benefit of placing acts in their chilling context while expanding the scope of evidentiary admissibility (particularly by resort to liberal rules for the admission of co-conspirator statements under Rule 801(d)(2)(E) and background evidence). While focus on the enterprise greatly enhances the prospects for conviction, however, it exponentially expands the universe of what may be discoverable.
(Rule 806, Fed.R.Evid.). In capital cases, moreover, Brady is expanded, requiring surrender not only of evidence that is colorably exculpatory, but also of that which, even if inculpatory, might induce a jury to vote against the death penalty (e.g., any information tending to show the defendant committed a terrorist act but was a hapless pawn in the chain-of-command).

This is a staggering quantum of information, certain to illuminate not only what the government knows about terrorist organizations, but the intelligence agencies’ methods and sources for obtaining that information. When, moreover, there is any dispute about whether a sensitive piece of information needs to be disclosed, the decision ends up being made by a judge on the basis of what a fair trial dictates, rather than by the executive branch on the basis of what public safety demands.

This is a fine state of affairs when the matter at hand is truly a law enforcement issue. International terrorism, however, is not such an issue, and treating it as if it were dangerously confounds significantly different duties imposed by our system on the executive branch. In law enforcement, as former U.S. Attorney General William P. Barr explained in his October 2003 testimony before the House Select Committee on Intelligence, government seeks to discipline an errant member of the body politic who has allegedly violated its rules. That member, who may be a citizen, an immigrant with lawful status, or even, in certain situations, an illegal alien, is vested with rights and protections under the U.S. Constitution. Courts are imposed as a bulwark against suspect executive action; presumptions exist in favor of privacy and innocence; and defendants and other subjects of investigation enjoy the assistance of counsel, whose basic job is to thwart government efforts to obtain information. The line drawn here is that it is preferable for the government to fail than for an innocent person to be wrongly convicted or otherwise deprived of his rights.

Not so the realm of national security, where government confronts a host of sovereign states and sub-national entities (particularly terrorist organizations) claiming the right to use force. Here the executive is not enforcing American law against a suspected criminal, but exercising national-defense powers to protect the nation against external threats. Foreign hostile operatives are generally not part of the fabric of American life, and thus not vested with rights under the American Constitution. The catalytic concern in this realm is to defeat the enemy, and as Barr puts it, “preserve the very foundation of all our civil liberties.” The line drawn here is that government cannot be permitted to fail.

In that context, the mountain of information we are discussing here is being surrendered to an enemy, not a defendant. If al Qaeda had expended millions of its finite resources, it could never have hoped to amass the trove of intelligence it has garnered, for free, as a result of our prosecutions and their attendant, generous discovery rules. Concededly, this information has routinely been disclosed subject to judicial admonitions: defendants may use it only in preparing for trial, and may not disseminate it for other
purposes. Again, though, we are not talking about ordinary defendants as
to whom a contempt citation is a grave prospect; we are talking about
enemies of the United States—guerillas bent on attacking government and
disposed toward mass murder tend not to be terribly concerned about
violating court orders (or, for that matter, about being hauled into court at
all).

Let me provide just one concrete example. In 1995, just before trying
Sheikh Abdel Rahman and his co-defendants, I duly complied with
discovery law by writing a letter to the defense counsel listing 200 names of
people and entities the government was reserving the right to identify at
trial as unindicted co-conspirators—i.e., people who were on the
government’s radar screen but whom there was insufficient evidence to
charge. Six years later, my letter turned up as evidence in the trial of those
who bombed the U.S. embassies in east Africa. It seems that, within a short
time of my having provided it to the defense, the letter had found its way to
Sudan and was in the hands of bin Laden (who was on the list), having been
fetched for him by an al-Qaeda operative who had procured it from one of
his associates.

Intelligence is dynamic. Over time, foreign terrorists and spies
inevitably learn our tactics and adapt: consequently, we must refine and
change those tactics. When we purposefully tell them what we know—for
what is presumed to be the greater good of ensuring they get the same kind
of fair trials as insider traders and tax cheats—we enable them not only to
close the knowledge gap but to gain immense insight into our technological
capacities, how our agencies think, and what our future tactics are likely to
be.

3. Terror Trials Reduce the Quality of Justice in the System

Finally, there is a profound but often undetected corrosion of our
justice system when we force the square peg of terrorism into its round
hole. The reluctance to treat terrorists as criminals, far from being caused
by disdain for the rigorous demands of criminal justice, is instead a
reflection of abiding reverence for our system’s majesty. I have had the
privilege of working with many dedicated prosecutors, agents, judges, and
defense lawyers who see it as both a point of honor and an epigrammatic
truism that our society best displays its enlightenment by affording even to
those who would destroy it all the luminous protections of our Constitution.
I was once one of them. Nonetheless, if we are to be honest with ourselves,
it is a dangerous delusion.

Islamic militants are significantly different both in make-up and goals
from run-of-the-mill citizens and immigrants accused of crimes. They are
not in it for the money; they desire neither to beat nor cheat the system, but
rather to subvert and overthrow it; and they are not about getting an edge in
the here and now—their aspirations, however grandiose they may seem to us, are universalist and eternal, such that their pursuit is, for the terrorist, more vital than living to see them attained. They are a formidable foe, and, as noted above, the national-security imperatives they present are simply absent from the overwhelming run of criminal cases.

As a result, when we bring them into our criminal justice system, we have to cut corners—and hope that no one, least of all ourselves, will discern that with the corners we are cutting important principles. Innocence is not so readily presumed when juries, often having been screened for their attitudes about the death penalty, see intense courtroom security around palpably incarcerated defendants and other endangered trial participants. The legally required showing of cause for a search warrant is apt to be loosely construed when agents, prosecutors, and judges know denial of the warrant may mean a massive bombing plot is allowed to proceed. For reasons already elaborated on, key government intelligence that is relevant and potentially helpful to the defense—the kind of probative information that would unquestionably be disclosed in a normal criminal case—may be redacted, diluted, or outright denied to a terrorist's counsel, for to disseminate it, especially in wartime, is to educate the enemy at the cost of civilian and military lives.

Since we obdurately declare we are according alleged terrorists the same quality of justice that we would give to the alleged tax cheat, we necessarily cannot carry all of this off without ratcheting down justice for the tax cheat—and everyone else accused of crime. Civilian justice is a contained, zero-sum arrangement. Principles and precedents we create in terrorism cases generally get applied across the board. This, ineluctably, affects a diminution in the rights and remedies of the vast majority of defendants—for the most part, American citizens who in our system are liberally afforded those benefits precisely because we presume them innocent. It sounds nice to say we treat terrorists just like we treat everyone else, but if we really are doing that, everyone else is being treated worse, and that is not the system we aspire to.

Worse still, this state of affairs incongruously redounds to the benefit of the terrorist. Initially, this is because his central aim is to undermine our system, so in a very concrete way he succeeds whenever justice is diminished. Later, as government countermeasures come to appear more oppressive, it is because civil society comes increasingly to blame the government rather than the terrorists. In fact, the terrorists—the lightening rod for all of this—come perversely to be portrayed, and to some extent perceived, as symbols of embattled libertarian principles, the very ones it is their utopian mission to eradicate. The ill-informed and sometimes malignant campaign against the Patriot Act is an example of this dynamic.

In sum, trials don’t work for terrorism. They work for terrorists. The only responsible national counterterrorism strategy is one that brings to bear all of the tools of government: military, diplomatic, intelligence, financial
and, to a far more limited extent than throughout the 1990's, law enforcement. Employing the criminal justice system alone imperils Americans.