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OP-ED CONTRIBUTOR

How to Try a Terrorist

By JOHN C. COUGHENOUR
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MICHAEL B. MUKASEY, President Bush's nominee to be attorney general, is coming under increasing fire for his views on what constitutes illegal torture. But the aspect of his philosophy that worries me more is his view of the judiciary's role in prosecuting the war on terror.

Judge Mukasey expressed his own views on the subject in August in an op-ed article in The Wall Street Journal in which he argued that our legal system is "strained and mismatched," and implored Congress to consider "several proposals for a new adjudicator framework." Judge Mukasey suggested we strike a different balance between civil liberties and national security in terrorism cases.

His views are undoubtedly informed by the time he spent on the federal bench, where he presided over the trial of Omar Abdel Rahman and others involved in a conspiracy to blow up the United Nations building and other New York landmarks. By most accounts, Judge Mukasey did an exemplary job of protecting national security while ensuring that defendant's right to a fair trial. The conclusion he draws, however, is by no means compelled by a vantage point from the bench.

In 2001, I presided over the trial of Ahmed Ressaam, the confessed Algerian terrorist, for his role in a plot to bomb Los Angeles International Airport. That experience only strengthened my conviction that American courts, guided by the principles of our Constitution, are fully capable of trying suspected terrorists.

As evidence of "the inadequacy of the current approach to terrorism prosecutions," Judge Mukasey noted that there have been only about three dozen convictions in spite of Al Qaeda's growing threat. Open prosecutions, he argued, potentially disclose to our enemies methods and sources of intelligence-gathering. Our Constitution does not adequately protect society from "people who have cosmic goals that they are intent on achieving by cataclysmic means," he wrote.

It is regrettable that so often when our courts are evaluated for their ability to handle terrorism cases, the Constitution is conceived as mere solicitude for criminals. Implicit in this misguided notion is that society's somehow charitable view toward "ordinary" crimes of murder or rape ought not to extend to terrorists. In fact, the criminal procedure required under our Constitution reflects the reality that law enforcement is not perfect, and that questions of guilt necessarily precede questions of mercy.

Consider the fact that of the 598 people initially detained at Guantánamo Bay in 2002, 267 have been released. It is likely that for a number of the former detainees, there was

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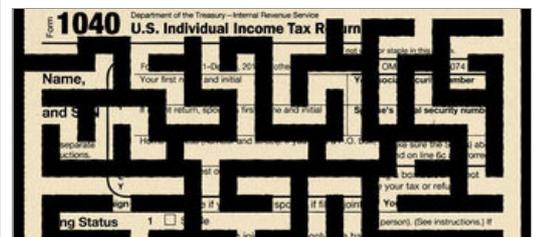
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simply no basis for detention. The American ideal of a just legal system is inconsistent with holding “suspects” for years without trial.

Judge Mukasey raises a legitimate concern about whether open judicial proceedings may compromise intelligence gathering. But courts are equipped to meet this challenge. The Classified Information Procedures Act provides a set of rules for criminal cases. They include the appointment of a court security officer to oversee protocol for classified information. The law also states that only people with security clearance may have access to classified information, and only as needed for their jobs.

Certainly this system cannot entirely prevent any misuse of information; the mere fact of an arrest may tell a story we’d rather our enemies not hear. But our system provides a sensible way to protect national security while maintaining some degree of transparency.

The case against Mr. Ressay demonstrates that our courts can protect Americans from terrorism. Through the commendable efforts of law enforcement authorities in 1999, Mr. Ressay was captured before he was able to carry out his plan to bomb the airport. For two years after his conviction, thanks in part to the fairness he was shown by the court, Mr. Ressay provided intelligence useful to terrorism investigations around the world, as German, Italian, French and British authorities were willing to attest.

After a fair and open trial in which Mr. Ressay was convicted by a jury of his peers, I stated at sentencing that “we have the resolve in this country to deal with the subject of terrorism, and people who engage in it should be prepared to sacrifice a major portion of their life in confinement.” Mr. Ressay now sits in a federal prison, and his punishment has the imprimatur of our time-honored constitutional values.

If confirmed, Judge Mukasey will join Michael Chertoff as another esteemed former jurist in the executive branch facing the formidable task of keeping our nation safe from terrorism. The distinction between the roles of judge and law enforcement officer should not be lost in the transition. Our courts ensure an independent process; they do not enforce the prerogatives of law enforcement. Any proposal that would blur this distinction would compromise a bedrock principle of government that has defined this country from its inception. This is a price too high to pay.

John C. Coughenour is a federal district judge.

This article has been revised to reflect the following correction:

Correction: February 11, 2009

An article in some editions on Thursday about a debate over the treatment of Syed Hashmi, a Queens man held in solitary confinement for 15 months on charges of providing support to Al Qaeda, misidentified the case in which Sheik Omar Abdel Rahman, an Egyptian cleric who sent messages to his followers from jail, was convicted. Mr. Abdel Rahman was found guilty in 1995 of conspiracy to blow up the United Nations building and other New York landmarks; he was not convicted in the 1993 bombing of the World Trade Center. The error also appeared on Nov. 1, 2007, in a column on the Op-Ed page.

A version of this article appeared in print on November 1, 2007, on page A27 of the New York edition.

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