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# **Policy on terror trials in need of an overhaul**

## **A few clear principles would help sort out the mess.**

By David H. Schanzer

The Obama administration did the right thing in trying to close the Guantánamo Bay prison and establish a clear, justifiable legal framework to deal with terrorist suspects. But the apparent reversal of its decision to try Khalid Sheikh Mohammed and his coconspirators in civilian court has left the policy in shambles. It's time to hit the reset button.

If these issues were easy, the bright people in the prior and current administrations would have solved them long ago. But they aren't, and a highly charged, hyperpartisan environment makes it even more difficult to choose and implement a policy.

Nevertheless, the Obama team has embarrassed itself. On his first day in office, President Obama announced the laudable goal of closing Guantanamo in a year, but without a clear policy or political path toward doing so. No wonder the deadline has passed with more than 200 prisoners still sitting in Gitmo.

Later, when the administration announced that it was planning to move some detainees to prisons on American soil, the demagoguery began. The media and public worried that detainees confined in supermax prisons would somehow threaten public safety. This reaction, while lamentable, should have been predicted.

Then the administration sent mixed signals by deciding that the military commissions the president had criticized during his campaign should be retained (with improvements) and used for some, but not all, detainees.

When Attorney General Eric Holder announced that Mohammed and four other detainees would be tried in federal court in Manhattan - even though Mohammed had expressed a desire to plead guilty in a military-commission trial - the public reacted negatively. The idea of holding a trial in New York seemed risky, and spending an estimated \$200 million on security at a time of high deficits and unemployment was hard to justify.

The administration eventually backed down from its position that the trial should take place in New York. Now it appears to be abandoning the entire idea of trying Mohammed in civilian court. What a mess.

We need a policy that is clear, justifiable under the rule of law, and easily understood by the American public. And, somehow, the administration has to defuse the political controversy by getting some bipartisan support. Here are a few suggestions:

**Use military commissions to try foreign terrorist suspects caught on the battlefield.** The Supreme Court has held that such detainees can be treated as enemy combatants and tried for war crimes by military commissions. This makes sense because they are "warriors" more than common criminals. They are not entitled to the rights afforded to U.S. citizens in civilian courts.

**Use civilian courts to try terrorist suspects who are citizens.** For the most part, this has been the policy of the Obama and Bush administrations. Most Americans would agree that citizens, no matter how heinous the charges against them, should get a trial before their peers in civilian court.

The Bush administration's decision to detain three citizens as "enemy combatants," deprive them of legal representation, and keep them in isolated cells in a military brig was a disgrace. One of these detainees was deported and is now free in Saudi Arabia. The two others were transferred back to the criminal-justice system and convicted of crimes, and they are now serving lengthy prison terms.

**Use the justice system for foreign terrorist suspects arrested in the United States.** This is a gray area, but it is how we dealt with shoe bomber Richard Reid, al-Qaeda affiliate Zacarias Moussaoui, and now underwear bomber Umar Farouk Abdulmutallab.

Yes, these men are part of a global insurgency against the United States, but we should treat them as common criminals, not heighten their status to that of glorious warriors (which is what they want). There is also no reason why we can't interrogate them for intelligence purposes before turning them over to the justice system.

**Transfer any remaining detainees to U.S. prisons.** Let's try to defuse the not-in-my-back-yard objections by dispersing any remaining Gitmo detainees to maximum-security facilities around the country.

Perhaps our political leaders can muster the courage to tell their constituents that we are already holding far more dangerous people in these facilities, and that terrorists are more likely to attack soft targets such as bus stations than they are to attack prisons.

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David H. Schanzer is the director of the Triangle Center on Terrorism and Homeland Security at Duke University and the University of North Carolina, Chapel Hill. He can be reached at [schanzer@duke.edu](mailto:schanzer@duke.edu).

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