After Guantánamo

The Case Against Preventive Detention

By Kenneth Roth

From *Foreign Affairs* , May/June 2008

Summary: The U.S. detention facility at Guantánamo Bay has become a stain on the United States' reputation. Shutting it down will cause new problems. Rather than hold terrorism suspects in preventive detention, the United States should turn them over to its criminal justice system.

KENNETH ROTH, a former federal prosecutor in New York and Washington, D.C., is Executive Director of Human Rights Watch.

These days, it seems, everyone wants to close Guantánamo. In January 2002, the Bush administration created a detention camp at the Guantánamo Bay Naval Base in Cuba to imprison what former Secretary of Defense Donald Rumsfeld called "the worst of the worst" terrorism suspects. The facility has since become an embarrassing stain on the United States' reputation. With some inmates now having endured more than six years of detention without charge or trial, and with no end to their ordeal in sight, Guantánamo has come to symbolize Washington's flouting of international human rights standards in the name of fighting terrorism. Now, even President George W. Bush says he wants to shut it down.

Rumsfeld's claim notwithstanding, more than half of the 778 detainees known to have passed through Guantánamo have been released, and many others deserve to be. But there is a hard-core group -- the Bush administration speaks of some 150 -- who have allegedly plotted or committed acts of terrorism or would do so now if they could. Shuttering Guantánamo would force the government to decide what should be done with these allegedly dangerous individuals. Should they be given criminal trials? Or should they, as a growing number of lawyers and scholars suggest, be subjected to a system that permits detention without charge or trial because authorities believe they might pose a future threat -- a system known as administrative, or preventive, detention?

At its core, this is a debate over whether the United States' criminal justice system can handle terrorism cases or whether due process should be sacrificed in the name of security. The stakes for the U.S. criminal justice system and the future of constitutional due process protections are enormous.

SECURITY AND LIBERTY

Many countries grapple with the dilemma of balancing national security and the rights of the accused. Authoritarian states have concluded that the best way to address serious security threats

is to summarily detain the people they consider the most dangerous suspects. Malaysia and Singapore, for example, have unabashedly embraced such preventive detentions. In both countries, the government can hold suspects for renewable two-year periods without charge or a meaningful court appearance based on the mere suspicion that they might endanger national security. Islamists, Communists, and political dissidents have been imprisoned on these grounds. One Singaporean dissident, Chia Thye Poh, alleged to be a Communist Party member, was detained without charge or trial for 32 years.

But U.S. policymakers seeking alternative models for balancing liberty and security are more likely to look to liberal democracies than authoritarian states. Among the liberal democracies, the United Kingdom and France are arguably the most aggressive in granting the state latitude in detaining terrorism suspects. The United Kingdom has experimented with preventive detention. In the 1970s, it interned hundreds of suspected Irish Republican Army members without trial. But when Westminster realized that this policy generated sympathy for the IRA and aided recruitment efforts, it changed course. The British Ministry of Defense later acknowledged, "With the benefit of hindsight, it was a major mistake." After 9/11, the government once again introduced preventive detention for non-British citizens suspected of involvement in terrorism. But the nation's highest court, the House of Lords, struck down those powers in 2004, arguing that their use constituted a disproportionate and discriminatory response to the threat of terrorism. However, the government has granted Scotland Yard the right to detain terrorism suspects at the early stage of an investigation for up to 28 days, and it has proposed extending that period to 42 days. Longer detention still requires filing criminal charges. In

addition, the United Kingdom allows judicially approved "control orders," which restrict the movement and association of terrorism suspects who are not in custody and have not been charged.

France has stricter rules when it comes to pressing charges against terrorism suspects. The French government requires the filing of criminal charges within six days. But it provides its prosecutors with leeway in other areas. France permits prosecution under a crime called association de malfaiteurs (criminal association), which allows charges to be brought when there is an "understanding" between two or more people to carry out a crime and the group has taken at least one material step toward its goal. This resembles U.S. conspiracy law but is harsher because it allows charges to be lodged on the basis of information gained through interrogation without the presence of a lawyer -- often supplemented by hearsay evidence -- and a suspect can then be held in pretrial detention for more than three years. In terrorism cases, such detention has been common. France thus stays within a criminal justice paradigm but requires far less evidence before allowing the state to place a suspect in long-term detention.

THE AMERICAN EXCEPTION

Seen against this backdrop, the United States has reason to be proud of its long tradition of criminal justice with rigorous due process guarantees. There have been exceptions, however. The internment of U.S. citizens and residents of Japanese descent during World War II is the most notorious example, but it was a rare exception, and such practices have not been permitted to serve as a regular substitute for criminal prosecution. Like many countries, the United States also allows detention without trial for mentally ill people found to pose a danger to themselves or others. Finally, the pretrial detention of a suspect is permitted once criminal charges have been filed if evidence shows that the suspect presents a danger or a flight risk, but any detention occurs under the presumption that a criminal trial will take place at the earliest possible date.

It is the category of combatants that has left Washington in murky legal territory. Like all countries, the United States allows captured combatants to be detained without trial until the end of an armed conflict. The Bush administration has cited that power to justify the Guantánamo detentions. The White House claims that it is waging a "global war on terrorism" and that terrorism suspects worldwide with alleged connections to al Qaeda can thus be arrested as combatants. But since this "war" knows no geographic or temporal bounds, it has become increasingly controversial as a continuing basis for detention, especially because many of the Guantánamo detainees were arrested far from any recognizable battlefield.

From the perspective of due process, the best alternative is undoubtedly to prosecute these suspects in either federal courts or, for those captured in armed conflict, military courts. U.S. courts, which have the jurisdiction to hear terrorism cases wherever they occur, have a long history of prosecuting terrorism suspects successfully, including Richard Reid (the so-called shoe bomber), Zacarias Moussaoui (a 9/11 conspirator), and, most recently, Jose Padilla (the "dirty bomber"). But the Bush administration claims that the courts are not up to the task. Its preferred option is special military commissions, before which the government now proposes to try a number of major terrorism suspects, including the alleged mastermind of the 9/11 attacks, Khalid Sheik Mohammad. Under a law adopted by Congress in 2006, suspects tried before military commissions can be convicted, and even executed, on the basis of statements secured by coercion. Rules protecting interrogation methods from disclosure coupled with lax hearsay rules mean that these men could be sentenced to death based on second- or third-hand affidavits summarizing statements obtained through abuse, without any meaningful opportunity to challenge the evidence. This is a dangerous approach. Convictions under these conditions would be seen as illegitimate and generate widespread outrage.

An alternative currently being floated in legal and academic circles and likely soon to surface in Congress is arguably even worse: a formal system of preventive detention. Such a policy would permit the long-term, potentially indefinite detention of suspects after some sort of hearing but without the filing of criminal charges or a trial. The precise contours of the hearings -- for example, whether they would be held before a regular federal judge, a judge chosen specially to hear national security cases, or an administrative official -- would be determined by legislation and scrutinized by the courts. But almost all proposed preventive-detention schemes assume that the person presiding could consider classified evidence never presented to the suspect. This would make it impossible for defense lawyers to meaningfully challenge that evidence, and statements obtained through coercion could be easily concealed from them.

Such a "solution" would be worse than the Guantánamo problem. Indeed, it would effectively move Guantánamo

onshore and make its detention regime a regular part of the U.S. government's arsenal. The temptation would be enormous to exploit the proceedings' secrecy and lax standards of evidence in order to pursue people with only tenuous connections to terrorist activity. Adopting such a system would transform the United States from one of the world's most progressive nations when it comes to protecting the rights of criminal suspects to one of the least.

FULL-COURT PRESS

Fortunately, there is no need to contemplate such a radical departure from U.S. constitutional norms. U.S. courts are fully capable of addressing today's terrorist threat. The U.S. criminal justice system has successfully dealt with a broad range of serious security threats, from espionage at the height of the Cold War to ruthless drug-trafficking enterprises. In none of these cases has the United States' strong tradition of protecting defendants' due process rights stood in the way.

The most common argument against criminal prosecutions is that they examine crimes that were already committed, whereas the threat of terrorism is said to be so dangerous that it requires preventing acts before they occur. But the crime of conspiracy is sufficient to address today's terrorist threat because it is both backward and forward looking. Under U.S. law, a conspiracy can occur whether or not an intended illegal act has been carried out. Much as with the French crime of association de malfaiteurs, all that must be proved is that two or more people agreed to pursue an illegal plan and took at least one step to advance it. This should cover most terrorist plans: the lone wolf terrorist is rare, and al Qaeda and its spinoffs have typically relied on numerous participants to agree on a plan and pursue it. The same intelligence that allows investigators to identify and prevent a terrorist plot should allow them to prosecute the participants for conspiracy. Similarly, the crime of providing material support to terrorists can occur even when a terrorist act is only in preparation and has not yet been committed.

Another objection to conventional prosecutions is that they make it harder for interrogators to obtain information from suspects. Under the Sixth Amendment to the U.S. Constitution, a suspect facing criminal charges is entitled to a lawyer, who will generally tell his or her client not to talk to interrogators. But in fact, many criminal suspects with lawyers end up cooperating with interrogators because doing so can shorten the prison time they face. Moreover, the constitutional limits on a prosecutor's ability to question a suspect without counsel need not interfere with parallel but separate questioning aimed at investigating other suspects or preventing terrorism. Even if a suspect's right to counsel has been violated, the Constitution only prohibits prosecutors from using the information derived from the flawed interrogation at trial; it does not forbid other investigators, such as those trying to prevent future terrorist acts, from questioning the suspect without a lawyer present, so long as these investigators do not relay his or her words (or leads based on what he or she said) to the prosecution team. This division of labor may not be ideal, but it is better than resorting to preventive detention and discarding many basic due process rights.

Preventive-detention advocates also oppose criminal prosecution because many terrorism suspects have been subjected to torture and other harsh interrogation methods, the fruits of which no ordinary judge would admit at trial. This, they argue, makes criminal prosecution impossible. But it would be a perversion of justice to invoke the illegality of coercing evidence in order to justify the further trampling of suspects' rights through preventive detention. Moreover, coerced confessions are not the only route to criminal convictions. A review of the hearings held before the Combatant Status Review Tribunals at Guantánamo shows that the government often possesses plenty of evidence unrelated to abusive interrogation -- from computers and cell phones seized, financial records, and witnesses who have cooperated voluntarily. The U.S. government has tacitly acknowledged this point by reinvestigating the major Guantánamo suspects using allegedly "clean teams" in an effort to free prosecutions from the taint of previously coerced statements and allow them to go forward.

Some proponents of preventive detention believe that criminal justice rules are too onerous and impractical. They scoff at the idea of U.S. soldiers reading suspects their Miranda rights in the heat of battle or following complicated rules of evidence to maintain a secure chain of custody. But the courts tend to apply these rules pragmatically. For example, only criminal investigators or their surrogates, not soldiers in combat, are required to give a Miranda warning, and the courts have allowed a "public safety" exception, when questioning is urgently needed to secure timely intelligence.

Finally, opponents of criminally prosecuting terrorism suspects argue that such trials force the government to

reveal its secret sources and intelligence-gathering methods. But this problem is not insurmountable. It often arises when sensitive investigations involving national security, drug trafficking, or organized crime lead to prosecution. In such circumstances, defense lawyers typically try to force the government to either reveal sensitive secrets or drop the case. To address these situations, Congress enacted the Classified Information Procedures Act (CIPA) in 1980. The law empowers federal judges to review defense counsels' requests for classified information with the aim of sanitizing that information as much as possible or restricting its disclosure to only those defense lawyers with security clearance. The purpose of the act is to protect a defendant's right to confront all the evidence against him or her while safeguarding legitimate intelligence secrets. If due process requirements cannot be met without revealing secret information, the government must either drop the relevant charges or declassify the information. Judges who have tried cases under CIPA speak of it as a reasonable compromise between fairness and security. CIPA rules have not forced the government to abandon even one of the dozens of international terrorism cases it has prosecuted since 9/11.

PRECRIMINAL ACTIVITY

A second line of argument comes from civil-liberties advocates, who worry that failing to carve out a special regime for terrorism cases would undermine the regular criminal justice system -- in much the same way that the "war on drugs" has weakened many of the traditional constraints on searches and seizures guaranteed by the Fourth Amendment. Their concern is that the crime of conspiracy, or the parallel crime of providing material support for terrorism, will be interpreted so expansively that even mere association or other innocent activities that fall short of consciously joining or supporting a terrorist plot will be criminalized.

These fears are not trivial, but at least in the most worrying cases typically cited, such as the conviction of Padilla on the grounds that he had sought to attend a terrorist training camp, there is generally some evidence of the defendant's intent to join a criminal plot beyond mere association or speech, which on its own should never be grounds for prosecution. It is true that the government has sometimes overreached and can be expected to do so again. But judicial scrutiny, although not foolproof, will curb abuse. The risk that the government will overreach would be far greater in a system that permitted the state to detain people indefinitely without trial.

Civil-liberties advocates also note that in the absence of legislation authorizing preventive detention, the Bush administration has used other laws to accomplish the same goals. For example, just after 9/11, it detained thousands of allegedly undocumented immigrants for months -- until law enforcement officials "cleared" them of complicity in terrorism -- instead of deporting or releasing them promptly. Similarly, the government has abused its authority to detain so-called material witnesses, which permits prosecutors to briefly hold an uncooperative crime witness until he or she can be brought to testify. The government has applied this authority far beyond its intended purpose and detained people as supposed witnesses against themselves for lengthy periods and sometimes without ever demonstrating that they had any connection to terrorism or having them testify. Under this radical approach, detaining someone as a material witness is a way of circumventing the usual requirement for arrest: proof that the state has probable cause to believe the suspect committed a crime. Pressure from human rights groups and the press, as well as judicial oversight, pushed the Bush administration, at least for now, to end these abuses. But establishing a preventive-detention statute would legalize an equally damaging process.

IF IT AIN'T BROKE

Criminal prosecution of terrorism suspects is not a perfect system. Not all suspects can be prosecuted. Sometimes evidence will be so tainted that it fails to meet even the low threshold of a conspiracy or a material-support prosecution, or the government will argue that established court procedures for protecting sensitive intelligence are insufficient. In these cases, the government will have to let the suspects go. Although they might still be deported (if they are foreign nationals and not at risk of torture when they return to their home countries) and almost certainly would be placed under intensive surveillance, releasing them certainly has its risks.

But a policy of preventive detention poses greater dangers. One lesson of Guantánamo is that when the United States begins detaining suspected terrorists on the basis of thin and untested evidence, it inevitably ends up detaining some innocent people. Particularly when combined with the government's insistence on using harsh interrogation techniques, such wrongful imprisonment generates resentment and a justified sense of victimization. As the British government discovered from its detention of IRA suspects in the 1970s, the resulting animosity is a boon to terrorist recruiters and arguably generates more terrorists than the detentions are

stopping.

Preventive detention also discourages citizens from cooperating with counterterrorist investigations, a crucial factor in uncovering terrorist plots. Counterterrorism experts report that information gleaned from interrogating detainees is far less important than information delivered by members of the general public who see something suspicious and report it. For example, information given by relatives of the perpetrators and the general public was key to the arrest of those responsible for the attempted bombings in London on July 21, 2005. Similarly, a British Muslim who found an acquaintance's behavior suspicious led the police to discover the plot to bomb several transatlantic flights using liquid explosives in August 2006. Because sympathy for the victims of abusive counterterrorism policies tends to be greatest in the communities that give rise to terrorists, policies such as preventive detention jeopardize this vitally important source of intelligence.

Finally, detaining suspects without trial as part of the "global war on terrorism" allows them to glorify themselves as combatants without facing the stigma of a criminal conviction. Khalid Sheik Mohammad's comments before the Combatant Status Review Tribunal reveal that he craved the "combatant" label. In broken English, he declared, "We consider we and George Washington doing same thing. . . . So when we say we are enemy combatant, that right. We are." By detaining such suspects as warriors rather than stigmatizing them as criminals, the Bush administration is effectively reading from al Qaeda's playbook. It would be far better for a convicted suspect to face the likes of U.S. District Court Judge William Young. On sentencing Reid, the "shoe bomber," Young berated him for being not "a soldier in any war" but "a terrorist" -- a "species of criminal guilty of multiple attempted murders."

Before discarding the U.S. criminal justice system, policymakers should keep in mind the old adage "If it ain't broke, don't fix it." The terrorist threat will undoubtedly challenge the criminal justice system, but the system's track record, the quality of its personnel, and its time-tested procedures make it an infinitely better option than preventive detention. Rather than countenance so radical an exception to basic due process rights, Americans should remain confident in the strength and resilience of their criminal justice system.
