



## Commentary: Terror trial all about talk, not action



Attorney and legal analyst Kendall Coffey says the Jose Padilla trial will shed little light on terrorism.

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**MIAMI, Florida** (CNN) -- As Jose Padilla finally goes on trial, this controversial case may write one of the defining chapters in America's legal war against terrorism.

But even if he is found guilty of supporting holy war, the former "enemy combatant" does not appear to be the very worst of the worst.

The truth is, the most horrific criminal terrorists will probably never be brought to trial before a U.S. jury.

From a national security perspective, senior al Qaeda leaders are poor candidates for civilian trials in which court rules require that they be given access to potentially sensitive information that we do not want to share with our most dangerous enemies.

Prior to September 11, the U.S. prosecuted terrorism defendants in civilian courts. Now, the world's worst are facing military tribunals in which government secrecy protections are greater and defendants' rights are fewer.

Today's critical venue in the legal war against terror may well be Guantanamo where military judges will determine justice for men like Khalid Sheikh Mohammed, the reputed mastermind of the World Trade Center attacks.

Just as the worst of terrorism's worst will not be defendants in U.S. courtrooms, security concerns also weigh against using them as witnesses.

In the wake of the Zacarias Moussaoui case, with its intense legal battles over the use of confidential al Qaeda sources, Padilla's trial appears to be lacking its most sensational evidence in the interest of national security.

### Trash talkers

And so, terror defendants in civilian trials may seem more like local trash talkers rather than foreign mass murderers. Despite the public outcry against terrorists, juries are returning mixed verdicts and U.S. civilian trials may necessarily be showcasing some of terrorism's lesser evils.

Well before Padilla's indictment, his case inflicted collateral damage on the Bush administration's legal strategies. Originally denounced as a potential "dirty bomber," the sensational claim that Padilla was plotting to explode radioactive nuclear materials in U.S. cities was later abandoned.

In the meantime, though, he was designated an "enemy combatant." Even though no charges were filed, he was imprisoned by military authorities for more than three years -- much of that time without access even to a lawyer.

After clear signals that the Supreme Court would not tolerate the indefinite detention of a U.S. citizen, Padilla was transferred from military custody, indicted by a Miami grand jury and bound over for civilian trial with all the constitutional safeguards of an ordinary defendant.

As recent trials suggest, though, the trial of a defendant who may have intended evil but harmed no one is far from a sure thing.

The first trial of U.S. based terrorism in the post-9/11 era confronted four men accused of running a terrorist "sleeper cell" in Detroit.

Initially, two defendants were convicted of terrorism, a third of document fraud and a fourth was acquitted. But a prosecution disaster soon followed when, after the trial, it developed that prosecutors had withheld evidence that might have exonerated the defendants.

The government commendably sought to remedy this constitutional violation by dismissing the terrorism charges and even initiating disciplinary proceedings against the prosecutor. But this troubling episode is a haunting reminder that the pressurized pursuit of aggressive justice can maximize the risk of occasional injustice.

## Trouble in Tampa

Also misfiring was the 2005 trial of a Tampa, Florida, college professor charged with assisting terrorism.

Following years of investigation that sparked a nationwide debate over the dividing line between support of terrorism and academic freedom to champion unpopular causes, Sami Al-Arian was tried for six months on 17 charges.

The jury, however, did not return a single conviction on any charges, acquitting on some and deadlocking on others. After failing before a jury, the government salvaged a piece of its case in 2006 when Al-Arian pled guilty to a single count of providing services to Palestinian Islamic Jihad and agreed to be deported.

Prosecutors scored a much needed trial victory later in 2006 when a Sacramento, California, jury issued a split decision convicting one defendant of providing material support to terrorism while failing to reach a decision against the defendant's father, charged with lying about the son's complicity.

As with other "sleeper cell" defendants in recent trials, there was no evidence that Hamid Hayat had ongoing plans to commit specific acts of terrorism. And the government informant had aggressively cajoled Hayat, urging him to attend camp for jihadists and even yelling at him to be "a man" and "do something."

But even when an informant's tactics might be deplored, the defendant's own words are rarely ignored. As a result, the government won a conviction by relying upon the defendant's videotaped statements about al Qaeda training and future plans against U.S. targets to secure a needed trial victory.

## Success with Guilty Pleas

The government's greatest successes in U.S. cases are found with an impressive number of guilty pleas. One such example is the case of the so-called "Lackawanna Six," in which young Arab-Americans near Buffalo, New York, pled guilty to charges stemming from their pre-9/11 training in al Qaeda camps abroad.

Predictably, some defense lawyers have suggested that these and other terrorism guilty pleas were prompted less by the government's evidence than by the offer of large reductions in prison time. In all events, results without a trial will be seen by some as less defining than verdicts that follow a full consideration of the facts.

As recent developments have confirmed, absent guilty pleas or self-incriminating statements, convictions are not automatic for small time players with future aspirations rather than present operations.

Defense attorneys can plant the suggestion that the government is trying too hard and spending too much on marginal cases to justify its high visibility proclamations about U.S. "sleeper cells." Meanwhile, the arguments go, prosecutorial resources are necessarily being assigned away from other law enforcement needs that are also critical to the public's safety.

Whatever may be the outcome of cases like Padilla's, the civilian trials of the lesser among the evils are not the true measure of the government's legal strategies concerning terrorism. But they are necessary.

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