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Liberty at the Altar of Security

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ABSTRACT: More than seven years after the attacks of September 11, 2001, some of the main suspects accused of playing roles will stand trial. The nature of how the trials in a specifically created military commission will be conducted is uncertain and doubts about the merits of any resulting verdicts are being raised.

KEY WORDS: due process, constitutional guarantees, fundamental legal principles, justice

After steady criticism for holding detainees without due process, the United States has recently announced the charging of six suspects alleged to have played roles in the devastating September the 11th attacks of 2001. However, just as their detentions have been clouded in secrecy and legal ambiguities, it is uncertain as to how their trials will proceed.

Chief among the suspects is Khalid Shaikh Mohammed, the self-described mastermind of the attacks. The five other suspects are thought to be coordinators and intermediaries of the attack. The United States is seeking the death penalty for all six of the defendants.

The accused will not be tried in civilian courts that must adhere to constitutional guarantees of due process. Nor will they be prosecuted in traditional military courts that retain many constitutional requirements with certain exceptions. Instead, the Guantánamo detainees will be tried in a specifically created military commission that was ordained by President Bush in November of 2001.

The legal rules governing the commission are not clear and it is uncertain whether they will retain any of the traditional guarantees of due process found in the Constitution that are fundamental to civilian as well as military courts. Although the trials have yet to start, criticisms and questions abound.

Questions include whether evidence obtained from legally dubious tactics will result in exclusion as it likely would in a civilian court pursuant to the “fruit of the poisonous tree” doctrine. Specifically, the commission will likely have to decide whether it is permissible to use evidence obtained from Mr. Bush’s wiretapping program that is viewed by many as unconstitutional.

Other possibly tainted evidence resulted from questionable interrogation tactics, viz., waterboarding, that was used on Mr. Mohammed and likely four of the other detainees. Other integral parts of presenting a defense such as the Constitution’s guarantee of
confronting one’s accusers through cross-examination are in doubt due to concerns about protecting the identities of witnesses.

The trials of the six suspects, as well as those who might follow, appear different in nature and therefore arguably all of the constitutional protections that an American citizen is guaranteed do not necessarily need to be offered. But the question remains how many fundamentals of due process may be withheld before the trials become nothing more than a formality.

Because if it becomes a show trial it must be asked what will be accomplished. There is the danger that a Kafkaesque trial will cede the high ground to an enemy that the United States and Western World claims to be superior to because of its democratic institutions. In relinquishing our principles to condemn those who condemn our principles, we could become the hypocritical heretics they claim we are and at the same time make them the martyrs they wish to be.

History does provide examples of liberal western principles confronting what it sees as evil. Very recently, the trial of Saddam Hussein began in an attempted open and fair adjudication of Mr. Hussein’s crimes against humanity. It derailed and careened into a retributive farce and resulted in Mr. Hussein’s former Shia adversaries hanging their former Sunni tormenter in a rushed, hardly judicial fashion, buttressing Hermann Goring’s assertion at Nuremberg that “[t]he victors will always be the judges, the vanquished always the accused.”

Sixty years earlier, it was also announced at Nuremberg, albeit by one of the victors, the American prosecutor Robert Jackson, that “[the] task is to make sure [it] is not the trial of superior might but the superior morality.”

The confrontation with a malignant strain of radical Islam is a long, difficult and dangerous one. But the gravity of it could demonstrate exactly what we are fighting for and against. It presents the opportunity to show just how important equality, justice and liberty are if they can be maintained in the most dire of circumstances.

For if they are adhered to when they are at their most inconvenient, their virtue is attested to all the more. Moreover, the easier, instant gratification solutions that have so besieged the modern world does not fit with regard to principles that we have claimed to be enduring.

But maybe what we face is such an existential threat that in trying to adhere to the principles of our system we could be allowing the possibility of our system itself to be destroyed.

President Lincoln suspended habeas corpus for the greater goal of preservation of the Union that, once reunited and stable, would be reinstated. He reasoned that to save the liberty of all he must sacrifice the liberty of a few instead of permitting the few to use liberty to the detriment of all.
It would indeed be the cruelest irony if the very openness and freedom we guarantee to all was used to destroy the possibility of anyone being free.