

How to Handle Terrorist Suspects:

No Easy Answer

by [Michael Jacobson \(/experts/michael-jacobson\)](/experts/michael-jacobson)

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ABOUT THE AUTHORS

[Michael Jacobson \(/experts/michael-jacobson\)](/experts/michael-jacobson)

Michael Jacobson is a senior fellow in The Washington Institute's Stein Program on Counterterrorism and Intelligence.



Brief Analysis

On October 22, a U.S. government case against the Holy Land Foundation (HLF) and five of its officials -- accused of financing Hamas -- ended in a mistrial when jurors deadlocked on nearly all of the 197 counts. A week later, Spanish judges acquitted a number of defendants charged with involvement in the 2004 Madrid train attacks. These are only the latest examples of the difficulties Western countries have faced in prosecuting terrorist suspects since September 11. Efforts to handle terrorism suspects outside of the criminal justice system have also encountered significant obstacles, making clear that there are no easy answers for how to treat suspected terrorists.

Terrorism Prosecutions: A Mixed Record

Although U.S. officials have made clear that they intend to retry the HLF case, the initial verdict was nevertheless a significant setback for government efforts to prosecute terrorism supporters. It demonstrated, once again, the difficulty of convicting defendants charged with anything short of involvement in a specific terrorist attack. As a Justice Department official stated several months before the trial, "We have not alleged that Holy Land pulled the trigger or lit the fuse of a bomb. But they have facilitated those who pulled the trigger or lit the fuse."

The HLF case was not the first time the U.S. government has had difficulty with terrorism financing prosecutions. In February 2007, for example, a jury acquitted Muhammad Salah and Abdulhalim Ashqar of providing financial and logistical support to Hamas, although both were convicted on lesser charges. In 2005, Sami al-Arian, accused of heading Palestinian Islamic Jihad's (PIJ) North American operations, was acquitted of the most serious terrorism-related charges against him but pled guilty to one count of conspiracy to provide funds or services to PIJ.

The record is mixed even in cases involving an actual attack or plot. In the Madrid case, judges acquitted eight of the twenty-nine defendants charged with playing a role in the train attacks. The most notable acquittal was that of Rabai Usman Sayed Ahmed, the alleged mastermind of the Madrid cell who is now imprisoned in Italy, where he was convicted of ties to terrorist cells in Europe and Iraq. And this summer, a British jury failed to agree on a verdict against two of the six individuals -- Manfu Kwaku Asiedu and Adel Yahya -- charged in connection with the failed 2005 London bombings (although the two will be retried later this month).

The Zacarias Moussaoui case provides an even better example of how difficult it is to prosecute terrorist suspects even when a specific attack was involved. During the course of his three-and-a-half-year litigation, Moussaoui managed to tie the system in knots with numerous appeals. Moussaoui's ability to prolong the case was particularly

striking in light of his behavior during the course of the proceedings. At various points, he admitted being a member of al-Qaeda, swore his allegiance to Osama bin Laden, and announced that he "prayed for the destruction" of the United States.

Reasons for Difficulty

A wide variety of factors have contributed to the problems in terrorism prosecutions in both the United States and Europe because each case has presented unique challenges. Prosecuting activity that is not tied to a specific attack or plot can be especially difficult. In these often complex, document-intensive cases, persuading a jury that the individuals were actually supporting terrorism can be an uphill battle. For example, in the HLF case, prosecutors struggled to persuade a jury that the defendants should be convicted of funding groups tied to Hamas, since these groups were not themselves designated as terrorist organizations. Plot-specific cases present problems of their own, however -- in the Moussaoui case, the most difficult issue was his request for access to captured al-Qaeda members as part of his defense.

Despite major differences between terrorism cases, some commonalities stand out. First, using intelligence in criminal cases is difficult, considering the need to protect sources and methods. In the United States and Britain, the strict rules governing what information can be admitted into the trial record can also be an issue. Second, terrorism prosecutions are increasingly becoming an international endeavor. Frequently, terrorist suspects have traveled to or have ties to numerous countries, requiring the cooperation of many governments for a successful case.

Operating Outside the Criminal Justice System

Some Western democracies, including the United States, have chosen to handle certain terrorist suspects outside of the criminal justice system. Although this strategy was implemented in part to offset the anticipated difficulties in prosecuting terrorism suspects, the initial and main reasoning focused on intensive intelligence gathering. After September 11, the United States housed terrorist detainees in Guantanamo Bay, Cuba, assuming incorrectly that they would be entirely outside the jurisdiction of U.S. courts.

Britain and Canada have also used a form of indefinite detention as part of their counterterrorism efforts. In Canada, the government can indefinitely hold terrorist suspects who are not Canadian citizens if it issues a statement certifying that the individuals pose a threat to national security. Britain had a similar arrangement in place for several years after September 11 for foreign nationals who could not be deported to their home country because of fears they would be tortured.

These extrajudicial means of handling suspected terrorists have faced serious problems. The U.S. classification of individuals at Guantanamo as "enemy combatants" has been the subject of widespread international criticism and a number of adverse court rulings. The latest challenge involves Ali Saleh Kahlah al-Marri, a Qatari national arrested soon after the September 11 attacks. In August 2007, the 4th Circuit Court overturned a district court's ruling that denied al-Marri habeas corpus rights under the 2006 Military Commissions Act.

And in Britain, the British Law Lords -- the equivalent of the U.S. Supreme Court -- found in December 2004 that the government's indefinite detention regime was illegal. Britain replaced this system with "control orders" that allow the home secretary to place a variety of restrictions on the movements and communication of suspected terrorists. In October 2007, however, the Law Lords found aspects of this system illegal as well. The Canadian Supreme Court issued a similar ruling earlier this year, striking down the use of secret evidence in the process certifying an individual as a national security threat. The judgment was suspended for one year, however, to give parliament time to pass a new law.

No Clear Way Forward

A broad range of proposals has been put forth regarding the handling of future terrorist suspects -- particularly in the kind of cases that are currently being addressed outside the criminal justice system. A number of experts have called on Congress to create a special court to deal specifically with terrorism prosecutions. Other experts believe that Congress should enact a narrowly tailored and closely managed detention regime, similar to those in France and Spain. On a smaller scale, the Justice Department should also engage in "lessons learned" exercises based on both successful and failed prosecutions. The recent HLF case, for example, may have included too many counts -- 197 in all -- for a jury to digest.

There are no easy solutions to these difficult problems. Any system the United States devises will inherently have flaws. That fact, however, should not prevent the United States from developing long-term solutions that will help it effectively handle all terrorism suspects.

Michael Jacobson, a senior fellow in The Washington Institute's Stein Program on Terrorism, Intelligence, and Policy, is author of *The West at War: U.S. and European Counterterrorism Efforts, Post-September 11*. Previously, he served as counsel on the 9-11 Commission. ❖

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