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Karen J. Greenberg Become a fan
Director, Center on National Security at Fordham Law School

Guilty Until Proven Guilty: Threatening the Presumption of Innocence

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Liberty versus security, that initial heated debate over the war on terror, is again rearing its head with much bravado, nowhere more so than in our nation's courtrooms where American justice continues to pay the price.

Over the course of the past nine years, in the name of counterterrorism, there has been a notable and unappreciated development inside the criminal justice system that is cause for alarm: a growing, if often veiled, intolerance for basic guarantees of justice in cases where "national security" is invoked. This trend leaves the nation's justice system at risk.

Last weekend, as the *Washington Post* reported, Obama administration officials inadvertently called attention to this development in a non-decision over whether, where, and how to bring Khalid Sheikh Mohammed to trial. Usually referred to only by his initials, KSM was the operational mastermind behind the attacks of September 11, 2001. Captured in Pakistan in 2003, and transferred to the American prison at Guantanamo Bay in 2006, he is the highest ranking al Qaeda member taken into U.S. custody since 9/11.

At issue is whether the Obama administration will try this close associate of Osama bin Laden via a military commission at Guantanamo or a jury of civilians in federal court in lower Manhattan or elsewhere. In a recent news conference, Attorney General Eric Holder mentioned that the decision was close. The response from New York's politicians -- Democratic Senator Charles Schumer, Republican Representative Peter King, and even Governor-elect Andrew Cuomo -- was prompt. There would, they insisted, be no 9/11 trial in New York City. At week's end, according to the *Post*, unidentified administration officials were backpedaling fast, saying that KSM would likely "remain in military detention without trial for the foreseeable future."

Since the moment a year ago when Holder first announced the administration's decision to try KSM in Manhattan (and four other Guantanamo detainees in federal courts), the fierce and growing opposition to such trials has focused mainly on issues of cost and security. It was claimed, in particular, that a trial of KSM would demand so much security that it would impede business in Manhattan, while putting a cost burden on New York City that could not be borne without federal aid. Behind such seemingly practical issues, though, lies a deeper current of opposition based on the fear of potential acquittal, the single unacceptable outcome for a trial in which terrorism is the charge.

This Wednesday's stunning acquittal of Guantanamo detainee Ahmed Khalfan Ghailani on all but one of 284 counts by a jury in a federal courtroom in Manhattan was the first sign in years that jurors felt confident enough to utter the word "acquittal" inside an American courtroom in a terror trial. (He may still get a life sentence for the single charge on which he was found guilty.) It was also the first time a jury had not been cowed by the notion that to be accused of terrorism is tantamount to being guilty. This verdict probably ensures that the Obama administration will never bring KSM before a jury of American civilians.

I've been following terrorism cases, both in civilian courts and at Guantanamo, for years and it would be easy enough for me to go off on a jag about the need to prove that civilian courts can try terrorists (without fear of a terrorist attack). Or I could write about how indefinite detention, a concept that lies outside the accepted norms of American civilian and military law, could take us down a path leading to the eradication of civil liberties on a far wider scale.

I could recite -- yet again -- all the ways in which transparency should be a key to such trials, and how healing it is for victims to be able to observe a trial in process. I could reassure you about how KSM's guilt is remarkably well-documented and how he might get what so many seem to want for terrorists, and what, as he's made completely clear, KSM wants for himself: execution.

All of that is important. But with the Ghailani verdict and the administration's recent non-decision over what to do with KSM as our guide, we should really be looking at something even more basic to our system: the presumption of innocence. It's clear that the Obama administration is now shying away from its earlier inclination to bring key terror suspects into civilian courts out of fear that the political

backlash from a decision to try KSM in Manhattan will prove disastrous, and that the ongoing national hysteria over national security, easy to trigger and hard to calm, will be ratcheted up by the thought of acquittal, the 800-pound gorilla in the room when it comes to terrorism trials.

A Conviction Rate Approaching 100%

Some of us who study terrorism trials see in this a particular dilemma for American justice. The Department of Justice and those who have supported civilian trials for terrorism suspects repeatedly try to bolster their case by playing up the spotless conviction record of federal courts, with profligate use of the word "success." In this context, success never refers to the system's theoretical skill when it comes to weeding out wrongly charged individuals -- or those who used to be called "the innocent" -- only to convictions.

The political debate over closing Guantanamo has put special emphasis on this definition of success. After all, the military courts at that prison, which in all these years have barely gotten off the ground, have had few convictions and are therefore less successful, many argue, than the federal ones. There, on terrorism cases, a near-90 percent conviction rate is the norm, if you include the penny-ante stuff, and on high profile cases nearly 100%. In an effort to bring the Guantanamo trials to the United States, liberals and progressives, who might otherwise have questioned the use of "success" as a synonym for "conviction," have signed on definitionally speaking.

Not surprisingly, then, when in November 2009 Attorney General Holder went before the Senate Judiciary Committee to defend his decision to try KSM in New York, he insisted that "failure is not an option. These are cases that have to be won. I don't expect that we will have a contrary result." KSM's guaranteed fate, he implied, would be death. As he emphasized when he announced his decision for the Manhattan trial, "I fully expect to direct prosecutors to seek the death penalty against each of the alleged 9/11 conspirators."

Holder's confidence a year ago was well-based in fact. Not only would KSM be found guilty in a federal trial, but those courts have a conviction rate in such cases that would be the envy of prosecutors anywhere. Nearly everyone accused of terrorism since 9/11 has, in fact, been convicted, even the weak cases, even when cases go to trial rather than ending in plea bargains.

A year later, Holder's hand should have been strengthened, since the record remains remarkably unblemished when it comes to convictions. Since he announced his decision on KSM, the New York City federal courts have successfully tried a number of high-profile terrorism cases. They have gotten convictions in the jury trials of Aafia Siddiqui (an American-educated Pakistani scientist found guilty of intending to kill her American interrogators in Afghanistan and sentenced to 86 years in prison), the JFK airport plotters, and the Bronx synagogue plotters, all of whom are awaiting their sentencing hearings.

This is the context in which untold numbers of Americans are worrying that KSM or others will be set free in federal court. Foreigners and U.S. citizens alike have been convicted in every terror case of any possible significance brought into a civilian court. With or without juries, via full trials or plea bargains, until the Ghailani case (as close to an acquittal as we are likely to see), the outcome has always been the same: guilty.

The Presumption of Guilt

Human rights groups, civil libertarians, and those of us who opposed the Bush Justice Department's disdain for the role of the federal courts in trying individuals once labeled "enemy combatants" have championed the push to bring the Guantanamo detainees to federal court. As it happened, most Americans did not. Many evidently assume that federal court equals a higher shot at acquittal (and greater odds of terrorist acts to free the prisoner). Despite conviction after conviction, a storm of political and media criticism has played up the strange idea that the most significant terrorist the U.S. has ever had in custody would somehow beat the rap against him. Although it is increasingly politically incorrect to insist on this point, in the American system of justice, a trial -- even in the context of terrorism -- should not, in fact, have a foreordained verdict. That verdict should not be known in advance, nor should it, in essence, need to be announced by the Attorney General before the trial begins. A jury should consider all the facts that the law allows to be presented to them in the context of the presumption of innocence; and those 12 jurors should come up with their own determination of guilt or innocence.

In the case of KSM, the courts would confront a figure whose role in terrorist attacks on U.S. targets is known and recognized around the world. And yet, even with this, trust in the system is so broken that fear of acquittal trumps all else -- despite the fact that, in case after case where, unlike 9/11, no attack came about, even where an FBI informant seemed to be doing much of the planning, convictions have still been the rule.

Had there been a full-scale acquittal over the past nine years, especially in one of the terror cases that look suspiciously like cases of entrapment, the system would be stronger for it. A candidate for such a fate would certainly have been one or more of the minor defendants in the Bronx synagogue bomb plot case this past summer. There, an FBI sting operation led four men to place what they thought were bombs at a synagogue and a Jewish community center in Riverdale, New York, and to purchase an inoperable surface-to-air Stinger missile to fire at airplanes at Stewart Air Base in Newburgh, New York.

Despite allegations of FBI entrapment, an entrapment defense failed, even though the predisposition of the lead defendant in the case, James Cromitie, was towards anti-Semitism rather than jihadist violence -- a subject the FBI informant claimed to know about. However, even the most peripheral players in this hapless "plot," one of whom seemed at best only dimly aware of what was going on, were convicted. Here was yet another recent moment when a chance to distinguish between guilt and innocence in a terrorism case was thrown away.

Since September 12, 2001, Americans have been systematically cowed to a degree that is hard to grasp, and the justice system in this country has in no way been inoculated from this virus. If you need a measure of which way the currents of politics are running today, start with the political calculation that the Obama administration has had to make when it comes to the trial of KSM, which has only grown that much more difficult in the wake of the Ghailani verdict.

So, too, for those of us who favor civilian trials. How do we really feel about having been put in a position where, to defend the merits of the system of justice, we feel compelled to equate certain conviction with the notion of success?

The deepest principle of American justice is being tested, right now in Washington, in lower Manhattan in the wake of the Ghailani verdict, and elsewhere. With terrorism trials, the more serious they get, the more the presumption of innocence seems to lie at the mercy of politics.

Karen Greenberg is the Executive Director at the Center on Law and Security at New York University Law School. She is author of The Least Worst Place: Guantanamo's First 100 Days *(Oxford University Press, 2009). Her daily commentary on the trial of Ahmed Khalfan Ghailani in Manhattan can be read by clicking here.*

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