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Gaming the System: "Are You Saying If We Plead Guilty We Will Not Be Able to Be Sentenced to Death?"

Adine S. Momoh

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GAMING THE SYSTEM: "ARE YOU SAYING IF WE PLEAD GUILTY WE WILL NOT BE ABLE TO BE SENTENCED TO DEATH?"

Adine S. Momoh[†]

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I. INTRODUCTION

Khalid Sheikh Mohammed, Ramzi Binalshibh, Mustafa Ahmed al-Hawsawi, Tawfiq bin Attash, and Ammar al-Baluchi,¹ defendants in a military tribunal convened after the September 11, 2001, terrorist attacks, wanted to plead guilty to alleged murder and war crimes on December 8, 2008.² With family members of some of the September 11 victims looking on, Mohammed told military judge Army Col. Stephen Henley that he had no faith in the Guantanamo trials, in his Pentagon-appointed legal adviser, or in the judge himself.³ "I don't trust you," Mohammed said.⁴ "We don't want to

[†] J.D. Candidate, William Mitchell College of Law, May 2009; B.A., University of St. Thomas, 2006, *summa cum laude*. The author would like to thank Professor A. John Radsan for his support, the *Journal of National Security Forum* team for their advice and assistance, and her family, including her parents Kofi and Mabel Momoh, brothers Kenny and Kofi Momoh, and David Dufort for their encouragement and input.

1. Mohammed's nephew, also known as Ali Abdul Aziz Ali.

2. Peter Finn, *Five 9/11 Suspects Offer to Confess; But Proposal Is Pulled Over Death Penalty Issue*, WASH. POST, Dec. 9, 2008, at A01. In announcing formal charges against the five men in May 2008, the Pentagon said each was accused of "conspiracy, murder in violation of the law of war, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, destruction of property in violation of the law of war, terrorism and providing material support for terrorism." *Id.*

3. Adam Zagorin, *The Moment*, TIME, Dec. 28, 2008, at 13.

4. *Id.*

waste our time.”⁵

Pleading guilty might have sealed the men’s fate before the end of the Bush presidency.⁶ If convicted by a military tribunal, the terrorists would have received both the ultimate punishment and ultimate reward in their eyes: death. Death is a coveted act of martyrdom for terrorists who believe that “[t]hose who risk their lives and go out to fight . . . are honorable people, pure of heart and blessed of soul.”⁷ At a pretrial hearing in June 2008, Mohammed even told the military tribunal that “for a long time,” he had wished for martyrdom.⁸

Even before President Barack Obama halted the military tribunals, these terrorists’ dreams of martyrdom came to a crashing halt when the military judge asked whether a military jury could impose the death penalty without a guilty verdict.⁹ The ringleader, Mohammed, asked the military judge, “Are you saying if we plead guilty we will not be able to be sentenced to death?”¹⁰ The answer to this question depended on at least two things: 1) a simple interpretation of the Military Commissions Act of 2006, and 2) the more complicated question of whether a military jury should, as a matter of policy, sentence al Qaeda terrorists to death based on their guilty pleas. As one columnist has suggested, “[e]ven martyrdom can hinge on a technicality.”¹¹

II. HISTORY OF MILITARY TRIBUNALS

Proponents of military tribunals claim that such proceedings can bring terrorists to justice quickly.¹² For example, in *Ex parte Quirin*, a military tribunal prosecuted eight Nazi saboteurs for committing a war crime.¹³ Within a few weeks, the military tribunal

5. *Id.*

6. See Finn, *supra* note 2, at A01.

7. Thomas Michael McDonnell, *The Death Penalty—An Obstacle to the “War Against Terrorism”?*, 37 VAND. J. TRANSNAT’L L. 353, 401 (2004) (quoting Paul Berman, *The Philosopher of Islamic Terror*, N.Y. TIMES, Mar. 23, 2003, at 33) (discussing how applying the death penalty to terrorists may create martyrs).

8. *Trying Terror: Doubly Damned*, ECONOMIST, Dec. 13, 2008, at United States.

9. Finn, *supra* note 2, at A01.

10. *Id.*

11. Zagorin, *supra* note 3, at 13.

12. Michal R. Belknap, *A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 434 (2002).

13. 317 U.S. 1 (1942). In this case, the war crime was dressing in civilian clothing. *Id.* at 34.

convicted the men.¹⁴ Soon thereafter, the military tribunal put six of the eight to death.¹⁵ In another case, *In re Yamashita*, a military tribunal prosecuted a Japanese general.¹⁶ Within three months, the military tribunal convicted the general and sentenced him to death by hanging.¹⁷

After September 11, former President George W. Bush issued an order governing the detention, treatment, and trial of noncitizen terrorists in November 2001.¹⁸ The U.S. Supreme Court held that the tribunals were unconstitutional in *Hamdan v. Rumsfeld*.¹⁹ Congress responded almost immediately with the bipartisan Military Commissions Act of 2006 (MCA),²⁰ which largely codified the November 2001 Order.

Immediately after taking office, President Obama issued an executive order halting the tribunals authorized by the MCA and requiring "a prompt and thorough review . . . of the military commission process."²¹ The January 2009 Order makes it unlikely that the Obama administration will employ these tribunals to try terrorists—unlikely, but not out of the question. In the event of another large-scale terrorist attack, the efficiency of the MCA may again seem necessary. It is also worth noting that President Obama's idolon, Abraham Lincoln, utilized tactics much more draconian than the tribunals authorized by the MCA. Moreover, it is easy to forget that the MCA received little resistance from democrats and was largely bipartisan. Therefore, it is not inconceivable that President Obama will revive the MCA, or, at least, go to Congress and ask for a revision.

14. Norman L. Greene et al., *Capital Punishment in the Age of Terrorism*, 41 CATH. LAW. 187, 202, 204 (2002).

15. *Id.*

16. 327 U.S. 1, 5 (1946). The war crime was that the general failed to supervise his troops. Greene et al., *supra* note 14, at 203.

17. *In re Yamashita*, 327 U.S. at 5.

18. *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006); *see* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter November 2001 Order]. The Order established military tribunals.

19. 548 U.S. at 607.

20. Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in various sections of 10 U.S.C. §§ 948–950 and 28 U.S.C. § 2241(e)(1)).

21. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), *available at* http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/ [hereinafter January 2009 Order].

III. MILITARY TRIBUNAL AND DEATH PENALTY INTERPLAY

The MCA may be waning, but it is not yet completely dead. For example, one issue that scholars continue to debate is whether the MCA, as a matter of statutory construction, allows the military tribunal to impose the death penalty without a unanimous military jury verdict when the accused pleads guilty.

Under the MCA, military juries perform three functions: making findings based on the merits, deciding whether to convict defendants, and imposing sentences.²² A two-thirds jury vote generally convicts.²³ However, pursuant to § 949i(b), a guilty verdict may be entered without a jury vote when a defendant pleads guilty.²⁴ But, while a guilty plea permits a judge to convict a defendant without a jury vote, the MCA's plain language requires a jury's unanimous vote of conviction for all capital punishment sentences, regardless of whether a defendant pleads guilty.

In order to impose the death penalty, the jury must convict the accused by unanimous vote pursuant to § 949m(b): “[t]he accused is convicted of the offense by the concurrence of all the members present at the time the vote is taken.”²⁵ However, since § 949i(b) allows conviction without a vote, it potentially circumvents the death-sentence requirement of a unanimous conviction. For that reason, a defendant could argue that Congress intended to foreclose capital sentences for defendants who plead guilty because capital sentences require unanimous conviction votes, and guilty pleas are entered without them.

The principle of statutory construction that the specific controls the general resolves this potential conflict.²⁶ Section 949i(b) is arguably more specific than § 949m(b) because it concerns the special case of guilty pleas.²⁷ Thus, capital punishment should be allowed even without a conviction vote. However, the jury can only sentence a defendant to death with a unanimous sentencing vote.²⁸ Since there is no “bypass” provision

22. Richard V. Meyer, Comment, *When a Rose is Not a Rose: Military Commissions v. Courts-Martial*, 5 J. INT'L CRIM. JUST. 48, 50 (2007) (citing MCA § 948m(a), 120 Stat. at 2616); see also MCA § 948i(b), 120 Stat. at 2604.

23. MCA § 949m(a), 120 Stat. at 2616.

24. *Id.* § 949i(b), 120 Stat. at 2614.

25. *Id.* § 949m(b), 120 Stat. at 2616.

26. 82 C.J.S. *Statutes* § 355 (2008).

27. MCA § 949i(b), 120 Stat. at 2614.

28. *Id.* § 949m(b)(1)(D), 120 Stat. at 2616.

for imposing death sentences, similar to section 949i(b),²⁹ a death sentence is impermissible without a twelve-member military jury unanimously voting to sentence the defendant to death. In sum, even if Mohammed and his cohorts plead guilty, the MCA would allow the death penalty so long as a jury votes unanimously for a capital punishment sentence.

IV. ACCEPTING AL QAEDA TERRORISTS' GUILTY PLEAS

Sentencing the five al Qaeda terrorists to death would be retribution for the harm that they caused on September 11. However, although these terrorists' alleged crimes are punishable by death,³⁰ the military jury should consider, as a matter of policy, not sentencing the men to death.³¹ The policy arguments against imposing the death penalty include that U.S. allies may decrease their cooperation in the war on terror, and the potential negative impact on U.S. civilians and military personnel in the field as terrorists begin to retaliate against the United States.³² Another policy argument is that executing terrorists might give them the "reward" that they seek: martyrdom.³³

While many Muslims argue that martyrdom resulting from a terroristic act is "incompatible with Islam,"³⁴ some contemporary apologists for the terrorists argue that particular terroristic acts are permissible under Islamic law as "jihad in the path of God."³⁵ For example, Yusuf al-Qaradawi, a renowned Sunni scholar whose

29. See *supra* note 24 and accompanying text.

30. See *supra* note 2 and accompanying text. For a discussion on whether the Constitution and public policy permit a secondary actor, one who did not kill but who was a member of a terrorist conspiracy, to be subject to the death penalty, see generally McDonnell, *supra* note 7, at 371–89.

31. The following analysis assumes that the men's guilty pleas would be accepted. This issue is beyond the scope of this article, as the judge's decision to accept a guilty plea depends on an analysis of whether two of the five men are mentally competent to represent themselves and whether Mohammed (or others) coerced the other four terrorists into confessing.

32. For a discussion of these policy arguments, see generally McDonnell, *supra* note 7, at 410–27.

33. According to Islamic tradition, martyrdom means, "[D]ying in a way deserving of paradise." Jerry Markon, *Martyrdom for Moussaoui?*, WASH. POST, Apr. 5, 2006, at A09.

34. See A. Kevin Reinhart, *Legitimacy and Authority in Islamic Discussions of "Martyrdom Operations"/"Suicide Bombings"*, in *ENEMY COMBATANTS, TERRORISM, & ARMED CONFLICT LAW: A GUIDE TO THE ISSUES* 167, 169 (David K. Linnan ed., 2008).

35. *Id.* at 178. Islamic law is often referred to as *fiqh*, the normative action derived from the Qur'an and the hadith. *Id.* at 170.

writings are found throughout Islam and are considered both authoritative and persuasive among many Muslims, has opined that the Qur'an justifies martyrdom operations.³⁶ Al-Qaradawi stated, "These operations are considered among the mightiest (a'zam) kinds of 'jihad in the path of God.' It is the kind of permitted terror to which the Qur'an points when God says 'make ready for them all you can of force and tethered horses that thereby you may terrify the enemy of God and your enemy.'"³⁷

The association between terrorists and martyrdom has not only sparked debate among scholars, but also among jurors. In 2001, jurors voted to spare the lives of two convicted al Qaeda terrorists for bombing U.S. embassies in East Africa out of fear that executing the men would make them martyrs.³⁸ More recently, during the trial for the supposed "20th hijacker" in May 2006, jurors could not unanimously agree that Zacarias Moussaoui—who pleaded guilty to conspiring with al Qaeda in the September 11 attacks³⁹—should be sentenced to death.⁴⁰ Accordingly, the court sentenced Moussaoui to six life terms in prison without the possibility for parole.⁴¹

Although the jury's verdict form rules out the possibility that jurors decided against execution because of martyrdom, the martyrdom factor may have played a subconscious role during the

36. *Id.* at 178. Martyrdom operations are also often referred to as suicide bombing attacks. Although al-Qaradawi has supported martyrdom operations, he has openly denounced the 9/11 terrorist attacks. He stated:

Islam, the religion of tolerance, holds the human soul in high esteem, and considers the attack against innocent human beings as a grave sin, this is backed by the Qur'anic verse which reads: "Who so ever kills a human being for other than manslaughter or corruption in the earth, it shall be as if he has killed all mankind, and who so ever saves the life of one, it shall be as if he had saved the life of all mankind."

IslamOnline.net, *Sheikh Yusuf Al-Qaradawi Condemns Attacks Against Civilians: Forbidden in Islam*, <http://www.islamonline.net/English/News/2001-09/13/article25.shtml> (last visited Mar. 16, 2009).

37. Reinhart, *supra* note 34, at 178 (citations omitted).

38. Markon, *supra* note 33.

39. Laurie Asseo, *Moussaoui Seeks to Withdraw Guilty Plea in Sept. 11 Attacks*, BLOOMBERG, May 8, 2006, <http://www.bloomberg.com/apps/news?pid=10000103&sid=aM4IKxRGuqBQ>.

40. Michael C. Dorf, *What the Moussaoui Sentence Teaches about "Mitigating" Evidence*, May 10, 2006, <http://writ.news.findlaw.com/dorf/20060510.html>.

41. *Id.*

jury deliberations.⁴² During Moussaoui's trial, prosecutors introduced evidence of an al Qaeda training manual that stated that members must "be willing to do the work and undergo martyrdom for the purpose of achieving the goal and establishing the religion of majestic Allah on earth."⁴³ Even U.S. District Court Judge Brinkema acknowledged that Moussaoui "came here to be a martyr in a great big bang of glory."⁴⁴

Although Moussaoui's jurors' intentions are unclear, one thing is certain. When Moussaoui realized that he was going to be facing life in prison and would perhaps be remembered as a "failed terrorist," he tried to game the system. On May 8, 2006, Moussaoui filed a motion to withdraw his guilty plea and go to trial in an effort to prove he was not part of the September 11 plot.⁴⁵ According to Moussaoui, his "understanding of the American legal system was completely flawed" when he entered his guilty plea.⁴⁶ Moussaoui wished to plead not guilty because he now saw "that it [was] possible that [he could] receive a fair trial . . . even with Americans as jurors and that [he could] have the opportunity to prove that [he] did not have any knowledge of and was not a member of the plot to hijack planes and crash them into buildings on September 11, 2001."⁴⁷ Fortunately, no game could be had for Moussaoui since Federal Rule of Criminal Procedure 11 forbade him from withdrawing his plea after the court imposed his sentence, and Moussaoui failed to make a direct appeal.⁴⁸

Some may argue that a military jury should not be concerned

42. *Id.* Jurors were asked the following three questions on the verdict form, and not one juror answered "yes": "(1) Should Moussaoui be spared because life imprisonment would actually be a harsher form of punishment than execution? (2) Should Moussaoui be spared because he actually desires martyrdom and the rewards he believes it entails? (3) Should Moussaoui be spared because executing him would make him a martyr for al Qaeda?" *Id.*

43. Markon, *supra* note 33.

44. MSNBC.com, Moussaoui Formally Sentenced, Still Defiant, <http://www.msnbc.msn.com/id/12615601> (last visited March 15, 2009). The Judge continued, "[B]ut to paraphrase the poet T.S. Eliot, instead you will die with a whimper." *Id.*

45. Asseo, *supra* note 39.

46. Defendant's Motion to Withdraw Guilty Plea, United States v. Moussaoui, No. 01-455-A (E.D. Va. May 8, 2006) (citing Moussaoui Aff. ¶ 8), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/72453/0.pdf>.

47. *Id.* (citing Moussaoui Aff. ¶ 18).

48. FED. R. CRIM. P. 11(e) ("After the court imposes sentence, the defendant may not withdraw a plea of guilty . . . and the plea may be set aside only on direct appeal or collateral attack.").

with whether imposing the death sentence may make terrorists martyrs. They say that if the terrorists committed war crimes warranting a severe penalty, then a severe penalty is justified, even if that penalty is death.⁴⁹ However, justice might not be served when a military jury imposes upon a terrorist the penalty he or she desires. Rather, the military jury should impose a punishment that serves the interests of victims and society. If the military jury determines that the death penalty is the punishment that serves society's interests, then that is one thing. But, if the military jury is not concerned with whether the death penalty serves the terrorists' interests, it should at least be concerned with the reprisal that flows from the men's deaths.⁵⁰

V. CONCLUSION

Five top al Qaeda terrorists surprised the military judge during their military tribunal trial with a demand to admit guilt and move straight to the death penalty, their coveted martyrdom.⁵¹ However, the men were quick to withdraw their offer when their fate came into doubt.

This article has discussed two issues related to these terrorists' quest for martyrdom: (1) whether a military tribunal can sentence an accused to death without a unanimous vote by a military jury when the accused pleads guilty, and (2) whether the military tribunal, or civilian tribunal for that matter, should sentence al Qaeda terrorists to death based on their guilty pleas. The answer to the former question is likely no, given the interplay between sections 949i(b) and 949m(b) of the MCA. As for the latter, the answer is more complicated.

A military jury should not impose the death penalty based on the terrorists' guilty pleas, as such a penalty might make the terrorists martyrs. These terrorists are trying to ensure their martyrdom in a manner that continues to attack the American legal system's credibility.⁵² One could say that these men are using the death penalty as a game. The death penalty, however, is not a

49. McDonnell, *supra* note 7, at 389.

50. See *supra* note 32 and accompanying text. Executing the men could inspire extremist groups, such as al Qaeda, to retaliate rather than discourage similar attacks. See McDonnell, *supra* note 7, at 406.

51. *The Week*, NAT'L REV., Dec. 29, 2009.

52. William Glaberson, *5 Charged in 9/11 Attacks Seek to Plead Guilty*, N.Y. TIMES, Dec. 9, 2008, at A1.

game. As one practitioner suggested, the death penalty is supposed to be a tool used by the Government.⁵³ The Government is not supposed to be the death penalty's tool.

53. See Greene et al., *supra* note 14, at 197.

PART III: STUDENT NOTES

The *Journal of the National Security Forum* held a nationwide student note competition. The following notes were selected as the winners.
