The National Security Court System: A Natural Evolution of Justice in an Age of Terror

By Glenn Sulmasy

*Reviewed by Hartmann Young**

Glenn Sulmasy's fine work, *The National Security Court System: A Natural Evolution of Justice in an Age of Terror*, was released in August 2009. President Obama and Attorney General Eric Holder therefore most likely did not benefit from Sulmasy's analysis of military commissions before opting late last year to prosecute accused al Qaeda terrorists like Khalid Sheikh Mohammed (KSM) in federal district court in New York. Sulmasy emphatically counsels against trying accused Islamist terrorists in domestic civilian courts and recommends instead, as the title of his book suggests, a national security court system. Sulmasy's book is part policy prescription, but it would be a valuable contribution even if it included only its initial chapters discussing the history of military commissions in the United States and their legality. Sulmasy's dispassionate analysis of the major precedents discussing military tribunals will prove valuable to policymakers for years, despite the fact that Sulmasy's national security court system remains for now only a possibility. Initially, Holder's KSM decision risked rendering Sulmasy's book irrelevant to the current debate, as the decision to try suspected terrorists in district court was presented as a *fait accompli*. Recently, however, indications that the Administration is second-guessing not only Manhattan but the entire district court system as appropriate for the KSM trial serve to underscore the continuing relevance of Sulmasy's work.

Regarding the legality of military commissions, Sulmasy writes that "[m]ilitary commissions have been used throughout American history. They have been a part of military jurisprudence since the founding of the country." Sulmasy's description of the history surrounding commissions, their acceptance, and the names of some of the Presidents who used them—including Washington, Jackson, Lincoln, and Franklin Roosevelt—is edifying in an area where political bomb-throwing and allegations of war crimes often have replaced reasoned discourse.

Sulmasy concludes that while military commissions are legal, having been validated throughout our history both by practice and by Supreme Court precedent, the Bush Administration's implementation of the idea was a disaster. One of the desired features of military commissions was the speed with which they dispense justice, as in the famous Nazi saboteur case, *Ex parte Quirin*. During World War II, it required less than two months from the point the saboteurs were captured trying to infiltrate America to the point the six Germans received their death sentences (with two American accomplices receiving life sentences). As Sulmasy points out, the times—and the legal culture—have changed. At the time of his writing, no al Qaeda detainee had been successfully prosecuted by military commission. Legality aside, as a matter of policy, there is now no choice but to close Guantanamo, Sulmasy writes.

Sulmasy convincingly argues that for a variety of reasons, including our standing with our allies and the rest of the world, the military commissions as currently conceived cannot continue. But instead of advocating a return to the law enforcement paradigm that prevailed until 9/11, Sulmasy advocates a hybrid court system, incorporating some of the best features of military commissions as well as necessary features of federal courts, in order to meet the hybrid threat presented by global Islamist terrorism. The current conflict necessarily requires both a preventive military approach and a law enforcement component.

Sulmasy is no bomb thrower, and he is not out to score political points. His book advances a policy prescription, which he hopes will engender discussion, not end it. Sulmasy rests his thesis on the notion that with a little more thought, a little more historical context, and a lot less rancor, the military commission system that America and its allies now regard with suspicion and embarrassment can "evolve" into something better—his national security court system. Sulmasy dutifully points out that he is not the only proponent of a separate court dedicated to trying accused jihadists. He respectfully explains the various proposals and explains where his ideas differ from those of others. Sulmasy's prose is measured to a fault. Even though he surely disagrees with the most recent Supreme Court decisions in this area—such as *Hamdan* and *Boumediene*—he portrays each argument fairly. He is similarly evenhanded with those who oppose a national security court system.

But make no mistake; Sulmasy disagrees with the Supreme Court's unabashed intervention into the national security arena. For example, Sulmasy writes:

> The judicial branch nibbling away at the edges of the Military Commissions Act will not resolve . . . differences but rather will continue to create greater ambiguity in how the United States should legally proceed. The Supreme Court's intervention, just within the last two years, has confused lawyer and non-lawyer alike. Judicial intrusion into the effort has complicated the mission for both the commanders in the field and the executive branch during an ongoing war on at least three fronts.

Sulmasy's discussion concerning the problems with civilian courts should be required reading for anyone with influence in this area. As Sulmasy describes, successful prosecution "in our own Article III courts against alleged Al Qaeda fighters (particularly those captured during battle) is unlikely." Further, "[i]ssues of evidence, court procedures, witnesses, juries, and other concerns will create chaos in our courts and additionally provide valuable propaganda opportunities for Al Qaeda." Sulmasy is no more sanguine about the use of Article III courts than he is about the current version of military commissions, which he believes have "proven unmanageable." As one reads

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through the litany of problems that can be expected if terrorists like KSM are tried in civilian court, one can only hope that someone who had a hand in sending KSM there read Sulmasy's analysis and at least tried to come up with a method to avoid the seemingly inevitable circus. The problems are daunting. Sulmasy describes potential problems with juries, the exclusionary rule, handling classified material, security clearances, exculpatory evidence, inconsistencies among federal courts, and the need for a unanimous vote for a guilty verdict, just to name a few. A corollary problem is that, to the extent constitutional rights of the accused need to be "relaxed" because the accused are not normally U.S. citizens, the impact eventually may be felt in the future by a concomitant dilution of citizen's rights, a problem Sulmasy describes as "bleed over." After reading Sulmasy's description of what lies in wait in federal court, one cannot but think that we need to rethink that choice of forum—fast.

In some ways, one wonders if Sulmasy's measured respect for differing points of view gets the best of him. Although Sulmasy makes a passing reference to "lawfare" in his book, it is used in a different sense than what one encounters in, for example, Jack Goldsmith's *The Terror Presidency*. In that book, Goldsmith provides a definition of lawfare as "the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective." Goldsmith further writes:

> Enemies like Al Qaeda who cannot match the United States militarily instead criticize it for purported legal violations, especially violations of human rights or the law of war. They hide in mosques so that they can decry U.S. destruction of religious objects when attacked. They describe civilian deaths as "war crimes" even when the deaths are legally permissible "collateral damage." Or they complain falsely that they were tortured as we now know al Qaeda training manuals advise them to do. Lawfare works because it manipulates something Americans value: respect for law.

If there is anything missing from Sulmasy's work, it is an analysis of how lawfare may have impacted the debate surrounding military commissions. Given the methods of lawfare, human rights violations, including torture, would have been alleged concerning Guantanamo no matter how well the detainees were treated. Sulmasy cites research by Kyndra Rotunda suggesting that after a number of initial problems, detainees have in the main been treated rather well there. Others, of course, took the opportunity to call Guantanamo the "gulag of our time." Divining truth from such murkiness admittedly can be difficult. But because Sulmasy treats all viewpoints as reasonable and made in good faith, he perhaps too easily elides over the fact that some of the criticisms of the military commission process were not made in good faith at all, but rather for the political goal of undermining America's war effort. It is not only asymmetrically overmatched terrorist organizations that engage in lawfare. Other "usual suspects" tending to undermine the use of American power include nations strategically opposed to the United States, NGOs, civil liberties groups, much of the academy, and what Goldsmith describes as the "human rights industry." One wishes that the possible impact of lawfare on the recent debates concerning military commissions had been elucidated more fully.

The salient features of Sulmasy's National Security Court system include civilian rather than Department of Defense oversight; set time periods within which a person must be tried for his alleged crimes; a respect for other nations' concerns about the death penalty (with capital punishment reserved only to those whose home countries allow for it); tailored habeas corpus rights for the accused; the creation of new Article III positions for judges well-versed in "the law of armed conflict, intelligence law, and national security law"; and a strict prohibition against torture against detainees during interrogation. In addition, Sulmasy recommends a reasonable approach to handling classified information, including keeping critical sources and methods and other critical information out of the hands of the accused. Classified information—or any information that should be kept out of our enemies' hands—is perhaps the Achilles Heel presented by Article III terrorist trials. Any defendant is going to demand all of the evidence the government possesses about him, which would normally sweep up key information concerning the government's sources and methods. U.S. forces operating in Afghanistan, Sulmasy points out, have discovered witness lists and other information culled from civilian terrorist trials in the United States. The risk is much more than a theoretical one.

Critics of military tribunals and a national security court system point to numerous successful prosecutions of suspected terrorists in civilian court. They see strategic value in "showing off" our civilian justice system to the rest of the world. On the other hand, the strategic importance of these trials to the enemy—in terms of providing a platform for the accused to stoke outrage and recruit—is difficult to measure and makes a simple tally of successful prosecutions an inappropriate metric of strategic success. Sulmasy is clearly seeking middle ground here—a system that is clearly and visibly fair, but without the risk of compromising the nuts and bolts of our nation's defense and intelligence operations.

Perhaps it is not too late for a practical effort to develop the national security court system that Sulmasy advocates—or at least a variant of it. Recent pronouncements from the Obama Administration reveal that it has not abandoned military commissions altogether, as Holder's decision to try a number of detainees by commission demonstrates. There is a chance that KSM himself may yet find himself before a military tribunal. But the decision to maintain two parallel tracks for handling suspected terrorists has the likely perverse effect of perpetuating all of the problems that military commissions present while introducing all of the new problems associated with civilian trials. It has recently been reported that attacks on foreign military installations—such as the USS Cole—will land a terrorist in a military tribunal, while a war crime against civilians—think 9/11—will entitle a terrorist to all of the constitutional protections civilian federal court provides. Many others have argued that such a policy approach makes no sense. Under such circumstances, Sulmasy's national security court system deserves serious attention.

Scott Brown now fills the "Kennedy seat" in the United States Senate in no small measure because he ran forcefully

against prosecuting detainees like KSM in places like New York or Boston. Polling from Massachusetts showed that voters disliked the idea of providing foreign terrorists the full panoply of constitutional rights to which a citizen is entitled. The Brown election has reinforced the notion that sending detainees to places like Manhattan for trial is bad politics. One hopes that Sulmasy can convince the Administration that it is also bad policy.

Sulmasy has performed a tremendous service to those who truly seek to understand the history of military commissions and who want to understand fully the policy choices in front of us. One can only hope that someone with a hand in formulating policy will listen to him.