

Time for intelligence interrogations

By David H. Schanzer

DURHAM

It's been eight and a half years since 9/11, but we still have no established procedures for interrogating terrorist suspects detained inside the United States. The military-based system developed during the Bush administration disregards civil liberties. The criminal justice model used in many terrorism cases inhibits intelligence collection. We need a better system.

To meet our counterterrorism objectives, Congress should enact a law that allows the government to interrogate a suspect for intelligence purposes, without counsel present, for up to seven days. To protect the suspect's constitutional rights, the information gained during this time could not be used as evidence against him in a criminal trial.

Once the interrogation is complete, the suspect would be turned over to the criminal justice system for a normal prosecution, with all the usual civil liberties protections. Such a system would maximize the chances of gaining valuable intelligence while leaving our criminal justice system undisturbed.

While civil libertarians will decry this proposal as a form of administrative detention, it's far more protective of civil liberties than the system devised during the Bush administration (and affirmed by the Supreme Court). Under this military system, suspected terrorists (including U.S. citizens) can be designated enemy combatants by the president, placed in military custody and held indefinitely without trial. Judicial review of the lawfulness of the detention does not take place for months, even years.

High-ranking Bush lawyer Jack Goldsmith, upon seeing a 22-year-old U.S. citizen, Yasser Hamdi, isolated in a naval brig after being designated an enemy combatant, said, "Something seemed wrong. ... This is what habeas corpus is for."

But, as critics have pointed out, the criminal justice procedures used following the failed bombing of Flight 253 to Detroit and the botched car-bomb attack in Times Square could squander opportunities to gain intelligence. Normally, when a suspect is arrested, he is read Miranda rights and given the opportunity to see a lawyer. In most cases, suspects are advised to stop providing information, at least until the lawyer can evaluate the case. Even if a suspect waives his Miranda rights and submits to an interrogation, he must be "presented" in court "without unreasonable delay." These procedures create obstacles to collecting intelligence in national security cases.

There is a "public safety" exception that was used to justify short interrogations in the Flight 253 and Times Square cases without Miranda warnings. And, in both of these cases, it appears the suspects continued to provide information to law enforcement even after being read their rights. But this is more a matter of good fortune than the result of good policy.

Recognizing this, Attorney General Eric Holder floated the idea of expanding the public safety exception to allow for a longer interrogation without Miranda warnings or a court appearance. Civil libertarians correctly note this proposal would undercut the logic of Miranda and threaten the constitutional protection against self-incrimination. Moreover, if Congress disposes of Miranda warnings in terrorism cases, the argument could be made that this protection can also be circumvented for other national security crimes - such as espionage - and then serious violent crimes, and so on.

Allowing an "intelligence-only" interrogation would not raise Fifth Amendment problems because the information would be excluded from any subsequent trial. And, because this limitation would complicate prosecutions, the government is likely to use it only in cases where core national security interests are at stake.

Congress should build multiple levels of protection into this system.

First, the government should be forced to establish probable cause of a terrorism crime to justify the interrogation.

Second, to prevent this authority from being used to conduct secret interrogations, family members should be notified that a relative has been detained.

Third, to protect against abusive treatment, the suspect's entire time in custody should be videotaped.

Congress would set the outer limit for this detention. In the United Kingdom, pre-charge detention is allowed for 28 days. We have a more libertarian tradition than the U.K. does, so an outer limit of seven days or less might be a reasonable period.

Detention for interrogation is an unsettling concept. But neither the criminal justice system nor law of war is perfectly suited for dealing with terrorism. To deal with this threat that combines aspects of both crime and war, we need to craft flexible institutions and legal procedures.

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