What is a Terrorism Trial?

(abstract)

Adam Thurschwell[1]

One does not adjudicate national survival.
– Paul Kahn[2]

Before I try to answer the title question, let me begin with two stories, one about a terrorism trial that happened (in fact is ongoing right now) and one that did not. In November 2008, United States and Pakistani officials reported that Rashid Rauf, a British citizen of Pakistani descent, was targeted and killed in a missile strike in the North Waziristan region of Pakistan.[3] Along with his alleged involvement in other al Qaeda-linked terror plots,[4] Rauf is reported to have been the mastermind behind a conspiracy to blow up seven trans-Atlantic airliners in 2006 using liquid explosives. The plot was foiled when English law enforcement arrested some of his co-conspirators[5] and Rauf himself was arrested by Pakistani authorities. Shortly thereafter he escaped to North Waziristan, where he was reported killed.

Whatever the process that led to the decision to target Rauf, it was not judicial. Rather, it was presumably based on the types of intelligence-gathering and tactical considerations that have always been relied upon by officials responsible for formulating military strategy against enemies of the United States generally and al-Qaeda in particular. Needless to say, Rauf was not given the opportunity to contest this intelligence, nor did he have the right to be heard in his defense or any of the other procedural rights we associate with American criminal law.[6] Due process – in the conventional sense, at least – played no part in the state's decision to kill him.

Contrast Rauf's story with the story of Khalid Sheikh Mohammad. Mohammad is alleged to have been the mastermind behind the attacks of September 11, 2001 ("9/11"). Similar to Rauf's airline plot, he allegedly conspired with others to commandeer airliners and use them

to cause the death of Americans. Unlike Rauf's plot, however, his conspiracy came to fruition in the attacks on the World Trade Towers and Pentagon in which almost 3000 people died.

In response to 9/11, the United States made the decision to kill the perpetrator; in response to the Trans-Atlantic airline plot, it reportedly made the same decision. Rauf is dead; Mohammad remains alive, awaiting trial. By every measure of American criminal justice, the situation ought to be reversed: if Mohammad is in fact guilty of planning the 9/11 attacks (as he has publicly declared), he is the more culpable of the two, and the one who the state is morally and legally justified in killing.[7] Only Mohammad, however, has been afforded due process rights that continue to keep him alive – 15 years after 9/11 – at least until the government obtains a death sentence against him that stands up on appeal.

The parallel stories of Rauf and Mohammad illustrate one of the paradoxes that inhabit the concept of a "terrorism trial." "Terrorism" is a federal crime subject to trial in United States courts. By specific definition in the United States Code and by general usage, "terrorism" is also, however, the use of violence to make a government perform some act or refrain from performing some act, up to and including its abdication of power. As such, it poses a direct threat to that government's sovereign prerogatives and national security. Terrorism may therefore be a crime, an act of war, or both. As Rauf and Mohammad's stories show, which way a particular terrorist act is characterized has dramatic consequences for the nature of the state's response to that act as well as the terrorist.

This dichotomy caused fewer practical and conceptual problems when the power to attack a nation's sovereign interests was limited to other sovereigns. As is well-known (and well-illustrated by the 9/11 attacks), however, the differences between criminal acts committed

by individuals and acts of war have become increasingly difficult to discern in some cases. At the same time, the legal distinctions between the two state responses – law-enforcement or force-of-arms? – have become less clear-cut as well. The consequences of these changes have been far-reaching and sometimes jarring. Without these new realities, for example, President Obama's decision to dispatch the nation's chief law enforcement officer, Attorney General Eric Holder, to a law school to defend the practice of targeted missile-strike killing as a matter of constitutional due process would have appeared even odder (and more ironic) than it did to many people at the time.[8] That was four years ago; today the "legalization" of national security is even more taken for granted as the theory and practice of warfare becomes ever more consumed with the Constitution and international humanitarian and human rights law. With these changes, moreover, complimentary questions can also be asked about the other side of the (dimming) line between war and legal process. In particular, does General Holder's core assertion – that "[w]here national security operations are at stake, due process takes into account the realities of combat"[9] – also now apply in criminal trials? Should it?

Against this background, and by way of beginning to answer the title question, I would like to propose two theses about the relationship of terrorism trials to the prevailing theoretical model of state sovereignty.

1. First thesis: The received (post-Westphalian) concept of sovereignty is constituted along two different axes of state action, what I'll call the "national security paradigm" and the "justice paradigm." In the early-modern terminology of sovereignty, these axes represent the two roles of the Prince: the Prince as protector of the people and the Prince as giver of the laws. In principle at least, the two roles appear independent – a dictatorship can maintain a powerful

military and arbitrarily deprive its citizens of rights at home, while a democracy may put its ability to defend itself in the hands of other states while following the rule of law in its domestic sphere. Indeed, in their classical formulations these sovereign functions are mutually indifferent to each other's fundamental purposes, and thus in extreme cases can come into irresolvable conflict. On one hand, in Paul Kahn's words, "[o]ne does not adjudicate national survival"[10] – at the end of the day, sovereign existence takes primacy over law. ("The Constitution is not a suicide pact" expresses the same thought.) On the other side, nothing in the basic principle of legality – the requirement of treating like cases alike – allows special treatment for one party over another, even if that party is oneself (or one's country), and even if deciding the case for the other party means ruin for oneself. The maxim *fiat justitia ruat caelum* ("let justice be done though the heavens fall") is inscribed over more than a few courthouse doors.

Despite their mutual indifference, it turns out that the paradigms are not simply independent functions. Rather, like mathematical axes, they also intersect, while together determining every point in the field of sovereign action. My first thesis is that terrorism trials are privileged exemplars of the friction generated by the two interlocking paradigms, which is today reaching its apotheosis in the institution of the military commission. Military commissions are both and neither trials aimed at justice and instruments of warfare,[11] and, as such, demonstrate more clearly than any other state action the simultaneous inextricability and incompatibility of the two paradigms.

2. Second thesis: The principle that cuts across the national security and justice paradigms – the principle that is the common source of their conflict and their co-dependence, and that indeed is the defining element of sovereignty as such – is the sovereign's right to death.

By that I mean the political state's right to kill its enemies and compel its citizens to sacrifice their own lives if necessary to defend its own continued existence (the right of conscription), and its right to take the life of individuals who offend against its domestic laws (the right to impose capital punishment).[12] Death is thus both the criminal punishment *par excellence*, imposed as a matter of just desert, and the final resort of the state against the existential threat posed by its enemies, without regard to justice or desert.

In that sense, to the extent that the "terrorist" represents the criminal who threatens the sovereign's existence or prerogatives – and this has been the *sine qua non* of the crime – every terrorism trial is a capital trial, in principle if not always in fact. More pointedly, every terrorism trial has about it the whiff of a "national security operation" in which justice will always take second place to raw sovereign interest – a problem that goes beyond passive indifference to legal rights, because the same sovereign is also the defendant's active adversary in the trial.[13]

At the same time and in a complimentary fashion (this is a speculative question I raise in conclusion), given the intersection of the paradigms in the sovereign's right to death, and taking seriously General Holder's suggestion that "[w]here national security operations are at stake, due process takes into account the realities of combat," one can also ask whether warfare can ever, even in principle, take place without carrying within itself normative standards that could potentially serve as the basis for legal judgment or self-judgment. If so, then far from *silent enim leges inter arma*,[14] every act of war would also share something, however vestigial, with the stakes of a capital trial.[15]

Notes

[1] General Counsel, Military Commissions Defense Organization, United States Department of Defense. The views expressed here are entirely my own and do not represent those of the Military Commissions Defense Organization, the Department of Defense, or the United States. The text includes no classified information nor was any classified information consulted or reviewed in connection with its preparation.

[2] Paul Kahn, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 11 (2010).

[3] Ismail Khan and Jane Perlez, "Airstrike Kills Qaeda-Linked Militant in Pakistan," *New York Times*, November 23, 2008, at p. A10 (www.nytimes.com/2008/11/23/world/asia/23rauf.html; last visited October 5, 2016). For an overview of his life, *see* Raffaello Pantucci,"A Biography of Rashid Rauf: Al-Qaida's British Operative" CTC Sentinel, Vol. 5, Issues 7 (July 2012), pp. 12-16 (www.ctc.usma.edu/posts/a-biography-of-rashid-rauf-al-qaidas-british-operative; last visited October 5, 2016).

[4] Pantucci,"A Biography of Rashid Rauf." The other plots allegedly included a conspiracy to attack the New York subway system. FBI Press Release, "Charges Unsealed Against Five Alleged Members of al Qaeda Plot to Attack the United States and the United Kingdom" (July 7, 2010) (archives.fbi.gov/archives/newyork/press-releases/2010/nyfo070710a.htm; last visited October 5, 2016).

[5] Khan and Perlez, "Airstrike Kills," *supra*.

[6] The recently-released Presidential Policy Guidance on the use of lethal force against "terrorist targets" outside areas of active hostilities was issued after the strike and under a different Administration, but may provide some insight into the process employed at the time. *See* "Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities" (www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download; last accessed October 5, 2016).

[7] For example, under the United States criminal code, conspiracies, including conspiracies to commit terrorist acts of murder, are not punishable by death unless they result in death. *See e.g.* 18 U.S.C. §2332a(a). More generally, the Eighth Amendments limits imposition of the death penalty to homicides. *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008).

[8] United States Department of Justice, Office of Public Affairs, "Attorney General Eric Holder Speaks at Northwestern University School of Law" (March 5, 2012) (www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law; last accessed October 5, 2016).

[9] *Id*.

[10] Paul Kahn, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 11 (2010).

[11] *See e.g.* William Winthrop, MILITARY LAW AND PRECEDENTS, 2ND ED. 765 (1920) ("The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war."); Charles Fairman, THE LAW OF MARTIAL RULE 262-3 (1943) ("A military commission forms no part of the judicial system. . . . [A] case tried before it is not, properly speaking, a 'criminal cause;' in short, to regard it as a court of justice is 'quite illusory.'"); *see also Ex parte Quirin*, 317 U.S. 1, 39 (1942) ("military tribunals . . . are not courts in the sense of the Judiciary Article").

[12] There is a consensus across the traditions of Western political philosophy from the beginnings of post-Westphalian modernity to the present day that identifies the essence of political sovereignty with this sovereign power to kill and demand sacrifice. John Locke's definition of "*Political power*" as "a *Right* of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of Such Laws, and in the defence of the Common-wealth from Foreign Injury" is perhaps its clearest statement, but the consensus is remarkably consistent over time and across widely divergent traditions of thought, from liberal social contract theory to Carl Schmitt's anti-liberal decisionism to contemporary Continental political philosophy. John Locke, "An Essay Concerning the True Original, Extent, and End of Civil Government," in P. Laslett, ed., TWO TREATISES OF GOVERNMENT 268 (1988) (emphasis original); *see also e.g.* Thomas Hobbes, LEVIATHAN, OR THE MATTER, FORME AND POWER OF A COMMONWEALTH, ECCLESIATICALL AND CIVIL 23 (1957)("Of Punishments and Rewards"); Jean-Jaques Rousseau, THE SOCIAL CONTRACT, IN SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU 199 (1948) (trans. Gerard Hopkins)("Of the Right of Life and Death") (under social contract, the citizen's "life is not now, as it once was, merely nature's gift to him. It is something that he holds, on terms, from the State."); Michel Foucault, THE HISTORY OF SEXUALITY, YOL. 1, AN INTRODUCTION 135 (New York: Vintage Books, 1978) (trans. Robert Hurley) (arguing that the essential characteristic of sovereignty is its "power to exercise the right to decide life and death"); Giorgio Agamben, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 87-90 (Stanford: Stanford University Press, 1998) (Daniel Heller-Roazen, trans.). Without getting into unnecessary details, both Schmitt's concept of the political and his concept of sovereignty (which is initially defined as "he who decides on the exception") ultimately turn on what he called "the real possibility of physical killing." Carl Schmitt, THE CONCEPT OF THE POLITICAL 19 (U. of Chicago Press, 1996) (George Schwab, trans.); *see also* Carl Schmitt, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (MIT Press, 1985) (George Schwab, trans.). In the contemporary United States legal academy, Paul Kahn is the writer who has focused most clearly on the relationship between sovereignty and sacrificial death. *See* Paul Kahn, "Imagining Warfare," 24 Eur. J. Int'l L. 199 (2013); Paul Kahn, "Criminal and Enemy in the Political Imagination," 99 Yale Review 148 (2011); Paul Kahn, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY (Ann Arbor: University of Michigan Press, 2008).

[13] See, for example, the comments of David Kris, former head of the Depart of Justice's National Security Division:

> When law enforcement personnel encounter a terrorist, or someone who may know something about terrorism, they need to recognize that prosecution is not an end in itself. It is a means to an end. Law enforcement personnel must use all available tools to collect the intelligence needed to protect the country. They must see themselves as part of a larger effort. If they become too parochial, they will miss opportunities to protect national security.

David Kris, "Law Enforcement as a Counterterrorism Tool," 5 J. Nat'l Security L. & Pol'y 1, 30 (2011).

[14] "In time of war the law falls silent." M. Tulli Ciceronis Pro T. Annio Milone Oratio, IV.1 (www.thelatinlibrary.com/cicero/milo.shtml; last accessed October 7, 2016).

[15] James Dawes, by way of example, has interpreted General William Tecumseh Sherman's exchange with Confederate General J.B. Hood prior to the sacking of Atlanta as a victory (albeit Pyrrhic) for law over Sherman's claims for the inevitability of total warfare. Despite initially taking the position that "'[w]ar is cruelty . . . and you cannot refine it," Sherman eventually felt compelled to resort to legal argument in his defense:

> At the conclusion of Sherman's public epistolary debate with Hood (the letters were published in Macon newspapers), the Northerner was forced to acquiesce. He did so partially, tersely, and negatively -- cruelty could be refined; he was not free to do anything--by acknowledging the potentially "binding" power of the laws of war in a denial that he had violated the requirements of the texts. "I was not bound by the laws of war to give notice of the shelling of Atlanta, a 'fortified town, with magazines, arsenals, founderies, and public stores;' you were bound to take notice. See the books." With all the power of an absolute dictator, Sherman was forced to retreat, to abandon his previously abstract characterizations of war and respond to the precise, publicly accessible

charges of his enemy.

James Dawes, “Language, Violence, And Human Rights Law,” 11 Yale J.L. & Human. 215, 228, 230-31 (1999) (quoting MEMOIRS OF GENERAL W.T. SHERMAN 601 (Library of America, 3d ed. 1990) (1875)).