

Published on *National Catholic Reporter* (<https://www.ncronline.org>)

November 18, 2010 at 7:41am

Terrorism and the \"great et, et\"

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Distinctly Catholic

Ahmed Ghailani was cleared in federal court yesterday on 284 of the 285 counts against him. Ghailani was implicated in the 1998 bombings of U.S. embassies in Kenya and Tanzania and was held at Guantanamo Bay. He was the first ex-Gitmo detainee to be tried in a civilian courtroom and the result may mean he was also the last.

President Obama came to office, in part, on the pledge to shutdown the U.S. detention facility at Guantanamo Bay. Calls for its closure were among the best applause lines during the Democratic primaries and gave Democrats a patriotic, if somewhat naïve, claim that they were better suited to defend the Constitution than the Republicans who were trampling on it in the so-called War on Terror. But, the office to which Obama came requires him to defend the country as well as its Constitution and he has not found anyway to make good on his promise.

At issue, is whether those arrested in the war on terror should be tried in civilian courts with all the rules of evidence and rights for the accused that make our judicial system the envy of the world, or if the Gitmo detainees should be sent before a military tribunal where the standards for conviction are not as high. The division between the two sides on this legal issue reflects an ever more profound, and consequential, divide between those who see terrorism as primarily an instance of law-breaking to be treated as such and those who see terrorism as an act of war and wish to respond accordingly.

Yesterday's verdict dealt a blow to the Administration's desire to try the detainees in civilian courtrooms. Ghailani was only convicted on one count of conspiracy to damage or destroy U.S. property. The murder and attempted-murder charges could not be proven to the satisfaction of twelve jurors. I confess that even just reading about the trial, I am overcome with a sense of the majesty of the law. But, the terrorists want to reverse that equation: They do not want to be overcome by the majesty of the law, they want to

overcome the law. There is the conundrum. We extend the rights of high civilization to people who want to destroy that civilization.

The solution, however, is to invoke one of the key insights of Catholic theology, what Pope Benedict calls the "great et, et." The issue of civilian courts versus military tribunals should not be an "either/or" question but a "both/and" solution. I wish I could claim credit for this insight, but it was published by Brookings Institution senior fellow Benjamin Wittes three weeks ago. He suggested that terrorism suspects like Khalid Sheik Mohammed be subject to both civilian and military jurisdictions in the same way that the D.C. sniper John Allen Muhammed faced charges in both Virginia and Maryland. If the trial went awry, as trials sometimes do, in one jurisdiction the indicted still faced prosecution in another jurisdiction.

This same "both/and" approach should characterize our approach to terrorism more generally. Terrorism is both an act of war and a violation of the law. As Wittes has long argued, the U.S. Congress needs to create a new body of laws to deal with this new type of war and this new type of criminality. They have failed to do so. But, here is an example where the President and the incoming republican Congress might find some common ground. But, achieving such common ground will require a particularly Catholic intellectual disposition. Benedict, of course, invoked the "great et, et" in the context of theology, as in "both grace and nature." In the case of Mr. Ghailani, his criminality earned him only one conviction, although it is enough to keep him in jail for the rest of his life. In the case of more prominent terrorists like Khalid Sheik Mohammed, the Justice Department should, before any actions are taken in court, stipulate that he will be subject to both civilian and military tribunals.

Liberals are right to insist that the rule of law is precisely what the terrorists want to overturn. The terrorists lack the military capacity to invade America and can only win if they terrorize us into abandoning the standards of our civilization. Conservatives are right to insist that a different set of rules applies to those who do not play by the rules. This is not an "either/or."

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