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Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

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Terrorists face real consequences in US civilian courts

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The American public has had a pretty good demonstration over the last couple of weeks in how a US federal court handles a big terrorism case. The New York City trial of Osama bin Ladens son-in-law, Suleiman Abu Ghaith, on charges of conspiring to kill Americans, has so far gone off without a hitch: [jury was selected, opening statements were made, evidence was produced, witnesses were questioned](#).

Which is to say, apart from the extra metal detector outside courtroom 26A and an uptick in media interest, it was more or less business as usual for the US District Court in lower Manhattan, a few blocks from the World Trade Center site.

For some politicians and pundits, of course, that's [precisely the problem](#). Last year, when Abu Ghaith was arraigned, a number of lawmakers wrote to President Obama expressing [grave misgivings](#) about the idea of giving him a civilian trial, and Senators Lindsey Graham and Kelly Ayotte [complained](#) that trying Abu Ghaith in federal court rather than shipping him off to the US military for interrogation at Gitmo makes our nation less safe.

But what these critics conveniently choose to ignore is that since the September 11 attacks, [around 500 alleged terrorists](#) have been prosecuted across 37 states, including such notorious figures as the underwear bomber, the Times Square bomber and 9/11 co-conspirator Zacarias Moussaoui, without creating serious security problems.

Attorney General Eric Holder [put it this way](#):

"In disrupting potential attacks and effectively interrogating, prosecuting and incarcerating terrorists, there is, quite simply, no more powerful tool than our civilian court system."

Case in point: the Obama administration was criticized by war on terror hardliners like [Senate minority leader Mitch McConnell](#) when the FBI read Christmas Day bomber Umar Farouk Abdulmutallab his Miranda rights after he tried to down a Detroit-bound airliner in 2009. Except that Abdulmutallab went on to [provide the Bureau with vital intelligence about al-Qaida](#), according to the US government, well after he'd been advised of his rights to remain silent and to have an attorney. He was eventually sentenced to life in federal prison without the possibility of parole.

Meanwhile, the leading alternative to federal court trials for terrorists military commissions have been a dismal failure. The Bush administration debuted the commissions 12 years ago to try terrorism suspects at the US naval base at Guantanamo Bay, and the system has been revamped twice since, in 2006 and 2009. In that time the commissions have completed just eight cases, and two of those were thrown out on appeal.

Spend some time observing a commission in action and you begin to understand why military tribunals are not the answer for questions of justice and terror.

In mid-February, I attended a pretrial hearing at Guantanamo for Abd al Rahim al-Nashiri, whose [case](#) is one of two being heard in [military commissions](#) set up under the 2009 revamp of the Bush-era courts. (The other involves Khalid Sheikh Mohammed, the alleged mastermind of the 9/11 attacks, and four co-conspirators.) Nashiri, a 49-year-old Saudi of Yemeni descent, is charged with multiple war crimes, including planning al-Qaidas attack on the American warship USS Cole in 2000, off the coast of Yemen, which killed 17 US servicemen. His trial is [set for December](#) and he faces the death penalty if convicted.

It was immediately clear that this commission was [a unique and very strange court](#), as Nashiri put it. And not just because it's in a squat prefab building on a potholed former airfield in Cuba. The defendant is led into the courtroom under heavy military guard. The defense and prosecution teams are a mix of business-suited civilian lawyers and military officers in uniform. The judge is an Army colonel. The jury will be an all-military panel.

A small number of Pentagon-approved nongovernmental observers are permitted to follow proceedings via video feed on a 40-second delay from a soundproofed gallery in back of the courtroom, along with family members of Cole victims. Unlike in federal court trials like that of bin Ladens son-in-law, the public isn't invited. Although anyone willing to make the trek to the US Army base at Fort Meade, in Maryland, can

watch the proceedings by way of closed-circuit TV.

What really struck me as a first-time observer was the extent to which military commission rules seem tailored to work around protections afforded to defendants in the civilian justice system.

Again and again, the commission got bogged down in arguments that would almost never come up in a federal court. Defense lawyers argued for the (usually uncontroversial) right to subpoena a witness specifically, former CIA agent Jose Rodriguez, whose 2012 book contains an account of Nashiri's role in the Cole bombing that apparently differs from the prosecution's account. Defense lawyers also complained that they're not allowed to talk to their client about evidence discussed in classified hearings and so can't apparently provide him with an adequate defense. They objected to the prosecutors proposing to use 72 pieces of hearsay evidence normally inadmissible in civilian court from 66 absent witnesses, at least one of whom has since been killed, apparently, by a US drone.

No wonder a UN special rapporteur in 2010 called the military commissions [fundamentally flawed](#) and very far from international fair trial standards.

Not to mention the main charges against Nashiri for war crimes relate to events that took place in 2000, long before the United States was in any kind of recognized conflict with al-Qaida. Since the military commissions were set up specifically to try war crimes, it's questionable whether they even have authority to prosecute this case.

Given these and [the range of issues](#) that have hampered the military commissions to try terrorists, it's hard to see how their outcomes will be viewed as legitimate. Since it's likely that any verdict will be vulnerable to challenge on appeal, one wonders why the government wants to use military commissions at all.

Even Obama and Holder have shown a preference for using civilian courts. Remember when, following the revision of the military commissions rules in 2009, the Obama administration actually recommended holding the 9/11 trial in federal court?

But Abd al Rahim al-Nashiri was never designated for civilian trial. A likely reason is that the evidence against him has been tainted by torture and might not stand up in a federal court. Indeed, Nashiri [was held in secret black sites](#) for almost four years under the CIA's notorious detention and interrogation program ([very much in the news this week](#)), and is one of three people the US government has admitted to waterboarding. (According to a government report, interrogators also [threatened him with a power drill](#) revved near his head while he stood hooded but naked, among other abuses.)

It's unclear how much information obtained from Nashiri during these interrogations or from other detainees subjected to similar treatment will be deemed admissible in the military commission proceedings. But as with hearsay evidence, the rules on the use of third-party statements obtained through coercion are no surprise looser in the military commissions than in federal court.

Even those accused of the worst crimes deserve a fair trial. And the victims of a terrorist attack deserve to see them tried in a just system, with a verdict that won't be overturned on appeal. That's why Osama bin Laden's son-in-law is having his day in federal court. And why Nashiri should, too.

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