

# Human Rights Watch

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

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Death Penalty in Flawed Military Commissions Should Not Be an Option

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The trials of six Guantanamo detainees being charged for their role in the September 11, 2001 attacks should be moved from the Guantanamo military commissions to US federal courts, Human Rights Watch said today.

The United States initiated military commission charges today against six detainees including Khalid Sheikh Mohammad, the alleged 9/11 mastermind, and Mohammad al-Qahtani, the alleged 20th hijacker for multiple terrorism-related crimes related to 9/11. The United States is seeking the death penalty against each of the six detainees.

The time to bring the masterminds and planners of 9/11 to justice is long overdue, but this needs to be done in a system that has credibility, said Jennifer Daskal, senior counterterrorism counsel at Human Rights Watch. If trials are held in Guantanamo by flawed military commissions, the system will be on trial as much as the men being accused of horrific crimes.

In addition to Mohammad and al-Qahtani, the United States is charging Ramzi bin al-Shibh, Ali Abd al-Aziz Ali (also known as Ammar al-Baluchi), Mustafa Ahmed al-Hawsawi, and Walid bin Attash (also known as Khallad). With the exception of al-Qahtani, the detainees were transferred from secret CIA detention to Guantanamo on September 6, 2006. All have reportedly been subjected to highly abusive interrogations that in several instances amount to torture, and the possibility that military commissions might rely on this evidence is expected to be a central issue in these cases, Human Rights Watch said.

Last week, CIA Director General Michael Hayden conceded that Mohammad had been subjected to waterboarding a form of mock drowning that has been prosecuted as torture by the United States for more than 100 years while in US custody. And an interrogation log for al-Qahtani reveals that for six weeks from mid-November 2002 to early January 2003, he was intentionally deprived of sleep, forced into painful physical positions (known as stress positions), subjected to forced exercises, forced standing, and a forced enema as well as sexual and other physical humiliation.

Its time for the United States to start rebuilding its moral authority and credibility around the world, Daskal said. Possibly putting someone to death based on evidence obtained through waterboarding, or after prolonged periods of sleep deprivation while being forced into painful stress positions, is not the answer.

Whereas US federal courts and courts-martial categorically prohibit the use of coerced confessions, the military commissions allow the use of statements obtained through cruel and inhumane interrogations, so long as the interrogation took place prior to 2006, and the military judge finds the evidence reliable and in the interests of justice. Because the United States refuses to label its interrogation methods unlawful let alone torture it may attempt to admit evidence obtained through highly abusive interrogations into these cases.

To make matters worse, the defense counsel in these cases may be denied access to the relevant information to establish that the evidence in question was obtained through abuse or torture, and should be excluded. Specifically, the military commission rules allow the prosecution to withhold classified sources and methods of interrogation from both the defendant and his counsel. This will make it extremely difficult for defendants to establish that evidence was obtained through torture or other coercive interrogation methods.

When coupled with the commissions lax hearsay rules, this means that defendants could be convicted based on second- or third-hand summaries of evidence obtained through abuse, without any opportunity to confront the accuser or to establish the evidences unreliability and taint. Unless military commission judges are extremely vigilant, even the prohibition on evidence obtained through torture could become virtually meaningless.

Prosecuting these men and possibly sentencing them to death before fundamentally flawed military commissions is not justice, Daskal said.

In accordance with the military commission rules, the charges against these six men are now being reviewed by the commissions convening authority, former military appeals court official, Judge Susan J. Crawford, who has the authority to accept, reject, or revise them. Once she approves any charges and serves them on the defendants, the military commissions clock starts ticking. The arraignment when the defendants make their first court appearance and are formally told the charges against them will take place within 30 days, absent any court-approved delays.

Only four other defendants have been formally charged by the military commissions authorized by Congress in October 2006, three months after the Supreme Court ruled that the initial military commissions set up by the Bush administration were unlawful.

The trials of Omar Khadr, the now 21-year-old Canadian accused of murdering an American soldier at the age of 15, and Salim Hamdan, the 37-year-old Yemeni accused of conspiracy and material support for terrorism, are both scheduled for May. And Mohammad Jawad, a 23-year-old Afghan who is being charged with attempted murder for acts allegedly carried out when he was 17, is expected to make his first appearance before the commissions in early March.

David Hicks, the only person to be convicted by the military commissions, pleaded guilty in April 2006 to one count of providing material support to terrorism and has since then completed his nine-month sentence in his native Australia. By contrast, the federal courts have successfully prosecuted dozens of international terrorists since September 11, 2001.

All of these cases should be moved to federal court where the defendants and their alleged crimes will be the focus of attention rather than the inadequacies of the hastily crafted and fundamentally flawed military commission system, Daskal said.

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