

Judge cites conflict of interest in removing official from military commission

Five charges approved and one rejected in 9/11 show trials

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Charges against one of the six alleged 9/11 conspirators in the US military commissions system at Guantánamo Bay were rejected last week, as the five others were allowed to proceed.

The charges were dropped in the case of Mohammad al-Qahtani, the alleged “20th hijacker.” The decision was announced on Tuesday but made last Friday by Susan Crawford, the “Convening Authority” for the military commissions. Al-Qahtani can still be held indefinitely, and the military prosecution may decide to file new charges. No reasons were given for Crawford’s decision.

At the same time, Crawford formally approved the charges for the other five prisoners, including Khalid Sheikh Mohammed, who allegedly organized the terrorist attacks. The five whose trials will go forward were all held for years by the CIA in secret detention facilities.

All five may be subject to the death penalty if convicted. They include Mohammed; Ramzi Binalshibh, alleged to be a top intermediary between the hijackers and leaders of Al Qaeda; Ammar al-Baluchi, nephew of Khalid Sheikh Mohammed; Mustafa Ahmad al-Hawsawi, alleged assistant to al-Baluchi; and Waleed bin Attash, alleged trainer of some of the hijackers.

Al-Qahtani was not held in the CIA centers. He was reportedly denied access to the US prior to the September 11 attacks and was later captured during the US invasion of Afghanistan. In 2002, while he was being held in Guantánamo Bay, al-Qahtani was subject to torture at the behest of then-Defense Secretary Donald Rumsfeld. His was an early test case in what the administration has euphemistically termed “enhanced interrogation.”

The Bush administration has publicly admitted that the CIA used waterboarding—a notorious torture technique—on three prisoners, including Mohammed.

The five individuals will be tried under the Military Commissions Act, which was enacted in October 2006 after the US Supreme Court ruled unconstitutional the Bush administration’s previous system of military commissions.

The act establishes commissions that are a travesty of due process and democratic rights, allowing the admission of evidence obtained from abusive interrogation, secret evidence, and hearsay evidence. All the defendants are denied the right to habeas corpus and cannot challenge the lawfulness of their imprisonment and treatment.

While the Bush administration has not admitted to waterboarding al-Qahtani, an interrogation log released in 2006 documented other forms of horrific abuse, including prolonged restraint, sleep deprivation, sensory overload, use of dogs, and exposure to extreme temperatures. He was also interrogated for up to 20 hours a day for 48 days, made to wear women’s underwear, and leashed like a dog.

Al-Qahtani’s treatment occurred after Rumsfeld issued explicit authorization for abusive methods against prisoners at Guantánamo Bay. According to an internal Army memo leaked in 2006, Rumsfeld was “personally involved in the interrogation” of al-Qahtani.

The memo called the interrogation “abusive and degrading,” but did not call it torture. However, al-Qahtani’s lawyer, Lieutenant Colonel Bryan Broyles, told the *Wall Street Journal*, “The government evidence is derived by torture. I say that flatly and without exception. If they have such statements that were not obtained through torture and they are evidence of his involvement in this conspiracy, you’d think that was enough to go forward.”

The announcement of formal charges against the five prisoners comes only a few days after a military judge ordered that the administration’s most prominent spokesman for the commissions, Air Force Brigadier General Thomas Hartmann, be removed from any role in a separate military commission. The judge cited Hartmann’s undue influence over the prosecution and the politicization of the cases in making his ruling.

Navy Captain Keith Allred ordered that Hartmann, who serves as the legal advisor for Crawford, be removed from any oversight responsibility for the trial of Salim Ahmed Hamdan,

who is alleged to have been Osama Bin Laden's driver.

In his order on Hartmann, Allred reviews some of the history of the military commission system, and in doing so exposes the degree to which the entire process has been politically manipulated and motivated. Much of the evidence he cites comes from the testimony of Air Force Colonel Morris Davis, who was formerly the chief prosecutor for the military commissions, but has since come out in opposition to them.

In 2005, Davis first interviewed for the job as chief prosecutor before Department of Defense General Counsel William "Jim" Haynes. Haynes was close to Rumsfeld and also helped draft, along with then-Justice Department lawyer John Yoo and then-White House Counsel Alberto Gonzales, the infamous "torture memos," which argued that the president has the constitutional authority to order torture.

According to Davis, when he suggested to Haynes that some of the commissions might lead to acquittals and this might improve the legitimacy of the commissions, Haynes responded, "We can't have acquittals. We've got to have convictions. We can't hold these men for five years and then have acquittals."

Davis was given the job despite this apparent disagreement. There was not much interest in the commissions, however, until late 2006, when Bush publicly acknowledged the existence of the secret CIA detention centers and transferred several prisoners—including those currently before the commissions—to Guantánamo Bay. There was political pressure to get the commissions going quickly, especially after the passage of the Military Commissions Act in October.

There was some initial hope within the administration that the commissions could begin before the 2006 mid-term elections. According to Davis, in September 2006 Deputy Secretary of Defense Gordon England said in a meeting, "There could be strategic political value in getting some of these cases going before the [November 2006] elections. We need to think about who could be tried."

When this proved impossible, the interest shifted to the 2008 presidential elections. Davis has said in an earlier interview, "There was big concern that the election of 2008 is coming up. People wanted to get the cases going. There was a rush to get high-interest cases into court at the expense of openness." In January 2007, Haynes pressured Hartmann to begin prosecuting Australian David Hicks and other prisoners quickly.

After he was appointed to be the legal advisor to the Convening Authority in July 2007, Hartmann became closely involved in the prosecution. According to Allred's order, "On 18 July [2007] General Hartmann announced that *he* was going to select the next cases to go forward. He wanted cases that would be 'sexy' enough to capture the public interest, or cases in which an accused might have blood on his hands, rather than cases involving low level actors transporting documents, etc."

Hartmann took up this role even though the Convening Authority is supposedly a neutral body with supervisory powers over both the prosecution and the defense. It makes decisions

on the allocation of staffing and resources, for example, and the approval or rejection of charges.

Hamdan's defense has testified that Hartmann did not provide sufficient resources for the military defense attorneys, while allocating generous resources to the prosecution.

Hartmann also pushed Davis to use evidence obtained through torture. Allred writes, "After General Hartmann's arrival, he and Colonel Davis had numerous discussions about the trial of these cases. In one discussion about the use of testimony obtained by coercive techniques, General Hartmann questioned Colonel Davis's authority to make decisions about the use of such evidence. General Hartmann considered all such evidence potentially admissible, and wanted the judges to determine the matter."

After complaining about pressure from Hartmann, Davis was placed under the chain of command of Haynes, the lawyer who had helped draft the torture memos. Davis said he decided to resign in response. "The guy who said waterboarding is A-okay I was not going to take orders from. I quit," he said.

Hartmann's actions only expressed the essential character and purpose of the commissions themselves. They are show trials designed to serve political ends, to legitimize the fraudulent "war on terror" and bolster support for the war. They have nothing to do with uncovering the truth about September 11, which would have to include an examination of the role of the US government in the lead-up to the attacks.

Though he will be removed from the Hamdan case, Hartmann will remain in his position as legal advisor to the Convening Authority. His role will no doubt become an issue in the other trials as well. Moreover, Allred did not dismiss the case, as Hamdan's lawyers had requested. It is slated to begin in June.



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