

# Guantanamo military tribunals proceed despite evidence of torture

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At Guantanamo Bay, the Obama administration continues to prosecute five alleged September 11 conspirators before a military commission over objections from defense attorneys regarding torture and challenges to the legitimacy of the proceedings.

The five prisoners are Khalid Sheik Mohammed, the reputed “mastermind” of the September 11, 2001 attacks; his nephew Ramzi Binalshibh, accused of playing a major role in Al Qaeda operations in Germany; and three men alleged to be lower level Al Qaeda figures: Mustafa Ahmed Hawsawi, Ammar al Baluchi and Walid bin Attash.

All five men have been held for years without trial or charge and have been subjected to brutal and illegal forms of torture at Guantanamo Bay and at secret CIA “black sites.” Khalid Sheik Mohammed was subjected to waterboarding (near-drowning by asphyxiation) 183 times in a single month in 2003.

All five are charged with murder, hijacking and terrorism, among other charges, and the Obama administration is seeking the death penalty.

At an arraignment that lasted more than thirteen hours earlier this month, lawyers appointed for the five men directly challenged the legitimacy of the military commissions and repeatedly sought to direct attention to the fact that the five men had been tortured. (See: Guantanamo military commission arraigns 9/11 defendants.) The proceedings frequently ground to a halt as the tribunal sought to defend its legitimacy and to prevent a discussion of torture.

At one point during the arraignment, bin Attash took off his shirt in an attempt to show the tribunal the scars that resulted from torture. “No, no, no,” said Colonel James Pohl, the presiding judge. “You will put your shirt on.”

In the weeks following the arraignment, defense attorneys have sought to use certain provisions of the Military Commissions Act, which prohibit any person from unduly influencing or coercing the commission, to challenge the actions and statements of top government and military

officials with respect to the proceedings.

The defense attorneys have demanded that Obama, former president George W. Bush, Attorney General Eric Holder, Pentagon attorney Jeh Johnson, Senator Lindsey Graham, and others appear to testify before the commission. Prosecutors have rejected the request for witnesses.

Defense attorneys are also opposing a joint trial of the five detainees, given that the government has accused each of them with a substantially different level of involvement in the September 11 attacks.

The ongoing proceedings are developing into a source of embarrassment for the Obama administration. The *New Yorker* magazine opined, “What should be the most important trial of our time is being improvised in a newly cobbled-together fake court, in which no side seems to have figured out the most basic rules.” Even the *New York Times* conceded that the tribunal “got off to a slow and rocky start...”

During his 2008 election campaign, Obama denounced military tribunals and vowed to close the infamous detention facility at Guantanamo Bay. Four years later, the prison remains open and military commissions are codified in law as permanent features of the American judicial landscape.

The entrenchment of the system of military commissions is not due primarily to Obama’s moral failings, but reflects the concern within the American ruling class that the US court system, even in its present form, affords the accused too many rights.

As with all measures enacted under the guise of the so-called “war on terror,” the primary purpose of military tribunals is not to prosecute the alleged participants in the September 11, 2001 attacks. There is no legitimate reason such people cannot be prosecuted in regular US courts. Rather, the use of military commissions against Khalid Sheikh Mohammed and others constitutes a test case for the more widespread implementation of military tribunals, including against US citizens.

The prosecution of the five Guantanamo detainees takes on special significance in light of the recent frame-up on terror

charges of Chicago anti-war protesters, utilizing undercover police spies. (See: Chicago police frame antiwar activists on “terrorism” charges.) Since these anti-war protesters are charged with “terrorism,” there is nothing in principle preventing the Obama administration from prosecuting them in the Guantanamo military tribunals.

The military commissions, codified into law by the Obama administration in the Military Commissions Act of 2009, make a mockery of the Bill of Rights. In these proceedings virtually every basic right afforded to a criminal defendant by the US Constitution is either curtailed or ignored.

The proceedings violate the right to a speedy and public trial by an impartial jury (the Sixth Amendment), the right to an attorney (the Sixth Amendment), the right to exclude evidence obtained through torture or other unlawful means (the Fourth and Fifth Amendments), and the right of the accused to confront his accusers (the Sixth Amendment), among other rights.

It goes without saying that a warrant was never issued by a neutral magistrate for the arrest of the Guantanamo detainees, in violation of the Fourth Amendment, and their torture and the conditions of their confinement certainly violate the Eighth Amendment (prohibiting cruel and unusual punishment).

In the administration’s military tribunals, as was the case with the medieval inquisition, the prosecution can introduce into evidence confessions obtained through torture. Moreover, “secret evidence,” which the accused has no right to examine or refute, can be considered by the commission.

For all practical purposes, the accused has no right to an attorney. Under current rules, the military may appoint an attorney for the accused, but the military also has the power to monitor and record every conversation between the detainee and his attorney. The attorneys are subject to countless restrictions, including the provision that nothing the accused says to the attorney can be repeated in public.

“We’re barred and restricted and constrained in everything we do,” Attorney Cheryl Borman, who represents bin Attash, told reporters after the arraignment earlier this month. “I can’t tell you what my client says because everything is presumptively top secret. So if my client wanted a tuna fish sandwich for lunch, I couldn’t tell you that.”

The trials themselves are broadcast to the media with a 40-second delay, ostensibly so that the government can bleep out with white noise any remarks that might constitute “state secrets.” In practice, it is already clear that this mechanism will be used to censor any remarks that might be embarrassing to the government.

At the arraignment earlier this month, defense attorney Air Force Capt. Michael Schwartz declared that “the torture that

my client was subjected to by the men and women wearing the big boy pants down at the CIA makes it impossible...” The military censored the rest of his remarks.

“Big boy pants” is a reference to a recent interview on the “60 Minutes” television program in which former CIA official Jose Rodriguez defended torture in the crudest terms. “We needed everybody in government to put their big boy pants on and provide the authorities that we needed,” Rodriguez said.

The military later acknowledged that Schwartz’ statement did not contain any confidential information.

The jury in proceedings before a military commission consists of military officers, and only two thirds of a jury (instead of a unanimous jury) is needed to convict a suspect. But the military has the authority to continue to imprison the accused even if he or she is acquitted by the jury.

Detainees do not even have a right to a trial before the tribunals. Of the roughly 170 detainees currently being held at Guantanamo, the Obama administration’s Guantanamo Review Task Force has recommended prosecution of only 36, whether in federal court or before military commissions. The overwhelming majority of Guantanamo detainees are being held indefinitely without the right to appear even before the kangaroo commissions.

If the military tribunals presently convened in Guantanamo Bay had been convened by Syria or Iran, the US government would have leapt to its feet to denounce human rights violations and authoritarian rule. The American media would have dutifully followed suit. What little coverage the mainstream media provides regarding the Guantanamo Bay proceedings, on the other hand, treats the drumhead tribunals as though they were entirely legitimate.

The next hearing in the case of the five alleged September 11 conspirators is set for June 12.



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