

**ARE TWO JUDICIAL SYSTEMS BETTER
THAN ONE?: A LOOK AT THE DEBATE
BETWEEN MILITARY TRIBUNAL
COMMISSIONS VERSUS FEDERAL
CIVILIAN TRIALS IN TERRORISM CASES**

*Lindsey N. Overton**

INTRODUCTION.....878
I. THE DEVELOPMENT AND USE OF MILITARY COMMISSIONS879
II. TERRORIST DEFENDANTS RECENTLY TRIED UNDER
MILITARY COMMISSIONS.....881
III. TERRORIST DEFENDANTS RECENTLY TRIED IN CIVILIAN
COURT.....883
IV. IS THERE ACTUALLY A MORE EFFECTIVE MEANS OF
PROSECUTING ALLEGED TERRORISTS?886

* J.D. Candidate, Albany Law School 2012; B.A., Economics and Spanish, Wake Forest University 2008.

This article was previously published on the *Albany Government Law Review Fireplace* on February 20, 2011. See Lindsey Overton, *Are Two Judicial Systems Better Than One?: A Look at the Debate Between Military Tribunal Commissions versus Federal Civilian Trials in Terrorism Cases*, ALB. GOV'T L. REV. FIREPLACE (Feb. 20, 2011), <http://aglr.wordpress.com/2011/02/20/are-two-judicial-systems-better-than-one-a-look-at-the-debate-between-military-tribunal-commissions-v-federal-civilian-trials-in-terrorism-cases/>.

INTRODUCTION

Khalid Sheikh Mohammed and four other individuals who are accused of planning and executing the September 11, 2001, attacks have been in United States custody since shortly after the attacks occurred and have yet to be prosecuted.¹ Although proceedings for a trial by military commission had commenced, in November 2009, Attorney General Eric Holder announced that the four men would be moved to New York and tried in federal court.² New York officials quickly objected due to concerns over security and the costs associated with such a trial.³ The Obama administration subsequently suspended its plans for federal civilian trials; however, more than a year later, no action has been taken to bring the five accused terrorists to justice.⁴

Shortly after the September 11 attacks on the United States, then-President George W. Bush established military tribunal commissions to try individuals accused of partaking in acts of terrorism, particularly those acts associated with the September 11 attacks.⁵ Since the employment of the military tribunals, there has been a heated debate regarding the appropriateness of such commissions in comparison to federal civilian trials. New York, the site of the vast majority of the destruction and the prime location for potential trials, has been at the center of this debate. While there have been many obstacles to the use of military commissions, including U.S. Supreme Court rulings, President Barack Obama has, despite his initial plan, allowed the commissions to function as a lawful means of administering justice within the American criminal justice system.⁶ The Obama administration has yet to issue a final decision on where to try the “high-value detainees,” including the previously mentioned September 11 masterminds.⁷ While some would like to see the detainees tried in New York, others oppose that venue due to the possibility of more terrorist attacks as a result of what would be

¹ *The Guantanamo Trials: Khalid Sheikh Mohammed*, HUM. RTS. WATCH, Oct. 16, 2010, <http://www.hrw.org/en/news/2008/12/04/khalid-sheikh-mohammed>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Randy James, *A Brief History of Military Commissions*, TIME, May 18, 2009, <http://www.time.com/time/nation/article/0,8599,1899131,00.html>.

⁶ *Id.*

⁷ Carol J. Williams & Geraldine Baum, *U.S. Civilian Court Acquits Ex-Guantanamo Detainee of All Major Terrorism Charges*, L.A. TIMES, Nov. 18, 2010, at 1.

high-profile proceedings.⁸ The opponents are also concerned that the stricter civilian evidence standards could result in more acquittals and more lenient sentences.⁹ This article will examine the results of accused terrorists tried in military commissions with those tried in federal civilian courts in an attempt to discern which process is the more effective means for administering justice.

I. THE DEVELOPMENT AND USE OF MILITARY COMMISSIONS

The first documented use of military commissions occurred in 1847 during the Mexican-American War.¹⁰ From then on, military commissions have “been used to prosecute thousands in the U.S. and abroad during the Civil War, Reconstruction, the Spanish-American War and World War II.”¹¹ Military commissions offer defendants fewer legal protections.¹² The judge and jury are comprised of U.S. military officers and, unlike courts-martial proceedings, military commissions do not guarantee the right to an appeal.¹³

Following the September 11 attacks on the United States, President Bush established the military tribunal commission system through a Presidential Military Order.¹⁴ In 2006, the U.S. Supreme Court in *Hamdan v. Rumsfeld*¹⁵ severely limited the power of the Bush administration to use military tribunals for the criminal prosecution of terrorist suspects imprisoned at Guantanamo Bay, Cuba.¹⁶ Specifically, the Court determined that only Congress could establish military commissions, that some protections of the Geneva Conventions must be afforded to defendants, and the right to habeas corpus could not be suspended.¹⁷ Justice Stevens wrote: “[The tribunals] must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international

⁸ *Id.*

⁹ *Id.*

¹⁰ James, *supra* note 5.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization*, 51 VA. J. INT'L L. 231, 237 (2011).

¹⁵ 548 U.S. 557 (2006).

¹⁶ Aronson, *supra* note 14, at 237; *see also Hamdan*, 548 U.S. at 557.

¹⁷ *Hamdan*, 548 U.S. at 557.

law.”¹⁸ In the wake of the Supreme Court’s ruling, Congress passed and President Bush signed the Military Commissions Act of 2006, which allowed the continued existence of military commissions.¹⁹ The Act gave the president the authority under Chapter 47A of Title 10 of the U.S. Code to establish military commissions in order to try unlawful enemy combatants.²⁰ Further, it set limits on the commissions’ procedures by affording all individuals the “necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples . . .’” pursuant to Article 3 of the Geneva Conventions.²¹ However, the Act provides that unlawful combatants are not able to “invoke the Geneva Conventions as a source of rights.”²²

During his campaign leading up to the 2008 presidential election, Barack Obama openly criticized the use of military commissions and also vowed to close the Guantanamo Bay detention facility.²³ After President Obama’s inauguration, White House officials became concerned about the prospect of not prevailing in federal court, mostly due to the more rigorous standard for admitting evidence. That concern has resulted in the continued use of military commissions during Obama’s presidency. When President Obama announced his new plan to continue using military commissions, he stressed that the newly revised commissions would afford individuals with more legal protection than in the past, including a limitation on the use of hearsay evidence.²⁴

Soon after Obama began his term of presidency, the Military Commissions Act of 2009 was passed and signed into law.²⁵ Overall, the latter act did not differ greatly from the 2006 act, although the 2009 act may contain some improvements. Some of the notable changes were: a transition from the phrase “unlawful enemy combatant” to “unprivileged enemy belligerent,” no limitation on the scope of the commission’s jurisdiction as applied to traditional notions of armed conflict, and narrower coverage to aliens only. However, like the previous law, there is a broad approach to the scope of jurisdiction regarding the “hostilities”

¹⁸ *Id.* at 633.

¹⁹ Aronson, *supra* note 14, at 238.

²⁰ 10 U.S.C. § 948b(b) (2006).

²¹ *Id.* § 948b(f).

²² *Id.* § 948b(g).

²³ James, *supra* note 5.

²⁴ *Id.*

²⁵ *Military Commissions*, HUM. RTS. FIRST, <http://www.humanrightsfirst.org/our-work/law-and-security/military-commissions/> (last visited Jan. 31, 2011).

with al Qaeda in that the 2009 act leaves open the possibility of prosecuting individuals for offenses “before, on, or after September 11, 2001.”²⁶

Although the Military Commissions Act of 2009 does make some minor changes to the previous law, the U.S. is still permitted to try accused terrorists in military commission proceedings. However, “[o]nly five trials have been held by military commissions at Guantanamo, and all have resulted in convictions. In the nine years since the Sept[ember] 11[th] attacks, at least 400 terrorism suspects have been tried in U.S. civilian courts. Most were convicted and sentenced to lengthy prison terms.”²⁷

II. TERRORIST DEFENDANTS RECENTLY TRIED UNDER MILITARY COMMISSIONS

Since the Military Commissions Act of 2006, there have been five individuals tried by military tribunal commissions:

On March 30, 2007, the Department of Defense announced that Guantanamo detainee David Hicks of Australia was “convicted of material support to terrorism in the first trial by military commission under the Military Commissions Act of 2006.”²⁸ Although the charge carried a possible life sentence in prison, the military commission panel of eight officers imposed a sentence of seven years confinement.²⁹ Due to a pretrial agreement, Hicks was ultimately sentenced to nine months confinement to be served in Australia as part of a transfer agreement.³⁰

On October 26, 2007, a jury sentenced Omar Ahmed Khadr to forty years confinement for the charges of murder, attempted murder in violation of the laws of war, conspiracy to commit terrorism, providing material support for terrorism, and spying.³¹ Khadr, a fifteen-year-old Canadian citizen, was “the first child fighter in decades to face war-crimes charges.”³² Although the

²⁶ 10 U.S.C. § 948d(a) (2006).

²⁷ Williams & Baum, *supra* note 7.

²⁸ Press Release, U.S. Dep’t of Def., Detainee Convicted of Terrorism Charge at Guantanamo Trial (Mar. 30, 2007), <http://www.defense.gov/releases/release.aspx?releaseid=10678>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *The Guantanamo Trials: Omar Ahmed Khadr*, HUM. RTS. WATCH, Nov. 2, 2010, <http://www.hrw.org/en/news/2008/12/04/omar-ahmed-khadr>.

³² William Glaberson, *A Legal Debate in Guantanamo on Boy Fighters*, N.Y. TIMES, June 3, 2007, at 11.

jury's sentence was forty years, due to a plea agreement, Khadr will spend eight years in prison.³³ The previous five years he spent in confinement since he was captured in Afghanistan do not count as time served.³⁴

Salim Ahmed Hamdan, Osama bin Laden's driver and the individual at the center of *Hamdan v. Rumsfeld*, was convicted on August 6, 2008, of providing material support for terrorism.³⁵ Hamdan was to serve a four-month sentence after the military judge credited him for sixty-one months of prior confinement time served.³⁶

Ali Hamza Ahmad Suliman al-Bahlul was one of the first detainees moved to Guantanamo Bay in 2002 under allegations that he held the position of Osama bin Laden's "media secretary."³⁷ His case was initially thrown out after the Supreme Court, in 2006, deemed that military tribunal commissions were unlawful.³⁸ However, after Congress passed the Military Commissions Act of 2006, which established new military commissions, new charges were brought against al-Bahlul.³⁹ The military commission found al-Bahlul guilty of conspiracy with Osama bin Laden to commit murder of protected persons, attacking civilians, solicitation to commit murder of protected persons, to attack civilian objects, and to commit acts of terrorism, providing material support for terrorism, and creating al Qaeda propaganda.⁴⁰ On November 3, 2008, the commission sentenced al-Bahlul to life in prison and he currently remains at Guantanamo.⁴¹

On July 7, 2010, Ibrahim Ahmed Mahmoud al-Qosi, a Sudanese national, pleaded guilty to conspiracy and providing

³³ Offer for Pre-Trial Agreement, *United States v. Khadr*, at 4 (Oct. 13, 2010), [http://www.defense.gov/news/Khadr%20Convening%20Authority%20Pre%20trial%20Agreement%20AE%20341%2013%20Oct%202010%20\(redacted\).pdf](http://www.defense.gov/news/Khadr%20Convening%20Authority%20Pre%20trial%20Agreement%20AE%20341%2013%20Oct%202010%20(redacted).pdf).

³⁴ *Id.* at 2.

³⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *See also Times Topics: Salim Ahmed Hamdan*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/people/h/salim_ahmed_hamdan/index.html.

³⁶ *Id.*

³⁷ *The Guantanamo Trials: Ali Hamza Ahmad Suliman al-Bahlul*, HUM. RTS. WATCH, Dec. 2, 2008, <http://www.hrw.org/en/news/2008/12/02/ali-hamza-ahmad-suliman-al-bahlul>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Press Release, U.S. Dep't of Def., Detainee Convicted of Terrorism Charge at Military Commission Trial (Nov. 3, 2008), <http://www.defense.gov/releases/release.aspx?releaseid=12329>.

⁴¹ *The Guantanamo Trials: Ali Hamza Ahmad Suliman al-Bahlul*, *supra* note 37.

material support for terrorism.⁴² Al-Qosi was the first conviction by a military commission under the Obama administration.⁴³ The military commission panel of officers sentenced al-Qosi to fourteen years confinement.⁴⁴ The details of the plea agreement, however, have remained secret and it is unclear how much confinement time al-Qosi will in fact serve.

III. TERRORIST DEFENDANTS RECENTLY TRIED IN CIVILIAN COURT

In the years prior to the War on Terror, there were elements of terrorism that had begun to surface, including the initial World Trade Center bombing. In order to obtain a better understanding of terrorism in federal civilian trials, it is helpful to begin with the trial that led the way for the many subsequent terrorism cases. In March 1994, a federal jury convicted four men responsible for the initial attack on the World Trade Center in 1993 that killed six people.⁴⁵ “The defendants were convicted on a wide range of charges, from conspiracy to destruction of Government property to using a destructive device resulting in death.”⁴⁶ Each man was sentenced to 240 years in prison with no possibility of parole.⁴⁷ Because the law did not allow for life sentences for any of the crimes of which the four men were charged, the judge employed actuarial tables in order to calculate the life expectancies of each of the six victims amounting to 180 years.⁴⁸ The two other counts, assault on a federal officer, provided for a mandatory sentence of thirty years each.⁴⁹

Since the start of the War on Terror, there have not been many civilian trials for alleged terrorists. There are two recent cases that should be considered when comparing military commissions with civilian trials. Most Americans likely have not heard of Aafia Siddiqui who was convicted in February 2010. More

⁴² *Guantanamo Detainee Ibrahim Ahmed Mahmoud al Qosi Pleads Guilty*, WASH. POST, July 8, 2010.

⁴³ *Ibrahim Ahmed Mahmoud al-Qosi*, HUM. RTS. FIRST, <http://www.humanrightsfirst.org/our-work/law-and-security/military-commissions/cases/ibrahim-ahmed-mahmoud-al-qosi/> (last visited Jan. 31, 2011).

⁴⁴ *Id.*

⁴⁵ Richard Bernstein, *Explosion at the Twin Towers; 4 Are Convicted in Bombing at the World Trade Center that Killed 6, Stunned U.S.*, N.Y. TIMES, Mar. 5, 1994, at 11.

⁴⁶ *Id.*

⁴⁷ Richard Bernstein, *Trade Center Bombers Get Prison Terms of 240 Years*, N.Y. TIMES, May 25, 1994, at A1.

⁴⁸ *Id.*

⁴⁹ *Id.*

publicized, though, was the trial of Ahmed Khalfan Ghailani, which occurred this past year in New York City.

In February 2010, Aafia Siddiqui, a Pakistani national, was convicted by a jury in the Southern District of New York “on charges related to the attempted murder of U.S. soldiers and FBI agents in Afghanistan.”⁵⁰ Siddiqui was captured in Afghanistan after attempting to kill soldiers and FBI agents who had arrived to question her.⁵¹ Instead of declaring Siddiqui an enemy combatant, the Bush administration opted to try the MIT-educated neurobiologist, previously married to Khalid Sheikh Mohammed, in federal civilian court.⁵² “Intelligence officials believe that Siddiqui, though never formally a member of Al Qaeda, helped to educate its members about the United States, and served as a conduit between potential terrorist cells.”⁵³ After the jury found Siddiqui guilty of seven charges, including two counts of attempted murder, a federal judge sentenced her to eighty-six years in prison.⁵⁴

Ahmed Khalfan Ghailani is the first Guantanamo detainee to be tried in federal civilian court. Ghailani was charged with “two deadly truck bombings outside U.S. embassies in Tanzania and Kenya that killed 224 people and injured thousands more.”⁵⁵ While the defense asserted that Ghailani was deceived into purchasing material to be used in the bombing, the prosecutors argued, “Ghailani, who later became a bodyguard for Osama bin Laden, was a full-fledged member of the conspiracy.”⁵⁶ In November 2010, the jury convicted Ghailani of one count of conspiracy in the 1998 bombing; however, the jury acquitted him on the other 284 counts.⁵⁷ The verdict resulted in extreme criticism of the Obama administration’s decision to try Ghailani

⁵⁰ Marc Ambinder, *A Terrorist Tried In Federal Court: The Case Of Aafia Siddiqui*, ATLANTIC, Feb. 11, 2010, available at <http://www.theatlantic.com/politics/archive/2010/02/a-terrorist-tried-in-federal-court-the-case-of-aafia-siddiqui/35793/>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Chad Bray, *Judge Gives Pakistani Woman 86 Years in Attack*, WALL ST. J., Sept. 23, 2010.

⁵⁵ Chad Bray & Evan Perez, *Man Convicted in ‘98 Attacks: Acquittal on Most Charges Stirs Debate About Terror Trials in Civilian Courts*, WALL ST. J., Nov. 18, 2010.

⁵⁶ Chad Bray, *Embassy Bomber Gets Life in Prison*, WALL ST. J., Jan. 26, 2011.

⁵⁷ Evan Perez, *Civilian Terror Trial Criticized, but Tribunals Also Face Hurdles*, WALL ST. J., Nov. 19, 2010.

in a federal civilian court.

The Ghailani case has largely been considered a test of the Obama administration's plan to try some of the alleged terrorists in federal civilian courts instead of military commissions. The trial proved more difficult for prosecutors due to stricter evidentiary standards.⁵⁸ The judge barred the testimony of a key witness because the identity of the witness was uncovered through the use of "harsh interrogation techniques" employed by the CIA.⁵⁹

Two months later, on January 25, 2011, U.S. District Judge Lewis Kaplan sentenced Ghailani to life in prison.⁶⁰ Judge Kaplan noted: "The very purpose of the crime was to create terror by causing death and destruction on a scale hard to imagine in 1998 when it occurred."⁶¹ As part of the sentence, Ghailani was ordered to pay \$33 million in restitution.⁶² Four other men who were tried in 2001 in federal civilian court in connection with the same embassy bombings were all convicted and received life sentences as well.⁶³

On the same day that Ghailani was sentenced to life in prison, a federal judge announced that Umar Farouk Abdulmutallab, a Nigerian man charged with attempting to ignite a bomb on Northwest Airlines flight 253 on Christmas Day 2009, will be tried in federal court beginning on October 3 of this year.⁶⁴ Abdulmutallab is charged with attempting to use a weapon of mass destruction and conspiring with others to kill 281 passengers and eleven crew members.⁶⁵ If convicted, Abdulmutallab faces a potential punishment of life in prison.⁶⁶

Although the Obama administration initially planned to try Khalid Sheikh Mohammed and four others allegedly involved in the planning of the September 11 attacks in the same New York City courthouse, pressure from lawmakers and New York City residents has suspended such plans. Official plans have not been released as to the fate of these individuals within the American

⁵⁸ Bray & Perez, *supra* note 55.

⁵⁹ *Id.*

⁶⁰ Bray, *supra* note 56.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Trial Date Set for Alleged Christmas Day Airline Bomber*, FOXNEWS.COM, Jan. 25, 2011, <http://www.foxnews.com/us/2011/01/25/alleged-christmas-day-bomber-face-court/>.

⁶⁵ *Id.*

⁶⁶ *Id.*

judicial system, but officials predict that a military tribunal commission is likely.⁶⁷

IV. IS THERE ACTUALLY A MORE EFFECTIVE MEANS OF PROSECUTING ALLEGED TERRORISTS?

It is clear from the cases examined that individuals tried in the civilian system generally receive much longer sentences than those who face military tribunal commissions. While the civilian system relies on a jury to convict and a federal judge to sentence, the military commissions often utilize plea deals, which limit the jury to a previously agreed term of confinement, although guaranteeing a conviction. While military commissions may result in a higher rate of conviction due to the use of pleas, civilian trials have also experienced success. Initially, the 284 acquittals in Ghailani's case did not comfort those opposed to civilian trials for terrorists. However, now that he has been sentenced to life in prison, it is possible that the support for civilian trials could increase some in the coming weeks.

Supporters of federal trials criticize military commissions mainly over the rights afforded to the detainees, the lack of clearly established procedures of the commissions that are present within both the Article III courts⁶⁸ and the military courts-martial system and the lack of experience of military lawyers in trying terrorism cases.⁶⁹ Those who support military commissions believe that they offer better, and less costly, security, the ability to better maintain classified information, and a higher conviction rate due to more liberal evidentiary rules.⁷⁰ In addition, military commission supporters do not believe that alleged terrorists should receive the rights and protections guaranteed by the U.S. Constitution.⁷¹

It could be sometime before it is clear which approach is more successful—if there is one victor at all. It all depends on how society measures the success of terrorist trials. If success is measured by the conviction rate, the military commissions have the higher rate of conviction. If the sentence is the standard for

⁶⁷ Perez, *supra* note 57.

⁶⁸ U.S. CONST. art. III (Article III courts are federal courts that are established under the federal constitution. The U.S. Supreme Court, the U.S. Court of Appeals, and the U.S. District Courts are Article III courts.).

⁶⁹ See generally Mark Hamblett, *Evolution of Military Commissions Clouds Debate Over 9/11 Trials*, N.Y.L.J. (2010).

⁷⁰ *Id.*

⁷¹ *Id.*

success, terrorist defendants are sentenced to much longer confinement terms in civilian court. It is clear that there is no method that undoubtedly exceeds the other, but that the two systems are just different. Perhaps the most successful approach may be to continue to use both federal civilian courts and military tribunal commissions. Regardless, if the Obama administration continues to use both systems, it is imperative that guidelines be developed and consistently used to determine the judicial setting, either military or civilian, for alleged terrorist trials.