



9/11 suspect finally goes to trial in military system

By Alan Gomez, USA TODAY

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When alleged 9/11 mastermind Khalid Sheikh Mohammed walks into his first court appearance Thursday in Guantanamo Bay, Cuba, it will launch the most high-profile test of a military court system that has been created, destroyed and rebuilt through nearly seven years of wrangling among the White House, Congress and the Supreme Court.

Mohammed's long-awaited arraignment could begin to answer fundamental questions about the United States' handling of justice in the wake of the Sept. 11, 2001, terrorist attacks: Will the military commission system, which President Bush created to prosecute accused terrorists, ever hold one of them accountable for the tragedy? Or will the federal government's efforts to secure guilty verdicts crumble amid mounting concerns about the evidence, fairness to the defendants and treatment of the accused while in custody? And if guilty verdicts ultimately are rendered for Mohammed, four alleged co-conspirators and about 75 other Gitmo detainees facing prosecution, will those verdicts be widely viewed as valid?

The answers could help determine whether the alternative justice system launched two months after the 9/11 attacks will prosecute alleged terrorists for years or even decades to come. Nearly seven years after the attacks — and after several revisions spurred by the Supreme Court and made by Congress — the system has not taken anyone to trial.

Instead, it has been mired in criticism over whether it should allow the use of evidence obtained through harsh interrogation techniques — including waterboarding, which creates the sensation of drowning — for permitting evidence that can be withheld from defendants, and for holding closed court hearings without defendants or their lawyers.

The Senate Judiciary Committee will meet Wednesday to scrutinize how the United States prosecutes alleged terrorists and to debate whether the system needs to be changed again.

Critics and even several prominent onetime supporters of the system now say it is so deficient legally — and so flawed in the eyes of human rights groups and foreign governments such as the United Kingdom — that it should be abolished. If that happens, the United States will have to decide whether to hold the prisoners indefinitely without granting them trials or find another way to prosecute them.

Military and legal specialists who study the commissions suggest four alternatives to the system at Guantanamo: using U.S. federal courts to hold trials, using the military courts-martial system, creating a new national security court or simply holding detainees until the undefined, open-ended "war on terror" ends. The analysts say each alternative highlights a perceived flaw in the military commission system

that must be fixed for it to be credible.

"It's dishonest to go through the charade and pretend we're doing something legitimate," says John Hutson, the dean of the Franklin Pierce Law Center in New Hampshire and a former Navy judge advocate who initially was an "ardent" supporter of the commissions. He believes the detainees deserve full trials in which they can see all the evidence against them.

Military officials insist the commissions are the best way to balance the need for fair trials with the obligation to protect Americans from people they say are eager to kill U.S. soldiers and civilians. Even though terrorists don't abide by traditional rules of war, military officials say they get the same rights as traditional prisoners of war.

"These courts, as constituted by Congress, meet and exceed all international standards," says retired Army major general John Altenburg, who oversaw the commissions from the Pentagon from 2004 to 2006. "We're too hung up on television programs and criminal justice as we know it in our own country. These people aren't entitled to that level of due process."

Even as Mohammed's case moves forward, the commission system could be derailed.

The Supreme Court, which has ruled against the Bush administration's detention policies three times since 2004, likely will rule soon on the latest challenge, which tests whether detainees have the right to protest their detention in U.S. courts. The court's decision could further delay hearings and force more changes.

All three presidential candidates have vowed to close the Guantanamo prison, although none has provided details on a justice system or holding site that they believe should replace it.

What's left is a cloud of uncertainty looming over the commissions and the prison that Amnesty International has dubbed the "gulag of our times."

"If we had gotten some of these cases to trial, people would have seen what a fabulous system of justice the military system is," says Andrew McCarthy, who led the Justice Department's prosecution in the cases involving the 1993 World Trade Center bombing and consulted for the Pentagon on the military commissions. "Now you've got a perception problem, which I don't know that you can cure at this point."

Questions about rules of evidence

One alternative to the military commissions system is the federal courts, which would let detainees see the evidence against them.

American courts generally require that defendants have access to all the evidence or witnesses who will be used at trial. Yet the Military Commissions Act passed by Congress in 2006 lets prosecutors introduce evidence against a detainee without sharing it if a judge believes doing so would compromise national security.

Proponents of the regular U.S. courts say federal judges have shown they can handle sensitive issues.

Federal prosecutors have convicted Zacarias Moussaoui for his role in planning and training for the Sept. 11 attacks; Omar Abdel-Rahman, the blind Egyptian cleric convicted of assisting in a plot to bomb New York City landmarks; and others.

Moussaoui pleaded guilty in 2005 to terrorism conspiracy charges. A jury convicted Abdel-Rahman in 1995 of seditious conspiracy and other charges. Both are serving life sentences.

"The judges were able to come up with some provisions to deal with national security concerns," says Stacy Sullivan, an adviser on counterterrorism for Human Rights Watch who has observed hearings in Guantanamo.

But Richard Samp, chief counsel for the **Washington Legal Foundation**, a conservative think tank, believes the evidence that federal judges allowed to become public during the trials hurt the war on terrorism.

He says the cases tried in federal court — especially Moussaoui's — provided al-Qaeda with information about U.S. intelligence-gathering techniques.

Some defense attorneys believe the commission system is weighted far too heavily in favor of the prosecution and cloaks mistreatment and neglect of detainees.

Air Force Maj. David Frakt has asked that a psychologist examine Mohammed Jawad, a detainee he is defending who is charged with throwing a grenade at U.S. troops in Afghanistan in 2002.

It wasn't until last week, Frakt says, that he was informed Jawad tried to commit suicide by hanging himself in his cell more than four years ago. He says the failure to disclose that speaks volumes about detainees' ability to get a fair trial.

Altenburg, who oversaw the commissions, says there has been no coordinated effort to withhold information. He says delays result from trying to prosecute alleged war criminals during a war, forcing intelligence officials to hand over evidence that is being used in the battlefield.

Seeking international trust

Some analysts ask why the military didn't use its courts-martial system. Hutson, the Franklin Pierce Law Center dean, says the proven, well-respected process could protect national security while ensuring fair trials.

Like the federal courts, this option would require that defendants and their lawyers see all the evidence against them.

Yet members of the military would remain as judge and jury, which would do little to alleviate the chorus of opposition against Guantanamo, says McCarthy, the former federal prosecutor.

McCarthy says there should be a clean break from the military-judge system to help the United States regain international trust. "The appearance of integrity is important in this war," he says. "Unless we have a system that has and exudes integrity, we're hurting our security."

He favors a third option for handling detainees: a new court that largely follows the military commission model but inserts a federal judge atop the proceedings.

A national security court could combine the neutrality of federal judges with the security safeguards in the military commissions.

Altenburg calls such a terrorism court a "reasonable alternative" but says there's no point in setting up an entirely new system now. "They're going to have the same hitches that the military suffered" when establishing the commissions, he says.

For some, no prospect of a trial

A fourth option is to treat the detainees as the United States has treated past prisoners of war: hold them until the government's "war on terror" is over — whenever that may be.

Timothy Lynch, director of the Cato Institute's Project on Criminal Justice, supports military commissions. But if enough pressure builds to abandon them, he thinks America should detain the most dangerous detainees until the war ends — a political determination, he says, to be made by a future president in consultation with Congress.

About 120 of the 270 detainees in Guantanamo are being held without the prospect of a trial, according to the Pentagon.

"In our past wars, we've held many prisoners in POW-style camps. We can do the same thing in this war," Lynch says.

Human rights activists believe such indefinite detention is inhumane, because it is unclear how or when the war on terror will end.

"Is it the war in Afghanistan? Is it the war in Iraq? It's an indefinite war. A war with no time frames," says Jamil Dakwar, director of the Human Rights Program for the American Civil Liberties Union. "All of this is going to create a humanitarian crisis and will only increase the problems the government is facing in the future."

The alternatives are beginning to receive more scrutiny on Capitol Hill and among military specialists. Yet no quick consensus is emerging. The fate of the Guantanamo detainees likely will be decided by the next president.

"There is a desire on the part of some defense counsel to delay proceedings until the next administration, in hopes that fairer procedures will be put into place," says Frakt, the defense attorney. "At the same time, every day that we delay is another day that our clients spend in misery in Guantanamo."