

## Some Key Facts on Military Commissions v. Federal Courts

### In the current incarnation of the Military Commissions:

- ☑ **Crimes triable:** Defendants in military commissions, who were tried ex-post facto for conduct such as “material support for terrorism” have had their convictions overturned because these charges did not constitute war crimes when the acts were allegedly committed. If these terrorism suspects were tried in federal court, these charges would be available. In fact, in 2014 Osama bin Laden’s son-in-law, Suleiman Abu Ghaith, was found guilty in federal court of providing material support for terrorism<sup>1</sup> and later sentenced to life in prison for this and other crimes.
- ☑ **Evidence obtained through torture:** Despite updated military commission rules designed to prohibit the introduction of evidence obtained through torture or cruel, inhuman, or degrading treatment, other rules could allow military commissions to consider such evidence, which is never permitted in federal court trials. For example:
  - Coerced testimony obtained at the point of capture is permitted, so long as the judge finds it reliable and probative;
  - Overbroad classified information protection rules make it nearly impossible to verify the source of information being used in military commission trials, including whether such information was obtained through abusive interrogation methods;
  - Rules permitting the use of hearsay in situations not permitted by federal courts could allow evidence obtained through abusive interrogation methods to be admitted.
- ☑ **Hearsay:** Hearsay evidence is admissible in military commissions in situations not permitted by federal courts, and the defense has limited opportunities to challenge its source. The result is that the defendant is denied the right to confront the witnesses against him.
- ☑ **Mitigating evidence:** In a death penalty case before a military commission, although the defense is entitled to produce mitigating evidence in the sentencing phase of the trial, defense counsel may be denied access to much of that evidence—particularly evidence about the detainee’s treatment in U.S. custody—due to classification of evidence or the difficulty of obtaining access to witnesses. Severe restrictions on the transmission of classified evidence—including statements from a defendant to his lawyer—make a fair death penalty case in a military commission nearly impossible. These issues do not exist in federal court, where court rules ensure that fair trial standards are properly maintained, in accordance with the Constitution.
- ☑ **Jurisdictional restrictions:** Jurisdiction in military commissions is defined too broadly. It is not compatible with international law because it applies to juveniles and those not engaged in hostilities. Federal courts try clearly defined offenses against juveniles, which accord with international norms. Further, because federal courts are not limited to trying war crimes, offenses are triable whether or not they were committed in the context of hostilities.
- ☑ **Access to witnesses:** Unlike in federal courts, the defense in military commissions does not have the same access to witnesses or other evidence as the prosecution. Though the defense has some ability to call witnesses in military commissions, unlike in federal courts, there is no right to subpoena witnesses to testify for the defense. In military commissions, the judge is authorized to compel witnesses to appear, but need not do so.

<sup>1</sup> <http://www.humanrightsfirst.org/press-release/abu-ghaith-guilty-verdict-demonstrates-effectiveness-federal-courts>.

- ☑ **Resources:** Military commission defense counsels frequently stat that they have insufficient resources and are otherwise prevented from fully advocating on behalf of their clients. An advisory opinion from the National Association for Criminal Defense Lawyers stated that military commissions' defense counsel would violate their legal ethics requirements if they followed the guidelines of a recent Guantanamo protective order requiring disclosure of confidential attorney-client communications to Department of Defense personnel.<sup>2</sup> Conversely, federal court rules require the highest compliance with legal ethical standards.
- ☑ **Judge and jury:** The U.S. military handpicks the judge and pool of potential panel members (the military commission equivalent of jurors), all of whom are members of the U.S. military. In a federal court, by contrast, the judge is a life-tenured civilian and the jury is drawn broadly from the civilian population.
- ☑ **Speedy trial:** Unlike in federal courts, there is no right to a speedy military commission trial, despite the serious difficulties in these cases of obtaining accurate evidence many years after the crimes were allegedly committed. The lack of this right is particularly notable in regards to the case against the five accused plotters of the 9/11 attacks; this case has been in pre-trial hearings since May 2012, with no trial start date in sight.
- ☑ **Trial of U.S. citizens:** While both Americans and non-citizens alike are tried for crimes in federal courts, military commissions are only used for aliens and therefore discriminate based on citizenship. The fact that the United States refuses to use military commissions for U.S. citizens is a tacit acknowledgment that they are sub-standard. U.S. federal courts could ultimately hold the entire military commission system unconstitutional on this ground.
- ☑ **Temporal restrictions:** Judicial precedents from World War II only uphold the authority of military officers to convene law of war commissions in the theater of their command and to try violations committed after the declaration of war and before the conclusion of a final peace treaty. It is thus not clear that any pre-9/11 conduct can validly be tried by the commissions. This has significant implications for the case against the alleged mastermind of the 2000 USS *Cole* bombing, which is currently in pre-trial hearings in the Guantanamo military commissions.<sup>3</sup> Pre-9/11 terrorism offenses can and have been successfully tried in federal courts, where such temporal jurisdiction issues do not arise.
- ☑ **Interference with proceedings:** Intrusions from federal authorities have caused delays and significant ethical issues at military commission proceedings. An "original classification authority" (thought to be the CIA) was found to be secretly monitoring proceedings, including operating a censorship system in court and hiding microphones in smoke detectors in attorney-client meeting rooms.<sup>4</sup> The FBI was found to have been investigating defense attorneys in the 9/11 case, requiring proceedings to be halted, while conflict of interest issues are resolved.<sup>5</sup> Federal courts have clear rules, based on decades of precedent, to handle these issues. Military commission rules are unclear, resulting in confusion and delays, while they are each litigated in court hearings.

All of these issues combine to undermine the credibility of the Guantanamo military commissions.

<sup>2</sup> <https://www.nacdl.org/gtmoethicsopinion/>.

<sup>3</sup> <http://www.humanrightsfirst.org/press-release/appeals-court-leaves-al-nashiri-languish-military-commissions-system>.

<sup>4</sup> <http://www.reuters.com/article/us-usa-guantanamo-idUSBRE90U0Z720130131>; [https://www.washingtonpost.com/world/national-security/2013/02/12/812c7662-7552-11e2-95e4-6148e45d7adb\\_story.html](https://www.washingtonpost.com/world/national-security/2013/02/12/812c7662-7552-11e2-95e4-6148e45d7adb_story.html).

<sup>5</sup> [http://www.huffingtonpost.com/2014/04/21/guantanamo-fbi-ksm\\_n\\_5187728.html](http://www.huffingtonpost.com/2014/04/21/guantanamo-fbi-ksm_n_5187728.html).