

Trying Terrorists in Civilian Court: The Case of Sulaiman
Abu Ghaith

Sulaiman Abu Ghaith, former spokesman for (and son-in-law of) Osama Bin Laden, was taken into United States custody late in February 2013. It is believed that Abu Ghaith, a Kuwaiti, spent many of the years since 9/11 in Iran, under a type of house arrest. He reappeared when he was caught entering Turkey on a fake passport. Turkey had initiated deportation proceedings at the time Abu Ghaith was apprehended in Jordan (Dewey, 2013). Rather than shipping Abu Ghaith immediately to Guantanamo Bay, where detainees from the "War on Terror" are typically incarcerated, U.S. law enforcement officials transported the suspected terrorist to New York, where he was charged and arraigned in federal court. Abu Ghaith entered a "not guilty" plea to charges of "conspiring to kill Americans" (Santora & Rashbaum, 2013). Trying Abu Ghaith in a civilian criminal court is a radical departure from the manner in which terrorism has been addressed in the post-9/11 period, during which time suspected terrorists, and other detainees from the War on Terror, have been held as military prisoners. A civilian trial offers several advantages—for the defendant, as well as for the Obama administration, which has had difficulty moving away from the Guantanamo

Bay/military tribunal paradigm since the President pledged to shut down the Guantanamo detention facility as a platform of his 2008 campaign.

Addressing the crime of terrorism in a framework of war itself represents one of the most significant policy shifts the United States made with respect to post-9/11 national security matters. In some cases, albeit on a selective basis, the U.S. continues to treat terrorism as a crime within a law enforcement paradigm—as it did prior to the 9/11 attacks. For the most part, however, the nation has adhered to a military approach toward the crime of terrorism in the dozen or so years since the 2001 attacks; an approach that uses the language and logic of the global “War on Terror” declared by the Bush administration, as well as Congress, in the wake of 9/11 (Hafetz, 2011).

Prior to 9/11, federal criminal prosecution—or federal immigration law and regulations under certain circumstances—was the sole method available to U.S. law enforcement for the long-term detention of terrorist suspects. Since 2001, however, the country has set up an alternative process of detention and prosecution via military commission (Hafetz, 2011). Guantanamo Bay is the most notorious of the sites associated with the military detention and prosecution of terrorism suspects; however,

the system is not limited to any particular location or facility and has been used at Bagram Air Base in Afghanistan as well as at secret "black sites" maintained by the CIA for the detention and interrogation of terror suspects (Hafetz, 2011).

The system established under the military commission differs significantly from the civilian system of criminal justice in the United States. Defendants charged in the military paradigm are afforded fewer procedural safeguards, as well as basic mechanisms of due process. In addition, the government, sitting in the prosecutorial seat, enjoys a much lower evidentiary burden than it would in civilian court. Secrecy is tolerated; what constitutes probable cause, when it is even called into question, is considerably expanded; and coerced testimony, due to lack of constraint on interrogations and interrogation methods, is not uncommon. Perhaps the most significant differences between the military and civilian systems are the extreme limits on judicial review and the indefinite length of pre-trial confinement (Walton, 2010).

In contrast to other suspected Qaeda terrorists, Abu Ghaith will presumably receive the same type of trial that any civilian, who has been charged criminally, would receive under federal law. Given the amount of scrutiny

that Abu Ghaith's trial is likely to draw—not simply because of who he is but for what this departure from the military commission proceedings represents—the defendant may actually receive a “more fair” trial than an average citizen, as all points of procedure and due process will likely be checked and rechecked as the case progresses.

Abu Ghaith will benefit from these differences as a defendant. Although his incarceration in a federal holding facility in New York City may be less pleasant than it would be at Guantanamo, it will certainly be less indefinite. If he is found not guilty, the defendant will be allowed to go free without chance of further investigation or prosecution because jeopardy will have been attached.

In the event he is found guilty, Abu Ghaith could still face the death penalty under the Antiterrorism and Effective Death Penalty Act of 1996, which was passed in the wake of the 1993 World Trade Center and 1995 Oklahoma City bombings (“Antiterrorism,” 1996). However, his death penalty verdict would be subject to appeal and all the mechanisms for judicial review available to those convicted under the civilian criminal justice system.

The defendant will also face some challenges in civilian court that may, in fact, be more unpleasant than

the circumstances in which he would find himself under the military system. For one, it is likely that a jury of Abu Ghaith's "peers" will not be empanelled. So, regardless of the protections this may afford a typical citizen, it may not be of benefit to Abu Ghaith. Under the military system, no civilian jury is organized. It will also be difficult to find impartial jurors in New York City, at a courthouse just a few kilometers from Ground Zero. Abu Ghaith, if he takes his case all the way to trial, will likely have to face survivors and the families of those who died in attacks. He would have been insulated from such personal stories at Guantanamo.

The party receiving the greatest benefit from Abu Ghaith's civilian trial may actually be President Obama. Andy McCarthy, a former federal prosecutor for the Southern District of New York—where Abu Ghaith was arraigned—believes this to be the case (Meyers & Walter, 2013). A senior fellow at the National Review Institute and author of *Spring Fever: The Illusion of Islamic Democracy*, characterized the decision to try Abu Ghaith in civilian court as alternatively shrewd or sneaky. According to McCarthy,

The Obama administration... whisked [Abu Ghaith] to to New York City, which... [undermines] the commission

system... [E]nemy combatants... in Guantanamo Bay will be able to claim that it's unfair and unlawful to give them a lesser form of justice. (Meyers & Walter, 2013)

McCarthy's point is valid. The Obama administration has been trying to make good on its promise to close Guantanamo since the President took office in 2009. However, pressure from both sides of the aisle in Congress, as well as from military leadership and intelligence agencies, have thus far prevented the de-commissioning of the now-normalized military tribunal system. Abu Ghaith's trial may be the legal chink in Guantanamo's armor that the President needs to shut it down.

Ultimately though, for the defendant, a civilian trial may offer little comfort. While Abu Ghaith is entitled to the substantial legal and due process benefits that the civilian criminal justice system has to offer when compared to that of the military commission's tribunal system, it may do him little good in the end. All that is really assured is that, whatever the outcome, the defendant will have been given the same type of trial as a U.S. citizen accused of the same crime, with the same type of media coverage, would have received.

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