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## **Court Trials Come Slowly for Detainees in Terrorism Cases**

Critics say justice takes back seat to security concerns as a majority of prisoners are still held years after being captured

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WASHINGTON - As the death penalty trial of Zacarias Moussaoui nears a conclusion, the biggest immediate question looming over the proceedings is whether the volatile confessed terrorist is sentenced to death.

But in the long run, there's a more significant question: Whether the government, more than four years after the Sept. 11, 2001, attacks, is using the tools of the U.S. legal system to deliver justice to the hundreds of prisoners it has captured in the war on terror that it is now confining in the United States, at Guantanamo Bay, Cuba, and at undisclosed locations around the world.

There's little sign that it is.

Key al-Qaida leaders, including Sept. 11 attack mastermind Khalid Sheikh Mohammed, remain in secret overseas prisons with no indication that they'll be tried any time soon, if ever.

Despite promises of swift adjudications, only 10 of nearly 500 prisoners at the Guantanamo Bay naval base have begun trials before specially designed military commissions.

None of the commission trials are complete, and the commission system is itself the subject of a challenge before the Supreme Court.

The Bush administration points to a number of successful terror prosecutions in northern Virginia, Buffalo, Portland and other locations. But targets in those domestic cases were minor figures compared to many of those in custody, such as Mohammed.

"I think their first concern is security," said former U.S. Sen. Bob Kerrey of Nebraska, a 9/11 Commission member. "I don't think they're worried about justice, or, I think justice is a significantly lower priority." Kerrey said the concern is understandable but needlessly sacrifices U.S. standing internationally. "I think we've lost a lot in the court of public opinion" overseas, he said.

Kerrey and fellow commission member Tim Roemer, a former Indiana congressman, said they think the United States should put Mohammed on trial.

"If the courts and the criminal justice system can handle a figure like Moussaoui, who's on the margins (of the Sept. 11 plot), it should be able to work with somebody more compelling like KSM," Roemer said. "I don't understand why they don't try the person who originated the plot."

Roemer questioned how much intelligence value Mohammed still has, especially since it probably would take at least another year to prepare for a trial.

Justice Department spokesman Brian Roehrkasse declined to comment on Mohammed's status.

But Justice officials acknowledged that the government's anti-terror strategy involves removing enemy combatants from the battlefield and extracting all possible intelligence, and only then worrying about trying them.

"The U.S. government must possess the flexibility to use every single tool necessary to prevent acts of terrorism in our homeland," Roehrkasse said.

Critics charge that the purported need for flexibility masks the lack of a coherent strategy except a perceived attempt to preserve and expand presidential power.

"They want to maintain all options without worrying about whether the exercise of those options will be perceived as consistent with international and domestic law," said Douglass Cassel, director of the Center for Civil and Human Rights at the University of Notre Dame Law School.

Indeed, some terror prosecutions appear to have bent or broken the law.

In the Moussaoui case last month, a government lawyer improperly coached witnesses, prompting the judge to temporarily halt the trial and limit some testimony.

Also last month, a former federal prosecutor, Richard Convertino, was charged with obstruction of justice for allegedly concealing evidence helpful to the defense in the so-called Detroit sleeper cell case in 2003, the first major terror trial after the Sept. 11 attacks.

There also is widespread concern among human rights advocates and lawyers for detainees that key al-Qaida leaders like Mohammed may have been tortured, thus tainting any evidence they might supply.

Kerrey said that should not be allowed to impede a trial of Mohammed. "There's an awful lot of reliable evidence out there in the open," he said.

But if evidence from Mohammed was obtained under torture, it may figure in the cases against Jose Padilla and Ali Saleh Kahlah Marri, both of whom were arrested in Illinois and imprisoned for long stretches as enemy combatants in the United States.

A one-time Chicago gang member, Padilla was picked up at O'Hare International Airport in May 2002 and designated an enemy combatant the following month.

Padilla at first was accused of planning to set off a radiologic "dirty bomb."

When he finally was criminally charged with terrorism offenses last November, however, the counts against him had nothing to do with a dirty bomb.

Those original dirty bomb accusations against Padilla involved his contacts in Afghanistan with Mohammed, raising the possibility that evidence was gleaned through torture. The current charges against Padilla do not include mention of Mohammed.

A senior Justice Department official declined to address the specifics of the criminal charges against Padilla, but said "obviously, it's a cleaner case in terms of discovery" than a case involving Mohammed. Padilla's trial is slated for September in Miami.

Marri, a citizen of Qatar and Saudi Arabia, was arrested in Peoria in December 2001 and has been held as an enemy combatant since June 2003. Because he's not a U.S. citizen, Marri has had a harder time than Padilla getting into a court to contest his detention.

Government lawyers have sought to use secret information to continue to hold Marri without trial. But they were rebuffed earlier this year by a federal magistrate who told them that "it just strikes me as a part of basic fundamental fairness, that if somebody is going to be held in jail under these circumstances and these conditions ... he should have everything that's going to be relied on."

An affidavit subsequently unsealed by the government revealed that Marri was allegedly sent to the United States as an al-Qaida sleeper agent by Mohammed.

Marri's lawyers immediately questioned if information about their client's contact with Mohammed was obtained through torture. Marri is the only remaining enemy combatant held in the United States.

About 490 other terror war prisoners who were detained overseas are held at Guantanamo Bay and could be subject to trial by military commissions, which have been created specially to deal with alleged terrorists held by U.S. armed forces.

The commission process provides "a full and fair trial" and numerous safeguards, including a presumption of innocence, a right to remain silent and a requirement of proof beyond a reasonable doubt, according to a Defense Department fact sheet.

The military typically uses courts-martial to try cases, but Air Force Brig. Gen. Thomas Hemingway said in a statement supplied by a Defense Department spokeswoman that enemy combatant cases cannot meet traditional military law norms.

"Chain of custody and other evidentiary challenges in battlefield conditions make the court-martial system and its Military Rules of Evidence impracticable," said Hemingway, legal adviser to the military commissions. In addition, Hemingway said, the military does not want to reveal classified information to defendants as might be required in a court martial for fear that it would "potentially endanger the lives of members of the U.S. armed forces engaged in the global war on terrorism."

Opponents say commission trials are inherently unfair because the executive branch picks all commission members and makes all the rules, with defendants allowed only limited rights to appeal decisions to a federal court.

Neal Katyal is a Washington lawyer who represents Salim Hamdan, a one-time driver for Osama bin Laden, and one of 10 Guantanamo detainees slated for a commission trial. He said that if the government wants to do away with a right as fundamental as confronting the accused with the evidence against him, it should get permission from Congress and the president.

"It cannot be done on the say-so of a prosecuting official like Gen. Hemingway," said Katyal, who last month argued Hamdan's challenge to the use of commissions before the Supreme Court.

Although Katyal believes courts-martial could adequately dispense justice to enemy combatants, others, like Kerrey, believe their cases belong in civilian courts.

Kerrey said convictions of such high-ranking terrorists as Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing, showed that civilian courts could handle sensitive terror prosecutions, such as one of Mohammed.

"Why don't we bring him to New York City and charge him, like Ramzi Yousef?" Kerrey asked.