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It's High Time the 9/11 Five Were Brought to Trial

BY [GORDON MEHLER](#) AND [PHILIP HILDER](#) 9/8/15 AT 2:19 PM

As we approach the 14th anniversary of 9/11, we can marvel at the rebuilding of Ground Zero and the opening of the Freedom Tower and a moving memorial and museum. We can be comforted knowing that Osama bin Laden was taken out and that American soil has been spared further mass assaults.

And yet, a critical element of closure is missing knowing that the five defendants accused of orchestrating that historic crime, including its alleged mastermind, [Khalid Sheikh Mohammed](#) (KSM), have not yet been brought to trial.

This long delay continues to harm 9/11 victims and their families, who deserve a judicial resolution of the case. It also undermines the imperative of due process for even the most hated of defendants. A trial date must finally be set and honored.

Having both served as legal observers at the American naval base at Guantanamo Bay, Cuba, we realize there have been time-consuming pretrial issues to resolve, from the handling of sensitive intelligence to the fallout from

coercive interrogations at secret CIA prisons. But there is a more fundamental reason for the hold-up.

The 9/11 prosecution is a casualty of the long-running tug-of-war between two competing trial systems, civilian and military, as to which is the better venue for terrorism cases. Had those supporting the civilian side prevailed, a trial of the KSM and his co-conspirators would almost surely have been over by now.

Instead, Congress, in considering its annual defense authorization bills, has prohibited funding for the transfer of Guantanamo detainees to facilities on the U.S. mainland. These alien detainees, including the 9/11 Five, will be tried by military commission, a tribunal with more flexible rules of evidence and criminal procedure than civilian courts or regular courts-martial.

Post 9/11 military commissions have been controversial since they were first unveiled by the Bush administration in late 2001. They've been criticized over detainee abuse, and the laws that apply to them have been revised several times in attempts to provide the basics of a fair trial. Commissions have been touted as the preferred way to speedily prosecute suspected alien terrorists captured abroad when, in fact, they have been painfully slow.

In a strict sense, the Sixth Amendment right to a speedy trial probably does not apply to the 9/11 Five, though the rules of several contemporary war crimes tribunals have included such a right. But the fairness concerns underlying this constitutional bulwark remain central to the 9/11 case, especially since the trial will be a showcase of American justice.

The absence of a timely trial can impair the defense, as memories grow dim with the passage of so much time. This concern is heightened because all five of the 9/11 defendants face the death penalty. Being able to litigate the precise roles of everyone involved may yield important mitigation evidence, especially for peripheral defendants.

There is also, as the Supreme Court has put it, a “societal interest in providing a speedy trial, which exists separate from, and at times in opposition to, the interests of the accused.” The American public as well as victims’ families, who must fly to and from Guantanamo to observe the proceedings, continue to be denied closure.

It took less than a year after World War II for nearly two dozen Nazi war crimes defendants to be tried by military tribunal at Nuremberg. By contrast, as President Obama put it in a speech seven years ago, the Guantanamo prosecutions have “met setback after setback, [and the] cases [have] lingered on.” That is still true today.

Some delays seem especially hard to justify. The presiding military judge sits on the case only one week out of every two months, and, under military rules, may not be pressed to sit more often in order to safeguard the judge’s independence. The lawyers and support personnel are not stationed at Guantanamo, further extending the timeline.

Proceedings related to a conflict of interest investigation, stemming from an FBI infiltration of one of the defense teams, have continued for more than a year. Additional months of delay resulted from defendants’ resistance to being escorted from their cells by female guards.

Many days of hearings have been scheduled and then inexplicably canceled, even though scores of people had been airlifted by military charter to the Navy base to participate in or observe the proceedings. All proceedings since mid-April have been canceled outright. There were only 34 court days on the 9/11 case last year, at a cost of \$78 million to American taxpayers.

Compare the 9/11 case to the trial of the only former Guantanamo detainee to be tried in an American civilian court. [Ahmed Khalfan Ghailani](#) was captured in 2004 based on charges growing out of the [truck bombings by Al-Qaeda of American embassies in Kenya and Tanzania](#), which killed 224 people and wounded more than a thousand. His case was transferred to the federal

district court in Manhattan in 2009, when newly elected President Obama briefly suspended military commissions. Within two years, Ghalilani had been tried, found guilty and sentenced to life in prison, a conviction recently affirmed on appeal.

It was no different before 9/11 when four others were convicted after trial for the same crimes in less than three years from the date of the bombings. All of these results were achieved despite a crime scene in two far-flung foreign countries, a smaller prosecutorial staff and a judge with a caseload greater than the retired judge who is overseeing the 9/11 military commission.

There have now been more than a dozen civilian prosecutions of Al-Qaeda and related operatives that have been completed in a timely manner. This includes three recent terrorism trials in New York City of defendants who have never passed through Guantanamo.

One of us was involved in a trial last year in the same courthouse as [Sulaiman Abu Ghaith](#), Osama bin Laden's brother-in-law. This high security trial proceeded efficiently and without fanfare. The entire process, from the capture in Jordan to the verdict in the United States, took barely a year.

Of course, the 9/11 trial involves five high-profile defendants and millions of documents, many of which are being declassified for trial, and is far more complicated. But no federal civilian judges would countenance the sluggish pace of the 9/11 proceedings despite the many understandable obstacles that have arisen.

A civilian trial for the 9/11 defendants would have been much quicker. Even if Congress were not itself an obstacle, the Obama administration crossed that Rubicon in 2011 by agreeing for political reasons to continue the prosecution of the 9/11 defendants by military commission and having the Department of Justice move to dismiss the civilian indictment of the 9/11 Five.

If trial by military commission is a *fait accompli*, at a minimum a real trial date should be set. The Department of Defense should then work with Congress to designate an accessible military site to prepare and try the case on a full-time basis. To maintain the status quo limbo will simply confirm that “justice delayed is justice denied” has come to define the trial of the 9/11 Five.

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