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Eric Holder was right about how to try the 9/11 defendants

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By Charles R. Church

Part 1 of 2

About 10 years ago, former Attorney General Eric Holder appeared before the Senate Judiciary Committee to defend his decision to try the 9/11 case defendants in a civilian federal court in New York City. But those who attacked him, many of them Republicans, should have realized that, by that time, civilian federal courts already had tried successfully more than 100 terrorist cases since 9/11. By February 2018, such courts had already convicted more than 660 individuals on terrorism-related charges since the brutal attacks on that terrible day.

Compare the current and feeble record of the military commissions at Guantánamo Bay, as described in national security expert Steve Vladeck's April 16 piece in "Lawfare," "It's Time to Admit that the Military Commissions Have Failed:"

- In 13 years, the commissions have produced merely eight convictions, six of which resulted from plea bargains;
- Only one of those convictions, that of al Bahlul, has survived a post-conviction appeal to the D.C. Circuit Court of Appeals (D.C. Circuit);
- In that case, the D.C. Circuit dismissed two of the three charges as being in violation of the U.S. Constitution, after the military commission and the Court of Military Commission Review (CMCR) had unanimously sustained them. The only surviving

charge failed to obtain a majority rationale from the D.C. Circuit;

- Three other convictions, all in cases where defendants had pleaded guilty, were vacated on appeal.

Hence, it plainly was a sad day when, in the face of enormous political pressure, Holder failed to stick to his guns. Both capital prosecutions — the 9/11 and the U.S.S. Cole cases — wound up before military commissions at Guantánamo Bay. Both began with the filing of charges in 2011 and remain mired in their pre-trial stages with no trial date being set, and none expected anytime soon. This pathetic record belies the primary rationale for creating the military commissions in the first place — that such a judicial system would deliver closure expeditiously.

In the latest body blow to the military commissions, on April 16 a unanimous three-judge panel of the D.C. Circuit, including Judge Thomas Griffith who normally has ruled in favor of the military commissions, nullified every pre-trial order rendered over more than two years by former military judge Vance Spath in the capital prosecution of Abd al-Rahim Hussein Muhammed al-Nashiri, the alleged mastermind of the lethal attack on the U.S.S. Cole while it lay at anchor in Yemen in October of 2000. The Court also threw out every ruling by the CMCR that reviewed now-vacated Spath orders.

In a case already renowned for how long it has been taking, the Court nullified more than two years of the little progress it had made! Think of how angry and upset that must have made the survivors and relatives of the 17 sailors who died when an explosives-laden launch was detonated beside the ship, almost sinking it. Something hugely important, even astonishing, must have forced the judges to mete out such severe justice. And, given the clear magnitude of Spath's offense and the culpability of the prosecution, the Justice Department (DOJ) and even the CMCR, I doubt strongly that the government will seek to have that harsh decision reviewed by either the entire D.C. Circuit or the U.S. Supreme Court.

Here's what prompted the panel to inflict such a blow. A bit over a year after Spath had assumed the role of military judge in the case in mid-2014, he applied for a job as an immigration judge with the DOJ, which also was playing a major role in al-Nashiri's prosecution. Making this blunder worse, Spath never disclosed this blatant conflict of interest to the defendant and his legal team. Further, his application highlighted the importance of his role in al-Nashiri's capital prosecution. It emphasized his "five years of experience as a trial judge" and crowed that he had been "handpicked by the top lawyer in the Air Force" to preside over "the military commission proceedings for the alleged 'Cole bombing' mastermind...." He even provided as a writing sample an order he had issued in the case.

After then-Attorney General Jeff Sessions appointed Spath as an immigration judge, an offer of employment came through. But as Spath still was an Air Force officer on active duty, and also remained detailed to preside in the Cole case, it would take time for him to be available, so the DOJ agreed to hold his paperwork and contact him again almost a year later, in early 2018.

Part 2 next time.

Charles R. Church is a resident of Salisbury. He is one of the attorneys representing Zayn al Abidin Muhammad Husayn (known as Abu Zubaydah), a detainee now at Guantánamo, who has been held by the U.S. government for more than 17 years. Church's opinions are his own.

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By Charles R. Church

Part 2 of 2

Military judge and Air Force office Vance Spath continued his work trying al-Nashiri for the attack on the U.S.S. Cole, even though he secretly had applied for and been appointed as an immigration judge in the Justice Department (DOJ), which had an important role in al-Nashiri's capital prosecution. As al-Nashiri's trial continued, a separate drama was unfolding over an ethical issue that prompted three of the defendant's four lawyers to resign and refuse to continue representing their former client, despite Spath's orders to the contrary, because they felt obliged to do so by compelling ethical precepts. On Feb. 14, 2018, Spath in open court stated that he was "still trying to figure out what to do" with the non-compliant lawyers and the next day indicated he "would think about it overnight," even though privately he knew that an email from the DOJ had arrived earlier that day offering him a start date of July 8, 2018, as an immigration judge. The following morning, Spath suspended "indefinitely" the proceedings against al-Nashiri, declaring that "[o]ver the last 5 months [his] frustration with the defense had been apparent," and concluding that "we need action by someone other than me" or else "[w]e're going to continue to spin our wheels and go nowhere." Then he added this bombshell: "[I]t might be time for me to retire, frankly. That decision I'll be making over the next week or two." At the same time, Spath was continuing to withhold from al-Nashiri — whose very life depended on the outcome of the case — and the lawyer continuing to represent him what was really going on.

The prosecution soon appealed Spath's suspension of the Cole case to the Court of Military Commission Review (CMCR.) During the pendency of the appeal, Spath submitted his retirement papers and the process began to find a new judge with a high enough clearance for the al-Nashiri case. Several months later, Spath announced his retirement and Col. Shelley Schools took over as military judge on Aug. 6, 2018.

During the summer, al-Nashiri's defense team, which had been joined by Capt. Brian Mizer, received "credible reports" that Spath had been pursuing employment as an immigration judge. The team sought more information on this, but the government refused to provide it, calling the reports "unsubstantiated assertions," while arguing that the "[d]efense request provides no basis to believe that [Spath] has applied for a position with the [DOJ] or even contacted the [DOJ] regarding employment." Yet less than a week later, an Associated Press photograph surfaced showing Spath standing next to Attorney General Sessions at a welcome ceremony for new immigration judges.

Urging that Spath's employment negotiations "created a disqualifying appearance of bias," al-Nashiri filed a motion in the CMCR seeking an order compelling the government to produce the requested information, and vacating Spath's rulings. The CMCR, in turn, concluded that al-Nashiri had failed to "show that 'a reasonable and informed observer would question [Spath's] impartiality,'" so it too denied relief.

Al-Nashiri promptly filed a petition for a writ of mandamus (a writ asking a higher court to direct a lower court to perform specified tasks) in the D.C. Circuit. Ultimately, because the CMCR had taken contrary action in the meantime, al-Nashiri filed a motion before the D.C. Circuit seeking to stay commission proceedings pending its decision on the mandamus petition; the Court granted his request.

As all litigators know, mandamus is a very difficult remedy to obtain. But Judge David S. Tatel, who wrote the 31-page opinion for the D.C. Circuit panel, disposed easily of al-Nashiri's request, saying simply that "a judge cannot have a prospective financial relationship with one side yet persuade the other that he can fairly judge in the case." As a result, the Court vacated all orders entered by Spath after Nov. 19, 2015, the date of his application to the DOJ. As noted, it also vacated any CMCR orders resulting from reviewing the now-vacated orders by Spath.

More importantly, Judge Tatel spread the blame for his harsh opinion to the DOJ, the prosecutors on the case, and even the CMCR. Only the defense lawyers who had defied Spath escaped Tatel's wrath. In fact, he specifically exonerated them from any wrongdoing.

A number of articles have appeared condemning the military commissions. More importantly, a higher authority also weighed in. As Sen. Dianne Feinstein, the ranking member of the U.S. Senate Select Committee on Intelligence (SSCI) and the primary force behind the publication in December 2014 of the Executive Summary of what has come to be called the SSCI's Torture Report, stated in her April 17 press release: "This week's decision by the [D.C. Circuit] to throw out years of proceedings in the al-Nashiri [case] is the latest sign that the military commission process has failed... [T]hese (alleged) terrorists should be tried in U.S. federal courts, which have a track record of successful prosecutions."

A least one important obstacle stands in the way of Feinstein's proposed fix. For years, Congress has barred moving to the mainland any person currently being detained in Guantánamo. But since Congress created the obstacle, it can remove it as well.

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