

# US DETENTION SYSTEM “ESSENTIALLY LAWLESS”

Just in case you haven't been following Balkinization since Marty Lederman went to work at DOJ, I wanted to link to this Jon Hafetz\* post, which hits on a lot of the points that powwow and Mary raised in this thread yesterday.

But at Guantánamo, the road to justice remains the road less traveled. Holder also announced that five other Guantánamo detainees would be referred back to military commissions, including Abd al-Rahim al-Nashiri, the alleged mastermind of the 2000 bombing of the USS Cole. So, those accused of the 9/11 attacks go to civilian court, while those accused of other crimes are diverted to military commissions. Yes, al-Nashiri is accused of attacking a military target. But the attack occurred before the United States was engaged in any armed conflict and before the passage of the Authorization for Use of Military Force that the U.S. has relied on for the claimed armed conflict against al Qaeda. (In *Hamdan*, Justice Stevens described such retroactive use of military commissions as “insupportable”). As Deborah Pearlstein points out, the administration has failed to provide a consistent, let alone valid, legal theory why one case goes to a military commission and another to federal court—why one prisoner gets full due process in a federal trial while another receives due process lite in a refurbished commission. Military commissions may have a place in the limited circumstances of true necessity—where the civilian courts are not open,

functioning, and capable of dispensing justice. But military “necessity” is not an excuse for the government to deviate from its regularly constituted courts because it lacks the evidence to convict. And even if that were not the reason (or the only reason) for using military commissions, it will be the enduring perception of America’s two-tiered system of justice.

Holder’s announcement, moreover, deals only with one slice of Guantánamo. In the eight years since President Bush first created military commissions, only three men have been tried by these supposed “war courts.” By contrast, more than 750 have been detained without trial and more than 200 remain in legal limbo. Military commissions have helped mask a much larger system of prolonged and indefinite detention without charge. This open-ended detention system has been one of the most brutal, arbitrary, and lawless aspects of Guantánamo.

Click through for the rest, including where Hafetz argues that, “U.S. detention policy will remain essentially lawless.”

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\*Mary (!) will be hosting an FDL Book Salon with Hafetz and Mark Denbeaux for a discussion of their book, *The Guantanamo Lawyers: Inside a Prison Outside the Law* on December 19.