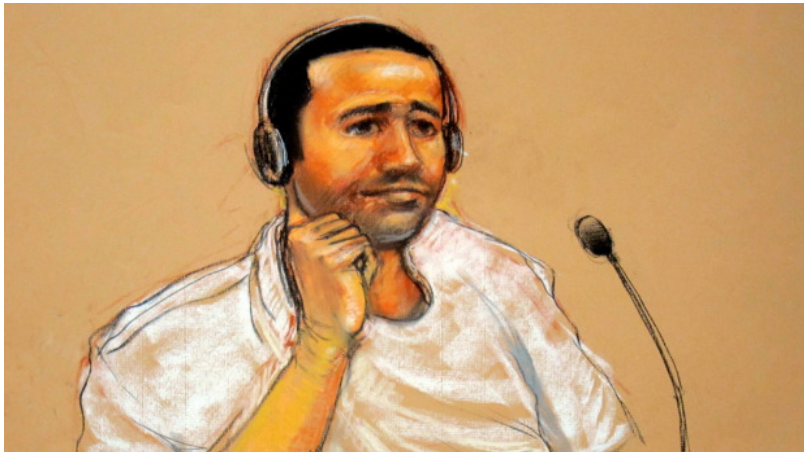


By Andy Worthington

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At Guantánamo on Wednesday, one of the most notorious torture victims of the Bush administration — Abd al-Rahim al-Nashiri — was arraigned for his trial by Military Commission, charged with masterminding the attack on the USS *Cole* in 2000, off the coast of Yemen, which killed 17 US sailors and wounded 39 others. Al-Nashiri is also one of three “high-value detainees” who, under the Bush administration, was [subjected to waterboarding](#), an ancient form of torture that involves controlled drowning.

Appearing publicly for the first time in nine years, al-Nashiri, a millionaire and a merchant before his capture, who is now 46 years old, was clean-shaven, and responded politely when asked by the judge, Army Col. James Pohl, whether he understood the proceedings, and whether “he accepted the services of his Pentagon-paid defense team.” As the [Miami Herald](#) described it, he replied, “At this moment these lawyers are doing the right job.”

For those who support George W. Bush’s attempts to twist the law out of shape in an attempt to claim that [torture was not torture](#), and then to use it on “high-value detainees” in a series of [despicable torture dungeons](#) located in other countries, the trial of al-Nashiri at Guantánamo is something of a triumph, although it is difficult to see how the torture apologists reach this conclusion.

In fact, al-Nashiri's arraignment, nine years after he was first seized in the United Arab Emirates, is a disgrace. He was held in torture prisons in Thailand and Poland (where prosecutors are [investigating his torture claims](#)), and possibly also in Romania, Lithuania and Morocco — and what distinguishes these locations from other prisons is how the Bush administration had to undergo devious, underhand negotiations to site its prisons on foreign soil. This rather tends to prove that torture was still torture, however much John Yoo, a compliant lawyer in the Justice Department's Office of Legal Counsel, [said it wasn't](#) in a series of notorious memos that will forever be known as [the "torture memos,"](#) because if it was legal, then why was all the dirty subterfuge needed?

For the supporters of Guantánamo and torture, the sordid details of his treatment are not generally discussed, perhaps because it might be revealed how he was only held in a prison in Thailand until the Thai government got fed up with harboring American torturers, and was then sent to Poland, where, eventually, the same thing happened. His torture, according to the apologists, was supposed to show robustness and resolve on the part of the Bush administration, and not the fairly desperate maneuverings of abusers who knew that their activities were illegal.

The apologists also shrug off the alarming truth that al-Nashiri was waterboarded, and also shrug off the findings of the CIA Inspector General, who concluded, in [a report in 2004](#), that CIA operatives had gone too far when they threatened him with a gun and a power drill while he was hooded, and also made threats against his family. Another way of expressing this would be to note that the use of the gun and the drill constituted "mock executions."

To the best of our knowledge, the torture of al-Nashiri yielded no useful intelligence. However, because of the way he was treated, and because of the Bush administration's foolish insistence that terror suspects were not criminals, but "warriors" in a possibly endless "war on terror," the federal court trial that should have taken place shortly after his capture in 2002, if there was any evidence that he masterminded the bombing of the USS *Cole*, never took place.

Nine years on, supporters of military trials for terror suspects may be celebrating because al-Nashiri's trial by Military Commission is finally going ahead, although, in the meantime, numerous other terror suspects have been successfully prosecuted in federal courts. Supporters of Guantánamo and torture tend to ignore the many successful federal court trials of the last decade, choosing instead to believe that being tortured in secret CIA prisons and then held in Guantánamo somehow makes prisoners like al-Nashiri much more significant than

these other terror suspects.

How else do we explain the uproar over the trial of Ahmed Khalfan Ghailani, the only prisoner held in secret CIA torture prisons and then Guantánamo to be transferred to the US mainland to face a federal court trial? Ghailani was [transferred in May 2009](#) (before Congress [imposed a ban](#) on the transfer of any more prisoners for trials on the US mainland), and was tried last fall, [convicted](#) and [given a life sentence](#) in January this year.

Even so, the supporters of the Military Commissions tried to portray his trial as a failure, and continue to rail against federal court trials for terror suspects, even going so far, in passages included in the National Defense Authorization Act, which is currently being examined by Congress, as to [demand mandatory military custody](#) for all terror suspects in future, even though that will cripple the ability of law enforcement officials to effectively investigate their crimes, and even though the military has shown no willingness to become a misplaced policeman for deranged ideologues in Congress.

President Obama is also to blame for Abd al-Rahim al-Nashiri's presence in a courtroom in Guantánamo, because his administration revived the Commissions in the summer of 2009, deciding that federal court trials were appropriate for some Guantánamo prisoners, and Military Commissions for others. That allowed the opponents of federal court trials to campaign against them, pushing the administration to [drop its plans](#) to try Khalid Sheikh Mohammed and four other men accused of involvement in the 9/11 attacks in New York, and obliging senior officials (and specifically Attorney General Eric Holder) to [undertake a humiliating climbdown](#), and to announce that federal court trials were off the agenda, and the Military Commissions were the only game in town.

That led directly to the notion that mandatory military custody for terror suspects is somehow acceptable, when it is clearly not, and left the administration, like an unconvincing puppeteer, holding Military Commission trials at Guantánamo which they have so far failed to endorse confidently, reaching plea deals in all three cases dealt with to date — those of [Ibrahim al-Qosi](#), [Noor Uthman Muhammed](#) and

[Omar Khadr](#)

As a capital case and one involving such well-publicized torture, al-Nashiri's case is much more of a test for the Obama administration, which cannot, for once, shirk its responsibilities through a plea deal. There is no way of knowing, as yet, if al-Nashiri will find a way to fundamentally challenge the administration, or if his trial will, in spite of the precedents established throughout the Commissions' inglorious history, somehow proceed smoothly, but it seems unlikely.

At the arraignment, Richard Kammen, one of al-Nashiri's defense attorneys, made it clear that questions about his client's treatment would form part of the defense's case. "Is torture a mitigating factor?" he asked Col. Pohl, to which the judge replied that the question would be appropriate when — if — al-Nashiri came to be sentenced. As the *Miami Herald* also explained, "Kammen also asked Pohl if he would fulfill his obligation under international treaty to report to 'outside authorities' evidence that Nashiri's 'torture' was arranged by high public officials, doctors, psychiatrists and lawyers," to which the judge replied, "I will comply with the law."

That sounds promising, but as the media focus drifts away from Guantánamo once more with the realization that al-Nashiri's trial will not begin for at least a year, it is also worth recalling that, fundamentally, this is not the right venue for the trial of anyone accused of terrorism, or, indeed, of [war crimes that are not real](#), and were only invented by Congress in 2006 and revived, fundamentally unaltered, in 2009.

Instead, the courtroom at Guantánamo, where the world is supposed to see justice being delivered, is composed in equal parts of an ideological fixation, on the part of Republicans, and an unconvincing capitulation, on the part of the administration, and these are not the correct ingredients for a fair trial, especially as the Obama administration has refused to confirm that, should al-Nashiri somehow not be convicted, there is [no guarantee that he will be released](#), which, of course, makes a mockery of the entire process.

Note: The courtroom sketch above is by Janet Hamlin, and is courtesy of [Janet Hamlin Illustration](#)