

By Charlie Savage

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WASHINGTON — The Obama administration is preparing to increase the use of [military commissions](#) to prosecute [Guantánamo](#) detainees, an acknowledgment that the prison in Cuba remains open for business after Congress imposed steep new impediments to closing the facility.

Defense Secretary [Robert M. Gates](#) is expected to soon lift an order blocking the initiation of new cases against detainees, which he imposed on the day of [President Obama](#)'s inauguration. That would clear the way for tribunal officials, for the first time under the Obama administration, to initiate new charges against detainees.

Charges would probably then come within weeks against one or more detainees who have already been designated by the Justice Department for prosecution before a military commission, including [Abd al-Rahim al-Nashiri](#), a Saudi accused of planning the 2000 bombing of the American destroyer Cole in Yemen; Ahmed al-Darbi, a Saudi accused of plotting, in an operation that never came to fruition, to attack oil tankers in the Straits of Hormuz; and Obaydullah, an Afghan accused of concealing bombs.

Preparations for the tribunal trials — including the circulation of new draft regulations for conducting them — were described by several administration officials familiar with the discussions. A spokeswoman for the military commissions system declined to comment.

With the political winds now against more civilian prosecutions of Guantánamo detainees, the plans to press forward with additional commission trials may foreshadow the fates of many of the more than 30 remaining detainees who have been designated for eventual prosecution: trials in Cuba for war crimes before a panel of military officers.

The administration is also preparing an executive order to create a parole board-like system for periodically reviewing the cases of the nearly 50 detainees who would be held without trial.

Any charging of Mr. Nashiri would be particularly significant because the official who oversees the commissions, retired Vice Adm. Bruce MacDonald of the Navy, may allow prosecutors to seek the death penalty against him — which would set up the first capital trial in the tribunal system. The Cole bombing killed 17 sailors.

Mr. Nashiri's case would also raise unresolved legal questions about jurisdiction and rules of evidence in tribunals. And it would attract global attention because he was previously held in secret [Central Intelligence Agency](#) prisons and is one of three detainees known to have been subjected to the drowning technique known as [waterboarding](#).

Lt. Cmdr. Stephen Reyes of the Navy, a military lawyer assigned to defend Mr. Nashiri, declined to comment on any movement in the case. But he noted that two of Mr. Nashiri's alleged co-conspirators were [indicted](#) in federal civilian court in 2003, and he made clear that the defense would highlight Mr. Nashiri's treatment in C.I.A. custody.

"Nashiri is being prosecuted at the commissions because of the torture issue," Mr. Reyes said. "Otherwise he would be indicted in New York along with his alleged co-conspirators."

As a candidate, President Obama criticized the Bush administration's tribunals. But after taking office, he backed a system in which some cases would be tried by revamped military tribunals while others would go before civilian juries. He also pressed to close the Guantánamo prison.

But last month, Congress made it much harder to move Guantánamo detainees into the United States, even for trials in federal civilian courthouses. That essentially shut the door for now on the administration's proposal to transfer inmates to a prison in Illinois and its desire to prosecute some of them in regular court.

More than a year ago, Attorney General [Eric H. Holder Jr.](#) designated Mr. Nashiri, Mr. Darbi and Mr. Obaydullah for trial in a military commission. But they have lingered in limbo amid administration indecision about broader terrorism prosecution policies. The paralysis followed a backlash against Mr. Holder's proposal to prosecute suspected conspirators in the Sept. 11 attacks in a Manhattan federal courthouse.

Three other detainees were also approved for tribunals by Mr. Holder in 2009. Those cases have progressed — two pleaded guilty last year, and the third is scheduled for trial at Guantánamo next month. But the charges in those cases were left over from the Bush administration.

While Mr. Nashiri and Mr. Darbi had also been charged in tribunals in the Bush administration, their cases were later dropped and must be started over.

The process of charging Mr. Obaydullah had started under the Bush administration, but it was frozen before completion.

Mr. Nashiri would be the first so-called high-value detainee — a senior terrorism suspect who was held for a time in secret C.I.A. prisons and subjected to what the Bush administration called “enhanced [interrogation techniques](#)” — to undergo trial before a tribunal.

Another former such detainee, [Ahmed Ghailani](#), was convicted in federal civilian court for playing a role in the 1998 Africa embassy bombings.

While Mr. Ghailani faces between 20 years and life in prison, many Republicans have pointed to his acquittal on 284 related charges — and a judge's decision to exclude an important witness because investigators learned about the man during Mr. Ghailani's [C.I.A. interrogation](#) — to argue that prosecuting terrorism cases in federal court is too risky.

Mr. Nashiri's treatment was apparently more extreme than Mr. Ghailani's. The C.I.A. later destroyed videotapes of some waterboarding sessions.

Moreover, the C.I.A. inspector general called Mr. Nashiri the “most significant” case of a detainee who was brutalized in ways that went beyond the Bush administration’s approved tactics — including being threatened with a power drill. Last year, Polish prosecutors investigating a now-closed C.I.A. prison granted Mr. Nashiri “victim status.”

An effort to prosecute Mr. Nashiri could also put a sharp focus on one of the crucial differences between federal civilian court and military commissions: the admissibility of hearsay evidence — statements and documents collected outside of court.

[Much of the evidence](#) against Mr. Nashiri consists of witness interviews and documents gathered by the [F.B.I.](#) in Yemen after the bombing. Prosecutors may call the F.B.I. agents as witnesses to describe what they learned during their investigation — hearsay that would be admissible under tribunal rules, but not in federal court.

It remains unclear whether the [Supreme Court](#) would uphold a tribunal conviction that relied on such evidence.

Mr. Nashiri’s case would also test another legal proposition: whether a state of war existed between the United States and [Al Qaeda](#) at the time of the Cole bombing — before the Sept. 11 terrorist attacks and the authorization by Congress to use military force against their perpetrators.

The United States initially handled the Cole attack as a peacetime terrorism crime, but the government now contends that a state of armed conflict had legally existed since 1996, when [Osama bin Laden](#) declared war against the United States.

The question is important because military commissions for war crimes are generally understood to have jurisdiction only over acts that took place during hostilities.