

But Attorney General Eric Holder also told senators Wednesday that accused 9/11 mastermind Khalid Sheikh Mohammed could be detained indefinitely if acquitted in a New York terror trial.

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From [The Christian Science Monitor](#) | Original Article

Attorney General Eric Holder told the Senate Judiciary Committee on Wednesday that "failure is not an option" in the prosecution of accused 9/11 mastermind Khalid Sheikh Mohammed in a New York City courtroom.

But he also acknowledged that the Obama administration may shift an acquitted terrorist back into open-ended military detention rather than allow him to walk free.

Mr. Holder made the comments in response to questions about whether he had considered the possibility of an acquittal.

"What I told the prosecutors and what I will tell you is that failure is not an option. These are cases that have to be won," Holder said. "I don't expect that we will have a contrary result."

The comment prompted a sharp response from Sen. Charles Grassley (R) of Iowa. "I don't know how you can make the statement that failure to convict is not an option when we have juries in this country," Senator Grassley said. "I'm a farmer not a lawyer, but I just want to make that observation."

The exchange with Grassley came during nearly four hours of testimony by the attorney general during an oversight hearing.

Delay in closing Guantánamo

Holder echoed President Obama's statement earlier Wednesday that the administration would not be able to close the Guantánamo detention facility by the announced Jan. 22 deadline.

The attorney general said the primary holdup is finding countries willing to accept detainees for transfer from Guantánamo. But he estimated the prison camp would close within a year. There are currently 215 detainees at Guantánamo.

At the top of the Judiciary Committee's agenda were questions about Holder's decision to try Mr. Mohammed and four others in New York.

"I knew this decision would be controversial," the attorney general said. "This was a tough call, and reasonable people can disagree with my conclusion."

In general, Republican senators on the committee were critical of Holder's decision. Several said the better option is to try Mohammed in a military commission. Democrats, on the other hand, emphasized that the federal court system is robust enough to hold alleged terrorists responsible for their crimes.

Would a military setting be better?

Sen. Jon Kyl (R) of Arizona asked Holder how a trial in New York would improve on a military commission process in which Mohammed had already expressed his desire to plead guilty and be executed.

Holder bristled at the question. He said his decision did not depend on the "whims and decisions" of Mohammed. "That was then; I don't know what Khalid Sheikh Mohammed wants

to do now. And I am not going to base this on what a terrorist, what a murderer, wants to do," Holder said.

Senator Kyl questioned how it could be easier to win a conviction in federal court than in a military commission with its more lenient rules of evidence.

The attorney general said it wasn't clear that a military judge would be more likely to admit the government's evidence. And he stressed that it wasn't clear that a military commission would be as likely as a federal trial to withstand the close scrutiny of an appeals court.

Indefinite detention a possibility

Holder was repeatedly questioned about the prospect of an acquittal. He was reluctant throughout much of the hearing to say so, but ultimately he acknowledged that in the event of an acquittal in a terror trial the administration might consider shifting a defendant back from the criminal justice system into open-ended military detention.

"Under the regime we are contemplating ... the ability to detain under laws of war, we would retain that ability," Holder said.

Sen. John Cornyn (R) of Texas asked Holder what the administration would do if a federal judge ordered the release of Mohammed.

"We have taken the view that the judiciary does not have the ability to require us to release [people held overseas]," Holder said. He added that the administration retained other options that would prevent Mohammed's release. "There are other things that we can do with him."

Senator Cornyn pressed the question. The US Supreme Court has ruled that the government cannot detain individuals indefinitely, he said.

"You can certainly hold people in connection with matters that are pending, and we have the capacity to make sure that Khalid Sheikh Mohammed is not released into the United States," Holder responded.

Later, Cornyn returned to the issue, asking whether Holder was concerned that a judge might rule that once the US government elects to try a suspected Al Qaeda member as a criminal, the government might be barred from reverting to the laws of war and open-ended military detention without charge.

"Under the congressional provisions that we have and the laws of war ... you cannot, perhaps, indefinitely detain somebody, but you certainly can detain somebody for lawful reasons," he said.

Holder promises 'taint-free' evidence

Holder said he doubted Cornyn's hypothetical would become reality. The government has a strong case and will rely at trial on a new, taint-free trove of evidence, he said.

"The trials that we will bring will not only be based on admissions and confessions, there are other ways we will prove the guilt of people we've charged," Holder said.

"There is really, from my perspective, very compelling evidence that probably won't be revealed until we are in a trial setting," he said.

"At some point an assistant US attorney will reveal that which I cannot talk about now," Holder told the senators. "It is compelling, it is not tainted, and I think will prove to be decisive in this case."