

A Look at Military Justice in Afghan Killing Case

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The U.S. military has already held a probable cause hearing for the soldier suspected in the weekend killings of 16 Afghan villagers, but the military still has not released his name or said when charges would be filed.

The military justice system, in many cases, holds to the same basic tenets as the civilian system. In both civilian and military law, a suspect in a crime cannot be held for more than 48 hours without a court hearing.

"There is a system in place to make sure that people simply aren't thrown into a dungeon somewhere," said Eugene R. Fidell, a former Coast Guard judge advocate who teaches law at Yale.

The soldier in the Afghan village killings had such a hearing, and it was determined there was cause to continue holding him, Col. Gary Kolb, a spokesman for the U.S.-led military coalition in Kabul, said Tuesday. The 38-year-old staff sergeant and trained sniper is accused of the weekend slaughter of nine children and seven adults in the middle of the night and burning some of the bodies. Defense Secretary Leon Panetta has said the death penalty is a possibility.

Kolb did not say when the hearing was held or give any other details. But Fidell said that under the Uniform Code of Military Justice, the hearing was to determine that an offense punishable by court-martial had happened; that there was reason to believe the accused had done it and that there was cause to continue to hold him, such as the possibility he wouldn't return for trial or would commit another crime if released.

The U.S. military continued Tuesday to withhold the name of the suspect, saying it will not be released until he is formally charged.

"It's certainly unusual not to even release the name of a person who is taken into custody," Fidell said. He said he thought, but had no official information, that it was being done for the safety of the soldier's family over concern there may be retribution against them.

Several factors could complicate evidence in the case. Those include the danger of going to the area to investigate. Taliban insurgents opened fire Tuesday when two brothers of Afghan President Hamid Karzai were leaving a village mosque where they attended a memorial service for villagers killed.

Also, bodies of the victims were buried quickly, in accordance with Muslim law, and without autopsy. Religious clerics said that while it's rare, exhumation has been done there before if relatives give permission, which is unlikely in this case.

Here's a look at what legal experts expect in the Afghanistan case and some ways it will differ from the handling of a civilian case:

A military court defendant is first charged and then sits through a preliminary "Article 32" hearing in which a military panel decides whether there is enough evidence to recommend a court martial hearing. At a court martial, like a civilian trial, evidence is presented and either a

judge, or a jury made up of military personnel, rule on the defendant's guilt or innocence and decide punishment.

In the Afghanistan case, it's likely the defense will argue that the accused does not have the mental capacity to stand for even the Article 32 hearing, which would mean he'd first go before a panel of three mental health experts, said Greg Rinckey, managing partner of Tully Rinckey PLLC and a former Army JAG lawyer.

That mental health panel, which probably can be convened in Afghanistan, will have to decide both if the defendant has a mental illness and if the defendant can tell right from wrong. As long as the second criteria is met, a trial will go forward, Rinckey said.

The defense lawyer will probably push for both the psychological evaluation and the hearings to convene outside of Afghanistan, Rinckey said. But the suspect definitely will be tried in a U.S. military court and likely in Afghanistan. Unlike a civilian who commits a crime in a foreign country and is subject to the laws of that country, there is a bilateral US-Afghan agreement that U.S. forces are immune from arrest and detention by Afghan authorities and instead fall under the jurisdiction of the U.S. military codes and judicial system.

But Rinckey said, "There's a fear that if he's tried there, is he really going to get a fair shake? There's going to be a lot of politics pushing for him to get convicted."

Lawyers said it will likely be some time before the case goes to any punishment stage.

"If it's going to be a death penalty case, it could take a year or more," Rinckey said.

Juries in military trials can be as few as five, but there must be 12 in death penalty cases, Fidell said.