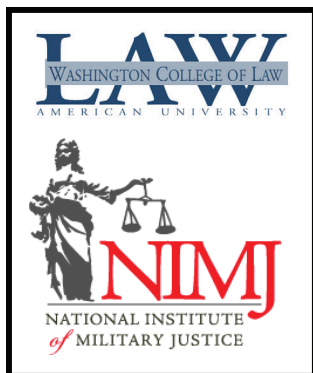


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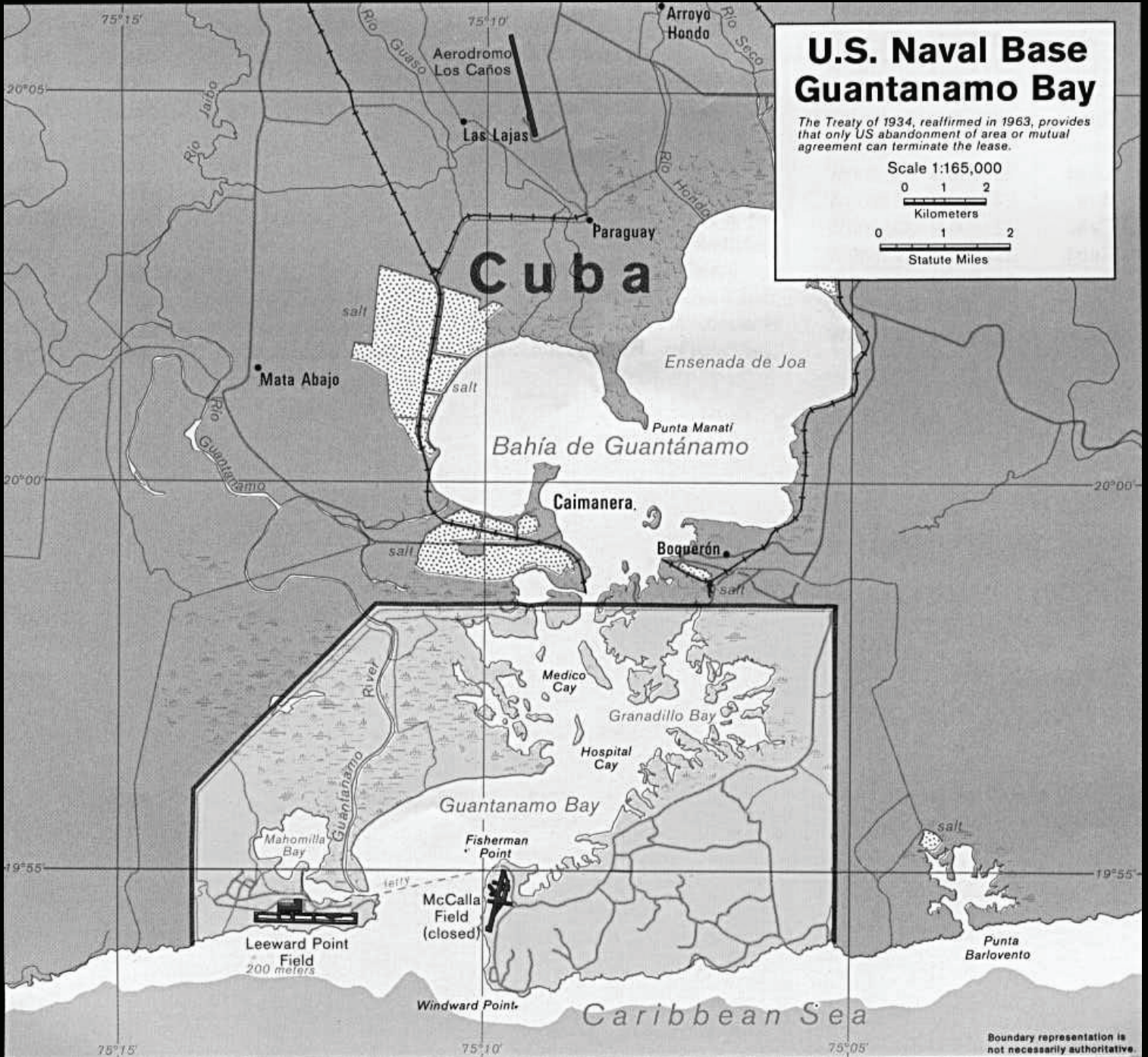
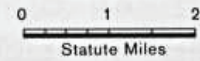
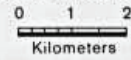
GUANTÁNAMO



U.S. Naval Base Guantanamo Bay

The Treaty of 1934, reaffirmed in 1963, provides that only US abandonment of area or mutual agreement can terminate the lease.

Scale 1:165,000



PREFACE

The National Institute of Military Justice (NIMJ) was founded in 1991 to advance the fair administration of military justice and to foster improved public understanding of the military justice system. Following President George W. Bush's November 13, 2001, Military Order authorizing military commissions, NIMJ studied and commented on the procedures established to hold and prosecute detainees by the Department of Defense. NIMJ appears regularly as an *amicus curiae* in cases involving detainee issues, including *Hamdan v. Rumsfeld*, 548 U.S. 547 (2006), where the Supreme Court overturned President Bush's original military commissions. NIMJ is involved in public education through its website, www.nimj.org, and publications such as the *Annotated Guide to Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism* (2002), four volumes of *Military Commission Instructions Sourcebook* (2003-09), and the forthcoming *Military Commission Reporter* (2009).

The Department of Defense at the U.S. Naval Base at Guantánamo Bay, Cuba invited a few non-governmental organizations to observe military commissions in an effort to satisfy the right to a public trial. It was natural for NIMJ to seek observer status of the Military Commissions at the U.S. Naval Base at Guantánamo Bay, Cuba. In October 2008, after a lengthy delay, the Office of Military Commissions named NIMJ as an alternate non-governmental organization observer. Between October 2008 and January 2009, when President Obama sought a stay in commission proceedings, the Office of Military Commissions invited NIMJ on five trips to observe commission hearings. No matter their long-term future, the commissions represent a significant event in the country's legal history.

While several organizations observed the proceedings over the last several years, NIMJ's observations are unique among NGO observers because of the military justice background NIMJ staff and board members possess. NIMJ's observers attempted to put the proceedings in the appropriate historical, legal, and military context.

Each field report published in this document was written by one of the five individuals NIMJ sent to observe proceedings. Each observer provided a unique perspective on the proceedings. They include Michelle M. Lindo McCluer, Executive Director, NIMJ; Jonathan E. Tracy, Assistant Director, NIMJ; Diane Marie Amann, Professor of Law and Director, California International Law Center at King Hall, University of California, Davis, School of Law; Arnon D. Siegel, Esq.; and Michael C. McNerney, Class of 2009, Washington College of Law.



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BACKGROUND

OF DETAINEE OPERATIONS, U.S. NAVAL BASE GUANTÁNAMO BAY, CUBA

The United States Naval Base at Guantánamo Bay was established in 1903 by virtue of an agreement between the United States and the Republic of Cuba. The base covers 45 square miles of land and water over which the United States exercises complete jurisdiction while simultaneously acknowledging the ultimate sovereignty of Cuba over the area. Throughout the twentieth century, the base was occupied by Marine battalions who maintained its integrity as a strategic point straddling the Caribbean Sea and the Atlantic Ocean.

In early 2002, the United States Southern Command established Joint Task Forces (JTF) 160 and 170 to operate an interrogation and detention facility. By the end of that year, JTF 160 and 170 were merged and re-designated as JTF—Guantánamo (JTF—GTMO). JTF—GTMO’s primary source of manpower currently consists of over 7,000 service members from all five branches. U.S. Army Military Police are responsible for the security in and around the detention facilities themselves.

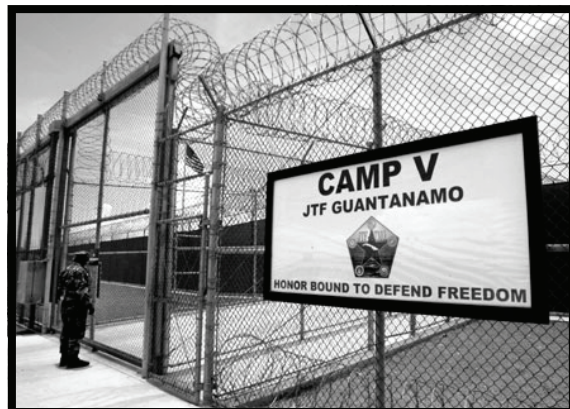
The first detainees were flown from Afghanistan and housed in Camp X-Ray, a leftover facility from Haitian migrant operations conducted during the 1990s. By the middle of 2002, Camp Delta had been constructed and all the detainees then being housed in Camp X-Ray were transferred to the newer facility. Camp Delta is subdivided into seven camps and has approximately 1,000 detention units. At the height of its occupancy, over 750 detainees were being held in

Guantánamo. This number has decreased, and as of May 15, 2009, there were approximately 240 detainees.

Although most of the detainees are housed in minimum to medium security facilities, those who have been designated “high-value detainees” – which include the accused 9/11 conspirators – are housed separately, where access to them is heavily controlled.

The military commissions established to try some detainees on criminal charges operate in two different courtrooms. In one, which was purpose-built for high security trials, only the judge, attorneys, the detainee and other essential personnel are in the actual courtroom.

The second courtroom is similar to a common courtroom with a gallery for press and observers. Observers are not allowed to take pictures or bring any electronic equipment or recording devices into the courtroom. The only images of the courtroom publicly available are sketches made by a sketch artist who sits with media representatives.



Public Law 109-366
109th Congress

An Act

Oct. 17, 2006
[S. 3890]

To authorize trial by military commission for violations of the law of war, and for other purposes.

Military
Commissions Act
of 2006.
10 USC 948a
note.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Military Commissions Act of 2006”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Construction of Presidential authority to establish military commissions.
- Sec. 3. Military commissions.
- Sec. 4. Amendments to Uniform Code of Military Justice.
- Sec. 5. Treaty obligations not establishing grounds for certain claims.
- Sec. 6. Implementation of treaty obligations.
- Sec. 7. Habeas corpus matters.
- Sec. 8. Revisions to Detainee Treatment Act of 2005 relating to protection of certain United States Government personnel.
- Sec. 9. Review of judgments of military commissions.
- Sec. 10. Detention covered by review of decisions of Combatant Status Review Tribunals of propriety of detention.

10 USC 948a
note.

SEC. 2. CONSTRUCTION OF PRESIDENTIAL AUTHORITY TO ESTABLISH MILITARY COMMISSIONS.

The authority to establish military commissions under chapter 47A of title 10, United States Code, as added by section 3(a), may not be construed to alter or limit the authority of the President under the Constitution of the United States and laws of the United States to establish military commissions for areas declared to be under martial law or in occupied territories should circumstances so require.

SEC. 3. MILITARY COMMISSIONS.

(a) **MILITARY COMMISSIONS.**—

(1) **IN GENERAL.**—Subtitle A of title 10, United States Code, is amended by inserting after chapter 47 the following new chapter:



JONATHAN E. TRACY

Jonathan E. Tracy, Assistant Director, NIMJ, joined NIMJ's staff in July 2008. After law school, Mr. Tracy served in the U.S. Army Judge Advocate General's Corps. He later earned an LL.M. at Washington College of Law, focusing on human rights and humanitarian law.

I was privileged to be the National Institute of Military Justice's first official observer at the military commissions at Guantánamo Bay. I observed pre-trial hearings in two cases: *United States v. Khadr* (October 22) and *United States v. Kamin* (October 23).

In my previous position as an Army judge advocate I participated in and observed numerous courts-martial. The lawyers representing the government, Mr. Khadr and Mr. Kamin are as good as any military lawyer I saw in court-martial proceedings. Both sides litigated each issue professionally and with the utmost competence. It occurred to me that if someone awoke from an eight-year nap to find themselves in the courtroom at Guantánamo Bay, he might get the impression that the proceedings are fair and just. This is a testament to the attorneys and the military judges. But once our Rip Van Winkle focuses on the issues, reads the Military Commissions Act (MCA),¹ and considers the evolution of detention issues, he will realize that his initial impression is quite flawed.

The charges against Omar Khadr, the Canadian citizen and juvenile captured in Afghanistan, include murder, attempted murder, conspiracy, providing material support for terrorism, and spying. Mohammed Kamin faces the charge of providing material support for terrorism. Kamin's proceedings were marred by the fact that he refused to attend. He has boycotted his commission from the start. In fact, he was forcibly extracted to attend his arraignment. Thankfully, the judge refused to issue an order to forcibly extract him for any future proceedings.

While I noticed numerous issues, I will focus on three broad observations. Each of them touches on two themes I noticed. First, while the lawyers and judges all

1. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), enacting Chapter 47A of Title 10 of the United States Code, as well as amending 28 U.S.C. § 2241. This law establishes the military commissions and provides them with their mandate and scope of jurisdiction by outlining who can be tried by military commission and for what types of crimes.

operated professionally and seemed eminently qualified, there is no escaping the fact that the commissions are ad hoc proceedings with little to no legal precedent on either substantive or procedural issues. Second, the system contains several inherent flaws that make for lopsided justice, no matter how qualified the defense counsel.

Inequality of Arms

Both hearings demonstrated the unequal positions of the defense and government in connection with discovery and access to witnesses. Khadr's lawyers² sought access to seven intelligence interrogators. The government claimed that no evidence produced from intelligence interrogations would be introduced at trial and that the statements they would use were all elicited by law enforcement professionals. Defense counsel Lieutenant Commander William Kuebler argued that the intelligence interrogators must be produced because the two sets of interrogations are related. If the intelligence interrogators used coercive techniques, the stage was set for the law enforcement interrogators, which were used contemporaneously. The government lawyer, a civilian Department of Justice attorney, John Murphy, argued that the defense's request was a "fishing expedition" and that the defense "must show" that their request was not such an attempt. Based on comments from the bench, the Army Judge, Colonel Patrick Parrish, seemed to understand the potential connection between intelligence and law enforcement interrogations. It was very apparent from the arguments that the government fights every issue of production. Yet without access to necessary evidence, the defense will not be able to develop a theory of the case or prepare an

2. The accused in the military commissions are detailed defense counsel from the Office of Military Commissions. Civilian counsel must gain permission to appear before the commission, as in the case of a non-U.S. lawyer from the accused's home country.

adequate defense. On October 23, 2008, Judge Parrish ruled in partial favor of the defense and ordered the government to provide the defense with the phone numbers of certain intelligence interrogators. However, the arguments demonstrated that the defense had to fight for every piece of evidence and rarely won all the evidence it was entitled to receive.

Khadr's attorneys also requested a continuance, which would delay the start of the trial. They argued that discovery was not complete because the government fought the release of every piece of evidence. Significantly, the issue does not always appear to be connected with national security concerns. One egregious example brought by the defense to the attention of the commission concerned certain discoverable psychological records (not related in any manner to national security) that were not released. The defense only found out about their existence through discovery in a separate commission. The government claimed that Joint Task Force – GTMO (the command that runs the detention facility) must have decided not to provide the documents "for whatever reason" to the prosecution. The defense pointed out that under such circumstances, it is impossible to know how much other discoverable but unreleased evidence still exists. On October 24,

MOHAMMED KAMIN is a national of Afghanistan. His official records state that he was born in 1978, but is one of a handful of detainees for which no evidence exists as to his birthplace. Kamin is charged with providing material support for terrorism, for various acts he allegedly committed as an al-Qaeda operative in Afghanistan and Pakistan. This includes surveillance activities, planting mines, and the placement of missiles targeting U.S. and Coalition Armed Forces.

Judge Parrish granted the defense request for continuance and delayed the trial by two months to January 26, 2009.

In Kamin's case, defense attorney Lieutenant Richard Federico argued for a complete dismissal because of the lack of discovery. LT Federico provided a disturbing history of Kamin's case, detailing instances where request after request and order after order had gone ignored. He complained about the intelligence community's "veil of secrecy" and the systemic problem with inter-departmental communication. He argued that, without a dismissal of the case, the government would not have the incentive to provide discovery in a timely manner in any commission. The government responded that, by the time defense counsel returned to Washington, D.C., 800-1,000 pages of discovery would be awaiting him, with more to follow in the coming weeks. Defense counsel complained that this process of suddenly providing another bit of discovery after every hearing was a sleight of hand and did not change the fact that the rate and substance of discovery had been grossly inadequate and unfair. In one instance, the government provided approximately 80 letters written by Kamin that went through the International Committee of the Red Cross. LT Federico later accessed the Department of Defense's secured internet and found twice as many letters as he received from the prosecution. One of the letters he found on the Web site that was not provided in discovery proved to be very valuable to his understanding of the case.

The Air Force Judge, Colonel W. Thomas Cumbie, refused to dismiss, telling the defense to make another motion to compel if the government again failed to respond. The issue would be revisited by the Commission then. Although the judge expressed displeasure with the speed of discovery, he declined to impose any penalty. The defense counsel wondered out loud if the government would unload 6,000

pages on him on the eve of trial, as was done in the *Hamdan* commission. The government laughed at the suggestion and promised that no such thing would occur. The unfair and unjust procedures used in one commission had thus become the butt of a joke in another.

Another disturbing part of the discussion in the *Kamin* hearing occurred when the judge asked about what prejudice the accused actually faced due to the slowness of discovery. In the words of Judge Cumbie, "It's not like he is in pretrial confinement or waiting to get on with his life." This statement indicates the lack of perspective the commissions have for the reality of post-9/11 detentions. One could conjecture that, given Hamdan's short sentence, and the fact that Kamin's charges are much closer to Hamdan's than one of the 9/11 co-conspirators, these delays in discovery will prejudice Kamin in that he is likely to have spent more time in pretrial detention than the length of the sentence ultimately imposed on him if he is convicted.

It was very apparent that the defense counsel in both cases face a daunting challenge getting access to evidence to which they are entitled. The tactics used by the government and their cavalier dismissal of charges of unfairness damage the credibility of the commissions.

Ad Hoc System

At several points in the proceedings, the ad hoc nature of the commissions also became apparent. For example, it appears that 12 investigators were recently detailed to the defense office. However, according to LT Federico, no one in that office, including the chief defense counsel, knew the investigators were coming until they reported for duty. To date, no one has explained how the defense office might utilize the investigators or how they will be funded. Judge Cumbie himself expressed surprise at this situation.

Another example concerns the competency determination³ for Kamin. This is especially important in this case, as the defense counsel is trying to represent someone who does not want to be represented. A Rule for Military Commission 706⁴ (competency) board recently concluded that Kamin was competent to stand trial. However, Kamin did not meet with the board, and one board member admitted that the ability to make recommendations was compromised unless the board members could actually observe Kamin. The defense objected to the board's conclusion because it relied on very little evidence, namely the charge sheet, referral packet, and some medical records. The defense argued that justice requires a thorough and independent evaluation and requested a civilian doctor. After arguing that the original 706 board was good enough, the government finally agreed to a second 706 hearing, but objected to the use of a civilian doctor. The judge indicated that he would grant a second evaluation with another DoD (Department of Defense) doctor. He also wanted to make sure the government would follow the defense's suggestion that the new doctor examine

“It was very apparent that the defense counsel in both cases face a daunting challenge getting access to evidence to which they are entitled. The tactics used by the government and their cavalier dismissal of charges of unfairness damage the credibility of the commissions.”

medical records from Bagram⁵ and video tapes of the accused at Guantánamo, in addition to interviewing guards and other detainees. In arguing this issue, LT Federico asked a prescient question: “What does the accused understand of our system? He is Afghan, and been detained for 5 years.”

It does not seem surprising that after 6 months of detention in Bagram and close to 5 years at GTMO, Kamin is suspicious of the proceedings and does not want to participate. At the same time, it is unnerving that the original 706 board issued findings after such an inadequate investigation.

These, and many other examples, demonstrate the inherent problems associated with creating a new system from scratch. Beyond the well-known jurisdictional problems with the commissions, the ad hoc approach diminishes the perception of justice being provided in Guantánamo.

Alien Unlawful Enemy Combatant and Violation of the Law of War

Two of the issues discussed in the *Khadr* hearing, but left undecided by the judge, were the level of proof needed to establish the status of the accused as an unlawful enemy combatant and the definition of “a violation of the law of war.” Judge Parrish indicated he would hear arguments on these issues but would not rule until after the parties submitted

3. As part of an assurance of due process, the defendant must be competent to stand trial. This means, loosely, that he is aware of the proceedings and is able to meaningfully participate in them through counsel or self-representation. If at any point a defendant's competency to do so is questioned, then the judge must determine whether there is a basis for a finding of incompetency. In Kamin's case, the question of competency is being raised as part of the pre-trial hearing.

4. Prescribed by the Department of Defense, the Rules for Military Commissions provide a set of detailed procedural instructions for the conduct of the commissions themselves. R.M.C. 706 prescribes procedures for competency boards.

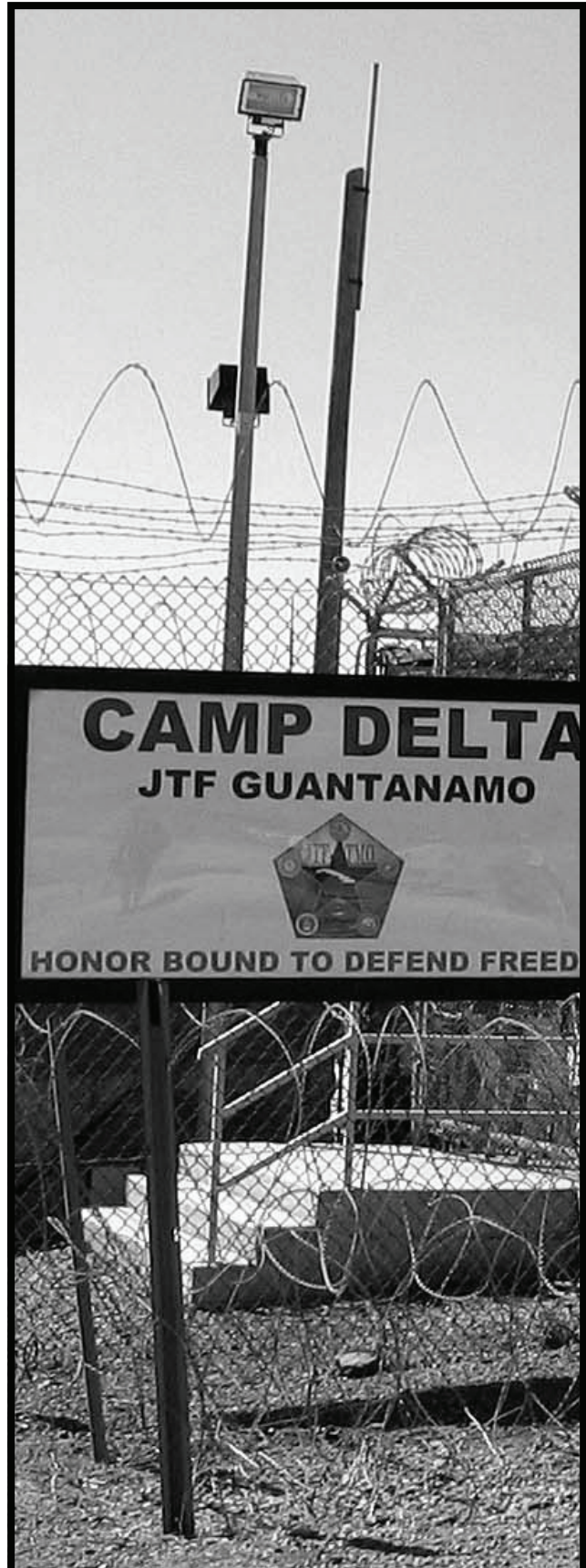
5. Bagram Theater Internment Facility, a detention center located on the Bagram Air Base in the Parwan province of Afghanistan.

proposed panel instructions. These issues concern the heart of the military commission system. The defense argued that the government must prove that the accused is an “alien unlawful enemy combatant” as an element of the crime – beyond a reasonable doubt. The government claimed that it is a jurisdictional matter and that if the defense raises the issue they would only need to prove Khadr’s status by a preponderance of the evidence.

Obviously, the definition of “a violation of the law of war” is an important issue in these commissions. The defense relied on four sources of law (the plain language of the MCA, the legislative history of the MCA, the War Crimes Act of 1996, and customary international humanitarian law) to argue that not all actions by “unlawful combatants” are war crimes. The defense argued that one commits the war crime of murder if he commits murder with wrongful means or he kills a wrongful target. The government, on the other hand, argued that there were three ways to commit the war crime of murder: (1) killing an unlawful target; (2) using unlawful means; and (3) or killing someone while in the status of an unlawful combatant.

Conclusion

At Guantánamo I observed competent and well-prepared attorneys litigate important issues for their clients. It was reassuring to see the professionalism that all the parties are bringing to these proceedings. However, this did not mitigate the serious and pervasive problems inherent to the military commissions. The defense teams face numerous obstacles in the preparation of their cases, the untested system has leaks in numerous places, and the existential justification for military commissions remains unresolved and obstructs legitimacy.



From December 7 to 14, 2008, I had the privilege of visiting Guantánamo Bay, Cuba, in order to observe military commission proceedings on behalf of the National Institute of Military Justice. On Monday of that week I observed a pretrial hearing in *Khalid Sheikh Mohammed et al. (KSM)*, the five-defendant matter known as the “9/11 case.” On Friday I observed a pretrial hearing

DIANE MARIE AMANN

Diane Marie Amann is Professor of Law and Director of the California International Law Center at King Hall, University of California, Davis, School of Law. Professor Amann’s scholarship examines the interaction of national, regional, and international legal regimes in efforts to combat atrocity and cross-border crime. Before entering academia Professor Amann was a federal criminal defense attorney in San Francisco, both as an Assistant Federal Public Defender and as a private practitioner. A member of NIMJ’s Board of Advisors, she was a principal coauthor of the brief amicus curiae that NIMJ filed in conjunction with the Bar Association of the District of Columbia, in Hamdan v. Rumsfeld, 548 U.S. 547 (2006).

in *Omar Khadr*, the case of a Canadian national captured on the battlefield in Afghanistan in 2002, when he was 15 years old.

KSM et al.

As I described in “Let the accused have fair trials in court,” an op-ed published in the *Miami Herald* on December 13, 2008, among the difficulties that emerged at the KSM hearing was the fact that, on a day when defendants asked permission to “give confessions,” no one in the courtroom – not the prosecutors or defense lawyers, not the judge, and certainly not the defendants – knew the answer to an essential question: Under the Military Commissions Act of 2006 and supplementary regulations, may a capitally charged defendant plead guilty before a military commission, and if so, would such a plea preclude imposition of a death sentence? NIMJ’s subsequent research, undertaken in order to file an *amicus* brief on the issue, confirmed that the answers to these legal questions are far from evident. That is indeed troubling – the questions combine matters of substance and procedure, and they relate to the ultimate outcome of the United States’ case against those it accuses of prime responsibility for the 9/11 attacks. One fears it will not be the only such puzzle should this case proceed before the tribunals that Congress authorized in the Military Commissions Act of 2006.

MILITARY CO GENERAL FACTS

Other difficulties were also apparent. There is, for example, the matter of self-representation. Though it is a fundamental right of the accused in U.S. courts, self-representation frequently poses special challenges. This is true even in proceedings when all other participants – the judge, the prosecution, and standby counsel – are well schooled in the rules and case law. It is likely to remain especially true in this case. First, Monday’s hearing demonstrated that not even the participants who are members of the bar were fully cognizant of the rules that governed the proceedings. Second, the three 9/11 defendants already granted the right to represent themselves – Khalid Sheikh Mohammed (“KSM”), Walid Muhammad Salih Mubarek Bin 'Attash, and Ali Abdul Aziz Ali – appeared to be paying closest attention to aspects of the proceedings that bore not just legal, but also political, significance. This is not uncommon in trials involving self-representing defendants charged with war crimes; the same occurred in the trial of deposed Serbian President Slobodan Milosevic before the International Criminal Tribunal for the former Yugoslavia and that of deposed Iraqi President Saddam Hussein before a special tribunal in Baghdad. In the instant context many, including various allies of and persons in the United States, see the commissions as a (geo) political liability. The government’s admission that some defendants endured waterboarding or other harsh methods of interrogation renders the cases politically as well as legally difficult. Indeed, the means by which defendant’s statements were obtained is said to have occasioned dismissal of charges against detainee Mohammed al Qahtani, who was to have been the sixth defendant in *KSM et al.* Complexities like these counsel in favor of a trial that benefits from the certainty of precedent. Yet precedent is something utterly lacking in the military commissions.

Of further concern are the questions about competency that linger with regard to two KSM defendants, Ramzi Binalshibh and

28 is the number of detainees charged under the Military Commissions.

Convictions & sentences:

14 is the number of cases subsequently referred for trial.

David Hicks, an Australian citizen, pled guilty in 2007 and was released to the custody of his government to serve a nine-month sentence.

Salim Hamdan, Osama bin Laden’s Yemeni driver, was the first detainee convicted at a contested military commission. He was sentenced to time served plus four and one-half months confinement and eventually released to the custody of Yemen.

Ali Hamza al Bahlul, al-Qaeda’s propaganda minister, was convicted after a trial in which he largely refused to participate. He was sentenced to life imprisonment.

Mustafa Ahmed Adam al Hawsawi, both of whom have also sought to self-represent. The former defendant spoke out of turn several times in the course of the hearing. In so doing, he displayed an odd affect, appearing to smile even as he spoke words of criticism. One hopes that the judge will decide the issue only after the most thorough of competency inquiries.

The December pretrial hearing was the first at which a new military judge, Army Col. Stephen Henley, presided. Col. Henley began the hearings with a disclaimer that enumerated all the other commission participants who had once been his superiors. The list included administrators and prosecutors, and served as a reminder of a key structural deficiency of the commissions; that is, those who are

COMMISSIONS & INFORMATION

Military commissions vs. Courts-Martial

While commissions and courts-martial are similar in some respects, the NIMJ has regularly highlighted the practices that make the two proceedings different.

Courts-martial are used to try U.S. servicemembers for violations of the Uniform Code of Military Justice. As a general rule, courts-martial have most of the due process guarantees accorded to the accused in federal courts.

Military commissions are used to try non-U.S. citizens for violations of the laws of war, or of specific terrorism-related crimes described in the Military Commissions Act which include providing material support for terrorism and conspiracy. Several organizations and experts have criticized the military commissions for failing to adequately address issues of due process.

empowered to decide these cases are military personnel within a chain of command at whose top is the person ultimately responsible for the system, the President of the United States.

Another matter that received scarce remark but gave cause for concern was the “victims’ screen.” Before the KSM hearing began, the government drew a blue curtain that set relatives of 9/11 victims apart from the rest of those seated in the glassed-in gallery. (I mentioned this in a February 14, 2009, IntLawGrrls post, at <http://intlawgrrls.blogspot.com/2009/02/beverly-eckert-in-passing.html>) This act of segregation carried an implication – incredible and incorrect – that the press and those who pressed for human rights somehow stood in opposition to persons who suffered from the attacks of September 11, 2001. It is perhaps no coincidence that, having

been shielded from the comments of nongovernmental observers, some relatives told the media that they were struck by “the rights accorded the accused men” during the military commission hearing that the government had flown them to GTMO to attend. This screen was unnecessary and improper. When I asked DoD spokesman Commander Jeffrey Gordon about it, he replied that some of the families had requested it. But such a request would not be honored in any stateside criminal courtroom with which I am familiar – at least not yet. If no objection is made to the practice, however, this innovation may be expected to creep to the mainland.

The purpose-built courtroom for the 9/11 case has six very long tables on the defense side, intended to allow one table for each of the defendants. Defendant no. 6, Mohammed al Qahtani, the alleged “20th hijacker,” having been dismissed from this case, the table at the back of the courtroom contained a hodgepodge of lawyers and others connected with the five remaining defense teams. The arrangement at the first five tables was as follows: (1) Khalid Sheikh Mohammed, (2) Walid Muhammad Salih Mubarek Bin ‘Attash, (3) Ramzi Binalshibh, (4) Ali Abdul Aziz Ali, and (5) Mustafa Ahmed Adam al Hawsawi.

KSM looked much thinner and older than in the thuggish picture typically printed of him. He was garbed in a white tunic and hat, and sported a very long, white beard. Also at his table were his interpreter and remaining detailed defense counsel, Lt. Col. Michael Acuff (KSM had fired the other detailed defense counsel, Prescott Prince, at that week’s hearing. KSM alleged that Prince, who had done a tour in Iraq, had been engaged in “killing our brothers and sisters”). Since KSM was self-representing, Acuff and two civilian attorneys, Boise-based David Nevin and Scott McKay, were standby counsel. At the outset of the hearing the latter two were in the catchall table at the back, but eventually moved to

KSM's table to advise him.

The other two self-representing defendants, Bin 'Attash and Ali, seemed to interact far less with their attorneys than did KSM. Indeed, with the exception of KSM there was much more interaction among defendants, who stage-whispered and face-gestured to each other across tables, than there was between them and their attorneys. It is also worth noting that one of the defendants had reportedly refused to accept his interpreter because she was a woman. She sat at the catchall table at the back, and he sat in court without an interpreter – apparently, someone else's interpreter filled him in at the break. Two other defendants did, however, have women military lawyers at their counsel table. Air Force Capt. Christina Jimenez second-chaired as standby counsel for Bin 'Attash. Cmdr. Suzanne Lachelier was the lead military lawyer for Binalshibh, whose competency is presently in question. (During this hearing Lachelier argued that she should not have to go forward on discovery disputes until after competency questions were resolved, and in the end no decision was made respecting those disputes.)

A complaint heard throughout the day, from more than one defendant, was that the "translation" was bad. In at least one instance this complaint pertained to a defense request for translation of court papers and other documents into Arabic. Other times,

however, it seemed to pertain to the interpretation in court. I must say that unless I am romanticizing my days as an Assistant Federal Public Defender, the interpreters did not seem fully up to speed. Often there seemed to be much lag time between the defendant's statement and the interpreter's English rendition of it – far more than the couple syllables' delay with which I had become familiar when working, frequently, with the simultaneous translators certified for federal court in San Francisco. At the GTMO hearing, defendants who understood some English occasionally complained that the interpreter was not rendering their Arabic statements into an English phrase that captured the essence of what they meant to say. These, of course, are grave concerns from the standpoint of a fair trial.

Khadr

It was a shock to see Omar Khadr. In my mind's eye he is a 15-year-old who looks much younger, a child with a wisp of whisker. Thus it was a surprise to see him on this December 2008 day, a 22-year-old man, broad-shouldered, seeming about 6 feet tall, with a full beard – a man who has spent one-third of his life, has come of age, in U.S. military custody. Khadr spoke at one point in the hearing, in English, with the accent of a Canadian.

There was far less security for Khadr's hearing, which took place in the older courthouse.

OMAR AHMED KHADR is a Canadian citizen born in 1986. His detention at Guantanamo began when he was 15. Khadr has been charged with murder and attempted murder in violation of the law of war for allegedly throwing a grenade that resulted in the death of a U.S. service member and for allegedly wounding several others in Afghanistan in 2002.

Because he was only 15 at the time of the incident, his case has brought into play issues related to child soldiers and their accountability for acts committed in a time of war. He is also being charged with conspiracy, providing material support for terrorism, and spying. Several other members of his immediate family are also suspected of having links with terrorist groups in Afghanistan and Pakistan.

Spectators were not seated behind a glass wall, as in *KSM*, but behind the bar, as in any open courtroom. (They included dozens of members of the international media, from Canada, Europe, and Asia. Khadr's status as an alleged child soldier has drawn much interest overseas.) When it was time for Khadr to leave court, a phalanx of MPs stood around him and marched him out. He was not shackled, and no one laid a hand on him while he was in the courtroom.

Of particular interest was the effort of Navy Lt. Cmdr. William C. Kuebler, lead military counsel for Omar Khadr, to gain admission during this pretrial hearing of photos made during the firefight at which Khadr was captured. Kuebler argued that the photos would help the defense to make its case for compelling certain witnesses, whose testimony, it was said, would exonerate Khadr by indicating that he was buried beneath rubble at the time someone threw the grenade that killed a U.S. servicemember. The judge refused, and Kuebler went forward without the photos. But the dispute whetted the appetite of the media to see them, and some published a next-day story suggesting Khadr's factual innocence.

Conclusion

Watching these proceedings did nothing to ease the core concern that I have expressed in my writings these past years; specifically, that the post-9/11 military commissions are unlikely to afford fair trials to the defendants who appear before them. Personnel on the bench and on both sides of the bar appeared to be doing their best under the circumstances. Yet as might be expected of any brand-new system, unanticipated difficulties continue to crop up and the improvised responses themselves also give rise to new difficulties. This was true with regard not only to procedures, but also to the substance of the criminal sanctions that the government sought to impose on defendants.



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ARNON D. SIEGEL

I had the privilege of representing NIMJ at the hearing held on December 15, 2008, in *United States v. Al-Darbi*.

At about 8:30 on the morning of December 15, the two other NGO (non-governmental organization) representatives from the ACLU (American Civil Liberties Union) and Human Rights Watch and I met our military escort outside our tents in Camp Justice. We rode in a golf-cart to the outside entrance of the courtroom, housed in an undistinguished, low-slung building on a hill. After going through a metal detector, being wanded, and showing our passports, we entered the courtroom.

The hearing began just after 9:00. The presiding judge was Army Colonel James L. Pohl (who became Chief Judge the month after, in January). Judge Pohl impressed me. He was brisk and efficient and controlled his courtroom well without being imperious. He also struck me as very thoughtful and smart.

The prosecution was headed by Susan Collins, an Assistant U.S. Attorney from the Northern District of Indiana who has been detailed to the military commissions. She was assisted by military lawyers, but she did the heavy lifting for the prosecution side. Ms. Collins easily met the high standards that we expect from lawyers at the Department of Justice.

The lead defense lawyer was Ramzi Kassem, a clinical teaching fellow at the Yale Law School. Mr. Kassem was assisted by military lawyers as well, but like Ms. Collins for the prosecution, Mr. Kassem

was clearly in charge for the defense. Mr. Kassem is young – about 30 – and graduated from law school only four years ago. He spoke to his client, Mohammed Ahmed Haza al-Darbi, in Arabic. Mr. al-Darbi’s military lawyer, Air Force Lieutenant Colonel Thomas Pyle, was the more polished advocate, easily as good as the JAG (judge advocate) officers I worked with and saw during my Army days.

The defendant was present at the hearing. Mr. al-Darbi sat between his lawyers at a table unshackled and wore a white jalabiya⁶ and white skullcap. Most of the courtroom spectators were in uniform. Among the civilian spectators were two Yale law students helping Mr. Kassem with the defense.

Judge Pohl began by denying a defense motion⁷ to dismiss, which had been fully briefed and submitted; he did not elaborate on his reasons. He then took up the government’s motion to admit a video entitled *The Al Qaeda Plan*, which was produced by the Department of Defense. The government compared its video to *The Nazi Plan*, which was admitted into evidence in Nuremberg. Like *The Nazi Plan*, *The Al Qaeda Plan* compiles archival footage and includes clips of, among other things, Al Qaeda training camps, the World Trade Center and the U.S.S. *Cole*. The defense argued in response that *The Al Qaeda Plan* is

MOHAMMED AHMED HAZA AL DARBI is a citizen of Saudi Arabia, born in the city of Ta’if in 1975. The charges against him include conspiracy, murder and destruction of property in violation of war, and providing material support for terrorism.

An admitted member of al-Qaeda, he is accused of providing weapons and logistics training in the Al Farouq training camp in Afghanistan and being involved in an al-Qaeda plot to use small ships to attack shipping vessels in the Straits of Hormuz.

irrelevant and that any probative value was outweighed by prejudice. The defense also asked that should the court admit *The Al Qaeda Plan*, it allow the defense in turn to introduce into evidence *Taxi to the Dark Side*, an Oscar award-winning documentary that discusses, among other things, the detention camps in Guantánamo. Judge Pohl then issued

what he called a “fluid ruling.” He admitted parts 1 to 4 of *The Al Qaeda Plan*, which he considered “background material.” He reserved judgment on admitting the rest of *The Al Qaeda Plan* pending an in camera review on Rule 403 grounds, and reserved judgment as well on admitting *Taxi to the Dark Side*.

Next, Judge Pohl considered a defense motion to dismiss on statute of limitations⁸ grounds. The defense’s argument focused mainly on the presumption against retroactivity; the prosecution’s argument focused on the text of the relevant statute, which the prosecution said clearly applied retroactively and thus trumped the presumption. Judge Pohl reserved decision.

The judge then addressed discovery. The primary point of contention was English translations of the defendant’s speeches, which the government wanted introduced into evidence. The defense asked, not unreasonably, for Arabic translations at government expense of both the summaries of the speeches

6. A long flowing garment with long sleeves typically worn by both men and women from certain Islamic countries.

7. A formal request made to a judge for an order or judgment.

8. A statute of limitation is a requirement that a criminal charge be brought within a certain amount of time. If the proscribed amount of time has passed, a charge may not be brought.



and of the speeches themselves. Judge Pohl granted the motion.

Judge Pohl then told that the parties that he, like everyone else, was aware that a new president would be sworn in on January 20, 2009, and that the change in administration might have an impact on the proceedings in Guantánamo. He nonetheless ordered the parties to proceed as scheduled, with the next hearing date then planned for March.

Finally, the defendant asked to speak. Rising, he showed the court a page from a newspaper, which I learned later was a full-page ad taken out by the ACLU in the *New York Times* in mid-November. The ad quoted then-President-elect Obama as saying that “As President, I will close Guantanamo, reject the Military Commissions Act, and adhere to the Geneva Conventions.” The ACLU then told Obama that “On day one, with the stroke of a pen, you can restore America’s moral leadership in the world” and concluded with an indictment of the Bush Administration and its policies. Mr. al-Darbi said in Arabic that he hoped that the President-elect would keep his promise and “respect the Constitution.” Judge Pohl admitted the advertisement into evidence.

The other two observers and I left the courtroom and walked down to the media center, located in what had been a hangar in the old airfield that now houses Camp Justice. We gathered in a small room with the sole reporter, two paralegals, the law students, and an Air Force colonel who was acting as public affairs officer. The defense lawyers then held a press conference. Afterwards, we were able to meet representatives of the defense and prosecution.

MICHELLE M. LINDO McCLUER

I made a quick trip to Guantánamo Bay, Cuba, to observe the latest round of military commission hearings between January 13 and 15, 2009. While two hearings were originally scheduled during this period, including one for a “high-value detainee,” one of the hearings was postponed.

My journey began where my active duty Air Force career ended six months before — at Andrews Air Force Base. The irony that I was flying out of Andrews as a civilian when I had never gotten the opportunity to make such a flight during my two year tour at Andrews was not lost on me. The 6:00 a.m. show time was also a bit earlier than most of my other mornings at the base. When I entered the passenger terminal, I noticed several people I knew from my JAG days, including a prosecutor and a defense paralegal. Fortunately, Murphy’s Law was not in force that morning, and our charter flight on North American Airlines took off on schedule with many empty seats.

Three hours later, we arrived in sunny 89° Cuba, a pleasant change from the sub-freezing temperatures in Washington, D.C. that morning. As this was a slow week for the commissions, a representative from the ACLU and I were the only NGO representatives present to break in the new NGO escort, a major from the Puerto Rico National Guard. The ACLU representative was making his

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NOOR UTHMAN MOHAMMED is a citizen of Sudan and has been described by JTF-GTMO counterterrorism analysts as being a senior leader of the al-Qaeda and providing weapons training to al-Qaeda recruits and operatives in the Khaldan terrorist training camp.

He was captured in a 2002 raid on an al-Qaeda safehouse in Faisalabad, Pakistan. Mohammed has denied ties to al-Qaeda, and the charges originally filed against him in May of 2008 were withdrawn and re-filed seven months later following accusations that his detention had been pursuant to information acquired through the use of waterboarding.

eighth or ninth visit to observe the commissions, so he was a valuable resource for navigating the base and its fairly limited dining/shopping/entertainment selections.

Upon hearing that I recently separated from the military after nearly eleven years of service, the escort relaxed a bit as we made our way from the airport side of the bay to Camp Justice on a Coast Guard speedboat. Our escort, Major Perez, was quite accommodating, and we had no issues with him, despite the mutual annoyance of having a babysitter/being the babysitter for adults.

Apparently, the NGOs previously traversed the bay on a 45-minute ferry, but that ended when one NGO representative began “organizing” the third-country national passengers. Since then, the NGOs have been whisked to the other side by themselves. I also heard that the press and NGOs had closer interactions in the past, but certain officials

9. This is the initial appearance of a criminal defendant in a commission (unless continued from an earlier time) and is usually when the accused formally enters a plea of either “guilty” or “not guilty.”

were afraid the NGOs would unduly influence the reporters, so more distance is kept between them now.

I observed the arraignment⁹ of Noor Uthman Mohammed on January 14, 2009. As Noor (his preferred name) was not considered a “high-value detainee,” his arraignment took place in the regular military commission courtroom set on a hill overlooking Guantanamo Bay. Although the arraignment was originally set to begin at ten in the morning, the hearing was later moved to eleven o’clock. We did not learn of the hearing delay until after we had gone through multiple layers of security and were sitting in the courtroom with our “minder/babysitter,” just a few feet from Noor. Noor sat alone at the defense table, dressed in the white flowing garment and crocheted cap that constituted prison camp uniform. The courtroom was ringed with uniformed guards who all seemed to wear the same alias name tag. When the delay was announced, half a dozen guards surrounded Noor as they escorted him from the courtroom.

During the pause in proceedings, we were led outside the court building, where we sat on picnic table benches. At the appointed time, we replayed our trip through the security procedures and, again, entered the courtroom. The prosecutors were Captain Tim Cox, USAF (United States Air Force), and Lieutenant Commander John Ellington, U.S. Navy. The lone uniformed defense counsel was Major Amy Fitzgibbons, U.S. Army. She was joined by Mr. Howard Cabot, a civilian attorney who has represented Noor in amicus (“friend of the court”) filings. Captain Moira Modzelewski, USN, presided over the arraignment proceedings. I understand this was her first time presiding over a military commission. She was quite patient and wanted to make sure Noor and his counsel and the Arabic (Noor’s native language) interpreters had enough time to get the translations worked out for every question she asked. Near the beginning of the

hearing, there was some confusion because the interpreters outside the courtroom had, inexplicably, rotated, thus, leaving a pause during which no interpreter translated the judge's statements. The judge began the hearing by ascertaining Noor's preferred name and inquiring as to whether Noor understood that he could wear civilian attire in the courtroom, rather than the camp dress. In fact, Captain Modzelewski encouraged Noor and his attorneys to have Noor appear in civilian clothing in future hearings, so as not to have his appearance prejudice the commission members.

Next, Noor assured the military judge that he was satisfied with the interpreter services provided to him. Captain Modzelewski also inquired as to whether Noor understood the military commission rules and whether Noor wanted to be represented by Major Fitzgibbons and Mr. Cabot. Noor did not seem familiar with the rules, and it became clear that he had never met Major Fitzgibbons before, although he did seem to have some rapport with Mr. Cabot. It seemed at one point as if Noor might not consent to Major Fitzgibbons representing him, but he did accept her representation in the end. Noor did not wish to designate either of his counsel as his lead attorney at that time. In addition to Mr. Cabot and Major Fitzgibbons, Noor requested to be represented by a Sudanese lawyer. After the military judge twice explained that the rules did not allow for

representation by foreign attorneys, Noor requested the presence of a Sudanese attorney as a defense consultant "as soon as possible."

The parties then had the opportunity to submit written voir dire¹⁰ questions challenging the military judge. Captain Modzelewski explained that she would issue responses to the questions and take up those challenges at the next court session. At that point, the judge moved to a discussion on the safeguarding of classified information and witnesses. The trial counsel submitted several protective order requests to keep certain information from being made known to the public, but the judge did not sign them at that time. Both parties agreed they had access to all the court filings in the case.

"Perhaps because of the familiarity with the UCMJ and the unfamiliarity of the military commissions, the parties and the judge referred to 'court-martial convening orders' and 'courts-martial' at various points throughout the arraignment, which lasted little more than one hour."

The next order of business was summarizing the contents of a Rule for Military Commission 802 conference held between the parties and the judge outside the courtroom. In that conference, they had discussed translation services, the filings record, preparing a proposed litigation schedule, and procedural aspects of the arraignment.

As was the case throughout the short arraignment, the detailed military defense counsel was on her game. At the conclusion of the judge's summary, Major Fitzgibbons reminded the court that they had also discussed the adequacy of the latest referral of charges against her client. Major Fitzgibbons did not believe there was a defect in the referral, but she wanted to reserve the right to conduct further research into the matter and

10. Voir dire allows the attorneys to question a military commission judge to determine if a judge is biased and/or cannot deal with the issues fairly, or if there is cause not to allow a judge to serve.

raise it in a brief at a later time if she saw the need to do so.

When the military judge inquired as to whether Noor had seen the charges against him, the defense counsel was unsure. Mr. Cabot mentioned that he had received a copy of the charges, and explained them to Noor in the courtroom. In the end, Noor waived the reading of the charges, which were summarized as providing material support for terrorism and conspiracy.

Captain Modzelewski then arraigned Noor, and Noor chose to reserve the entry of pleas for a later time. After the arraignment itself, there was a rather lengthy, in-place discussion between Noor and his defense counsel. The discussion focused on Noor's desire to address the court, but the defense counsel did not want to waive any potential motions by having Noor make that statement. The prosecution objected to Noor making any statement without entering pleas, but the judge allowed the statement, prompting one of the government attorneys to request that Noor be advised that any statement he made could be used against him. At that point, those of us in the courtroom all had pens in hand, ready to record Noor's statement, thinking this would be the highlight of the hearing. Alas, Noor's statement was nothing more than a short denial of his guilt of the charges pending against him.

Perhaps because of the familiarity with the UCMJ and the unfamiliarity of the military commissions, the parties and the judge referred to "court-martial convening orders" and "courts-martial" at various points throughout the arraignment, which lasted little more than one hour. It was interesting to note that all the uniformed attorneys were in service dress, with the exception of Captain Cox. I was later surprised to learn that most hearings at GTMO are conducted in Class B uniforms, rather than Class A, as required in most courts-martial.

Throughout the hearing, Noor complied with the judge's instructions, and there were no outbursts or any other events of note during the arraignment. After the judge informed Noor of the consequences of his voluntary absence after arraignment, should he choose not to attend future hearings, the hearing was adjourned until a future date, which would be determined at a later time.

Shortly after the hearing ended, commissions chief defense counsel, Colonel Peter Masciola, an Air National Guard officer activated for this position, held a press conference in a metal building inside a hangar on the base. I have been told that the small shed, outfitted with drapes and flags to make it look like a Pentagon briefing room, cost as much money as a small house in the Midwest. Colonel Masciola explained that his defense counsel had hoped to attend the press conference, but they had the opportunity to meet with their client immediately after the hearing, and, given the constraints on detainee availability for such meetings, the defense counsel had chosen to speak with their client instead.

There was not much media presence at the conference—reporters from China, South Korea, and Great Britain, and Carol Rosenberg from the *Miami Herald*. The press conference was short and did not reveal anything new.

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MICHAEL C. MCNERNEY

During my trip to Guantánamo Bay from January 17 to 22, 2009, I observed two military commission hearings. My experiences at the commission hearings proved to be very valuable.

The hearings I saw involved the conspirators of 9/11 and the *Omar Khadr* case. The conspirators of 9/11, including Khalid Sheik Mohammad, were tried in a high-security courtroom adjacent to my living quarters at Camp Justice. Upon entering the courtroom, all the observers proceeded into an anteroom, separated from the main courtroom by double-pane soundproof glass. I could see the main courtroom through the glass, but could not hear anything. Audio was actually delayed forty seconds and accompanied by a replay on closed-circuit television.

The 9/11 hearing itself focused on a few preliminary subject matters. The conspirators raised concerns about not having access to various documents and made several inflammatory comments about America. After a few minutes of this, the court tackled the problem brought about by the withdrawal of charges by the Convening Authority.¹¹ At issue was whether or not this withdrawal merely changed panels or required a new military commission. The military judge determined that he had jurisdiction to hear this case and decided that only a panel change had occurred. With this settled, the court turned to the issue of the competence of Ramzi Binalshibh.

Allegedly, the Justice Department had information regarding a medical interview with Binalshibh acquired pursuant to his parallel habeas proceedings in federal civilian court. The detailed defense counsel

11. The authority responsible for drafting, finalizing, and referring charges to the military commissions.

wanted this information for use during the military commissions because Binalshibh refused to cooperate with them or their experts. The military judge refused to order the government to produce this information but did allow for testimony from some medical personnel. The testimony was due to start in two days after a closed hearing to determine the sensitivity of the information but never happened because the judge later granted a continuance.

The final issue discussed was the parameters of Protective Order 7, which seemed to forbid all manner of information from being disseminated. Many statements made by the 9/11 conspirators are presumptively classified because of the potential for them to provide or reveal intelligence information. The defense argued that this was overbroad and prevented proper communication with their clients. For example, the defense said that when the conspirators made a statement to their attorneys, Protective Order 7 technically barred the attorneys from repeating the very same statement back to the conspirators because the conspirators lacked a security clearance. The parties eventually agreed that a “common sense” exception should apply, akin to Correction 1 to Protective Order 3.

9/11 CO-CONSPIRATORS: KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBAREK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, & MUSTAFA AHMED ADAM AL HAWSAWI are being jointly tried for conspiracy, attacking civilians and civilian objects, murder and destruction of property in violation of war, causing serious bodily injury, hijacking, terrorism, and providing material support for terrorism. With Khalid Sheikh Mohammed acting as their purported leader, these individuals are allegedly responsible for the September 11, 2001 attacks that resulted in the destruction of the World Trade Center in New York, damage to the Pentagon in Washington, D.C. and the deaths of more than 2,973 civilians.

Mohammed himself has confessed to his participation in this and several other terrorist incidents over the past 15 years, including the 2002 Bali nightclub bombings and the murder of American journalist Daniel Pearl.

My observations in the *Khadr* case, which occurred in a relatively normal courtroom, were limited to the testimony of one FBI Special Agent who interrogated Khadr and elicited a statement from him that he had trained with known terrorists. The prosecution tried to make the case that Khadr was a dangerous man from a family of terrorists. They included a great deal of information regarding the links between Khadr and his family to other terrorists. The implication was that Khadr had ties to al-Qaeda. The defense did a very good job on cross examination and poked a few holes into the testimony of the FBI Agent.

In both cases, the military judges stopped proceedings on Inauguration Day to allow people to watch the events. The expectation on base was that President Obama would shut down the proceedings after he was sworn in. However, as the day wore on and no word came from the White House, the defense began to get nervous. At about 10:00 p.m., a rumor started circulating around camp that the judge in the 9/11 case was rearranging the next day's schedule in order to allow the conspirators to enter pleas. Everyone expected the 9/11 conspirators to plead guilty. This could make stopping the commissions difficult for

President Obama because there would then be guilty pleas on the record. Outside of the obvious political difficulties that would create, there may have been other legal concerns regarding double-jeopardy.

Just then, one of the members of the defense team came running into camp



with an order from the President ordering the Secretary of Defense to order the prosecution to request a 120-day continuance. President Obama had ordered the continuances so that he might have some extra time to study the military commission system. His order contained the official justification that “the newly inaugurated president and his administration [can] review the military commissions process, generally, and the cases currently pending before military commissions, specifically.” Both proceedings were stopped on the morning of January 21, when the military judges granted government motions for continuances.

I believe that my experience as a veteran and position as a law student helped give me a unique perspective on the military commissions. On the one hand, I joined the military as a direct response to 9/11 and the emotions the attack on America created in me. On the other hand, I spent the last three years studying justice and have great respect for the rule of law. I think these two competing parts of my persona helped keep me objective.

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