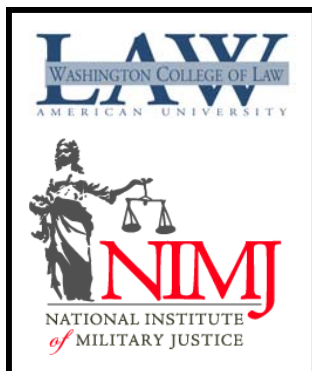


NIMJ Reports from

GUANTÁNAMO

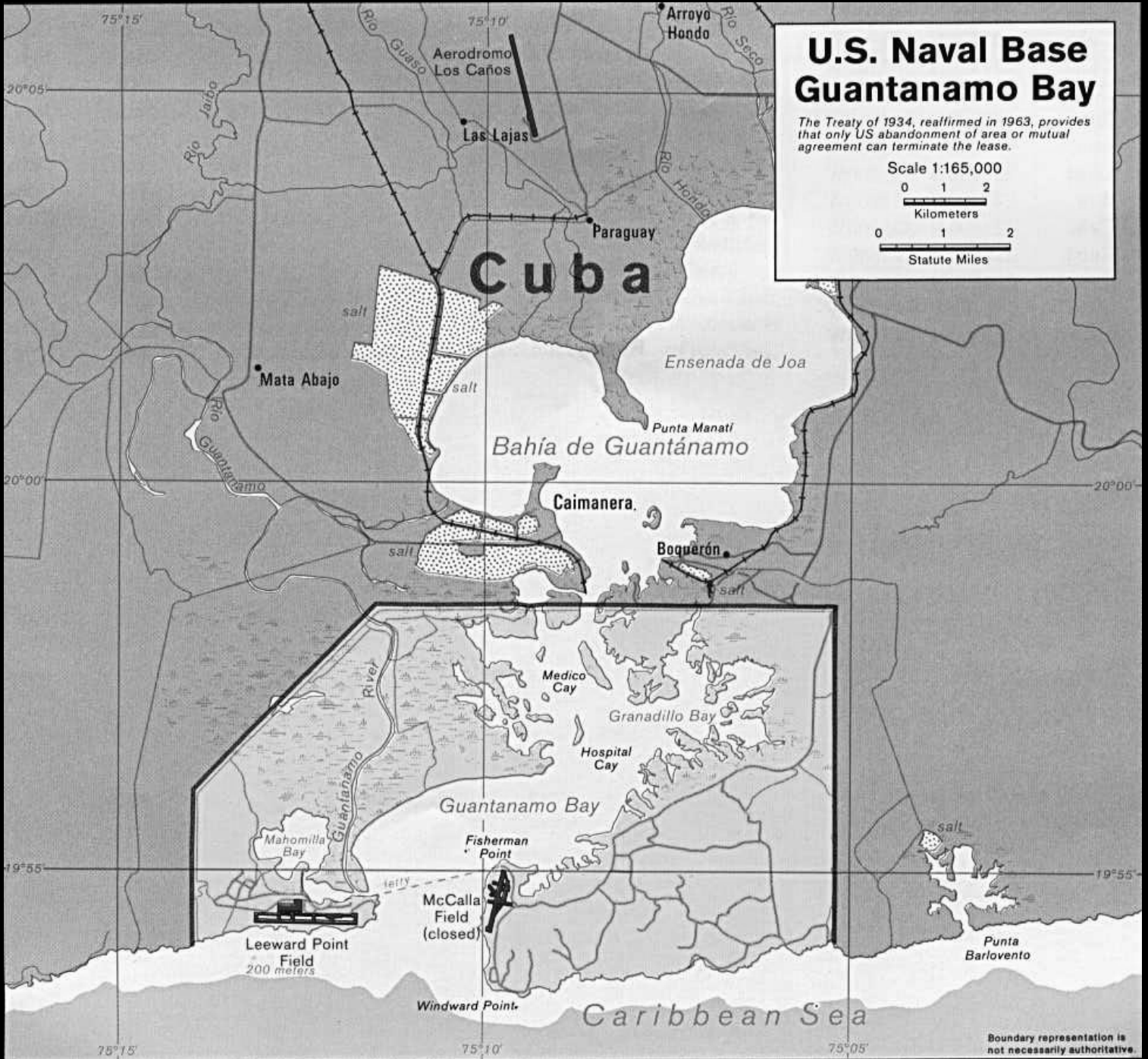
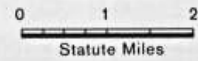
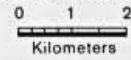
Volume 2



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 Department of Defense procedures established to imprison and prosecute detainees. 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. Another aspect of NIMJ's mission is fostering public education through its website, www.wcl.american.edu/nimj, 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 the *Military Commission Instructions Sourcebook* (2003-09), the *Military Commission Reporter* (2009) and the forthcoming *Military Commission Reporter, Volume 2*.

The Department of Defense invited a few non-governmental organizations to observe military commissions at the U.S. Naval Base at Guantánamo Bay, Cuba, in an effort to satisfy the right to a public trial. It was natural for NIMJ to seek observer status. In October 2008, after a lengthy delay, the Office of Military Commissions named NIMJ as an alternate non-governmental organization observer. NIMJ observers made five trips between October 2008 and January 2009. Reports from those trips appear in Volume One of this series. After President Obama requested stays in all cases in early 2009, the future of military commissions remained in limbo for many months. Even during this time certain pro-

ceedings continued, and the Office of Military Commissions invited NIMJ on seven trips to observe hearings in the months after Obama's inauguration. In adhering to President Obama's request, no commission went to trial during this time. In fact, most of the hearings concerned the repeated stay requests made by the government. Most of the military judges approved the stays to give the new administration time to decide how best to handle each case. President Obama ordered an inter-agency task force to review the files of every detainee to determine an appropriate course of action.

Not all of the hearings were limited to stay requests. Legal fights between defense counsel and the government continued over issues such as discovery obligations, legal representation of the accused, and mental competency determinations. With the passage of the Military Commissions Act of 2009 it would seem that, barring invalidation by the Supreme Court, commissions will continue to play a significant role in the country's legal system. Whether at Guantánamo Bay or in a federal prison in the United States, NIMJ will continue to observe and comment on military commissions.

Each field report published herein was written by one of the individuals NIMJ sent to observe commission proceedings. Each observer provides a unique perspective. The observers included long-time military justice practitioners, academics, and law students.



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TITLE XVIII—MILITARY COMMISSIONS

- Sec. 1801. Short title.
- Sec. 1802. Military commissions.
- Sec. 1803. Conforming amendments.
- Sec. 1804. Proceedings under prior statute.
- Sec. 1805. Submittal to Congress of revised rules for military commissions.
- Sec. 1806. Annual reports to Congress on trials by military commission.
- Sec. 1807. Sense of Congress on military commission system.

SEC. 1801. SHORT TITLE.

This title may be cited as the “Military Commissions Act of 2009”.

SEC. 1802. MILITARY COMMISSIONS.

Chapter 47A of title 10, United States Code, is amended to read as follows:

“CHAPTER 47A—MILITARY COMMISSIONS

| “SUBCHAPTER | Sec. |
|--|---------|
| “I. General Provisions | 948a. |
| “II. Composition of Military Commissions | 948h. |
| “III. Pre-Trial Procedure | 948q. |
| “IV. Trial Procedure | 949a. |
| “V. Classified Information Procedures | 949p–1. |
| “VI. Sentences | 949s. |
| “VII. Post-Trial Procedures and Review of Military Commissions | 950a. |
| “VIII. Punitive Matters | 950p. |

“SUBCHAPTER I—GENERAL PROVISIONS

- “Sec.
- “948a. Definitions.
- “948b. Military commissions generally.
- “948c. Persons subject to military commissions.
- “948d. Jurisdiction of military commissions.

“§ 948a. Definitions

“In this chapter:

“(1) ALIEN.—The term ‘alien’ means an individual who is not a citizen of the United States.

“(2) CLASSIFIED INFORMATION.—The term ‘classified information’ means the following:



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 American University Washington College of Law, focusing on human rights and humanitarian .

'Round and 'Round the Court of Ad-Hockery

The wheels of ad hoc justice continued a slow and uncertain path through Guantánamo Bay Monday. Instead of deciding whether to grant the government's application for a 120-day stay in the proceedings – a request submitted pursuant to President Obama's recent directive – the hearing focused on the on-going soap opera surrounding Omar Khadr's defense attorneys. Judge Parrish ordered that the stay approved shortly after the inauguration will continue until July 13 at which point the judge will decide whether to grant the full 120-day stay. Also on that day, Mr. Khadr will be asked to formally decide who he wishes to serve as his military defense counsel. This leaves undecided the request from the Chief Defense Counsel, Colonel Masciola, that Judge Parrish rule on whether Lieutenant Commander Kuebler, one of Mr. Khadr's defense counsel, should be dismissed from the case. The details surrounding Colonel Masciola's decision to remove Lieutenant Commander Kuebler are not publicly known because his filing with the commission remains sealed. For now, Kuebler will continue to represent Mr. Khadr. Judge Parrish dismissed the other defense counsel detailed to the case pursuant to Mr. Khadr's request.

Unfortunately, the controversy surrounding Mr. Khadr's representation, however disturbing, is a side-show to the real tragedy unfolding slowly in Guantánamo. The seventh anniversary of his capture is fast approaching with no indication of an end to Mr. Khadr's perpetual state of limbo. A feeling of frustration surfaces because issues such as the one considered today could have been handled quickly and more easily in federal court. Justice requires stability and fairness, not arbitrariness and inequality. The commissions come with no precedence – rules are made up as the process moves along. While court-martial rules can provide guidance to a military judge in a commission, they are not binding. Whereas decades and centuries of case law inform courts-martial and civilian federal trials, the current commissions started largely from scratch in 2006. As a former judge

advocate, some aspects of the commissions remind me of a court-martial. Yet, the discussion I heard in the courtroom today and the fact that it is taking place nearly seven years after Mr. Khadr's capture remind me only of a zoo.

In a press conference after the hearing, Deputy Chief Defense Counsel, Michael Berrigan, pointed out the obvious: the greatest unfairness in all of this mess befalls Mr. Khadr. The National Institute of Military Justice hoped that President Obama would permanently halt the commissions. Everyone involved would be better served if the government turned its back on this inequitable system. While Mr. Khadr must receive adequate representation and be able to place trust in his attorneys, so must we all be able to trust the courts of law used by our government to mete out punishment. Unfortunately, these goals seem impossible to come by in Guantánamo.

OMAR AHMED KHADR is a Canadian citizen born in 1986. His detention at Guantánamo began when he was 15. Mr. 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. soldier 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 charged with conspiracy, providing material support for terrorism, and spying.



Sitting as an observer of the military commissions process in the cases of Mohammed Kamin, Omar Khadr, and the five 9/11 conspirators, I wondered if this is what was envisioned when President Bush gave the initial order directing the use of military commissions back in November of 2001. Now, in mid-July of 2009, we are at Camp Justice, Guantánamo Bay, Cuba, and the issues that the parties are addressing have very little to do with any substantive issues of guilt or innocence of those charged with offenses under the Military Commissions Act of 2006 (MCA).

VICTOR M. HANSEN

Professor Victor Hansen teaches Criminal Law, Criminal Procedure, Evidence, and Prosecutorial Ethics at New England Law Boston. Before joining the New England Law faculty in 2005, he served a 20-year career in the Army, most of that time as a JAG Corps officer. In his last military assignment he served as a regional defense counsel for the United States Army Trial Defense Service. He has been involved in military capital litigation as a prosecutor and as a defense attorney. He also served as an associate professor of law at The Judge Advocate General's Legal Center and School in Charlottesville, VA. He is the author of several articles and books on criminal and military law, evidence, and national security issues.

Mohammed Kamin:

In *Kamin*, the primary issue before the commission was whether to grant the prosecution an additional 120-day continuance. The prosecution argued that such a delay as necessary in order to comply with President Obama's executive order directing a delay in the proceedings while Congress and the Administration work out changes to the commissions process and the MCA. The prosecution argued that the likely changes to the MCA will make the process better and fairer for the accused and it does not make sense to proceed under the current system with all of these changes in the works.

The defense responded by claiming that the only fair remedy for Mr. Kamin would be a dismissal of the charges. The defense pointed out that the government has had literally years to work out a fair process to try Mr. Kamin and others but has been unable to do so. The defense also noted that according to the DoD General Counsel, Jeh Johnson, the charge of material support for terrorism is not a viable offense under the Law of War. Material support for terrorism is the only charge which Mr. Kamin faces.

Mr. Kamin was not present during this hearing, as he has declined to participate in any of the commission hearings. When he was informed on the morning of the hearing that he could take a shower and come to the hearing Mr.

Kamin allegedly responded by saying, "I'll take a shower when you guys are ready to send me home."

The proceedings also briefly addressed ongoing discovery issues. The commission expressed some frustration with the prosecution's failure to provide even the most basic discovery requests in a timely manner. The military judge noted that information, which has clearly been in the government's possession for some time, only seems to get to the defense on the eve of each pretrial hearing.

Omar Khadr:

In the *Khadr* case, the 120-day continuance was also one of the issues before the commission. As in *Kamin*, the prosecution and defense in *Khadr* made their respective arguments for why the continuance should or should not be granted. The government's argument was virtually the same as in *Kamin* with the additional claim that the defense cannot possibly be ready for trial because the assigned military counsel is being released from the case and the civilian counsel who will replace him has not yet obtained official clearance from the government. In essence the argument is that since the government has not yet made Khadr's attorney available, the defense is being disingenuous by arguing for a dismissal of the charges.

9/11 Conspirators

In the 9/11 case the commission attempted to conduct a status conference to address any unresolved discovery matters related to the competence determination hearings for Mr. al Shibh and Mr. al Hawsawi. The three other 9/11 conspirators, Sheikh Mohammed, Bin 'Attash and Ali were permitted to attend the session but the commission was to hear only from the prosecution and detailed military defense counsel for Mr. al Shibh and Mr. al Hawsawi and only as to issues related to the upcoming competency hearing.

The limitations imposed by the commission for this session were quickly abandoned when none of the five conspirators initially appeared for the hearing. In order to entice the attendance of the conspirators, the prosecution suggested that the commission modify the limitations on the hearing to allow for the three *pro se* defendants to address the commission for no more than 5 minutes on any outstanding issues that were pending before the commission. This modification eventually got three of the five conspirators to come to the hearing, but much of the unclassified portion of the hearing quickly devolved into arguments over what was specifically told to the conspirators to get them to come to court and whether any of the conspirators were threatened with revocation of certain privileges if they refused the government's "invitation" to come to court.

The few substantive matters that were covered in the unclassified portion of the hearing focused on defense access to medical

MOHAMMED KAMIN is an Afghan national. His official records state that he was born in 1978, but he is one of a handful of detainees for which no evidence exists as to his birthplace. Mr. 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.

information, the appointment of defense expert assistance to review certain medical information, and the re-opening of the sanity board for one of the conspirators. Not surprisingly, the prosecution countered many of the defense requests by arguing that, for the limited purposes of a competency hearing, the defense had all of the information they needed to present their case.

Observations

Listening to and observing these proceedings, I often felt as if I were observing just one more court-martial, not so much different than any of the hundreds of courts-martial I have observed over my military career. I was impressed with the quality of the representation for both sides. The attorneys were well prepared, articulate, and everyone involved seemed very comfortable in this forum that has many similarities with the court-martial system. The respective arguments were exactly what one would expect each side to make.

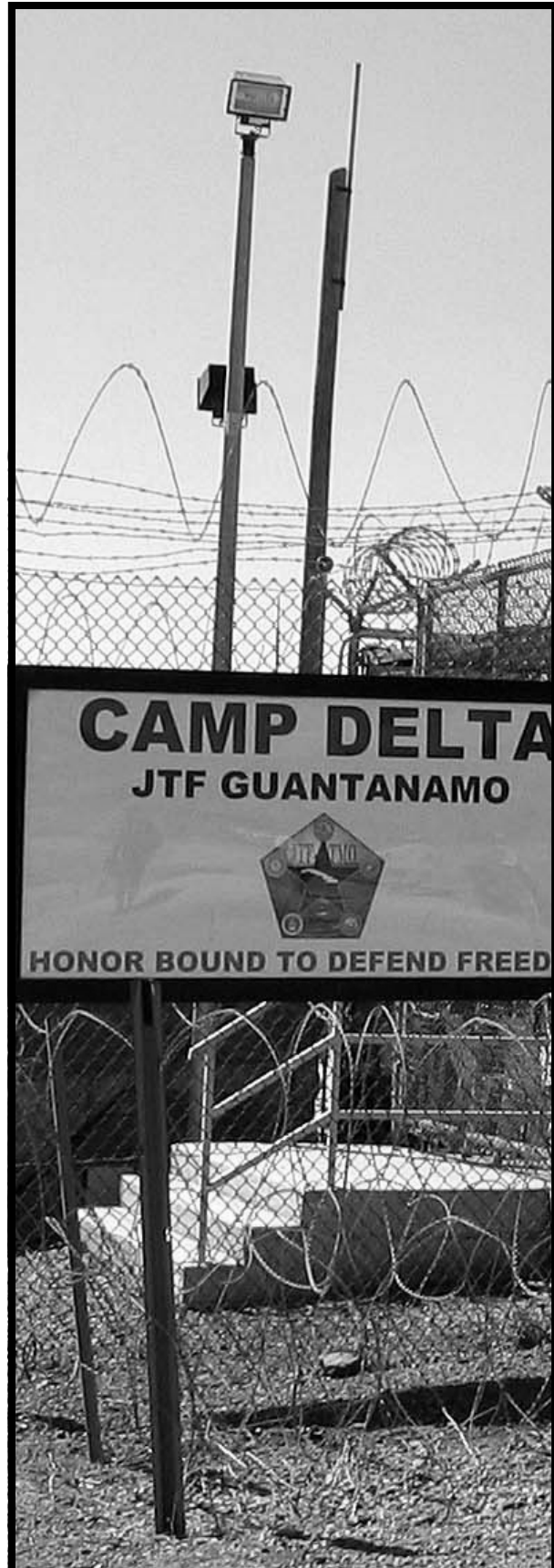
But when I reminded myself that I was at Camp Justice in Guantánamo Bay, observing a process that was begun almost eight years ago, these proceedings took on a much different cast. In spite of the best efforts by counsel, nothing they could do or say would turn the clock back to November 2001. Even though so much time has elapsed since that initial order, the focus of the litigation for a vast majority of these cases is on the most preliminary of issues; appointment of counsel, the granting of delays, the accused's capacity to represent himself, and of course, discovery issues. Even though the Chief Prosecutor claimed that his team was ready now to begin prosecuting several of the 66 cases he claims have been identified as triable by military commission, this claim is not unlike the claims of those who preceded him in that office as far back as the fall of 2002. And yet, here we are in July of 2009 still stuck in a seemingly endless morass.

To be sure, some of this delay has little to do with the conduct of the prosecution teams tasked

with trying the cases. I suspect that these prosecutors, like most good soldiers, are trying their best to execute the orders of their superiors. Nonetheless, in spite of their best efforts and the best efforts of the defense attorneys for their clients, it cannot be said that justice is being done at Camp Justice. The victims' family members in the 9/11 case have yet to receive justice. Those charged with committing war crimes under the MCA, who have been subjected to delay after delay in a system that has changed no fewer than three times in the past eight years and is set to change yet again, have not yet received a fair trial. The American people, in whose names these cases are brought, have not received justice. When judged by the standards of fairness and justice, thus far, this process has been a failure.

It does seem that ever so slowly, the commissions process is moving in a direction that could give it much needed legitimacy. For example, there are now systems in place that allow the commissions to deal with classified evidence in such a way that the accused and his counsel can have access to this evidence without inadvertent disclosure to the public. These procedures are not unlike those used in federal and military courts. The Obama Administration also recently proposed a number of changes to the MCA. These changes include proposals to remove material support for terrorism as a charge under the MCA, a proposal that would both clarify and enhance the government's discovery obligations, a change that would more closely align the hearsay rules with the rules used in federal and military courts, and a proposal that would provide the accused with more latitude in the selection of military defense counsel. Congress is now taking up these and other changes to the MCA, and it appears that some modifications enjoy bipartisan support in the Congress.

These changes are clearly for the better, and as a result, the military commissions process could be much more closely aligned with military court-martial practice. The shame of it is that the court-martial system should have provided the structure for these commissions back in November 2001, and it is taking the government much too long to get back to a place it should have started from. The question then is, after so much time, after so many delays, after so many changes, after so many rebukes by the courts, and after so much bungling, whether justice can ever be done under the military commissions system. If the past eight years are any guide, the prospect looks bleak.



Mason C. Clutter is an attorney in Washington, D.C. Ms. Clutter currently serves as a Senior Associate with the Constitution Project, where she focuses on various criminal justice and rule of law issues. She has also worked as a Research Associate on national security law issues for Yale Law School's National Litigation Project. In 2009, she completed her LL.M. in Law and Government at American University Washington College of Law. Ms. Clutter graduated from Barry University School of Law, cum laude, in 2006.

MASON C. CLUTTER

I was recently privileged to represent the National Institute of Military Justice and travel to Guantánamo Bay, Cuba, to observe military commission proceedings in two cases, *U.S. v. Mohammed, et al.* and *U.S. v. al-Darbi*. Hearings were originally scheduled for September 21-25 in *Mohammed* and September 24 in *al-Darbi*. As anticipated by news reports and commission observers, the government, yet again, requested a 60-day continuance in each case. The Obama Administration continues to discuss and study which cases will remain in the military commission system, along with what the military commissions will look like, and which cases might move to Article III courts.

Mohammed, et al.

Mohammed, et al. is also known as “the 9/11 case.” The defendants in this case include the five 9/11 co-conspirators who 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. Upon entering the high-security courtroom, designed specifically to try these five defendants, the *ad hoc* nature of these proceedings became quite apparent. The courtroom is equipped with a viewing area separated from the proceedings by very thick, soundproof glass. Included in the courtroom is a closed-circuit television system that provides visual and audio recounts of the proceedings on a 40-second delay to those in the viewing area. The viewing area is also equipped with a royal blue curtain, used to separate 9/11 victims’ families brought to observe the proceedings from members of the media and non-governmental organizations.

This curtain provides for an “us and them” feeling in the room.

After all of the hype and expense dedicated to this pre-trial hearing, nothing substantive occurred. This has been the status of the proceedings in Guantánamo since Obama first requested continuances in the commissions after his inauguration. No one seems quite sure when commissions will restart in earnest and what substantive and procedural aspects may change to bring the commissions more in line with regular courts. In the 9/11 case, the government simply requested an additional 60-day continuance of the trial, which was granted by the military judge, Army Colonel Stephen Henley, one hour before the hearing. However, the show must go on, especially when the government has flown 9/11 victims’ families to Guantánamo to witness the proceedings against those accused of nearly 3,000 civilian deaths. Five *pro se* motions were also scheduled for hearing on Monday. The prosecutor, Colonel Robert Swann, all but guaranteed the presence of Khalid Sheik Mohammed (known as “KSM”) and his co-conspirators at the hearing; however, the defendants waived their right to appear. Colonel Swann informed the court that he believed the defendants had not received ade-

quate notice that their motions were still going to be heard and requested that they be “forcibly extracted” to appear at the hearing. One of the civilian defense counsel, David Nevin, informed the commission that his clients had been notified and knowingly and voluntarily waived their appearance. Judge Henley respectfully denied the prosecution’s request and proceeded to hear the *pro se* motions without the defendants present.

The motions included a motion to dismiss military standby counsel and civilian legal advisors, a motion to compel Arabic translation of the commission sessions, a motion to publicly release transcripts of all prior commission sessions, a motion to compel research support materials and to receive matters from standby counsel, and a motion to boycott the Staff Judge Advocate commission session. The judge heard arguments from both parties regarding these motions. After an hour of back and forth between Swann and the various defense counsel, including a mistranslation of the Arabic word “printer” into the English word “typewriter,” Judge Henley deferred ruling on the *pro se* motions until the 60-day continuance period has passed. The judge ordered that no hearings be scheduled until November 16, 2009, at which time the

government assured the court that it would have an answer regarding the elephant in the room, the future of this court in flux. Also to be determined at that time are the competency issues regarding two 9/11 defendants who wish to represent themselves, Ramzi Bin al Shibh and Mustafa Ahmed Adam al Hawsawi.

9/11 CO-CONSPIRATORS: KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBAREK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, & MUSTAFA AHMED ADAM AL HAWSAWI were being jointly tried for conspiracy, attacking civilians and civilian objects, murder and destruction of property in violation of the law 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 nearly 3,000 civilians.

In November 2009, the Obama administration announced that the 9/11 co-conspirators would be charged in civilian federal court.

I was surprised that the court proceeded with the hearing. It felt like it was a hearing simply for the sake of having a hearing. Having practiced in the federal court system in Florida, I was acutely aware of the fact that this hearing would not have taken place in a stateside court. In a system where the dockets are full and

resources are scarce, the federal system is far more frugal with time and money. I also became aware of the fact that the defendants have learned how to manipulate this uncertain system. For instance, the three *pro se* defendants filed motions to dismiss their standby military and civilian counsel, yet KSM himself directly communicated with his standby civilian counsel Monday morning, requesting that his attorney read a statement, on his behalf, on the record. Again, several hours of time and thousands of dollars were spent to prepare for an *ad hoc* hearing where nothing substantive resulted.

Following the hearing, a press conference was held in a small trailer inside an old airplane hangar. Each 9/11 family member approached the podium and gave a heart-wrenching account of the losses they suffered. There were stories of losing sons and daughters and grandchildren, recollections of last phone calls and visits. Tears were shed, and pictures were displayed while each family member spoke of the justice for which they have been waiting. They were very frustrated by the additional 60-day continuance and were disappointed that they did not get to see the defendants.

One family member stated that he believed the 60-day delay would be more like a two-year

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, destruction of property 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.

delay if the cases were transferred to federal court. He feared that he would not see justice in his lifetime.

All but one family member stated that they believed the 9/11 terrorist attack was a war crime and that this case should be tried by a military commission. The dissenter, a Muslim woman who lost her son in the 9/11 attack and was

later investigated for possible terrorist connections, expressed her desire that the case be tried in federal court because she wanted the defendants tried in accordance with the Constitution and the rule of law. She believed that Guantánamo should be closed, as it has become a “symbol of torture and has undermined our integrity and standing in the world.”

Chief Prosecutor, Captain John Murphy, then assured the media that he and his team were ready to commence the trial and were just awaiting approval from the administration to proceed. It felt as though Captain Murphy was making a distinction between the military commissions office and the executive branch, even though there is no distinction to be made. He reiterated the government’s long-held position that the 9/11 defendants are “unlawful combatants” who violated the law of war, and not common criminals. Captain Murphy praised the accomplishments of the members of his trial team, claiming that together they have over 100 years of experience prosecuting cases. The press conference concluded without any comments from the defense.

al Darbi

On Wednesday, I attended Mohammed

Ahmed Haza al Darbi's hearing. Scheduled to be heard were the prosecution's motion to reconsider the military judge's ruling excluding parts of the documentary *The Al Qaeda Plan*, which was played during Salim Hamdan's military commission, the defendant's motion to pre-admit the PBS documentary *Torturing Democracy* and the documentary *Taxi to the Dark Side*, the prosecution's motion for access to the accused for medical and mental health evaluations, and outstanding discovery issues, including production of defense witnesses for motions and trial. However, the government again requested a 60-day continuance in order to determine the appropriate forum in which to prosecute Mr. al Darbi.

Unlike the 9/11 co-conspirators, Mr. al Darbi was present for and participated in the hearing. In fact, at one point, the translation was so poor that Mr. al Darbi engaged the judge in English, informing him that he understood the judge's ruling on his motion to dismiss his military counsel. Mr. al Darbi sought to excuse his military counsel from the proceedings and replace them with military counsel of his choosing. Shockingly, neither defense counsel, nor the prosecutor, nor the judge was on the same page as to whether this was permitted. Defense counsel, Ramzi Kassem, also acting as a second interpreter for Mr. al Darbi, informed the court that a recent MCA administrative amendment permitted Mr. al Darbi to exercise his right to select his military counsel. The prosecutor rebutted that the provision was not in effect and that Mr. al Darbi had to proceed with his current military defense counsel until new military counsel was appointed. The military judge, U.S. Army Colonel James Pohl, ruled that Mr. al Darbi could dismiss one member of his military counsel team, but needs to retain at least one military counsel until substitute counsel is provided or it is clear to the court that the rules do not require that he have military counsel throughout the proceedings.

Not only was the uncertainty of the future of the

military commissions an issue, the proposed amendments to the MCA also played a dominant role at the hearing. Defense counsel moved for a dismissal, arguing that, once the proposed amendments are passed, the case would need a new referral, which would require that the case begin again from scratch. The prosecutor, Department of Justice attorney Frank Rangoussas, stated that the government would not require a new referral because, while the underlying evidentiary standards may change, the charges against Mr. al Darbi would not. Mr. Kassem felt that this statement was very perplexing, given the fact that Mr. al Darbi is accused of, among other charges, providing material support for terrorism, and just a few days before the hearing, a high-ranking member of the Department of Justice testified before Congress that he did not believe material support was a viable war crime.

Judge Pohl reminded the government that it had requested three continuances in this case. He stated "the government has now requested 2 more months' delay after an 8 month delay for charges that arose 9 years ago." He further informed the government that Mr. al Darbi has been in custody for approximately 7 years and that the government controls the charging decision and discovery, and now continues to delay the process. The judge noted that nothing has changed since this case was referred in February 2008. Judge Pohl then granted the government's request for a 60-day continuance. The judge conceded that the current rules were in flux, but did not believe that the proceedings would need to start from scratch in 2 months. The judge stated that, while he was hesitant to use this term to refer to this process, he felt it would be more "efficient" to grant a continuance than to dismiss the charges against Mr. al Darbi at this time. No other motions were heard. Judge Pohl set evidentiary hearings, including Mr. al Darbi's motion to suppress 119 statements he alleges were obtained from him through the

use of torture and inhuman and degrading treatment, for January 11, 2010.

At the press conference following the hearing, Mr. Kassem informed the media that his client was frustrated with the latest continuance and was an “innocent man.” He claimed that the case against Mr. al Darbi rests on statements obtained through the use of torture and inhuman treatment. Mr. Kassem reiterated the newly formed opinion of the Obama administration that providing material support for terrorism should not be a crime under the MCA, and, therefore, he believes Mr. al Darbi should be tried in an Article III court.

Prosecutor Rangoussas informed the media that the case against Mr. al Darbi consists of his own statements, as well as corroborating information that supports his statements.

Captain John Murphy then stated that the government will make a decision regarding a trial forum for each of the 6 referred cases, involving 10 accused, by November 16, 2009. As on Monday, he stressed that he and his team remain ready and prepared to try this case as directed by the Attorney General in consultation with the secretary of defense. Captain Murphy referred to Mr. al Darbi as an “enemy combatant,” which incited Mr. Kassem to state that he believed that Guantánamo was still being run by the Bush administration and that the military commissions are like a “headless chicken that keeps on moving after it is decapitated.” Captain Murphy responded that it is not his job to decide what terms are used, whether “enemy combatant” or “unlawful belligerent,” because the detainees are actors charged with violating the law of war, “whatever you call them.” Captain Murphy stated that material support is currently a charge under the MCA, and he will continue to prosecute under the current law. As you can imagine, the litigants’ blood was boiling after this press conference, even though nothing substantive took place during the hearing.

Conclusion

I was excited and honored to have the privilege to travel to Guantánamo and observe these proceedings. For months I have been researching and writing and forming opinions about the commissions, yet I had never seen a proceeding. I left more confident that my original opinion was correct: these are *ad hoc* proceedings, and nothing has been accomplished in the years since President Bush’s commencement of military commissions. There was a thick sense of frustration on the part of everyone involved — judges, parties and victims’ families alike. With the coming of the new administration, everyone hoped things would be clearer; however, in light of the current debate in DC regarding the future of these proceedings, nothing could be farther from reality. There is an overarching uncertainty, not just regarding the future of the commissions, but an uncertainty about what, if anything, is being accomplished. In which forum will these cases be tried? Which amendments to the MCA will Congress enact and what kind of an impact will those amendments have on the pending cases? The answers to these questions are soon to come, and, hopefully, by November 16 a new direction will be established to achieve justice for those who have been patiently awaiting it for over 8 years.

VALARIE KAUR

I had the honor of observing the military commission proceedings at Guantánamo Bay, Cuba, as a representative of the National Institute of Military Justice. On October 7, 2009, I observed a hearing in *United States v. Khadr* for Omar Khadr, a Canadian citizen whom the U.S. captured on the battlefield in Afghanistan in 2002 when he was fifteen years old and detained at Guantánamo for the last seven years. His charges include murder, attempted murder, conspiracy, providing material support for terrorism, and spying. In the 29-minute hearing, one of the quickest hearings at Guantánamo to date, the judge granted Mr. Khadr's motion to change counsel and the government's motion for a 60-day continuance. The judge then spent the majority of the hearing considering whether Khadr had the right to protect the privacy of his own legal notes, a right that would not have been in question in a federal courtroom. Several weeks later, on November 13, the Obama Administration announced that Omar Khadr's case would remain in the military commissions.

The Courtroom

On the morning of October 7, 2009, our military escort led us to the courtroom. The courtroom was neither plush nor bare; it conveyed only a modest sense of authority. The room boasted several dark wooden tables and burgundy leather chairs that matched the carpet. Fluorescent lighting shone overhead, and an air conditioning unit hummed in the

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corner. Our military escort showed the NGO observers to the public seating in the back behind a wooden railing, far from the reporters seated to our right. Tables for the defense and prosecution sat in front of us, but a white pillar awkwardly blocked half the prosecutors' table from our view. A lectern rested in the middle of the room where lawyers could address the judge. In the front right corner, an elevated platform held the judge's seat. The only decoration in the courtroom hung on the left wall, behind three tiers of empty jury seats: official seals for the Department of Defense, Army, Marine Corps, Navy, Air Force, and Coast Guard.

The atmosphere in the courtroom was relaxed. A military man in front of me waited patiently, holding in both hands a thick spiraled book with a big bold title: "Manual for Military Commissions." Several dozen military personnel, lawyers, and spectators chatted quietly – until the doors swung open and four military guards led in the defendant. Then the room went silent as all eyes fell on Omar Khadr. The first thing I noticed was Mr. Khadr's hands. He held his hands at shoulder level, fingers spread delicately, barely touching the guard's hands leading him, in a surprisingly tender posture. The delicateness of his hands stood in sharp contrast to the body that followed. Mr. Khadr is no longer a boy. His broad shoulders and chest filled out his white uniform. His eyes were boyish and calm, and a smile lingered on his lips, framed by a fuzzy black beard.

Mr. Khadr was fifteen years old when U.S. soldiers found him under a pile of rubble after a shoot-out at an Afghan compound on July 27, 2002. The Pentagon alleges that, when soldiers approached the rubble after the battle, Khadr threw a grenade that killed Sergeant 1st Class Christopher Speer. Khadr was shot twice, tearing two gaping holes in his chest and causing near-blindness in his left eye. He was taken to Bagram Prison and then Guantánamo, where his lawyers allege he was tortured during in-

terrogations and detained in isolation for months at a time. Mr. Khadr has now spent seven years in detention and celebrated his twenty-third birthday last month: he has grown up at Guantánamo.

The first time Mr. Khadr was seen or heard by the outside world after his capture was in this very courtroom on January 11, 2006. He was nineteen years old. The Bush Administration chose Mr. Khadr as one of the first defendants in the military commissions. The Supreme Court found President Bush's original commissions unconstitutional later that year, but Congress quickly passed the Military Commissions Act to grant legislative authorization. And Mr. Khadr was back in this courtroom again and again, defended by a succession of lawyers. Now on his sixteenth visit to this courtroom, Mr. Khadr took his seat at the defense table and asked for a pen. He spent the rest of the hearing doodling on a yellow legal pad between whispered exchanges with his attorneys.

The military judge, Colonel Patrick Parrish, entered the room in a flowing black robe and called the commission to order. He acknowledged the lawyers before him, including the chief prosecutor, Captain John Murphy, dressed in a naval uniform with gold stripes at his sleeve, and new civilian defense attorneys Barry Coburn and Kobie Flowers. Dressed in suits, Coburn and Flowers seemed to stand out in a courtroom filled with uniformed military personnel. I wondered whether military judges could put aside seeing civilian lawyers as outsiders, versus "one of their own." I later learned that Judge Parrish comes from the same military base as Speer, the man killed by the grenade allegedly thrown by Khadr.

Defendant's Motion to Change Counsel

The judge first turned to Mr. Khadr's motion to change his counsel. In June, Mr. Khadr had moved to fire his military defense attorneys, because they were fighting among themselves,

accusing one another of ethics violations. The conflict pitted Mr. Khadr's most prominent and passionately outspoken defense attorney, Lieutenant Commander William Kuebler, against the rest of the Pentagon-appointed defense team. Michelle Shephard of the *Toronto Star* has noted that detainees have such little control over their lives that hiring and firing their attorneys is often the only way to exercise control over their cases.

Judge Parrish asked Mr. Khadr whether he wished to proceed with new counsel. "Yes, sir," he said in a low tenor with a hint of a Canadian accent. The judge then asked Mr. Khadr whether he wished to excuse Kuebler. "Yes, sir," he said again. This was one of the few times Mr. Khadr had ever spoken in this courtroom.

Judge Parrish dismissed Kuebler on the spot, and the lieutenant commander promptly rose from the defense table and left the courtroom after working on the case for two years. Barry Coburn and Kobie Flowers, former federal prosecutors, became Mr. Khadr's tenth and eleventh attorneys, respectively, in five years. The judge approved their request to add Army Major Jon Jackson as detailed defense counsel.

Prosecutor's Motion for a 60-Day Continuance

The Obama administration had asked for yet another continuance – the third since the president took office in January – in order to decide whether to continue to prosecute Mr. Khadr in the military commissions, transfer him to federal civilian court, or dismiss the case and repatriate him to Canada. The motion could have been a point of frustration for the judge and defense, but instead, it went unopposed. Captain Murphy then announced that the Obama administration had set November 16 as a "definitive date" to select a forum for Mr. Khadr's case in order to "bring finality to the review process." He had submitted his motion with a declaration by

Pentagon General Counsel Jeh Johnson that the government would honor this date.

Judge Parrish granted the motion for a continuance and then briefly checked on the process of discovery. The defense and prosecution both supported re-starting discovery, given the entry of new defense attorneys. The judge made them commit to sending him an email on November 30th with a status update and joining him on a conference call on December 4th to discuss progress on discovery and decide future dates for hearings.

The judge and lawyers on both sides were quick, polite, and gracious to one another. The hearing was about to end, but then defense attorney Coburn took the lectern to introduce an entirely new issue, Mr. Khadr's access to his own legal notes.

Discussion on Detainees' Right to Access and Protect Legal Notes

Defense Counsel Coburn informed the judge that Guantánamo's guards read the notes Mr. Khadr takes during meetings with his attorneys and then deny him access to these notes once back in his cell. In response, Captain Murphy explained standard protocol: guards at Guantánamo routinely review legal notes taken by detainees after they meet with their lawyers, including notes taken in their cells, scan them for any sign of security threats to the facility, stamp them as legal papers, and lock them up in a "legal bin" held somewhere on the camp that detainees can access whenever they want. The legal bin is not stored in the detainees' cells, Murphy explained, because other detainees could access them, creating security or privacy problems. Murphy professed that he would make sure that Mr. Khadr had access to his legal bin, but he insisted that guards must be able to review detainees' notes.

"For?" asked Judge Parrish.

“Force protection,” answered Murphy. Guantánamo’s Joint Task Force (JTF-GTMO) must be able to check whether detainees have written down plans to attack guards or other detainees, he said. If the guards find indication of a security threat, the notes go up JTF-GTMO’s chain of command. These notes are not shared with the prosecution, Murphy assured the court. “We think the protocol is reasonable,” he concluded. Coburn courteously responded that he did not doubt Captain Murphy’s good faith but that the security imperative to review his client’s notes had to yield to attorney-client privilege.

Judge Parrish then asked Coburn whether he had any experience with how federal maximum security prisons handle attorney-client communication. This was a striking question: the military judge was actually asking the defense how things worked in the federal criminal justice system to help inform what he should do here. Coburn responded that high-security federal prisons allow his clients to keep legal notes in their own cells and never review them without a search warrant. Upon hearing this, the judge dropped the comparison.

Toward the end of the discussion, Murphy read an excerpt from “The Military Commission Counsel Visitation Practice Guide”: the detainees’ legal notes are subject to search to ensure that there is no contraband (Page 7, Paragraph 7). The word “contraband” struck me as incongruous. Why would Murphy cite a rule that permitted searching for illegal goods hidden in legal notes when the issue concerned actually reading the notes? He appeared to be stretching a rule to justify an *ad hoc* procedure, yet neither the judge nor the defense challenged him.

Judge Parrish concluded that he could not resolve these issues in this hearing. The attorneys agreed to work together to ensure Mr. Khadr had access to his legal notes and

submit briefs if the issue of review remained disputed. The hearing ended at 9:31am, and Mr. Khadr was led once again back to his cell in Camp Four.

Press Conference

The prosecutors and defense lawyers held press conferences after the hearing. We exited the sterile courthouse back into the tropical heat, where our courtroom attire seemed out of place. We walked past the military tents of Camp Justice into a crude airplane hangar and then entered a small free-standing air-conditioned room set up in the corner. Modeled after the Pentagon’s pressroom, the room functioned as another stage, outfitted with plush red chairs and a lectern framed by royal blue curtains.

There were only a dozen people in the pressroom – three reporters, four NGO representatives, lawyers, and a few spectators. They all knew one another well, and many would later have drinks together that night, but they all played their roles like strangers in this pressroom.

Mr. Khadr’s new defense attorneys Coburn and Flowers vowed to complete a genuine, intensive, and thorough review of his case, including reading thousands of pages of legal documents and visiting Afghanistan and Canada. Their goal is to repatriate Mr. Khadr to Canada, they affirmed, but they are willing to litigate the case wherever the government sends it. If the case remains in the commissions, Flowers added, it would be the first time that the U.S. government prosecuted a juvenile for a war crime. Throughout the hearing and the press conference, the attorneys maintained a conciliatory tone and expressed trust in the “good faith” of the prosecutors, an apparently notable shift in tone compared to past hearings. It was the sort of tone that litigating parties use to prepare for a plea bargain.

When Captain Murphy took the lectern, on the

other hand, he made the case for a trial in the military commission. He defended the integrity of the commission and praised the adoption of a new practice in the hearing: the defendant was able to choose his own detailed defense counsel, rather than accept whomever was assigned to his case. The revision was adopted from the Manual for Courts-Martial's provision for Individual Military Counsel (IMC). This "brand new procedure" used for the first time in the hearing "affords a new right and [marks] an improvement over the commissions," Murphy said. He then repeated his readiness to try the case in the commission, as if he feared losing the case to federal court. "No other team of prosecutors knows this case better; we've worked on it for years," he concluded. "All we await is direction from our leadership."

"As a law student who has come to understand attorney-client privilege as an essential protection for defendants, it was troubling to witness confusion over a right that would have been settled in any other courtroom."

The press conference did not address the issue that dominated the hearing: detainees' right to attorney-client privilege. In a one-on-one conversation, I asked Captain Murphy more about his position. He argued that Guantánamo's guards must review detainees' legal notes in order to check for security risks, namely plans to attack guards or other detainees. It seemed to me unlikely, if not absurd, that a detainee would disclose such plans to their attorneys and then write them down in his own notes. The opposite situation seemed more likely: that a detainee would tell his attorneys about possible misconduct by the guards and take notes on the attorneys' advice.

Murphy argued that if a detainee had a complaint against Guard X, then the Joint Task Force would want to know about it. "What if Guard X is the one reviewing the notes?" I asked. Murphy admitted that he hadn't con-

sidered this scenario. He then argued that a limited number of guards actually reviewed the detainees' legal notes and added, "I believe that the guards are objective." I was not convinced that guards at any prison could be objective when encountering complaints against themselves or their fellow guards. Murphy's defense of the protocol suggested that attorney-client privilege could be invaded in the name of security even in situations that compromised the safety of the detainees themselves.

Conclusion

This hearing revealed for the first time that Guantánamo's guards have been reading detainees' legal notes ever since lawyers were allowed to meet with their clients.

The court, however, did not resolve the issue. As a law student who has come to understand attorney-client privilege as an essential protection for defendants, it was troubling to witness confusion over a right that would have been settled in any other courtroom. The hearing showed that military commissions have little legal precedent to resolve basic legal issues, no matter how professional the parties or austere the courtroom.

The absence of legal precedent creates a vacuum in the military courtroom, where judges and lawyers turn to other judicial systems in order to figure out how to proceed. The judge and lawyers in the hearing seemed to make these comparisons arbitrarily; they would compare the commissions to other systems to support one position, and then claim Guantánamo's exceptionalism to support another. For example, the prosecutor praised the com-

missions' adoption of a court-martial practice, and then argued that Guantánamo's special circumstances mandated an invasion of attorney-client privilege. Similarly, Judge Parrish asked the defense to explain the extent of attorney-privilege in federal prisons, but when he heard that it protected detainees' legal notes, he did not challenge the protocol at Guantánamo. This kind of discretion sows the seeds of arbitrariness and bias – antitheses of the functional rule of law.

In the end, the government spent at least \$100,000 over the course of four days to hold a 29-minute hearing devoted almost entirely to a detainee's right to his legal notes, an issue that would not have been an issue at all in federal court – and left it unresolved. Pentagon officials had earlier estimated the cost of any single session exceeded \$100,000, according to *Miami Herald* reporter Carol Rosenberg.



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TRAVIS M. CRUM

During the week of October 21, 2009, I had the privilege of representing the National Institute of Military Justice at the military commission hearings in Guantánamo Bay, Cuba. There were two hearings scheduled for that day: *United States v. Noor Uthman Muhammed* and *United States v. al Qosi*. Both hearings occurred in the normal courtroom, housed in a former air traffic control tower. My stay at the military base lasted from Monday to Thursday, during which time I was lucky to have numerous informative conversations with journalists, military officers, and fellow NGO representatives.

United States v. Noor Uthman Muhammed

A Sudanese national, Noor Uthman Muhammed is charged with providing material support for terrorism for allegedly running al-Qaeda training camps in Afghanistan. At the October 21, 2009 hearing, the government requested a continuance until November 16, 2009, the date when Attorney General Eric Holder will announce the government's decision whether to end the Guantánamo Bay military commissions. Despite being slated as a continuance hearing, numerous issues were raised and decided.

Before the commencement of proceedings, there was a disagreement between the defense team and the guards over whether an extra chair could be placed at defense counsel's table. While Mr. Muhammed's primary defense team consists of military attorneys, he is also represented by a civilian attorney. Eventually, the guards relented and allowed the civilian attorney to sit at counsel's table.

Mr. Muhammed was then brought into the courtroom, unshackled and wearing traditional Sudanese clothing. Mr. Muhammed was led in with both arms held by military guards and appeared to be compliant.

According to the NGOs present, the fact that Mr. Muhammed was allowed to wear white indicates that he is not a problem prisoner.

The military judge, Captain Moira Modzelewski, soon entered and initiated the proceedings. The first order of business was a detailed list of events that had occurred since the court was last in session on January 14, 2009. There had been four informal "802" conferences conducted in the Washington, DC, area. Those meetings were on May 19, 2009; June 26, 2009; August 4, 2009; and September 2, 2009. There was also an 802 conference held at Guantánamo Bay on October 20, 2009, the day before the hearing. Pursuant to military commission rules, Mr. Muhammed was excluded from all of these meetings. After the judge finished her remarks, the defense moved to amend her summaries of the meetings. Many of the omissions were technical, but the defense wanted to reiterate its displeasure with the pace of discovery. The defense also requested that Mr. Muhammed be present — either physically or via videoconference — at future 802 conferences. The judge noted these objections but declined to rule on them.

Next, the judge mentioned no voir dire was requested at the arraignment. Although neither party moved for a voir dire, the judge conducted a self voir dire. The judge stated that she had worked as a Navy JAG officer and was socially and professionally acquainted with many attorneys in the Office of the Military Commissions. The judge also noted that her brother and sister-in-law were involved in gathering intelligence. To her knowledge, neither relative was involved in detention-related issues.

Although the defense agreed to the continuance, the judge asked for oral argument so that the issues discussed at the 802 conferences would be put on the official record. This was the government's third continuance request. The judge indicated that the elephant in the room was whether the Attorney General would decide to move Mr. Muhammed's case out of the military commission system and whether Congress would amend the Military Commissions Act (MCA). On October 28, 2009, a week after the hearing, President Obama signed the Military Commissions Act of 2009. The judge granted the motion, but required discovery to proceed. The judge scheduled the next hearing for January 13, 2010.

The defense then rose to contest what the government had handed over during discovery. The crux of the defense's argument was that it had been seven years and seven months since Mr. Muhammed had been brought to Guantánamo Bay and one year and five months since Mr. Muhammed had been charged. Indeed, there was no discovery in the case for the first thirteen months after Mr. Muhammed was charged. Mr. Muhammed has been charged on multiple occasions, with charges dropped without prejudice.

Specifically, the defense requested that the government hand over several categories of documents: Mr. Muhammed's statements, records of detention and interrogation, records

NOOR UTHMAN MOHAMMED is a citizen of Sudan and has been described by JTF-GTMO counterterrorism analysts as being a senior leader of 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. Mr. Muhammed 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 the evidence against him had been obtained through the use of waterboarding.

related to Mr. Muhammed's confinement in Bagram and Pakistan, Mr. Muhammed's medical records, and any physical evidence the government intended to use at trial. The defense also mentioned that other detainees/witnesses for Mr. Muhammed's trial were dying or other-wise unavailable. Despite being an explosive accusation, the defense did not elaborate on this claim.

The prosecution blamed the delay on two external events. First, the prosecution explained that the Obama Administration's decision to re-evaluate the military commission system had backlogged their office. Second, the "equity holders," i.e. the intelligence agencies in possession of classified information, were slow in approving the release of discoverable documents. The prosecution hinted that two documents of Mr. Muhammed's statements may exist. However, the prosecution asserted that there were no records for Bagram or Pakistan; the government did not know if the records never existed or if the records were never transferred along with Mr. Muhammed when he arrived at Guantánamo. The prosecution remarked that, while there are logs of Mr. Muhammed's interrogations, it would not hand over training manuals/videos used by interrogators. Regarding medical records, the government claimed nothing had been sent from Bagram. Finally, the government refused to hand over physical evidence — handwritten letters found where Mr. Muhammed was captured — because those documents were being tested.

Suddenly, the defense interrupted the prosecution and requested a recess. The judge agreed. It was then revealed that Mr. Muhammed was quite ill and was taken to use a restroom. After a ten minute wait, Mr. Muhammed returned and the proceedings continued.

The defense then moved to preserve the physical evidence in the government's possession, requesting that the government permit

access to the actual physical evidence, rather than merely providing pictures of the documents. Commenting that the FBI had been in possession of the letters since April 2009, the defense complained that they only learned of the documents' existence in June 2009. The defense, therefore, requested that the government immediately stop testing the documents, fearing that the testing would destroy the documents.

At this stage, a colloquy between the judge and the defense revealed a potentially significant distinction between the MCA and the Uniform Code of Military Justice (UCMJ). The MCA provides that the defense will have a "reasonable opportunity to view the evidence," whereas the UCMJ states that the defense will have an "equal opportunity to view the evidence." In other words, compared to the UCMJ, the MCA restricts the defense's access to evidence. Unmoved by this distinction, the defense argued that access before the destruction of evidence was reasonable. The defense further requested that the government disclose any other physical evidence still in its possession.

The prosecution agreed to provide the defense with an accounting of the evidence. The prosecution stated that on Friday, October 23, 2009, it would make one third of the evidence — approximately 1,700 documents — available for inspection in Washington, DC. The government then noted that it is merely performing fingerprint testing on the documents, but, due to the poor quality of the paper, the chemicals used in the testing may destroy the documents. Indeed, the government conceded that the tests can only be performed once. The prosecution cautioned that any interruption in testing would put the documents at the end of the queue, resulting in another eight month delay.

The judge asked the defense if it knew the volume of the evidence the government planned to disclose. The defense responded

that it had “no idea” that the government was talking about thousands of documents.

The defense then requested another recess, claiming that Mr. Muhammed was “in distress.” The court adjourned. While the guards made security preparations to open the courtroom, Mr. Muhammed had to hold himself up by leaning on a pillar next to the defense table.

After a fifteen or twenty minute break, Mr. Muhammed returned and the proceedings began again. The defense reiterated that it wanted its own experts to inspect the evidence. The judge cut off argument at this point, noting that everything had been taken under advisement. She stated that a written opinion would issue within twenty-four hours — before everyone left Guantánamo Bay. The judge, however, informed the government in open court that, if its testing destroyed the evidence, it may result in the evidence’s exclusion.

The next issue on the agenda was the defense’s motion regarding Section 505 summaries, which involve classified information. The defense argued that it deserved two opportunities — one chance before the government submitted redacted documents and one chance afterwards — to inform the judge why it should have access to certain classified information. For support, the defense cited *United States v. Libby*, 429 F. Supp. 2d 18 (D.D.C. 2006) (Walton, J.), as a model for the type of system they wanted to establish.

The prosecution’s rebuttal focused on the need to protect classified information. The govern-

IBRAHIM AHMED MAHMOUD AL QOSI is a Sudanese citizen. He was captured in Afghanistan in 2001 and allegedly served as the treasurer for one of the business fronts for al-Qaeda operations.

He allegedly served as Osama bin Laden’s driver and bodyguard, having joined al-Qaeda in 1989. Charges were sworn against Mr. al Qosi on February 8, 2008. The Convening Authority referred charges on March 5, 2008.

ment also noted that these provisions may change in the revised MCA. The defense’s reply argument cited the Classified Information Procedures Act (CIPA) as yet another model for discovery. The judge took these issues under advisement and promised to issue an order the next day.

Right before the end of the proceedings, the defense informed the judge that the prosecution had agreed to most of the defense’s demands over medical treatment and that the issue would not be discussed further at the hearing. Including the two recesses, the hearing lasted approximately two and a half hours.

United States v. Ibrahim Ahmed Mahmoud Al Qosi

Also a Sudanese national, Mr. al Qosi is charged with conspiracy and providing material support for terrorism for allegedly assisting al-Qaeda and serving as Osama bin Laden’s bodyguard in Afghanistan. This hearing was billed as a continuance. Prior to the hearing, the rumor around the base was that Mr. al Qosi would boycott because of the continuance. Upon arriving at the courtroom, this rumor was confirmed. The defense had met with Mr. al Qosi the previous day and learned that he would voluntarily waive his right to appear at the hearing. The government declined to request, and Judge Nancy Paul refused to order, Mr. al Qosi’s extraction from his cell.

The hearing was broadcast live to the United States embassy in Khartoum, Sudan. In a bid to gain Mr. al Qosi’s cooperation, his military defense counsel had arranged for a civilian Sudanese attorney to be assigned to the case.

The Sudanese attorney had attended at least one of the prior hearings at Guantánamo Bay, but the parties had subsequently agreed that the attorney could participate via secure videoconference. Somewhat disconcertingly, the image was displayed on a giant plasma screen television above the vacant witness stand.

In contrast to the prior hearing, the defense opposed this continuance. The prosecution began oral argument on a bad foot. It noted that on November 16, 2009, Attorney General Holder would announce what would be done in all the pending military commission cases. The prosecutor emphasized that Holder wanted to announce everything simultaneously. In particular, the prosecutor cited public interest in the decision whether to try the five 9/11 co-conspirators in federal court. The prosecutor then noted that the reviews of the cases were complete and had been sent to the Attorney General.

The prosecutor then seemed to indicate that a decision had been made in Mr. al Qosi's case. When pressed by the judge, the prosecutor backed off this claim, stating that the government had merely made a decision to prosecute Mr. al Qosi, but had not determined whether it would be in civilian court or a military commission. Next, the prosecution argued that the court should grant the continuance, given the anticipated changes in the MCA. The government concluded by stating that it was only asking for a month-long continuance. During this argument, the defense objected on at least one occasion, claiming that the prosecutor was testifying instead of arguing.

In rebuttal, the defense gave a wide-ranging critique of the government's case. Pointing to the Sudanese attorney, the defense demonstrated that Mr. al Qosi had cooperated with the military commission prior to the continuance. Because of the inordinate delay, the

defense requested that the judge dismiss the case. Next, the defense criticized the government for invoking the national security privilege during discovery, pointing to a recently announced policy change initiated by the Obama Administration that limited the use of the state secrets privilege. Finally, the defense argued that the charges should be dismissed because high-ranking officials in the Defense Department had admitted that material support for terrorism was not a violation of the law of war and, therefore, could only be tried in civilian court.

At this point, the judge interrupted, denying the defense's motion to dismiss on the material support for terrorism argument. The judge commented that the current version of the revised MCA included the crime and that it would behoove the court to wait for final passage of the new MCA to make a final determination. The prosecution gave a brief reply argument, adding that the "Office of the Military Commissions has flowered into a great prosecutor's office."

The judge granted the government's continuance request, and held that the continuance would not implicate Mr. al Qosi's speedy trial rights. The judge, however, ordered discovery to continue during the continuance and instructed the parties to prepare for trial. The judge scheduled a Section 505 meeting on November 23, 2009, in Washington, DC, to go over classified information. The judge commented that she disagreed with the government's broad assertion of the national security privilege and noted that the defense had gotten most of what it had asked for in discovery.

The defense then argued over discovery, emphasizing that Mr. al Qosi had been held in Afghan custody and that evidence of his confinement was necessary for his defense. The defense also complained that the prosecution

had handed over redundant evidence in an attempt to fool the court.

The government replied that it had not handed over redundant evidence, explaining that, oftentimes, multiple reports of single events existed. The judge then asked whether everything had been handed over to the defense other than the evidence purportedly protected by the national security privilege. The prosecutor responded in the negative, stating that they were still processing documents with the relevant intelligence agencies. Finally, the government protested that there had not been reciprocal discovery from the defense.

Yet again, an issue was left unresolved. The judge set up an 803 conference on December 2, 2009, at Guantánamo Bay to argue all pending motions and make final preparations for trial. The judge made it quite clear that she wished to proceed to trial quickly if the case remained in the military commission system.

In a final request, the defense asked if the transcript and motions could be made publicly available. None of the motions were classified, so presumably, there should be no bar. The judge expressed surprise that the transcript and motions were not available promptly online. She stated that she would look into the matter and make a transcript accessible after she had checked it for errors. The hearing then concluded. The total time was approximately an hour and fifteen minutes.

Conclusion

The hearings I witnessed at Guantánamo Bay vividly displayed the haphazard and disorganized history of these cases. The disturbing realization during the *Muhammed* hearing that

no records existed from Bagram, Afghanistan, epitomized the legal black holes that these detainees have been kept in for nearly eight years. At the same time, however, Bagram still has gravitational pull, making a transfer of a detainee to civilian court far more difficult than it would otherwise be. The absence of these records evidences a level of incompetence that is damaging both to our national security and our commitment to human rights.

“The hearings I witnessed at Guantánamo Bay vividly displayed the haphazard and disorganized history of these cases.”

Overall, the atmosphere of the hearings was surreal. Everyone was playing a role, but it seemed few thought the proceedings had any real meaning behind them anymore. The impending November 16 announcement was the elephant in the room. But in Guantánamo, everyone was talking about the elephant.

RONALD W. MEISTER

Virtually all the talk in the departure lounge at Andrews Air Force Base on Monday morning, November 16, was about the Administration's announcement the previous Friday that Khalid Sheikh Mohammed and five other Guantánamo prisoners would be tried on charges of planning the September 11 attacks in federal district court in Manhattan. Although no hearings in the "9/11" cases were scheduled for the upcoming week, that decision loomed over all those preparing to embark on what was for the Gitmo run a luxurious means of transport – a Delta Airlines charter flight, in place of the uncomfortable Air Force bucket usually assigned to the trip. Military and civilian counsel for habeas defendants not charged with crimes wondered whether the decision augured well for their clients, who might be closer to release; counsel in pending commission cases tried to discern the government's rationale for trying some defendants in civilian court and others before the commission, so they could determine on which side of the line their clients fell; commission staff and other veteran Gitmo travelers wondered if they would soon be out of a job, much as they had wondered the same thing almost a year earlier, when the President had announced the facility would be closed; and the sole reporter, Carol Rosenberg of the *Miami Herald*, who had attended virtually every hearing open to the press, flitted among the various groups, gathering quotations.

Meanwhile, the five NGO observers, among whom I served as NIMJ's representative, began their job of observing even before the plane departed. The others in our little group, which would be required once we arrived to travel in a pack under close Marine guard supervision, included representatives of Human Rights Watch, Human Rights First, the American Civil Liberties Union, and the New York City Bar Association. Two were Gitmo veterans; the other three, including myself, were making our first trip.

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Prior NIMJ travelers to Gitmo had provided three valuable pieces of advice: (1) keep your ears open in the Andrews waiting room; (2) ask the defense counsel where to eat; and (3) bring shower shoes. All this advice was good.

The flight was, as all air travelers wish, uneventful, though the civilian flight attendants provided a note of amusement on landing, by announcing, "Welcome to Guantánamo Bay. The local temperature is 90 degrees. For those of you who need gate information for connecting flights — you're on the wrong plane."

Guantánamo Bay is an oddity as a Naval Base, and not only because no ships are homeported there, and because members of all branches of the service, as well as stateside and Jamaican National Guard troops, provide support. More significantly, and almost exclusively to the public eye, it is a prison camp. Security is higher and different than in most operational bases. On arrival in the processing hut, our planeload of visitors was lined up against the wall and ordered to place our bags against the opposite wall, where bomb- (and presumably drug-) sniffing German Shepherds went to work. Our accommodations — large six-person tents with bare bulbs and air-conditioners turned up to "stun" — were in Tent City, adjacent to the high-walled barbed-wired enclosure that served as the 9/11 courtroom complex. Floodlights glared down eerily throughout the night, obscuring the hoped-for viewing of the Perseid meteor shower that might otherwise have been spectacular on a tropical isle.

The relatively little courtroom activity during our week's visit showed the inefficiency of the process. This week, trial and defense counsel, a judge, and courtroom and staff personnel flew 1,300 miles at government expense for a preliminary hearing in a single case. As will be seen, the defendant refused to attend, and for all it mattered, the proceedings could have

been conducted in Washington, D.C.

Those proceedings were in the case of Mohammed Kamin, who is charged with providing material support for terrorism by his actions in Afghanistan in 2003. Unlike every other Guantánamo defendant, Mr. Kamin is charged only with this single count, which his counsel vigorously argue is not a crime triable by the commission. They have been arguing this for months, buoyed by statements from the General Counsel of the Department of Defense that "providing material support" should not be triable by the commission.

This week's hearing, however, focused on the kind of pre-trial maneuvering that characterizes so many of the proceedings before a tribunal that is making up its rules as it goes along. A closed hearing on procedural issues the day before had considered various issues and set the upcoming agenda. Now, the public session — to the extent the five NGO observers and one representative of the press can be considered the public — began by taking up the question of the accused's refusal to attend. An hour was devoted to testimony from the commission's representative that, after she had read the accused a statement describing his right to attend proceedings in his case, he had taken to his bed, pulled the covers over his head, and waved her away. After perfunctory questioning by the prosecution and defense, the presiding judge found that the accused's absence from the hearing was voluntary. With a caution to defense counsel that a time might come when the court would compel the accused's attendance, the judge moved onto other issues, among which were: (1) a defense motion to compel production of the defendant's seventeen statements to investigators; (2) a defense motion to compel the government to produce the civilian witnesses who had participated in interrogations that the defense contends may have been coercive and tainted the accused's subsequent statements; (3) a defense motion to compel the command to move their client to a

different cellblock, where he would, they hoped, be subject to less peer pressure to refuse to cooperate with his counsel; (4) a defense motion to sanction the prosecution for failure to comply with discovery obligations; and (5) a motion to dismiss for failure properly to allege jurisdiction. One had to admire the doggedness of defense counsel, particularly the Navy Lieutenant Commander who has the admiration of many colleagues for his persistence. His gains from this session, though, were less obvious, as the court, in response to the respective applications, expressed the views that (1) the government should do its best to get the statements, or explain why they cannot; (2) the government having expressed its inability to find the witnesses, he could do nothing more, and he declined to set a deadline for a progress report; (3) he had no power over detainee assignments; (4) the government was doing the best it could; and (5) a motion to amend the allegations might be necessary.

It was hard to avoid the feeling that the quality of mercy in these proceedings was being strained through a colander filled with molasses. Mohammed Kamin has been a prisoner — forget the government’s euphemistic term “detainee” — for over six years, the last five at Guantánamo, and he cannot get anything like what in the civilian courts would be considered a speedy trial or production of the most basic items in discovery. The judge himself freely admitted that he had long been expressing impatience with successive teams of prosecutors, but seemed entirely disinclined to impose any meaningful sanctions. In light of the defendant’s own boycott of the proceedings, what resulted was a theater of the absurd where both the prosecutors and the defense counsel represented parties over which

they had no control, at a hearing half a world away from where the facts to be tried took place, to which all participants had to travel at enormous expense.

A word should be added in commendation of the hospitality extended to the NGO observers. While the accommodations were primitive and the food rated about one and a half on the iguana scale, our escorts could not have been more personable or accommodating. We were made to feel welcome, and accorded as much liberty as could be allowed under the circumstances. The commission counsel and support personnel were congenial and informative, and did their jobs with dedication and, for the most part, skill. There was a minimum of cynicism or complaint. Thousands of personnel support the Guantánamo Bay Naval Base, and, despite the generally distasteful nature of their assignments, they serve their country well. Guantánamo Bay has become an alien landscape, reflecting little credit on civilian policymakers, but the uniformed men and women of the command deserve our thanks.

“It was hard to avoid the feeling that the quality of mercy in these proceedings was being strained through a colander filled with molasses.”

Brig-adoon: Report from Guantánamo

By now, many readers of this report will already have seen a variety of other accounts by Guantánamo observers dispatched by the National Institute of Military Justice and other non-governmental organizations. Rather than dwell, therefore, on the “scene” as such, a few comments on the arrangements and their implications may be worthwhile, along with a summary of the commission proceedings.

EUGENE R. FIDELL

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First, a few words of praise. Although it took the Defense Department far longer than it should have to afford NIMJ an opportunity to send observers, the Department finally did. I’m grateful for that and also to the many busy individuals who have made time before me to travel here on behalf of NIMJ. Similarly, it is certainly true that detainee-related duty at Guantánamo has to be among the least rewarding lines of work for uniformed personnel, but those I had the pleasure of meeting this week deserve thanks not only for their service to the country (regardless of their personal views of current events) but also for unfailingly making NGO visitors as comfortable as possible in the somewhat austere circumstances. Hats off especially to host personnel from the Virgin Islands National Guard and a hearty Semper Paratus to the platoon of very squared-away Coastguardsmen and women who were doing courtroom duty. As a former Coastie, I was proud to see them, although, as noted below, I wondered whether it was economical to involve them simply to achieve jointness.

Now for the other side of the ledger. The fact of the matter is that, even with the best of arrangements, there is no debating that Guantánamo is a remote and inconvenient venue for the military commission proceedings. The administrative complexities of arranging air transportation as well as full-time minders for visitors cannot be overstated. The sheer time, effort, and expense involved must be prodigious. The administrative complexity of

running a joint operation — Coast Guard Reservists flown in from California for courtroom duty? — must be equally enormous as units come and go, each one with a learning curve to overcome on an unfamiliar base.

On top of this, the transportation of the cast of players — judges, counsel, journalists, NGO representatives — brings them into cheek-by-jowl contact that may be undesirable. It's true, of course, that in olden days it was the practice for English judges and those barristers riding the circuit to stay at the same cozy inn, and enjoy a festive meal during the Assizes, and I am all for camaraderie between bench and bar. Still, it was unsettling to realize that the people who had been mingling for several hours in the terminal at Andrews Air Force Base before takeoff would soon be wrangling (or presiding) at the Camp Justice courthouse. If so many of the players must be flown in, one would think a change of venue would make sense.

Is it possible to dispense justice under these circumstances at such a distant location? Yes. The courtroom is entirely acceptable (aside from a few obstructed-view seats in the gallery). Proper decorum is carefully observed. But I have to say, as a taxpayer, that the arrangements are, overall, wildly inconvenient. I am not persuaded that the reasons for conducting military commission proceedings at Guantánamo, assuming they ever had any force, today come even close to justifying the expense in human resources and sheer out-of-pocket costs. If, as the Administration has decided, military commissions should continue to be employed, let it be done on the mainland. The entire process would move forward far more quickly. This would greatly facilitate attendance by victims' loved ones. It would also facilitate broader media coverage (a desirable thing, in my view, and harder than ever in this era of quickly shrinking newsroom staffs); this week a grand total of only two journalists were present to cover the proceedings, Carol Rosenberg of the *Miami Herald*

and Peter Finn of the *Washington Post*. (Note to history buffs: Captain Dreyfus may have been confined on Devil's Island, but his trial and retrial were conducted in France.)

Only one case came on for hearing this week: *United States v. al Qosi*. The accused is charged with material support for terrorism and conspiracy. This is a noncapital case. The judicial business involved a range of motions. These were heard by Air Force Lieutenant Colonel Nancy Paul, a military judge. The commission members were not present. Prosecutors were from the Navy and Marine Corps; defense counsel were from the Navy and Army, as well as two civilian attorneys. Following is a summary of the motions adjudicated:

The government moved to amend the charges to reflect the Military Commissions Act of 2009 requirement that the accused be an alien unlawful enemy belligerent and to add several new overt acts to the conspiracy charge. At issue is whether these changes are major and hence require dismissal and re-prefferal, or whether they are permissible under MCA §1804(c)(2). The Judge granted the government's motion in part (as to the personal jurisdictional trigger) but denied it in part (as to the additional overt acts). She found that the latter changes materially expanded the specific allegations and the period covered from five years to nine years, and that this was unfair to the accused. The question now is whether the government will withdraw the charges and re-prefer new ones that reflect both the 2009 MCA personal jurisdiction trigger and the additional facts the government wishes to plead. The government is currently reviewing its options. Military justice practitioners will find it interesting that much of the discussion on this issue was framed against the backdrop of UCMJ/MCM rules governing the amendment of charges.

The defense moved for a status determination

under Geneva Convention Relative to the Treatment of Prisoners of War (GPW) article 5, seeking a “competent tribunal” to decide whether the accused qualifies for POW status. The government argued that the commission itself would have to decide this issue on the merits, as unlawful enemy belligerent status is an element of the offense. According to the prosecutor, the defense’s motion subjects the government to a dilemma, since it won’t know if it has produced enough evidence to carry the point. This struck me as wide of the mark, and that the government’s real concern is that it might have to show its hand on the status issue earlier than the merits, leading to added expense (two appearances by witnesses) and affording the defense two opportunities to examine those witnesses. The defense argued that an article 5 3-member proceeding under Army Regulation 190-8 is required before the commission can go forward. In the end, the Judge denied the defense’s motion, but, in doing so, rejected aspects of both parties’ submissions. She ruled that the commission (meaning she herself) could make the required determination prior to trial, and set that matter down for evidentiary hearing on January 6, 2010. The government will have to prove personal jurisdiction by a preponderance of the evidence, and if it does so, it will still have to prove it again beyond a reasonable doubt before the members. The parties are to indicate their witnesses no later than a week before the hearing. Interestingly, Judge Paul noted from the bench that AR 190-8 confers no rights that are not afforded by a military commission. That seems not quite accurate since AR 190-8 requires a multi-member tribunal, whereas she will rule alone at the pretrial stage. She also observed that she would take the GPW into account in deciding the issue presented to her.

A defense motion to dismiss for vagueness was deferred, pending the government’s final wording of the charges. The defense moved to dismiss on the ground that it violates equal protection to subject only aliens to military

commissions. According to the defense, this discrimination is subject to strict scrutiny; the government argued for rational basis review. The defense pointed out that we try aliens on terrorism charges in the district courts and have tried citizens before military commissions. FDR’s Quirin commission tried a United States citizen, and President George W. Bush’s pre-MCA commissions were not precluded from trying citizens. The Judge did not rule on this motion.

The Judge also did not rule on a defense motion to dismiss on the ground that the MCA is a bill of attainder. The defense argued that *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) found the Suspension Clause applies to Guantánamo Bay, and that the Bill of Attainder Clause applies as well. The defense’s theory is that the MCA makes conviction all but inevitable and singles out a discrete group for punishment. For this, the defense cited a variety of comments made by members of Congress during the course of consideration of the MCA. The government responded with what struck me as quite a strained analogy; it contended that, if the defense’s theory is correct, then nonjudicial punishment under the UCMJ also violates the Bill of Attainder Clause.

The defense moved to dismiss on the ground that there is no armed conflict underlying the charged conduct; in other words, there can be no war crime without a war. Counsel cited *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) for the proposition that there was no war prior to enactment of the Authorization for the Use of Military Force (AUMF) in 2001. The defense cited the International Criminal Tribunal for the former Yugoslavia (ICTY) decision in *Tadic* for the proposition that both the intensity of a conflict and the organization of the parties must be examined in order to decide whether there is an “armed conflict,” and noted that President Clinton never claimed that we were at war during his term in office. The government argued, among other things, that

it is for the members to decide whether hostilities were ongoing at the pertinent time. It also noted that both Hamdan and al-Bahlul were convicted by military commissions based on pre-9/11 (and *a fortiori* pre-AUMF) conduct.

Three procedural aspects of the commission proceedings troubled me. First, Judge Paul presided over a lengthy R.M.C. 802 conference before the public hearing began on Wednesday. Even though such conferences must be summarized on the record, there is a tendency to overuse the 802 process, thereby short-changing the public, which has a right to expect that the public hearing will not be a mere rerun of something rehearsed at length behind closed doors. Some — perhaps many — military judges trying courts-martial use 802s to go over everything that may come up because they do not wish to be surprised or seem unprepared. This is not only a waste of time but an abuse, and counsel should object to it when it happens. Particularly where all of the parties are on hand and there is no jury present in the courthouse, there is little reason to use an 802 for business that can and should be transacted in public.

It is also concerning that most of the motions argued during this session were unavailable on the Office of Military Commissions website. In a normal court, the parties' submissions may be obtained in a reasonable period, either from a clerk's office or from counsel. The commission process is severely deficient in this respect; there is no excuse for depriving observers, including the media and other members of the public, of timely access to the legal pleadings underlying the open-court proceedings. This is,

“The commission process is severely deficient in this respect; there is no excuse for depriving observers, including the media and other members of the public, of timely access to the legal pleadings underlying the open-court proceedings. This is, unfortunately, also the case with courts-martial.”

unfortunately, also the case with courts-martial. I gather that the Defense Department has defended this state of affairs on the notion that commissions are a form of “expeditionary justice.” That argument might be more compelling if the commissions were being conducted in the field, but, be it ever so inconvenient and be the accommodations ever so humble, Guantánamo cannot, after a century of United States control, plausibly be considered part of a military or naval “expedition.” Real-time transparency should

be a priority for the Administration. Legal proceedings, even if they are open to the public and media, do not make the grade without access to the underlying documents, be they briefs or rulings. The good news on this score is that, after the Judge read her two rulings this morning, NIMJ and the other par-

ticipating NGOs were successful in urging the immediate release of the full text of the rulings. This was apparently a departure from past practice, and it is an encouraging sign. We raised the issue by commenting to the Clerk of the Military Commission via the courtroom monitoring system and by submitting a handwritten motion to the Judge via counsel for the parties. We can only hope that these measures will not be necessary in the future.

Finally, the absence of a revised Manual for Military Commissions that reflects the 2009 MCA was a significant shortcoming. It is baffling that any proceedings at all would have been conducted at a time when the basic rules of the road have still not been finalized, despite



the saving clause in the 2009 MCA. I cannot imagine any other court conducting important proceedings when the governing rules were in this kind of limbo. In this connection, although Congress provided a 90-day deadline for the Pentagon to submit a new Manual, it made no provision for a period of public comment, as has long been the practice for changes to the Manual for Courts-Martial. The Department and the Armed Services Committees should ensure that, before the new rules take effect, the public has a meaningful opportunity to comment. To facilitate comment, there should be a detailed explanatory memorandum setting forth with particularity what has changed from the 2007 Manual for Military Commissions, so that interested parties need not search for needles in a haystack (as with the countless changes between the 2006 and 2009 MCAs). An Admin-

istration that wishes to foster public confidence in the administration of justice by an unusual forum it wishes to employ will do no less.

Despite my initial promise not to discuss the "scene," I have to note the loveliness of this place, despite a century of naval activity. The other night there was a full moon and a cloudless sky. The scene from the door to my tent was startlingly moving. But this will pass: I predict that within 10 years the whole shebang will revert to Cuba — and that within five years more, the economy permitting, it will be a magnificent resort area, with regular direct flights from New York. The commissions will be long over by then.

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