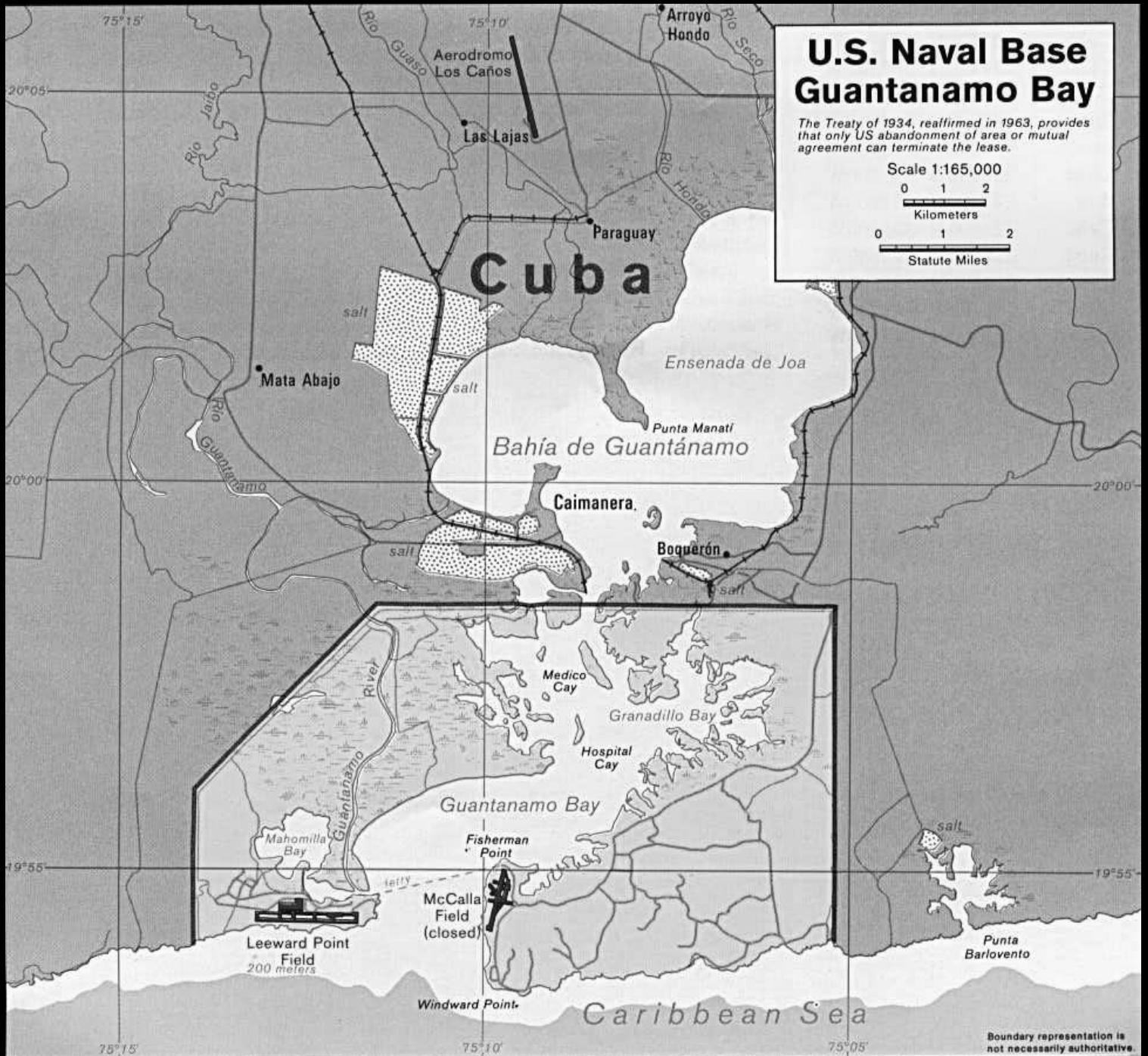


NIMJ Reports from

GUANTÁNAMO

Volume 3





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 *Military Commission Reporter, Volume 2* (2010).

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. Since then, NIMJ has made over 20 trips to observe military commission hearings. This publication is the third volume in NIMJ's series: *NIMJ Reports from Guantanamo*.

Most of the hearings have been limited to stay requests and legal fights over issues such as discovery obligations, legal representation of

the accused, and mental competency determinations. However, NIMJ did observe the conclusion of two military commissions covered by this volume. Ibrahim Al Qosi pleaded guilty in July 2010 to conspiring with al-Qaeda and providing material support for terrorism. And Omar Khadr pleaded guilty in October 2008 to murder.

Each field report published herein was written by one of the individuals NIMJ sent to observe the 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.
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“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:



ELIZABETH HILLMAN

Elizabeth Hillman is a veteran of the United States Air Force who earned a Ph.D. and J.D. at Yale. She currently teaches at the University of California Hastings College of Law. Before joining the Hastings faculty in 2007, she taught history at the U.S. Air Force Academy and law at the Rutgers University School of Law, Camden. She is the Vice President of the National Institute of Military Justice and legal co-director of the Palm Center, a military policy research institute at University of California Santa Barbara.

April 6, 2010 was Day One at Guantanamo Bay for me – but more like Day 2,900 for Noor Uthman Mohammed, who has been held here for nearly eight years. He's one of about 183 prisoners remaining of the original 779 detainees at the military prison at Guantanamo Bay. Noor (his preferred name), a citizen of Sudan captured in Pakistan in March 2002, has been charged with providing material support to international terrorist organizations for his role in training camps run by al-Qaeda and others. On April 7, 2010, the United States held hearings related to his prosecution before a military commission.

It's hard to describe how Guantanamo Bay feels upon first glance. The color of the ocean, the beauty of the bay and the dramatic clouds above it, and the mountains of Cuba visible over the horizon existed in such contrast to the sense of foreboding evoked by the starkness of the concrete-and-concertina-wire style of the buildings and the intensity of the security measures. As many others have noted, the juxtaposition of a post-modern naval base on an undeveloped part of a Caribbean island creates dramatic vistas at virtually every turn.

NGO observers' access to Guantanamo Bay is restricted; our handlers were required to be with us at all times during our waking hours. Our escorts were courtly and respectful, but their presence was a not-so-subtle reminder of the grim reality of being on a naval base carved out of Cuba that's also the site of a prison complex housing suspected terrorists. The hearing was scheduled to start at 9:00 a.m. We were told to hide our badges so that our names couldn't be seen (by Noor, presumably, the only detainee who appeared in the courtroom). Most military personnel also pulled their Velcro-ed uniform nametags off or placed black tape over sewn-on names. Once in our seats, we waited, unsure of what time it was because we weren't permitted to bring any cell phones, laptops, or other electronic devices into the gallery.

Courtroom 2, the shiny new facility apparently constructed—at a reputed cost of \$12 million—to try the 9/11 defendants, boasts a soundproof gallery separated from

the action by a glass wall. As we waited for the hearing to begin, we watched people move about the courtroom and glanced up at the video monitors to track the action, trying to gauge how long the transmission delay was between what we could see directly and what appeared on the screens. The video and audio feed is delayed to give an official in the courtroom a chance to block any classified information that might be inadvertently disclosed. The delay has been advertised as 20 seconds; I thought it was much longer than that, perhaps a minute or so.

The audio delay, a much-vaunted security feature of this state-of-the-art courtroom, adds to the other-worldliness that suffuses Camp Justice. During a press conference after the hearing, both Noor's civilian and military defense counsel commented on the unusual feel of the courtroom. The

room is large, with acoustics that swallow the voices of advocates. We did not hear Noor speak at all, and caught only a glimpse of his face. He wore a headset for the translation feed, and the defense interpreter at his table spoke for him when the judge requested his approval to consider the motion before the court at the start of the proceeding.

The explanatory sheet provided to reporters prior to the hearing suggested that four issues would be discussed in the hearing. The military judge, however, heard argument on only one issue during the two-hour hearing on April 7. The rest, which involve Noor's status under Article 5 of the Geneva Conventions and discovery motions (to compel the government to disclose and account for evidence under its control), were deferred until a later date, no

earlier than August. Another delay in a case already much delayed.

The delays revealed another troubling aspect of the commissions: the number of attorneys who labored within the commissions before quitting in protest. In October 2008, charges against Noor were dropped (only to be reinstated a few months later) after a military prosecutor resigned, citing grave doubts about the fairness of the proceedings. Army Lieutenant Colonel Darrel J. Vandeveld went on to become a vocal and

convincing critic, explaining that the handling of classified evidence, the rules of admissibility (which permit some hearsay and evidence obtained through coercion), and the obstacles faced by defense counsel made the commissions impossible to reform.

The current delay seems due to the slog through classified

documents that Noor's case requires. Although the military commission was last on the record four and a half months ago, the judge conducted six meetings with opposing counsel during that time in an effort to create and apply procedures to the review of classified documents. The 2009 Military Commission Act (MCA 2009) adopted the same rules for handling classified material that are used in federal court (codified in the Classified Information Procedures Act, or CIPA). Yet there is still no procedural manual to implement the new MCA, so the judge must impose procedures to conform with the new legislation while a handbook based on a superseded law continues to govern commission procedure. In press conferences, defense counsel have repeatedly lamented the government's failure to release an updated manual. No doubt prosecutors would lodge the

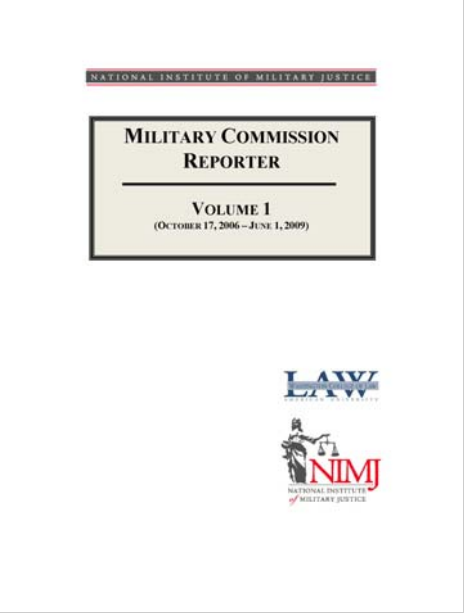
“There is still no procedural manual to implement the new MCA, so the judge must impose procedures to conform with the new legislation while a handbook based on a superseded law continues to govern commission procedure.”

same complaint (not to mention many others!) were they not operating under gag orders that restrict their ability to speak publicly.

The frightening impact of these collective delays on the mental health of detainees—and on U.S. standards of justice—has been much documented. Noor has been held for eight years without a trial; he was held for five years before he was even informed of the charges against him. Yesterday the judge said that she expected his trial would not commence before February 2011, when he will reach almost nine years in pre-trial detention. That sort of treatment sets a very low bar for any standard of due process. Less noticed is the profound impact of seemingly endless delays on the servicemembers and civilians who represent the detainees and the people who make Guantanamo's Camp Justice run. For them, the uneven pace of the commissions is a source of great frustration. Because of the potential for intervention by federal courts, the White House, or Congress, the people assigned to make the commissions run have been asked to make impossible choices. Shall they press ahead – as they are right now in Noor – with inadequate official guidance, aware that

further delay is unconscionable from a due process standpoint, but knowing that changes in regulations might create issues for appeal – and force them to re-do work that they are striving mightily to accomplish right now?

The one issue that was addressed, if not quite resolved, during the April 7 hearing was a motion by the defense to retain an Army officer as Noor's counsel. After Captain Modzelewski (the presiding judge) reviewed the posture of the case, she requested Noor's consent to consider the defense motion to retain counsel. He agreed, and she proceeded to recount the relevant facts. Army Major Amy Fitzgibbons was detailed to represent Noor more than two years ago, during a period in which she was mobilized from the Army Reserve. When Major Fitzgibbons' mobilization ended and she returned to the civilian work force, she transitioned into the pool of civilian counsel qualified to represent detainees. She filed notice to the commission that she intended to continue, with Noor's consent, as his



In July 2009, NIMJ published the first volume of the Military Commission Reporter, a compilation of all unclassified, publicly available decisions, orders and rulings of the Guantanamo military commissions and all known substantive rulings of the United States Court of Military Commission Review. Volume 1 covers the period from October 2006 to June 1, 2009, and is currently available in paperback, on CD-ROM, and on-line. NIMJ also published two electronic installments of Volume 2 of the Military Commission Reporter. Volume Two is now available through NIMJ's website in periodic pamphlets. A hard-copy version of Volume Two will be published in due course.

**For more information, please visit:
www.wcl.american.edu/nimj**

counsel. Now, however, she represented him as civilian, not military, counsel.

Several months after transitioning to the civilian defense pool, about thirty months into her continuous representation of Noor, Ms. Fitzgibbons accepted voluntary mobilization orders that sent her back into the Army, this time assigned not to represent detainees but to do capital defense work for the Army's Trial Defense Service. The problem that led to this motion grew out of a conflict between the interests of the Trial Defense Service, for whom Major Fitzgibbons began working last month, and the interests of Noor and the military commissions, both of whom hoped she would continue to work for them. Major Fitzgibbons did not intend to resign from representation of Noor when she was mobilized this year; she wanted to continue as his attorney and likely felt an ethical responsibility to do so. But, understandably, her Army superiors were not entirely comfortable with loaning their new asset to the work of the military commissions, a sort of (endless?) labor that could drain the resources of even the most energetic of judge advocates.

As for Noor? According to Howard Cabot—Noor's civilian defense counsel, a partner at Perkins Coie, and the attorney who argued this motion before the commission—Major Fitzgibbons had established an attorney-client relationship with Noor that the detainee did not want to sever and that the commission was bound to preserve. Cabot stressed the importance of continuity of counsel, cited to court-martial precedent (there is no commission precedent, alas ...) in support of his position, and asked the commission to "do what's right" to ensure Fitzgibbons was retained as Noor's counsel.

The prosecutors' halting response to Cabot's impassioned argument reflected their awkward position. Navy Lieutenant Commander Arthur Gaston argued that the Office of Military

Commissions had no authority to order a branch of the Army – the Trial Defense Service – to release an officer for voluntary duty. The judge interrupted to point out that Chief Deputy Defense Counsel Michael Berrigan's recently filed affidavit listed numerous instances in which Army commands had in fact consented to their judge advocates continuing to represent detainees despite being transferred out of the Office of Military Commissions. The prosecution responded by pointing out that Major Fitzgibbons took her new position with full knowledge of the potential conflict. Lieutenant Commander Gaston conceded that Noor and Fitzgibbons had an attorney-client relationship that warranted respect, but suggested that the commission could do little to preserve it, given the circumstances.

After defense counsel spoke briefly in rebuttal, the judge recessed the commission for thirty minutes and then returned with a decision. In an opinion read from the bench, she found that voluntary mobilization does not sever an attorney-client relationship and that Major Fitzgibbons accepted mobilization orders aware of her responsibility. Captain Modzelewski, however, cautioned that she could not order Fitzgibbons be detailed to the case, since she had no authority over the Trial Defense Service. She did, however, strongly recommend that Fitzgibbons' request to continue as Noor's counsel be accommodated by her new command. The judge closed by pointing out that even if the Trial Defense Service refused to release Fitzgibbons, she was still Noor's attorney, implying that Fitzgibbons might have to resign from her current post if her superiors did not acquiesce.

In some ways, this hearing was an exercise in abstraction. Noor apparently wanted Fitzgibbons to continue as his attorney, the prosecution had no objection, Fitzgibbons herself wanted to continue, and the judge concurred with the need for continuous representation. There was no disagreement among the parties

involved in the commission. There was also no implication that Noor had suffered harm as a result of this dispute; he was well-represented at this hearing, and would continue to be in future proceedings by Mr. Cabot and Navy Lieutenant Commander Katharine Doxakis, who was the other defense counsel present at the hearing. Left unexamined were the concrete obstacles that have made representing detainees so challenging for even the most dedicated defense counsel. Could Noor, in fact, develop a meaningful, effective attorney-client relationship with his Guantanamo lawyers, given the conditions of his detention and the context of his culture, his language, his past?

Perhaps the most critical legal issue in Noor's prosecution is the one that will probably be argued at the next preliminary hearing in his case. It involves an Article 5 hearing, where a conclusive determination will be made regarding Noor's vulnerability to trial by military commission. This determination goes to the very core of the commission's legitimacy; it involves whether or not Noor can be properly tried. It also implicates many of the facts that will be presented at trial to determine his guilt or innocence. Article 5 hearings take their name from the Geneva Conventions provision that requires a "competent tribunal" to determine whether a captured belligerent is an illegal combatant and can therefore be denied procedural protections that would otherwise be available. If Noor, who is accused of being a weapons instructor and deputy commander of a terrorist training camp in Afghanistan, does not belong in the category of "unlawful enemy belligerent," he might still be found guilty of committing crimes of war. But he will fall outside the jurisdiction of the military commission, a commission responsible for detaining him for many years already.



JONATHAN KOTILNEK

I was given the honorable opportunity to travel to Guantanamo Bay and observe the military commissions on behalf of NIMJ. I observed a pre-trial hearing in the commission against Omar Khadr between April 26 and April 29, 2010. Omar Khadr is a Canadian citizen who is accused of throwing a grenade which killed a U.S. soldier in Afghanistan.

There were 36 reporters on the island for the hearing, an unusually large number which had not been seen for some time here. On Tuesday afternoon we attended a scheduled press conference. The press offices were set up in a large abandoned air hanger. The hanger was the only place the media was allowed to film.

At the press conference, the defense gave their key points on why the trial should not go forward, namely because there were no rules to go along with the Military Commissions Act of 2009 (MCA 2009). The Guantanamo bar, the NGOs and the public had been waiting for an updated Manual for Military Commissions to take into account the changes between the 2006 and 2009 Military Commissions Act. The Manual provides many of the procedural and evidentiary rules needed for a military commission to proceed. The prosecution then came out and gave their position that they believed the trial should go forward because the MCA 2009 gave enough direction to litigate the narrowly defined issue that was the subject of this hearing. Ironically, at approximately 7:30 that night, we heard a rumor that the new rules for the MCA 2009 had been released.

These rumors were confirmed when we went to court for the first time on Wednesday morning. Our escort picked us up and led us to the building which housed the courtroom. Once in court, the judge confirmed the rumor and postponed the hearing until later that afternoon so that both sides could review the new rules.

Jon Kotilnek earned an LL.M. in International Legal Studies from American University Washington College of Law with a specialty in International Organizations. During his course work at Washington College of Law, Jon served as a Dean's Fellow for the National Institute of Military Justice. He received his Juris Doctor from Marquette University and his Bachelor of Science in Political Science from South Dakota State University. Jon currently serves as a U.S. Army Judge Advocate. The views expressed here are his own and not that of the Department of the Army or the Department of Defense.

After a short review of the rules, we arrived back in the courtroom later that afternoon. We sat approximately 20 feet behind the defense table. Before long, the guards opened the double doors, and in walked 6 other military guards escorting Omar Khadr. His military defense counsel stood up and walked over to Mr. Kadhr, whispered something in his ear, and gave him a reassuring pat on the back, followed by a hand shake. It appeared that Mr. Khadr had both respect and trust for his newly appointed military defense counsel.

During the trial Mr. Khadr was observant and appeared very engaged with what was going on. The bulk of the afternoon hearing consisted of preliminary motions that none of the NGOs had received. It was akin to being in a law school class without doing the reading. It was difficult to follow what motion they were talking about and what arguments were being made. Once the preliminary motions were finished, the prosecution called an FBI interrogator who questioned Mr. Khadr while in Afghanistan. The interrogator was only allowed to answer a few questions before the judge recessed for the day to accommodate Mr. Khadr's scheduled prayer time.

Wednesday's events, which demonstrated the lack of transparency, prompted the other NGO's and me to write an email to the convening authority to request access to all of the preliminary motions to which we had not been privy. We received an email shortly after saying that we had to have the judge's permission because it was his responsibility to determine what needed to be redacted. The following day we literally slipped a note to the clerk of court to pass to the judge to request these preliminary motions. It surprised

me that there was no formal request mechanism that we could go through to get access to these motions. The judge was quick to respond that he had already cleared those motions and that it was the convening authority's responsibility to disseminate them in whatever means he saw fit. Once again, we contacted the convening authority and explained to the staff what the judge had told us. The convening authority's office confirmed what the judge had said and stated it would post the preliminary motions on the webpage later that week. To me, this was a prime example of how difficult the govern-

ment makes obtaining information related to the commissions, even information that has already been declassified and is ready for public viewing.

After court on Wednesday, the defense wanted to hold a press conference to discuss their views on the new rules. The prosecution had

not scheduled a similar conference. When we arrived to the "press" hanger, I noticed the air-conditioned press conference room was locked. Instead the defense counsel was forced to give the press conference inside the hanger without the protection of air conditioning. I found it interesting that the authorities kept the defense from utilizing the air-conditioned press room.

A more significant example of inequality was demonstrated when the defense was not allowed to question the military's motive for changing transportation procedures for the accused. We awoke Thursday morning and were taken to the court by our escort. It was my last day of hearings. We arrived in the

"To me, this was a prime example of how difficult the government makes obtaining information related to the commissions, even information that has already been declassified and is ready for public viewing."

courtroom at 8:45 am, as court was scheduled to start at 9:00 am. We sat in the courtroom for approximately an hour before the judge and counsel (minus Mr. Khadr) arrived. The fact they were so late led me to believe something had gone afoul. The judge convened the hearing and the defense called a guard from the prison, which was strange to me because we had ended the previous day with the notion that they were going to continue questioning the FBI interrogator. We learned that Mr. Khadr was refusing to come to court that morning because the military had changed the standard operating procedures (SOP) in terms of transporting him from the confinement facility to court. Mr. Khadr felt that this recent change in SOP was in connection with the start of his trial and felt it was an attempt to humiliate him. The judge became angry at the defense counsel for requesting the judge to look into why the SOP had changed and whether it was in connection with the impending start of the trial. The judge told counsel that he was not about to question the security procedures of the U.S. military and that was it. He further went on to point out that Mr. Khadr can voluntarily waive his right to be at trial, and that morning's actions were akin to voluntary waiver. At that moment, the microphones went out and there appeared to be other technical difficulties.

After the microphones were fixed, the judge reconvened and reaffirmed his ruling that Mr. Khadr had the ability to voluntarily waive his right to attend his trial. However, during the recess the judge's clerk stumbled across a very important error. Apparently, even though Mr. Khadr had been arraigned twice, he was never read his right to voluntarily waive his appearance at trial. Therefore, because Mr. Khadr had never been notified of this right to voluntarily waive his right to appear at his trial, he could not, as the judge determined, voluntarily waive his right in the current circumstances. The judge told defense counsel that they were going to recess until later that afternoon. During that period, the judge strongly suggested that defense counsel convince Mr. Khadr to come into court

so that his right to voluntarily waive court appearances could be read to him. If he did not come in that afternoon voluntarily, the judge was ready to order forcible extraction. Unfortunately, I had to leave at that point to catch a flight back to the States and did not get to witness the conclusion of the drama that was unfolding before my eyes.

I'm glad I was able to witness the events that happened on Thursday morning. If I had left after Wednesday's hearing, I would have gone home with the impression that the military commissions were a working, functional body equivalent to a U.S. civilian court. However, the events that transpired on Thursday morning showed that the new courts under the MCA 2009 are still plagued with not only legal complications but even logistical complications such as the microphone outage, lack of transparency and overall lack of communication between the convening authority and the judge.

Mary Weld is an attorney based in Washington, DC, and a member of the bars of New York Bar and the District of Columbia. She has worked on research and policy issues for NIMJ, and received her law degree from Harvard Law School.

MARY WELD

It was my privilege to represent the National Institute of Military Justice as an observer at a suppression hearing in the trial of Omar Ahmed Khadr that took place on May 4-6th, 2010, at Guantanamo Bay, Cuba. Jon Kotilnek had represented NIMJ at the hearing the previous week, and by the time I arrived, proceedings had been underway for several days.

Summary of Proceedings

We arrived on Monday just in time to catch a post-court press conference convened by defense counsel. Apparently, a medic had testified that day that he had seen the accused shackled, hooded, and crying, with his hands chained about at head level. Defense counsel characterized this treatment as torture, and noted that, if a wounded American met with that treatment from North Koreans, Americans would be outraged. A journalist asked how such treatment compares to beheadings, and defense counsel replied that beheadings were obviously worse, but that beheadings are not the appropriate point of comparison when considering the morality or legality of the conduct in question.

The next morning, we were seated in a relatively normal looking courtroom, which has been adequately described by prior NIMJ observers. Mr. Khadr appeared focused on the proceedings, and spoke with his attorneys frequently. This was a change from the previous Friday and Saturday, when newspapers reported he had refused to attend the hearing because he found the goggles he was made to wear in transit to be unnecessary, humiliating, and painful. We were not told how that issue was resolved, but he was present in court for the duration of the hearing.

Counsel for both the defense and prosecution appeared to be dedi-

cated and capable. Counsel on both sides had changed several times throughout the pre-trial process, perhaps the most notable change being the departure of Navy Lt. Cmdr. William Kuebler, who had been lead counsel for the defense. Mr. Khadr's current military defense counsel, Army Lt. Col. Jon Jackson, struck me as particularly impressive. Unlike Lt. Cmdr. Kuebler, Lt. Col. Jackson is not the lead counsel for the defense and spent less time questioning witnesses than did his civilian counterparts.

There were six witnesses for the prosecution and two for the defense. Witnesses for the prosecution included two military interrogators, an FBI agent, the nurse and doctor in charge of Bagram field hospital, and an ophthalmologist who conducted eye surgery on Mr. Khadr. Witnesses for the defense were Mr. Damien Corsetti, a military interrogator who had become acquainted with Mr. Khadr at Bagram, and Interrogator #1, who had been Mr. Khadr's primary interrogator at Bagram.

Generally speaking, the prosecution attempted to show that Mr. Khadr had received excellent medical care, was popular with and pitied by his interrogators, and voluntarily spoke with interrogators, particularly after he was confronted with a video of himself setting explosive charges. Defense counsel argued the video was inadmissible because it had been located as a result of involuntary statements by Mr. Khadr. More generally, the defense called into question the quality of the medical care Mr. Khadr received, and elicited descriptions of aggressive interrogation tactics, with a focus on the use of painful or fear-inducing techniques.

The interrogators were asked by defense counsel if they ever informed Mr. Khadr of his right to remain silent; none of them had done so. When asked by the prosecution why not, they all replied that their mission was intelligence collection, not law enforcement. Defense counsel raised questions about whether a detainee

would think that his participation in interrogation sessions was truly voluntary, given the fact that they were never told that they could remain silent, and were not at liberty to leave the room. The prosecution countered by arguing that Mr. Khadr regularly made it clear to interrogators that he was finished talking to them, which they argued meant that any statements he made were voluntary.

The most dramatic witness testimony of the week came from Mr. Damien Corsetti and Interrogator #1, both of whom were called by the defense. They both worked as interrogators at Bagram while Mr. Khadr was detained there, they were both later disciplined for detainee abuse, and they both remembered feeling pity for Mr. Khadr, because of his youth and perhaps also because he was easier to communicate with because he spoke English.

Mr. Corsetti testified for and cooperated with the defense, in part because of his stated desire to atone for his abusive behavior toward other detainees. He remembered seeing Mr. Khadr when he first arrived at Bagram, with a hole in his chest large enough to fit a tin of Copenhagen chewing tobacco inside. As Mr. Khadr lay there, being questioned by an unidentified person, and Mr. Corsetti remembered that his heart rate or breathing monitor (Mr. Corsetti was not sure which) began to speed up, which Mr. Corsetti interpreted as a sign of stress or suffering. Once Mr. Khadr had been released from the hospital and sent to the detention facility, Mr. Corsetti said he pitied him because of his age, and brought him books and soft drinks. Mr. Corsetti was not present for any of the regular interrogations of Mr. Khadr.

Interrogator #1 was somewhat surprisingly called by the defense, although he had been given immunity and a clemency recommendation by the prosecution. Given that he was Mr. Khadr's primary interrogator, his testimony was probably the most directly relevant to the determination of the voluntariness of Mr.

Khadr's statements at Bagram. He described a technique he used on Mr. Khadr called "fear up harsh", which included screaming, swearing (something he said Mr. Khadr particularly disliked), and in at least one instance, throwing furniture. He said he never touched Mr. Khadr or ordered him to be placed in stress positions because he was injured, but did not rule out the possibility that he might have ordered Mr. Khadr to raise his head and look him in the eye when Mr. Khadr was handcuffed to a stretcher. Interrogator #1 denied ever threatening Mr. Khadr, but recited a "fictitious story" that he had told to Mr. Khadr about an Afghan man who was sent to a federal prison in the United States where he was gang raped in the shower and subsequently died of his injuries. Interrogator #1 testified that he had been court-martialed for behavior including choking a detainee with a hood, roughly grabbing a detainee, and forcing a detainee to roll around on an unclean floor and kiss his boots.

On cross-examination, Interrogator #1 said that the "fear up" method did not elicit good results from Mr. Khadr, but rather caused him to "shut down" and refuse to talk. However, he said that after Mr. Khadr was confronted with a video tape of himself setting up explosive devices, Mr. Khadr suddenly became extremely cooperative.

Legal Issues Highlighted in the New Manual

The new Military Commissions Manual, updated to comply with the Military Commissions Act of 2009, was released the day before Mr. Khadr's suppression hearing was to commence. A brief recess was taken so that counsel for both sides could familiarize themselves with the new Manual.

The 2010 Manual updated the 2007 Manual with numerous changes of varying significance. Perhaps the most relevant for Mr. Khadr's trial was a comment inserted into the definition of the crime of murder in violation of the law of war. The comment does not work

a substantive change, but clarifies which murders of this type are triable before military commissions. (The elements of this crime, an unlawful and intentional killing in violation of the law of war and in the context of hostilities, have not changed since 2007.)

The comment is significant because it defines the jurisdiction of military commissions over offenses that satisfy all of the constituent elements of the crime. The first part of the comment is not relevant to Mr. Khadr; it claims jurisdiction for commissions if the accused resorts to illegal means (such as poison) or methods (such as perfidy). The second part of the comment claims jurisdiction for commissions if the accused's actions are traditionally triable by military commission. Two examples are given: the first is spying, and the second is "murder committed while the accused did not meet the requirements of privileged belligerency". This is the most controversial point, and the part of the comment most relevant to the charges against Mr. Khadr.

The comment shifts the emphasis from the nature of the alleged murder, to the status of the alleged murderer. Legal scholars hotly debate whether murder by an unprivileged belligerent is a war crime, rather than a violation of domestic criminal law (in Mr. Khadr's case, domestic Afghan law). News reports assert that this particular comment was debated at the highest levels in the Department of State and Department of Defense. Its resolution is of critical importance to the outcome of Mr. Khadr's trial.

This is just one example of the importance of the Manual; anyone interested in the proceedings at Guantanamo Bay should study this important document closely.

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MICHAEL ORLANDO

I recently had the opportunity to observe a hearing in the military commission of Noor Uthman Muhammed (Noor), a Sudanese national, charged with six specifications of providing material support for terrorism and six specifications of conspiracy. As the hearing approached, I noted that neither I, nor my fellow observers, were sure which motions would be argued. The Department of Defense (DoD) maintains a website containing a list and electronic copies of motions in each case. However, the website is spottily updated, and the order of motions listed on the page does not necessarily correspond to the order in which motions will be heard. I spent the night before the hearing reviewing a defense motion for dismissal based on an alleged 5th Amendment violation of the Equal Protection Clause and the government's response to that motion. This was the most recent motion listed on the DoD's webpage for Noor's commission, having been posted the day before the hearing was to begin. However, this motion was not mentioned once during the hearing, leading to a good bit of confusion among observers, as the hearing focused on a wholly unrelated issue. While I appreciate the Department of Defense making documents available online, I suggest that, in the interest of further transparency in the commission process, it also maintain a list of motions to be argued at particular commission hearings. This would aid the public by allowing citizens to keep up with the particulars of a case without having to wait for the press, or an observer like me, to recount what motions were argued on which date.

The Accused did not attend the hearing. The first few minutes were spent establishing that Noor's absence was knowing and voluntary. The hearing was set to discuss discovery, issues regarding the continuity of Noor's rep-

resentation by Major Amy Fitzgibbons, and a defense motion for the appointment of a psychological expert.

However, by the time the hearing began, the defense and the government had made sufficient progress regarding the discovery issues that neither party desired to argue those issues in court. Major Fitzgibbons' status as one of Noor's counsel was resolved in the days leading up to the hearing. Major Fitzgibbons had been taken off of Noor's case when she changed duty assignment. A new agreement allowed Major Fitzgibbons to remain as Noor's defense counsel. The only issue left to discuss was the defense motion to appoint a psychological expert consultant.

The court heard first from the defense, which asked for a psychologist as an expert consultant. Lieutenant Commander Doxakis, the other military counsel assigned to Noor's case, outlined several reasons for appointing the expert. First, the defense argued that Noor may be suffering from Post-Traumatic Stress Disorder and depression as a result of the "unique" conditions of confinement and interrogation to which Noor had been subjected. Lieutenant Commander Doxakis also noted that Noor has been prescribed psychiatric medication, although there is no evidence he received a psychiatric evaluation. The second reason Lieutenant Commander Doxakis cited was that Noor suffers from chronic pain, and that this could be a symptom of an undiagnosed mental health problem. Third, the expert would be utilized to assess the voluntariness of Noor's statements made while under interrogation. In addition, the expert might be used in the sentencing phase of the commission to testify in mitigation, should Noor be convicted. Lieutenant Commander Doxakis noted that Noor's statements were the lynchpin of the government's case against him, and that an expert was needed to adequately prepare for the introduction of those statements by the govern-

ment. The defense noted that the expert sought was uniquely qualified to serve because he had previously worked with detainees released from Guantanamo and speaks Arabic. Finally, the defense asked that the expert be pre-approved to provide 200 hours of work, so as to avoid the necessity of having a hearing to approve work every time the defense needed it.

The government took the position that the defense had not made a sufficient showing to support their request for an expert. Lieutenant Commander Arthur Gaston, the lead counsel for the government, also asserted that the motion should not be granted because the expert's help in developing a theory of the case alone did not warrant spending taxpayer dollars. Lieutenant Commander Gaston then argued that, if the defense could assert specifics about the case, that an examination should be done pursuant to RMC 706 to determine Noor's mental competency and responsibility.

The defense responded that they had provided enough specific information in their motion to support the appointment of a psychological expert and that the government had been given adequate time to suggest an alternative to the expert sought, which it was unable to do. With that, the military judge announced that she would take the motion under advisement and rule at a later date. The entire hearing lasted one hour and four minutes.

Following the conclusion of the hearing, it struck me that the entire court had been transported from the Washington, DC, metro area to Guantanamo Bay, Cuba, via chartered airliner and spent nearly four days on base at Guantanamo for a hearing that lasted barely over an hour. While I grant that those involved in the proceedings do this on a regular basis out of a sense of duty to both the nation and the fair administration of justice, this use of resources is clearly inefficient. This inefficiency is only exacerbated by the fact that hearings in individual cases often have many months of inaction be-

tween them. Conducting proceedings over the course of several years not only contravenes a basic tenet of American jurisprudence, it also threatens to undermine the reliability of evidence and the overall verdict in Noor's case.

In addition to the above concerns, the actual nature of the charges brought against Noor raises serious legal questions. Generally speaking, military commissions are convened to try violations of the laws of armed conflict. These laws are well-known and have developed over time. A defendant tried for a violation of the laws of armed conflict would not be able to successfully claim that the provision under which he was tried was being applied in an *ex post facto* manner because these laws have existed for many years. Noor is charged with conspiracy and material support for terrorism committed before September 11, 2001. The Military Commissions Act of 2009 (MCA 2009) grants temporal jurisdiction for acts committed before, during, and after September 11. This grant of jurisdiction would not be much of an issue if the acts charged were considered war crimes at the time they were committed. However, the charges of conspiracy and material support for terrorism are not, nor have they ever been, considered part of the body of the law of armed conflict. Justice Stevens says as much in his plurality opinion in *Hamdan v. Rumsfeld*. Because conspiracy is not a part of the law of armed conflict, there was no way Noor could have known that his actions would be considered war crimes at the time he allegedly committed them.

This lack of notice creates a fundamental problem in Noor's prosecution. The MCA 2009 essentially incorporates the domestic notion of

conspiracy into the law of armed conflict and applies it to those subject to military commission jurisdiction. In addition, material support for terrorism has never before been considered a violation of the laws of war. Finally, there has been no evidence introduced that Noor's alleged crimes were committed within the context of an armed conflict. While it may be argued that direct actions in preparation for the September 11 attacks can be considered acts of war, no such evidence of Noor's involvement in such actions has been alleged. For all these reasons, trying Noor in a war court does not make sense.

“Conducting proceedings over the course of several years not only contravenes a basic tenet of American jurisprudence, it also threatens to undermine the reliability of evidence and the overall verdict in Noor’s case.”

As noted above, the only issue argued at the hearing was a defense motion for the appointment of a psychological expert to their team. The appointment of a psychological expert to a defense team is not that uncommon in criminal cases. However, in

this case, Lieutenant Commander Doxakis asserted that, given the “unique” conditions of interrogation and detention that Noor had faced, an expert was needed to determine the voluntariness of Noor's statements. Lieutenant Commander Doxakis said that Noor's statements made up the majority of the government's case against him and that it was necessary to verify that each statement was not coerced in any way. According to the MCA 2009, any coerced statements made by an accused are inadmissible at the commission, except those statements made in a battlefield setting. One of my fellow observers pointed out that Lieutenant Commander Doxakis had just stood up in open court and said that she felt it necessary to have a psychological expert review Noor's statements because she felt they may have been given involuntarily. I found

this particularly poignant because this allegation did not elicit any reactions of shock or surprise from anyone in the courtroom, myself included. Lieutenant Commander Doxakis' use of the word "unique" to describe the interrogation and detention to which her client had been subject was telling. While we do not know the particulars of what happened during Noor's interrogation, other detainees have been subjected to methods of interrogation that amount to torture. If the defense were able to prove that Noor's statements were the product of similar interrogation practices, those statements could be ruled inadmissible. If these statements were inadmissible, it is very likely that the government's case against Noor would collapse for lack of evidence. In addition, any statement ruled inadmissible at a military commission for lack of voluntariness would certainly also be ruled inadmissible in a court-martial or in civilian federal court. This creates a major difficulty in prosecuting suspected terrorists who have been subjected to "enhanced interrogation." Cases will have to be built on evidence apart from coerced statements. This will likely prove difficult in some cases and impossible in others.

My visit to Guantanamo and the hearing I witnessed have convinced me that the men and women working in the military commission system take their duty seriously and perform it admirably. They deserve our thanks. However, the commission system as it exists is flawed. The commissions are inefficient. In addition, Noor's prosecution under MCA 2009 raises serious questions about *ex post facto* prosecution, the nature of what actions constitute a war crime, and the potential impact of coerced statements on successful prosecutions. These issues must be addressed in order for the trials of suspected terrorists to be considered fair and legitimate.



CHARLIE FOWLER

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Flying into Guantanamo Bay, Cuba, is a bit of an exercise in the absurd. Like visiting the Kafka museum, if it had been moved from Prague to a tropical island. More *National Lampoon's Caribbean Vacation* than *The Penal Colony*, but with security clearances and bureaucracy.

An oft-asked question by friends is “were you scared?” (I resisted yelling back, “Do you want the truth!?!”). But on its surface, Guantanamo Bay is little different than any other military installation I have visited, albeit with more iguanas and coastline than most Army bases, despite its small size. There is no Colonel Nathan R. Jessup from *A Few Good Men*: although we did fly down with Navy Reserve Capt. David Iglesias—an inspiration for Tom Cruise’s character in the movie.

Just past the security check-point leading into Courtroom One, I noticed a pair of plastic goggles that had been covered with duct tape to keep out light and earphones, to keep out sound—still used during prisoner transport on the island. The control tower, where Courtroom One is located, is pretty basic, concrete walls covered with yellowing paint and linoleum floors. But the courtroom has a fresh coat of paint and burgundy carpet, with long, dark wooden tables for the defense and prosecution. A plasma TV was set to the right of the military judge, to video-link with al Qosi’s Sudanese counsel, but the display was blank throughout the hearing.

We sat in the court for about an hour before the parties arrived.

In the Courtroom

Although neither side had announced beforehand that there would be a plea deal, the rumor was widely circulated through the press. And that is what happened. The proceedings were almost identical to a guilty plea at a court-martial. The terminology in the court, from the Manual for Military Commissions (containing the Rules for Military Commissions or R.M.C.), was instantly familiar to anyone who had read the Manual for Courts-Martial (containing the Rules for Courts-Martial, or R.C.M.): the pre-trial agreement—R.M.C. 705/R.C.M. 705; the plea—R.M.C. 910/R.C.M. 910; out-of-court conferences—R.M.C. 802/R.C.M. 802.

It was quickly apparent that al Qosi was going to plead guilty to conspiracy and

material support for terrorism, as part of a pre-trial agreement with the Convening Authority that would remain sealed until after sentencing. Before accepting the guilty plea, the military judge had to ensure that the plea complied with R.M.C. 910—that al Qosi knew what rights he was giving up by admitting his guilt, that the plea was voluntary, that the pretrial agreement complied with the rules, and that the plea was accurate—in essence, that there was a factual basis for the plea. Although the joint stipulated facts and the charge sheet were not available before the trial, the military judge went over the charges, to ensure that al Qosi understood the charges and their elements, and the joint stipulated statement of the facts, to ensure that he agreed to the stipulation's accuracy.

The facts first established that al Qosi was not a

lawful combatant, borrowing from the language of Article Four of the Geneva Convention Relative to the Treatment of Prisoners of War. Al Qosi admitted that he was not a member of the armed forces, militia or volunteer corps of a state party to the Geneva Conventions, and that he did not have a regular chain of command, wear a fixed, distinctive insignia or openly carry arms.

The rest of the facts established that al Qosi joined al-Qaeda on 15 February 1996, he knew

that it was an internationally recognized terrorist organization, and knew Osama bin Laden had issued a fatwa against the United States with the purpose of influencing the policy and conduct of the country and its citizens. Al Qosi admitted that he had provided material support for terrorism by acting as a driver and cook, manning a defensive mortar position defending Kabul against anti-Taliban Afghan fighters [or

“against Ahmad Shah Massoud’s forces”] in the late 1990’s, and moving several times on orders from superiors in al-Qaeda. He did not have foreknowledge of, nor did he help in the planning of the 1998 embassy bombings in Dar es Salaam and Nairobi, the 2000 attack against the USS Cole, or the 9/11 attacks, but he continued to provide logistical support for al-Qaeda—driving and cooking—even after learning of al-Qaeda’s role in those attacks.

Although the pretrial agreement will remain sealed until after sentencing, the military judge read over several portions of the agreement with al Qosi, to ensure that he understood what he was giving up in exchange for an agreed-upon limited number of years in confinement. He has to withdraw his current habeas petition, and he will not be able to challenge his detention, confinement, trial, conviction,

“It was quickly apparent that al Qosi was going to plead guilty to conspiracy and material support for terrorism, as part of a pre-trial agreement with the Convening Authority that would remain sealed until after sentencing.”

tion or sentence on appeal or by collateral attack. Nor can he bring a suit or join in a suit against any employee of the United States acting in an official capacity with regards to his capture, detention or confinement. He still retains the right to challenge a sentence that is beyond the statutory limitation or the limit in the pretrial agreement. Mr. al Qosi also waives any credit for time served—approximately eight-and-a-half years—time that would not have counted anyway, under the new Manual for Military Commissions.

A Bit of Both, The Best of Neither/Flaws in the System

While eating dinner after the trial, we heard a rumor that Omar Khadr, the last Western detainee at Guantanamo, had fired his lawyers. In a handwritten note, Khadr explained that he was boycotting the military commissions because they have “been constituted to convict detainees, not to find the truth.” It is hard to argue with Mr. Khadr’s statement, a sentiment shared by at least six officers detailed to prosecute Guantánamo detainees. Al Qosi’s conviction, coming six months after President Obama had planned on closing the detention camps in Cuba, is only the fourth for the commissions, and the first for the new president.

The most readily apparent shortcoming of the commission process is the lack of transparency. The Department of Defense has a website set up specifically to post information regarding the military commissions. The most recent update to the website under al Qosi is a docketing order from November 20, 2009 (still marked *NEW*), although more current documents are available on the web, including the NIMJ website. If the new administration wants to increase public confidence in the commission process, it should make the process as transparent as possible. A good first step towards transparency would be immediately posting all court documents cleared for public consumption on the military commissions website.

My second problem with the commissions is the jurisdictional problem. The commissions were created “to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission”—specifically UCMJ Articles 104 (aiding the enemy) and 106 (spies). Captain Iglesias, spokesman for the prosecution, said that al Qosi “admitted to some pretty serious violations of the law of war.” However, al Qosi pled guilty to conspiracy to provide material support for terrorism and providing material support for terrorism, neither of which are clearly recognized as violations of the laws of war. Material support for terrorism had not been considered a war crime by any court until several years after al Qosi was taken into custody.

It is clear that the federal government has jurisdiction over the crime of providing material support for terrorism. See, e.g. 18 U.S.C. § 2339A. It is far from clear, however, whether a military commission constituted solely to try violations of the law of war has jurisdiction over the crime of material support. In fact, Jeh Johnson, DOD General Counsel, and David Kris, Assistant Attorney General, both testified to this effect before the Senate Armed Services Committee in July 2009. Mr. Kris warned that there is a significant risk that appellate courts will overturn commission material support convictions, raising questions of legitimacy, and Mr. Johnson recommended that material support be removed from the list of offenses triable by military commissions.

But the government avoided this question in al Qosi’s case, with the prohibition on appeal contained in the pretrial agreement. And this highlights an important departure of the Rules for Military Commissions from the Rules for Courts-Martial. In a court-martial, “[a] term or condition in a pretrial agreement shall not be enforced if it deprives the accused of . . . the right to challenge the jurisdiction of the court-martial; the right to a speedy trial . . . the com-

plete and effective exercise of post-trial and appellate rights.” However, in a military commission, a term or condition is only unenforceable if it “deprives the accused of the right to counsel or to other indispensable judicial guarantees.” Evidently, the right to challenge jurisdiction, the right to a speedy trial, and the right to exercise post-trial and appellate rights are not “indispensable judicial guarantees” under the military commission system.

My third complaint is that the procedural structure of the commissions is flawed. Al Qosi has faced charges under three judicial schemes: in 2004 under the original incarnation of the commissions—the creation of which was ruled unconstitutional; under the 2006 MCA—ruled an unconstitutional suspension of the writ of habeas corpus; and the 2009 MCA. Al Qosi’s military judge ruled on the ability of the government to amend the charges under the 2009 MCA in January 2010, four months before the procedural rules of the 2009 act were promulgated.

In a press conference after the trial, Navy Captain and prosecutor John Murphy said that al Qosi’s conviction “validates the commission process and advances the hearings.” In light of the other convictions that occurred under the military commissions, it is hard to understand how this plea enhances the credibility of the commissions. Al Qosi was in custody for over eight years, waiting for his day in court. In pleading guilty under this third system, the pretrial agreement denies the first person convicted under the 2009 MCA the opportunity to challenge the process. Not exactly the hallmark of a legitimate, time-tested system.

The military commission system we have today unsuccessfully takes elements from our military law and federal court systems, resulting in a hybrid system that neither fulfills the mandate of the commissions nor provides a minimum level of justice. Although certain procedural guarantees of the Uniform Code of

Military Justice are understandably absent from the military commissions—certain evidentiary rules, pre-trial investigations, warnings against self-incrimination—other fundamental rights are discarded—the right to speedy trial and the non-waivable right to appeal, among others. The commissions also reach beyond their mandate to try crimes not traditionally recognized as war crimes, such as material support for terrorism. Federal courts have successfully prosecuted hundreds of terrorism suspects in the same amount of time the commissions have prosecuted four. Most importantly, federal courts have the legitimacy and history that the commissions lack. They are a tried and true system that has the ability and tools to successfully try terrorism suspects.

The military commissions have been flawed since their inception. As the last presidential administration found out, creating a judicial system from scratch is not an easy process. Our current federal court system has evolved through hundreds of years of trials and challenges. There might have been a slim chance that the designers of the military commissions could have created an efficient system for dispensing justice, but that chance was missed. The commissions suffer from the taint of two Supreme Court invalidations, numerous delays, and multiple assigned military counsel, both prosecution and defense, who requested reassignments or resigned because they thought the system was fundamentally unfair. Al Qosi’s plea deal highlights the flaws in the commission system: after eight years of confinement, in order to plead guilty of driving and cooking for al Qaeda, he had to sign a water-tight plea agreement which prevents him from challenging the legitimacy of the commission system.

STEPHEN I. VLADECK

What follows is my first-hand report on today's proceedings here at Guantánamo in the military commission trial of Omar Khadr, a Canadian citizen captured in Afghanistan in the summer of 2002 at the age of 15, and charged with, among other things, throwing the grenade that killed Sergeant Christopher Speer. I came down here as observer for the National Institute of Military Justice—an NGO affiliated with my law school that was founded in 1991 to promote the fair administration of justice in the military system, and to educate the public, press, and Congress about the military justice system. Although I am here through NIMJ's good graces, it should go without saying that what follows are my own views, and do not necessarily represent the position of NIMJ, its leadership, or its employees.

I had never been to Guantánamo before yesterday. Notwithstanding my involvement at various stages in the Hamdan litigation and in various other cases involving non-citizens detained here, I had somehow managed to avoid this remote stretch of southeastern Cuba in my travels—for better or for worse. Now, after observing almost a full day's worth of proceedings in Omar Khadr's case (the big news from today's events has already been broken elsewhere), I think it's easy to see why everyone is so frustrated—the lawyers on both sides, the judge, the defendant, even the JTF personnel whose thankless job it is to deal with the dozens of people (like me) who converge upon the base from afar for each new round of hearings. Frustration comes cheap here at Camp Justice; progress is the priceless commodity.

Frustration is also at the heart of the current predicament in Khadr's case. Although Khadr had largely been cooperating with his lawyers, that changed recently, for reasons that we can only speculate about (I won't here). Thus, Khadr fired his civilian lawyers, and made representations to the court that he also wanted to rid himself of his detailed military lawyer, Lt. Col. Jon

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Jackson. The court initially took that as a motion to proceed *pro se*, and, ostensibly, that was the matter pending before the court when it convened this morning.

It quickly became apparent, though, that self-representation was but a means to an end for Khadr—that his own frustration with the entire process had boiled over, and that he no longer wanted to participate (or have anyone actively participate on his behalf) in the commission. After reading a prepared statement, and reiterating time and again that he believes the outcome of the trial is foreordained no matter what happens now or what arguments are made, Khadr got into a lengthy colloquy with the judge, Army Colonel Patrick Parrish, about his intentions. Parrish, who initially seemed inclined to allow Khadr to represent himself, only slowly came to realize that self-representation wasn't Khadr's real endgame, and that, if he allowed Khadr to represent himself, there would in fact be no defense. Suffice it to say, though, that it took the better part of separate 46-minute and 25-minute hearings this morning before this all became apparent, and I think there were at least two distinct points in the interim when Judge Parrish was prepared to rule to the contrary and allow Khadr to represent himself.

Of course, the Constitution does confer a qualified right upon defendants to represent themselves, but (1) that assumes that Khadr has Sixth Amendment rights, hardly a settled proposition; and (2) the right is not absolute, and can be abridged, *inter alia*, in cases in which the defendant is mentally impaired from raising an effective defense.

Anyway, the question then became how the defense wished to proceed with its (still-) pending motion to suppress the various statements Khadr made to his interrogators, both here and after he was initially detained at Bagram. And that's what precipitated the second recess, to allow Lt. Col. Jackson to confer with

Khadr and figure out whether the defense would (1) withdraw the motion; (2) take no action (which would presumably mean the motion would be decided based purely on the existing record and any further argument by the government); or (3) call witnesses and present evidence in support of the motion. Related, there's also the timing question. With the trial still scheduled for the week of August 9, and with no witnesses here to testify in conjunction with the suppression motion, each of these options carried consequences for what at times today seemed to be the most frustrating problem of all—the calendar!

When things reconvened after lunch, Judge Parrish asked Khadr which of those options he wished to pursue, and Khadr, again, said he was "boycotting." Perhaps it's just me, but once Parrish decided that Jackson was still going to be Khadr's lawyer, it seems that such a strategic question should have instead been directed to Jackson. Little matter, though, because Parrish immediately turned to Khadr's military lawyer, who now finds himself in an awful bind. On the one hand, his client clearly wants him to do nothing at all (and doesn't even like the idea that he is still Khadr's lawyer). On the other hand, his ethical obligations as a lawyer may well compel him to act against his client's wishes at least to some extent so long as he reasonably believes it to be in his client's best interests. Different Guantánamo lawyers have handled this problem differently, and, in any event, state ethics rules may well vary. And if that weren't enough, there's Rule 109(b)(3)(A) of the hot-off-the-presses 2010 Manual for Military Commissions [I know, how'd I miss that one?], which provides that "In effecting a choice of law between the professional responsibility rules of a counsel's licensing jurisdiction and the rules, regulations, and instructions applicable to trials by military commission, the latter shall be considered paramount, unless such consideration is expressly forbidden by the rules of a counsel's licensing jurisdiction."

It's not as if these kinds of issues don't arise in civilian courts; of course they do. Judges are faced all the time with recalcitrant defendants who want to represent themselves, or with lawyers who feel caught between their obligations to their client and to their bar. The difference, so far as I can tell, is that the civilian system has tradition and precedent, from which stability—if not legitimacy—naturally flows. Here, in contrast, there's no law on virtually any subject, and so there are just too many independent variables, only so many of which can be controlled by the text of the Military Commissions Act or the Rules for Military Commissions.

“Judges are faced all the time with recalcitrant defendants who want to represent themselves, or with lawyers who feel caught between their obligations to their client and to their bar.”

So, Lt. Col. Jackson did what any reasonable lawyer in his situation would do: he punted, asking the court for time to consult with (and obtain an opinion from) professional responsibility experts in both the Army Judge Advocate General Corps and in the Arkansas bar. Not for the first time today (but perhaps the most vociferously), the prosecution objected to any further delay, suggesting that Khadr is manipulating the process, mocking the commission, and seeking only to further postpone the proceedings, never mind that Khadr himself said four or five times today that he wants the trial to be over as quickly as possible. Nonetheless, Judge Parrish decided to give Jackson until August 2 to hear back from the JAG and the Arkansas bar, and to leave untouched, for the moment, the trial date for the week of August 9, leaving aside the sheer impossibility of either resolving the ethical issue or, even assuming that goes quickly, disposing of the (fairly critical) suppression motion. [There are no available dates for all of the necessary parties to convene

again here between now and August 9.] And so, court finally adjourns for the day (week? month?) around 2:30 p.m., with the distinct sense that a whole lot of effort was expended by a number of people who mean really well, and nothing at all was accomplished.

Just another day in the life at Camp Justice.

***Editorial comment:** From 9-12 August 2010, I was privileged to represent the National Institute of Military Justice as an observer at Guantanamo Bay, Cuba, at the military commission of Omar Khadr. It was apparent that commission observers with a background in American courts-martial were unusual, even rare. That is unfortunate. Civilian NGO and media representatives, having no point of military justice reference, are quick to ascribe malevolent military motives to courtroom events they don't understand or agree with. A few words of explanation from someone with court-martial experience go far to quell wrong-headed theories that too often find their way into print, unnecessarily casting military justice in the worst light.*

GARY SOLIS

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Omar Khadr's first appearance before a military commission was in January 2006. During the period of my observation the Military Judge (MJ) was Army Colonel Patrick J. Parrish. The government was represented by three lawyers (trial counsels, or TCs), including a civilian attorney (recently a Marine Corps major and judge advocate) from the Department of Justice who is the lead TC, two Air Force captain judge advocates (JAs) and a Navy captain JA. The accused's defense counsel (DC) is Army Lieutenant Colonel Jon Jackson. He was assisted by a civilian Canadian lawyer who was seated at the defense table, but who was not permitted to take an active part in the trial itself. Conversation with the DCs on the weekend prior to the opening of court indicated the probability that Khadr would not be present. He did attend Monday's opening session, however.

On the Monday my observation began, pretrial motions for both sides, including witness testimony, had been completed. The MJ was to hear arguments on the motions by DC and TC, and announce his rulings. Monday proved fascinating in that I heard the arguments which, to a degree, recapped weeks of prior testimony and legal wrangling in a concise form. After opening the proceedings, the MJ noted that the Muslim holy month of Ramadan would begin in two days, but the accused had earlier expressed a desire to continue the trial without delay. Ac-

cordingly, the military commission would carry on through Ramadan. Neither side objected.

Pursuant to a government request that it be admitted into evidence, a lengthy video was played showing the accused physically resisting being weighed. The event was filmed months previously. Regular weight records are provided the International Committee of the Red Cross. The video apparently was offered by the government to rebut the accused's allegation of undue force being applied to him during an event which, the accused said, had been videotaped. The tape showed that, while there had been physical resistance by Khadr, and counterforce by six or seven military guards, the counterforce was as minimal as the situation allowed. The government contended that, contrary to the accused's assertion of torture, neither excessive force nor prohibited methods of restraint were employed. As the videotape played, the accused perused a soccer magazine, as he did for most of the day's proceedings. The upshot of the hour-long film and oral arguments was never made clear in the courtroom. Was the video offered into evidence? Was it admitted or was it found inadmissible? Although all of this was unclear, the in-court arguments went far in revealing the abilities of the lawyers for both sides and the attitude of the MJ. The video's fate having been determined, if not clearly so, the government made final argument on the motions.

The prosecution was well-prepared and its arguments for denying the defense motions to exclude were well-considered and persuasively presented. The government referred to, *inter alia*, a previously admitted film showing Khadr, prior to his capture, involved in making an improvised explosive device (IED), as well as other films of six separate interviews of the accused by an FBI "clean team" in which Khadr confirmed his knowledge of bomb-making, his knowledge of the identities of senior American military leaders, and a descrip-

tion of the events during which Khadr admitted throwing the hand grenade that killed Army Sergeant First Class Christopher Speer, the basis of charge one against the accused. In the latter film, the government noted that Khadr refers to the incident as the proudest moment of his life. The government contended that Khadr was transferred to Guantanamo solely to receive medical treatment to save his eye, injured during the firefight in which he was captured. In later statements to the MJ, the TC noted that the accused was fifteen years, ten months old at the time of his capture.

Lieutenant Colonel Jackson, the lone defense counsel, offered an abbreviated argument stressing the accused's initial mistreatment at Bagram, while still badly wounded, saying that it broke the accused and, in a fruit-of-the-poisonous-tree argument, rendered any subsequent statements of the accused inadmissible. In previous pretrial motions, at which I was not present, Army "Interrogator #1," now a civilian, was said to have admitted telling Khadr that, unless he cooperated, he would be transferred to an American prison. In pre-trial testimony on the motions admissibility, "Interrogator #1" admitted telling Khadr that another young Muslim detainee who had been so transferred had been homosexually raped by four African-American fellow-prisoners. ("Interrogator #1," in events not associated with the Khadr case, apparently had been given a letter from the government urging leniency in a case in which the interrogator was charged with detainee mistreatment. The interrogator was convicted in that case and received a notably lenient sentence. "Interrogator # 1" was convicted in the *Taxi to the Dark Side* case, in which the several accused all received surprisingly light sentences.) In a decision silently questioned by some in the audience, the DC chose not to detail in his final argument additional mistreatment that apparently had been detailed in other prior testimony. The defense closed with a plea to the MJ to send a message to the world that the United States

does not tolerate such treatment of prisoners, the message to be communicated by granting defense motions to suppress the bomb-making film and all statements made by the accused.

Throughout the closing arguments on the motions to dismiss the MJ was quick to correct any suggestion that he is either unaware of the tasks within his judicial purview, or that he might not be the final arbiter of the law. ("Rulings in prior military commissions may be persuasive, or they might not be.") He is firmly in control of the courtroom.

Finally, the government argued the admissibility of an eighty-minute-long video apparently produced by the Department of Defense (the maker's precise organization was not made clear) entitled *The al Qaeda Plan* that details al Qaeda's plan to defeat America, to include showing the 9-11 aircraft attacks on the Twin Towers. The video was offered, the TC said, to establish that there was a state of hostilities at the time of Khadr's alleged war crimes (an element of the charge of murder in violation of the law of war), and that al Qaeda tactics include purposeful violation of the law of war, including the targeting of civilians and protected objects. The defense responded that the film was irrelevant and inflammatory.

In response to the defense motion to exclude *The al Qaeda Plan*, the prosecution offered Mr. Evan Kohlmann, and successfully qualified him as an expert on virtually all things related to terrorism. Mr. Kohlmann, who holds a JD from the University of Pennsylvania, does not have a doctorate, holds no university professorship, and speaks no Middle Eastern language. He is a frequent prosecution expert. Mr. Kohlmann was not examined on this day. It was also noted that an un-named civilian seated at the defense table was a jury consultant.

With an understanding that he would soon announce his rulings on the defense suppression

motions, the MJ called for the accused's plea to the charges:

Charge 1: Murder of Army Sergeant First Class Christopher Speer, in violation of the law of war

Charge 2: Attempted murder in violation of the law of war

Charge 3: Conspiracy to attack civilians and civilian objects, and to commit murder in violation of the law of war

Charge 4: Material support for terrorism

Charge 5: Spying

The accused pleaded not guilty to all charges. In a contemporaneous exchange, the MJ announced that, contrary to the defense's request – a request previously made several times, apparently – he would not now announce his intended instruction regarding the charge of murder in violation of the law of war. He was undeterred by the DC's protests that he had to know the content of the MJ's instruction to craft *voir dire* and his final argument.

The MJ announced his rulings on the defense motions to suppress/exclude.

Re the video found in the compound after the firefight there: denied

Re the motion to exclude the courtroom guards from the courtroom when the members were present: denied

Re *The al Qaeda Plan* video: denied, although the portions showing the actual 9-11 flights will be excluded

Re testimony of expert witness, Mr. Kohlmann: denied

Re dismissal of Charge 5, spying: denied

Re the law of war instruction relating to Charges 1 and 2: he will instruct the members substantially as the government

has charged the offense (This ruling was unclear to many observers, including me.)

The DC requested that he be allowed to voir dire the MJ regarding his expertise on the law of war. The MJ responded that the DC should put his questions in writing, and that he, the MJ, will not entertain questions regarding his personal background.

Editorial comment: *With the denial of the defense motion to exclude six statements of the accused, the military commission missed the opportunity to announce that it would not permit admission of evidence gained through the torture, or cruel, inhuman, or degrading treatment, of a wounded fifteen-year-old enemy. At Bagram, shortly after his capture, the accused, while still seriously wounded, was interrogated and essentially threatened with homosexual rape, as previously referred to. While the members will presumably hear details of that encounter from the interrogator involved, the government will not offer any statement by the accused from that particular interrogation. The government apparently will offer, however, six subsequent inculpatory statements the accused made to the FBI "clean team." In my opinion, this is not a case of "fruit of the poisonous tree," Silverthorn Lumber v. U.S., or its attenuation, Murray v. U.S. The case is not about U.S. constitutional law. Rather, it is about the Convention Against Torture, and America's obligations under the 1949 Geneva Conventions, common Article 3, and its commitment to "the just determination of every proceeding relating to trial by Military Commissions." (Manual for Military Commissions, United States (2010 Edition), Rule 102. (a).)*

Seventeen prospective uniformed members were called into the courtroom and seated, identified only by number. The accused was present, for the first time dressed in a Western-style suit. The MJ delivered initial instructions to the members quickly, with little inflection or pacing. The court then voir dired Member #10, a female Army lieutenant colonel who, seven years ago, was an MP officer. No startling

revelations surfaced. The MJ questioned no other prospective member.

During the collective *voir dire* that followed, only two members said they had heard anything about the Khadr case from any source, suggesting a certain ignorance of current events. The TC asked if any member believed detainees at Guantanamo are treated inhumanely. No member did. He asked if any member had read about military commissions. Only three had. He asked if any member had an opinion as to whether Guantanamo should be closed. Three did, although what those opinions were was not then explored. In response to another question, all members agreed, surprisingly, that age has no bearing on the case.

In individual *voir dire*, (begun and completed on Tuesday, 11 August, questioning was conducted in order of seniority in grade. There was no prospective member #1).

- Prospective member #2, a male USAF colonel voiced respect for the military justice system, and admiration for the DC for taking on the case.
- Prospective member #3, a male Army colonel, was a battalion commander in Iraq, where some of his men were killed or wounded.
- Prospective member #4, a male Army colonel, had no experience with courts-martial; as a battalion commander, four of his soldiers were killed in Iraq.
- Prospective member #5, a male Navy captain, believed Gitmo should be closed, thought it a political issue, and believed that, early on, detainees had been mistreated.
- Prospective member #17, a male USAF colonel, believed the length of time between detainee confinement and trial was a problem that raised doubts of military commission fairness.

- Prospective member #6, a female USMC colonel, while leading a motorized column that was ambushed, was wounded in Iraq in 2003, with no lasting physical effects.
- Prospective member #8, a male Army lieutenant colonel, was friends with a female officer killed in the attack on the Pentagon, but holds no ill-will toward the accused.
- Prospective member #9, a male Navy commander, was notably slow in his answers but appeared thoughtful in his unremarkable responses.
- Prospective member #10, a female Army lieutenant colonel, the former MP, had no "hands-on" law enforcement experience, and is now assigned to the Department of State.
- Prospective member #16, a male Army lieutenant colonel, was the hit of the *voir dire* process. Reticent at first, the TC's pointed questioning soon elicited that, as a part-time history professor and as an American, he believes Gitmo should be closed, that it has eroded America's moral authority world-wide, that he objects to lengthy detention without trial, to torture, to rendition, and to the treatment of Gitmo detainees early in the program. Very informed, very thoughtful, he was apparently even expert in some issues directly related to the trial.
- Prospective member #11, a female USAF lieutenant colonel, an Air Force Academy graduate, was an instructor of basic law of war there. She believed that Gitmo was the best place for terrorist trials.
- Prospective member #12, a male Navy lieutenant commander and submariner, was asked few questions by either side, apparently due to his vanilla member's questionnaire.
- Prospective member #13, a female Army major, was similarly unremarkable in her responses.
- Prospective member #14 was a male USAF captain. His father was in the South Viet-

namese Air Force during the Vietnam conflict, was shot down and captured by the North Vietnamese. The prospective member has a master's degree in criminal justice which, he pointed out without prompting, was an on-line degree. Several times his answer to pertinent questions was, "I have no thoughts." Indeed.

- Prospective member #15, a male USAF captain, like other prospective members asked the question, was untroubled by trying a fifteen-year-old as an adult for the war crime of murder. He believes that a twelve-year-old could be tried for murder as an adult.

Editorial comment: Each prospective member, several of whom had young children of their own, was asked his/her opinion regarding the trial of an individual as an adult for the crime of murder committed when he was fifteen. Without exception each member responded that they had no problem with such a procedure. Nor did any prospective member suggest factors that would or would not militate either for or against the criminal prosecution of a minor as an adult.

Following *voir dire* the DC challenged for cause the four prospective members who were USAF officers. In response to questions as to how they came to be potential members, all four had responded that, in 2006 or 2007, an Air Force-wide memo sought volunteers for Gitmo "jury duty." As the DC pointed out, that does not comply with the UCMJ (or, presumably, Military Commissions manual rules) for prospective member suitability. Before the military judge ruled on the challenge, the remaining challenges for cause were heard.

The government challenged for cause potential members # 5, 16, and 17 for their asserted lack of impartiality. The MJ denied the challenges as to #5 and 16. The government's challenge of #17, an Air Force officer, was joined by the defense in keeping with its motion to exclude

USAF officers. The MJ granted the joint challenge of #17.

The defense challenged for cause potential member #2 for a reason I missed, challenge granted; challenged #3 because three of his soldiers had been wounded in action by an IED, challenge denied; #4 because the effect of four of his soldiers having been killed by an IED raised "implied bias," challenge granted; #11 by reason of her USAF method of selection, and her having a friend WIA by an IED, raising "implied bias," challenge granted, for which reason not being specified by the MJ; #14 by reason of his USAF method of selection, and because his father had been a POW while remaining able to resist, challenge granted; #15 by reason of his USAF method of selection, and a presumption of guilt implied by his response to a TC question that the government "must have a lot of evidence," challenge granted.

The MJ immediately called for peremptory challenges. The government challenged prospective member #16, the defense #3. Seven members, two more than required for a quorum, remained. The government's peremptory challenge of # 16, who believed Guantanamo and military commissions to be harmful to America's image, was eminently predictable but it left on the panel #5, who said in *voir dire* that the length of time between detainee confinement and trial was a problem raising doubt of military commission fairness. Ironically, after challenges he was the senior member of the four-man, three women panel.

Interestingly, just before hearing challenges for cause the MJ, responding to a DC plea for a liberal granting of challenges for cause, noted that he was not going to set a precedent of a liberal granting of challenges for reason of bias. Then he granted defense challenges of #s 4, 11, 14, and 15, either in whole or in part for reason of bias.

At 0900 on Thursday, 12 August, the commission heard opening statements. The accused was again present in a suit.

The government wheeled in a four-foot by four-foot detailed model of the compound in which the battle was fought that resulted in SFC Speer's death and Omar Khadr's capture. It was placed before the members, the model's far edge tilted upward so all could clearly see it. The prosecution witnesses were well-briefed on its use, and described the events of that day in 2002, but never pointed to the location on the model they were describing, thus avoiding the need for insertion of descriptions of the witnesses' actions in the record.

Throughout the day's proceedings, SFC Christopher Speer's widow and sister were seated in the media section, near-center of the members' field of view. Understandably, tears were shed as witnesses testified to details of SFC Speer's death. There was no objection from the defense.

Opening statements by both sides were expertly presented, without notes or verbal stumble. Both lasted no more than fifteen or twenty minutes each. The TC described Khadr's father as a radical Islamist who passed his radical fervor on to his son, the accused. Khadr, the TC noted, received "basic terrorist training" in 2002, and briefly lived in the same compound as Osama bin Laden. The prosecution described how, on 27 July 2002, an Army Special Forces unit, with attached Afghan soldiers, all under the command of Major "W," acting on a tip that bomb makers were present, attempted to talk the occupants out of the compound. Repeated attempts failed and a four-hour firefight soon broke out. Eventually there was a U.S. air strike, after which an assault led by Sergeant Major "D," under fire from the surviving few enemy, cleared the compound. During this clearing action the accused, said the TC, threw the hand grenade that resulted in SFC Speer's wounding and, several days later, death. A

few days later, a team led by Major "W" searched the compound, discovering a video of Khadr building an IED. The TC showed still photos of Khadr working on an IED, and apparently helping to bury an IED. The spying charge, said the TC, would be supported by the accused's admission of "going out" to gather information regarding U.S. troops and returning to his supervisors with that information. Other statements by Khadr, he said, would include his own description of having thrown the fatal grenade.

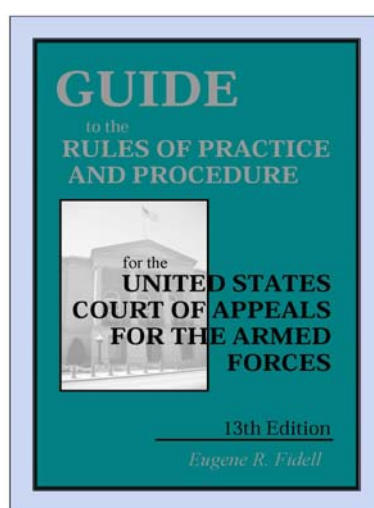
***Editorial comment:** Although not part of either side's opening statements, through in-court statements and arguments, it was clear that Khadr was raised in Canada but, at an early age, moved to Afghanistan at the instruction of his father.*

The DC, in his opening statement, said that Khadr was sent to Afghanistan to be a translator but was instead trained as a bomb-maker. The DC urged that, while in the compound, Khadr merely followed the direction of the three adult fighters who were usually present. During the firefight he was partially blinded by an American hand grenade and, said the DC, dragged into the alley where the three fighters were bombed, strafed, and, eventually, two of them killed and Khadr captured. (The two

dead fighters were killed by Sgt. Maj. D during his assault of the alley, rather than the aerial attack.) It was one of the dead fighters, the DC said, who had thrown the grenade that killed SFC Speer; not Khadr. After capture, Khadr was sent to Bagram where, still on a stretcher, he was questioned by "Interrogator #1," who was later convicted by court-martial for his mistreatment of murdered detainees. It was after "Interrogator #1's" questioning that Khadr admitted blindly throwing the fatal grenade over his shoulder, said the DC, while wounded and sightless from his wounds.

A stipulation of fact was offered by the defense. The MJ asked the usual questions of the accused, assuring that he was aware of and joined in the stipulation. When asked if he indeed joined in the stipulation, to the surprise of all, Khadr looked up briefly and calmly replied, "No."

The first government witness was Army Special Forces "Colonel W." (At the time of Khadr's capture, "Major W.") An Army National Guard officer with twenty-eight years active service, he is an assistant chief of police in civilian life. A well-prepped and impressive witness on direct examination, he repeated the facts of the TC's opening statement in detail.



In March 2010, NIMJ published the 13th edition of the Guide to the Rules of Practice and Procedure for the U.S. Court of Appeals for the Armed Forces. This edition reflects cases decided by full opinion, rule changes, and Daily Journal entries through September 30, 2009.

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He added particulars of finding a twenty-six minute video tape showing the accused making an IED, which was at that point in his testimony shown to the members. He also testified to finding three IED remote firing devices, photos of which were shown the members.

In cross-examination, "Colonel W" proved argumentative and, a fair description, "slippery." Clearly hostile to the DC from the first question, the witness attempted to dodge defense questions by closely parsing words to avoid responding. Ultimately he conceded that, yes, an armed CIA agent in civilian clothes was among the SF team that assaulted the compound. The DC clearly wanted that fact in the record, presumably to use in argument regarding Charge 1, murder in violation of the law of war, to demonstrate that U.S. forces in the compound were doing what they now charge Khadr with doing. "Colonel W" also described his after-action report in which he noted that the wounded enemy who threw the fatal grenade was killed. With some difficulty and resistance, he further described how, after being questioned about the firefight by government agents several years later, he altered his copy of the AAR to read that the grenade thrower was "engaged," rather than "killed."

***Editorial comment:** As a former Marine Corps prosecutor and military judge, I was surprised by minor TC mis-steps. At one point, for example, he seemed unfamiliar with the procedure required to refresh witness recollection under M.R.E. 612, unlike the DC who objected to the TC's attempted shortcuts. Although the procedure can be confusing, it was a predictable aspect of this witness' testimony that one would have expected the TC to be*

prepared for. There were other small stumbles too petty to recite but, in the aggregate, they were noteworthy.

The second government witness was "Sgt. Maj. D," now retired for four years and employed as an Army civilian contractor. His recall was excellent and his testimony very well done. He essentially repeated details of the assault on the compound, which he led. Agreeing with "Colonel W" in most respects, he showed himself to be not only a broadly-experienced Special Forces warfighter, but an impressive witness.

"Although not part of either side's opening statements, through in-court statements and arguments it was clear that Khadr was raised in Canada and, at age fourteen or fifteen, moved to Afghanistan at the instruction of his father. "

In cross-examination, "Sergeant Major D" was similarly clear, concise, and responsive. There were no new revelations. As cross was nearing its end, the DC coughed slightly and asked the MJ for "a break." The MJ promptly recessed the commission and the members left the

room. As the door closed behind the members, Lieutenant Colonel Jackson slumped to the floor, apparently unconscious.

About twenty-five minutes later, the DC was wheeled from the building on a gurney, an IV in his arm, and taken away by ambulance. He was med-evac'ed to the U.S. mainland the following day.

The next morning, Friday, 13 August, with the parties and the members present (and no one else), the MJ announced that the commission was in recess for thirty days, at which date it would re-convene and schedule future proceedings. The members, who would return to their billets on the mainland during the recess, were appropriately warned. For purposes of the brief session, the accused was represented

by a female Navy JAG captain, the deputy chief of military commission defense counsels, who fortuitously had been an observer for the past three days.

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Volume 2



CHARLIE FOWLER

On August 9, 2010, the sentencing portion of Ibrahim al Qosi began. As part of a sealed pretrial agreement, al Qosi pled guilty to one count each of conspiracy to provide material support for terrorism and providing material support for terrorism in a short proceeding in July, 2010. He had been held in the Guantanamo Bay detention facility for over eight-and-a-half years, and had been charged under three military commission systems, one of which was ruled unconstitutional by the Supreme Court. The plea portion of the trial was very similar to a proceeding that would take place in a court-martial under the UCMJ, but the sentencing portion of the trial revealed how different the military commission is from a typical court-martial.

Some of the differences were by design, but most of them were because there is no jurisprudential history from which the military judge can draw to inform her decisions, and no precedent to guide the defense, trial counsel and Convening Authority. Some of the designed differences include certain rights: the plea waived any right to appeal or collaterally attack the conviction—rights that a servicemember cannot waive under the UCMJ; nor can a servicemember waive the right to speedy trial or the right to challenge jurisdiction, as these rights are considered “indispensable judicial guarantees.”

The lack of jurisprudential history in the commissions was quickly highlighted. Although the sentencing cap portion of al Qosi’s pretrial agreement was sealed throughout the trial—as it would be in a court-martial—the prosecution revealed a portion of the agreement at the beginning of the first day of sentencing, to ensure it would be enforced. Evidently, the plea contained an agreement on post-conviction housing, a stipulation that the defense counsel characterized as “the lynchpin” of the plea agreement—so fundamental that failure to enforce would be tantamount to a breach of the agreement. The government had promised that al Qosi would serve the remainder of his time in Guantanamo in Camp Four, a community-style confinement facility akin to a POW camp. After fifteen minutes of explaining how important Camp Four was to the agreement, trial counsel spent five minutes agreeing, using phrases such as: “we gave our word,” and “our word is our bond.” Despite such agreement of counsel, the judge does not have the authority over Joint Task Force-Guantanamo (“JTF-GTMO”), the command that runs the detention facilities, so she added to the record that failure of the government and JTF to comply with the Camp Four portion of the plea would be tantamount to a breach of the plea. This meant that al Qosi’s guilty plea could be withdrawn,

even after trial.

The court then moved onto voir dire, but that was cut short before the end of the day when the Deputy Staff Judge Advocate and another judge advocate for JTF-GTMO came into the courtroom, conferred with trial counsel, then defense, then in a R.M.C. 802 conference with the military judge. My fellow NGO observers and I were wondering what could be so important that it would stop the panel selection, something that the judge had wanted to finish that first day. We were left in limbo for the entirety of the second day. On the third day we discovered the reason for the delay: the Convening Authority and trial counsel had promised something in the pretrial agreement that was not within their power to convey.

Rule 12.7(a) of the Regulation for Trial by Military Commission, last updated in 2007, states that a “convening authority and the accused may agree to include provisions related to the nature of confinement. Prior to reducing any such arrangement to print, the convening authority shall coordinate with the Commander of [JTF-GTMO] and receive written confirmation that such an arrangement is acceptable and will be honored.” However, it seems that the Convening Authority did not notify JTF-GTMO of that portion of the pretrial agreement until on or around July 7—the date al Qosi pled guilty, and JTF-GTMO and the Deputy Assistant Secretary of Defense for Detainee Affairs (DASD/DA) did not confirm that they had received notice of the pretrial agreement until August 5—four days before sentencing began. Nor had JTF-GTMO and the DASD/DA agreed to keep al Qosi in Camp Four: possibly because they interpret the Geneva Conventions and Army Regulations to require that pretrial detainees and convicted belligerents be segregated in detention facilities. Furthermore, the military judge said that she was informed that JTF-GTMO has no written policy on convicted detainees, despite a letter from the DASD/DA, dated August 8, 2008, requiring USSOUTH-

COM and JTF-GTMO to create exactly that policy. She found this especially troubling in light of the fact that one detainee, al Bahlul, is already serving a sentence in Guantanamo and two detainee trials were taking place the week of al Qosi’s sentencing.

So, despite the fact that the trial counsel “gave [his] word” on Monday, on Wednesday he said that he had “overstepped his bounds,” and that the Convening Authority had merely “strongly suggested” that al Qosi be kept in Camp Four. Of course, the result was that there was absolutely no guarantee of such post-conviction treatment. And despite a statement 48 hours prior that such a guarantee was the “linchpin” of al Qosi’s pretrial agreement, defense counsel acknowledged that they had understood during plea negotiations that the location of post-conviction confinement was merely a suggestion by the Convening Authority to JTF-GTMO, and not a promise. So the judge accordingly backed away from the order she gave on Monday and simply “strongly suggested” that he be so detained after sentencing.

There were several similar procedural hiccups during the hearing. When the voir dire finally resumed, and counsel had submitted their challenges, the judge wondered aloud if the court-martial liberal grant of implied bias challenges for cause applied to the commissions, and then decided it did not; Omar Khadr’s judge came to a similar conclusion on the same day. After the second day of al Qosi’s sentencing, while nothing was happening in our courtroom, Judge Parrish in the Khadr courtroom dismissed all the Air Force members of the panel. It appeared that those members had volunteered for the duty, instead of being selected, as is required in R.M.C. 503(a)(1). Al Qosi’s defense did not challenge the Air Force members of their panel, presumably because they were so satisfied with the pretrial agreement that such a motion was not to their client’s benefit.

After hearing the guilty plea portion of the joint stipulation of fact, several witnesses—a Naval Criminal Investigative Service investigator who was an expert on Al Qaeda for the prosecution and several taped character witnesses for the defense—the panel was given the possible range of punishment. The NGOs, one of whom had worked for the Office of Military Commissions, thought the range would be anywhere from no confinement to life, much like a general court-martial sentencing case. However, the panel was given a limited range of punishments: they could confine Mr. al Qosi between 12 and 15 years. They chose 14. It is unclear from the 2010 Manual for Military Commissions, whether there is even an option of a minimum sentence; the term “mandatory punishment” is mentioned several times in passing. It is also not clear how much actual time al Qosi will serve, since his

pretrial agreement will remain sealed until after the sentence is carried out. According to a reporter for Al Arabiya, who claims to have spoken to two people who saw the pretrial agreement, Mr. al Qosi will serve two more years in Guantanamo and will then be transferred to Sudan, his home country. The judge postponed the imposition of the sentence for 60 days in order for the Convening Authority to figure out where Mr. al Qosi would serve his sentence.

In addition to procedural problems, the commissions still suffer from a lack of transparency. The Office of Military Commissions’ website, set up solely to convey information about the commissions, is still sorely out of date: the last update to al Qosi’s trial is the judge’s ruling on a Government Motion to

Amend Charges, dated December 3, 2009. There is more up-to-date material available, that has been released pursuant to FOIA requests, but the Commission’s website has not been changed to reflect those materials. There is no reason that current motions, rulings and court documents are not posted. A commission spokesman, Navy Captain David Iglesias, said that the pretrial agreement would be unsealed a few weeks after the trial, but the judge said in court that it would remain sealed until Mr. al Qosi served his entire sentence. Either the judge is mistaken, or the spokesman for the office that created the pretrial agreement is wrong. Or they are both wrong. Only time will tell.

“One of the basic flaws I observed during this trip to Guantanamo Bay is that big mistakes are being made simply because no one seems to know what the rules are.”

One of the basic flaws I observed during this trip to Guantanamo Bay is that big mistakes are being made simply because no one seems to know what the rules are. The commissions do not benefit from the decades of trial and error under

the UCMJ or the centuries of history of the federal court system. Every decision by the judge is making history and setting precedent for every following commission, however many there might be. It does not speak well, however, for the government’s confidence that they got the commission process right this time around, when the first conviction under the 2009 MCA is accompanied with a bulletproof pretrial agreement that strips the accused of any right to appeal. Rather than increase confidence in the fairness and efficiency of the military commission process, Ibrahim al Qosi’s conviction reinforces the conviction that the commissions were flawed from the beginning, and are irrevocably tainted with innate and ingrained unfairness.

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ALLEN DICKERSON

Pre-trial proceedings in the Noor Uthman Muhammed case were expected to last most of a week. Instead, six motions were heard in a single morning. Taken together, they illuminated the difficult process faced by military judges presiding over a hybrid system that draws from the rules and practices of both military and civilian tribunals. At least in Noor's case, the presiding judge largely chose to follow the military precedents, which both assisted and hampered the defense.

Some of the motions were straightforward. For instance, having responded to voir dire from the defense, the military judge, Captain Moira Modzelewski of the Navy, inquired as to whether there were any challenges to her presiding over the case. There were none, and the matter was quickly settled.

But two issues were particularly hard-fought. The first was a motion to dismiss the case on jurisdictional grounds, as the Military Commissions Act of 2009 (MCA 2009), in the view of the defense, is unconstitutional. The second was a motion for defense access to the government's witnesses, specifically FBI agents stationed in the United States, and a related motion to exclude their testimony if no access was granted.

The Defense Motions to Dismiss

Noor's attorneys argued that the MCA 2009 violates the Equal Protection Clause of the Constitution, as the commissions may only try "alien unprivileged enemy belligerents." The defense's papers are available on the Office of Military Commissions website, but the hearing partially turned on questions of historical practice. The defense made the interesting point that the U.S. has accused at least one American before a military commission, a co-conspirator of Nazi saboteurs during World War II. They also noted that, from their research, this practice contrasted with that of our enemies: during the war, Germany and Japan limited their commissions to the trial of aliens. The defense also pointed to a long line of cases holding that aliens may not be accorded lesser protections than citizens in the courts of the United States.

The government countered with a distinction. Historical practice and legal decisions do show, in their view, a consistent belief that aliens must be provided with the same protections as citizens. But this is true only when those aliens have a “voluntary connection” to the United States. Put colloquially, those who voluntarily join the U.S. community, as resident aliens or otherwise, are entitled to the full protection of our laws. But those whose only connection to the United States is having attacked her forces on a foreign battlefield do not. The government largely relied on a 1950 case from the United States Supreme Court, *Johnson v. Eisen-trager*, holding that Germans captured in China and tried before a military commission in Europe were not entitled to the protections of the Fifth Amendment.

Similar motions have been brought and lost in earlier commission proceedings before different judges, but an independent decision will be reached for Noor. The defense also noted they would bring a further motion to dismiss, arguing that the clause of the Constitution allowing Congress to “define and punish offenses against the law of nations” could not serve as a legal basis for the MCA 2009. The brief sketch of their argument suggested that they do not believe Congress has authority to “define” violations of the law of war in a way that conflicts with customary international law, and elements of the MCA 2009 that do so are invalid.

Military versus Civilian Practice: the Case of Pre-Hearing Witness Interviews

The second major issue at this week’s hearing was one of access. The government intends to call certain FBI agents as witnesses at a juris-

dictional hearing, scheduled to begin November 9. The defense has demanded the right to interview those agents before that hearing.

The defense admitted that the prosecution was not blocking their access to the agents, but rather that their requests were being ignored by the FBI itself. An interesting scuffle broke out over whether the defense was entitled to speak with the agents at all prior to cross-examination. The practice in federal court is that an individual agent may choose

to speak with the defense, or not do so, as he or she prefers. But in military practice, investigative agents are routinely made available to the defense before trial, although there is no rule specifically requiring this. Pre-hearing access, then, is an interesting case where the defendant enjoys greater protections under the mili-

tary system than he would in a civilian court. In short, the defense appears to pick-and-choose between the civilian and military systems, depending on the issue, in an attempt to gain an advantage for Noor.

In this case, they were partially successful. The military judge noted that, in her court-martial practice, NCIS agents (the criminal investigators employed by the Navy) are regularly made available to defense counsel prior to a hearing. She also noted that she doubted her power to force an FBI agent to do so. Her solution was to require the FBI to meet with the defense when all parties arrive back in Cuba on November 8 for the next hearing, but prior to the November 9 hearing itself.

“The brief sketch of their argument suggested that they do not believe the Congress has authority to “define” violations of the law of war in a way that conflicts with customary international law, and elements of the MCA that do so are invalid.



The discussion was complicated by two facts.

First, the commissions' military judges do not enjoy the substantial contempt powers belonging to judges in the Article III courts. Indeed, their inability to directly command important witnesses, including agents of the United States, poses troubling questions about their ability to enforce fair trial procedures. I spoke with a prosecuting attorney after the hearing who noted that while this year's Senate version of the defense appropriations bill would give substantial contempt powers to military judges in the court-martial system, the proposal explicitly excluded judges of the military commissions from its coverage. If this legislation passes, the exact same judge would have greater contempt powers when presiding over a court-martial in Norfolk than she would as

military judge for a commission proceeding at Guantanamo Bay.

Second, a related discussion concerned the appropriate sanction if the defense is not given pre-hearing access to the prosecution's witnesses. Defense attorneys argued that the FBI testimony should be excluded, while the prosecution suggested that a continuance to allow for the interviews and defense preparation would be appropriate. The defense is in a tight position. On one hand, Noor has already been confined for over eight years, and further delays to his trial are, clearly, unwelcome. On the other, proceeding without interviewing government witnesses may hobble their performance at the jurisdictional hearing. This tradeoff will likely be an ongoing theme. Exclusion of evidence is a very strong sanction, and dangerous, as it tends to distort the truth-finding

function of a court. But it is also effective. And the alternative is delays to allow for compliance with the judge's orders, adding further time to Noor's incarceration.

Judge Modzelewski was aware of these delays, and her response was interesting. She reminded the defense that delays caused by their discovery requests were "charged" against the defense, and not the government – a clear reference to speedy-trial analysis before a court-martial. While irrelevant in a commission context, where no such speedy-trial protection applies, the Judge's exchange with Noor's counsel was another example of the Military Judge drawing on her experience with the UCMJ to guide her decisions.

Next Steps

The next step in this case will be a jurisdictional hearing, scheduled to begin November 9. The government will provide a truncated version of their entire case against Noor. The Judge will be asked to decide whether Noor is, in fact, an alien unprivileged enemy belligerent. This is a key hearing. The Judge's determination will be made under a preponderance-of-the-evidence standard, instead of the more familiar (and far more rigorous) beyond-a-reasonable-doubt standard. But without such a finding, the commission will not have jurisdiction to try Noor.

On a personal note, while this hearing was largely technical in nature, there were only two other NGO representatives in attendance, along with less than ten members of the press. I was impressed by the professionalism of those participating in these challenging cases. But it is impossible not to be reminded of the great distance, physical and informational, that separates these proceedings from the people and government on whose behalf they are conducted.

Friday, October 22, 2010

Omar Khadr's trial is set to resume on Monday, but the flight carrying the Office of Military Commissions personnel, witnesses, press, and NGO observers to GTMO left shortly after dawn today. I'm not sure what we'll do for the next 3 days.

MICHELLE LINDO MCCLUER

Ms. Lindo McCluer has been the Executive Director of NIMJ since September 2008. Ms. Lindo McCluer graduated from the University of Oklahoma School of Law with honors in 1997. After passing the bar exam, she served on active duty as a judge advocate in the United States Air Force from 1997-2008, where she concentrated her practice in the area of military justice. In 2003, she began a three-year assignment as an appellate counsel, writing briefs and arguing cases before the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces. She spent her final two years on active duty as the Assistant Director of the legal office at Andrews Air Force Base in Maryland, home of Air Force One.

Sunday, October 24, 2010

At this morning's short press conference in the un-air-conditioned media hangar, Omar Khadr's lead Canadian attorney advisor, Dennis Edney, spoke to a small throng of mostly Canadian reporters, plus other reporters, military public affairs officers, and representatives of non-governmental organizations. It was clear that Edney could not say much about the rampant rumors that there is a plea deal in the works for Khadr's case. When directly asked about such negotiations, Edney responded there is "no deal at this point."

Edney deplored the lack of action on the part of the Canadian government to help one of its native sons, despite what he described as tremendous empathy (although no action) from members of the Canadian public. Apparently, Canada did provide Khadr with glasses for his "good" eye within the past 2 months, but that is about the extent of the concern. Edney lamented that Canada "has let down a most vulnerable citizen, a youth. It is remarkable how he's kept his humanity."

The frustration with the military commission system was best summarized by the reflection that President Obama won the Nobel Peace Prize and hundreds of detainees have been released without charges, but Khadr remains at Guantanamo 8 years later. Edney repeated a constant refrain that the case should be moved to the civilian federal

court system, as "there is no justice here." In proclaiming the process "unfair," Edney reminded the listeners that those were the words of former military commission prosecutors, not Edney.

Monday, October 25, 2010

This morning's military commission session dawned with the air of uncertainty that had permeated the weekend at Tent City in Camp Justice. We filed through the various security checkpoints and settled into our assigned seats in the non-high-value-detainee military commission courtroom. A crew of guards brought now-24-year-old Omar Khadr into the courtroom to answer for acts committed when he was 15. My seat was approximately 10 feet behind his, where a pin-stripe suited Khadr sat with his 2 US military defense counsel and his 2 Canadian foreign legal advisors (his defense attorneys in all but name). LTC Jackson still led the defense team, which included a newly detailed USAF major. The prosecution team, including a civilian, Navy Capt Murphy, and 2 USAF captains, was partially hidden behind the pillars that seem to adorn all military courtrooms. At 9 am, we all stood for the entrance of COL Parrish, the military judge appointed to preside over this commission.

To begin the hearing, Khadr withdrew his previous plea of not guilty to all the charges and specifications and waived all outstanding motions. Then, LTC Jackson announced that Khadr pled guilty to all the charges and their specifications.

Much of the hour we spent in court today mirrored what a court-martial Article 39a plea hearing would look like. One of the trial counsel placed Khadr under oath for the plea inquiry. As part of the plea colloquy, the 50-paragraph stipulation of fact was used. Judge Parrish ensured that Khadr understood the stipulation, which was written in English, and had voluntarily signed it. Mindful of the transparency of the proceedings, Parrish also made

it clear that the full stipulation would be released tomorrow after it is published to the members.

Next, Parrish listed the elements of the offenses. Charge I—Murder in Violation of the Law of War; Charge II—Attempted Murder in Violation of the Law of War; Charge III—Conspiracy; Charge IV—Providing Material Support for Terrorism (2 specifications); Charge V—Spying. As I listened to the elements and the facts alleged as part of the elements, it struck me how these charges were not ones you would traditionally think of as war crimes—often, they were simply made up. It even sounded as if the 2 specifications of Charge IV were multiplicitous, each covering the exact same conduct.

Unlike a court-martial, the accused in military commission pleas is not required to "Tell me in your own words why you're guilty" of each offense as required under *U.S. v. Care*. At the conclusion of the explanation of the elements and definitions applicable to each specification, the judge simply verified that Khadr wished to admit the elements listed. Rather than engaging in the familiar colloquy of potential defenses, Khadr just answered "Yes" to each specification's elements. It was interesting, although not surprising, to note that the military judge always addressed Khadr as "Mr. Khadr" or "sir." At the completion of the plea inquiry, Parrish had Khadr and his counsel rise, and Parrish found Khadr guilty of all the crimes alleged.

The counsel agreed that the maximum punishment Khadr faced, based on his pleas, was life in confinement. They also revealed the long-rumored fact that there was a pretrial agreement (PTA) to limit the punishment allowed in the case. Unlike many PTAs in courts-martial, this PTA contained no separate quantum portion. The judge then went through the standard PTA inquiry that is familiar to court-martial practitioners, ensuring that Khadr had

read the agreement, had his counsel explain it to him, entered it voluntarily, and believed it was in his best interests to do so. The key terms of the PTA—the sentence limitation—won't be revealed until after the commission members announce their sentence, likely at the end of this week. As with the stipulation of fact, Parrish ensured that the PTA terms would be made available to the public. He made it clear to the trial counsel that he expected them to work with the Office of Military Commissions to get the PTA released immediately upon the announcement of the adjudged sentence.

As part of the PTA, Khadr agreed to plead guilty to all the charges and specifications, not to initiate any litigation against the US, to submit to interviews with US personnel, and not to appeal his conviction. After 1 year in confinement, the United States government will support Khadr's request to return to Canada to serve the remainder of his sentence. Although Canada hasn't agreed explicitly to accept Khadr back at that time, the defense counsel was satisfied that that would happen.

The huge chunks of wasted time continued Monday. Because the court members weren't scheduled to arrive on island until much later in the day, we spent the bulk of the day searching for reliable internet service so that we could broadcast the commission's progress to the public.

Tuesday, October 26, 2010

The prosecution's sentencing case began today. The logistics of housing the court members on the other side of the bay and the limited dining

facilities there constrained the court hours. The hearings generally began around 9, with an hour and a half break for lunch, and then court resumed until around 5 in the evening, with a short prayer break around 4. For anyone familiar with a normal court-martial schedule, these were extraordinarily short days dictated by the circumstances.

We watched the court members (3 females, 4 males) file out of their van, each carrying a garment bag with their service dress uniform into the courthouse. Over the course of the week,

this change of attire repeated itself multiple times a day so that the court members could retain their anonymity while they ate in the same dining hall as the media, witnesses, and other trial participants.

After a brief discussion of proposed prosecution

sentencing exhibits, the judge admitted a number of documents. He also admitted a 10-second video of an improvised explosive device (IED) blowing up a Humvee, over defense objections on relevance and unfair prejudice grounds, and then the members joined us in the courtroom.

The military judge immediately inquired as to whether any of the members had heard anything about the case during the 2-month recess. Such a recess, especially with members already seated, is a highly unusual occurrence in the military justice system. Fortunately, military members are trained to follow orders to the letter, and only 1 member volunteered that he had heard anything about Khadr's case during the break. Neither the prosecution, nor the de-

After 1 year in confinement, the United States government will support Khadr's request to return to Canada to serve the remainder of his sentence. Although Canada hasn't agreed explicitly to accept Khadr back at that time, the defense counsel was satisfied that that would happen.

fense, chose to challenge #5 over this, and all the members rejoined us in the courtroom.

The sentencing case started with Parrish informing the members that the plea had changed during the recess. The first evidence the trial counsel presented was prosecutor Groharing reading the 50-paragraph stipulation of fact aloud to the members. Much of the first part of the agreement between the parties and the accused centered on a history of al Qaeda and Khadr's family's involvement in al Qaeda. It mentioned Khadr's training, his making and planting of land mines, and his fluency in 4 languages (English, Arabic, Pashto, Dari).

The stipulation shifted to the firefight at the safehouse in Afghanistan where Khadr was captured. The leader of the cell left when he heard US forces were approaching, but Khadr remained even after the women and younger children left the compound. Two Afghan soldiers were killed by someone in the compound after the compound's occupants refused to meet with US forces. I noticed 1 commission member kept an eye on Khadr as Groharing read the passages about Khadr's opportunities to leave the compound.

Then the details of Khadr's throwing the grenade that killed Sgt Speer and injured Sgt Morris tumbled out, as did the description of Khadr's wounding in the subsequent bombing of the compound. Khadr thought he would die in the firefight, so he wanted to kill as many Americans as possible before his death. When coalition troops reached Khadr, he had a weapon with a round in the chamber and grenades nearby.

Investigators

Capt E from the prosecution called the first witness, Special Agent (SA) S, to the stand. S is a hazardous/explosive devices examiner supervisor at the FBI lab in Quantico. The court recognized SA S as an expert in bomb making and explosives. SA S described the grenade that

killed Speer. SA S then walked the members through various prosecution exhibits that featured still photos from a video which showed Khadr and his group making and placing IEDs with the intent that coalition Humvees would run over them, causing them to explode. These video stills were often shown alongside replicas assembled by the FBI agents for a demonstration requested by the prosecution. Despite the fact that no Humvees actually ran over the IEDs Khadr placed, this testimony culminated with the showing of the video of an IED blowing up a Humvee. My entire row of spectators jumped at the explosion, even though we knew it was coming. Predictably, the Humvee was blown to pieces.

After the drama of the IED video, LTC Jackson cross-examined the agent. Jackson verified that the agent was a professional who is supposed to be objective, yet SA S refused to submit to a pretrial interview with the defense counsel. This was true despite the fact that SA oversaw the creation of the Humvee video for the prosecution. While it does not seem to be standard practice within the civilian community for federal law enforcement agents to make themselves available to both parties before trial, it is customary in courts-martial to allow such interviews.

Next, the defense counsel elicited that Khadr's admissions to the agent allowed for the removal of the IEDs Khadr set, avoiding injury or death to coalition troops that were the intended targets. SA S also admitted he believed Khadr was 15 at the time of the interviews.

On redirect, Capt E asked leading questions that brought an objection from Jackson. Before being permanently excused from the commission, SA S acknowledged that many variables were at play in determining the scope of injuries expected from the dropping of 2 500-pound bombs on a compound, such as that in which Khadr was found.

The next prosecution witness was SA G, who had interrogated Khadr 7 times at GTMO in late 2002. SA G had 21 years of experience with the FBI and a background as a Marine. SA G interviewed Khadr at the Camp Delta hospital with no parent or doctor present. SA G described Khadr, with a junior high education, as quiet and cooperative; in fact, Khadr eventually was glad to see the agents when they came for interviews. The agent described a “mutual respect” during their “conversational” encounters during which Khadr was offered food and restroom breaks. Khadr provided a “tremendous amount of information” about his fugitive father.

SA G told of Khadr’s recounting of the firefight during which he was captured. Khadr thought he’d see signs for Allah, as he believed he’d die in the battle; then he realized the Americans had saved his life. SA G reported Khadr was happy he killed an American soldier and bragged about this to other detainees.

There was an ongoing dispute as to whether the witnesses could testify about Khadr’s lack of remorse for his actions, with the government citing *US v. Alis*, an Air Force case I recognized, in support of its position. The defense argued that “lack of remorse” wasn’t a matter in aggravation. Ultimately, the judge rejected the prosecution’s arguments and refused to allow such testimony because the interrogators did not ask Khadr if he was sorry for his actions.

During the cross-examination, Jackson skillfully read sections of what we believe was the lead interrogator’s (#11) notes in a successful attempt to impeach SA G’s memory that also wove in statements about Khadr’s regrets and other information sympathetic to the defense. Moreover, while SA G had described Khadr as “cold and callous” during his direct examination, those words were nowhere to be found in SA G’s notes from the interrogation.

The defense counsel also highlighted Khadr’s isolation during the interviews. He was in the hospital, wounded, and SA G didn’t request permission from Khadr’s doctors to conduct the interrogation. Yet, SA G admitted he got a doctor’s permission to interview other hospitalized suspects.

A second agent who interrogated Khadr 25 to 30 times in 2002 repeated virtually the same testimony given by SA G.

Dr. Michael Welner

After the series of agents testified, the government called their star witness, Dr. Michael Welner, a forensic psychiatrist who is best known for his “Depravity Scale” regarding criminals, to speak about his opinion of Khadr’s risk assessment, future dangerousness, reintegration into civil society, and deradicalization needs/prospects. Welner founded the peer review organization The Forensic Panel, which includes Dr. Nancy Slicner, a retired USAF psychologist who worked with Air Force investigators for years, as a member. The testimony began mid-afternoon on Tuesday and lasted until mid-afternoon Wednesday. As he painstakingly listed his long string of qualifications, I longed for Maj S to jump up and state that the defense would stipulate to Welner’s expert status.

Welner testified that he spent 500 to 600 hours working on this case, but we didn’t learn until the cross-examination that he only concentrated on the “future dangerousness” assessment towards the end of this preparation. Welner relied on 150 items—documents, web research, videos, and 21 interviews (including a 2-day interview with Khadr) in establishing his conclusion that Khadr was “highly dangerous.” The primary bases for this conclusion were that Khadr had killed, he had been part of al Qaeda, the war remains ongoing, and it isn’t ending soon. “Past history informs the future.” In support of this premise, Welner described the Khadr family’s well-known terrorist ties, implying that Khadr would likely continue on

the family path after his release. Khadr's declination to speak of the impact of his father's death was another red flag for the doctor. I found it odd that Welner felt the need to emphasize repeatedly alleged crimes for which family members hadn't been convicted and ones totally unrelated to terrorism. When you have a family with a significant al Qaeda connection, is it really necessary to list every black mark?

It soon became evident that, in addition to his psychiatric expertise, Welner fancied himself an expert on radical Islam, defining such adherents as not wanting to live in a country that doesn't follow Sharia law. On cross-examination, the defense elicited that this was the first case in which Welner had testified on such matters. It didn't help that the primary resource Welner used was a Danish study of 250 youthful Muslim inmates. Rather than relying on the study itself (as it was written in Danish), Welner's reliance was based on a phone conversation with the author, purportedly a 33-year-old doctor whose credentials Welner did not verify. On cross-examination, Maj S brought out a host of disturbing writings attributed to the Danish author which revealed a general disdain, if not outright racist views, of Muslims. While Welner professed to have read "everything he could get his hands on" in his preparation, he managed not to have seen any of these biased documents until the defense brought them to his attention during cross-examination. After reviewing the additional documents, Welner's opinion of the Danish author's study remained unchanged.

Another significant factor in Welner's assessment were the growing percentage of former GTMO detainees who have reverted to terrorism, according to him. Given the skepticism with which such numbers are viewed, this seemed like a reliance fraught with peril in attempting to predict how Khadr will react outside of GTMO.

The prosecution expert took every opportunity to weave in nearly every high-profile violent Muslim who has committed crimes in the past decade as he spoke, most of which hardly seemed relevant to the matter at hand. The term "violent jihadist" seemed synonymous with "Muslim" until Welner clarified this late in his testimony today. As factors contributing to his beliefs about Khadr's rehabilitation potential, Welner listed Khadr's age, perceived lack of remorse, depth of his religious devotion, anger, and the length of time he'd been confined at GTMO with "radical jihadists," prompting those of us in the gallery who are familiar with international law on child soldiers to whisper among ourselves that that is precisely why minors should not be housed with adult prisoners.

Welner excelled in hyperbole. He described Khadr's status as a "rock star" and "al Qaeda royalty" who "attracted more attention than Fidel." This heightened status due to his language proficiency, his charm, his comfort with various groups of individuals, his memorization of the Koran, his killing a US soldier, and the fact that he has experience with the Western world (but isn't very Westernized, according to Welner) contributed to his capacity to lead others. Welner described Khadr as a leader among the prisoners in his unit and as a spiritual leader for them; in fact, Khadr related to Welner that he looks to himself, rather than the older prisoners, for spiritual help. Following up on Welner's testimony that Khadr read Harry Potter books as a means of escape, rather than doing schoolwork, intimating that Khadr isn't interested in bettering himself through education (although Khadr wants to be a doctor) unless it's related to doing such things as memorizing the Koran, on cross-examination we learned that Khadr also read books by Danielle Steele, Nelson Mandela, and President Obama.

Welner emphasized that Khadr was manipulative and told lies, explaining that Khadr's

compliant behavior at GTMO could not be seen as a sign of his lack of dangerousness because the “radical jihadists” (which he later claimed included 100% of the GTMO detainees) await the right opportunity to lash out, and Khadr has been “marinating in radicalism.” In this context, Khadr’s good impulse control in avoiding confrontations with guards and detainees was spun as a negative factor. Even Khadr’s saying that others could be Christians, while he is Muslim, without causing problems was viewed as suspect.

Not surprisingly, the subject of deradicalization was a hot topic with this witness. For the same reasons he described Khadr as “highly dangerous,” he lamented the lack of good moderate Muslim role models for Khadr when he is released from detention, as there are no deradicalization programs in Canada. Still, Welner cited “uneven” success rates for various deradicalization programs around the world, specifying that the former GTMO detainees “infect” such programs. Despite all this emphasis on radicals, Welner could not recall whether Khadr ever said he wanted to live under Sharia law—a pretty astounding lapse, considering the subject.

Discounting the impact of higher education prospects and finding no mental defect in Khadr, Welner called radical jihadism (a favorite phrase of his) a passion, not a disease or mental illness capable of medical treatment. Because Khadr did not accede to government-provided mental health services, this, too, was a strike against him.

As the testimony wore on, it became apparent that the defense was allowing Welner quite a bit of leeway in replying to simple questions with lengthy narratives. This brought back memories of my years doing trial work in which the best strategy with witnesses who drone on is to just let them alienate the court members without making any objections. Particularly with military panels, and in this case,

ones who don’t get to go home until the case ends, time wasted on superfluous testimony is not usually welcomed by commanders who need to launch ships, get jets into the air, and the like.

Wednesday, October 27, 2010

On cross-examination, Welner continued his windy replies. A smile escaped from me when Maj S cut the doctor off after one answer by replying “Awesome, so....” as he asked the next question; I wish I’d seen more of that. While there were certainly some sizable hiccups along the way, the lack of reliable sources and data on many of the issues about which Welner testified became apparent during cross-examination. Redirect was unremarkable, and, mercifully, short. Finally, the court members had several questions to ask, and then Welner was allowed to leave the witness stand.

Sgt Layne Morris

Capt E did the direct examination of the government’s first victim, Sgt Layne Morris, a medically retired former Army Special Forces member who lost sight in one eye during the firefight in Afghanistan that ended SFC Chris Speer’s life and began Omar Khadr’s road to GTMO. Morris’ stoicism and matter-of-fact presentation were powerful. He also had a sense of humor, describing his initial thought at feeling a “punch” in his eye as perhaps being from his own rifle exploding as he fired grenades into the compound. After all, he remarked, the rifle was “built by the lowest bidder.” Of course, the rifle manufacturer was not to blame in this case.

Morris was evacuated to Germany with the severely wounded Speer, who’d suffered shrapnel wounds to his head as the result of Khadr’s grenade attack. There, Morris and his wife met Tabitha Speer, a woman he described as being of dignity and courage.

Rather than considering himself a victim, Mor-

ris was grateful to realize he was alive after believing he would die at that compound so far away from home. "It was like getting a promotion." Given the injuries and deaths of the many who have fallen in this long-running war, "my injuries are insignificant."

On cross-examination, Morris admitted he and Mrs. Speer had filed a multi-million dollar lawsuit against Khadr's father for failure to control his minor child and instructing Khadr to commit violent acts, among other allegations, related to the injuries Morris and Speer suffered. The defense highlighted that the lawsuit was not filed against Khadr himself, as it was the father who was ultimately responsible for the injuries and death. Despite winning the lawsuit, the Morris and Speer families have not received any money.

SFC Chris Speer

On Wednesday, Sergeant First Class Christopher Speer became a living human being through testimony from his former boss and a colleague, both of whom knew Speer on- and off-duty. SGM Y and CPT E painted a portrait of a young man who was skilled at his profession as an Army Special Forces medic and utterly devoted to his family. He was the guy who stayed late during training to practice his skills and who rushed home to play with his daughter—the guy who needed the encouragement of his boss to decide to stay for the birth of his son, rather than deploy with the first wave of Operation Enduring Freedom soldiers. And it was Speer who risked his own life to pick his way through a minefield to snatch 2 Afghan children from danger only days before his death.

Special Forces Coworkers

SGM Y and CPT E cut striking military figures—both had chests of military decorations that most generals can't match, and their service dress uniform pants were snugly tucked into their Ranger boots. These are the type of men who undertake the most dangerous as-

signments, and only a select few fit the category. Have you ever seen a Special Forces member cry? Two choked up as they described the impact the loss of their friend Chris had on them.

Thursday, October 28, 2010

Former GTMO SJA

This morning we began with a witness taken out of order due to the availability of a video teleconference from Afghanistan with the former staff judge advocate (SJA) of Joint Task Force-Guantanamo (JTF-GTMO). Surprisingly, this Navy captain (O-6), a man not known for his warm and fuzzy ways, and one who is a close advisor of a powerful commander (in other words, more logically aligned with the government) testified as a defense witness. The man had been the SJA of JTF-GTMO from 2006 to 2008, and he had at least weekly interactions with Khadr during that period.

Captain M described Khadr during these contacts as respectful and helpful, particularly relating to keeping the detention facility personnel abreast of potential troubles among the detainees. Due to his age and the influence of Khadr's father at the time of the firefight and his capture, and factoring in Khadr's compliance and lack of radical expressions during his detention, Capt M opined that Khadr had good rehabilitative potential, something he'd never done before in his 25 or so years in the military. The import of this man's words was not lost on the military members in the room. It is not often you see a senior officer, much less a lawyer who serves as an SJA, put his credibility on the line for an accused. To see it done for a GTMO detainee's military commission sentencing case was really something.

On cross-examination, Capt Murphy scored some points by informing Capt M about a number of minor infractions Khadr had committed mainly during his early 2 years at GTMO. He also liberally quoted passages from the stipulation of fact to test Capt M's defini-

tion of “radical” and to highlight the different status Khadr has now as a convicted criminal versus just being a suspect when Capt M dealt with him. (Trial techniques critique: It would have been helpful if the defense had provided a copy of the charge sheet and the stipulation of fact to Capt M before his testimony.) I’ve seen a number of lawyers testify over the course of my career, and they often have a tendency to get defensive or parse words unnecessarily. Capt M did neither, agreeing on points that weren’t favorable to the defense, and, thus, coming across as a very credible witness.

On redirect, Capt M’s opinion that Khadr was salvageable was unchanged, despite the additional information he’d learned on cross-examination.

Tabitha Speer

This morning’s testimony brought more of a glimpse into a life that could have been when Tabitha, Chris’ widow, took the stand. The love Speer had for her and their 2 tiny children he left behind was immediately evident. Speer’s dreams of becoming a doctor, his bathtime routine with his daughter, his final day at home with his family before his 2002 deployment, and family photos shown on the courtroom screen all put Speer into focus for the court members and spectators. Tabitha emphasized the importance of a father to a son. She looked Khadr in the eye at one point and forcefully declared that he is not the victim here; the victims are Tabitha’s children. The children’s letters to Khadr and Taryn’s struggle with the loss of her daddy at age 3½ left few dry eyes as Khadr himself bowed his head. Tabitha was the last sentencing witness for the government.

After Tabitha Speer’s testimony and the government’s resting its case, the defense began calling the rest of its sentencing witnesses. Unfortunately, that was also my cue to head for the ferry to the PAX terminal for the flight home.

As we made our way to the leeward side of the bay, it struck me that there were some parallels among the key players in the case. While I certainly don’t mean to place the parties on equal planes, it’s worth considering that Speer’s son is now the age Khadr was when his dad uprooted the family and took them to Afghanistan. Khadr lost an eye and thought he would die in the firefight that took Morris’ sight in one eye and killed Speer. Both Khadr and Speer envisioned becoming doctors. Khadr and the Speer children both lost their fathers. The difference is that Speer was, by all accounts, a wonderful father who taught his children to do good, while Khadr’s father instilled just the opposite in him. One can’t help wondering how different life could have been for both sets of children.

Post-script:

Thursday afternoon, the defense presented its sentencing case to the members. While it was highly anticipated that two mental health providers who had spent hundreds of hours with Khadr would testify, neither Dr. Xenakis, nor Dr. Porterfield, took the stand. Khadr did make an unsworn statement in which he apologized to Mrs. Speer and spoke of starting over outside Guantanamo, in addition to recounting the abuse allegations that were the subject of the suppression motion earlier in the military commission. For reasons I have not yet seen fully explained, the military judge declined to allow the defense to present additional presentencing evidence of Khadr’s maltreatment at the hands of detention officials during the beginning of his incarceration.

Friday was mainly another wasted day for the commission members, reporters, and other observers while the counsel and the judge hashed out sentencing instructions. I’m not sure why the counsel needed an entire day to prepare for argument.

The commission reconvened Saturday with

sentencing arguments and instructions to the members before they retired to deliberate on the sentence. While the prosecution asked the members to sentence Khadr to 25 years in confinement, LTC Jackson spoke of giving him a “first chance” at a life of freedom. Deliberations carried over to Sunday afternoon, allowing the parties and members a chance to attend worship services in the morning.

Reporters covering the case noted that Mrs. Speer and several court members all had Sunday brunch at the same location, although there was no indication of any direct interaction between them. Given the limited selection of Sunday morning food venues at this remote location, there was nothing improper, but this just added to an already awkward situation. There are only a few places to eat and one place to shop on the windward side of Guantanamo Bay. There was no escaping the military commission, even outside the courtroom. For instance, one night we NGOs watched the prosecution witnesses eat dinner literally within feet of the defense counsel while media floated in and out of GTMO’s lone sports bar.

The members reached their verdict Sunday evening, adjudging 40 years in confinement for Khadr. A pretrial agreement limits the convening authority to approving no more than 8 years of additional confinement. Diplomatic notes exchanged between Canada and the United States revealed that it is likely Khadr will get to serve all but one year of that sentence in Canada, with the bulk of the sentence subject to parole considerations that could result in an early release.

The end of this military commission was at once a moment of relief and yet one of regret. After 8 years, the plea deal closed the door on issues that many of us have fought over for years. What is the appropriate way to deal with child soldiers? How can we punish individuals for actions that weren’t crimes at the time they were committed? Why are we able

to use Article 1 courts to prosecute crimes that have never before been recognized as law of war crimes? Those are answers Khadr’s case won’t provide us.

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