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Al Nashiri Before a Military Commission at Gitmo

This guest post was written by Charles R. Church, and is drawn from his copyrighted e-book titled *My Week at Guantanamo's War Court*, which is available on amazon.com.

My excitement ran high when Mark Denbeaux phoned to tell me I would be heading to the Guantanamo Naval Base for a week, for I had been studying, writing and talking about both its detention facility and its military commissions for years. Now I would be attending, as a journalist and observer, pretrial proceedings in the military tribunal capital prosecution of abd al Rahim Hussayn Muhammad Al Nashiri, the Saudi claimed to have presided over bin Laden's "boats operation," for which he had planned three attacks on foreign ships, including the devastatingly lethal one in 2000 on the USS Cole, the destroyer fueling in Aden Harbor in Yemen.

I took with me deep skepticism about the integrity of the military commissions, which I knew had gone through three incarnations. The first resulted from George W. Bush's Military Order of November 13, 2001, titled "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism." From the outset, Bush made clear that he was willing to abandon our accepted norms of justice when it came to trying aliens for war crimes. Any and all evidence—sworn to, or not—would be admitted, including confessions wrung from a prisoner by torture, and hearsay far outside the usual exceptions, if the presiding officer or a commission majority thought it had "probative value to a reasonable person." Anything sounding reasonable to a group of military officers with no legal training could provide the basis for a conviction—and even a death sentence. In certain situations, the trial could be conducted in secret. Under the Order's terms, the executive branch would act as lawmaker, law-enforcer and judge. Defendants were deprived of resort to any U.S. or foreign court or international tribunal. Vice President Cheney revealed the government's intentions most tellingly the day after Bush signed the Order. "We think it guarantees that we'll have the kind of treatment of these individuals that we think they deserve."

When the sharply divided Supreme Court in "Hamdan v. Rumsfeld" struck down the Military Order in 2006, without the need to reach its constitutionality, four justices observed that nothing prevented the President from turning to Congress to seek the authority he believed necessary to lawfully try enemy combatants. The Administration lost little time in doing exactly that, and Congress dutifully passed the Military Commissions Act of 2006 (2006 MCA). Though designed to cure the defects in Bush's Military Order, its own flaws were obvious.

Evidence would be admitted, even when obtained by coercion. Hearsay would be allowed, far beyond the familiar exceptions to non-admissibility learned in law school, and when proffered the accused was required to prove its unreliability to prevent its being allowed. But three levels of judicial review—two by traditional Article III courts (assuming a grant of certiorari)—replaced the President, or Secretary of Defense, as his designee.

Only three cases were completed before the 2006 MCA commissions, which some predicted would be put out of business when Barack Obama was elected. He had voted against the 2006 MCA, but due to a complex array of political forces and despite his preference for federal court trials, Obama in May, 2009 defended the use of commissions for detainees “who violate the laws of war.” But these would be reformed commissions, which no longer would permit the use of evidence of statements obtained “using cruel, inhuman or degrading interrogation methods.” The result was the Military Commissions Act of 2009 (2009 MCA), and that was the governing law I went to see in action last June.

Colonel James L. Pohl (Ret.) presides over the Nashiri case. Throughout the week he displayed an exemplary judicial temperament; he was fair minded and unusually patient. Yet he knew how to stop the hyper-assertive Commander Andrea Lockhart when she interrupted lead defense counsel Rick Kammen once too often. Pohl let his annoyance fly, and Lockhart—to her credit—thanked him and sat down. And he will keep order in the face of obstreperous behavior. Months later, in the 9/11 case, when one defendant refused to stop shouting during a chaotic hearing, at one point yelling, “You cannot stop me from talking,” Pohl shouted back, “Yes, I can.” After repeated warnings, Pohl ordered two soldiers to remove him.

But the Nashiri defense team has requested that Pohl recuse himself, in a kind of motion unthinkable in a civilian federal court, where judges have what is tantamount to life tenure. Pohl had retired from the Army before accepting an appointment as Chief Judge of the Military Commissions, and serves pursuant to a one-year renewable contract. “[I]t is undisputed that the same sovereign that is seeking to prosecute and ultimately execute Mr. Nashiri makes the decision on whether to keep Col. Pohl employed,” the motion argued. A predecessor, Col. Peter Brownback worked under the same arrangement for years, but after he dismissed all charges (without prejudice) in a case on jurisdictional grounds in 2007, the White House publicly criticized the decision, and his contract was not renewed. Further, Pohl presided over the courts-martial of the Abu Ghraib defendants, who sought to demonstrate that they were acting pursuant to orders by superiors issued in response to directions and policies from senior military and civilian commanders, including Secretary of Defense Rumsfeld. “In the view of some observers, Col. Pohl assisted the senior commanders in hiding their roles in the Abu Ghraib abuses.” Nashiri may seek to demonstrate that the torture inflicted on him was done “with the full knowledge, consent and permission of high level government officials,” hence the basis for concern was obvious.

Because so little precedent exists for the war courts, what seems like an endless parade of issues gets litigated. Kammen, who wears a kangaroo lapel pin to make plain his feelings about the commissions, repeatedly complained: “We’re making this up as we go.” And he is right. One such issue, perhaps the most important in

the case, came up for argument during my stay. The defense moved for a ruling declaring that the Sixth Amendment's Confrontation Clause applies to the military commissions. The reason was obvious. The generous allowance of hearsay evidence in the 2009 MCA would, Kammen feared, create this nightmare scenario. Rather than being able to cross-examine prosecution witnesses appearing at trial, he would face FBI or other agents "who interviewed people in Yemen thirteen, fourteen, years ago (and) who will be reading (their) reports or worse (yet) it will be FBI agents reading reports (of interviews by) other FBI agents." Judge Pohl—no surprise here—declined to rule that the hearsay provisions of the 2009 MCA on their face violate the Confrontation Clause. He acknowledged the tension between the two, but insisted on waiting for a factual context before ruling. But the government's subsequent Notice of Intent to adduce at trial a lengthy list of just the kind of hearsay reports Kammen worried about made clear that the judge would get that factual context.

The elephant in the room, of course, is the torture which the CIA visited upon Nashiri while holding him captive for four years in one or more black sites, before he was transferred to Guantanamo in 2006. While it's true that the 2009 MCA forbids the use of evidence wrung from a defendant with torture, Brigadier General Mark Martins, the Chief Prosecutor, already has staked out his claim to a potentially gaping loophole. If, after the passage of time and at another location, interrogators got the same or similar admissions from the accused, such evidence would be admissible. Hence, Nashiri's torture inevitably will enter the case when counsel wrestle over whether at least some of his statements can be used against him. In any event, evidence of his torture can serve to mitigate his sentence.

It's particularly sobering to witness a prosecution which seeks to take the life of the man seated before you. And as the pre-trial proceedings continued, the frailties of the war courts became ever more clear. Kammen believes that the case will not be triable until early 2015, after almost four years of litigation attacking all of them. Whether Nashiri is convicted or not, two levels of appeal are assured, and—if certiorari is granted—the Supreme Court may deal with the Sixth Amendment and other major issues. Hence Nashiri's fate will not be decided finally for years, and if a higher court finds that Pohl committed a substantial error at trial, or that the 2009 MCA is flawed in a significant respect, but still viable as a whole, the case may be tried again. So the decade's end might be a reasonable guess on when the case will be closed at last. And the defense has argued that statements by high officials, including by President, suggest that even if exonerated Nashiri will not be released.

Surely we could have done far better than employing such an inferior form of justice for this important capital case. As U.S. District Judge James Robertson wrote years ago in a 2006 MCA case: "The eyes of the world are on Guantanamo Bay. Justice must be done there, and must be seen to be done there, fairly and impartially...." I fear that the good judge will be disappointed.

Charles R. Church

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