

# FROM THE PRESIDENT

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## Confrontation — An Essential Right

Under the Sixth Amendment, an accused in a criminal case “shall enjoy the right . . . to be confronted with the witnesses against him,” that is, the right to hear the testimony of the prosecution’s witnesses, the right to cross-examine those witnesses, and the right to challenge any other evidence against him at trial.

At Guantanamo Bay’s “Camp Justice,” the prisoner has no right to confront and cross-examine the witnesses against him. And in the case of Omar Khadr, a Canadian citizen wounded and captured in Afghanistan, the defendant will not even know who is testifying against him, by order of the military court. A Pentagon spokesman has stated that this unprecedented level of secrecy is necessary to protect national security and “the safety of our military men and women.”

Khadr was 15 years old when he was captured. He is now 21. He has spent a third of his life at Guantanamo. The charge against him is murder, and he faces spending the rest of his life in a military prison. It is alleged that during a firefight with a crack U.S. Special Forces unit, Khadr threw a grenade that killed Sgt. Christopher Speer, a Delta Force commando. Khadr was shot three times but survived.

The Department of Defense is so fearful of this young prisoner that they will not allow even his lawyer to discuss the prosecution’s witnesses — presumably the same Special Forces commandos who shot and captured him — with anyone, including Khadr.

“It is conceivable, if not likely, that al Qaeda members or sympathizers could attempt to target witnesses,” a prosecutor, Marine Maj. Jeffrey D. Groharing, wrote to the court. Besides, the prosecution says, “Providing the witnesses’ true identities will add nothing to their testimony.”

Perhaps not, from the prosecution’s point of view, but throughout history and in virtually every culture, confrontation has been deemed essential to defense against an accusation. The confrontation right did not begin with the Sixth Amendment. Justice Stephen Breyer has noted that the right of an accused to meet his accusers face-to-face is mentioned in the Bible (Acts 25:16) and Shakespeare (Henry VIII, act II, scene 1) and in 16th and 17th century English statutes, cases, and treaties. Abrogation of that right allowed the Crown to convict Sir Walter Raleigh of treason based on the out-of-court “confessions” of Lord Cobham before the Privy Council, coerced by threat of execution and possibly torture. Raleigh asked the law judges to bring Cobham before the court, suspecting he might recant in public. The judges refused. Raleigh was executed.

This brings us back to Guantanamo. Camp Delta is our Tower of London. Prisoners are held there for years, without charges or trial, and denied habeas corpus. When they go before the Combatant Status Review tribunal, they are not

allowed to see or hear the evidence against them or have the assistance of counsel. If the tribunal declares them an “unlawful” enemy combatant, they face trial before a military commission, which may deny them the right to confront the evidence against them, whether true or false, even though it has the power to impose the death penalty. And if the U.S. Justice Department’s assertion that the prisoners at Guantanamo have no constitutional rights whatsoever is to be believed, then even prisoners who were juveniles when they committed their alleged offenses could be executed by military authorities.

“The system is designed to be open,” Brig. Gen. Thomas Hartmann, of the Office of Military Commissions, told the *New York Times*. “But there are certain things that simply must be protected.” Due process and fair play are not among those things, it would seem. As Khadr’s defense lawyer, Lt. Cdr. William Kuebler, told the *Times*, “Instead of a presumption of innocence and of a public trial, we start with a presumption of guilt and of a secret trial.”

The damage that these flawed proceedings is doing is not limited to the detainees and the reputations of those involved. “Injustice anywhere is a threat to justice everywhere,” as Dr. Martin Luther King wrote from his cell in Birmingham. “We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.” Shrouding the proceedings in secrecy, where no valid reason is given, risks the perception abroad that the United States is more afraid of truth than terrorists. ■

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