

MILITARY COMMISSIONS UPDATE

BY MASON C. CLUTTER

Obama's First Capital Case at Guantánamo

Nearly seven months after the Obama administration's announcement that military commissions proceedings would resume in Guantánamo Bay, Cuba, the first detainee to be tried in the revised system was arraigned on Nov. 9, 2011. Abd al-Rahim al-Nashiri is accused of plotting the attack on the USS Cole in 2000, which resulted in the death of 17 American sailors. Al-Nashiri's case is the first trial of a so-called "high value" detainee and will likely set the stage for other "high value" trials, including the trial of the five alleged 9/11 co-conspirators.

Two years into the "revised" military commissions, one would expect most of the previous kinks in the system to have been worked out by now. However, this third iteration of the commissions remains plagued with the same uncertainties and inconsistencies as the last two. For example, just 36 hours before al-Nashiri's arraignment was scheduled to begin, the Department of Defense issued new Regulations for Trial by Military Commission — the first revision since 2007. This latest last-minute change in the rules serves as a good example of the ad hoc nature of the military commissions at Guantánamo Bay.

In his first appearance in public since his capture in 2002, al-Nashiri presented to the Commission in his detention attire, unrestrained — although subject to close supervision by about six military personnel — and actively participated in the hearing.

Unlike an arraignment in traditional federal criminal court, which would normally take about five minutes to complete, the military commissions arraignment of al-Nashiri lasted nearly four hours, without the entrance of a plea on the record.

Among al-Nashiri's military counsel was learned defense counsel, and NACDL Life Member, Richard Kammen. Kammen conducted a voir dire of the commission judge, an aspect of the military system that is unmatched in the civilian system. Kammen asked the judge about his views on the death penalty, torture, and the legitimacy of the commissions system in general. Kammen, seemingly satisfied with the responses, did not challenge the judge. However, his questioning did lay the foundation for some of the issues that will be raised by the defense during al-Nashiri's trial, namely the fact that his client was subjected to so-called "enhanced interrogation techniques," including waterboarding.

Additionally, the judge heard oral argument on other outstanding issues, including al-Nashiri's right to conflict-free counsel, defense access to resources, alleged violations of the attorney-client privilege, and the possibility of al-Nashiri's continued indefinite detention following an acquittal in his military commissions trial. Al-Nashiri's counsel argued that statements by administration officials indicated that should al-Nashiri be acquitted of the charges brought against him, he could continue to be held pursuant to the "laws of war" for the duration of hostilities. Noting that the standard for such detention is a



much lower standard than that of "beyond a reasonable doubt," the government refused to state on the record whether or not it intended to hold al-Nashiri post-acquittal. The judge ruled that this issue was premature and denied the defendant's motion; however, he did indicate that he may be inclined to consider a request for a jury instruction on the detention issue at a later date.

Alleged violations of the attorney-client privilege by members of the Joint Task Force (JTF) Guantánamo — the body responsible for the detention operation at Guantánamo Bay — are of grave concern to al-Nashiri's defense team and the defense teams of all "high value" detainees. The judge found that in October 2011 members of the JTF had read the content of al-Nashiri's attorney-client privileged mail, and ordered the JTF to only review mail for proper attorney-client privilege markings and contraband, such as staples and paper clips. This order only applies to al-Nashiri's case, however, and does not address allegations that the JTF has also read the contents of other "high value" detainees' attorney-client privileged

Editor's Note: NACDL is one of the non-governmental organizations authorized to observe military commissions at Guantánamo Bay. National Security Counsel Mason C. Clutter traveled to Cuba to serve as NACDL's representative.

mail. This issue is likely to be raised in these other cases as they proceed.

Finally, the judge heard argument on a motion regarding defense access to resources, including expert assistance. As the rules currently stand, requests for resources must be made by the defendant to the Convening Authority — the person in charge of the Guantánamo military commissions — with notice to the government. The government then has the ability to contest the defendant's need for the requested resources. The defense argued that this procedure essentially gives the government a preview of defense strategy and requested that it be permitted to make *ex parte* requests for expert assistance. While the government did not oppose this request, the judge did not enter an order because he was not certain of what, if any, authority he had to order the Convening Authority to do anything. The parties agreed to submit a joint letter to the Convening Authority requesting that they follow an *ex parte* procedure in this case.

While significant improvements were made to the Guantánamo military commissions in late 2009, they remain inherently flawed and lacking in fundamental constitutional protections. Ten years after their creation, the commissions have only convicted six individuals. With a record like this, one would think the Obama administration would re-evaluate its use of the commissions and move to a system that has completed over 400 terrorism-related cases since 9/11 — the traditional criminal justice system. However, the administration and Congress remain committed to using the Guantánamo military commissions. As “liberty’s last champion,” NACDL will continue the fight for due process and fair justice, and will continue to oppose the use of the commissions for trial of current Guantánamo detainees and future terrorist suspects. ■

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HEENEY AWARD

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NACDL. “When fellow attorneys ask me why I go, I say, ‘I have never attended an NACDL seminar without coming away with an idea, motion, argument, or something I was able to use to benefit a current client or a future client.’ Isn’t that what we want to do — improve our chances of success? That happens at NACDL seminars.” He often ends his seminar pitch with a challenge: “Go to an NACDL seminar and see if I am wrong.”

The year 2013 marks the 50th anniversary of *Gideon v. Wainwright*, a decision Gallagher views as the most important for criminal defendants. “Everyone is entitled to an attorney. I cannot fathom a person standing trial for a felony without a lawyer,” he said.

What is one of the most important tasks facing the nation’s most recognizable criminal defense organization? Gallagher said NACDL must find the resources, human and economic, necessary to continue its mission of improving the quality of representation provided to clients and improving the quality of justice they receive. He is proud to be a member of NACDL. “NACDL has given me access to programs and ideas that have made me a better lawyer and has introduced me to great people who have become lifelong friends. It does so much good for so many.”

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Gallagher is passionate about his wife, his children, the White Sox, and social issues. When he has the time, he sits down in front of the television and watches *The Daily Show*, *Seinfeld* reruns, and *Modern Family*. “We need to laugh at the end of the day if we have not had the chance earlier.” ■

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THE CHAMPION (ISSN 0744-9488) is published monthly, except for January/February and September/October, which are bimonthly, by the National Association of Criminal Defense Lawyers, Inc. Printed in the United States of America. Basic subscription rate \$65 per year when received as a benefit of NACDL membership. Non-member subscriptions are \$100 annually in the U.S. or \$125 if mailed outside the U.S. Periodicals postage paid at Washington, DC and additional mailing offices. Postmaster: Send address changes to *The Champion*, 1660 L Street, NW, 12th Floor, Washington, DC 20036.

THE CHAMPION is published in the interest of the members of the National Association of Criminal Defense Lawyers to inform and educate the membership and to improve communication within the criminal defense community. See www.nacdl.org for details.

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