Military Commissions Update

BY MASON C. CLUTTER

Alleged Cole-Bomber Case Most Important At GTMO

In February, Majid Shoukat Khan, formerly of Baltimore, Md., became the seventh person convicted in the military commissions at Guantánamo Bay, Cuba, since 2001. Khan accepted an offer for pretrial agreement to charges including conspiracy to commit the August 2003 bombing of the J.W. Marriott in Jakarta, Indonesia, and attempted assassination of the former President of Pakistan in 2002. It is believed that Khan may serve as a government witness in upcoming trials of Guantánamo detainees, including the alleged 9/11 co-conspirators. Should he fulfill the terms of the agreement, Khan will be sentenced to no more than 19 years in prison; however, at the time of his arraignment, Khan acknowledged that the government may continue to hold him in indefinite detention after he serves his sentence. Three weeks later, charges were referred against the 9/11 defendants, whose second arraignment is scheduled for early May.

Amongst the hype of the pending 9/11 arraignment, additional hearings were held in the trial of Abd al-Rahim al-Nashiri, the alleged U.S.S. Cole bomber. All eyes should be on the *al-Nashiri* case as Chief Judge of the Military Commissions, Colonel James Pohl, the judge in *al-Nashiri*, also appointed himself judge over the 9/11 case. On April 11 and 12, Judge Pohl finally heard oral arguments on constitutional challenges to the Guantánamo military commissions system, in addition to several discovery motions. The judge's interactions with counsel and his forthcoming rulings will set the road map for the 9/11 case. *Al-Nashiri* is arguably the most important case in Guantánamo.

Emotions were palpable as defense counsel moved to dismiss the charges against al-Nashiri on the grounds that the Guantánamo military commissions lack jurisdiction over him because the Military Commissions Act of 2009 (MCA) violates the equal protection component of the Due Process Clause and the MCA's limitation of personal jurisdiction to aliens violates the Define and Punish Clause. Counsel also challenged the jurisdiction of the commissions over the charges of conspiracy and terrorism and raised ex post facto challenges to each charge. Finally, counsel challenged the MCA as an unconstitutional Bill of Attainder. Judge Pohl reserved ruling on each of these motions; however, he made it clear that the Court of Military Commission Review (CMCR) had already ruled in favor of the government when it considered these challenges in a prior commissions case, *al-Bahlul*, and needed specific reasons to depart from those rulings to which he is bound. Counsel argued that the *al-Nashiri* case is distinguishable from *al-Bahlul* because al-Nashiri is facing the death penalty and those provisions of the MCA were not at issue in the case before the CMCR. Judge Pohl seemed skeptical.

NACDL maintains its position that the Guantánamo military commissions are inherently flawed, even after improvements to the MCA in 2009. Charges of conspiracy, material support, and terrorism are not traditionally considered war crimes and therefore not properly within the jurisdiction of the commissions system. Further, the commissions continue to allow the use of evidence derived as a result of coerced statements, albeit not the use of those statements directly made by the defendant, and severely impinge on a defendant's ability to confront witnesses. Given the continual displays of intrinsic unfairness in this commissions system, NACDL continues to advocate for the use of traditional federal criminal courts to try Guantánamo detainees and future terrorism suspects.

Of significant importance to future commissions cases, Judge Pohl ruled on several discovery motions, including a challenge by the defense to the constitutionality of a provision of the 2009 MCA that denies the defendant the ability to move the judge for reconsideration of his rulings on the adequacy of the government's classified information substitutions. Judge Pohl found that the constitutional challenge was not ripe given that no summaries have been ruled on yet; therefore, there is no actual need for reconsideration at this time. However, while the judge found,

as he did previously, that the MCA prohibits the defendant from making a request for reconsideration, he also found, and the government agreed, that nothing in the statute prohibited the judge from deciding *sua sponte* to reconsider the adequacy of the substitutions. While this workaround appears to have addressed the reconsideration issue for the time being, it puts the judge in the position of being a mind reader to know when the defense may have requested the judge to reconsider his previous rulings. This is just another example of how the commissions differ from the federal system and the creative and potentially unfair ways military judges are forced to work around the revised MCA.

Further argument was heard on the issue of classified information, including a defense motion to extend the time in which it may submit its *ex parte* statement of the case to the judge to better assist him in ruling on the adequacy of the government's substitutions of classified evidence. This issue first arose in January when Judge Pohl denied the defense's request to make such adequacy determinations close to the trial date to afford the defense the time to investigate the case and build a defense strategy, but granted a defense motion to provide him with *ex parte* information regarding the defense's trial strategy for his use when considering the adequacy of the summaries of the classified documents. Counsel requested an extension of at least 90 days to make the submission, but Judge Pohl only gave them approximately two weeks of additional time. His ruling resulted in part from the fact that a classification "spill" occurred by inclusion of classified evidence in a file marked "unclassified discovery" by the government that caused the defense a two week delay in reviewing the discovery. Defense counsel was noticeably upset by this order and noted that it can take years to develop a defense theory in a capital case, but that they were being forced to submit their theory within the first six months of al-Nashiri's case.

Defense resources — which will prove to be a continual theme in commissions cases — were at issue again this time around. Judge Pohl denied a defense request to compel translation of all discovery into Arabic so that al-Nashiri could exercise his right to participate in his own defense. The Judge found that translation of every piece of discovery is not mandated in federal court, nor should it be mandated in the commissions. Upon denying the defense's motion, al-Nashiri's learned counsel and NACDL Life Member Richard Kammen preserved the record for appeal, noting that the judge's ruling denies al-Nashiri of his rights to effective assistance of counsel and to participate in his own defense, and violates the Fifth, Sixth, and Eighth Amendments, as well as the MCA, Detainee Treatment Act, and the United States' international treaty obligations.

Still considering resources issues, the judge did grant the defense's request for funding for a Yemeni investigator; however, the judge questioned the team's choice of a man who reportedly has no investigation experience and openly called for the former Yemeni President to step down from power. Finally, the defense requested information about the amount of resources expended by the government prior to referring charges against al-Nashiri. The judge agreed that such information can be useful to al-Nashiri's mitigation case and ordered the government to come up with some reliable numbers to satisfy this request. The defense contends that the government spent approximately 30 man-years between 2000 and 2002 investigating the attacks on the Cole and other vessels in Yemen, plus an additional 30 man-years between 2002 and referral of charges in October 2011. At a press conference following the hearings, Chief Prosecutor Brigadier General Mark Martins stated that the average capital case in federal court runs the defense about $300,000, and the defense in al-Nashiri has already received $100,000 in resources to date. When asked what the prosecution's budget was, General Martins replied that the prosecution has no budget — that the budget is driven by what due process and justice require — and referred reporters to the Department of Defense for actual costs.

After hearing argument on about 24 different motions, Judge Pohl was noticeably frustrated with both sides, noting that he no longer wanted to hear "argument by anecdote," nor did he desire comparisons of the commissions system with the traditional federal system and the courts martial system. What is troubling about this last comment is the fact that the Guantánamo Military Commissions are basically a hybrid of the other two existing systems, except when the MCA completely departs from fundamental notions of fairness and creates its own rules, such as lax hearsay rules and the use of derivative evidence obtained by coercion. With each hearing in the *al-Nashiri* case it becomes ever more apparent that the commissions system is irreparably flawed and designed to provide fewer protections to a defendant than the federal criminal justice system, making convictions — and ultimately death — easier. Mr. al-Nashiri is viewed as being a guinea pig for the 9/11 case, while the United States government disregards the fact that this man, while accused of a heinous crime, deserves every ability to defend his life from arbitrarily being taken. Defense attorney Kammen said it best: the attitude of the military commissions is that it can kill al-Nashiri and do it cheaply. ■

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