Pacific Council
ON INTERNATIONAL POLICY

Observer Dispatches

Guantánamo Bay Hearings, September 7-9, 2016
United States v. Abd al Rahim Hussayn Muhammad al Nashiri

By John Stamper

Introduction

I attended hearings in the Military Commissions Trial of United States v. Abn al Rahim Hussayn Muhammad al Nashiri from September 7 through September 9. Although it was a short week because of the Labor Day holiday, the motions heard raised several important issues which were the subject of extremely heated argument. Those issues go to the integrity of the proceedings, the constitutionality of the procedures and the jurisdiction of the Commission.

Going to Guantánamo

The trip to Guantánamo, and the conditions at the base, are described very well in the prior reports of members who have served as observers. My trip did involve some additional uncertainty because a hurricane passed by Guantánamo a few days before our trip, and another was predicted to reach that area before the end of our trip. We went, therefore, not knowing if we might be rushed back to the mainland or, worse, experience a hurricane on the island. Fortunately, the storm did not materialize. Unfortunately, the weather was very hot and very humid. It bears mentioning that the military personnel assigned to see that we were in the right place at the right time and to assist us with other needs during our stay were unfailingly polite, professional and efficient.

We traveled on Tuesday, September 6, and returned on Saturday, September 10. We had very little free time because the calendar for the three days available for hearings, September 7-9, was very full. For example, on September 7 the hearings began at 9 a.m. and did not conclude until 6 p.m. We then had a meeting with General Martins. We left for a rather late dinner at 9 p.m.

We were seated in the segregated gallery with the press and the members of the families of the victims of the Cole attack. Al Nashiri attended the sessions on September 7 and 9, but not September 8.

The Al Nashiri Case

Al Nashiri is a Saudi citizen who is alleged to have been the head of al Qaeda operations in the Persian Gulf and the mastermind behind the bombings of the USS Cole on October 16, 2000, and an attempted bombing of the USS The Sullivans as well as the bombing of the French oil tanker Limburg. Seventeen American sailors were killed in the Cole bombing. Several of their family members attended the hearings.

Al Nashiri was captured by the CIA Special Acts Division in Dubai in 2002 a few months after the Limburg attack. He was held in CIA secret prisons ("black sites") for four years before being transferred to Guantánamo. He was charged in the Military Commission in 2008. The prosecution dropped the charges in 2009 then reinstated them in 2011. The charges against him with respect to the bombing of the Cole and the other maritime attacks are punishable by death.

Al Nashiri was sentenced to death in absentia in Yemen in 2005. There is also an indictment pending against him in the United States District Court for the Southern District of New York.

The Hearings on Defense Motions AE332, AE332A, AE348, AE350, AE351, AE 352, and AE355

On September 7 through 9, Judge Spath conducted hearings on several motions, including approximately three hours of witness testimony, and discussed further discovery and scheduling. The NGOs were able to attend most of the proceedings because there was little discussion of classified material. We met separately with General Martins for the prosecution, General Baker for the defense and learned counsel Rick Kammen for the defense. We watched a press conference at the conclusion of the hearings. We also attended a party given by the defense on the last evening where we had an opportunity to discuss informally the proceedings with members of the defense team.

These proceedings were the first in 18 months. The case had been delayed because the court disqualified a number of persons in the Convening Authority from further involvement in the proceedings. The court had found they had exerted unlawful influence over the proceedings. The delay was also occasioned by the need to seek re-nomination and re-confirmation of the military judges as U.S.M.C.R. judges.

Judge Spath began the proceedings by noting that it was his preference to resolve scheduling and procedural matters informally in what are called "802 sessions" off the record, but that the defense had not agreed to that procedure for these hearings. The judge expressed a hope that such sessions might resume in the future. Mr. Kammen responded that there had been two "sea changes" that caused the defense to want everything on the record. First, the D.C. Circuit decision refusing to review jurisdiction until after the trial means to Kammen that they must have a complete and robust record. Second, evidence of ex parte communications between the prosecution and the Court of Military Commissions Review causes him again to think everything must be on the record.

The defense motions raise or illustrate a number of issues concerning the suitability of the military commission procedures for resolution of these matters including the following: 1) whether the restrictions on defense access to witnesses and documents may provide a basis to challenge a result, 2) whether the military's customary rotation of attorneys may in a capital case of this complexity and duration raise effectiveness of counsel issues, 3) the extent to which this tribunal may assert jurisdiction over extraterritorial actions of an enemy combatant not directed against U.S. nationals or interests, 4) the extent to which the

proceedings under the Military Commissions Act may encompass claims based upon conduct prior to 9/11, including the issue of when the armed conflict here at issue began, 5) whether the Convening Authority structure denies a defendant due process because the Authority performs both a judicial and a prosecutorial role, 6) whether the relaxed hearsay rule in these proceedings allows for a fair opportunity to defend, and 7) what type of ex party communications between the prosecution legal team and the reviewing court may constitute unlawful influence, and, to the extent such contacts are a part of the system, whether that impairs the ability of the commission to provide a fair trial. This list consists entirely of issues advanced by the defense because all of the motions on the calendar for the week were defense motions. In some instances, it may be that the prosecution arguments set forth in their papers were not fully presented in the oral hearings. To that extent my summaries of the arguments may be incomplete and somewhat less than balanced. The defense bore the burden of proof on all of these motions and made the more extensive arguments.

Motion AE 332: Defense Motion to Abate the Proceedings Pending the Restoration of Com. Mizer to the Defense Team

The defense moved to abate the proceedings until Commander Mizer, who was previously the senior military counsel assigned to the Nashiri defense, is restored to the defense team. They asked the court to order the military to return Mizer to the defense. Com. Mizer played a lead role in major parts of the proceedings prior to his departure from the team. He is represented to have been the only lawyer to have gained the trust and confidence of the client. Indeed, al Nashiri said earlier this year that he wished to fire his current lead defense counsel, Mr. Kammen. The defense contends that the years of torture that al Nashiri endured have made it exceedingly difficult for him to establish relationships of trust. Com. Mizer was the fifth experienced military attorney to be rotated off the defense team. Al Nashiri consented to the other four but objected to the removal of Mizer. Mr. Kammen argued that Mizer has been replaced by a much less experienced lawyer ("Peyton Manning replaced by Tim Tebow").

The defense contends that Com. Mizer left the defense because, when the case was stayed because of unlawful influence by members of the Convening Authority, it appeared that the case might not continue at all. Com. Mizer's tour of duty ended, and he requested to be reassigned. When the case resumed, he had left active duty but was still in the reserves. The defense asked that he be returned to the team as a reserve officer, and he is prepared to serve in that capacity. The Convening Authority denied that request, the defense moved the court for an order abating the proceeding until the government reinstated him (exact procedure unclear), and the prosecution opposed the motion. The defense contends Com. Mizer is essential to provide effective assistance of counsel. They presented Com. Mizer's testimony via an electronic connection in which he detailed his experience and the role he had played in the defense.

Lieutenant Cantil for the prosecution argued that the rules provide for one "learned counsel" (civilian counsel with particular expertise and experience) and one designated military counsel and that Nashiri already has what the rule requires and more. They also

contend that Com. voluntarily left the case, and that his departure complied in all respects with the relevant military rules. The test for prejudice is whether there is adequate time for the new defense lawyer to prepare and whether the counsel provided is adequate. He contends that both are met here.

Judge Spath at several times during the argument noted that the defense has what the rules require, but he also clearly recognizes that meeting the minimum necessary under the rule to constitute providing counsel does not necessarily satisfy the requirement for effective counsel in a capital case. He seemed troubled by the motion.

In support of the motion the defense had sought to introduce at the hearing the oral testimony of Gen. Baker, Chief Defense Counsel for all of the Commission proceedings and the officer who assigned Com. Mizer to the defense. When the defense was not allowed to call Gen. Baker, the defense submitted a written offer of proof as to what Gen. Baker's testimony would have been. That statement explains why Gen. Baker designated Com. Mizer to serve in the defense and why he considers his continued involvement important. It was somewhat strange to hear Gen. Baker's declaration read in court when the general was sitting right there but was not allowed to testify.

The judge had also denied a defense request to introduce the oral testimony of an expert in PTSD. In a written offer of proof of her testimony, that expert declared that al Nashiri was suffering from an extremely severe case of PTSD. She opined that it is exceedingly difficult to establish a relationship of trust and confidence with him but that Com. Mizer had succeeded in doing so. She opined that it would be very difficult for al Nashiri to have any trust in his defense team without Com Mizer.

The defense also submitted an offer of proof of the testimony of counsel for the defense in the Oklahoma bombing case. That defense team was much larger and had much greater continuity.

The judge stressed several times that the case is still a long way from trial and seemed more concerned with ensuring that Mizer's replacements had time to be fully effective than with any attempt to reinstate Mizer. He does not to me seem to be inclined to order a procedure that differs from the military norm, but he did not give any clear indication of an intended ruling.

Com. Mizer's situation illustrates a problem of continuity of representation in a case of this length and complexity. It is expected that military lawyers will move off of cases and move on to other matters when their tour of duty ends, and the rule is that the attorney/client relationship is severed when that tour ends unless circumstances require otherwise. That may work well for the type of cases typically handled in military proceedings, but it presents problems in a capital case that lasts many years, is exceedingly complex and involves a large volume of documents. Effectively handing over all acquired knowledge and maintaining the trust and confidence of the client is, in the view of the defense in Nashiri, not possible if key personnel are not maintained. This problem is complicated by the military system of evaluation of officers for advancement. Remaining too long on a case

such as this would in many, perhaps most, cases be detrimental to the officer's career. In at least one case an attorney for the defense who wished to stay on the case was told that, if he did so, his military career was essentially over.

According to Mr. Kammen, 86 percent of the death sentences imposed by military tribunals are reversed, most often because of ineffective assistance of counsel. In this motion, and the related issues presented by motion AE350, the defense is creating the record for an appeal on that ground.

AE 350 Defense Motion to Abate the Proceedings Until Key Members of the Defense Team Receive Their Security Clearances

The staffing problems illustrated by Com. Mizer's situation are compounded by the need for special security clearances for defense team members. When the defense sought the reinstatement of Com. Mizer, the Authority instead added two young military lawyers to the defense team. Motion AE350 sought to abate the proceedings because those new members have been waiting for more than a year for security clearances. As a result, they have not been able to participate in important parts of the case and cannot meet the client. The day after the defense filed this motion, and more than a year after the attorneys had been assigned, they were contacted to begin the clearance process. The court denied the motion to abate from the bench but made it clear that he expected the clearance procedure to be conducted with all deliberate speed. One of the two attorneys received her clearance by the end of the week. The court and parties recognize this will be an ongoing issue because personnel will continue to rotate.

AE 332 and AE 332A Defense Renewed Motion to Dismiss for Unlawful Influence and Motion to Compel Testimony Related to AE332

The Court previously found that members of the Convening Authority had been exerting unlawful influence over the conduct of the proceeding, and the court disqualified several members of the Authority from further participation in the matter. Motion AE 332 alleges that some of those persons continued thereafter to participate in violation of that order. The defense seeks the testimony of witnesses with respect to that issue. The defense presented via video link communication the testimony of a Mr Gill, now a civilian. Gill has filed a whistle blower action against the Government claiming that he was discharged for reporting that disqualified members of the Convening Authority continued to play a role in the Nashiri case in violation of the court's order. His testimony was long and rambling, but the actual substantive allegations of misconduct were sparse. He alleges that Mark Tule, Legal Adviser to the Convening Authority and Gill's direct superior, did not segregate himself from the case after being disqualified and that others up the chain of command failed to act upon being informed of that misconduct. Specifically, he alleges that Tule kept the al Nashiri matter on the general calendar to be followed and discussed in departmental meeting just like any other case. He alleges that Tule discussed the progress and issues in the case with Gill and in the general meetings of the staff. He also testified concerning a time when an order was issued affecting the al Nashiri case. When Gill went to the office of a senior officer to discuss the order, he found Tule already there and believes they were

discussing the order. Gill testified that he repeatedly reported this conduct which he regarded as a violation of the disqualification order up the chain of command, but little action was taken. He claims that he was ultimately discharged as a result of his "whistle blowing."

Gill was a very difficult witness both on direct and cross. He gave long rambling and often non responsive answers even to the simplest "yes or no" questions. He was repeatedly directed by the judge to answer directly, but to no avail. He may have been significantly discredited on cross examination by a showing of bias and general untrustworthiness, but his testimony that he had personally observed improper conduct was sufficient to cause the judge to indicate that he would permit the defense to call more witnesses on this issue. The defense had originally sought the testimony of around 10 witnesses, and the judge had allowed them to call only Gill. The judge made it clear that he sees a distinction between conduct which may violate the disqualification order and be the basis for a finding of contempt and conduct which constitutes unlawful influence over the proceedings. He did not seem inclined to rule that the conduct Gill identified rose to the level of unlawful influence although it might violate the order, but he did conclude that it raised enough of an issue to require further investigation.

The motion to compel testimony (AE332A) in this proceeding illustrated another manner in which these proceedings differ from federal court. The prosecution can subpoena witnesses; the defense cannot. If the defense wants to call a witness, it must give the prosecution a written request setting forth a summary of the testimony the witness is expected to give and its relevance to the proceeding. If the prosecution refuses, the defense must go to the court with a motion. That procedure must be followed even when the prosecution has already identified the person as a potential prosecution witness. The defense must give its own explanation of the relevance and the expected testimony. The prosecution can call any witness it chooses without any explanation of relevance or any statement of expected testimony. The defense must also ask the Convening Authority to approve the expense of calling a witness. The defense has no independent budget and must ask the Convening Authority to approve all expenditures. In discussing defense arguments about the unfairness of these rules, the judge noted that the military rules are designed to preserve the discipline and good order of the unit and thus differ from Article III judicial proceedings.

Document Production Issues

Document production has been ongoing in this case for several years, but the production of documents pursuant to the first defense request is still not complete. These cases involve a large volume of classified material. The prosecution redacts classified material and replaces it with a summary intended to give the defendant substantially the same defensive position as would the classified version. The Convening Authority reviewing court then reviews those revisions and may change them. The judge then reviews the material and can change the redactions or summaries. The reviewing court then reviews what the judge has done and can change that. The result is that document production is not close to being

completed. The prosecution hopes to have the last of the material thus far required to be produced to the judge by the end of September.

AE 351: Defense Motion to Dismiss the Limburg Charges for lack of Jurisdiction

This defense motion raises the issue of whether the Military Commissions Act can apply extraterritorially. The charges in question relate to a terrorist attack against the French Merchant Vessel Limburg in 2002 in Yemen. One crew member was killed and 90,000 barrels of oil were spilled into the ocean. The attack occurred outside of the United States against a foreign vessel. None of those injured were U.S. nationals. The defense argues that there cannot be jurisdiction under the statute without a nexus with the United States, citing Nabisco v. European Community. The prosecution argues that it is the status of the individual rather than the character of the actions which governs the jurisdictional determination. They contend that Nashiri was an enemy combatant engaged in hostilities against the United States and could thus be prosecuted in the Commission proceeding for any war crimes no matter where committed or against whom.

The argument on this motion was extensive and fascinating. The trial court previously dismissed this charge on the grounds that the prosecution had not presented any evidence to show a basis for jurisdiction. The Court of Military Commission Review reversed saying the issue of whether the actions came within the statute was a question of fact for the jury. The defense appealed to the D.C. Circuit. A divided panel concluded that mandamus was inappropriate because the defendant would have an adequate remedy in post-trial review and that he had not shown a high likelihood of success. The dissent argued that abstention was inappropriate in this case because there was a risk of extraordinary harm to the defendant, especially in view of the history of his torture. The dissent also argued that the reason for deference to a military tribunal—preservation of good order and discipline in the unit—is inapplicable here. Counsel for the defense indicated that they will seek a writ of certiorari from this ruling.

One might question why the prosecution is so determined to preserve this claim when they have the USS Cole and The Sullivans actions which were directly against the United States and could be punishable by death. It could be because those other actions occurred prior to 9/11 and were called a "peacetime attack" by the president and others at the time. If we were not engaged in armed conflict at the time, they may not be within the scope of the Military Commissions Act and thus not be properly triable in the Commission. The prosecution may hope to use the post 9/11 Limburg action as the basis for commission jurisdiction and seek plenary jurisdiction over the Cole and Sullivans claims. This possible significance of the claim was not discussed in the proceeding, but the defense did say more than once that they could be in the wrong court for al Nashiri. Resolution of this claim will present the question of what is required to come within the statutory grant of jurisdiction over acts that take place during armed conflict and who is to make that determination. Is it what the president says when the acts occur, what Congress may say later or what a jury decides? Is it a political question not suitable for the courts to decide? The Court of Military Commission Review said that it was a question of fact for the jury, but it is far from clear that that is correct.

AE 352: Defense Motion To Dismiss Because The Convening Authority's Dual Judicial And Prosecutorial Responsibilities Violate Due Produce, Or In The Alternative To Abate The Proceedings Until The Convening Authority Is Removed From Those Roles

The Defense cites the recent Supreme Court decision in Williams v. Pennsylvania for the proposition that the same person or entity may not consistent with due process perform both a judicial and a prosecutorial role. In that case the person who had elected to seek the death penalty as the Attorney General of Pennsylvania was the Chief Judge of the State Supreme Court when the death sentence appeal came before the court. He refused to recuse himself. The Court found that to be a denial of due process. The defense catalogued a number of prosecutorial functions of the Convening Authority, including approving the charges to be brought or dropped and whether to seek the death penalty. The Convening Authority will perform a number of Judicial functions as well. It will select the specific individuals from whom the jury will be selected. The judicial functions would also include regulation of the conduct of discovery, issuance of protective orders, identification of legal errors in the proceedings, and post-conviction review of the death penalty and other charges.

The court noted that the military system is quite different from the court in Williams and questioned why Williams should apply. The defense replied that Williams is a due process decision and due process applies to these proceedings.

Counsel for the prosecution argued that the Williams facts were quite different. He relied primarily on the prior opinion of Judge Pohl rejecting a similar challenge to the Commission. He also argued that the Commission proceedings have already been upheld as adequate because they are consistent with the UCMJ, and the UCMJ procedures have been upheld as adequate. The judge did not indicate what he was likely to rule, but he seemed more receptive to the prosecution's argument that this is a standard part of trying a case in a military tribunal.

AE335: Defense Motion to Compel Testimony of Witnesses at Motion to Suppress Custodial Statements made by Al-Darbi

Defendant Al-Darbi has reportedly reached a plea bargain with the prosecution and has agreed to cooperate in their case against al Nashiri. The defense argues his statements were made as the result of torture and must be excluded. The prosecution agreed not to use the statements obtained during torture in its case in chief (although seeking to reserve the right to use them for impeachment) but intends to use statements made after the torture had ended and to call Al-Darbi at trial. The defense seeks to bar his testimony in its entirely. The judge seemed clearly inclined to permit the trial testimony and was receptive to the prosecution's arguments on the statements made some years after the torture. The court concludes he needs first to see what the documents say and that it would be premature to rule on the motion regarding a hearing to exclude.

There will also be motions related to statements taken by FBI agents in Yemen. The hearsay rule is significantly less restrictive in these proceedings, and such hearsay may be allowed. The defense believes such statements will be a major, perhaps essential, part of the prosecution case. The prosecution agrees that the relaxed hearsay rule is one of the principle differences between these proceedings and federal court but contends that the standard of reliability is not materially different and that the relaxed rule is necessary where the evidence is in hostile territory.

AE355: Motion to Compel Disclosure re Alleged ex parte Communications of the Prosecution with Members of the CMCR

This defense motion sought to compel production of ex parte communications between the prosecution and members of the military court of review. The prosecution conceded that such communications took place but contended they were entirely benign. They refused to produce them. The prosecution said that such communications would not be relevant to the defense. The defense contended such communications are highly improper and go to the issue of unlawful influence and to the integrity of the entire proceeding.

The prosecution argued that the acts of public officials are presumed to be proper absent other evidence. The defense here is just speculating about what the communications could be and has no evidence of actual impropriety.

The court ordered the documents (which the prosecution said consist of a binder of material) produced to the court for in camera inspection. He will turn them over to the defense if he determines they should have them, and they will remain part of the record under seal if he does not. Mr. Kammen for the defense has promised a public apology to the prosecution if the materials are in fact entirely benign.

Meetings with Counsel

We met separately with General Martins for the prosecution and with General Baker and Mr. Kammen for the defense. They are very different people but all three were impressive. General Martins is more formal and dignified. His presentation was clear and direct. General Baker is much less formal but was equally well spoken. He seemed very candid in his discussion of the situation. Mr. Kammen is more casual still—irreverent and very direct in his criticism of the proceeding. He wore a kangaroo lapel pin in court.

General Martins

We met with General Martins on the evening of September 7. Gen. Martins is a Brigadier General in the Army and the Chief Prosecutor for the Military Commissions. He began with some prepared remarks in which he explained that a military commission is the only way to try al Nashiri because of the Congressional prohibition against bringing him to the United States. He said that allegations that the government is hiding evidence of torture and other misconduct are simply wrong. Documents are redacted or withheld to protect national security, but the defense is given information that puts the defense in the same

position it would occupy with the originals. He discussed the standards and procedures to be applied in national security reviews.

General Martins also addressed the reasons for the slow pace of the proceeding. He said that the parties have filed 424 substantive motions of which 313 have been argued orally. He explained the complications and difficulties of document production where national security issues are involved.

General Martins opined that federal courts "do not do this well." He noted two important differences between federal court trials and the commission. First, the hearsay rule is relaxed. This is important because the government often cannot find and bring to trial witnesses from hostile jurisdictions. Second, the privilege against self-incrimination is relaxed. Statements of the accused can be used if, given the totality of the circumstances, the statement was voluntary.

General Baker

We met with General Baker on the afternoon of September 8. Gen. Baker is a marine and the Chief Defense Counsel for the Military Commissions. He did not have any prepared remarks but simply asked for our questions. He described the problems facing the defense given the rules which give the prosecution substantial control over the defense case. The prosecution can subpoena witnesses; the defense cannot. The defense does not have its own budget and must seek prosecutorial approval of all defense expenses. The defense cannot rate its own personnel for advancement purposes separately—that must be done with the Convening Authority, and the Authority must approve their bonuses.

When asked what changes he would make if he could, Gen. Baker said he would make the rules governing the proceeding either all UCMJ or all Federal Rules. The hybrid ad hoc creation of the Commission results in lack of clarity.

He said that the federal courts do a very good job of trying terrorist cases while the military court martial system does a very good job of trying service cases. Nonetheless, he said that he would use the court martial process for enemy combatants except perhaps in capital cases. The reversal rate for DCMJ capital convictions is 86 percent.

Gen. Baker said that the defense did not expect that the charges would be dismissed pursuant to the defense motion regarding unlawful influence. Depending upon the evidence ultimately produced he said the Convening Authority could be disqualified, the proceeding could be abated pending a cure or "death could be taken off the table."

Mr. Kammen

We met with Mr. Kammen and his second chair military lawyer shortly after the press conference at the conclusion of proceedings on the afternoon of September 9. Mr. Kammen is a civilian lawyer from Indianapolis with extensive experience in capital cases. He simply invited our questions. He opined that the statute creating the Commission is pretty good.

The problem in his opinion is primarily that the Department of Defense has created rules which distort the statute. He says that the main bulk of the evidence against al Nashiri will be statements taken by FBI agents in Yemen 15 years ago.

Kammen said that Republicans in Congress are the only thing keeping the defendants alive. The prohibition against taking the defendants to the U.S. is causing enormous delay in resolution of the cases. He expressed sympathy for the survivors who do not understand the causes of the delay but just want and need a resolution.

Kammen contends that al Nashiri cannot receive a fair trial in the Commission. He points out that the Convening Authority will hand pick the members of the panel. He says that many senior Department of Defense officials have said that the defendants are in Guantánamo for a reason. It would be difficult for a career officer to return an acquittal. I spent some time talking to Kammens privately after the meeting. He was even more candid in his comments about what he regards as misconduct and injustice in the proceedings.

The Press Conference

We watched the press conference at the conclusion of the proceedings on television in our work area. We were told that NGOs are no longer allowed to attend press conferences because there "had been issues" with the behavior of NGOs at past press conferences. The press included Carol Rosenberg of the Miami Herald. She is said to be the one U.S. reporter who continues to follow the proceedings closely. A reporter from France and one from Ireland were also present. This was consistent with Mr. Kammen's remarks to us. He had said that the press in this country has largely forgotten about these proceedings but that he receives weekly requests for interviews from foreign reporters.

Rosenberg asked Kammen whether he was sure that his client would be convicted given that he was always talking about what would happen on appeal. He replied that it was difficult to have any confidence is a jury selected by the Convening Authority.

In the course of his remarks, Kammen referred to the proceeding as "legal madness."

General Martins followed Mr. Kammen. He explained that jurisdiction over al Nashiri was proper because of his status as an enemy combatant and that that gave the Commission jurisdiction over his actions. He also discussed the practical problems with document production in a case of this type. He declined to give any estimate as to when the case could be tried.

In response to a question about Mr. Kammen's "legal madness" statement, Gen. Martins said "that is what justice looks like in a particular case."

Conclusion

I am, after only a few hours of observation, not at all qualified to evaluate the seriousness of these questions and issues. The parties and the judge do seem, however, to take them very

seriously. The arguments became quite heated and at times impassioned. There would seem to be cause for concern for both sides. Defense counsel considers it extremely unlikely that a panel selected by the Convening Authority would be prepared to acquit Nashiri regardless of how much of the hearsay evidence is allowed. Thus he clearly has a cause for concern about the nature of the proceedings. It is possible there would be little admissible evidence against him in federal court. The prosecution may have cause for concern as well. Eighty-six percent of death sentences issued in ordinary military courts are reversed on appeal without the special issues presented here.

It has been 16 years since the Cole attack. These cases have already been pending eight years and will take many more to proceed through trial and appellate review. For the sake of all, and particularly the surviving family members of the victims, it will be a tragedy if the outcome is a finding that the Commission was the wrong court or that the procedure was fatally flawed. Some issues could be removed if the defense succeeds in obtaining judicial review of the jurisdictional issues prior to trial. It is also possible that some of the procedural and due process issues could be at least partially resolved if the Department of Defense chose to review and possibly revise some of the rules to ensure that they are consistent with the Military Commissions Act. I do not know whether the defense objections regarding the rules are well taken, but it might be worthwhile to examine the issue before investing several years and extensive resources in the proceedings. It might be, for example, that the defense could be given something closer to parity with respect to access to witnesses and documents or that the defense could have its own budget to spend without prior approval by the prosecution.