

Pacific Council

ON INTERNATIONAL POLICY



Observer
Dispatches

OBSERVER DISPATCHES FROM GUANTÁNAMO

April 2014
Robert C. O'Brien

Background

In April 2014, the Pacific Council was invited to send an observer to a week of Military Commission hearings in the case of *U.S. v. Khalid Sheikh Mohammed, et al.* at Naval Station Guantánamo Bay, Cuba ("GTMO"). Khalid Sheikh Mohammed (KSM) is accused of masterminding the September 11 attacks on the World Trade Center and has been linked to many other attacks between 1993 and 2003. He is on trial

with four other alleged co-conspirators. Robert C. O'Brien, a Council member and California Managing Partner at Arent Fox LLP, served as the Council's designated observer to pretrial hearings in the case from April 12 to 18, 2014. What follows is a collection of observations and reflections Robert recorded during the trip.



Robert's dispatches follow those of Richard Goetz, a Council member and litigation partner at O'Melveny & Myers LLP, who served as the Council's first designated observer to the pretrial hearings from June 16 to June 21, 2013. Richard's [Observer Dispatches](#) are a very useful introduction to the following commentary.

The History

In order to provide context for these Dispatches, it is useful to consider the past use of military commissions, and particularly GTMO, by the United States. In what was essentially the first American use of the procedure, General George Washington established a court of inquiry to try Major John André, a British officer and suspected spy. André was captured wearing civilian clothes and carrying documents obtained from Benedict Arnold relating to the defense of West Point. He was tried and sentenced to death in substantially the same manner that the British had earlier dealt with an American officer and accused spy, Nathan Hale. Since that time, military commissions have been employed in almost every American conflict, including the Mexican-American War (during which the term "military commission" was first used), the Civil War, the Spanish-American War, World War I and World War II.

The U.S. Supreme Court has upheld the constitutionality of military commissions on several occasions in various wars. In *Ex Parte Quirin*, the court upheld the convictions and sentences of eight German saboteurs who landed in New York by German U-Boat and were subsequently arrested wearing civilian clothes. They were tried and six of them sentenced to death pursuant to an order issued on July 2, 1942, by President Franklin D. Roosevelt. President Roosevelt's order was very similar to President Bush's military order that established the military commissions following 9/11. In *Quirin*, the court held that unlawful combatants are "subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." The court also held that the accused in military commissions are not entitled

to the same constitutional safeguards afforded defendants in civilian courts: [S]ection 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commissions, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

The current proceedings in GTMO are governed by The Military Commissions Act, as amended by the Military Commissions Act of 2009 (“MCA”). The MCA establishes jurisdiction over “alien unprivileged enemy belligerents” for violations of the law of war or the offenses specifically enumerated under the MCA. Notably, the MCA includes conspiracy charges, which international law does not recognize as a war crime. In January 2013, the Military Commission prosecution represented that it would dismiss the conspiracy charge against KSM, but soon after [retracted](#) that position. The MCA also sets forth certain procedural safeguards, which [differ](#) in some respects from the rights afforded to criminal defendants in federal court.

Naval Station GTMO



GTMO is the oldest American base overseas and the only United States base in a communist country. It is strategically located on the southeast corner of Cuba near the entrance of the Windward Passage, the strait that separates Cuba from Hispaniola. GTMO is less than 400 miles south of Miami.

Through two World Wars and the Cold War, GTMO has been a key to American control of sea lanes in the Caribbean that lead to the Panama Canal. In addition to its current role in the war on terror, the base allowed the United States to deal effectively with both the Cuban and Haitian refugee crises in the 1990s. GTMO continues to provide key support to the Coast Guard’s drug interdiction efforts in the region as it regularly hosts and supplies Coast Guard cutters and air crews during their patrols.



The initial base lease was entered into by Cuba and the United States in 1903 and was affirmed again in the Treaty of Relations ratified by Cuba and the United States in 1934. The United States pays Cuba \$4,085 per year to lease the property and keeps the bay’s waterway dredged to allow commercial shipping to reach the Cuban commercial ports in the Ensenada de Joa. The lease can only be terminated with the agreement of both the United States and Cuba.

On his first day of office (January 22, 2009), President Barack Obama signed an executive order mandating the

closure of detention facilities for enemy combatants being held at GTMO within one year. Within days, Cuban Foreign Minister Pérez Roque told Agence France-Presse that Cuba “expects that Obama's decision to close down the Guantánamo prison camp ‘is [to be] followed by the decision to close down the base and return that territory to the Cubans,’ a base that the United States ‘really does not need for its security and defense.’”

Progressive American bloggers have also [advocated](#) the return of the base to Cuba. John Peeler in the LA Progressive claimed our base is a “symbol of arrogant lawlessness” and is “a metaphor for Yankee imperialism,” which “has outraged Latin Americans for over a century.” Charles Lemos on the [MDD blog](#) argued that it is “time to unwind an empire the United States should have never acquired in the first place. Moreover, the lease of Guantánamo Bay is likely illegal under international law.”

However, in light of the Administration’s inability to close the detention facilities, the lengthy military commission proceedings ahead, and the strong opposition the return of GTMO to communist Cuba would engender in Congress, it is likely that GTMO will remain under the stewardship of the U.S. Navy for the foreseeable future.

The Case

During the week of April 14, 2014, the Military Commission was set to continue pretrial hearings in *U.S. v. Khalid Sheikh Mohammed, et al.* As widely reported, KSM is the alleged mastermind of the September 11 attacks on the United States. Charges against him and his four co-defendants, who were also allegedly involved in the September 11 attacks, include conspiracy, murder in violation of the law of war, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, destruction of property in violation of the law of war, terrorism, and material support of terrorism.

The United States captured the defendants in 2002 and 2003 and held them in secret detention facilities abroad. In 2008, they were transferred to the detention facilities at GTMO and the initial [arraignment](#) was conducted on June 5, 2008. Soon after President Obama took office in 2009, he issued an executive order to close the GTMO detention facility. Amid concerns about national security, Congress intervened. Using funding restrictions, they prohibited transferring the non-citizen Guantánamo detainees to the United States for prosecution (or any other purpose).

The current 9/11 proceedings began in May 2012 with a twelve-hour arraignment hearing of the five defendants. The Military Commission has conducted several rounds of pretrial hearings since then, most recently in December 2013.

Protection of the attorney-client privilege has been a hotly contested issue in the case. In January 2013, the defense counsel raised concerns about microphones disguised as smoke detectors located in rooms where counsel met with defendants. The judge, Army Colonel James Pohl, ordered prison officials to remove the microphones, “[t]he sooner the better.” At the same [hearing](#), the defense counsel questioned a military official about the seizure of confidential documents from the cells of three defendants, including KSM.

The trial is currently scheduled for early 2015, but there is real doubt that it will occur before 2016 or even 2017. After this week’s proceedings (April 12-18, 2014), it is hard to see how Chief Prosecutor Army Brigadier General Mark Martins will maintain the schedule, absent additional and longer hearings at GTMO, prior to January 2015. Nevertheless, Martins expressed confidence that the trial schedule would remain in place.

The visit to GTMO begins at the "President's Airport," Andrews Air Force Base, located in suburban Maryland. Seating on the Delta Charter Flight is open but each group was asked to board and sit in groups. Media and NGO observers sat in the back, followed by the defense team, prosecution team and the Judge. The first class cabin was reserved for the 9/11 victims' family members.

Traveling in the back with the media and NGO folks had the feel of a campaign plane or bus: lots of information, gossip and theories floated through that part of the cabin. One defense-associated lawyer explained that if the case ever gets to trial, KSM would likely argue that he planned 9/11 out of "necessity" to defend the Muslim Ummah (people or community) from America, which had "attacked" them by establishing bases in Saudi Arabia, home of the Holy Places, and

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"abandoning" the people of Afghanistan after the Soviets left the country on February 15, 1989. Since the Ummah, as represented by Al Qaeda, did not have an Air Force to attack the United States, it was forced to obtain one by hijacking civilian airliners. I mentioned that such an argument probably will not play well before a jury of American military officers. The response was a shrug.

We landed at Leeward Point Field and cleared the military equivalent of customs by showing our passports (no Cuba entry stamps) and our travel documents supplied by the Office of Military Commissions (OMC). This was my second visit to GTMO. While serving as Co-chairman of the Public Private Partnership for Justice Reform in Afghanistan, I spent a day on base in 2009 viewing the Joint Task Force's detention facilities and receiving a briefing on detainee issues from the then-JTF commander. There is also a bit of family history at the base. My father deployed to the naval station as a young Marine Corps officer during the Cuban Missile Crisis.



In 2009, I observed the detention camps and, at the time, was impressed by the professional manner in which our young soldiers and sailors undertook the difficult custodial work with which they were charged. I also noted the humane and clean living, recreational, culinary and medical facilities provided to the detainees. The International Committee of the Red Cross (ICRC) has routinely monitored the detention facilities since 2002 and recently completed its 100th visit to GTMO. Not surprisingly, given the security surrounding the proceedings, the NGO observers on this visit are not permitted to

visit the detention facilities, something that is not appreciated by several of the human rights organizations.

GTMO definitely has the feel of a naval facility. Each morning at 8 a.m., all activity comes to a halt for the National Anthem, which is played over the base's loud speakers. What makes GTMO really unique is that its surroundings transport you back half a century. The base architecture, paint scheme and period buildings are similar to the old Canal Zone or the Presidio. Old pill boxes, naval gun emplacements and ammunition bunkers dot the base and recall a time when it was a frontline base in the Cold War. The massive piers in the harbor once regularly hosted American battleships. Just off the piers are long rows of at least 50 pay phones. It is easy to imagine hundreds of sailors charging down the gangways to the phones to place collect calls to wives and girlfriends following a cruise. Like the machine gun nests, the pay phones now belong to another era. The paint peels on old unused buildings throughout the base, which in many places are in a state of arrested decay. The Cuban Cultural Center, once home to the naval station's hundreds of Cuban employees, is empty. The last two Cubans, who enjoyed grandfathered jobs on the base, retired two years ago. They have been replaced by hundreds of Filipino workers (ironically recalling earlier days in the U.S. Navy). Jamaicans also make up a large component of the contractor force.

Housed within this cocoon of an aging imperial naval station are modern detention facilities and courtrooms. While only a few hundred miles from the continental United States, the base has an expeditionary atmosphere. The housing at Camp Justice consists of tents (thankfully, air conditioned due to the good work of Air Force engineers) and container-style units built on the runways of the old McCalla air field. The courthouse is surrounded by rings of security with check points, towers, chain link fencing and concertina wire. Military Police (MP) patrol with side arms.

Morale is sustained in the "little America" base town by free admission to nightly first-run movies shown at a balmy outdoor theater. The GTMO Scuba shop is the best stocked and friendliest dive shop I have ever visited. Scuba diving is the preferred hobby of the soldiers and sailors who come through GTMO on nine or twelve month rotations. Many arrive never having participated in the sport and leave as PADI-qualified Dive Masters or Instructors. The packed dirt nine-hole golf course, where only the greens are watered, does not offer the same experience to golfers as the Caribbean does for the divers. It was, however, the site of a recent PGA morale-boosting tournament attended by several top professionals.



After checking into our tents, the defense lawyers, in a GTMO tradition, hosted the NGO observers for a backyard BBQ. The hospitality was kind and the informal briefings were generous. Eating hot dogs and drinking Coca Cola on a hot Cuban night just miles away from the "cactus curtain" was interesting.

April 13, 2014: Hearings begin

Sunday brunch with fellow NGO observers on the patio of the GTMO Officer's Club had an "old school" feel. In light of the location, there were, of course, several attempts at the famous Col. Nathan Jessup line in "A Few Good Men" - "I eat breakfast 300 yards from 4,000 Cubans who are trained to kill me, so don't think for one second that you can come down here, flash a badge, and make me nervous."

In the overseas equivalent of a Hollywood star sighting, we watched from our table as legendary war photographer James Nachtwey shot photos of Canal+ White House correspondent Laura Haim, as she in turn interviewed several 9/11 family members. Several of us had the opportunity to talk with Nachtwey, who was the subject of the 2001 award-winning documentary “War Photographer,” over dinner later in the week. He was very generous with his time and perceptive in his observations.



One of the highlights of visits to overseas military bases for me is the ability to attend worship services with our soldiers, sailors, airmen, marines and coast guardsmen. Given how little free time our deployed troops often have, it is heartwarming to see them enjoy the fellowship and spirit that is present at these services. There is a mixing of branches and ranks in such a setting that is unique within the military.

We were at the naval station during the Christian Holy Week as well as the Jewish Passover holidays. Visitors to GTMO were welcomed by the Chaplain's column in the JTF's weekly newsletter. The Chaplain, Commander Stephen A. Gammon, noted the religious significance of the week and provided information on where different denominations would hold their services.

GTMO is home to a beautiful turn-of-the-century chapel. It is also home to a number of Roman Catholic roadside shrines built by Cuban base employees when they were the mainstay of the civilian work force. It was hard not to contrast the infrastructure for free worship at GTMO with the situation just over the “cactus curtain” in Cuba, where the U.S. Department of State's annual International Religious Freedom

Report states: “[m]any [clergy] feared that direct or indirect criticism of the government could result in government reprisals... or other measures that could stymie the growth of their organizations.”

April 14, 2014: Conflict of interest

Notwithstanding GTMO's remote location and status as a naval station located on a foreign island, where only military personnel and approved visitors are permitted, the security around the Military Commission court facilities is a ring of steel. IDs are checked at multiple points by armed MPs. Magnetometers are passed through. The 9/11 families, NGO observers and the media are escorted by military personnel at all times. No cameras, phones, laptops or electronic devices of any kind are allowed within the premises. Special software and sensors can detect them and will alert security personnel to the offending device (which occurred once).



The 9/11 families, the NGO Observers and the media share the gallery at the back of the courtroom. The media contingent included the Guardian's Spencer Ackermann, Dave Cullen, writing a freelance piece for the New Republic, French war correspondent Laura Haim, James Nachtwey, a Dutch reporter on assignment and the dean of the GTMO press corps, the Miami Herald's Carol Rosenberg. As no cameras are allowed in the courtroom, talented courtroom artist Janet Hamlin busily sketched pictures of the participants in the proceedings.

The courtroom follows the traditional layout with a bench, witness and jury boxes and a well where stenographers and clerks work. The five defendants sit at tables in a row, one behind the other, with their four to six person legal teams composed of uniformed Judge Advocate General lawyers and learned civilian counsel, several of whom are famous for their past death penalty cases.

The prosecution team is an interagency affair lead by General Martins and his JAG lawyers and supplemented by Department of Justice prosecutors. They sit in rows of desks facing the bench with the jury box to their right.

KSM sits to the far left of his table, as do all defendants. He was not apparently restrained from our vantage point but could have been shackled. He is pudgy and has a bushy red beard that is reportedly dyed using fruit juice and berries from his meals. Each day he wore a white turban and shalwar kameez or dishdasha (it was hard to tell which as he sat during our time in court) covered by an Army woodlands-style battle dress field jacket.

Immediately behind him sat Walid Bin Attash, a Yemeni. Bin Attash was attired the same as KSM but wore a 1990s desert-style battle dress field jacket. Ramzi bin al Shibh, another Yemeni, wore the same dress as Bin Attash. Ali Abdul Aziz Ali (aka Amar the Baluchi) from Pakistan wore a white thobe and red and white checkered head dress like the one that Yasser Arafat made famous. Mustafa al Hawsawi, a Saudi, wore a white dishdasha and white turban.

Each of the defendants brought their own prayer rug and large plastic box containing their legal papers with them to court.

Approximately 25 Army MPs provided security within the courtroom. Most stood along the wall closest to the defendants seats. All had “Internal Security” in place of name tags on their uniforms. This is standard practice for personnel at the camps, who still fear Al Qaeda reprisals on themselves or their families if their identities are discovered by associates of the detainees. When I asked one soldier where he was from, he politely declined to tell me; a first in my many years of interactions with our soldiers, who usually enjoy talking about home. They know the potential consequences, even in the United States, of being on an Al Qaeda list.

The first day of court ended in dramatic fashion just 36 minutes into the proceedings. My fellow NGO Observer, Brett Max Kaufman, a young ACLU fellow and former 2nd Circuit clerk, posted the following accurate [summary](#) of events on his blog:

Just minutes after Army Col. James Pohl called the courtroom roll, defense lawyers revealed that, hours earlier, they had filed an emergency motion seeking to stop this week's proceedings and asking the court to investigate yet another instance of alleged government meddling with defense counsel in this death penalty case. This time, said James Harrington — lead counsel for bin al Shibh — two FBI agents visited the Defense Security Officer assigned to bin al Shibh's defense team on the morning of Sunday, April 6. Each team of defense lawyers is assigned a DSO, who vets classified filings and acts as a liaison with the government on classification issues. Defense lawyers described the DSO as charged with helping that team further its mission of mounting a vigorous and effective defense and his work falls within the attorney-client privilege. Harrington suggested that the visit, during which the agents had inquired into various activities of all five defense teams, was part of an investigation into wrongdoing on the part of the defense attorneys themselves. (Carol Rosenberg of *The Miami Herald* reported that the investigation relates to the publication of a 36-page document by defendant Khalid Sheikh Mohammed in January — a document several 9/11 defense lawyers say was never classified, is not relevant to the pending prosecution, and was distributed widely last year to all lawyers for both the defense and the prosecution.) According to Cheryl Bormann, the lawyer for defendant Walid bin Attash, the agents also had the DSO sign a ‘Sensitive Information Non-Disclosure Agreement,’ a document that the attorneys had filed with the court for inspection as part of their new motion. Defense attorneys also raised a related concern: Have other members of defense staffs been approached — and gagged from ever saying so? Today in court — before a stunned gallery of journalists and NGO observers — the defense lawyers asked Judge Pohl a simple question: How can they advise their clients on *any* issue if they are uncertain whether serious conflicts of interests (such as an FBI investigation of the lawyers) might prevent them from giving those clients unbiased, confidential advice?”

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April 15 & 16, 2014: Recess

Judge Pohl ruled on what had been expected to be the primary issue for the week’s hearing: whether alleged 9/11 co-conspirator bin al Shibh is competent to stand trial. Since the Defense is not disputing bin

al Shihb's competence, the judge held that the presumption of competence meant that the hearings could proceed until some proved the Yemeni defendant was incompetent.

The FBI's investigation of the defense team, however, remained front and center in the brief proceedings. Kaufman captured the Defense position and Judge Pohl's concern in his [blog post](#):

Defense lawyers have asked for an independent inquiry by the military commission into the circumstances of the FBI investigation, which reportedly centers on the publication early this year of a series of letters written by 9/11 defendant Khalid Sheikh Mohammed. They argue that only after the court examines the facts surrounding the DSO interview — and any other FBI contact with members of the defense teams — can they determine whether they are faced with a conflict of interest that would undermine the effective representation of their clients. Judge Pohl seems inclined to agree; in court today, he raised the possibility that, perhaps as soon as next week, he would appoint independent counsel to any of the accused whose defense has now been implicated by a potential attorney-client conflict of the government's making. As David Nevin, lead attorney for Khalid Sheikh Mohammed, explained in court on Tuesday, there are only two roads ahead: 'One of them is that I go, and that anybody who is subject to the investigation goes also; and the other is that Mr. Mohammed waives the conflict after being independently advised.' The four other defense teams and their clients confront the same issue.

Over concerns raised by the DOJ's lead counsel, but not General Martins, Judge Pohl did order all members of the five defense teams to inform their lead counsel if any of them had been contacted by the FBI.

With the military commission in recess for the day while the defense prepared discovery requests relating to the FBI investigation, 9/11 family member frustration with the slow proceedings boiled over. It was reported within Camp Justice that many of the family members were blaming the defense teams, the NGOs and the FBI for the delays in the proceedings.

General Martins hosted a morning meeting with the NGOs for an "off the record" Q&A session. He fielded tough questions from the human rights lawyers and law student observers. His answers were direct and reasonable. He was modest and engaging. While he may not have won many converts among those who oppose the military commission process, I believe that he earned their respect based on his integrity and openness.

April 17 & 18, 2014: Full circle

It is an odd experience to sit in a civilized court room setting and observe the behavior of a man who planned the mass murder of 3,000 Americans. My thoughts turned to the famous black and white stills of the courtroom at Nuremberg where justice was dispensed to Nazi war criminals.

The military commission session today was basically a short status conference in which Judge Pohl attempted to determine a way forward. After a total of just over three hours in court over the course of four days, the military commission proceedings ended just where they started on Monday – centered on the alleged FBI investigation into KSM's defense team.

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Prior to departing GTMO, General Martins issued a brief statement saying:

Of course, our hearts go out to the family members of those who were killed on 9/11, and we can certainly understand their frustration. Still, we are determined to move forward under the supervision of the Judge. When each of us was assigned to this important mission, we were prepared for a marathon. We remain so.

Final thoughts

America still produces heroes and they can more often than not be found in our armed forces. It is our young soldiers, sailors, airmen, marines and coast guardsmen, however, that are most inspiring. Most of the uniformed personnel running our military are in their late teens and early twenties. They are professional, courteous, and courageous. They are called upon to exercise judgment well beyond their years. America can be proud of its troops, and that goes for those involved in the military commission proceedings as well.

General Mark Martins looks the part of the Chief Prosecutor. He walks the walk. A warrior with a Ranger tab and a Harvard law degree, he passed up his most recent promotion board and a sure second star to stay in his current role to "get the job done" for the American people and the 9/11 families. Hopefully, when that happens, the Army will reward General Martins with the additional star he deserves and keep him leading our troops.

Major Jason Wright is an impressive young Army officer with enough medals and ribbons to show that the Army believes the same. He is assigned to the KSM defense team. Under other circumstances, I have no doubt that Major Wright would be fully engaged in any effort to "find, fix and finish" KSM. But as his assigned defense lawyer, he resigned his active duty Army commission rather than leave the defense team and report to the JAG Advanced School, a required step to promotion. Major Wright believes that his ethical duties as a lawyer require him not to abandon his client mid-case. He announced the decision to the court without complaint about his orders or a request for the Judge's intervention. It was a gutsy move based on principle.

America is defined by its commitment to the rule of law. Its written constitution remains the model document for almost all the nations of the world – whether they abide by the principles of liberty enshrined in the document or not. It is not surprising, therefore, that the press, many of the NGO observers, law professors and others of goodwill are deeply concerned with the rights provided to the accused war criminals in these proceedings. This is a badge of honor for our country, the very foundations of which were built on the ideals of an adversarial system, right to counsel, trial by jury (including in a military commission) and a neutral judge to preside over criminal proceedings. Judge Pohl's careful handling of the FBI investigation and attention to the defendants' attorney-client privilege are in the best traditions of American jurisprudence.

Too often the rights of victims of crime – in this case, mass murder in a heinous act of terrorism – are forgotten. The United States military has not forgotten the 9/11 families. Their presence at the proceedings is a poignant reminder to all of us that thousands of families are still suffering the consequences of the attack. On the ferry ride across the harbor to catch our plane home, one father, accompanied by his eldest son, shared with me the story of the loss of his son.

The young man was a 26-year-old commodities trader who was killed on impact when one of the hijacked American Airlines jets slammed into his office in the Twin Towers. The father spoke with genuine pride in his son, who had moved to New York, grown to love the city and found success and reward in his young career. He told me of his son's soccer games as a kid and how his son always sought out risks. He talked about his son's friends, who now have families of their own. Despite the passage of years, this dad was not and never will get over the senseless murder of his son.

The Military Commission cannot bring back his son or the other 9/11 family members' lost loved ones. It can and, based on my observations, likely will bring justice to the perpetrators of the 9/11 atrocity in a manner that is consistent with our nation's enduring commitment to the rule of law.

