

RONALD W. MEISTER

Virtually all the talk in the departure lounge at Andrews Air Force Base on Monday morning, November 16, was about the Administration's announcement the previous Friday that Khalid Sheikh Mohammed and five other Guantanamo prisoners would be tried on charges of planning the September 11 attacks in federal district court in Manhattan. Although no hearings in the "9/11" cases were scheduled for the upcoming week, that decision loomed over all those preparing to embark on what was for the Gitmo run a luxurious means of transport – a Delta Airlines charter flight, in place of the uncomfortable Air Force bucket usually assigned to the trip. Military and civilian counsel for habeas defendants not charged with crimes wondered whether the decision augured well for their clients, who might be closer to release; counsel in pending commission cases tried to discern the government's rationale for trying some defendants in civilian court and others before the commission, so they could determine on which side of the line their clients fell; commission staff and other veteran Gitmo travelers wondered if they would soon be out of a job, much as they had wondered the same thing almost a year earlier, when the President had announced the facility would be closed; and the sole reporter, Carol Rosenberg of the *Miami Herald*, who had attended virtually every hearing open to the press, flitted among the various groups, gathering quotations.

Meanwhile, the five NGO observers, among whom I served as NIMJ's representative, began their job of observing even before the plane departed. The others in our little group, which would be required once we arrived to travel in a pack under close Marine guard supervision, included representatives of Human Rights Watch, Human Rights First, the American Civil Liberties Union, and the New York City Bar Association. Two were Gitmo veterans; the other three, including myself, were making our first trip.

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Prior NIMJ travelers to Gitmo had provided three valuable pieces of advice: (1) keep your ears open in the Andrews waiting room; (2) ask the defense counsel where to eat; and (3) bring shower shoes. All this advice was good.

The flight was, as all air travelers wish, uneventful, though the civilian flight attendants provided a note of amusement on landing, by announcing, "Welcome to Guantánamo Bay. The local temperature is 90 degrees. For those of you who need gate information for connecting flights — you're on the wrong plane."

Guantánamo Bay is an oddity as a Naval Base, and not only because no ships are homeported there, and because members of all branches of the service, as well as stateside and Jamaican National Guard troops, provide support. More significantly, and almost exclusively to the public eye, it is a prison camp. Security is higher and different than in most operational bases. On arrival in the processing hut, our planeload of visitors was lined up against the wall and ordered to place our bags against the opposite wall, where bomb- (and presumably drug-) sniffing German Shepherds went to work. Our accommodations — large six-person tents with bare bulbs and air-conditioners turned up to "stun" — were in Tent City, adjacent to the high-walled barbed-wired enclosure that served as the 9/11 courtroom complex. Floodlights glared down eerily throughout the night, obscuring the hoped-for viewing of the Perseid meteor shower that might otherwise have been spectacular on a tropical isle.

The relatively little courtroom activity during our week's visit showed the inefficiency of the process. This week, trial and defense counsel, a judge, and courtroom and staff personnel flew 1,300 miles at government expense for a preliminary hearing in a single case. As will be seen, the defendant refused to attend, and for all it mattered, the proceedings could have

been conducted in Washington, D.C.

Those proceedings were in the case of Mohammed Kamin, who is charged with providing material support for terrorism by his actions in Afghanistan in 2003. Unlike every other Guantánamo defendant, Mr. Kamin is charged only with this single count, which his counsel vigorously argue is not a crime triable by the commission. They have been arguing this for months, buoyed by statements from the General Counsel of the Department of Defense that "providing material support" should not be triable by the commission.

This week's hearing, however, focused on the kind of pre-trial maneuvering that characterizes so many of the proceedings before a tribunal that is making up its rules as it goes along. A closed hearing on procedural issues the day before had considered various issues and set the upcoming agenda. Now, the public session — to the extent the five NGO observers and one representative of the press can be considered the public — began by taking up the question of the accused's refusal to attend. An hour was devoted to testimony from the commission's representative that, after she had read the accused a statement describing his right to attend proceedings in his case, he had taken to his bed, pulled the covers over his head, and waved her away. After perfunctory questioning by the prosecution and defense, the presiding judge found that the accused's absence from the hearing was voluntary. With a caution to defense counsel that a time might come when the court would compel the accused's attendance, the judge moved onto other issues, among which were: (1) a defense motion to compel production of the defendant's seventeen statements to investigators; (2) a defense motion to compel the government to produce the civilian witnesses who had participated in interrogations that the defense contends may have been coercive and tainted the accused's subsequent statements; (3) a defense motion to compel the command to move their client to a

different cellblock, where he would, they hoped, be subject to less peer pressure to refuse to cooperate with his counsel; (4) a defense motion to sanction the prosecution for failure to comply with discovery obligations; and (5) a motion to dismiss for failure properly to allege jurisdiction. One had to admire the doggedness of defense counsel, particularly the Navy Lieutenant Commander who has the admiration of many colleagues for his persistence. His gains from this session, though, were less obvious, as the court, in response to the respective applications, expressed the views that (1) the government should do its best to get the statements, or explain why they cannot; (2) the government having expressed its inability to find the witnesses, he could do nothing more, and he declined to set a deadline for a progress report; (3) he had no power over detainee assignments; (4) the government was doing the best it could; and (5) a motion to amend the allegations might be necessary.

It was hard to avoid the feeling that the quality of mercy in these proceedings was being strained through a colander filled with molasses. Mohammed Kamin has been a prisoner — forget the government's euphemistic term "detainee" — for over six years, the last five at Guantánamo, and he cannot get anything like what in the civilian courts would be considered a speedy trial or production of the most basic items in discovery. The judge himself freely admitted that he had long been expressing impatience with successive teams of prosecutors, but seemed entirely disinclined to impose any meaningful sanctions. In light of the defendant's own boycott of the proceedings, what resulted was a theater of the absurd where both the prosecutors and the defense counsel represented parties over which

they had no control, at a hearing half a world away from where the facts to be tried took place, to which all participants had to travel at enormous expense.

A word should be added in commendation of the hospitality extended to the NGO observers. While the accommodations were primitive and the food rated about one and a half on the iguana scale, our escorts could not have been more personable or accommodating. We were made to feel welcome, and accorded as much liberty as could be allowed under the circumstances. The commission counsel and support personnel were congenial and informative, and did their jobs with dedication and, for the most part, skill. There was a minimum of cynicism or complaint. Thousands of personnel support the Guantánamo Bay Naval Base, and, despite the generally distasteful nature of their assignments, they serve their country well. Guantánamo Bay has become an alien landscape, reflecting little credit on civilian policymakers, but the uniformed men and women of the command deserve our thanks.

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