

Human Rights Watch

Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

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The delay allows us to spend some quality time with Charlie Swift, the former Lt. Commander and military defense lawyer who took his clients case to the Supreme Court and back, getting military commissions ruled illegal and cornering the administration into seeking new congressional authorization. The new and improved military commissions still fall far short of either the standards of courts martial or of international human rights and humanitarian law for independence, defendants rights, transparency, presumption of innocence, you name it. But Charlie is going to put them to the test anyway, seeing if they will hear real evidence that his client, Salem Ali Hamdan, wasnt an unlawful enemy combatant and therefore cant be tried before them.

Hamdan is a Yemeni fellow with a fourth-grade education who reportedly had a hard time making a living at home. He drifted to Afghanistan where he began driving people to and from a farm for a rich and locally powerful guy, eventually making enough of a living to get married and bring his wife to join him. Unfortunately, he also got to chauffeur the rich and powerful guy himself and that was Osama bin Laden. In the rest of the US, this sort of proximity to notoriety might get someone a spot on a talk show, but at Guantanamo, it seems to be enough to justify indefinite detention. Its hard to see how someone with this resume counts as one of the worst of the worst in the pantheon of terror, but thats how the administration characterized the denizens of Gitmo. Hamdan has been here since April 2002.

Charlie, however, is taking seriously his clients protestations that he had no intent to wage terrorism against the US and in fact had no knowledge of or part in bin Ladens conspiracy. The lawyer has brought evidence and witnesses, and a snazzy PowerPoint presentation to introduce them. In bravura style, he is planning to reverse conventional wisdom that anyone associated with al-Qaeda had to be an unlawful enemy combatant, or even in the loop of bin Ladens terrorist schemes. People like Hamdan, he is prepared to show, were not the stuff of terrorist cells, but were in fact part of the uniformed, disciplined Arab unit of Afghanistans armed forces. A big question is whether hell get to put any of this evidence on.

The prosecution says no a lot, says Swift, in what must be a rare understatement. Well see Wednesday what the military commissions judge says.

December 4

We have relatively luxurious quarters in military bachelor barracks, complete with fancy hotel soaps and showers, and fortunately extra blankets as it is chilly at night. The physical setting of the base is quite beautiful, with grassy hillocks sloping down to the ocean and a big, unpolluted sky.

Of course many of the detainees dont get to appreciate any of this, as their lawyers, who are lodged with us, report. Many are held solitary in metal and concrete cells with the lights on 24/7, no windows, and a thin suicide blanket for covering. The respite allowed for exercise (really cell search time) is release into parallel corridors as one attorney said, sort of a dog run with a mesh ceiling showing the sky in which they can pace back and forth. This privilege can come at any time including the middle of the night. The Australian, David Hicks, the only detainee to have been judged by a military commission so far thanks to his plea agreement which got him a nine-month sentence and return to Australia, reportedly grew his hair long so he could block out the light and sleep at night, as it was forbidden to pull even the thin sheet he had over his face.

Some of the lawyers say that their clients are all in varying stages of despair and depression, and that their quarters and treatment regime is often unconnected to their behavior or whether they are still deemed important to detain. Space limitations, whether the detainee can be returned to his home country these appear to be the reason someone is in a high security block or still in Guantanamo at all. One lawyer laments the lost opportunity to positively influence those who are released. A lot of detainees are young, and their stay here has only reinforced competition to be pure and hostile in the face of harsh treatment. He speculates that a lot could be done to counteract this

so that people would be sadder and wiser, rather than angry or mentally ill upon release small things, like allowing family calls (he thinks most mothers would chew out their sons and tell them I told you so).

We are treated as though we are potentially subversive but esteemed guests, our movements controlled by our military escort. This is not all that different from how I've been treated as a human rights activist on other military bases, but the great courtesy and friendliness also seem to reflect the isolation and disrepute of this place, which weigh heavily on the personnel assigned here. The press may speak with us, but only outside the various buildings where the hearings and briefings take place. They have their own escort and bus, and there is a wall with a big locked door between our internet corner and their room which we are not supposed to open. But we are all sleeping in the same barracks and interacting; these strictures seem faintly ridiculous and un-American to everyone involved.

While the lawyers have been meeting with clients, and the press have been trying to interview officials on suicide attempts at Gitmo, four human rights monitors have been essentially assigned to sunbathing, though we did manage to get a ride across the bay and a birds-eye view of the base. On one side of the tall ridge you can see the brightly lit detainee camps Camp Echo, Camp 6, Camp 4, Camp Delta, and Camp Iguanathe barracks for the interrogators, the rooms for lawyer visits. On the other side of the hill is the rest of the base: barracks, officers cottages, baseball field, a golf course, swimming pool, ceramics studio, bowling alley, tennis courts, elementary school, movie theater, library, playground, basketball hoops and of course, the McDonalds, the Subway, the Starbucks. Healthy-looking folks jog by the side of the road, where the streetlights are hung with Christmas lights in the shape of snowflakes and candy canes.

We also caught a glimpse of the yellow building that houses the military commissions, and the vast new tent city that is growing up next door. The dun color tents are where the authorities intend to house the lawyers, the press and the observers in the near future. Word has gotten out that they are aggressively cooled (to discourage bugs and banana rats), noisy from fans, and equipped with sleeping bags and not private toilets. That should surely cut down on civilian visitors and shorten up the lines to buy those attractive mugs with the Guantanamo Joint Task Force motto, Honor Bound to Defend Freedom, superimposed on a picture of barbed wire.

We hear that people are already lining up in front of the Supreme Court in Washington, DC to secure places for the argument in *Boumediene v. Bush* as to whether Gitmos Combatant Status Review Tribunals are an adequate alternative to the federal courts. Needless to say, no one is lining up in front of the military commission building to hear Salim Ahmed Hamdan argue that he should have been granted an Article 5 determination of his prisoner-of-war status. That's because they are already setting up the checkpoints and the roadblocks and our movements are all controlled.

Getting into the commission building is quite an effort. There are endless security checks. When we finally think we are near to being let in, we are told that the few papers we have brought copies of the charges, the Military Commissions Act, the Military Commission Rules, the briefs, bound, not stapled lest a terrorist use the staple as a weapon are not allowed in, even though observers have always brought these in the past, as key resources to understanding what's happening in front of us. I can bring in a bottle of water, a pen, and a pad, but not the law. I complain that I never have encountered this sort of Kafka-esque restriction in any other court where I've been an observer, and a journalist complains as well. At a recess, we are given photocopies of the charges. We can't change seats to see the proceedings better, even though it's hardly crowded. The courtroom looks like any American courtroom, but smaller. There are only about 30 people in the gallery, of whom a third are in uniform as military police, military escorts and the like.

Hamdan is escorted into the courtroom rather roughly by some burly guards. He is a small, meek-looking man who smiles in a pleasant way and looks stressed out and confused. The hearing is delayed because the headphones for simultaneous interpretation aren't working properly. At last, a solution is found that allows only Hamdan to hear through headphones, and a member of the defense team to sit with the interpreter behind a wall to monitor the interpretation, but without much ability to intervene in real time if things go wrong as they have in the past. Although there are several Arabic-speaking observers and journalists, they can't hear the translation because there are no working headphones for them.

Navy Captain Keith Allred, the judge, is a down-to-business guy who doesn't hesitate to tell counsel when he's lost the thread. We lose the thread as well, not least because several motions have been made since we arrived in Gitmo and of course no copies are available.

The action begins with the argument of a motion to dismiss for lack of jurisdiction. Hamdan, who was initially classified as an enemy prisoner of war, contends he is entitled to be treated as such unless and until a competent tribunal under Article 5 of the Third Geneva Convention finds him to have a different status. The judge wants to know what the difference is between an Article 5 tribunal and his proceeding. A key difference is that an Article 5 hearing will consider whether Hamdan falls within the wider range of protected persons under the Geneva Conventions, including civilians in support positions to military units, and civilians who take up arms spontaneously, both of which may describe Hamdan's situation near the time of his capture. Such persons are entitled to POW status. By contrast, the commission presumes Hamdan is an enemy combatant and will only consider whether he is lawful or unlawful, without any consideration of other possible status. The judge reserves decision on this, but allows the defense to present evidence that might go to these issues.

On to the motion to compel witnesses to testify for the defense. Apart from Hamdan himself, his defense team has nine others. The first, a professor who is an expert on the organization of terrorist groups, was at first rejected by the prosecution, but then accepted once they actually talked to him. Hamdan's mother and brother-in-law are dismissed as irrelevant and speculative by the prosecution, but the judge allows their testimony by telephone if it can be arranged. Another witness, a detainee who was captured with Hamdan, may be allowed if the Department of Defense agrees he can have testimonial immunity. Yet another detainee is rejected as too speculative by the prosecution, but the judge allows the defense access to him for a preliminary interview. Indeed, wherever the defense says it believes or expects a witness to testify in a helpful way, the prosecution objects to the speculation, apparently unaware that every attorney in the United States phrases such requests this way because you can't guarantee what the witness will really say on the stand. This can be a particular problem when the prosecution doesn't let you have access to them before your request.

The real excitement comes with the most audacious, but potentially important requests for three of the alleged highest leaders of al-Qaeda: Khalid Sheikh Mohammed, Ramzi Bin al-Shib, and Abu Faraj al Libi. The prosecution objects to these requests, saying they are of only speculative relevance. The defense explodes, and explains that as the masterminds and facilitators of the terror operations of al-Qaeda, they surely knew who was in on their conspiracy, and are more qualified than anyone to say if Hamdan was an insider, or a

hanger-on chauffeur who wasn't on the inside of anything more than Osama bin Laden's car.

The judge excludes the witnesses, not because they are irrelevant, but because they are high-value detainees, and the defense has not requested them early enough in the process to get through the security barriers the government has erected. Never mind that the defense filed their witness request by the deadline, and have been asking for access to interview them for weeks, with no response from the prosecution or word that there were security qualifications they must first acquire. Defense attorney Charlie Swift asks, "How can we comply with rules that we didn't know existed?"

That's sort of the problem here: these commissions are an impromptu, new-fangled affair, where the rules get changed or invented all the time. No one knows what to expect, or how the rules work, or whether there are rules. But fairness requires rules.

Judge Allred wants to keep momentum going, even though Hamdan would rather a delay so that he can get access to the key witnesses. And the argument for pressing ahead is unclear: there is no risk that Hamdan's liberty is at stake if he has to wait for his lawyers to get security clearances. Even if he is acquitted by a military commission, he isn't entitled to release. That's entirely at the discretion of the Bush administration, which claims that it can hold Hamdan so long as the so-called war on terror continues and Hamdan is deemed dangerous.

Perhaps on a day when the Supreme Court was hearing arguments as to whether Guantanamo detainees are entitled to go to federal court to seek habeas review of the basis for their detention, the military judge wants to show that the alternative form of justice at Guantanamo works. But if that's the case, the military commissions are the wrong process to highlight. In six years only one case has been decided: David Hicks, an Australian who pleaded guilty and is now finishing the last weeks of his nine-month sentence in his home country. Apart from Hamdan, only two others have been charged, Omar Khadr and Mohammad Jawad, both of whom were just teenagers when they were arrested.

Yet, it's full speed ahead anyway the hearing resumes tomorrow at 9:00 a.m.

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