

Human Rights Watch

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

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Hearings for Khalid Sheikh Mohammed and others here were marred by intimidation, partial censorship and a ruling that left justice in doubt.

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It should have been a great day for justice. The alleged perpetrators of the Sept. 11 terrorist attacks were finally appearing in court. This was their arraignment, at which they were to be formally charged of conspiring to cause the death of 2,973 people in the United States. But this was no ordinary court at all: It was a military commission, taking place more than six years after the terrorist attacks. And the quality of justice that the defendants were due to receive was in serious doubt.

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"This military commission is called to order," the judge, Marine Col. Ralph Kohlmann, announced on Thursday. Strangely, the movement of his lips and the sound of his voice were out of synch. For the press and human rights observers like me, sitting behind a glass wall in the gallery, there was a 20-second delay between the time something was said and the time we heard it. People in the courtroom would stand up to talk, but we wouldn't hear them until after they had sat back down. The mismatch was disconcerting.

Judge Kohlmann told the courtroom audience that the purpose of the delay was to protect classified information. He explained that the defendants had been "exposed" to such information, and that any statement any of them made was "presumptively classified." The 20-second delay was designed to give the security advisor, who was sitting in the courtroom listening intently, enough time to conduct the censorship deemed necessary.

Most of the daylong hearing went uncensored. [Khalid Sheikh Mohammed](#), the self-proclaimed architect of the Sept. 11 attacks, was given free rein to describe his wish for martyrdom, to criticize President Bush, and even to chant Koranic verses in a surprisingly melodic voice.

Mohammed called the security measures "red lines" and said he understood that they were intended to prohibit the audience from hearing what they were not allowed to hear. "They explained them to me," he announced, without saying who "they" were. "I don't have to mention about the country names, [and] I don't have to mention about the torture."

The U.S. government's sensitivity to those two topics is familiar to observers of these cases. The government fears that the defendants might divulge details about the way in which they were treated or, more to the point, tortured and about the countries in which they were held.

Mohammed and the other four detainees being arraigned Thursday were originally captured in 2002 and 2003, held for years in the custody of the CIA or the abusive foreign regimes working as its allies, and not [transferred](#) to Guantanamo until September 2006. In February 2008 the CIA director, Gen. Michael Hayden, [acknowledged](#) that Mohammed had been subjected to waterboarding, a form of mock drowning. Others were reportedly subjected to other abusive interrogation methods while in CIA custody, including extended sleep deprivation, the imposition of painful stress positions, and forced nudity.

Mohammed managed not to offend the censor during his interchanges with the judge, unlike two of his co-defendants. The censor twice muted the proceedings when defendant [Ramzi bin al-Shibh](#) who, like Mohammed and the other three, faces the death penalty in this case discussed the psychotropic medication he is taking. Another 90-second sound cut came when defendant [Ali Abdul Aziz Ali](#) was saying how he felt his treatment was "unfair and unjust." He started describing the day of his arrest and then his account dissolved into loud static.

Ali, the youngest of the five defendants, did manage to make a point about abuse in explaining his decision to refuse legal representation.

He said that he was skeptical of the U.S. government's desire to provide him "free-of-charge lawyers" since the government had "tortured [him] free of charge for years."

Although torture was an inescapable backdrop to the case, the question of legal representation was the centerpiece of the day's proceedings. And it was this issue, above all, that made the proceedings a failure.

"The matters that we're going to be discussing today are fairly simple," Kohlmann said at the outset, a comment that struck many observers as dismissive. The same attitude was apparent moments later when the civilian attorneys for Khalid Sheikh Mohammed and Ramzi bin al-Shibh tried to convince the judge that any ruling on the legal representation question should be postponed. The attorneys had previously tried to postpone the arraignment, describing how, because of the government's delays in granting them security clearances, they had had only minimal contact with their clients. (Mohammed and bin al-Shibh had spent more time with their military counsel, but, as one military lawyer pointed out, there are obvious reasons for a prisoner at Guantnamo not to view a uniformed military officer as an advocate.)

After a testy exchange with the lawyers, in which Kohlmann showed little interest in hearing what they had to say, the judge abruptly indicated that he'd had enough. "*Sit down*," the judge warned one of the attorneys, in a peremptory tone of voice that implied "sit down and shut up." This was to be the first of several such exchanges over the course of the day.

Wearing a white robe, thick black glasses and a white turban and looking at least 15 years older than the age he claimed (43) Khalid Sheikh Mohammed seemed confident and self-aware. Addressing him first, Kohlmann got straight to the point: "Do you desire to be represented by the lawyers who are seated at your counsel table today?"

After chanting for a while, invoking God, and promising not to name the countries in which he had been detained, Mohammed said: "I will not accept any attorney."

And that was pretty much it, in terms of the outcome, although the judge did walk Mohammed through the required steps for asserting the right to self-representation. (Do you understand that you could be sentenced to death? Mohammed: "This is what I wish." Do you understand that a lawyer knows the law better than you and is better able to keep an objective distance from the case? Mohammed: "God is all-sufficient." And so on.)

Mohammed's English was serviceable, if not fluent, and he seemed to enjoy the opportunity for verbal sparring with the court. The judge also allowed him to chat at length with his co-defendants, who were lined up at tables behind him on the left side of the room.

The content of these conversations jumped to prominence near the end of the day. From the perspective of proper justice, it was among the hearing's most appalling moments. Maj. John Jackson, counsel for the defendant [Mustafa Ahmed al-Hawsawi](#), informed the judge that before the hearing started, when the defendants were talking, his client had been intimidated by his co-defendants. As Jackson explained in greater detail after the hearing ended: "Khalid Sheikh Mohammed is saying to my client, 'What are you, in the American army now?' ... It was clear that Mr. Mohammed was attempting to intimidate Mr. al-Hawsawi into not accepting me as counsel. He [al-Hawsawi] was shaking."

In the end, al-Hawsawi told Kohlmann he wanted to represent himself, just as the four defendants interviewed before him had done. Although the judge decided to postpone ruling on al-Hawsawi's request, he did rule that three of the other four defendants had freely relinquished their right to counsel. (Because of the medication concerns that were raised in Ramzi bin al-Shibh's case, the judge also postponed ruling on al-Shibh's request to represent himself.)

It is a defendant's right not to accept legal counsel but only if he does so knowingly and voluntarily. "Voluntarily" means, of course, that it should not be done out of fear, and "knowingly" means that he should have a good understanding of the consequences of what he is doing. While there may be good reason to believe that one or more of the defendants would decide to represent themselves even if given a fair opportunity to choose, the judge's precipitous rush to address this question has badly harmed future prospects for the trial.

Five defendants who represent themselves are very likely to be five defendants who receive the death penalty faster. This may be a quick way to so-called martyrdom for those who declare they want it, but it is not justice.

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