

## NDAAs Report from Guantanamo Bay, Cuba

BY BRIAN PRELESKI, STATE'S ATTORNEY, NEW BRITAIN, CONNECTICUT

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ON OCTOBER 12, 2000, the USS *Cole* stopped in the Yemeni port of Aden to refuel. The refueling was a routine part of an unremarkable cruise for the guided-missile destroyer until 11:18 that morning when a small craft approached the *Cole*. The craft approached the port side of the *Cole* and detonated a massive explosion tearing a forty-foot hole in the ship's portside and killing seventeen American sailors. It soon became apparent to the American intelligence community that the bombing of the USS *Cole* was carried out by members of Al-Qaeda, and the effort to

bring justice to those responsible began.

America's hunt for justice led to Abd al-Rahim al-Nashiri. Al-Nashiri is alleged to have served as Al-Qaeda's chief of operations in the Persian Gulf and was the architect and planner of the *Cole* bombing as well as several other terrorist attacks. He was captured in 2002 in Dubai by agents of the United States and has been held since that time. After a previously aborted attempt to try al-Nashiri, he now faces the death penalty charged with perfidy, murder in violation of the law of war, attempted murder in violation of the law of war, terrorism, conspiracy, intentionally causing serious bodily injury, attacking civilians, attacking civilian objects, and hazarding a vessel.

Al-Nashiri joins five other defendants charged in connection with their roles in executing the September 11 attacks on the United States and who now have active cases pending before the military commission sitting in Guantanamo Bay, Cuba. Although trials before military commissions have a long history in American jurisprudence, having first been used by George Washington during the Revolutionary war in the famous case of Major John Andre, these are the first such tribunals since World War II.

NDAAs is serving as a non-governmental organization observer to the proceedings against these defendants, and I

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was able to spend a week as an observer representing NDAA. However, NDAA members and former members have more than observer status in Guantanamo. NDAA member and Connecticut Senior Assistant State's Attorney Lou Luba is currently a mobilized Coast Guard Reservist serving as the executive officer of the USCG Port Security Unit 301 in Guantanamo. Former NDAA member, New York prosecutor and retired military judge John Imhof is the officer in charge of the Office of Military Commissions on Guantanamo.

The United States Navy has had a continuous presence in Guantanamo Bay since leasing 45 square miles of land from Cuba for use as a coaling station in 1903. Sitting 400 miles south of Miami, Naval Station Guantanamo Bay as it is formally called, feels more like a small south Florida town than the heart of America's legal battle to bring justice to those responsible for Al-Qaeda's attacks on our nation. The Caribbean heat and humidity are omnipresent. The tallest structures on the base are the windmills that provide green energy to the service members and their families who call Guantanamo home.

Camp Justice, the setting for trial proceedings, sits on a former runway at McCalla Field on the windward side of the base. The camp is expeditionary, meaning it is designed to be packed up and relocated when needed. The current proceedings are taking place pursuant to the Military Commissions Act of 2009 that does not require the proceedings to take place in any particular location. The 2009 statute is the latest iteration of a formal framework to govern trials before military commissions that began with President Bush's November 13, 2001, Executive Order establishing military tribunals under his Article I authority and has been refined through subsequent acts of Congress.

The proceedings take place in a modern courtroom that would be thoroughly familiar to any trial lawyer. They are presided over by Colonel James L. Pohl, the Army's most experienced military judge. Judge Pohl, with grace and seemingly infinite patience, tries to keep the proceedings moving. This is especially challenging in a capital case scheduled to take place one week every few months with time blocked off for things like trial conflicts and even the Muslim holy month of Ramadan.

The pace of the proceedings would be familiar to any prosecutor with exposure to capital litigation. During the



*Courtroom at Camp Justice with the seals of the armed forces behind the bench.*

*Left to right: CDR Lou Luba, Brian Preleski, John Imhof.*



four days of hearings in the al-Nashiri case, lead defense counsel Richard Kammen, an experienced capital defender from Indiana, and his team of lawyers argued motions that ranged from dispositive motions to dismiss to the seemingly inconsequential issue of whether he could visit his client while in possession of a spiral notebook. On the spiral notebook motion, testimony was presented and between argument and evidence, approximately one-half day of court time was consumed.

The government's prosecution team is headed up by Brigadier General Mark Martins. General Martins is a West Point ('83) graduate, Rhodes Scholar and Harvard Law School alumnus. He capably leads a prosecution team that includes both military lawyers and civilian attorneys from the Departments of Defense and Justice. The focus of the prosecution team throughout the contentious proceedings was to obtain a scheduling order to ensure a date for trial

would be set. As in many capital cases, delay is the greatest enemy often faced in the courtroom not only for the prosecution but especially for the family members of the victims.

Despite the remote location and logistical difficulties of reaching Guantanamo Bay, accommodations have been made for victims' family members to attend the proceedings. Several family members were present in the courtroom throughout the week I was in attendance as were members of the media and representatives from other non-governmental organizations. The military provides transportation to Guantanamo for everyone involved in the proceedings and accommodations range from trailers to tents. Camp Justice will never be mistaken for a five star resort, but the beds are comfortable and after

a long day in court the air-conditioned tent is a welcome respite.

Although the proceedings were contentious, they were also meticulous in their attention to the concerns of everyone involved. Mr. al-Nashiri is represented by a diligent, capable defense team and they are countered by a zealous

government prosecution team. Judge Pohl presides over these proceedings in accordance with the federal law that established them and hundreds of years of common law precedent. Perhaps the most striking aspect is the care and attention America is giving to ensure a just process

in dealing with individuals accused of the most heinous crimes of our generation. Everyone involved is cognizant that the fairness and integrity of these proceedings will be judged not only by appellate tribunals but by history.

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