A FIRSTHAND LOOK AT FAIRNESS

American Legion joined human-rights groups witnessing Gitmo detainee hearings in December.

By Dave Rehbein, Leading candidate for American Legion National Commander, 2008-2009

The U.S. government extended an invitation to The American Legion to send an official observer to the hearing of alleged al-Qaeda member and terrorist Salim Hamdan at Guantanamo Bay Naval Station Dec. 3-7. At the time, National Commander Marty Conatser was traveling in the Far East, so he asked if I could represent the organization at the hearing. As an official representative of a non-governmental organization (NGO), I was invited to travel by military aircraft to Guantanamo Bay.

Other organizations represented included the American Civil Liberties Union, Human Rights Watch, Human Rights First and Amnesty International. A handful of journalists and a member of the U.N. Commission on Human Rights also attended.

The hearing’s purpose was to determine Hamdan’s status as either a lawful or unlawful enemy combatant. Captured in the last days of the initial phase of the Afghanistan war on the main highway and supply route between Pakistan and Kandahar, Hamdan is accused by the U.S. government of driving a car containing two SA-7 anti-aircraft missiles. He was not wearing a uniform or other markers indicating official status in the Taliban army.

The Geneva Convention governs the status of all combatants in wars between nations. Since both the United States and Afghanistan are signatories to the Geneva Convention, during the period when the Taliban was still the official government of Afghanistan, the status of all combatants captured is to be determined according to that document. At the hearing, both the prosecution and the defense presented evidence to a military judge.

As official observers, we traveled on an Air Force C-9 – the military version of the DC-9 – from Andrews Air Force Base to Guantanamo Bay. It was interesting to know we were walking across the same concrete to board the plane that we have watched the president and many foreign dignitaries cross on TV.

At Guantanamo Bay – “Gitmo,” as it is commonly called – we were housed in the visitors quarters and ate either in the base mess hall or at one of the civilian restaurants.

Since Gitmo is an active military base, we traveled everywhere with an escort – in our case, an Army lieutenant colonel serving with his Puerto Rican National Guard Military Police unit and detailed to the Joint Visitors Bureau. Quartered on the less-populated side of the bay, we had free access to the few facilities there but were escorted everywhere on the other side. Due to the presence of the detention facilities, security is quite heavy at the base.

Entering the courthouse required passing through four separate checkpoints manned by Army MPs. Once inside, we were restricted to one pen and a pad of paper for notes. No spiral notebooks are allowed, due to the possibility of using the wire as a weapon in the event someone slipped through the background checks in an attempt to aid the defendant. Two MPs flanked Hamdan at all times.

The hearing lasted approximately 21 hours. Not all of that time was spent working since the translator needed frequent breaks. Every word spoken in the courtroom during official sessions was simultaneously translated into Arabic for the defendant.

Originally, two translators were to relieve each other, but one of the two was challenged by the defense for inaccuracy, leaving one translator to handle all the duties.

The courtroom was state of the art, with a wireless sound system for translation and a computer system used for documents. The evidence was almost all received electronically, the only exception being a small number of pictures that were classified and could only be viewed by the prosecution, defense and military judge.

The computer system allowed the evidence to be viewed in any combination of the judge, prosecution, defense and audience.

The hearing broke new ground in two ways. It was the first legal proceeding for any of the detainees in which witnesses were called and testimony received. In addition, a grant of limited immunity was given to another of the detainees to testify on Hamdan’s behalf. In all, we heard testimony from five witnesses: three for the prosecution, two for the defense.
The prosecution presented Maj. Henry Smith, the commander of the combined U.S. Army Special Forces and Afghan Northern Alliance force that severed the Highway 4 supply route, capturing Hamdan in the process. He detailed his experience during Hamdan’s capture, his observation of the missiles, and his observations of the Taliban Army regarding uniforms and behavior.

Two civilian witnesses also testified for the prosecution. Both George Crouch of the FBI and Robert McFadden, a Defense Department counterintelligence investigator, had questioned Hamdan. They recounted the results of their separate interrogations, both speaking of Hamdan’s admission of his close, prolonged contact with Osama bin Laden prior to the USS Cole and East African embassy bombings.

The defense presented testimony from a second detainee, Mr. Boujaadia, who was captured the same day as Hamdan. His testimony was used to attempt to cast doubt on the account of Hamdan’s capture and which vehicle actually contained the missiles.

He was granted immunity in that his testimony that day cannot be used against him in later proceedings. Boujaadia has been cleared for release at a future date.

Brian Williams of the University of Massachusetts-Dartmouth also was called by the defense. Williams is an expert on groups that have formed to fight on the side of Muslims in places where Muslims have been suppressed, from Bosnia and Kosovo in the West, to the Uighur region of China.

He spoke from his knowledge of al-Qaeda and the Taliban, and their relationships with the Arab foreign fighters enlisted on behalf of the Taliban by bin Laden and al-Qaeda, known as the “055 brigade.”

Williams also referred to a group called al-Qaida al-Suba, which governed what he termed the “outside activities” of al-Qaeda – namely, operations like the USS Cole attack and 9/11 – with the implication being that Hamdan had not been a member of al-Qaida al-Suba and therefore should be declared a lawful combatant. Williams did not make that statement, but that was the intent of the defense.

Two other possible witnesses may yet present testimony. The military judge indicated that he was willing to take testimony over the telephone from Hamdan’s wife in Yemen if she had relevant information in his defense, and that access to a third detainee was granted for his examination if a potential disagreement on attorney representation for him could be resolved.

The judge will render a decision on Hamdan’s status following the testimony of those two witnesses and his deliberations. Charges have been filed against Hamdan and an arraignment conducted. If the judge’s decision declares him as an unlawful enemy combatant, a trial on those charges will follow.

In general, the hearing process I observed at Guantanamo appeared to me to be quite fair. Without having a legal background, I cannot speak regarding any of the legal issues surrounding every case of this magnitude, whether in a civilian or military court. It did appear to me, however, that the defense was accorded every opportunity to present its case.

The only possible problem was the defense’s request for access to three other detainees to ascertain if they had information on Hamdan’s status with al-Qaeda. They are considered to be high-value detainees, and the judge denied the request based on the lack of available time to work out arrangements with the government for access to the detainees. He also noted that the defense had no knowledge of those potential witnesses’ actual testimony. The defense replied that without the ability to interview them, there was no way to know what knowledge they may possess. This appears to be an issue that will need to be resolved at trial if the judge rules against Hamdan.

Discussions with on-site military personnel and the other NGOs – based on their experience at prior proceedings – suggest the process is becoming more open and much more reminiscent of the civilian justice system with which we are all more familiar. These proceedings remain in a military court, so some differences exist. It did not appear to me that those differences might result in a basic unfairness to the defendant.

These types of hearings have occurred during past wars much closer to the battlefield and the accused person’s capture. Though the length of time between capture and hearing is a problem, it is possible the defendant may receive a better hearing of his case due to the attention now being given to these cases. Past actions will no doubt leave some residual problems and what-might-have-beens, but based on the proceedings that I observed, I believe that thanks to the attention, the right actions are now being taken.

It was a privilege to be invited to observe these hearings but an even greater privilege to have spent several days among the men and women serving us in the military. I found myself greatly reassured and very comfortable in their presence. They are outstanding.