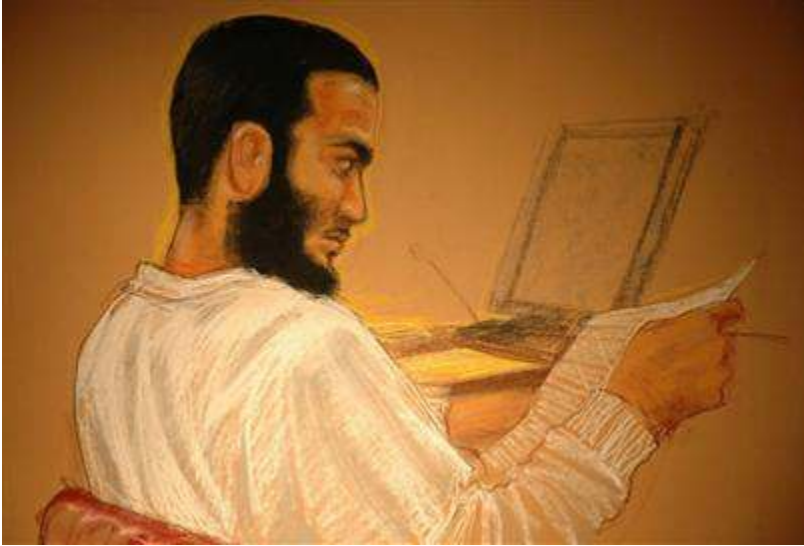


Khadr's shallow victory



Court drawing of Omar Khadr, who is currently imprisoned at Guantanamo Bay in Cuba.

Exotic as its Afghanistan-to-Guantanamo setting appears to be, the Supreme Court's recent ruling on Omar Khadr is remarkable for its lack of legal drama. In requiring the government of Canada to disclose materials it collected during its own interrogation of Khadr, the court may have handed the young Canadian a victory -- but it moved only inches from where the law previously was.

What Khadr really wanted, and what the court declined to give him, was a ruling on the Bush administration's unique process for trying foreign combatants captured in Afghanistan, Iraq and elsewhere. While the tone of the judgment suggests that Canadian jurists are unimpressed with even the latest version of the U. S. military commissions being implemented in lieu of regular criminal trials -- unsurprising, considering that our Constitution almost certainly prohibits us from creating any similar regime -- they did not say so. Instead, they deferred to the U. S. Supreme Court, which already ruled that the previous procedures in place in 2003 when Canadian officials interviewed Khadr violated international law.

Accordingly, civil libertarians have little to celebrate and security officials have equally little to pine about. If Justice Stevens of the U. S. Supreme Court could say in the case of Yemeni national Salim Hamdan that the authorization for U. S. military prosecutors to withhold crucial information violated "the judicial guarantees which are recognized as indispensable by civilized peoples," who, the Supreme Court of Canada says of itself, are we to say otherwise?

On a literal reading, therefore, Khadr holds that Canadian law, far from overriding U. S. legal process, is obliged to respect it. Two Canadian Security Intelligence Service officers questioned Khadr in his Guantanamo cell soon after his capture, and shared their notes with U. S. military authorities. Since the U. S. military violated its own court's interpretation of international law by failing to share the notes, the judicial ruling from Ottawa does little more than piggyback on the bold stance already taken by a more conservative bench in Washington.

Moreover, the Khadr ruling is as significant for what it does not do as for what it does. The U. S. military has prepared a controversial report about the circumstances of his capture, but has refused to give a copy to the defence. Although Canadian officials allegedly have the secret report, the court did not require them to reveal it. Canada's obligations toward its citizen held in foreign custody begin and end with active Canadian involvement in the case. If CSIS produces a relevant document, it has to hand it over; if CSIS passively receives a U. S. document, it has no duty to disclose.

All of which leads to a pair of questions. If we dislike the Guantanamo-based process so much -- if we could not use such procedures ourselves without running afoul of the Charter of Rights -- why not bite the bullet and condemn the U. S. military commissions? On the other hand, if we support the Guantanamo-based process -- if our own forces deal with captured enemy combatants by handing them to Afghanistan authorities who may mete out much worse -- why not bite the bullet and endorse the American efforts? In other words, is there a set of principles reflected by the nine justices in their Khadr ruling, or is there nothing more here than 18 intellectually weak knees?

The seeds of principled compromise are found in a case far removed from the "enemy combatant" context. In a decision last year, the Supreme Court ruled that the RCMP cannot be faulted for searching, without a warrant, the offices of a Canadian businessman in the Turks and Caicos during a money laundering investigation, where they co-ordinated with local authorities and followed local procedures. Out of respect for foreign sovereignty we do not impose the Charter of Rights, which would require a warrant for any police search, on foreign states.

The court's way of accommodating foreign procedures and fair process for Canadians is to impose Charter-style obligations only on Canadian officials, and only where they actively participate in a violation of international law. What Khadr demonstrates is that we show ample respect for foreign law, including some very harsh procedures. It's only when we --not they --breach the Geneva Convention that our court draws a line.

- Ed Morgan is a professor of law at the University of Toronto.

Source: BY Ed Morgan, National Post Published: Tuesday, May 27, 2008