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## A “Convicted Terrorist” By Any Other Name

**By: Maureen Duffy**

**Case Generally Considered:** *Pelham, Warden of the Bowden Institution, et al. v. Khadr*, [No. 36081](#) (Alberta) (Criminal) (SCC, By Leave); *Bowden Institution v Khadr*, [2015 ABCA 159](#); *Khadr v Bowden Institution*, [2015 ABQB 261](#); *Canadian Broadcasting Corporation v Warden of Bowden Institution*, [2015 FC 173](#); *Khadr v Edmonton Institution*, [2014 ABCA 225](#); *Khadr v Edmonton Institution*, [2013 ABQB 611](#)

### “What’s In a Name?”

Shakespeare famously [wrote](#):

’Tis but thy name that is my enemy;  
Thou art thyself though, not a Montague.  
What’s Montague? it is nor hand, nor foot,  
Nor arm, nor face, nor any other part  
Belonging to a man. O! be some other name:  
What’s in a name? that which we call a rose  
By any other name would smell as sweet ...

The idea, of course, is that names may be superficial labels, which do not, by themselves, define the character of the person to whom they are attached. Rather, they can be misleading, giving an impression of a person that is entirely different from reality.

A name, or a label, can be dispositive, however, if your name happens to be “Omar Khadr.” While Khadr’s status, both legally and in the public perception, should have been based on the specific facts and the law regarding his case, the reality is that the Canadian Government has gone to lengths to build a narrative around him, which does not match those facts or that law. Although the U.S. Government is largely responsible for the many abuses Khadr suffered in the eight years he was in U.S. custody, his case seems to be less in the public eye in the U.S., so this phenomenon has not played out in quite the same way there.

Khadr’s case provides a disturbing example of ways in which the public narrative created around a story can overshadow, and even contradict, the story itself. It would not be possible, in a posting like this, to comprehensively explore this theme relating to Khadr, since this phenomenon played out over a period of approximately 13 years. The intent, rather, is to illustrate this problem through several specific examples. The problem is significant, because the

media in Canada picked up on much of the discourse used by the Government, and several misconceptions appear to have thus become embedded in some of the public discourse. That problematic perception became apparent this past week, as Khadr was [released on bail](#), pending the appeal of his Military Commission “conviction,” and as the [Supreme Court of Canada](#) hears one of the outstanding legal issues on this case on May 14, 2015.

The statements routinely made by the Canadian Government, echoed by the media, suggest that Khadr is some sort of hardened terrorist, convicted of terrible crimes. To genuinely believe that, though, one must overlook virtually every aspect of his case, right from the very beginning.

I have blogged about some of the serious lapses in the handling of Khadr's case by U.S. authorities, [here](#), and, to a lesser extent, [here](#), and [here](#). While the extensive litigation, in two countries, may make this case appear complex, the underlying issues are actually quite straightforward and not consistent with the public narrative presented. It is only by considering the context of what happened that a true narrative can emerge.

### **“Sticks and Stones May Break My Bones, But Names Can Never Hurt Me”**

#### **The “Convicted Terrorist” and/or “Convicted War Criminal”**

The Canadian Government, and much of the media, often call Khadr a “[convicted terrorist](#),” or sometimes a “[convicted war criminal](#).” Aside from the fact that these terms are not simply interchangeable in the way such usage suggests, there are numerous other problems with these labels.

It is arguable that Khadr is not a “convicted” anything. The problems with the way Khadr was treated date back to 2002, in a virtually unbroken chain, so they are extensive, but well documented. The many problems with each step of his proceeding have been seriously critiqued as undermining the legitimacy of any ultimate “conviction.”

For example, there is the over-arching problem with the notorious Guantanamo Bay prison, which the U.S. uses to warehouse people it accuses of terrorism, but is unwilling to try before a legitimate court, established under [Article III](#) of the U.S. Constitution. The prison has been widely denounced for egregious human-rights violations, and it has been referred to as a “[legal black hole](#).”

Then there is the important fact that Khadr was tortured. While the extent of his torture has been the subject of some dispute, the fact of his mistreatment was [acknowledged by some of his interrogators](#) and accepted as fact by the *Supreme Court of Canada* (see *Canada (Prime Minister) v. Khadr*, [2010] 1 SCR 44, [2010 SCC 3 \(CanLII\)](#)). In real courts, evidence obtained through torture is inadmissible. In the parallel world of Guantanamo Bay, however, a military judge ignored even the admissions of mistreatment by Khadr's interrogators to find that he had not been mistreated.

There is also the problem with the very existence of the Military Commissions. The U.S. has a sophisticated court system, sanctioned by the U.S. Constitution, which is perfectly capable of trying allegations relating to terrorism. In fact, numerous high-profile terrorism prosecutions have been successful before U.S. courts, such as that of [Richard Reid](#), the so-called “Shoe Bomber”, or [Umar Farouk Abdulmutallab](#), the so-called “Underwear Bomber”. Those cases both involved plots to attack a civilian population, not the alleged tossing of a grenade in the heat of a

battlefield firefight, so they also highlight substantive problems with calling Khadr's alleged actions “terrorism” at all.

For those detained at Guantanamo Bay, the U.S. Government has gone to great lengths to avoid the U.S. court system. To avoid U.S. courts, President George W. Bush simply made up a parallel system, [a fabricated Military Commission system](#), after the 9/11 attacks. Although the specifics have since evolved, it was obvious from the original structure of the Military Commissions that they were intended to avoid the [due process](#) guaranteed under the U.S. Constitution. The Military Commission system was amended, and supposedly “improved” – although arguably made worse – through the iterations of the *Military Commissions Acts of 2006* and *2009*, in the face of successful challenges before the Supreme Court of the United States (see *Hamdan v. Rumsfeld*, [548 U.S. 557 \(2006\)](#)). The Military Commissions are still [widely denounced](#) as [violating international standards for fair trial](#), as well as those mandated by the U.S. Constitution. [David Glazier](#), an American law professor and former member of the U.S. Navy, summed up the Military Commissions by saying “[t]here's no plausible reason for the government to be using these military commissions, they're really just a complete failure on every level.” Nathan Whitting, one of Khadr's lawyers, has referred to the Military Commissions as [“kangaroo court\[s\].”](#)

The list goes on, of course. Khadr was held for eight years with no trial before his hearing at the questionable Military Commission even began. He was charged with various offenses that were [only created](#) four years after the incident giving rise to his charges. Some of those same offenses have [already been thrown out on appeal](#) in other cases, and all of them are subject to potential problems, both based on retroactivity and based on the fact that they do not meet the standards for [war crimes](#) under international law.

Khadr was also [charged](#) with killing a U.S. soldier, and wounding another, in a case that proceeded before a U.S. Military Commission, before a U.S. military officer as presiding judge, with members of the U.S. military as members of the jury, and U.S. military personnel as prosecutor and defense. The lack of impartiality is obvious. There is also the substantive issue as to whether the laws of war actually allow for criminal sanctions for throwing a hand grenade during the course of a firefight.

I previously [blogged](#), beyond all of the above, about the disturbing, coercive circumstances under which Khadr pled guilty to the “charges” before this problematic court. Although the Canadian Government makes much of the fact that Khadr pled guilty, he hardly did so under conditions that could be described as voluntary.

Even this is not a comprehensive list of the numerous problems with Khadr's so-called conviction. For the Canadian Government to simply refer to Khadr as a “convicted terrorist”, or a “convicted war criminal”, is misleading at best.

The shaky foundation of Khadr's “conviction” before the Military Commission has been given a coat of whitewash by the Canadian Government. As soon as Khadr crossed the border to return to Canada, the official narrative has simply assumed that his underlying “conviction” in the U.S. was legitimate. Putting a coat of whitewash on rotting wood may give a short-term appearance of something new, but the underlying wood rot will eventually show through. By taking the position that it has in regard to Khadr, the Canadian Government has moved from simply endorsing the misconduct of the U.S. to actively perpetuating it.

All of this sounds rather complicated, but it did not have to be. If either the U.S. or Canada truly believed that Khadr was a “terrorist” or a “war criminal”, the recourse would have been simple. They could have charged Khadr with offenses under their respective national laws, in legitimate courts that are governed by their national constitutions. The fact that both, instead, relied on a process so riddled with legitimacy problems is enough, on its own, to raise serious doubts as to Khadr’s “conviction”.

The problems do not stop there. Khadr's age at the time of the firefight raises a number of additional issues, further muddying the narrative.

### **The “Young Jihadist”**

Khadr is also sometimes referred to as a “[young jihadist](#).” Those defending him, similarly, often refer to him as a “child soldier”, and Khadr himself used that term in an [editorial he wrote](#) in late 2014. The issue of Khadr's age is relevant to the upcoming hearing before the [Supreme Court of Canada](#), in relation to the decision by the Alberta Court of Appeal to grant his *habeas corpus* petition, and to order his transfer to another prison facility, based on his age at the time of the Afghanistan incident (see [2014 ABCA 225](#)).

The narratives surrounding his age continue to be as polarized as the issue of whether he is a “convicted terrorist”. What is often missing from these narratives, however, is the possibility that Khadr was, in reality, an abused child.

At the age of 15, he was put in a battlefield situation, in another country, by his father – a fact that is apparently undisputed. He was an unemancipated minor. He did not choose to pick himself up and go to Afghanistan to fight with Al Qaeda, which is the type of conduct often associated with those referred to as jihadists. Rather, his parents brought him there at an age under which he was legally subject to their decisions.

While it is true that child soldiers are entitled to [special legal protections](#), and that Khadr was not afforded any of those protections – but was abused instead – there is this preliminary issue regarding his status that is often overlooked. Generally, when a child is thrown into a dangerous situation by his parents, the State intervenes to protect the child, not to torture and demonize him. Dennis Edney, Khadr's Edmonton lawyer, put it best when [he said](#), after Khadr's release on bail, “[w]hen you put your children to bed, ask yourself if you would like your children abused like Omar Khadr?”

Khadr also appears to have been tainted by the larger public dislike for his family, the so-called “[first family of terror](#).” This mindset ignores the fact that the law does not generally hold people responsible for the criminal actions of relatives. Khadr was arguably a greater victim of that “first family” than most people. When his father endangered him, he should have been protected from this family, not blamed for their perceived wrongdoing. If a parent beats a child, that child is generally subject to protection from the parent, not blamed for the beating, and certainly not tortured and imprisoned because of the beating.

### **Doomsday Predictions About Khadr's Release**

The muddled narrative about Khadr took on a new layer with doomsday predictions, as the Government sought to block his ordered release on bail pending his appeal of his Military Commission ruling (see [2015 ABQB 261](#); [2015 ABCA 159](#)). The Canadian Government argued

that releasing Khadr would [damage relations with the U.S.](#) An official of the U.S. Government, however, quickly quashed that argument by saying that Khadr's release was subject to Canadian law and would have no impact on [U.S.-Canadian relations](#).

The Canadian Government, however, continues to claim that Khadr presents a threat to the safety of Canadians and continues to call him a “convicted terrorist”. Ignoring the actual facts of this case, Prime Minister Harper [said](#) about Khadr's release, “Mr. Khadr, as we all know, pled guilty to very grave crimes, including murder ...”

The Alberta Court of Appeal, in considering the Crown's evidence regarding supposedly irreparable harm from Khadr's release, saw it differently. In an already-famous line from the ruling, the Court said “... Mr. Khadr you are free to go” ([2015 ABCA 159 at para 42](#)).

### ***Previously Missing from the Narrative: Khadr's Own Voice***

With the exception of the editorial Khadr published late last year, his voice has been conspicuously absent from the dramatically competing narratives about him. Once he was transferred to Canada, the Government fought hard to keep the media away from him, resulting in an [unsuccessful court action](#), filed by various media groups, seeking access to interview him. (see *Canadian Broadcasting Corporation v Warden of Bowden Institution*, [2015 FC 173](#)). Given the efforts the Canadian Government has undertaken to control the narrative around Khadr, it is perhaps not surprising that the Government also fought to keep the media away from him.

The public narrative, though, may have undergone a shift, based on Khadr himself. In an interview outside of his lawyer's house, shortly after his release, Khadr presented as an affable young man, with no bitterness, no wish to cause any harm, and a compelling hope that his release signals the first step in the beginning of a new life. It is difficult to reconcile the image of that young man with the “[unrepentant terrorist](#)” at the center of so many dire Governmental warnings.

The facts of what happened should have been sufficiently compelling to change the narrative in favour of Khadr, but the mere invocation of labels was adequate for many people to overlook the reality of his case. Perhaps, in finally seeing Khadr's face and hearing his words in his own voice, the misleading narrative that has been built around him may finally be shattered.

Khadr still has protracted legal proceedings ahead of him, including the appeal of his Military Commission judgment and his third Supreme Court of Canada case. His scheduled [parole hearing](#) was cancelled on May 12, 2015, since his sentence was claimed to be suspended while he is out on bail. With optimistic predictions as to the ultimate outcome of the Military Commission proceeding, it is entirely possible that Khadr will not be returned to prison.

In the meantime, it is time for the public narrative to shift. On the day of Khadr’s hearing before the Supreme Court, his attorney, Dennis Edney, will be speaking at Carleton University, in an event that is well named as “[Omar Khadr: Facts Over Fear](#).” [Khadr](#) himself presented the best argument for a shift in public narrative, asking Canadians to “see who [he is] as a person, not as a name.”

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