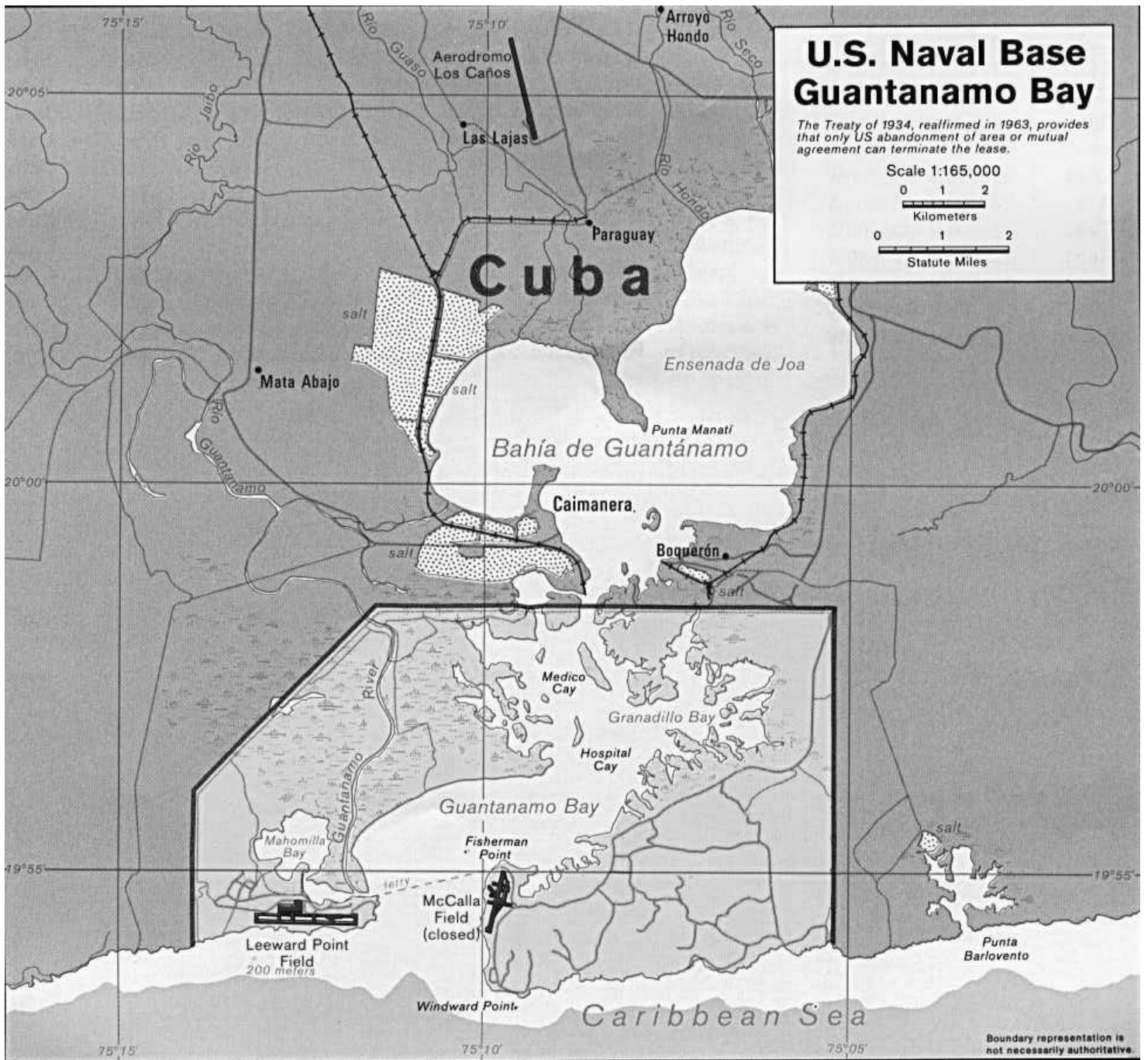


NIMJ Reports from

GUANTÁNAMO

Volume 4





TITLE XVIII—MILITARY COMMISSIONS

- Sec. 1801. Short title.
- Sec. 1802. Military commissions.
- Sec. 1803. Conforming amendments.
- Sec. 1804. Proceedings under prior statute.
- Sec. 1805. Submittal to Congress of revised rules for military commissions.
- Sec. 1806. Annual reports to Congress on trials by military commission.
- Sec. 1807. Sense of Congress on military commission system.

SEC. 1801. SHORT TITLE.

This title may be cited as the “Military Commissions Act of 2009”.

SEC. 1802. MILITARY COMMISSIONS.

Chapter 47A of title 10, United States Code, is amended to read as follows:

“CHAPTER 47A—MILITARY COMMISSIONS

“SUBCHAPTER	Sec.
“I. General Provisions	948a.
“II. Composition of Military Commissions	948h.
“III. Pre-Trial Procedure	948q.
“IV. Trial Procedure	949a.
“V. Classified Information Procedures	949p-1.
“VI. Sentences	949s.
“VII. Post-Trial Procedures and Review of Military Commissions	950a.
“VIII. Punitive Matters	950p.

“SUBCHAPTER I—GENERAL PROVISIONS

- “Sec.
- “948a. Definitions.
- “948b. Military commissions generally.
- “948c. Persons subject to military commissions.
- “948d. Jurisdiction of military commissions.

“§ 948a. Definitions

“In this chapter:

“(1) ALIEN.—The term ‘alien’ means an individual who is not a citizen of the United States.

“(2) CLASSIFIED INFORMATION.—The term ‘classified information’ means the following:



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FOREWORD

This fourth volume of NIMJ Reports from Guantanamo covers the period from July 2012 through June 2013, during which the Commissions heard only two cases: those of Abd al-Rahim Al-Nashiri, who is charged with an attack on the U.S.S. Cole, and of the five alleged September 11 conspirators. With the benefit of hindsight, we know that both these cases are continuing more than five years later. In a kind of reverse of Zeno's paradox, the more the cases proceed at their sluggish pace, the farther away from resolution they appear. Nowhere in these reports will the reader find any discussion remotely connected with the merits of the cases.

During the twelve months covered by this volume, NIMJ sent nine different observers to attend and report on the proceedings. They included NIMJ's President and members of its Board of Advisors, law professors and private practitioners experienced in the field, and law students studying military law. Despite the differences in their perspectives and writing styles, they all tell of the myriad issues in which these unprecedented hearings have bogged down. Those issues fall into several categories: (1) procedural issues like the propriety of the referral of the charges, funding of expert witnesses, discovery of documents, defendants' right to confront witnesses, and the possible recusal of the military judge; (2) structural issues, like the procedure for appointing the Convening Authority, the classification of documents, the proper courtroom clothing for defendants, the censoring of proceedings, and the need for defendants to attend the hearings; (3) issues arising from claims that the defendants were tortured before being put on trial; (4) issues relating to claimed eavesdropping on defense counsel and other interference with their privileged communications with their clients; and (5) substantive issues involving the law of war. Taken together, they demonstrate the improvised procedures under which the Commissions operate, and the lack of precedent and experience to guide the participants.

Readers can draw their own conclusions whether the Commission proceedings as reported here are consistent with due process of law, and with the expectations the Supreme Court expressed in *Rasul*, *Hamdan*, and *Boumediene*. There can be little doubt, however, that they bear little similarity to proceedings conducted under any system of law familiar to American jurisprudence.

Ronald W. Meister

Chair

National Institute of Military Justice

DAN DRISCOLL

Dan Driscoll is a 2014 graduate from Yale Law School. Prior to attending law school, Dan served in the U.S. Army as a Cavalry Scout Platoon Leader stationed at Fort Drum, N.Y., with the 10th Mountain Light Infantry Division. His service in the armed forces also included a deployment to Iraq.

Prosecutor v. Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri

Hearing Report

17-19 July 2012

I. Introduction

On July 17-19, 2012, hearings were held at Guantanamo Bay concerning the case against Al-Nashiri (pronounced as "Na-shah-ree"). Al-Nashiri is facing the death penalty and charged with the following: 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. The charges arise out of an attempted attack on the USS THE SULLIVANS in January 2000, an attack on the USS COLE in October 2000, and an attack on the MV Limburg in October 2002.

The first day of the hearings covered many of the defense's motions for the week. The judge heard arguments on the Defense Motions:

To disqualify or, in the alternative, requesting the recusal of COL James L. Pohl as the military judge in this case.

To allow the accused to view a message from his family when he next appears in court.

To allow the defense to take a photograph of the defendant when he next appears in court so that his family may see his current condition.

To compel the prosecution to advise the commission and the defense as to the possible subject matters of expert testimony and to disclose the names and contact information of any expert witnesses the prosecution knows will testify at trial.

To compel the convening authority to reimburse learned coun-

sel's expenses pertaining to his use of a civilian paralegal and associate in the manner Article III courts do in capital cases.

To compel the funding of Dr. Elizabeth Loftus as a consultant to aid the defense.

To compel discovery of prosecutorial resources in addition to detailed counsel.

To compel the convening authority to fund Ms. Nancy Hollander as a consultant to aid the defense in the area of national security law.

The second day of the hearings was closed and determined whether certain motions could be heard in open court or would need to be heard in a closed hearing.

The third day of the hearings covered the last of the defense motions for the week. The judges heard arguments on the Defense Motions:

To dismiss because the Convening Authority assumes the responsibilities of an Office of the Government without the Minimal Procedures required by the Appointments Clause that ensure Democratic Accountability.

To withdraw the charges based upon an Improper Referral by the Convening Authority.

Requesting that proceedings of this Military Commission be available to media outlets as well as CCTV locations.

II. Participants

1. Military Judge - Colonel Pohl, U.S. Army

2. Prosecutors:

a. Lead Prosecutor - Brigadier General Mark Martins, U.S. Army

b. Asst. Prosecutor - Mr. Mattivi, Civilian detailed from DoJ

c. Asst. Prosecutor - Commander Lockhart, U.S. Navy

d. Asst. Prosecutor - Ms. Baltes, Civilian detailed from DoJ

3. Defense Counsel:

a. Civilian Learned Counsel - Mr. Kammen

b. Detailed Defense Counsel - LCDR Reyes, U.S. Air Force

d. Detailed Asst. Def. Counsel -Major Allison Danels, U.S. Air Force

4. Gallery:

a. Media (1)

b. Observers (7)

c. Victims & Victim's families (around 7)

III. Motions

July 17, 2012

FAMILY: AE 073, Defense Motion to Allow the Accused to View a Message from His Family When he next appears in Court, dated 22 May 2012.

Ruling: Motion Denied

a. Request to allow defense counsel to play a video message from AN's parents. The motion states that the message contains "expressions of love."

b. The government responds that the JTF-GTMO commander handles non-legal mail to the detainees and that the commission should not interfere with that process. Also states that there is a method for AN's parents to communi-

cate with him (although apparently not by video?).

The judge asked both sides whether this was a Commission or Detention Center Issue. The defense argued that they needed to show Mr. Nashiri the video to help them prepare their case. The government said that the only possible reason they had for wanting to show Mr. Nashiri the video was to create a good relationship with Mr. Nashiri's family and that was not enough to justify showing him the video. They also argued that it is not common for non-professionally created DVDs to be shown in the detention centers. The government further argued that videos could be sent through the ICRC and that the ICRC would confirm the identities of the parties who were speaking on the video. The judge said that he would read an ex-parte submission about the importance of the DVD over lunch. After reading the submission, he said he was not convinced and ruled against the defense.

EXPERT WITNESSES: AE 074, Defense Motion to Compel the Prosecution to Advise the Commission and the Defense as to the Possible Subject Matters of Expert Testimony and to Disclose the Names and Contact Information of any Expert Witnesses the Prosecution knows will Testify at Trial, dated 22 May 2012.

Ruling : Motion denied

- a. Defense wants disclosure of the experts.
- b. Government moves commission to issue a litigation schedule requiring reciprocal disclosure of information, and that for the exchange of expert lists to occur 90 days prior to trial.

The defense argued that they are trying to save the government time and money by knowing which experts they should begin to request and which ones they can ignore. They stressed that

they were not trying to limit the government to following their disclosure, but instead wanted to get a head start on finding experts. They also argued that it would save the court time and delays later in the process. The judge agreed with the defense that it would save time and asked the government if they were willing to accept delays later by not revealing the information earlier in the process.

I would strongly recommend reading through the motions and making summaries of the arguments before attending the hearings. It was incredibly helpful to have summaries on hand to make the process seem more familiar.

The government sidestepped answering the question. The government said that the information is already available to the defense because it is obvious which types of experts the government will call (i.e., fingerprint and DNA experts). They offered to disclose the names if the defense would also disclose their expected experts. The government and judge then discussed the inevitable long delays that will occur before the actual trial. The judge asked the government how much longer discovery would be and the government responded that they were constantly doing discovery. The judge said he could not set a trial date until discovery was complete. The government has at least another 100+ pages of information it will be giving the defense.

FAMILY: AE 075, Defense Motion to Allow the Defense to Take a Photograph of the Defendant

When He Next Appears in Court so that his Family may see His Current Condition, dated 23 May 2012.

Ruling: Picture to be taken and sent to the family

a. Defense wants to take a single photo of AN to send to family and to use for case preparation.

b. Government makes a similar response as above but also notes (i) that it has a policy restricting the photographing of detainees, but that (ii) that the policy allows the ICRC to take photographs for dissemination to their families and that another opportunity to use the program will likely occur in October 2012.

c. Defense responds that it also wants the photo for case preparation (to show to witnesses who knew what AN looked like before U.S.A. detention) and that it should not have to wait for ICRC for that case related use of a photo.

Judge asked both parties whether this was a Commission or Detention Center issue. Gov't argued that it was a Detention Issue and that there were already mechanisms in place to take a picture and send it to his family (ICRC). The defense said that they needed the picture to be taken to help them with their defense and that the next possible picture time from ICRC would be in October. Defense wanted to have Commander Welsh (position unknown, but it seemed like he had a lot of experience at the Detention Centers) testify about how it is not uncommon for pictures to be allowed.

The judge ruled that it was not necessary and ordered a picture to be taken this week.

RESOURCES: AE 076, Defense Motion to Compel the Convening Authority to Reimburse Learned Counsel's expenses pertaining to his

use of a Civilian Paralegal and Associate in the manner Article III courts do in capital cases, dated 23 May 2012.

Ruling: Ruling deferred

a. Defense asks for more resources for the use of a paralegal and associate counsel. Compares this case to what the government reimbursed defense counsel for in the Moussaoui prosecution.

b. Government states that MCA and Rules allow civilian counsel to represent detainees, they may not be compensated with government funds. Government also disputes claim that defense is under-staffed, even in comparison to Moussaoui.

c. Defense reply states that Government's response to Moussaoui comparison is misleading (70 paralegals for document review in Moussaoui).

The defense wants to hire a paralegal that works for him in Indianapolis. He says that even if the Convening Authority agrees to hire another paralegal, it will take months before the person is hired and they will be more expensive and based in Washington, DC. The defense requests for 300 hours at \$40 /hour. The government argues that the defense is just trying to circumvent the process and that it would be inappropriate for the judge to rule on this because it is not ripe (the Convening Authority has not had a chance to rule on it).

RESOURCES: AE 077, Defense Motion to Compel the Funding of Dr. Elizabeth Loftus as a Consultant to Aid the Defense, dated 4 June 2012.

Ruling: Ruling deferred. Judge looking at an ex-parte submission.

a. Defense wants funding for Dr. Loftus as a

consultant on eyewitness identification and memory (and perhaps later as an expert depending on what her consultation reveals). Defense presented request directly to commission and not to convening authority.

b. Government says motion is not ripe because a complete statement of need was never given to the Convening Authority to consider first. Alternatively says motion should be denied because the defense has not met the burden of showing that expert assistance is necessary.

The defense wants an expert in forensic psychology, and the government argues that they already have one. The arguments did not last long with the government saying that it did not object to the judge looking at the defense's ex-parte submission.

RESOURCES: AE 082, Defense Motion to Compel Discovery of Prosecutorial Resources in addition to Detailed Counsel, dated 12 Jun 2012.

Ruling: Motion granted

a. Defense requests for number and functions of members of prosecution team (in addition to 7 detailed counsel) to support its argument that it needs more funds/staff ("there must be at least a minimal equality of arms").

b. Government argues that prosecution resources not discoverable because not relevant. If the defense is underfunded, it should ask for more resources. Also, government offered to exchange information reciprocally, but defense refused.

c. Defense replies that defendants have wide latitude in presenting mitigating evidence, and that prosecution's narrow definition would ex-

clude, for example, evidence of Al-Nashiri's waterboarding. Defense reiterates that there is a disparity in resources.

The defense initially argued that it wanted to know everyone that was currently helping the government build its case against Mr. Nashiri. They stressed, however, that they only wanted to know how many people were working on the case and very broadly where they worked. They argued that it would help with the transparency of the case. They also said that only they had to constantly approach the Convening Authority with "hat in hand" to ask for funding for different parts of the case.

It is fascinating to see how different individuals can witness the same event and see two very different things.

They believed that having the comparison would allow them to justify why they needed the different requests that they had made. The government said that it was not trying to keep the information a secret and would be very willing to share it with the defense on a reciprocal basis.

They made sure to stress that they were only willing to share the number of lawyers and paralegals working on the case. The judge set a deadline of August 3rd for the information to be shared.

DISQUALIFICATION/RECUSAL: AE 084, Defense Motion to Disqualify or in the Alternative requesting the Recusal of COL James L. Pohl as Military Judge in this case, dated 14 Jun 2012.

Ruling: No Recusal

a. Summary of defense's argument: "For several reasons, COL Pohl's behavior, his relationship to the prosecutions arising out of the Abu Ghraib cases, as well as the circumstances of his employment, raises a perception that COL Pohl cannot fairly preside over this commission,

moreover, the defense questions whether any single judge can fairly preside over both this commission and the 9/ 11 Commission."

i. In Abu Ghraib cases, Pohl prevented the defendants' efforts to demonstrate that they were acting pursuant to orders given by superior officers (including, up the chain, Rumsfeld, etc.).

ii. Pohl's contract must be renewed every year. Creates conflict.

b. Government opposes; determines that there is no basis for recusal.

i. Pohl employed by The United States Army, not the Convening Authority.

ii. Pohl detailed himself to commission cases because he has a smaller non-commission workload than other military judges.

iii. No pecuniary interest; military judges presiding over courts-martial also paid by military.

c. Reply not yet public

This motion lasted approximately 80 minutes. The judge began by saying that there would be no further voir dire allowed. The defense then asked permission to have the questions they would have asked put on the record. The judge allowed them to ask the questions without him giving any response. Defense asked:

Who decides whether to reappoint the judge?

Whether the judge is aware of who reappoints him?

Whether he knew what his current employment contract was (including the rate of pay and retirement recall status)?

If the contract was not resumed, would the judge lose pay?

What were the judge's impressions from reading the book "Black Banner?"

Did the judge offer this case to other judges?

The defense then offered three reasons they believed the judge should recuse himself.

The reasons were the following:

There was a monetary conflict because of the 1-year contract.

The judge presided over the Abu Ghraib cases.

The judge detailed himself to this case.

The judge clearly got frustrated by the questions, and much of the debate turned into comparisons between Article I and Article III courts. The defense counsel repeated the same argument at least 5 times continually saying that it appeared as if there was bias, which seemed to frustrate the judge further. The defense compared the proceedings to the Soviet Kangaroo Courts, and it appeared as if the defense just wanted the complaint noted in the record. It felt very much like watching a filibuster. The government basically said they did not think the judge needed to recuse himself because the defense was citing no law and just defended their arguments by saying there was a bad perception of the trials.

RESOURCES: AE 085, Defense Motion to Compel the Convening Authority to Fund Ms. Nancy Hollander as a Consultant to Aid the Defense in the Area of National Security Law, dated 14 Jun 2012.

Ruling: Deferred ruling

a. Defense motion notes that government has had assistance from a DOJ lawyer on national security issues (e.g., CIPA).

b. Government opposes; states that motion is really a request for another attorney and should be denied, but that should be denied even if taken as a request for expert assistance.

The defense argued that they do not have an expert familiar with CIPA litigation and it was unfair for the government to have someone that was specialized in dealing with classified information. They believed that it was unreasonable for the Convening Authority to expect them to be able to learn 20+years' worth of experience from simply reading some law review articles and books. The government asked where this process would stop. Would they be responsible for giving the defense their resumes for the defense to identify all their strengths? The judge said he was not prepared to make a ruling.

COUNSEL: AE 083, Defense Notice of the Undetailing of Mr. Paradis, dated 14 Jun 2012 (In conjunction with AE 059, Government Motion to Review Mr. Paradis's Representation of the Accused in this Case, dated 12 Mar 2012).

Ruling: Defense Counsel removed

a. Notice that Chief Defense Counsel undetailed Michel Paradis from Al Nashiri's case. Paradis also represents Al Bahlul, and government and the commission agreed that conflict would only arise if Al Bahlul were called as a witness.

b. But the military judge attempted to obtain Al Bahlul's view on the "dual representation issue."

c. The Chief found that this request put Paradis in an untenable position because the interests of his clients diverged. He undetailed Paradis from Al Nashiri's case and kept him on Al Bahlul's case.

The defense believes there may have been ex-parte communication between the judge and

Mr. Paradis when he emailed the judge without notifying the defense. When the judge responded to the email, he cc'd the defense. He asked the defense what harm had been done. There was no clear answer, but the possible ex-parte contact was noted for the record.

July 18, 2012

A closed 505H hearing was held. Mr. Nashiri did not attend the proceedings. The defense requested that the prosecution be forced to give them evidence related to Mr. Nashiri's four-year detention in secret CIA prisons and his initial arrest. The judge ruled that the motions could be heard in open court and the motions will be argued at a later hearing. Observers and Media were not allowed to attend the hearing and were denied a requested broad summary of what occurred at the hearing.

July 19, 2012

Mr. Nashiri did not attend the proceedings. He knew about the hearings, however, chose not to attend. No reasons were given for Mr. Nashiri's absence.

PUBLIC ACCESS: AE 081, Defense Motion Requesting that Proceedings of this Military Commission be Available to Media Outlets as well as CCTV locations, dated 8 Jun 2012.

Ruling: A decision will be made before the next pre-trial hearings on Oct 23, 2012

The defense argued that allowing media outlets to broadcast the proceedings would not require any further intrusion to the system than the court already must broadcast it to Fort Meade. They repeatedly said that it would only require one extra cable being plugged in. The defense stressed that if the goal of the government was to increase transparency, they should not fight this motion.

The defense told the judge that he had already adopted a legal fiction by allowing the case to be broadcast on the CCTV. The judge did not disagree with the assessment but pointed the defense to the actual statutory language, which set out CCTV as an exception to the rule that the proceedings could not be broadcast. The defense avoided responding to the judge's point. The defense also pointed out that many of the usual reasons for keeping proceedings from being broadcast did not apply to this case because the capabilities were already in place, the lawyers would not act any differently, and the jurors were battle-tested military officers versus the "housewives" that often make up civilian juries. There was definitely a slight reaction of surprise from the courtroom and the observers when the defense made the "housewives" comment. The government argued that the regulations clearly state that the hearings should not be televised and that it would damage the legitimacy of the case.

Their strongest point was that even if the judge wanted to rule to allow the proceedings to be televised, he does not have the power to do so because that power lies with the Secretary of Defense. A prosecutor from DOJ (unidentified) made the argument on behalf of the government and was generally regarded by those in attendance as giving the worst oral argument that anyone had ever seen.

PROCEDURAL: AE 086, Defense Motion to Withdraw the Charges Based Upon an Improper Referral by the Convening Authority, dated 15 Jun 2010.

Ruling: Taking motion under advisement

a. Defense requests that commission order that the charges in the case be withdrawn because the Convening Authority allegedly "unlawfully inserted himself into the voir dire process when he purported to command the Commission on how to conduct voir dire and other portions of the trial that are within the domain of the Military Judge.



b. Further, the CA has ensured that the size of the commission will never exceed twelve members. This ultra vires act by the CA improperly skews the size of the panel so that it favors a death verdict."

c. Government opposes.

The defense argued that usually, the convening authority would convene the Military Commission and then step back to allow the judge to control the rest of the commission process. They argued that this Convening Authority has attempted to wield his influence over the convening process from the very beginning. By sending the judge a letter which told the judge how to voir dire the future members and by strongly suggesting that the judge should have 12 jurors with three backups, the Convening Authority was greatly overstepping his role in the process. The defense also argued that this was improper command influence and that the decision of how many jurors there should be was one that was solely within the judge's discretion.

General Martins, for the government, argued that it was clear that the Convening Authority had done nothing wrong and that he was simply exercising the authority that had been given to him. He listed 12 points that illustrated that the ambiguous nature of the statute and said that it was clearly within the convening authority's discretion to make suggestions to the judge. It was a fairly contradictory argument for him to use a confusing 12-point argument to claim that the statute was clear.

The judge said that he would need to take this motion under advisement but strongly suggested that if there was improper command influence, the remedy would be to follow the normal courts-martial procedures rather than to dismiss the charges.

PROCEDURAL: AE 087, Defense Motion to Dismiss because the Convening Authority Assumes the Responsibilities of an Office of the Government without the Minimal Procedures Required by the Appointments Clause that ensure Democratic Accountability, dated 15 Jun 2012.

Ruling: No Ruling

a. The defense argues that the Convening Authority is not a duly appointed officer under the Appointments Clause and therefore the charges should be eliminated.

States that the President appoints court-martial convening authorities and confirmed by the Senate

b. Government opposes because Convening Authority is not a "principal officer" within the meaning of the Appointments Clause.

The defense argued that because the Convening Authority was improperly appointed, the charges against Mr. Nashiri should be eliminated. They argued that the Convening Authority's tremendous power and lack of a boss required Senate approval of the appointment, as specified in the Appointments Clause of the Constitution.

The government argued that the defense's motion should be denied for two reasons:

The appointment is proper because Congress delegated the Secretary of Defense the power to make the appointment and because the current system that is in place has the checks and balances that it needs.

The government k a Navy court has already found that the Convening Authority is not a primary officer as defined under the Constitution.

IV. Miscellaneous

Next Session: The next hearings will take place on October 23-25, 2012.



Be sure to ask for a tour of the island (where they will take you to Camp X-Ray and the new detention centers) because it was definitely a highlight of the trip. The last thing I would do is to be sure to read the articles, blog posts, and summaries that are created from the observers and media that are on the trip. It is fascinating to see how different individuals can witness the same event and see two very different things.

* * *

Edward F. Sherman, the former Dean and David Boies Distinguished Chair at Tulane Law School, teaches Civil Procedure, Complex Litigation, Mediation and Arbitration, and (occasionally) Military Law. He served as an Army Reserve JAG for over twenty years and as defense counsel in a number of courts martial, both trial and appellate. He was counsel for the ACLU in a number of constitutional cases in federal courts involving service members' rights. He was co-author of one of the first law school case-books on military law.

Report of Ed Sherman on Trip to Guantanamo on August 20-23, 2012

I was on the flight to Guantanamo from Andrews Air Force Base on August 20, along with 150 court personnel, judge and attorneys, 9/11 family members, 30 press and media, and 9 NGO observers. We stayed in tents at Camp Justice (which were comfortable enough, with wood floors and air conditioning), and the escorts (mostly military and a civilian from the Office of Military Commissions) were most accommodating and helpful.

On our second day, the weather reports showed Tropical Storm Isaac on a likely course to pass over Cuba. Although a press conference had been planned for the following day, held on our third day in which the lawyers previewed the 27 motions that would be taken up beginning the next day, the command ordered evacuation instead.

We did get a good tour of the two courtrooms by the head of the OMC Convening Authority Office, Mrs. Wendy Kelly (a retired Army JAG Colonel), and extensive discussion of the procedures followed. There is an obsession with not letting, what is considered national security information, come out at the hearings and trials (and the interrogation techniques and conduct relating to the captures and detentions are so labeled). The observers and 9/11 families sit behind a glass window with a 45-second delay in the sound from the courtroom so the security advisor can cut out what is considered to be security related. It's a high tech courtroom, with long individual rows of tables for each of the five defendants (which is the number they are trying of the 9/11 high profile defendants and likely other groupings) and their military and civilian attorneys.

The motions will be taken up in U.S. v. KSM, et al. on Oct. 13-20 and in U.S. v. al-Nashiri on Oct. 22-26. To be on the distribution list for motions and other documents made public by the defense, email gitmowatch@gmail.com or tweet @gitmowatch.

I have attached the press releases distributed by the attorneys for each side at the press conference. It was conducted by General Mark Martins, prosecutor, and defense counsel for KSM, James Connell and Lt. Col. Sterling Thomas. They laid out the arguments relating to the pending motions, and, in questions from the press, said they expect many more motions in the future and a number of years before the completion of the commissions.

I had the opportunity to talk with Mr. James Connell and Lt. Col. Sterling Thomas quite a bit and, once on an evening at the Irish pub, with the attorneys for some of the less high profile cases. I was impressed by their intelligence and dedication to presenting defenses on behalf of their clients. General Martins is a highly articulate prosecutor, careful and nuanced. I was not able to speak with him before we had to leave, but he emailed me expressing how he was disappointed in not getting to talk, indicating, I think, his awareness of and interest in the views of NIMJ.

The motions deal with a wide variety of discovery and substantive law issues, such as:

1. **The blocking of information concerning the conditions of confinement including the use of torture and other interrogation techniques and the rendition program.** The motions seek a protective order to prohibit the continued use by the prosecution of classification rules to block the discovery (and presumably the ultimate testimony) of such information. They maintain that such information is readily available with a quick Google search and that the effect of classifying such information is to make it unavailable only to the defense.

The government position, as set out by General Martins in his press release, relies heavily on the concept of relevance, arguing that the focus of the trial should be on the guilt or innocence of the accused, and post-capture conduct is irrelevant.

2. **Of particular concern in the motions is "the process of presumptive classification in which all statements of defendants are considered classified."** In what the defense calls "a departure from ordinary classification rules," the de-

fendants are considered "participants" in the classified CIA interrogation program, and any statement by them concerning their treatment is classified because they were exposed to classified interrogation methods. The defense claims this gives the government "the option of preventing you from hearing any testimony by the defendants it does not want you to hear."

The ACLU filed a motion challenging presumptive classification, which it expects to argue when the hearings commence. Michael Kaufman, the acting ACLU representative observer when I was there, had this comment on the issue:

But the right of public access is not absolute. That right, important as it is, must be balanced against the accused's right to a fair trial and also against the need to protect critical national security and other public interests.

The absurdity of the government's position was starkly illustrated during a press conference with counsel for both parties. A reporter asked defense counsel whether a defendant wanted to be present in court for the upcoming hearings, but defense counsel stated he

could not respond because the answer would be "presumptively classified." While the moment was humorous, there are real harms that result from over-classification: it limits defense counsel's ability to use information learned from their clients to develop a defense, and it limits the public from learning about our government's shameful history of torture.

The government position is: "There is considerable public interest in understanding the basis of decisions made by the government. But the right of public access is not absolute. That right, important as it is, must be balanced against the accused's right to a fair trial and also against the need to protect critical national security and other public interests."

3. **Process by which defense counsel can ob-**

tain funds for investigation and subpoena witnesses. Several of the motions address the manner in which defense counsel have to obtain funding for experts and subpoena of witnesses. They claim requests for funding have been denied by the Convening Authority. Also, the defense must notify the prosecution of any request for funding —and permit them to oppose a request —which forces the defense to reveal their strategy and privileged information. The prosecution does not need to obtain the Convening Authority's approval for funding requests or notify the defense of their proposed expenditures.

4. Whether the powers of the military commission are restricted by the Constitution. The prosecution has taken the position at various points that due to the "carve out" of authority for military commissions, the Constitution does not apply directly. This would seem to be a hard argument to make in light of *Boumediene*. Perhaps the argument has more force as claiming that constitutional due process rights may not be fully applicable in military commissions (as in some ways in courts-martial), and therefore the procedures may be tailored to ensure governmental interests are protected (as in security information). Whether there will be a ruling on this abstract question should be interesting.

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KATHLEEN DOTY

Kathleen A. Doty is the Director of Global Practice Preparation at the Dean Rusk International Law Center at the University of Georgia School of Law. Previously, she served as Assistant Counsel for International Law and Arms Control at the Department of the Navy, Office of the General Counsel, Strategic Systems Programs. She currently chairs the American Society of International Law's Non-proliferation, Arms Control, and Disarmament Interest Group. She holds a BA from Smith College, a JD from the University of California-Davis School of Law, and is currently an MA candidate in political science and international affairs at the University of Georgia. Doty observed pre-trial hearings in the Al-Nashiri case for the National Institute of Military Justice in 2012 and 2017.

Introduction

On Tuesday and Wednesday of October 23 and 24, 2012, hearings were held at Guantanamo Bay concerning the capital case against Abd al-Rahim Hussein Muhammed Abdu al-Nashiri. al-Nashiri is charged with perfidy, murder and attempted murder in violation of the laws of war, terrorism, conspiracy, intentionally causing serious bodily injury, attacking civilian objects, and hazarding a vessel. The charges arise out of an attempted attack on the USS THE SULLIVANS in January 2000, an attack on the USS COLE in October 2000, and an attack on the MV Limburg in October 2002.

Pre-trial hearings were scheduled to last three days. However, due to hurricane Sandy which struck the island mid-week, hearings were only held on Tuesday and Wednesday. The first day consisted of argument on a government motion requesting an order requiring the accused's presence at all hearings. The second day of hearings continued with the issue of presence, and also consisted of two motions to dismiss, one for violation of the defendant's due process right to a neutral Convening Authority, and the other because the Convening Authority exceeded his power in referring the accused's case to a military commission. The day also included a series of discovery motions.

I participated in the hearings as an observer representing the National Institute of Military Justice. Other organizations with representatives present included: Amnesty International, Human Rights Watch, The American Bar Association, The New York City Bar Association, The American Civil Liberties Union, Human Rights First, Duke Law School, and Seton Hall Law School.

Motions Heard Tuesday, October 23

On October 23rd, the court heard motion number 99, a request by the government for an order requiring the accused's presence at all hearings.

The government argued that the court should not hear any further issues until the accused was advised in open court. Prosecutors argued that the 10-point written waiver, read to and signed by the accused that morning, was insufficient to meet the requirements of the 2009 Military Commissions

Act and case law from Article III federal courts. They also argued that a lack of presence and later claims of ineffective assistance of counsel are highly correlated; that the defendant faced no detrimental effects from appearing, as he has appeared multiple times in the past and would not be subjected to extreme force in transport, given that Common Article 3 of the 1949 Geneva Conventions is observed at the facility; and that there is a legitimate societal interest in seeing justice done in open court.

The defense countered that the accused in this case is not a garden-variety defendant in custody; rather, that the past torture inflicted upon the defendant requires a different approach, so as to avoid re-traumatization. Defense lawyers argued that the written waiver by the accused should be sufficient, and that the law of the case to this point has been that this waiver is enough. They also argued that the accused should be examined by two medical professionals to assess his condition before he is required to appear in court. The defense stressed that forcible removal of the accused from the camp would be detrimental, and urged the judge that they had concerns about his condition that could only be discussed in camera.

After a 15-minute recess, the judge, Army Colonel James L. Pohl, returned and ordered that the court will require "periodic" presence for waiver of the right to appear. The judge stressed that "periodic" is open to definition, but added that because the accused had not been apprised since April, before proceedings continue, the accused must be given instruction on record. Therefore, under these circumstances, "periodic" meant the next day. As such, the judge adjourned the court for the afternoon to give defense counsel the opportunity to meet with their client and explain the change of procedure.

The judge carefully balanced the need to keep the trials moving without posing a threat to the defendant's well-being. Waiting for psychological evaluation for a number of reasons discussed would delay the next hearing until January; both parties asserted that a waiver was possible at this stage, it was simply a matter of procedure as to how it was reached. The judge appeared concerned with the need to lay an adequate and complete record. He gave both sides multiple opportunities to respond to each other, and even entertained further argument after he issued the ruling.

Motions Heard Wednesday, October 24

On October 24 the court advised the accused of his right to be present, and heard motions related to discovery. Of note, the court heard argument in motion 117, Defense Motion to Dismiss for Violation of the Defendant's Due Process Right to a Neutral Convening Authority, and motion 104, Defense Motion to Dismiss because the Convening Authority Exceeded his Power in Referring this Case to a Military Commission.

The defense argued in motion 117 that due process is offended by the Convening Authority structure, which vests in Bruce MacDonald, a retired Navy officer who has served as the Convening Authority since 2009, the powers to: refer charges; decide whether capital punishment is available; select commissioners and the chief judge; grant plea agreements; determine the budget of the court, the defense, and the prosecution; and make the initial post-trial decision to grant clemency. While these grants are borrowed from the courts-martial, the defense argued that the Convening Authority is not concerned with the same issues as the latter system, such as the well-being of the defendant, the best way to resource and command a unit, and the good order and discipline

function. Further, the defense continued, Congress did not require this set-up by statute, and due process requires neutrality.

Prosecutors argued that due process has been afforded. Congress, by statute, created the military commissions, they continued, adding that the authority to convene them was delegated to the Convening Authority, and that the defense has not shown that the military commissions operate contrary to this structure. They argued further that the due process cases cited by the defense all refer to the neutrality of a final decision maker —which in this case is not the Convening Authority, but the judge. The prosecution also stressed that great deference should be given to the military rules in this context. It argued that the defense has the burden to show a lack of due process and that the burden had not been met. Judge Pohl took the matter under advisement.

The court also heard motion 104, in which the defense argued that the referral of charges against al-Nashiri were not in accordance with applicable law. Defense attorneys explained that the military commissions are courts of limited jurisdiction, intended to hear cases concerning war crimes committed during times of war and subject to the laws of war. As such, they argued that only if the political branches had acted, either by a congressional declaration of war or a presidential war powers notification, would the military commissions have jurisdiction over hostilities occurring in Yemen before the acts were passed.

The defense did not argue that the United States had to be at war with another country; rather, it argued that if Congress or the

President had identified a state of war against an organization, this would be legitimate. The Military Commissions Act cannot retroactively cover this time period or location, or deem a state of hostilities to have existed if the political branches had not acted. The defense stressed the importance of American reputation abroad. It also contended that this is a question of law to be decided by the judge, and not a question of fact to be proven beyond a reasonable doubt at a later time.

The prosecution, citing primarily to *Hamdan v. Rumsfeld* (2006), countered that this is a question of fact, and should be proved as an element of the case. They argued that the political branches spoke when they created the military commissions, and only required the prosecution

to show a state of hostilities, not a state of war. As such, they requested that the motion be dismissed. The judge also took this motion under advisement, and due to Hurricane



Sandy, the judge adjourned for the day.

On the legal issues discussed during the day, the skill of both the lawyers and the judge was apparent. It is interesting to note that while both parties could have made arguments under international treaty law, both declined to do so. The other striking element of the day's hearings was the presence of the accused in the courtroom. He and the judge engaged in an extremely interesting conversation about his treatment in detention and transport. While the judge was clear that many of these issues would need to be raised by his counsel by motion later, al-Nashiri went on the record saying: "If I don't come again, that will be my way

of condemning what's going on ... let the world know that the judge sentenced me to death because I didn't show up to court due to chains."

Travel and Other Items

Hurricane Sandy: Our travel was rather badly interrupted by Hurricane Sandy. We lost over a full day of hearings as a result. Observers and victims and family members were transferred from the tents to condo units located in another part of the base. Many observers were adamant that these accommodations should be made available to observers regularly. However, they cost \$50 per person, per night, and for many organizations may cause financial hardship to observers. Also, the base lost power for nearly 24 hours, and all communications (phone and email) were unavailable. While these kinds of weather risks will unlikely mark other observer trips, bringing extra cash in case of the need to provision heavily as we did is a good idea. Knowing that calling home may not be an option should also be considered by potential observers.

I spent considerable time reading past NIMJ reports and documents on the Office of Military Commission website before leaving. None of the documents related to the October 23-25 hearings were declassified before I left. The press room had access to the Internet and printers, and so we were able to borrow brief print-outs from them during our trip. It should be noted that this may not always be an option, and observers should be prepared to listen to hearings "cold."

Internet was available for an outrageous fee of \$150 for the week, I believe. Some tents were able to pick up the Internet wirelessly, without paying the fee. There is also free Internet at various places on the base, including the "Starbucks" coffee shop, and in a lounge in the condos

to which we were moved. If observers intend to blog, they should be advised that the most reliable source of Internet would be to purchase it.

Things to Bring: Following the advice of several other observers, I brought warm clothes to sleep in and a sleeping bag for the tents. These were very necessary and I highly recommend them. Also bring workout clothes if you are interested in running or going to the gym; this was available nearly daily to us, though it may depend on the interests of your military handlers. We also had the opportunity to swim on the day of our arrival and a swimsuit might be advisable. While we had plenty of opportunities to go to the Navy Exchange to purchase food items, I also brought a box of granola bars which came quite in handy on the day of our departure. Because of the power situation, there was no food or drink available in the airport, and we spent hours waiting for our flight to be cleared.

Transportation: I am based in the D.C. area, and so arranged for friends to drop me off and pick me up. Although the flight times were rather unreasonable (very early morning departure and very light night arrival due to the hurricane) this was preferable to the expensive taxi rides in and out of the base.

Conclusion

It was an honor to represent the National Institute of Military Justice as an observer in these hearings. I note that in addition to this report, I have written an op-ed which appeared in Jurist, available at: <http://jurist.org/hotline/2012/11/kathleen-doty-justice-guantanamo.php>. It would be a pleasure to attend hearings in the future. Thank you for the opportunity.

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KEVIN CIEPLY

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He is admitted to practice in Arizona, Colorado, Florida, Georgia, and Wyoming, the Ninth and Tenth Circuit Courts of Appeals, and the U.S. Supreme Court.

04 February 2013

Below is a synopsis of the motions that were decided:

1. Motion 149:

Defense's motion was filed last Friday in the wake of the 9/11 hearings. During those hearings, the Military Commission discovered that the OCA, Original Classifying Agency, was actually tapped into the courtroom, listening live, and had actually interrupted the feed. The MJ was not aware that the OCA had this ability, and the defense was not aware of this. Given those events, the defense team for al Nashiri moved the MJ to order the government to prove that the OCA had not invaded attorney client conversations in the courtroom, in the holding cells, and back at the JTF Detention Facility prior to allowing the proceedings to go forward. In the morning hours, the MJ denied the defense's motion based on the fact that the defense had not submitted any evidence that the OCA had listened in on attorney-client communications. Defense counsel then requested a recess to consult with their state bars and supervisors. The MJ granted this request as a one-time exception.

After lunch, Mr. Kammen stated that during the break courtroom personnel briefed both the defense and trial counsel on the operation of the microphones. Mr. Kammen argued that the entire courtroom was one large listening device, placing the defense attorneys in a perilous position every time they wanted to have attorney-to-attorney conversations, as well as conversations with their client. Mr. Kammen also made the overall argument in a more artful manner than the morning's argument. Mr. Kammen explained that they gave the "system" the benefit of the doubt, up until last week. Now, they are no longer willing to give the system that benefit.

In particular, Mr. Kammen stated that in the courtroom, they are forced to walk to a corner, away from the microphones, any time they wish to discuss a matter in private (which he and Major Reyes did a short time later, drawing from Mr. Mattivi a comment that there were "theatrics occurring in the courtroom"). The other option, according to Mr. Kammen, would be for them to go into the holding cells, as he was comfortable after speaking with the courtroom personnel that there was no audio in the holding cells, only a video camera. As far as the 1TF Detention facility, Mr. Kammen said that he has reason to believe that there is no degree of privacy for their attorney client conversations.

In the end, the Military Judge stated that this was simply a matter of logistics and gave the government time to fix the courtroom issue and investigate the situation at the detention facility. The Military Judge suggested that the courtroom remedy may be as simple as removing the microphones from the defense side of the courtroom, at least for the al Nashiri hearings, and just working around the issue when the MJ needs to speak with the defendant.

2. Motion 140:

This was the government's motion for a Rule 706 examination. The government made the motion for two reasons. One, the defense counsel, on multiple occasions, have claimed that the defendant was suffering from extreme PTSD as a result of being tortured by the CIA. And two, the government based their request on a response that the defendant had made during the October and July hearings concerning whether his absence from the courtroom in previous hearings was or was not voluntary. Apparently, al Nashiri had made some comments that he was under some physical threat, which the government felt was completely fabricated, thus bringing into question his abilities to reason and comprehend.

The defense objected to the motion, stating that while their client was indeed suffering from PTSD, he was completely capable of understanding the proceedings and maintained the capacity to stand trial (the other portion of Rule 706 addressing mental capacity at the time of the crime, was not an issue as agreed by both parties). Given that Rule 706 allows the government to raise it, and the fact that the standard is so low: "reason to believe," the judge granted the government's motion. He will write an order to a medical treatment facility (a facility the government will designate upon investigating which facility is most appropriate) for the examination. Under 706, the defense will receive the entire report. The government will only receive a summarized statement that the defendant does or does not have the capacity to stand

trial.

3. Motion 140C.

This motion is a defense motion for Dr. Iacopino to provide input to the medical examination board conducting the Rule 706 examination. We will hear testimony from Dr. Iacopino, then the MJ will decide. What was interesting is that the government's argument here was that the court should not tell the medical board how to conduct the medical examination, if they (the medical board) needs an individual such as Dr. Iacopino, they can reach out. But the government took the exact opposite approach in the next motion.

4. Motion 135.

The defense requested that Dr. Crosby be allowed to physically exam the defendant for torture injuries, without any guards present, without being shackled, by herself. The government opposed this motion, saying that the medical examiner should not make all the calls, but rather the detention facility commander should be able to place parameters for security purposes.

Basically, each side argued here in an inconsistent manner from how they argued Motion 140C. The judge granted the defense motion, stating that given the convening authority appointed Dr. Crosby to conduct a medical examination, it is up to her to decide how to conduct, within reason. And the military judge felt that the defense request was within reason. A motion that was not addressed was Motion 99D, addressing whether the defendant's absence at some past hearings was or was not voluntary.

This is a government motion to clarify the record. Given that it would require a colloquy with the defendant, the MJ put it off until after the 706 examination. Lastly, the government tried to argue that even though the MJ had granted their motion for a 706 examination, that the hearings could, nonetheless, proceed forward. The government pointed to Rule 909(e) (2) that makes the mental capacity of the ac-

cused an interlocutory matter, allowing the trial to proceed unless: "it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease ... to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case." The government argued that there is space between the "reasonable grounds" to believe that a Rule 706 examination was needed and a "preponderance" of evidence that the defendant was incompetent. The military judge denied this and stated that other than the testimony of Dr. Iacopino, nothing further would occur until the 706 was conducted.

* * * * *



MELISSA MILLS

Khalid Sheikh Mohammed; et al.

11 February 2013– 14 February 2013

Melissa Mills is a federal prosecutor in the National Security Division of the Department of Justice, where she is responsible for investigating and prosecuting counterterrorism and counterintelligence cases. She previously worked at the Los Angeles law firm of Gibson Dunn, advising clients on foreign corruption and other compliance matters.

From 2002 to 2006, Melissa served as a commissioned officer in the United States Marine Corps, including a 2004 tour in Iraq. She is a graduate of SUNY Binghamton and Colombia Law School. After law school, she served as a law clerk to the Honorable Andrew S. Effron, U.S. Court of Appeals for the Armed Forces.

She is an advisory board member of the National Institute of Military Justice. The views expressed are her own and do not reflect those of the Department of Justice.

2/11/13

This morning's session began with AE 133, the defense emergency motion to abate the proceedings due to the revelation at the last session that an out-of-court government censor was apparently controlling the audio feed unbeknownst to the defense or the judge. Counsel for KSM asked the judge this morning for an additional 24 hours after interviewing the necessary witnesses in support of the motion. He opined that his difficulty in scheduling those interviews was yet one more example of the prejudice to the defense caused by the government's decision to hold the proceedings on a remote island in the Caribbean.

Although the judge had reportedly expressed ire and indignation at the last session when the activities of the unknown government censor were revealed, he seemed—at least initially—decidedly less sympathetic to the defense position today. In particular, he appeared skeptical that defense had any evidence whatsoever that an agent of the government was monitoring their privileged communications. He noted that there is a little sign on every microphone in the courtroom advising caution with live microphones and that there is a mute button on each microphone. Counsel for KSM replied that the mute buttons apparently do not work because he had tested them with the court reporter, who could still hear him when the mute was pressed.

Counsel for Al Baluchi then proffered additional information, learned during an interview of the courtroom technology expert, to clarify the situation. He explained that all 27 microphones in the courtroom are incredibly sensitive and will, working together, pick up virtually every sound made in the courtroom. All of that raw sound then gets filtered through a "gate." The filtered or "gated" audio is what goes through the audio feed heard in the gallery and at remote locations. But the "pre-gated" audio field containing everything picked up on every microphone goes to an agent of the original classifying authority (the member of the intelligence community with a stake in the information). Counsel further explained that even if a defendant or counsel presses mute on the nearest microphone, the audio will still be picked up on other microphones in the room. This gives rise to the defense's concern that conversations at the defense table, made with the expectation of privilege, are being monitored and possibly retained by an agent of the government.

Counsel for bin'Attash was more strident in expressing her concerns. She relayed that although she had explicitly asked whether the meeting rooms at the detention facility were monitored and was explicitly told that they were not, she has since learned that there are in fact listening devices masked as smoke detectors and that these devices have a recording function as well. The judge accepted those representations to a point, but he then stated that these issues would be more properly introduced through the presentation of evidence than through counsel's proffer. The judge took issue with counsel for bin'Attash's other concern -- namely that she had been previously unaware that the prosecution owns and prepares the record of trial (unlike in civilian courts, where this function is judicial) -- noting that this is how it has worked in military courts for many years, and that counsel's lack of awareness of this basic fact did not make it unfair. Counsel stated that nonetheless, the fact that the prosecution possesses and controls the audio feed -- which may contain privileged material -- even for the purposes of preparing a record of trial was problematic.

The prosecution stated that currently, the microphones operate with a default of picking up sound unless the mute button is affirmatively activated, but that the government is able and willing to change the system from "push to mute" to "push to talk." The prosecution further agreed to recess while that change was implemented (estimated several hours), which would also allow defense additional time to conduct interviews on the subject.

Faced with a defense request for the pre-gated audio feed to allow the defense to determine whether any privileged communications were captured, the judge asked each defense team whether they agreed to have the audio feed given to all defense teams, noting that one defendant's privilege is not another's. There were no objections. Counsel for bin'Attash noted that she did not see how they could possibly be privileged at this point, but that she had no objection to her fellow defense counsel hearing what the government had already heard.

The judge granted the government proposal to modify the audio system. He further granted the defense request to continue the proceedings until 0900 tomorrow morning. At approximately 1020, the court had adjourned for the day. Meanwhile, the defense will review some of the pre-gated audio feed and conduct witness interviews in preparation for hearing of this motion tomorrow.

2/12/13

Court reconvened at 0900 with KSM, bin'Attash, and bin al Shaib present. The other two defendants had elected not to attend.

Resuming the litigation of AE 133, counsel for KSM called the civilian CCTV technology program manager, who is responsible for the recording and broadcast of audio and video of commission proceedings. The witness testified to the functioning of FTR Gold, a court-reporting system used at GTMO and also widely used in courts throughout the United States. He explained that all audio feed from every microphone in the courtroom is directed to a digital mixing board, which serves as a gate in the path of the sound. Only sounds above a certain decibel level—generally, between -40 and -60 decibels—passes through the gate. Some sounds near the threshold may be picked up, but not very clearly. The witness further testified that if a sound did not make it through the gate, it would not be able to be heard, even on the ungated feed.

The gated audio goes to the gallery and other off site viewing locations. The ungated feed goes to three entities: the court reporter, the interpreters, and the OCA (Original Classification Authority). Perhaps foreshadowing a prospective remedy, the judge interjected to ask the witness whether it is possible to change the system to route only gated audio to those three entities. The witness affirmed that such a change is technologically possible. Counsel for al Baluchi asked numerous times how any changes to the gating system would be documented, what form that documentation would



take, and what proof the defense would receive. This line of questioning elicited an increasingly testy response from the judge, who ultimately shut it down as irrelevant.

The witness acknowledged that more than one microphone can pick up a person's words, assuming that the person is speaking loudly enough and aiming his voice near a nearby microphone. But, he asserted, if one is careful to press the mute button on the nearest microphone and to whisper, one's sidebar conversations will not be picked up by other microphones. Near the end of his testimony, the witness attempted to illustrate his point by pressing the mute button on the microphone in the witness box and whispering words to the effect that "now the other microphones can't pick up my voice." His intended point was rather severely undermined by the fact that all of us in the gallery receiving the gated feed heard him clearly (though less loudly) say those words, which must have been picked up on other microphones.

On cross-examination by trial counsel, the witness explained that when the microphones feed into the gate, all of the sound is mixed. The FTR Gold software is capable of separating the

audio into eight channels. Only the court reporter receives these eight channels; neither the interpreter nor the OCA has the capability to break the audio into channels. Later, on redirect, the witness conceded that he has no knowledge of the OCA's technology, which served to undermine his earlier assertion that the OCA did not have that capability.

Trial counsel elicited testimony that the OCA does not have the ability to record, amplify, or clean up the ungated audio feed. The witness further testified that his office maintains (in a safe) the only two recordings of the proceedings and that no one from the prosecution or any other government entity had ever asked for those recordings. On redirect, the defense asked various questions designed to get to a point that may be summarized as follows: "Really? The original classification authority, whomever it may be, could not possibly have the technology to record, amplify, or clean up sound from these courtroom microphones? Not with a handheld tape recorder or garden-variety amplifying device, not by purchasing the FTR Gold software, not through whatever more sophisticated technology it may have at its disposal?" In the end, the witness's acknowl-

edgment that he was not familiar with the OCA's technological capabilities left open the question of what could potentially happen to the ungated feed. However—theatrics aside—without any evidence that any of these nefarious possibilities actually occurred, it is unclear that the defense can meet its burden of proving that the channeling of ungated audio feed to the OCA infringed defense counsel's ability to communicate confidentially with their clients. In a more typical case, the judge might permit the third party to be called on to testify about what it did or did not do, but it would seem unlikely that the OCA will be called to the stand.

Another aspect of AE 133 alleges that the government has improperly monitored confidential defense communications using hidden microphones in defense meeting spaces. To speak to this issue, the defense first called the Staff Judge Advocate to the Commander of JTF GTMO (the command that runs the detainee operations). The SJA testified that in January 2012, during a proffer session involving a detainee along with prosecutors, defense counsel, and law enforcement officers, he observed a law enforcement agent in the control room listening in on the meeting using headphones.

The proffer session was taking place in a meeting space that was then, and is now, used for meetings between defense counsel and their clients. The SJA testified that he knew that it was standard operating procedure to monitor meetings in these rooms by video, for security and safety reasons; however, he had not previously been aware of the capability to monitor these meetings by audio. The following day, he raised it with the JTF commander, who assured him, "Don't worry, we never listen in on defense counsel." The SJA was satisfied with this

representation and took no further action to investigate. Apart from this one occasion, the SJA was never aware of anyone using the audio-monitoring capabilities to listen to something in the meeting rooms. He is not aware of when those capabilities were installed, nor of what the meeting rooms were used for in the past, before the military commissions began and when intelligence-gathering was a more prominent function of the JTF.

The defense questioned the SJA about several of his emails, which the government had provided in discovery. First, they called his attention to an email that the JTF commander (a different officer from the one with whom the SJA discussed the monitoring of the proffer) sent to the Public Affairs office. The email con-

tained a document relating to a press inquiry, which stated words to the effect that "no microphones are installed in the meeting rooms to ensure that attorney-client privilege is maintained."

The SJA explained that he had not seen the document before it went out (which is evident from the fact that he was not on the original email

chain and was sent the document by his commander only after the fact), and further that he does not recall having ever opened the attachment, since he would have seen that it had already gone out to the PAO before he received it.

The SJA testified that the microphones are concealed in what appears to be a smoke detector. On cross-examination, trial counsel attempted to elicit that the device was "clearly marked" with a particular logo and that a simple Google search would have revealed that this logo was that of a listening device. The witness was not able to read the marking on the side, and the judge seemed incredulous at what

Without any evidence that any of these nefarious possibilities actually occurred, it is unclear that the defense can meet its burden of proving that the channeling of ungated audio feed to the OCA infringed defense counsels' ability to communicate confidentially with their clients

he perceived as a suggestion that counsel and defendants were somehow on notice that their communications were being monitored. Trial counsel clarified that he was not suggesting that; rather, he was merely pointing out that if the government had wanted to hide the existence of this device, it could have done a better job.

Defense counsel also called the SJA's attention to the 27 Dec 2011 order regarding procedures for attorney-client meetings, and in particular to the section that requires counsel to advise the government in advance of what languages will be used during a meeting. The SJA stated that this provision was never enforced and that he did not know or recall its purpose. He conceded that this could, in retrospect, be read to suggest that defense conversations would be monitored by a government interpreter. He also acknowledged that the only way to verify which language had been used, had compliance with this provision been enforced, would be to listen to the meetings.

To his knowledge, however, that never happened. Trial counsel later suggested on cross-examination that since some defendants speak multiple languages, the government might have asked what languages were to be used in order to decide how many meeting participants (including interpreters) would be attending, which is relevant to security procedures. With respect to the portion of the order requiring that detainee-attorney meetings use only one language to the extent possible, and prohibiting detainee-interpreter sidebar conversations, the SJA testified that the JTF has a security interest in restricting any conversations a detainee may have with an interpreter not involving defense counsel.

The witness testified that when a defendant moves anywhere, it is SOP to conduct a security inspection of that defendant and anything that comes with him (including his legal bin). He is not aware of any legal mail having been seized.

The final full witness of today – called out of order by video-conference on three other motions (8, 18, and 32, dealing generally with

privileged mail communications) was an Army lieutenant colonel who was in charge of high-value detainee issues at the SJA office. He described his primary job function as delivering mail to and from the HVDs. When asked about this function, he stated that his job was to search the mail for physical contraband only, with no review of written contents. (He further offered, on three separate occasions, that “the detainees knew the SOPs and made sure we did it properly.”) He testified that in early fall 2011, he became aware of a policy change at the SJA's office that would require searching detainee's mail for content.

Defense counsel attempted to elicit that he objected to this concept for ethical principles, and to a limited extent he did give that response, but his greater concern appears to have been that it would make his job more difficult by hampering his relationship with the HVDs. Ultimately, the witness testified that he expressed his concerns to the SJA, and that shortly afterward, he was relieved of his position and replaced with someone who, in his opinion, had no ethical concerns about reading attorney-client mail.

The SJA was then very briefly recalled, purportedly on AE 133. He stated that he is not aware of legal mail being reviewed for content. If he were aware of anyone monitoring (including for intelligence purposes) attorney-client communications, he would notify his supervising attorney, “because that would be wrong.” This appears to go to the mail issue, which will be covered in more detail on other motions scheduled to be litigated this week.

2/13/13

Today's first witness was a Navy judge advocate, a lieutenant who had been assigned to the SJA to JTF GTMO in 2011 and was responsible for handling HVD issues for a time after yesterday's witness had been relieved from that position (who testified that he was fired shortly after expressing disagreement with the SJA's policy of reviewing privileged attorney-client communications). The defense called him in support of defense motions 8 and 18, and the oppo-

sition to government motion 18, all of which generally deal with privileged mail communications.

The witness testified that his duties included screening HVDs' legal mail, as well as documents that defense attorneys intended to bring in to legal visits, to ensure that those materials complied with an order by RADM Woods (commander of JTF GTMO). He further stated that items other than those authored by the attorney of client were not considered "legal mail" under the order and that such other items must be routed through the intelligence function of JTF GTMO, which would screen them for content and, if deemed not to contain information contraband, submit them for delivery. The witness acknowledged that this process might take several months; however, it was the only way under the order that any mail deemed "non-legal" could be allowed into the detention facility.



He testified that he did not review for content any materials that defense counsel represented to him that they had personally authored and that it was not his practice to send mail deemed "legal" under the order to the intelligence function for content screening. He acknowledged that he had refused to allow them to bring such materials as RADM Woods's order covering privileged mail communications, amicus briefs filed in other commissions cases, published legal opinions and filed pleadings in other cases, a published book discussing the detainee to whom the book was sought to be brought, and the Navy JAG Instruction covering the ethical ramifications of seizing attorney-client communications.

Next, the defense called an Army colonel serving as commander of the Joint Detention Group in support of AE 133, the emergency defense motion alleging audio monitoring of privileged defense communications in several locations, including meeting rooms at the detention facility.

The witness testified that the meeting rooms at the E2 detention facility are under his control, but that the electronics and technical systems therein are owned by the JTF intelligence function. Other agencies, including the FBI, have access to the facilities through the proper channels, which should include getting permission from his command. He has never personally seen anyone monitoring the audio in the E2 meeting rooms, and the only such occasion he is aware of is the proffer session that the SJA previously testified about, where he observed a law enforcement agent listening in (the SJA, who testified about this yesterday, told the witness about it).

The witness was unaware that the meeting rooms were equipped for audio monitoring until the defense filed its motion. When he assumed command of the JDG, he did a turnover operation and inspected the facilities, but while he noticed the video cameras, he did not see the microphone, which he agreed looked just like a smoke detector. He testified that he also asked the E2 OIC whether there were audio monitor-

ing capabilities and was told that there were not.

The witness testified that in October 2012, the intelligence function performed certain repairs and upgrades to the audio and video systems at E2. The witness was not aware that the audio work was being done because he did not know it was there. When the defense asked why they would repair a system if it was not used, he speculated that if it was broken on their watch, they probably felt a duty to return it to its original condition. When asked how they would even have known to repair it if it was not used, he said that the wires had been damaged. Despite the repairs, the witness testified, the audio still was not working in meeting rooms 1-4. It was working in rooms 5-8. When asked if it would be fixed in rooms 1-4, he replied that it would not, because there was no need, since the audio was never used.

Multiple defense counsel asked whether he was aware that since the repairs of October 2012, all meetings with their clients had been scheduled in rooms 5-8 (the ones with working audio). He was not aware, so we will look out for possible evidence on that point. He did confirm that rooms 1-4 are otherwise in working order, except for the audio.

Perhaps foreshadowing a prospective remedy, the judge asked the witness whether the listening devices - which have now been disabled since the defense motion - can be removed entirely. The witness confirmed that it is possible.

Next, the defense called the Director of the ABA Death Penalty Representation Project in support of 8, 18, and 32. They requested her testimony, over prosecution objection, to offer the judge insight into the deliberations behind the 2003 ABA guidelines on death penalty representation. The value of her testimony was not clear to me, as the defense asked a brief handful of questions that were not, in my view, illuminating of the issues for which she had been called, before turning her over to the government. The purpose of the government's lengthy and laborious cross was even less clear to me. In the end, I suspect that the judge will

read the ABA guidelines himself and give them the weight he deems appropriate, irrespective of their "legislative history."

At day's end, three defense counsel returned with a dramatic announcement: their clients' legal bins were reportedly ransacked while they were in court yesterday, with several clearly marked attorney-client materials now missing. The government is looking into these allegations this evening and will report back in the morning.

2/14/13

The final day of this week's session opened with a brief discussion of the allegation raised by the defense the previous afternoon. Defense counsel represented that several defendants' legal mail bins had indeed been searched while defendants were in court this week, resulting in the confiscation of multiple pieces of legal mail that had already been reviewed for content, cleared, and stamped as attorney-client privileged material.

Defendants were present in court, and each brought a shallow plastic bin presumably containing their legal mail. Bin'Attash refused to sit down for some time and eventually attempted to address the court, saying that he had something important to say to the judge. "You make us come to court..." he began, a reference to the court's standing order that defendants appear on the first day of a session, and perhaps an accusation that this requirement gave the guards the opportunity to search the bins without the detainees present. The judge cut him off and advised his counsel that if the accused wished to testify, he would have an opportunity to do so under oath.

After a brief attorney proffer about the facts as known, defense counsel for KSM, bin'Attash, and bin al Shaib urged the judge to take up the mail search issue immediately and postpone the witness originally scheduled for that morning (the convening authority for the military commissions, who was standing by via video-conference to testify on other motions). The defense argued that the privilege issue had be-

come a fundamental structural issue that must be resolved before anything else could be effectively addressed. Specifically, they articulated that the repeated and continuing invasion of attorney-client privilege was causing the detainees to lose whatever faith they had in the fairness of the process and was making counsel's job of representing them next to impossible. One counsel characterized it as ironic that while the detainees were in court listening to witness after witness testify that their confidences with their attorneys were – and would continue to be – respected, the guard force was at that very moment once again invading those confidences.

Certainly, the witness standing by to testify via VTC – who was the convening authority, a career judge advocate, and former TJAG of the Navy – would have understood better than most that court schedules are fluid and must sometimes be changed to address other pressing matters. The prosecution did not represent that the witness could not be easily rescheduled, and indeed it came as no surprise to anyone when his testimony was nowhere near complete by the end of the allotted time and he was advised that he would be recalled at a later date anyway. Nonetheless, the military judge elected to proceed with a portion of the admiral's testimony first and to postpone the mail issue until the last few hours of the session.

The defense proceeded with the convening authority's testimony on motions alleging defective referral (008) and unlawful command influence (031). The witness testified that he was appointed by the Secretary of Defense in March 2010 for a three-year term and that he serves both as convening authority and as Director for the Office of the Convening Authority. He reports directly to the Secretary of Defense.

He stated that he had been "disgusted" with President Bush's first attempt at military commissions, but that he was a proponent of "properly constituted" military commissions modeled after the UCMJ and wherein statements extracted through torture or degrading treatment would be excluded. Sometime after

assuming his duties, he became concerned about the pace at which security clearances for commissions participants were being processed, so he appointed a colonel to work directly with OPM and DIA in an attempt to speed things up. The witness further testified that at some point during the relevant time period, his office's security department was subjected to an investigation with respect to these issues.

At day's end, three defense counsel returned with a dramatic announcement: their clients' legal bins were reportedly ransacked while they were in court yesterday, with several clearly marked attorney-client materials now missing.

The essence of the defective referral motion, at least from the perspective of the al Hawsawi defense (the only party to examine the witness thus far), is that the defense team did not have a meaningful opportunity to submit matters in mitigation before the convening authority referred capital charges. Specifically, al Hawsawi alleges that he did not have a cleared mitigation specialist before the deadline to submit mitigation matters and that he did not have a dedicated translator capable of traveling with the team. The prosecution concedes that al Hawsawi's mitigation specialist did not receive his security clearance until after the deadline; however, it argues that a mitigation specialist is not an essential component of the defense team, and thus that the government's failure to allow him to do his job does not render the referral defective.

Counsel and the witness also sparred on the issue of translation resources. The witness disputed counsel's factual predicate that he was not afforded an interpreter, stating that his

office had made eight to ten cleared linguists available to counsel, and that counsel had turned them down and had instead requested another individual who was ultimately unable to be cleared. (At a press briefing after the hearing, counsel for al Hawsawi stated that the eight to ten translators referenced by the witness comprised a pool of OCA translators generally available to defense teams to translate documents on an as-needed basis, but that they were not able to be assigned to a particular team or to travel with counsel to GTMO to assist in interactions with a client. He stated that he would present evidence on this point in support of the motion at a later date.)

The witness testified that he had granted several extensions – over many months – of the deadline to submit mitigation matters because he wanted each team to have at least 60 days from the appointment of learned defense counsel. Once that standard was finally met, he declined to further extend the deadline, notwithstanding the defense’s protestations that the slow pace of his office’s security clearance process had left them without adequate resources to provide a meaningful submission of mitigation matters.

He stated that mitigation specialists are not required by the law or the rules, and that he did not consider a mitigation specialist to be an essential part of a capital defense team, particularly where each team had learned defense counsel with extensive experience in capital cases and holding proper security clearances. Counsel asked why, if that were true, the witness had granted his request for a mitigation specialist in the first place. The witness repeated that a mitigation specialist was not required.

The witness stated several times that counsel could still submit matters for his consideration. Referral of capital charges has already happened, but the convening authority could dismiss charges if a submission were to change his mind. But now that the charges have been referred, it would seem that the standard to deviate from that default and to shut down processes that have been in motion for nearly a

year might be considerably higher. (Of course, the mitigation-matters issue is not merely academic. As the Khatani case shows, the possibility of a convening authority declining to refer charges against a 9/11 defendant on the basis of mitigating factors is not a fantastical notion.)

The commission turned its attention back to the privileged-communications issue for the last few hours of the session. The day before, the prosecution had proposed asking the Joint Detention Group command to investigate what had happened with the search of the legal mail bins. That informal investigation presumably led to the witness that the defense called, a Navy lieutenant commander and assistant SJA who was assigned to deal with HVD matters. However, it quickly became clear to all parties that this individual was not the right witness, as he had no firsthand knowledge (and limited knowledge from other sources) about the search.

This witness testified that he had been told that in the course of routine security inspections on February 11 and February 13 (the first and third days of this court session), members of the guard force had searched the detainees’ legal mail bins and had seized certain items from KSM, bin’Attash, and bin al Shaib. Most or all of the items seized had previously been stamped with a green square stamp similar to that used by the guard force to mark legal mail that had been properly reviewed and cleared. However, some of the green square markings were not as complete as the others, possibly as a result of insufficient ink or insufficient pressure being applied to the stamp.

Certain others were lacking initials of the reviewing member of the guard force and/or dates of review. Defense counsel for bin’Attash inquired whether these inconsistencies were something over which the detainees could possibly have any control, a question that the witness declined to answer based on his lack of knowledge of guard force procedures. He testified that one of the items seized was a photograph of the Grand Mosque in Mecca. Another item, seized from bin al Shaib’s cell, was a piece

of toilet paper with English words written on it. He believed that these items, along with all of the legal mail seized, would be returned.

The witness further testified that in addition to the stamp inconsistencies, some items were seized because they were disturbing and presented possible security concerns. This material included a metal pen insert found concealed in a book binding in KSM's cell, as well as multiple books that might be considered information contraband. The titles of which the witness was aware were "Black Banners," which he understands to be a prohibited title, as well as "Perfect Soldiers" and two volumes of the 9/11 Commission Report.

He was not sure how or whether books and other publications were stamped, although he thought it might have something to do with a "guan" number assigned to a particular title (such that any copy with that guan number possessed by any detainee would be permitted). The witness had heard that the 9/11 report books would be returned to the detainees; he did not know for sure about the others. The pen, of course, would not be returned.

When asked who had given him the information about the search over the past 24 hours so that more knowledgeable witnesses could be called, the witness testified that it was members of the guard force, but he did not know which ones (either by name or title), nor did he know how they could be identified. Later in the day, the government stated that the command was prepared to initiate a JAGMAN investigation into the issue of that week's legal bin searches and seizures. The report will be prepared in approximately one week, after which the defense will have more information from which to conduct its own investigation. The judge and the defense concurred with this proposal.

When the judge asked for a proposed remedy to the ongoing problem of seizure of attorney-client communications, the government argued that the court should implement – at least on an interim basis – the government's proposed order governing mail communications (AE 018). The government noted that its proposed order was fashioned after the one that this

judge signed in the al-Nashiri case, prompting the judge to caution both sides that just because he did something in one case military commissions case, no one should assume it would be done in another. The government's proposed order had been vigorously opposed by the defense even before this latest issue arose, and here the defense challenged the idea that this order – which they consider to present an even broader threat to attorney-client confidentiality – could somehow remediate this new violation.

Moreover, they argued, the proposed order would do nothing to address the actual problem at hand, because it would only govern the issue of who conducted the initial searches and would not alter the fact that the government was now seizing attorney-client mail that had already been effectively reviewed and cleared at least once. Rather, defense wanted the judge to order that all legal mail that was already stamped and marked not be subject to seizure or re-review, except for security searches for physical contraband. Additionally, the defense argued that making the disputed government version the default would put them at a disadvantage and would essentially put them in the position of moving for reconsideration of the existing baseline. Ultimately, the judge deferred the question, inviting both parties to brief the issue in the coming weeks before he issues an interim order.

In discussing a remedy, the judge also acknowledged the underlying structural problem that unlike in a typical court-martial, the convening authority does not own or control the camp commander, the guard force, the intelligence function, or other relevant assets aboard NAS GTMO that may be involved in inspections and searches. Nonetheless, the judge asked the prosecution to convey a "message to the stamping authority" that if he issued an order that mail be stamped a particular way, it had better actually be stamped that way, or else there would be another order that the Joint Detention Group would not like. Precisely what this means, or by what authority he could enforce any such order in this fractured command context, is not clear.

At the very end of the session, in discussing housekeeping and docketing matters for the next session in April, the judge advised that the “emergency motion to abate” portion of AE 133 was denied. He stated that he was open to hearing the merits of 133, including presentation of additional evidence as well as arguments for prospective relief and any remedies for past wrongs, during the April session, but that he would no longer consider it to be prioritized over all other matters.

The parties further discussed the fact that defense counsel still had not signed the outstanding memorandum of understanding (MOU) regarding treatment of certain classified material, such that the prosecution may not produce the classified discovery to the defense. The defense counsel have thus far refused to sign the MOU, on the theory that because it prevents them from sharing evidence with their clients, it may bind them to violate their ethical obligations. The judge stated that if defense continued to resist signing the MOU, thereby effectively opting out of classified discovery, he might have an independent duty to consider whether counsel could continue to competently represent their clients in this case.

The import of the privileged-communications issue was evident at a press briefing conducted after the week’s session concluded. Defense counsel’s frustration was palpable, with four of the five lead counsel speaking at some length about the tremendous strain they feel that these developments have placed on their ability to effectively represent their clients. As counsel for bin al Shaib put it, “every time this happens, it makes it more and more difficult for us to tell our clients that there is any legitimacy to these proceedings.”

Counsel for bin’Attash agreed, stating that, “I cannot explain how detrimental it is to tell my client that everything he says to me goes no further than me, because that’s how the rule of law works in our society, and then to turn around again and again to see that this just isn’t true. It erodes his trust in me. And if my client can’t trust me, then why should he bother having a lawyer?” Counsel for KSM stated that

during 3.5 years of torture, the military instilled in his client “learned helplessness” – the concept that he has no ability to control anything in his life. Counsel observed that within that framework, even the appearance that the government was invading the sanctity of his relationship with his attorney makes it virtually impossible for the client to have any trust in the process, or in his lawyer, who is then put in the tenuous position of vouching for the government.

He further tied these difficulties to the commissions system as a whole, noting that the federal court system has – over the course of more than two hundred years – painstakingly built a framework of precedents and doctrines and principles pursuant to which any conceivable obstacle may be addressed, while the commissions system has no such structure. Finally, counsel for al Hawsawi opined that judge had.

* * * * *



BRIDGET WILSON

Bridget Wilson has successfully represented numerous clients in military cases, at administrative proceedings and courts-martial and before the discharge review and corrections boards and in the military appellate courts. In addition to her military law practice, she is a frequent speaker and author on military law and policy.

She is a graduate of Creighton University and the University of San Diego School of Law. Ms. Wilson has taught military law as a member of the adjunct faculty of Thomas Jefferson School of law. She is a veteran of the U.S. Army Reserve.

The hearings conducted by the Military Commissions, at Guantanamo Bay, were anticipated to be routine. However, it was difficult to call any part of the Military Commission routine. The motions listed for the current proceeding were primarily related to discovery issues and the ambiguous requirements delineated in Protective Order #1. To illustrate, the Defense moved the Court to clarify and/or revise the definition "unauthorized disclosure." After thorough arguments from both sides of the isle, the Government and the Defense narrowed the term "unauthorized disclosure." In addition, the presiding judge entertained the Defense's other motion to revise Protective Order #1, which specifically included AE 13S, 13T, and 13U, all of which requested changes in PO #1's "need to know" provision. And finally, just before its hearing, the Defense's Motion to Compel Production was rendered moot because the government produced the documents pertaining to the protocols for force feeding prisoners.

Additionally, on February 28, 2013, there was an argument from Cheryl Borman, Learned Defense Counsel for accused Bin Attash, challenging the constitutionality of the Rule for Military Commissions 703 (RMC), which, if consistent with court-martial practice, requires the defense to submit requests for witnesses to trial counsel with a synopsis of the expected testimony. Borman argued that the rule violated both the attorney-client privilege and work product privilege. Military Judge Pohl denied the motion pertaining to percipient witnesses, however, he did allow Borman to submit requests for an expert witness *ex pane*.

Later on, the Military Judge took under consideration a motion to allow the accused, Ali Abdul Aziz Ali, to have a onetime audio/visual communication with his family following the recent death of his father. The Military Judge took the matter (AE93) under submission, but did engage in discussion with the Defense about his limitations in controlling any matter outside the four walls of the courtroom, noting that he has authority over the court, not a detention facility. That comment foreshadowed events that would take place later in day. In the Military Commissions courtroom, members of the press, as well as victim family members and observers, sit behind a glass partition with an audio/video feed that had a 40 second delay to permit the court to silence discussion of classified information.

In addition, there is a security "alarm," a red light locate on right side of the judge's bench, which upon being triggered, flashes, sounds an alarm, and "white noise" is piped over the sound sys-

tem to mask what is being said in the courtroom. The video feed is also cut off when the alarm is triggered. The alarm is set up in the courtroom to avoid the inadvertent release of classified information. In the afternoon session, the alarm was triggered by an unidentified third party, which brought the proceedings to a temporary halt. Although all persons in the observation area could see the courtroom, the audio feed was replaced by very loud "white noise" that continued for several minutes. (Those watching the CCTV feed at Ft. Meade would be unable to see the courtroom as well).

David Nevins, Counsel for Khalil Sheik Mohammed, rose to speak to the court regarding the ongoing efforts of the Defense counsel to discover information on alleged "black sites" where the accused may have been confined before transfer to the detention facilities at Guantanamo Bay. As he began to speak the alarm was triggered. When the audio/video feed was restored, Military Judge James Pohl, who was visibly angry, announced that an unknown third party had interrupted the proceedings, that neither he nor the court security officer had triggered the alarm. He confronted the Government's counsel about "who has the ability" to interrupt the court. He did not receive an answer in open court, although Johanna Baltes, the government's counsel on classified information, did say that more information might be forthcoming under the protection of a RMC 505 (h) closed session. The defense attorneys reacted with Nevin demanding to know who is involved in "censoring" the courtroom. The only person in the courtroom who seemed to not be surprised by this event, was the Government's counsel. The Defense insisted that this incident verifies their continuing belief that their conversations in court at the counsel tables are being monitored.

This event occurred within the context of new restrictions placed on the Defense. On December 27, 2011, the JTF-GTMO Commander, RADM David B. Woods, signed an Order Governing Written Communications Management for Detainees Involved in Military Commissions. The Order established a review team of

individuals tasked with reviewing all material from the attorneys to the detainee. The review team reports to RADM Woods. The Order also prohibits attorneys from bringing any notes into client meetings that they may have created for the meeting without first providing those notes to the review team for a classification review.

James Connell, the Learned Defense Counsel for accused Ammar al-Baluchi, had commented outside the courtroom to several observers that since December 2011, the Defense had no telephonic or written communications with their clients, as they were unwilling to have a third party review their material. After the alarm incident, he also commented that the "paranoia level" was high with the Defense's attorneys. As the afternoon session continued, LCDR Walter Ruiz also raised the defense's concern that the conversations at the counsel tables were being monitored, a concern only heightened by the events of that afternoon. This is a tension that appears unlikely to diminish in the future. Khalil Sheik Muhammed arrived in court wearing the camouflage vest that he had requested as distinguishing garb, after discussion in earlier hearings. All the accused appeared at the first day's hearing, but declined to appear at the subsequent days. Because the accused have refused to participate in these proceedings, every matter that would require their assent was confirmed with representations from counsel. All the accused did cooperate with the detention staff and facility SJA in declining to appear on the days the Military Judge did not require their presence.

The alarm incident changed the schedule for the week. The morning session on Tuesday adjourned midday. Counsel were given time to address the issues that arose and an 802 session, which was closed, was scheduled for Wednesday, 30 January at 1600 hours, which gave the observers, press, and victim family members a day away. Again, the final session of the week, 31 January, was only a morning session. Counsel for KSM, David Nevin, filed an "emergency" motion to abate the proceedings until the identity of the unknown third party who had trig-

gered the court security alarm could be determined. The judge set a briefing schedule so that the matter could be heard for the first day of the next motion hearings on February 11. And, although he had ruled earlier that the accused need not be present for these motion hearings, because of the unexpected events, and the motion to abate, the MJ ordered that the accused be present for the next hearing.

The observer escorts through the entire process were pleasant and professional. There was, at least for this cycle, a relaxing of the rules so that observers could go alone. The same secured locations were off-limits, the detention and court facilities, for example. But several of the observers went running in areas that had been off-limits to prior visitors unless with escorts. The escorts, including the civilian escorts and military officers and NCO's were available for transportation of small groups to various locations on base.

Communications with the outside world remained difficult. In my case, I had been warned that the \$150.00 Internet was slow and not dependable but that there was wireless at several locations including the Green Bean coffee shop. When I arrived, I did not sign up for the Internet and instead opted to go to the wireless. After the first day's hearing, and another observer, law professor Ben Davis from the University of Toledo went to the coffee shop. We were told that the wireless was down for the day, but would be available the next day.

When we returned on Tuesday afternoon, the wireless was still down and there was a notice that wireless service would be down for maintenance from 31 January to 2 February. Our escort made a call and came back with the news that "they started doing the maintenance early". I found myself trapped as the Bluetooth keyboard for my tablet requires a wireless connection. I was unable to type up my notes. In the future, it would probably be wise to take a laptop and sign up for the Internet service offered. Another minor problem was reviewing the pleadings ahead of the hearings. Several of the matters to be heard were not accessible be-

fore I left San Diego. The process of security review for the pleadings is slow and one of the defense motions was to compel

the release of redacted pleadings. It is useful to review the transcripts on the OMC website, which appear to clear classification review more quickly than the pleadings.

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His scholarship focuses on combating terrorism within existing legal constraints and the Guantanamo military commissions.

Guantanamo Military Commission Pre-Arrestment Press Conferences

I am currently in Guantanamo as the National Institute of Military Justice (NIMJ) observer at the scheduled May 5 arraignment of the five alleged 9/11 co-conspirators. Tonight, I had the opportunity to attend back-to-back press conferences by James Connell, the civilian "learned counsel" representing one of the five defendants, Ammar al Baluchi, also known as Ali Abdul Aziz Ali, and the second by Chief Prosecutor Mark Martins, whose prepared statement is already posted at the Lawfare Blog.

Connell addressed the long delay in the prosecution and previous false starts, suggesting that Saturday's arraignment marked only the beginning of a multi-year process that could still be in progress in ten year's time should the Supreme Court strike down the new military commissions as they did once before. But most of his discussion focused on the secrecy of the proceedings, and how he was legally prohibited from saying anything at all about his client's intention because of the government's insistence that anything a detainee formerly held in CIA custody said was presumptively classified at the Special Compartmented Intelligence (SCI) level. The ACLU has filed a motion that I think does an excellent job of addressing the impact of this approach on the public's right to know (full disclosure — I authored a supporting declaration on historic military commission practice but played no role in drafting the actual motion). But the major adverse impact this secrecy has on Guantanamo defense teams' ability to represent these clients are a topic significantly underreported to date, and Connell's remarks only scratched the surface of the issue.

Connell also explained the one significant development today — the military judge had intended to conduct an informal session with only counsel present (called an "802 hearing" after the Military Commission Rule 802 addressing the subject). The judge's staff began notifying the defense counsel of his intention, and according to Connell, attorneys for the first two detainees who were notified both said they would come only if the hearing was recorded so that it could eventually be included in the formal trial record. Shortly thereafter word was sent to the attorneys that there would be no 802 hearing today, meaning that tomorrow's arraignment will proceed without any formal pre-coordination.

Connell was followed by Chief Prosecutor Martins who gave a polished defense of the commissions' fairness. I think it odd that the individual charged with prosecuting the defendants has taken upon himself the role of head cheerleader for the commission process. One might remember that Morris Davis did this several years ago in his tenure in that job, resulting in significant complaints about his extrajudicial commentary that would have been a subject of some judicial discussion had David Hicks not cut it off by pleading guilty. And Martins should have his focus on fulfilling his ethical responsibilities to do justice in the prosecutions —the Convening Authority certainly can call on other resources such as his own public affairs staff to defend the commissions.

In any event, as a scholar of the military commission process since their announcement in 2001, I found many of Martins' comments to be less than fully candid. Here are just a couple of examples:

(1) He cited the detainees right to represent themselves but neglected to mention that prosecutors previously successfully insisted that al Bahlul be denied that right at trial (before Martins took over), and then unsuccessfully sought to have the D.C. Circuit Court of Appeals reject his appeal because the prosecution believed that he no longer wanted an attorney to represent him. (This was on Martin's watch).

(2) He suggested that the press should be skept-

tical of defense claims they are under-resourced and read the government's filing on the issues. And he noted in Q&A that Congress had called for the defense to have comparable access to witnesses and evidence as provided in Article III courts. But what he did not tell the media was that military commission defense teams must go to the Convening Authority or the judge to seek resources, and unlike Article III courts must submit witness requests to the prosecution, and that the Guantanamo prosecu-

tors contest almost every request made by every defendant. When the defense in a federal trial requires assistance from a court, they are typically allowed to make such requests on an ex parte basis with no opportunity for the government to object. And international criminal law —which should supply minimum due process standards for a trial supposedly based on the law of war — now calls for "equality of arms" between prosecution and defense, a standard clearly not met by the commis-



sions.

(3) His assurance that no statement obtained through coercion will be used rings hollow based on the prosecutions observed track to date, in which virtually every case to date was based largely on statements from detainees who had been subjected to varying degrees of coercive interrogation, and several prosecutors have cited pressure to use tainted statements as at least part of their reasons for resigning.

I can't help but find myself comparing Martins' approach with that of Justice Robert Jackson before Nuremberg. Jackson cautioned that the Nuremberg tribunal must be fair to merit international credibility, and dedicated himself to achieving that result. Martins insists that the Guantanamo tribunals are fair in the face of international doubts about their credibility, and has seemingly dedicated himself to persuading us of that belief.

Observations from the Guantanamo Arraignment

The experience of observing Saturday's military commission arraignment of the five alleged 9/11 conspirators in Guantanamo Bay, Cuba on behalf of the National Institute of Military Justice left me with serious concern that systemic issues, many involving "outside" agencies, particularly Joint Task Force Guantanamo (JTF) are likely to preclude the exercise of meaningful attorney-client coordination. This in turn will call into question whether these trials are sufficiently fair as to merit contemporary, and ultimately historical, public approval. These concerns are separate from any issues the substantive law being applied; my comments in this post are limited to matters observed at Guantanamo.

First let me acknowledge some positive points. The government has promised greater transparency in the commission process, and the establishment of additional remote sites where the trial can be viewed as well as the unprecedented same-day Internet posting of unofficial trial transcripts (from this link one must go to "Khalid Shiek Mohammed et al. 2 and then to "transcripts") are both good news in this regard. And on some matters Judge Pohl went out of his way to demonstrate "fairness" to the defendants, announcing recesses for prayer times *sua sponte*, pausing the trial to allow conversion from the planned simultaneous Arabic translation via headphones to sequential translation broadcast via overhead speakers, saying nothing about Bin Attash's offensive paper airplane, tolerating prayers at times other than actual prayer times, etc. While quality translation is

essential to a fair trial where not all defendants speak adequate English, most observers, even commission critics, thought Pohl actually went too far in most of these accommodations. There was unanimous agreement among trial observers with federal practice experience that no U.S. federal judge would have tolerated such breaches of courtroom decorum as unscheduled prayers or defendants making paper airplanes, and few, if any, federal courts would have recessed for prayer times falling outside reasonable mealtimes.

But the obvious "considerations" extended the defendants mask broader concerns which threaten the trial's ultimate credibility. As a matter of law, these need not necessarily have been addressed Saturday. Colonel Pohl was likely on solid legal ground in deferring the motions that defense attorneys repeatedly tried to push forward until the next court session in June. And some of the defense concerns may well lack objective merit — there are always two sides to every story. Nevertheless, the aggregate impression I came away with was that the defense had a number of legitimate issues about detainee treatment impacting their ability to mount a defense that were not merely frivolous attempts to delay the proceedings.

Deferral of these issues, even if legally permissible, now impacts their ability to press ahead with trial preparation, and may introduce further delay into a trial the judge unilaterally suggested was still at least a year away. It was very evident from the very limited interactions between the defense lawyers and the defendants that few, if any, had established any meaningful trust-based attorney-client relationships.

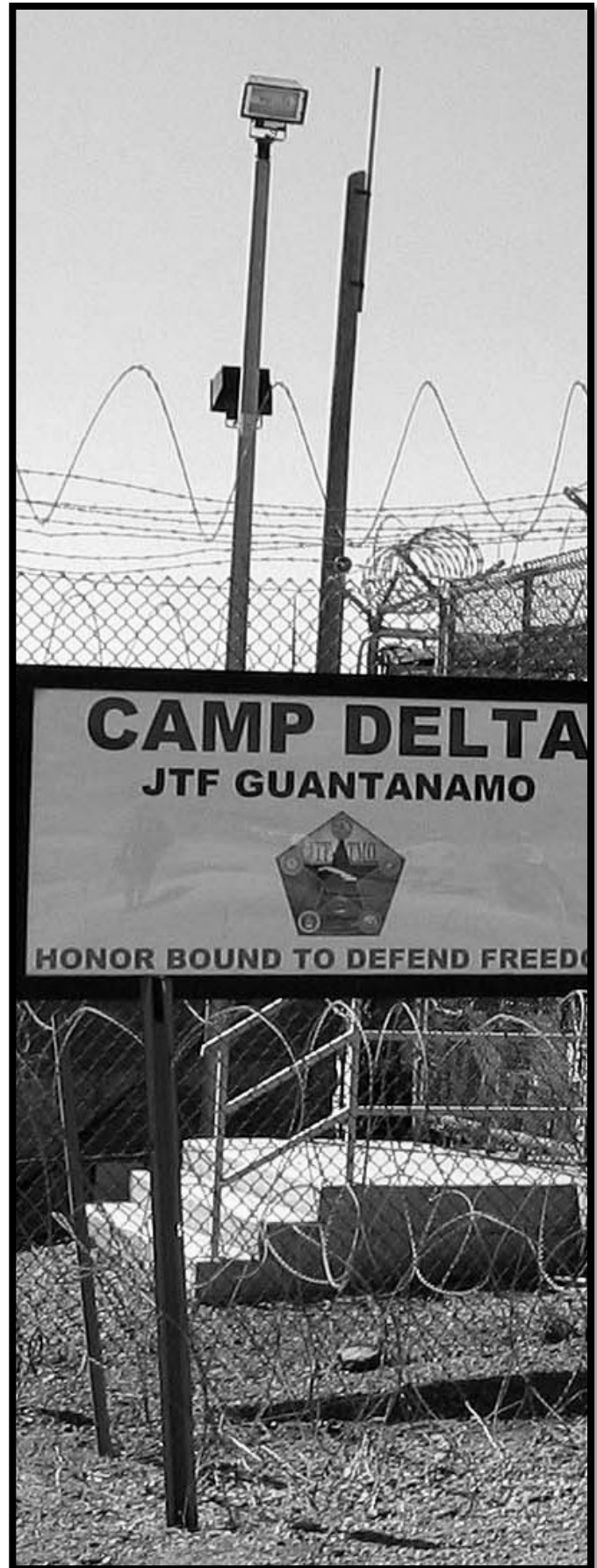
The defendants' previous treatment in U.S. custody clearly impacts their willingness to trust any U.S. government personnel, particularly uniformed military, as well might their ideological perspectives. Those are issues are largely beyond the scope of the commission's ability to redress. But concerns that can be dealt with include classification rules making it virtually impossible for attorneys to have meaningful discussions with their clients about the practical

impact of past treatment, including most importantly the admissibility of prior statements. In this regard, it was rather amazing that when most of the attorneys said they didn't fully understand the commission classification rules in a colloquy about their willingness to abide by them, the judge accepted what he termed as "hollow" yeses from them in order to proceed through his script.

There is obviously real concern with defense counsels' ability to confer with their clients outside of the courtroom that require judicial addressable. JTF rules forbid telephonic communication, and the unilateral JTF decision to read, rather than merely inspect, properly marked attorney-client mail, has resulted in ethical rulings that the defense cannot communicate with clients by mail. This leaves only face to face visits, and anyone who has gone through the clearance and travel process to GTMO can understand how onerous this is.

Detention policies also impact defendants' courtroom presence. Attorneys complained Saturday that they had provided their clients appropriate civilian garb to wear to the hearing, but JTF staff refused to let them wear it. One lawyer said he was told by a JTF Colonel, that's "not happening" about the defense provided vest and that he could provide a business suit or nothing. No officer of the court had any insight into the process used to bring the defendants to the courtroom or why one defendant, Bin Attash, was strapped into a restraint chair as the proceedings began.

The judge presumed that he must have resisted coming to the commission and left him tightly restrained for the first hour or so of the proceedings until the inability of headphones to remain on his head led to the ultimate decision to switch from simultaneous to sequential translation and further discussion about the pain inflicted by the restraints. This discussion finally resulted in him being unstrapped from the chair and allowed to sit normally. It was only very late in the day that any defense attorney had had sufficient conversation with their client to raise allegations that they had to undergo strip searches prior to entering the courtroom that morning, and that it was likely that this would cause at least some of the men to



elect to skip future trial sessions if that was the only way to avoid that process.

It is certainly true that even in civilian court systems pre-trial confinement management is generally, in the hands of authority other than that of the actual courts. But federal prison rules, for example, explicitly mandate that prisoners be able to receive attorney calls; absent a warrant attorney-client mail can be searched for physical contraband but not read; and lawyers and support staff are assured of reasonable face-to-face access to their clients. Moreover, they can simply drive to the prison and park, even if it might be some hours away — they don't have to engage in the multi-day advance process to coordinate travel followed by the expenditure of multiple days of travel for a single visit. And it is the judge, not the jailor, who decides what is appropriate for defendants to wear in civilian courtrooms.

These are issues that require it be addressable if any credible defense efforts are to be mounted. And, while the defense attorneys seemed obstructionist by repeated allusions to them after the judge made it clear they would not be addressed Saturday, it is understandable that they felt the need to get these considerations both into the record, and before the public.

Guantanamo Arraignment — You Had to be There (Or not?)

Having spent five days on the road (one day each way flying between LA and D.C. and three days in Guantanamo) to attend a thirteen-hour hearing (at least I got my money's worth there!) on behalf of the National Institute of Military Justice, one has to ask, "Was it worth it?" Is there sufficient value from "live" observation when one can read the transcripts or watch from a remote site to justify the time and expense of traveling to Cuba? I will describe what I got from the observation experience and let others decide. To at least whet your appetite, let me say now that the proceedings I observed differed a bit from the impression created by media reports.

Just getting to Guantanamo gives one perspective on the challenges confronting military com-

mission attorneys, particularly defense attorneys, on a regular basis, including the multi-day lead time for travel approval and the requirement to show several hours before flight time in classic military "hurry up and wait" style. And there is nothing like flying in a 20 plus year old aircraft operated by low-budget charter operators you've never heard of to inspire confidence. (U.S. troops deploying overseas also frequently get to travel this way.) And of course, you come and go not when convenient, but when these irregular flights are scheduled.

Next, I got to experience the curious realities of military commission security. You must present a passport — the only form of ID accepted — at a checkpoint where you are validated against the pre-approved entry list and undergo a traditional security screening — X-ray of all possessions; metal detector/wand of your person; before being led a short distance to a second location where this entire process is repeated in full. (Imagine if TSA tried to adopt this approach.) Only then are you allowed to proceed to the courtroom gallery entrance where you show your passport a third time and receive an individual seat assignment. I'm tempted to conclude from this passport fetish that these are actually foreign courts. Observers cannot bring any pens, pencils, electronic devices, notebooks, etc. with them — courtroom staff provides loaner writing implements and plain white pads. If this is how U.S. nationals, physically separated from the courtroom by a glass wall, are screened, claims that defendants experience much more rigor, including strip searches, seem entirely credible.

A real value added from traveling to Guantanamo is the ability to see the full courtroom, from before the arrival of the detainees (observers had to start our entry process a full hour before the scheduled start time), until the completion of the trial day. Observers sit in a soundproof glass booth listening to the same 40-second time delay as remote observers, and have video monitors showing the same picture. It is generally less surreal to watch the monitors, so what you hear and see match up. But there is merit to

being able to see what is happening throughout the courtroom rather than just the view of the currently speaking participant offered on the monitors.

Watching from the gallery, for example, highlighted the largely dysfunctional attorney-client relationships. The courtroom is arranged with six long defense tables arranged one behind the other. (It was specifically designed for this trial, but former convening authority Susan Crawford refused to approve charges against alleged twentieth 9/11 hijacker, Mohamed al Kahtani, leaving one extra table). The defendants sit one behind another at the extreme left end (as viewed from the gallery) of their respective tables. The lead attorneys generally sat near the right end of their respective table, convenient to the center podium from which they were expected to address the court, meaning but what looked to be at least twenty-five away from their client with wholly empty table in between.

The small number of assistant counsel, interpreters, and other defense support personnel elected to sit at the "extra" table or along the back wall. This physical separation highlighted the gulf between these attorneys and clients, and the resulting need for the attorney to stand up and walk over to the defendant made it easy to observe how little actual attorney-client conversation took place. The fact that KSM and bin Attash's lawyers conferred with their clients without use of an interpreter revealed that these defendants' refusal to wear headphones do not mean they weren't following trial events; they can do so in English. To confer with Al Hawasi, however, whose counsel complained that he does not have an assigned interpreter, Commander Walter Ruiz had to "borrow" KSM's interpreter.

Several attorneys said that they were recently assigned and had not established any rapport with their clients. Ruiz, a reservist with extensive civilian trial experience, doubles as both designated military counsel and "learned counsel" for Al Hawsawi although the Military Commissions Act calls for "at least one additional counsel" "whenever feasible."

Surely the military has enough attorneys that it can come up with a second lawyer for a man on trial for his life? It appeared from the gallery that the prosecution outnumbered the five separate defense teams combined.

Media reports belittle hijab-compliant attorney Cheryl Bormann's complaint about female prosecutorial attire. Live observers thought she was a bit over the top, but we at least had the opportunity to observe the prosecution staffer walking about in a tight skirt, heels, and sleeveless top drawing comments from some of the men present, who presumably inspired her comment. I did not see any civilian woman in the courtroom without a jacket on after that.

But perhaps the most significant thing I saw was five defendants sitting quietly in their assigned chairs for the vast majority of the lengthy day, with approximately twenty uniformed guards sitting in a row little more than an arm's length away from them, ready to intervene instantly if called upon. From media reports, one might assume this was the Chicago Seven trial redux, with outrageous defendant conduct largely responsible for drawing out the proceedings so long.

Other than the extension of the lunch break by continuing prayers which may have been either schedule confusion or deliberate defendant misconduct, by my estimation what we saw otherwise was substantially less than five minutes of activity over the course of a thirteen hour day that violated traditional courtroom decorum.

It could have been limited to mere seconds if the judge had been so inclined. The fact that the judge tolerated even a few minutes' interruption provides concern that this will just prove to be a dry run for future tactics. But I think the commission's inadequate preparation for the session, including lack of contingency planning for technical or translation issues, issuance of a new arraignment script the day before trial unavailable in Arabic for defendant or translator use, last-minute bickering over a pre-trial conference, etc. were actually much more significant issues for concern than defendant [mis]conduct.

Finally, although NGO reps are required to be relatively passive observers, and are not to ask questions at the press conferences or initiate contacts with the media or actual commission participants, I certainly gained a lot from the opportunity to benefit from hearing the views of a number of other participants and observers. I have been a close scholar of both past and present military commissions since President Bush announced their use in November 2001, and have read many thousands of pages of Guantanamo transcripts and documents from every case conducted to date. I still found the opportunity to see the events in person to be a valuable complement to that experience. And while many members of the media have done a tremendous job covering commission events, I think that NGO reporting by academics and practitioners with greater specialized knowledge can be a useful adjunct to the mainstream media coverage.

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ABBIGAIL W. SHIRK

Abbigail W. Shirk is a staff attorney at MetroWest Legal Services, where she specializes in domestic violence advocacy in family and immigration law matters. Prior to MetroWest, Abbigail worked as a staff attorney for DoVE Inc. (Domestic Violence Ended). She served as an NGO Observer for the National Institute of Military Justice in Guantanamo Bay, Cuba, while she was a law student at New England Law Boston. She is an aspiring marathon runner and is licensed to practice in Massachusetts and Washington State.

I. INTRODUCTION & EXECUTIVE SUMMARY

I was an observer representing NIMJ observing the Military Commission against Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri. Al-Nashiri, who is 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. The charges arise out of an attempted attack on the USS THE SULLIVANS in January 2000, an attack on the USS COLE in October 2000, and an attack on the MV Limburg in October 2002.

There were nine other NGO organizations in attendance: American Bar Association, New York Bar Association, University of New Mexico law School, Toledo Law School, Seton Hall University School of Law, Judicial Watch, Duke University Law School, ACLU, and the National District Attorneys Association.

This memorandum reflects the observations of oral arguments and evidentiary hearings made on June 11-14, 2013. This memorandum is organized by the docket list published on the Military Commissions website on May 31, 2013, and is not reflective of the actual order motions were heard by the commission. Some motions were considered moot at the time of this hearing, while Judge Pohl took most under advisement without guidance as to when decisions would be rendered.

II. PARTICIPANTS

1. Military Judge: Colonel Pohl, U.S. Army

2. Prosecutors:

Lead Prosecutor: General Mark Martins, U.S. Army

Asst. Prosecutor: Commander Lockhart, U.S. Navy

Asst. Prosecutor: Lieutenant Bryan Davis

Asst. Prosecutor: Mr. Justin Sher

Asst. Prosecutor: Major Chris Ruge

Asst. Prosecutor: Ms. Joanna Baltes

3. Defense Counsel:

Civilian Learned Counsel: Mr. Kammen

Detailed Asst. Defense Counsel: Major Allison Daniels, U.S. Air Force

Detailed Asst. Defense Counsel: Captain Daphne Jackson, U.S. Air Force

4. Gallery:

Media (6, although after the first day most watched remotely).

Observers (10)

Victims & Victim's Families (around 8, including a crew member on board at the time of the attack and parents of 3 sailors who were killed).

III. MOTIONS

a. AE 013J Defense Motion to Amend Protective Order # 1 to include a Defense Security Officer

Motion was argued on June 12, 2013. Defense argues the need for a Defense Security Officer because of privilege issues and to maintain attorney-client confidences. The prosecution agrees that one may be provided to the Office of Defense but there is no need for an individual officer per team. The underlying debate is over the conflict of interest by the Defense Security Officer (here in after "DSO") and if there are measures to protect against conflicts.

Defense argues at this point there are six defense teams in litigation, and that previously there were no co-defendants in the instant matter. That has now changed and those who will testify against al-Nashiri present a conflict because they will have taken a plea, and this officer instructs on how to deal with classified information which presumably have to be substantively reviewed per document, which could conflict as he moves across defense teams.

Prosecution says that a protective order would prevent any issues by this potential conflict of the DSO and that the DSO has no affirmative duty to disclose privileged information.

When defense counsel hypothetically asked if this was money issue, Judge Pohl responded that the "price tag would not concern him" and that defense counsel was "entitled to the legal support you need." Humorously, when Defense counsel started stating that the 9/11 cases received an individualized DSO, Judge Pohl

reminded Mr. Kammen that these are separate cases and that while defense "will quote me on the rulings you like, I am sure you will feel differently on the rulings you don't like."

b. AE 27L Defense Motion for Appropriate Relief to Enforce AE 27K Government Motion for a Scheduling Order and Issue a Finding that Attorney's Notebooks, Writing Utensils, Eyeglasses and Similar Items Necessary for Effective Assistance of Counsel Are Not Prohibited "Physical Contraband"

Motion was argued on June 11, 2013. This was probably one of the more entertaining motions to watch of the day. Judge Pohl asked if the government was objecting to relief requested by Defense, and they unequivocally said "yes." To reiterate the issue Judge Pohl said, "so we, I mean you are, fighting over a spiral bound versus paper tablet." For more on this issue Carol Rosenberg has already published a piece on this motion.

Prosecution's main argument that for Judge Pohl to dictate what was allowed in and/or how manage the risks associated was to manage the day-to-day operations of the detention facility. Prosecution requests deference by the Judge to the GTMFJMTQ on security procedures because of safety of the detainees and staff. Prosecution was interrupted several times as Judge Pohl challenged Trial Counsel's argument that deference was the only appropriate measure to be taken.

Defense argues that this is not a new issue, that it began in 2011 and that previous commanders have allowed an inventory procedure before and after meeting with the accused to manage the risk. Defense sees the protocol as unreasonable and unpredictable always subject to change with the next commander. Judge seemed to agree that Defense just needs a "list of what is allowed and what is prohibited." Judge asked for specific harm by Defense counsel, who responded that impact the ability to communicate with the client when there is no notice of a change in procedure, and how they planned to meet would not longer be possible. Judge Pohl continued that since Witness is al-

ready coming on Thursday to testify about the monitoring procedures at the Camp, the scope of testimony could include questioning on security protocols.

June 13, 2013. [Witness, Commander Bougdin, testified initially under AE149C, pg. 12, and Defense continued questioning under this motion]. Because of the frustration of Defense Counsel about the spiral bound notebooks, parts of this direct examination were downright comical. The highlights include Mr. Kammen handing Commander Bougdin two spiral notebooks and marking them as demonstrative exhibits, asking the Commander to see how long it would take him to dismantle the objects. Of course Judge Pohl denied this request, and Defense Counsel moved on asking if common sense was a requirement for the rule making procedures the Commander instituted. Even while Defense Counsel pushed as many spots as possible to make the Commander react, he remained a calm confident witness for the Prosecution.

I believe the prosecution made a grievous error as Defense contended for the basis of this motion that this specific protocol, spiral notebook ban, was “unreasonable and arbitrary” had an opportunity to refute this accusation after Defense’s direct exam. The questions and answers that best supported Prosecutions opposition finding not only was this reasonable, but deference should go to Detention Commander who has not only experience but responsibility to the safety of inmates, lawyers, guards went as follows.

Defense Counsel Question: Okay. Now, have you run any experiments on how long it would take to remove the wire from a spiral notebook and turn it into a garrote?

Commander Answer: No, I have not.

Defense Counsel Question: Have you ever seen that done?

Commander Answer: I have.

Transcript at 2401. I felt that as soon as Commander testified that the basis for his change in protocol was not speculation, but firsthand knowledge of seeing the conversion of a spiral bound notebook into a weapon, the motion on prohibiting the classification of this item to contraband was severely diminished.

The Judge did note that when the judgment of the detention facility effects the commission, in

that it prejudices the ability to make a defense with effective assistance of counsel, then the Judge may make a ruling on the issue presented. However, the Judge also noted that it wasn’t in his job description to run the detention facility.

c. AE 045G Government Motion for a Scheduling Order Appellate Exhibit

The charges arise out of an attempted attack on the USS THE SULLIVANS in January 2000, an attack on the USS COLE in October 2000, and an attack on the MV Limburg in October 2002.

1510 (AI-Nashiri)

This motion was not argued but addressed by the Judge on the record that he was taking into consideration and would come to a trial schedule soon based on both parties’ proposals.

d. AE 048C Defense Renewed Motion to Dismiss the Charge of Conspiracy

Motion argued June 12, 2013. The oral arguments made were less clear to this observer how the effect would be made on the charge sheet as requested by Prosecution.

Defense counsel again, Major Daniels, struggled to answer the Judge’s questions and frame the oral argument with support requested. The Judge was attempting to find some middle ground as Prosecution agreed to the dismissal of the conspiracy charge in their response post Hamden II. Defense argues that the “common allegation” approach as suggested by the Prosecution, is not how it is done in military court martial.

The Judge followed up on this point, sharing

with Prosecution that in Judge's entire history of service, alternate theories were not listed on the charge sheet. Prosecution argued that the D.C. circuit had in Hamdan II determined that law of war meant international law of war and therefore the commission needed to look to international tribunals to for an "out of manual experience." Prosecution says that it needs to stay on the charge sheet to keep Defense on notice, as opposing counsel had already complained of notice previously. Another option would be to leave the conspiracy charge as is, and instruct the panel that they could not convict and punish separately. Prosecution cited to Kieran as example of a commission that had been reviewed by an article three court and upheld the separate charge of conspiracy that was not a substantive charge.

No decision made.

e. AE049C Defense Renewed Motion to Dismiss the Charge of Terrorism

Defense started the oral argument by acknowledging they are the proponent of the motion; this is a jurisdictional challenge which shifts the burden to the prosecution to be able to charge the defendant. Asking the Judge to rely on the analysis made by the Hamden II court, the defense argues that prior to 2006, the charge has to be "firmly grounded" by the international law of war at the time the offense was committed. The defense argues that this colloquial word "terrorism" is a broad category and the government is trying to apply it to "acts of terror." The defense rests its argument on the absence of internal law precedent for defining terrorism as international law of war.

Prosecution flatly refutes this proposition citing to Art. 21, the law of war, and international case precedent to meet the "firmly grounded" standard. The Government first relied on 1919 Paris Conference and the inclusion of "murderous intent of non combatants" (1 U.S. Department of State 1944, at 1266.) In addition, Gen. Martins' categorized this as the "sweet spot of terrorism."

f. AE 092 (Classified)

June 13, 2013. Judge Pohl made a findings on the record that classified information by both parties was relevant and necessary and that due to the interlocutory nature of the proceedings, that exclusion of the public was necessary to national security. In addition, since the defendant was not the original source of the information, he will not be permitted to be present. The Judge continued that compelling reason combined with narrowly tailored means to effectuate the classified information saying classified, would be balance by a redacted transcript available to the public. Prosecution supported the Judge's ruling citing compliance under 505 and CIPA case precedent.

There was a closed session on Friday, June 14, 2013 that was not open to the public. It was speculated on Thursday, on the record, that it would last about an hour. On Friday, when the first press conference wasn't until 11am, it was suggested that the session may have been two hours long.

g. AE 099D Government Motion for the Commission to Discuss with the Accused Matters Considered by the Commission During the 18 - 19 July 2012 and 23 October 20 12 Sessions

Motion argued June 11, 2013. Judge Pohl gave a simple colloquy to al-Nashiri (as he said he would do at the beginning of every week the commission convened) about his right to appear and if he waives his appearance, it has to be voluntary. In addition, Judge Pohl noted the difference in policy previously instituted. In the hearings al-Nashiri waived before, if he waived in the morning he waived for the day. Presently it appears that waiver will be offered, and implemented, individually for each of the morning and afternoon sessions.

h. AE 107 Defense Motion to Compel the Convening Authority to Fund Two Individuals to act as Defense-Initiated Victim/Survivor Outreach (DIVO) Liaison (plus witness production issue)

Motion argued June 11, 2013. It appears that this previous motion request had been deferred and by Judge Pohl's description an "unusual



procedure” in before ruling the Judge had asked Defense to provide testimony of what a DIVO would do and why it was necessary. Prosecution had consented to the motion to have Ms. Tammy Crawsky to testify. Ms, Crawsky is a DIVO, but presently is a consultant with the Defense Counsel, so Defense counsel had asked to limit cross examination, and Prosecution had refused to agree. Defense then pulled her from the witness list, represented her as unavailable, and had suggested that a professor who is published testify on the subject. Professor Madera had previously been requested as a witness but denied as cumulative. The crux of the Defense argument was that the Professor would be able to testify to what a DIVO does because of that assertion by the government.

Trial counsel contends that that a witness to replace Ms. Crawsky needs to be an actual DIVO. Judge agrees, that doesn’t want a secondary source. Defense pushed that he wants to get it done this week. Judge Pohl ruled Madera was denied, a new witness with DIVO qualifications would be approved, and that if Crawsky was made available to testify that the cross examination would be limited to the general testimony of what DIVO does and what purpose they serve distinguished from victim witness outreach on behalf of the prosecution.

June 12, 2013. Defense counsel updates the commission as to where he is at in securing a witness to testify. Mr. Kammen says he has been in touch with several DIVOs who are lawyers and are unwilling to testify to their “untrusting” of the prosecution to expand cross examination to whom the witnesses are presently working for. The Judge refuses to ‘institute a promise he can’t keep” but suggest that Mr. Kammen can make objections and if they cross exam question is irrelevant it will be sustained as in ordinary practice. The Judge also concludes that bias can present as an issue for every witness, and therefore he can’t rule on limiting cross before the situation is in front of him.

Defense disagrees, saying this is to just educate the commission on the generic duties of the DIVO, like “asking a math teacher what their job is.” In addition the defense tries to convince the Judge they do have a witness who will testify, Professor Madera and that commission could glean necessary information from her.

The Judge says the Defense can look for a practicing DIVO or submit something in writing.

June 13, 2013. The Defense counsel brings up the DIVO motion again on the third day to make an offer of proof to complete the record. Defense counsel offers that Jodi McDeera is a lawyer with her degree form the University of Pennsylvania and had her Ph.D. in communica-

tions. She has completed a peer-reviewed study on the Oklahoma City Bombing, and would testify that for many victims of terror the end of a case is more important than the punishment inflicted. She would also testify that victims have different needs, and meaning for some to be intensively involved while others don't. Defense states that with over 300 victims or family members being affected there may be individuals who want to reach out to find out information only defense would have. Judge requests an approximation of the time and costs to be provided to the government.

i. AE 109 Defense Motion to Take Judicial Notice that the Confrontation Clause of the Sixth Amendment to the Constitution of the United States, as Interpreted by the United States Supreme Court Applies to this Capital Military Commission

Motion argued June 11, 2013. Judge Pohl did not rule on this motion. This oral argument lasted for approximately 30-45 minute with many supporting case cites. . An abbreviated description of the arguments is that both the government and (subtly) the Judge characterized Defense's motion as a facial challenge to 949A, B3D of the Military Commissions Act governing hearsay testimony as unconstitutional, in violation of the Confrontation Clause.

Prosecution argues that judicial notice was not a proper vehicle for this motions as no witness list or trial schedule had been given to defense counsel and therefore the issue was not ripe. In addition, prosecution contends that Art. I of the Constitution applies to Military Commission and Congress has statutorily created a process that must be followed.

Defense contends the "need for rules" which Judge Pohl quickly dismisses, as there are rules for procedure under the MCA. Defense's position is that all constitutional trial rights would apply, and is only asking for limited Confrontation Clause of the sixth amendment. To illustrate the need for predictability and reliability, Defense counsel articulates the problem of prosecution's witness, Fahd Mohammed al-Quso, who was killed by U.S. Drone strikes.

Defense then begs the soon to be unanswered question; "Can the U.S. Government kill witnesses then still use their evidence?" Defense narrows down this request for the application of the confrontation clause and the Crawford analysis on the basis that the Defense will know how to strategize and investigate. The statutory procedures standing alone (as represented in court) govern hearsay, not hearsay exceptions as provided by the Federal Rules of Evidence. Therefore each witness or testimonial evidence will need to be vetted on indicia of reliability through litigation of how the evidence was obtained, where it as from, where the original source was from, etc. In the wake of the sequester, Defense argues this is a huge and costly undertaking, when a confrontation clause application would clear up many issues rather than "making it up as we go along."

No ruling issued.

j. AE 114 Defense Motion to Find that R.M.C. 703 (c) violates 10 U.S.C 949j(a)(I) and Mr. al Nashiri 's Constitutional and Statutory Rights to due process.

Defense presented this motion asking Judge Pohl to look to legislative intent when interpreting 703(c), stating, "words are the most important thing we have." Defense counsel argued that Congress' choice in changing the phrase from "reasonable opportunity" change to "comparable to and Art. III Court" implied that Congress rejected the 703 of a court martial process for production of witnesses. The Judge interrupted to ask how counsel reasonable he thought it would be for the Judge or the court to pick and choose, and what relief counsel was actually looking for.

Defense counsel articulated the difference in the witness production processes of the Federal Rules of Criminal Procedure, than that of a court martial. Whereas, the defense has no blank subpoena power, and all requests instead must be approved by the government. Judge Pohl seemed to push back on the major discrepancy, citing the only difference between the two is when the relevancy of the witness is discovered; either in F.R.C.P when the witness takes

the stand, or in a motion compel hearing by the Defense. Counsel asked for relief that the statutory change should control and that Art. III procedures should control witness production, not the court martial system.

The prosecution flatly rejected the proposition that witness production did not meet “comparable to Art. III standards.” In addition, the government argued that there isn’t an unfettered right to witnesses, and turning over witnesses’ testimony is deeply rooted in the court martial system.

The Defense then countered that the court martial standard is not “the gold standard” citing that there is an 87-90% reversal rate on court martial death penalty cases. The defense insists that it is only looking for equity and that it is the disparity of having to turn over witness lists and synopsis for the government to determine relevance is not comparable to the federal court system.

k. AE 118 Defense Motion to Cease the Use of Belly Chains on the Accused by ITFGTMO

June 11, 2013. Both sides agreed that this outstanding motion from previous session was now moot, due to the discontinued use of belly chains. No other commentary was made on the motion.

1. AE 120 Defense Motion to Compel Discovery of Information in the Possession of any Foreign Government and the United States related to the Arrest, Detention, and Interrogation of Mr. al Nashiri Classified.

m. AE 131 Defense Motion to Compel Production of Representative of the OCA to Testify at the Hearing on AE 112

June 12, 2013. Determined as moot without discussion.

n. AE134 Government Motion for Hearing to Identify and Minimize Amount of Closure of Proceedings Compelled by Defense Reply AE 18B

Presumed to be moot due to AE 118’s determination as moot.

o. AE 135C and 135D Defense Motion For Appropriate Relief - Defense Request That the Medical Examination of the Accused by Defense Expert Assistant Be Conducted Without Restraints and outside the Immediate Physical Presence of the ITF Guard Force.

June 11, 2013. This motion was considered moot as defense and prosecution had worked out an agreement for the defendant to have this medical examination, and it will be taking place in July.

p. AE 141 Defense Motion to Compel Discovery of the Prosecution's Prudential Search Requests

Relief requested by Defense is to see a copy of the requests sent by Prosecution in the prudential search requests to other agencies. Defense clarifies that this does not pertain to classified information or the entire universe of documents returned by a PSR. The proper standard for discovery is that of “material to defense.”

Prosecution wishes to distinguish when they used 701 and 703 standards. That the government uses 701 in the PSR requests and when Defense’s requests are too broad or don’t return anything, government follows up with a 703 standard allowing Defense to request with specificity a certain document.

Defense contends that it is hard to take the governments “good faith” approach of handling discovery requests properly when their trial brief and discovery responses include cites to both 701 and 703 at the same time, therefore mixing the standard. Defense also contends that the Prosecution does not understand what is relevant and material to defense in terms of mitigation strategy. The evidence does not need to be exculpatory just anything about the individual that that fact finder could use to sentence to life instead of death.

No ruling issued.

q. AE 142 Defense Motion to prevent Mr. Al-Nashjri From Being Removed from the Courtroom During a Closed Session

June 12, 2013. The defense of course lists spe-

cific harm as not being able to consult with the accused during closed session to adequately prepare and counter evidence by the government. Before Major Daniels of the Defense could get much further, Judge Pohl asks the question that seems to be difficult for the defense counsel to answer with any statutory or case law support. The Judge asks: "Does an un-cleared defendant have a right to review classified information material to prepare for his defense in interlocutory matters?" Everyone seemed to be on board that during the prosecution case in chief, the defendant would have a right to hear the evidence against him, but during interlocutory matters the Judge did not seem to be convinced as any disclosure would violate federal statutes governing "need to know."

The prosecution had similar problems answering the Judge's question of what happens when "the source of the information is the defendant, and he has actual knowledge of the classified information?" It became quickly evident that what was really being discussed is when the hearing is closed to due discussion of evidence of torture, or information resulting from the torture of al-Nashiri, could he then be present.

Both defense and prosecution oral arguments were heard from team members who had not yet spoken, and struggled in getting through their points when the Judge interrupted to ask specific questions. By the end, each counsel team had (personally described as) a more senior member finish the last round of presentations to the commission, which the court acknowledged was unorthodox. Mr. Kammen of the defense states that these pre-trial motions

meet the criteria of a "critical stage" of the proceedings, because the whole point of learned counsel is to bring experience to the accused for effective assistance of counsel. Mr. Kammen argues that a mitigation strategy is absolutely necessary and the effects of pre-trial motions are profound on a capital case. Trial counsel for prosecution counted that both cases (in re Terrace and Marzook cited by government) analyzed the rights infringed upon by closed session review of interlocutory matters and found no violation under confrontation clause or due process.

After considerable back and forth, the governing procedure as proffered by the judge seems

Does an un-cleared defendant have a right to review classified information material to prepare for his defense in interlocutory matters? Everyone seemed to be on board that during the prosecution case in chief, the defendant would have a right to hear the evidence against him, but during interlocutory matters the Judge did not seem to be convinced as any disclosure would violate federal statutes governing "need to know."

to be as follows for this narrow situation: the evidence would be discussed in a 505(h) hearing and a determination would be made if the accused had been exposed.

However from previous oral arguments we know that defense counsel can't ask the defendant directly, only the accused

can bring up classified information sharing. Moving on, the government position would most likely be no, the accused had not been exposed; the defense position would be that the accused had been exposed. Judge would decide based on that decision (if exposure was determined positively) the prosecution could make a decision whether to introduce the information in front of al-Nashiri, not present the information, or remedy through reaction or summary.

Defense requests a 505(h) hearing on AE 142 at the end of today.

r. AE 143 Defense Motion to Compel a Copy of All Discovery Provided to Habeas Counsel

June 11, 2013. In 2006 a writ of habeas corpus was filed in District Court in the District of Columbia when al-Nashiri had been identified as a detainee at Guantanamo Bay. This action is still pending and his counsel in the habeas corpus petition had contacted al-Nashiri's defense counsel that they need to request the documents because they were exculpatory, which habeas counsel was prohibited from doing due to a protective order issued from the District Court. The disclosure of these documents came to habeas counsel after the D.C. District Court issued an order requiring the Government to turn disclose anything that "materially undermined the government's justification for detaining him (al-Nashiri)."

The basis of Prosecution argument is that the procedures in place with search requests and affirmative discovery disclosures are effective and accurate. And that there is no place for defense to "double check" their work. Prosecution's contention is whatever habeas counsel has is either A) not relevant or B) already in the Defense's possession.

Defense of course argues there are already issues with the standard of discovery used by the prosecution, that habeas told defense that defense "needs" this, and that if they do already have it what is the harm. But no one knows what these documents contain. Prosecution has not reviewed what was disclosed to Habeas counsel so how can they contend that is not relevant to the proceedings.

Judge Pohl said if there was going to be an order it would be for the Prosecution to review the documents disclosed to habeas counsel, and then if discoverable to deliver to the defense.

s. AE 144 Motion to Compel Discovery in the Possession of the United States Attorney for the Southern District of New York Demonstrating the Guilt of Fahd Mohammed Ahmed a1-Quso and Jamal Ahmed Mohammad Ali al-Badawi Relating to the Present Charges

June 12, 2013. Defense asks to table the motion

for now as prosecutor said during break it was given during a recent discovery disclosure on May 30, 2013. Judge says will list it as moot as a housekeeping preference but can then revisit it.

t. AE148 Defense Motion for Appropriate Relief: All Future Conferences Held Pursuant to R.M.C. 802 Be Recorded and Made a Part of the Official Record

June 11, 2013. Judge Pohl ruled that as a matter of right the motion was denied. However, as a matter of policy he would grant the motion as a matter of discretion. Judge Pohl stated he had no problem being on the record, but that counsel had to understand what he was asking for. Now conferences that often included scheduling and counsels' private travel schedule would now become part of the official record.

Defense counsel said the commit to transparency was paramount. Judge Pohl responded that every effort would be made.

June 12, 2013. Judge states that 802 conferences will be recorded, but not made part of the official record and published on the transcript. Defense asks if the media or member of the public wish to request it would it be granted. Judge said he would have to think about it as typically as a general rule the conferences would be summarized on the record and asked of both counsel if there was anything they would like to add or disagree with. Judge said that the record reflecting the hearing was his job, and it might be resource problem to get it on the website.

u. AE149C Defense Motion for Appropriate Relief: Determine the Extent of Past Monitoring at Camp Echo II and Order That No Future Monitoring Occur in ITF-GTMO Facilities (Defense Motion to Abate the Proceedings in Order to Resolve the Issue of Third Party Monitoring of Defense Communications and Censorship of Commissions Hearings)

June 11, 2013. Prosecution contends no monitoring has, is, or will occur at Camp Echo II, and that it has been asked to prove a negative. Defense argues that is has been an issue for other defense counsel teams, and those internal

inconstancies is enough of a showing to put the testimony on the record.

Judge Pohl rules allowing witnesses: Captain Welsh and Con. Bougdin. Judge Pohl Denies FBI special agent De la Roca.

June 12, 2013. First witness called is Captain Welsh who severs in the Joint Task Force GMTO since 2011. Defense starts direct with the responsibilities of Welsh and the time he had during the turnover of his position. Welsh had been in Echo II but had not personally inspected every interview room. At some point, he walked into the control room and witnessed an FBI agent listening into a meeting with a detainee, prosecution, defense counsel, and FBI agents. Welsh states he was surprised thinking the only observation was video monitoring and then reported this incident to Con. Thomas. Con. Thomas who stated while it was possible, it was not done. Welsh also testified that he never told Con. Bourdin, and that he presumed Con. Thomas would relay that information. Defense asked witness if there was any log of when that equipment was used, and Welsh responded in the negative.

...I would absolutely recommend reading as many motions as possible on the military commission website.

The government used their cross to elicit the layout and use of the Echo II facility. Welsh testified that the multipurpose meeting rooms were used not only for attorney client meetings, but also for medical treatments, international community, and visiting specialists. In addition they reviewed that the audio monitoring was not done during and attorney client meeting. At the end of Welsh testimony he stated he has never seen or hear of attorney-client monitoring and that there "no dragons either."

Welsh also testified on redirect that after witnesses this incident he spoke with Gen. Thomas and FBI Agent DeLaRoca. DeLeRoca told Welsh

that it was FBI standard operating procedures to monitor meetings that FBI agents are in. Since arriving at GMTO in 2011 Welsh testifies that is the only FBI interview session he knows of. This witness had incredibly strained interaction with defense counsel, and testimony lasted approximately an hour and half.

Second witness called is Joint Detention Commander Bougdin. He has over thirty years in the military, with 20 of those as a military police officer. Bougdin testifies that Welsh (first witness) supports him but does not work directly on his staff. Bougdin affirmed it is his responsibility to maintain the premises and equipment of Camp Echo II. Defense solicited testimony that while Echo II was under his control, there were renovations late October/ early November and during that time the wires connecting the audio listening equipment was severed. In addition, an order was made in early December to fix the equipment all without Com. Bougdin's knowledge.

Further after he immediate command takeover he had expressly asked if such capabilities existed in Echo II and was denied by reporting officers. Bougdin testified he was surprised to find all of this information out and as soon as he was informed he removed all the equipment from every room but one, and informed the guards that no monitoring was too occur and that Attorney client meetings should not happen in that remaining room. In addition, Bougdin had originally cut the power to make sure no inadvertent listening had occurred. Boudgin did admit that beyond the prison guards there are other agency stakeholders, who do have a presence in GMTO.

Prosecution just solicited again that this second witness had no actual knowledge of any Attorney -Client Privilege being breached due to monitoring of meetings. Defense counsel requested the permission to do periodic checks of the cell without notice to the government if they had already scheduled a meeting. While the witness first seemed amenable, he then seem to retract the statement and said he would need notice.

The ending sentiments by the Defense was that the government had created "plausible deniability" that no one tells anyone anything and that relief requested was a specific order from the commission to ban listening, followed by freedom by the defense to search the room during the course of ordinary visits. The government contended this was "bad policy" and that no direct order was needed from the commission.

From here the Judge allowed the transition to allow defense to start direct on Motion AE 27L.

v. AE 153 Defense Request to Postpone Commissions Hearings Set for II August 2013, September 2013, and 14 October 2013 (SEE SUPPLEMENT BELOW)

Defense requested all three upcoming motion weeks be postponed as Learned Counsel is on another month long trial in Indiana. The Judge granted the continuance over the Prosecution's objection and canceled the August date. The Judge suggested he would keep the September date for now, but that upon a request by Defense counsel he would continue again. In addition, Judge Pohl thought that adding November 9-15, 2013 and December 9-20, 2013 would keep the commission moving on and possibility ahead of schedule.

w. AE 153G Supplement to Defense Motion to Continue the April 15111 Hearings or Abate the Proceedings Until the Department of Defense Provides Sufficient Protections to Ensure that Defense Communications and Work-Product Are Secured and the Deletion of Defense Files Have Been Remedied

June 11, 2013. Judge Pohl said he denied the abatement motion because we are (obviously) here today.

Defense breaks down the Attorney Client Privilege complaints to three factual predicates. 1) Replication Server problem, 2) al-Cosi Problem, 3) Monitoring interferences. This in regards to Camp Echo (one should see Motion 143(C)), but applies in this motion because of its referral to

outside monitoring for classification and security protocol of Defenses work product and files. Defense wishes to make a record preserving the issue for appellate review, however in oral argument is questioned frequently by Judge Pohl as to evidence of misconduct or breach in the instant case, as opposed to issues at large resulting in from other cases.

Prosecution contends that relief being requested is unnecessary because of the procedures right now in place and being worked on to provide a solution to the problems of communications and work product. Prosecution explains that Defense Counsel will have their own email server soon (approximate date July, 22, 2013) and that the replication server error has a saved copy of what the server looked like December 28, 2013 and IT will be going line by line to compare the present server to see what, if anything, is missing. Until then all resources have requested by the Con. Mayberry have been granted. In addition, that of the 6 gb of data as cited by Defense as missing from their sever is of the entire defense counsel office servers, with no facts to demonstrate that anything is missing from the al-Nashiri case. Prosecution also has two rebuttal witnesses.

Judge rules allowing Mr. Broyles to be called as a witness, and defers the other three requested by defense until after Broyles testimony.

June 12, 2013. Witness Brian Broyles, Deputy Chief to the Office of General Counsel called to the stand.

Direct Testimony

Witness listed the IT problems regarding Defense's work product in three specific categories.

1) ISR searches were not restricted to non-defense data.

a. Problem: In the al-Cosi an ISR was run using search terms for specifically looking for emails between defense counsel and prosecution regarding a limited topic. However the confusion on search terms expanded from this desired results to include had internal emails. Witness

explained that defense servers were searchable and while ISR reviews search requests with a legal review team, if their SOP aren't followed it could result in a breach of A-C privilege.

b. Timeline:

i. First Search had several thousand hits. This search was found to violate the Standard operating procedures.

ii. Second Search (to remedy) came back with 20-30k hits. This search was not acted on since the data was so large.

iii. Third Search had 540k hits. This search SOP was also not followed.

c. Solution: Presently a "switch" has been thrown to prevent ISR to run searches on defense servers. But upcoming solutions include the hired contractor design of own system for the Office of Defense counsel.

2) Replication of OMC servers to GMTO resulted in files 7g of missing, including Defense Servers.

a. Background: Replication was necessary because the island bandwidth was so limited that it was being consumed by litigation teams accessing work in D.C.

b. Problem: South Side servers (GMTO) as some point believed that they were the dominant server and deleted files on the North server that did match files on their own. Witness testified that on 12/28/12 there were a certain amount of files and on 3/4/13 there were only 2 million files.

c. Timeline: Three discrete events were data went missing, early March was the last event, and from that deletion they OMC was able to determine that the replication was the cause of the missing data.

d. Solution: A perfect copy was made 12/28/12 of the server and that will be compared with the 6/10/13 version of the servers. Software will analyze the two and make a list of "orphan files" that no longer exist in the location or name that they did on 12/28/12. Using non critical data, witness will see how much was just individually changed by the user, how many were deleted, and what files can be restored to determine as an appropriate sampling of the extent of the problem. This could have 100% success rate or have permanent deletion of files.



3) Active Monitoring of internet activity by DOD personal

a. Problem: NOMSD (check) monitors through computer systems, which then recognizes an issue reports to a person who calls the user that triggers the alarm. If convinced that there is no issue, no further course of action is taken. If not, then a network search is done for classified information on defense network.

b. Solution: The upcoming solution is estimated at 45-60 days before a new individual defense network can be created and completed. Then Defense Counsel will have their own in house IT administrators who will be investigating when the computer alert goes off.

Cross Examination

Prosecutor limited the time of issue to 12/28/12 to 3/4/13 and no other files before or after could be damaged. In addition, prosecution was able to elicit that encryption was an option for the defense counsel to protect attorney- client privilege.

The most contentious part of the cross was one of Prosecution's final questions "Did the prosecution, in the al-Nashiri case, have access to defense files?" Witness answered an unequivocal "yes" which at least made several people in the gallery snap to attention. In an attempt to rephrase, counsel received the same answer two more times. The Judge then asked because he felt "the prosecution won't- how do you know this?"

Witness replied he was able to access the prosecution server when reviewing all servers after the replication problem, and when on the phone with Mr. Teller (get title) who assured him there was no cross over, witness was able to click on a file called "award photos" of the prosecution. Mr. Teller then instructed witness to cease access because there was no firewall/block at that time.

The judge then clarified that it was then the witness' testimony that while it is his actual knowledge the procession had accessibility to the defense servers, it was not his testimony they did access defense files. Witness agreed,

and added he did not believe prosecution did actually access defense files.

x. AE 156A Defense Motion Pursuant to Trial Judiciary Rules of Court 4.B (Excusal of LCDR Reyes)

June 11, 2013. Changes mad to both sides of trial counsel, with a new Trial Counsel for the prosecution entering an appearance. In regards to the motion, the feeling in the courtroom was very casual. However Judge Pohl did say while there was no objection and the Convening authority approved his removal, he did feel that a Judge's permission was necessary if counsel has made an appearance. He then did a short colloquy with al-Nashiri to be sure he consented to LCDR Reyes. Al-Nashiri calmly and affirmatively gave his responses about his understanding of Reyes leaving the defense team. Later today, one of escorts told us that the Navy had stated Reyes' tour was finished and that it was time for him to move on.

IV. NOTES

June 11, 2013

There were some translation issues today. At the beginning of the hearing al-Nashiri had been using the headphones but the speaker provided for those defendants who don't to wear them, was still playing. In addition there seemed to be something wrong with the (presumably) translator's headphones. A short recess was called shortly after the start of the hearing. Later in the afternoon there were some microphone levels and the CCTV was cut for about 30 seconds. After that, all IT problems were resolved for the day.

Organization on several motions was not entirely consistent. Defense counsel, Mr. Kamen, went on several tangents about the issues involving missing data, lack of security, and monitoring. These issues interplay and were argued somewhat simultaneously under motions 153(G) and 149(C) motions.

A 505(h) hearing was held at the end of the day to most likely schedule the two classified motions on the docket list.

June 12, 2013.

During the afternoon session there was a delay in starting the proceedings and multiple conversations were had without the microphone picking up for CCTV observers. Turns out that Mr. Al-Nashiri wanted to waive his appearance for the afternoon and observe in his holding cell and observe through CCTV. He signed a waiver which Commander George Massucco testified he had read the English document (exhibit AE163) in full with Arabic translation, and that he had added a handwritten portion that said Arabic translation was not available in the holding cell and Mr. Al-Nahiri understood and agreed. Finally Commander Massucco testified that al-Nashiri had listed his back hurting as reason for not attending the afternoon session.

V. MISCELLANEOUS AND TRAVEL

1. Next Scheduled Hearing: Mr. Kammen has a conflicting trial for the previously scheduled August date. Judge Pohl decided to keep the September and October date as is, noting that they could be continued if Mr. Kammen's trial wasn't over. In addition Judge Pohl requested two weeks in November and December respectively to "get ahead of schedule." Prosecution also entered a motion for trial scheduling requesting February, 2014 as a start date.

2. Case Preparation: While some motions won't be declassified until departure, I would absolutely recommend reading as many motions as possible on the military commission website. In addition the docket list is usually posted several days before the hearings. The internet lounge has a binder of printed motions available for

review, and General Martins mentioned a future attempt to offer a flash drive with the motions, since downloading from the web is a slow process due to bandwidth.

3. Travel: I would advise flexibility on both ends for flights to and from Andrews Air Force base. I flew to Dulles IAD Washington on Sunday, June 10, 2013, and stayed with friends who then transported me to Andrews on Monday, June 11, 2013. Fellow NGO's mentioned problems with cab companies who were permitted on base. My suggestion would be to take any transportation to the visitor center and then call Anthony McCloud to come retrieve you. The New York Bar Observer and I did this and were the first through check in allowing us to join our escorts for a coffee run before our flight. However there is only vending machine at the gate, so my suggestion would be to bring snacks and coffee with you as there are no options while waiting to board. The return flight was delayed an hour and many people struggled to catch connecting flights home. In addition, clearing customs upon arrival at Andrews added an unexpected time delay to most.

4. Tents/ Living Quarters: Like most observers I would recommend warm clothes and packing a blanket. Even in June the AC is kept so high that at least six observers bought blanket/sweatshirts while there for evenings in the tent. In addition, the latrines and showers are in separate facilities so having shower shoes/ flip flops for each travel in getting ready in the morning is important. The water is non-potable but there was plenty of water in every facility to drink or use.



5. Internet: Cost was \$150 for the week, but to be able to use to internet within walking distance of the tents was highly beneficial. The other options involved going to town and Starbucks was having problems with their Wi-Fi that week.

6. Daily Schedule: Attending breakfast at the galley meant departing at 6:30AM and returning at 7:30AM. Showtime to depart to security was usually around 8:15AM. We generally broke for Lunch between 12-1PM but since we are the first to come back through security (it is set in stages, NGO's, Media, then Victims) our break is the shortest, roughly about 30 minutes. Generally our military escorts got our Subway order in the morning then had it ready to go when we recessed. Depending how late the proceedings went (anywhere from 4pm-6pm) we were usually given a half hour break before regrouping to go to dinner. We would ultimately return to the camp between 9-10PM at night. The schedule would of course vary based on the availability for us to sit down to have meetings with counsel, and any other trips planned. Late evening was generally the first opportunity of the day, in my opinion, to start typing the daily report for NIMJ.

* * * * *



DRU BRENNER-BECK

Khalid Sheik Mohammed; et al.

17-21 June 2013

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17 June 2013

Day 1 of this session of hearings in Khalid Sheik Mohammed, et al. started with a technical glitch regarding the translator feed for two of the detainees. After a short recess to remedy the situation, the hearing resumed with Vice Admiral MacDonald, the convening authority who referred the charges against the defendants to the Commission, on the stand to continue the testimony that he began the last session. The defense, in their examination of Adm. MacDonald, sought evidence on several issues: the restrictions on counsel access and confidential discussions with their clients, interference with legal mail to the defendants, any communication with higher authorities within the Executive branch on the referral decision, and the establishment of a limited deadline to allow presentation of mitigation matters to the Convening Authority to consider in his referral decision. Counsel for Al-Hawsawi began. Cdr Ruiz explored the sequence of protective orders that controlled defense counsel's access to their clients at Guantanamo, telephonic contact with detainees at Guantanamo, the flow of legal information into the Guantanamo detention facility, and the presumptive classification scheme designed to designate as classified any information obtained from the detainees. Beginning with the Busby memo early on, followed by the Convening Authority's 4 March 2011 order, withdrawn before its 21 March 2011 effective date, leading to the two JTF GTMO orders on 27 Dec. 2011 (Communications and logistics of access of counsel to detainees involved in military commissions trials), the defense questioned Admiral McDonald on the sequence of, his involvement with, and his understanding of these protective orders, which the defense contends impermissibly interfered with their ability to have confidential communications with their detainee clients without violating ethics requirements to protect client confidences.

These issues impact AE 008 (defense motion to dismiss for defective referral), and the various motions addressing defense counsel access to detainees and detainee's access to legal information involved in their case. Mr. Kannel, counsel to Mr. Al-Baluchi, continued the examination on this subject later in the morning. Admiral MacDonald's testified that he had issued a protective order in the case on 4 March 2011, with an effective date of 21 March 2011, which established controls on defense

access to their clients, and the flow of defense information into the detention facility through use of a privilege team. The later effective date was designed to allow defense and other parties an opportunity to review and comment on the protective order. The proposed privilege team was to be staffed by one or more DoD lawyers, one or more intelligence or law enforcement personnel, and interpreters and translators. This was based on the privilege team established by the federal district court in habeas cases.

The defense alleges that specific restrictions on the privilege team in this order differ from those in Al-Nashiri, and are inadequate to allow them to meet their ethical obligations when sending written communications of attorney-client privileged information to their detainee clients. The 4 March 2011 protective order, in addition to establishing this privilege team to review the defense's legal mail sent to the Guantanamo facility, provided broad definitions of contraband and information contraband that arguably prohibited the defense from discussing the case with their clients. The protective order initially required that counsel speak the same language as the client in any meetings, and that telephone calls between counsel and a detainee were to be subject to contemporaneous monitoring and recording. Although Adm. MacDonald testified that the telephonic restrictions were imposed to ensure that unauthorized third parties did not join the phone conversation, he could not explain why recording was authorized. These restrictions on attorney-client communication were implemented against a background of Adm. MacDonald's knowledge that intelligence organizations continued to interrogate detainees generally, and exploit any intelligence gathered at JTF GTMO.

Adm. MacDonald also testified, that in response to objections by the Military Commissions Chief Defense Counsel as to the Convening Authority's authority to issue a protective order, as well as to its provisions impacting on

defense communication with their clients (which arguably would destroy the attorney-client privilege), the Convening Authority withdrew the protective order before its implementation date. Significant to this March 2011 protective order is that it was staffed with the DoD Office of General Counsel as well as the CIA. In the late summer of 2011, at a meeting with the DoD General Counsel, Jeh Johnson, directed that if the Chief Defense Counsel objected to the Convening Authority's ability to issue the order, the Convening Authority should send it to the JTF GTMO Commander, Admiral Woods, to issue. The Convening Authority's legal staff subsequently provided a draft protective order to Captain Welch, the JTF GTMO Staff Judge Advocate. A protective order substantially similar to that of 4 March 2011 was issued on 27 December 2011 by Admiral Woods.

Admiral McDonald testified that, prior to issuing his 4 March 2011 protective order, he had requested that the JTF GTMO Commander send a letter asking for his office to issue a protective order to deal with defense access to detainees. The JTF Commander did so on 2 March as part of a consolidated process to facilitate the issuance of the 4 March 2011 protective order. This order included several provisions that impacted the defense perception of their ability to ethically represent their clients. First, it included the imposition of a presumptive classification scheme that required any information from the defendants to be treated as presumptively classified.

Admiral McDonald testified that he was only implementing what he believed was required from the original classification authority, but did not know how that information was conveyed to his office. He acknowledged that the CIA had reviewed and provided a chop on the 4 March 2011 which included the presumptive classification scheme for any information obtained from High-Value Detainee, to include statements of their memories and experiences since their capture and detention at remote de-

tention sites. Secondly, its definitions of contraband and information contraband (over which any disputes as to applicability were left entirely to the discretion of the JTF GTMO Commander), included textual definitions that would preclude effective representation of the client. For example, prohibited information included information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigation, or arrests, and results of any such activities by any nation or activity. It also precluded discussions of any current political or military event. Both of these categories would rationally include the events surrounding their capture and interrogation. The defense argued that the text of the protective order included no exception for events necessary for the defense of the case to be discussed, even if they fell within the broad categories of information contraband described above.

The 27 December 2011 JTF GTMO protective order was based on the draft provided by the Office of Military Commissions Legal Advisor, largely adopted the language of the earlier 4 March 2011 protective order, and included contraband provisions which left the determination of contraband to the complete discretion of the JTF GTMO Commander. Admiral MacDonald testified that in his opinion the broad language of the protective order had to be read in context with the definitions of legal mail, non-legal mail, contraband and threat information although he did acknowledge during his examination that strict application of those standards would preclude defense counsel from discussing significant portions of the case with their clients, to include information concerning their capture and detention.

The proposed privilege team was to be staffed by one or more DoD lawyers, one or more intelligence or law enforcement personnel, and interpreters and translators, and was based on the privilege team established by the federal district court in habeas cases.

Concerning access to legal mail and privileged attorney-client material, Admiral MacDonald stated he was generally aware that the JTF Commander was going to conduct a baseline review (BLR) of items in the detainees' cells in early October 2011, to include items in their legal bins, but testified that it was only after a 2 November 2011 letter from defense counsel Cheryl Bormann (counsel to Mr. Bin-Attash) objecting to JTF restrictions on defense counsel visits to, and communications with detainee clients, that he became aware of the allegation that the BLR included searches of the detainee's legal bins in October 2011. In response to this letter, Adm. MacDonald testified that his staff checked with Captain Walsh, the JTF SJA, who assured them that they were complying with the terms of the Commission's oral order in the Al-Nashiri case issued by Judge Pohl, also the judge in this case, as a prudential matter to treat all detainees similarly.

Admiral MacDonald did not compare the revision memo issued by the JTF Commander with the Commission's 9 November order, relying instead on his staff's oral briefing on the comparison. On 7 December Admiral MacDonald received an additional letter from the defense alleging that the JTF was not complying with the requirements of Judge Pohl's ruling. Again his legal staff called CPT Walsh and was informed they were complying, but did not verify whether the specific allegations raised by the defense were accurate. In the context of these defense complaints alleging an inability to consult with their clients, Admiral McDonald was aware of the ongoing litigation over legal mail in the Al-Nashiri case.

Agreeing that legal clients would expect to see matters drafted and filed on their behalf, Admiral McDonald did not know that the JTF GTMO was prohibiting Al-Hawsani's counsel from showing his client the amicus brief filed on his behalf in the Al-Nashiri representation. In Admiral McDonald's opinion, the December 2011 written communications order issued by the JTF Commander was better than Judge Pohl's order because it established a privilege team to review legal mail. Under this procedure, the privilege team's members were required to sign a non-disclosure agreement, as the mechanism to protect attorney-client and work product privileges, but Admiral MacDonald was not aware if they had done so. In his opinion, this non-disclosure agreement would protect the defense's attorney-client privilege, although the Commissions' Chief Defense Counsel disagreed.

On 8 January the Commission Chief Defense Counsel, Col Caldwell, issued a draft ethics memorandum, with a final memorandum on 13 January 2012 prohibiting counsel from sending written matters to their clients through the existing objectionable privilege team process. Admiral MacDonald, although disagreeing with COL Caldwell's ethics conclusions, did agree that all subordinate defense counsel in the Commissions were required to follow them. When faced with counsel for Mr. Al-Baluchi's 2 January 2012 mitigation submission raising the ethical issues and difficulties in forming an attorney-client relationship with his client that impacted his ability to properly formulate and submit mitigation matters prior to referral, Admiral MacDonald asked his staff to get him more information on the privilege teams, which was provided orally.

Other portions of the protective orders also established the rule that seeking a classification decision from the original classification authority (on the presumptive classification regime involving any communications from High-Value Detainees) would be outside the attorney

-client relationship, and therefore destroy any attorney-client privilege.

Admiral MacDonald's testimony established a direct relationship between the 4 March 2011 Convening Authority memo, and the subsequent 11 December 2011 JTF GTMO Commander memo protective orders that imposed significant restrictions on defense counsel's access to their clients, discussions with their client, phone calls to their clients, and legal mail and documents provision to their clients, to the extent that the Commission Chief Defense counsel issued an ethics opinion prohibiting the provision of attorney-client documents to the privilege team, and thus eliminated mailing any legal mail to a detainee. The monitoring and recording of telephone calls created a similar bar to telephonic contact between client and counsel.

AE 31 Defense Motion to Dismiss for Unlawful Command Influence. Admiral McDonald denied contacting any executive officials concerning his referral decision but did state that he had kept his bosses informed on the timing of what he was doing, not his contents. The defense articulated that to the extent the DoD General Counsel was involved in the preparation of the protective orders that substantially interfered with the attorney-client relationship, it would contribute to a finding of unlawful command influence.

All defense counsel questioned Admiral MacDonald on his decision not to grant additional delays in the preparation and submission of mitigation matters prior to his referral decision. He testified he had provided the defense an opportunity to offer matters in mitigation for him to consider in his referral decision and set 6 February 2012 as the consolidated suspense date for these submissions because that date was 60 days after the last learned counsel for the defendants had received his final security clearance. He did not consider the final clearance status of the mitigation experts to be re-

quired for submissions in mitigation for referral and therefore would not extend the deadline even though they had not been cleared and could not fully participate in the preparation of mitigation materials (i.e., could not speak to the client or examine classified materials). In his opinion the cleared learned counsel could work on any classified matters to include speaking with their client, and the uncleared mitigation experts could begin to analyze unclassified material in mitigation pending receipt of their final security clearances. Admiral MacDonald testified that he expected submissions addressing torture which had been publicly admitted to by the United States at least as to KSM's waterboarding.

In the second post-lunch session, James Harrington, counsel for Mr. Bin Al Shihb, elicited that Admiral MacDonald had no capital litigation experience, and had not read the ABA guidelines on capital litigation in their entirety, but instead had relied on his staff's evaluation of relevant death penalty case law in evaluating his request for a 6 month delay in submitting matters in mitigation for referral. Although finally receiving his security clearance on December 7th, 2011, Mr. Harrington only visited his client once on January 17, 2012, which Admiral MacDonald considered to be inadequately explained by the holidays and his participation in another trial at the beginning of January. Although Mr. Harrington's request recited the numerous ways in which the JTF GTMO 27 Dec. 2011 protective orders interfered with his ability to meet and communicate with his client, Admiral MacDonald's staff concluded that the prohibitions were not as prohibitive as claimed by Mr. Harrington. The testimony established that Mr. Harrington submitted his initial request for a delay on 2 Feb. 2012, which was denied on 3 Feb. 2012. He submitted a 70-page request for reconsideration on 6 Feb. 2012, which was denied on 7 Feb. 2012. Admiral MacDonald was unconvinced by the declaration of various experts provided by Mr. Harrington in his request that the allegations of torture in the case required detailed ongoing

discussions with the client in order to effectively represent him, and that restrictions on discussions of "jihad" severely limited exploration of the basis for the defense. Although Admiral MacDonald recognized that the Chief Defense Counsel's order which precluded the use of written communications with the client was in place, he felt that if he accepted the defense position he would never be in a position to refer the case because he was not in a position to tell the JTF GTMO Commander what to do regarding his protective orders. He also disagreed with the Chief Defense Counsel's position that the protective orders impermissibly interfered with confidential attorney-client communications.

Adm. MacDonald admitted that the publicly acknowledged accounts of Khalid Sheik Mohammed's waterboarding was "torture" in his personal opinion, he did not know why that mitigating factor was not included in the written pre-trial advice, and he acknowledged that the Convening Authority may consider mitigating evidence from any source. Nevertheless, he did not seek additional information on that from the prosecution, nor grant the delay for the defense to present such matters. Testimony from Admiral McDonald will continue on Tuesday, June 18th, with expected testimony from Admiral Woods and Captain Walsh on Wednesday the 19th.

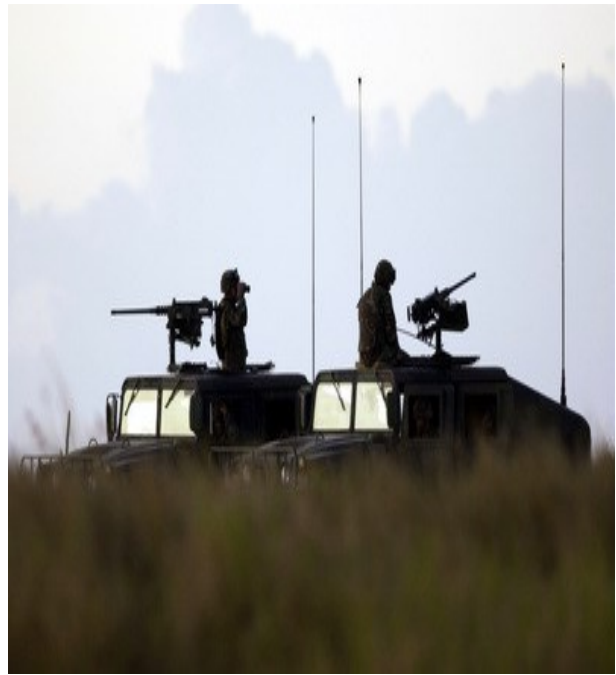
Tuesday, June 18th:

Testimony commenced with Adm. MacDonald again on the stand and Cheryl Bormann, counsel for Mr. bin- Attash examining him on many of the issues addressed on Monday. Ms. Bormann asked Adm. MacDonald if he was aware that the previous Convening Authority had declined to refer charges against, Mr. Al-Khatani because of evidence presented that he had been subject to torture. Adm. MacDonald acknowledged he knew that outcome from his legal staff. Ms. Borman explored that Adm. MacDonald had no direct experience with capi-

tal litigation, and attempted to establish that the Pre-trial Advice (PTA) in this case was defective because it lacked any discussion of the mitigating evidence in the case (although later testimony established that one mitigation submission from Mr. bin-Attash had accompanied the referral binders and was considered in the decision).

Although Adm. MacDonald had agreed to be interviewed by defense counsel after the last session in February 2013, when he realized that he would be recalled to testify at the Commission regardless, he decided against being interviewed by defense counsel even though the interviews would be transcribed and a member of the prosecution would be present. Adm. MacDonald testified that he spent three days with prosecution representatives prior to his February testimony and three half-day sessions prior to this week's testimony preparing. He acknowledged that he declined to give the same opportunity to the defense, although he perceived his interaction with the prosecution as preparation for his testimony, not as a prosecution interview.

When technical difficulties once again interfered with the video feed, Adm. MacDonald was excused until after lunch, and the International Committee of the Red Cross addressed its motion to intervene and to protect its confidential communications (its privilege). The ICRC argued that the government's motion opposing disclosure of the ICRC confidential reports on the United States detention of defendants involved the crucial question of whether the government could be compelled to breach its obligations under international law to protect the ICRC's clear unequivocal privilege under customary international law, as recognized in the ICTY's decision in *Simic v. Prosecution and Tedorovic*. The ICRC argued that it occupied a unique position as a neutral, impartial and independent international organization--the only organization mentioned in the Geneva Conventions, with permanent observer status at the United Nations, and recognized under US law in the International Organizations Immunity Act.



Because of the ICRC's unique mission to foster humanitarian protections in armed conflict, its ability to protect its confidential communications was necessary to enable the ICRC to conduct confidential dialogues with States to accomplish its mission and maintain its unique access worldwide to areas normally off limits. Under Military Commissions Rule of Evidence 501b(4), modeled after MRE 501, a privilege asserted by any source would be recognized if it incorporated the general principles of federal common law generally recognized in trials of criminal cases in federal district courts. The ICRC argued that consistent practice of international tribunals recognized their privilege under customary international law and that under the Charming Betsey cannon, Congress and the President should not be presumed to intend to violate international law absent clear evidence of that intent.

In the ICRC's opinion, the language of MCRE 501 "as required by, or provided for, in the principles of federal common law, generally recognized in trials of criminal cases in federal district court" specifically included customary international law as part of federal common law, and did not necessarily require prior domestic precedent recognizing the privilege. The ICRC asserted, that under international case law the privilege is clear and unequivocal and confidential information is not disclosed absent ICRC consent.

The clear practice recognized in international tribunals is recognitions of their privilege achieving status as customary international law. The privilege can be selectively waived only by the ICRC as the holder of the privilege. Under ICRC Rule 76, the ICRC and States may engage in a consultative process to selectively waive portions of the privilege. The ICRC also argued that the D.C. Circuit's case law clearly establishes that foreign interests and foreign privileges should be respected. Finally, the ICRC argued that it would be ironic if this Military Tribunal, established in large measure to support and defend provisions of international law, the law of armed conflict, should fail to recognize a privilege recognized as customary international law by the international community.

Cdr. Ruiz, Mr. Al-Hawsawi's counsel, argued that when the United States seeks to put someone to death through the exercise of its judicial process, information that is useful in mitigation or extenuation must be provided in a capital prosecution. He highlighted that no federal district court criminal cases had recognized such an ICRC privilege, focusing on the Rule's requirement that the privilege be "generally recognized" in the trial of criminal cases in federal district court. He also attempted to distinguish Simic and Tedorovic as applying only to testimonial versus documentary evidence, and that discovery of this information was required under Brady.

Mr. Kannel, Mr. Al-Baluchi's counsel, stated that they agreed with the ICRC that the privilege existed by operation of international law, and the privilege belonged to the ICRC, and could only be selectively waived by them. However, he disagreed as to whom was included within the privilege, claiming that defense counsel, as part of DoD, were within the privilege, and that disclosure to them would not violate the privilege, particularly as DoD policy memoranda specifically required ICRC reports to be treated as if classified as secret. In this unique case, Military Commissions are

in a better position than an Article III Court, because they are a DoD entity and as such are within the privilege, and thus could share the ICRC reports with defense counsel, while Article III courts arguably could not if they recognized the privilege. If mitigation is determined to exist in these ICRC documents, then they can be admitted at trial before members under the procedures specified in MCRE 506. He further argued that the information could be additionally protected by an appropriate protective order issued by the Commission.

Mr. Nievan, Mr. Mohammed's counsel, argued that due process required disclosure of this material under the requirements of due process, but also joined Mr. Al-Baluchi's argument. Ms. Bormann agreed with the position of Mr. Hawsawi, arguing that particularly as to the events predating the detainees arrival on Guantanamo, the ICRC reports may be the only mechanism to obtain this info, as the detainees had little ability to record their detention experiences after their capture prior to 2006, and it may be the only information available to corroborate other information. Mr. Harrington, counsel for Mr. Al-Shibh, stated their position was not to focus on admissibility, but instead on information material to the preparation of a defense, which is required to be disclosed if in the government's possession.

The prosecution opposed disclosure of the ICRC information, but would not argue for an absolute privilege under US law. Instead, he asked that if the Commission were to issue a ruling that it delay until 4 weeks from today to allow the US and the ICRC (and defense) to engage in the ICRC consultative process seeking a selective waiver.

The Commission Judge queried whether the selective waiver provisions were problematic as few privileges operated in such a manner, rather the usual rule is that waiver of the entire privilege as to that matter. The Judge was concerned about the scenario that Brady material

might be contained within ICRC reports: didn't that obligate the government to look for such material under Rule 701, and trigger their obligation to review for possible exculpatory material.

After lunch testimony from Adm. MacDonald continued with the examination by Ms. Bormann, counsel for Mr. bin-Attash, who attempted to establish if any contacts had occurred between the prosecution and the Convening Authority during the referral process from receipt of charges on 1 June 2011 to referral on 4 April 2012. Other than an initial meet-and-greet when BG Martins assumed his position as Chief Prosecutor, and ex parte submissions 1-2 times on other matters, he did not discuss the 9-11 cases with prosecution officials. In response to questions on whether he considered 60 days to be sufficient to prepare a mitigation submission in a capital case, Adm. MacDonald contested that 60 days was the relevant measure, as many counsel had been on the case, and cleared for far longer, in some cases establishing an attorney-client relationship during the first referral of the case in 2008.

He also stated that in his opinion the JTF GTMO protective order in Dec. 2011 did not impermissibly interfere with the attorney-client relationship, and he did not have the authority to order the JTF GTMO Commander to alter his order. He reiterated that his office did all it could to resolve the matter of access to the facility, and expedite the security clearance process for learned counsel and defense mitigation experts, but felt that 60 days after the last learned counsel was cleared would be an appropriate deadline for submission on any mitigation matters. Adm. MacDonald also stated he did not have any authority to order pre-referral discovery from the prosecution as requested by Ms. Bormann. He acknowledged that the PTA did not discuss the 2002-2006 period when defendants were in the Rendition Detention Interrogation process.

In the Prosecution's examination of Adm. MacDonald, he testified to his 20 plus years of legal experience culminating in his appointment as the Navy TJAG. He had considerably more legal knowledge than the "normal" Convening Authority who is usually a line officer, who is not a lawyer, and had acted as a Convening Authority previously while a Navy JAG. He knew that the referral of the charges was only the beginning of the case and that he could consider mitigation matters submitted to him after the deadline, and after referral itself. Adm. MacDonald considered the two referral binders in making his decisions, and also considered the one mitigation submission put in by Mr. Kannel on behalf of Mr. al-Baluchi, which raised several issues on which Adm. MacDonald wanted additional information and research done on prior to making his referral decision. He also considered two amendments to that submission put in in February and March 2012 by counsel for Mr. al-Baluchi, prior to making his referral decision on 4 April 2012. All defense counsel were given initial extensions to previous mitigation deadlines, and Adm. MacDonald finally established a joint deadline of January 15, 2012. He accorded the defense an opportunity to present matters in extenuation and mitigation for his consideration in the referral decision even though he was not required to do so by the Rules, and he included in his letters the clear information that the ability to do so did not create any new rights for the accused, and had to be accomplished in a timely fashion. He considered 60 days after the final clearance of the last learned defense counsel to be reasonable given the context of the representation of the various accused by counsel. He did not consider the clearance of mitigation experts to be essential to this task, given learned counsel's abilities and knowledge, and the mitigation experts' ability to begin with unclassified materials.

On 2 February 2012, he received requests for extension for the mitigation submission from all counsel, with counsel for Mr. Mohammed requesting an additional 6 months; Mr. Hawsawi,

an additional 4 months; Mr. al-Baluchi, an additional 60 days after the JTF GTMO policy restricting counsels' access to, and communication with their clients was fixed; Mr. al-Shibh, an additional 6 months; and Mr. bin-Attash, an additional 12 months. All were denied. Only counsel for Mr. al-Baluchi made a mitigation submission by the deadline, supplemented by two amendments in late February and early March 2012. This was not shared with the prosecution at counsel's request. The submission was excellent and caused Adm. MacDonald to research the issues raised, and carefully consider the submission in his referral decision. Adm. MacDonald allocated resources to all five defense teams, through the Chief Defense Counsel or directly upon requests for specific resources. Adm. MacDonald did not rely solely on the PTA in the case, but also on the referral binders, and Mr. al-Baluchi's mitigation submission.

All defense counsel attempted to establish that nothing they submitted would have altered the referral decision in this case, but Adm. MacDonald disagreed, saying that he maintained an open mind until all information was provided and he made his final decision on 4 April 2012. Tomorrow, Wednesday 19 April 2012, we start with testimony from Admiral Woods, prior Commander of JTF GTMO, via VTC, and CPT Welch, in person, at some point this week. It is expected they will testify concerning the rules government defense counsel access to and communication with their clients.

June 19th:

All defendants were once again present in court. After the Commission was convened, additional argument was made by defense

counsel on the ICRC privilege issue, with defense counsel emphasizing that the government must seek out extenuating or mitigating evidence, not only produce what is in its possession. The prosecution's failure to even review the ICRC information was due to a voluntary DoD policy. The judge summarized the requirements to decide the motion before him as: first he had to decide if the ICRC had a privilege to protect its information; secondly, if so, to decide if it is discoverable; third, if so, to determine how that discovery is to be relayed to the defense, under what circumstances, and he may look to MCRE 505 for that issue; fourth, later how and if that information may be used in trial, and finally the legal basis of a closed proceeding, if any.

All defense counsel attempted to establish that nothing they submitted would have altered the referral decision in this case, but Adm. MacDonald disagreed, saying that he maintained an open mind until all information was provided and he made his final decision on 4 April 2012.

The ICRC contended that as an intervenor, it was entitled to an adjudication on their claim of right. Admiral Woods, the previous JTR GTMO Commander testified: Mr. Konnell, counsel for Mr. Al-Baluchi, questioned Adm. Woods on the organization of JTF GTMO, which he commanded from 24 Aug.

2011 to 25 June 2012. JTF GTMO consisted of the Joint Detention Group, the mission of which is to provide a safe, humane, detention of detainees in US custody; the J2, which was charged with gathering intelligence from the detainees, and finally providing support to military commissions. Adm. Woods testified that when he took command, there was already discussion on the concern that detainees had a large amount of material in their cells, including legal and attorney-client privileged information, that had not been consistently marked, making it more difficult for the guard force to ensure that only material that had been properly cleared into the detention facility was present.

During the prior commissions case, and during habeas representation a significant amount of legal material was provided to the detainees for their legal cases, but the marking requirements had changed over time, and may not have been consistently applied in the past. Because of this, JTF GTMO wanted to conduct a baseline review (BLR) of the material in preparation for the reconstituted military commissions trials. The 2008 Busby memo was in place when he arrived, and updating that policy was on his priority list of things to do. He was aware that the Convening Authority had sent a draft communications order for their use in drafting a policy. He knew that actions officers at SOUTHCOM and his SJA were working on the issue. He saw the first draft of the new policy in early December 2011. In a 30 Sep 2011 memo he directed the Commander of the Joint Detentions Group to conduct the BLR, which included seizing the legal bins of the defendants with no prior notice to either them or defense counsel and having the SJA and guard force personnel search the documents to determine if they were legal or privileged material. The BLR was conducted based on specific and general concerns on the materials across the camp. When documents were seized by the BLR team, the intent was that the defense counsel for that detainee be informed of the number of pages seized. There were monthly to bi-monthly VTCs between the JTF GTMO Commander, the SOUTHCOM Commander, Adm. MacDonald (the Convening Authority), and Mr. Lietzau, (the Under Sec Def., Policy, Detainee Policy), and the intent to conduct the BLR was discussed at these VTCs.

On 22 Nov. 2011, Adm. Woods issued a "Revision memo" to revise the Busby memo and establish interim policy until he could reissue a new policy concerning screening of information and documents. This memo was issued because of the 9 Nov 11 oral ruling by J. Pohl in the al-Nashiri case, in which the Judge had issued rules on screening legal mail coming into the detention facility for al-Nashiri. This memo was intended to issue guidance to apply the

same procedure as to all detainees until a final memo could be completed. A single procedure was easier for the guard force to implement and enforce. The Judge Pohl order defined privileged communications very narrowly, as original hand written or typed correspondence between a detainee and his counsel signed by defense counsel as well as attorney-generated material (e.g. pleadings) directly related to the defense.

There was a break in the testimony of Adm. Woods, due to technical problems. A brief discussion of the issues to be addressed today was discussed while awaiting technical resolution. Presence of Accused at Sessions Discussing Classified Information.

An interesting discussion began concerning the proper procedures to deal with classified information in this trial, in the context of AE 013, and the defense all objected to the removal of their clients during 806 conferences. Ms. Joanna Baltes, the DOJ Classified Information procedures/CIPA expert addressed defendants' AE 136 motion demanding the presence of the defendants at 806 conferences, beginning with the position that under EO 13526, the Executive branch is the sole authority to determine who may have access to classified information, distinguishing 806 conferences now from sessions involving the presentation of evidence at the trial on the merits.

However, in interlocutory matters, involving primarily legal issues, she argued, the accused may be excluded from the 806 conference unless he is the "proponent" of the classified information, which is a concept a little broader than source. The majority of the issues involving classified information in this case involve exposure of the defendants to intelligence sources and methods when they were held in the Rendition Detention Interrogation (RDI) program. Addressing the presence of other defendants, as this is a joint trial of five defendants, she said the usual rule is that they would be excluded,

but each instance had to be examined on a case by case, fact specific basis to determine whether appropriate to ensure that no rights of the accused is violated by his exclusion. She argued that federal courts analyze this issue as a trial right, either under 5th Amendment due process, or 6th Amendment confrontation grounds. She argued that in preliminary (pretrial) matters, it is appropriate to exclude the accused so long as the defense attorney is able to participate in the defense, there is no deprivation of right, citing to the 2d Circuit opinion in *In Re Terrorist Bombing*. The prosecution's bottom line is that this is not applicable at pretrial, which deals with only "legal" matters and that clearly if the defendant was a "proponent" (which she widened from the concept of source), he must be allowed to be present, but that otherwise, classified information could only be provided to properly cleared individuals. In her opinion, incorporation of CIPA and its case law, was Congress's intent in military commissions.

The defense argued that the Military Commissions are operating under a specific statutory rule that states that the accused has a right to be present in all "proceedings," except for deliberation by the members, or if he causes physical safety concerns or disruption. Arguing for Mr. al-Baluchi, Mr. Konnell described the statutory structure of the 2009 MCA—10 USC 949a sets forth the minimum rights that the Secretary of Defense may not abrogate by rule. 10 USC 9494a(b)(1), provides that the Secretary of Defense may deviate from rules governing courts-martial as may be required by the unique circumstance of the conduct off military or intelligence operations during hostilities or by the practical need, however, the statute also states that "notwithstanding any exceptions [required by these needs] the defendant shall have the right to be present at all sessions of the military commission (other than those with members deliberating or voting) except when excluded under 949d of this title.

Mr. Konnell's argument is that 949d only allows exclusion to prevent disruption or threats to physical safety (the specific three exceptions are when members deliberate or vote, when the defendant persists in conduct that justifies exclusion to prevent disruption of the proceedings, or when the defendant persists in conduct that justifies exclusion to ensure physical safety of individuals). The defense argued that the strong clear text of the statute is only reinforced by the fact that Congress had the Supreme Court's opinion in *Hamdan I* before it when drafting the 2009 MCA. Under *Hamdan*, the first MCA violated Article 36 of the UCMJ because it allowed the presiding officer to exclude the accused from the trial. When asked how that squared against the prohibition of sharing classified information with unauthorized people, he stated that "not authorized" in 10 USC 949 is not a direct analog to a cleared person, arguing that there are multiple ways a person may be authorized to receive classified information. Congressional language in 949b2(b) is a blanket authorization for provision of that information to the accused in all sessions of a military commission.

The defense argued that 949a2(b) recognizes national security concerns, but notwithstanding concerns for national security the accused must be present. In response to a question by Judge Pohl, Mr. Konnell argued that Congress had intended a different rule in the Commissions process than in Article III courts, because it had *Hamdan* directly before it, with 5 justices agreeing that the fundamental flaw was to permit the defendant to be excluded from the proceeding because it violated Article 36, and four because it violated the Geneva Convention. As to the prosecution's argument that this is solely a trial right and does not apply in pretrial proceedings, Mr. Konnell reminded the court that *Hamadan* was a pretrial case. Bottom line, in drafting the 2009 MCA, Congress took similar language from Article 36 into 949a, recognizing there can be variations, can include accommodations for national security purposes, but "notwithstanding" those exceptions the defendant cannot be excluded except for the three listed exceptions.

He and other defense counsel then demonstrated the falseness of the dichotomy between trial and pretrial by describing how cross examination of an FBI agent about torture would require reference to his/her report describing it and comparing it to other evidence [for example by contrasting what the FBI claimed the defendant said, memorialized in its report, from what the defendant claims was said], and the FBI report is not something that the accused is the proponent of. Mr. Nievans raised an 8th Amendment objection, which was also adopted by all counsel, as were Mr. Konnell's arguments.

In response, the prosecution argued that Congress did intend to make a distinction between trial and pretrial as it is drawn directly from MRE 505, that the Military Judge lacks authority to order the disclosure of classified information to unauthorized personnel, and that Congress cannot have intended for Military Commission accused to have greater rights than defendants in Article III courts.

After lunch, we resumed Adm. Woods testimony. He testified that the issuance of the 22 Nov. 2011 Revision Memo was intended to update screening procedures after Judge Pohl's ruling in al-Nashiri. This memo attempted to describe a divide between "privileged" and "non-privileged" communications. Adm. Woods stated his intent was to have material reviewed only for proper markings and physical contra-



band. He stated it was not his intent to exclude filed pleadings by counsel, or other documentation between the attorney and his client, and defense counsel showed him numerous documents which were clearly attorney-client privileged information or work product, (which were excluded by JTF personnel), and the Admiral testified that he would have considered all of the examples to be privileged and admissible to the detention facility. Adm. Woods focused on whether the documents were properly marked on every page, stating that once markings were on it, it would preclude any future review. It took over three months for non-legal mail to get to a detainee through the non-legal mail screening system.

When examined on the 27 Dec 2011 written communications order, he did not recall where the language for the privilege review team (PRT) came from. The Office of the Convening authority was working to establish the PRT, and JTF GTMO was working to get independent office space at GTMO for it. He envisioned a similar PRT to the habeas PRT. He was not familiar with the language of any non-disclosure agreement for the PRT, but there was never a military commission PRT in existence.

He testified as to the structure of the 27 Dec 11 written communications order which broadly established "information contraband," but included limited exceptions for information a defense counsel reasonably believed was related to the Military Commission proceeding. Unfortunately, significant categories of information contraband did not contain that exception, and these areas included elements which a counsel may need to deal with, such as "a discussion of information on historical perspectives or discussion of jihadist activities or jihadist philosophies," or the identification of any detention personnel (to include those who allegedly tortured the defendant in the case). In Adm. Woods' mind, the process involved a request for exception policy such that an attorney disagreeing with a decision to exclude a matter could come to him as final arbiter, even though

he was not within the attorney-client privilege. He testified that he intended that the defense counsel would explain that he or she needed to take the information into the detention facility, and the JTF Commander would make sure the counsel understood the risks, and allow it to properly marked and brought in if counsel stated it really was needed. Neither this intent, nor clear language incorporating such a procedure, was included in the 27 Dec 11 order. Which left counsel in the position that certain categories of information were "contraband without exception," a term coined by Mr. Nievens, counsel for Mr. Mohammed, could not be taken into the facility, and could not be discussed with the client at all, unless the client disclosed his privileged plans and strategy to Adm. Woods. Adm. Woods repeatedly testified that he intended to defer to defense counsel's professional judgment, but acknowledged that the 27 Dec 11 policy would have required a presentation to someone not within the attorney-client privilege as the only avenue for an exception for defense counsel to do so.

When questioned by Ms. Bormann concerning the initial 22 Nov. 2011 order (referred to as the Revision memo), with its narrow definition of privileged information, he stated that the only intent was to align the policy with Judge Pohl's 9 Nov. 2011 oral order in the al-Nashiri case, and acknowledged that his intent had not been to bar pleadings filed in the case or other attorney generated items directly to the defense. He stated that he had not intended this policy to have any effect on the notes taken by counsel and taken in and out of the facility for attorney meetings with the defendant. He testified that he wanted a privilege review team stood up quickly so he could get his staff out of the business of determining if items were properly legal and related to the defense. He also testified that no one in the Convening Authority's office conveyed to him that the baseline review (BLR) violated the attorney-client privilege. He was aware of the Chief Defense Counsel and made the determination that defense counsel could not ethically submit matters for government review, probably through CPT Welsh, his then SJA.

This concluded the testimony on 19 Jun. 2013. When the commission reconvened on 20 June, all of the defendants were present in court. Testimony from Adm. Woods continued. Cdr. Ruiz, counsel for Mr. Hawsawi established that Adm. Woods' background was as a Combat Electronics Warfare Specialist. Adm. Woods was not aware that CPT Welsh had received a draft of the protective order from the Office of the Convening Authority. After establishing that the contract for the privilege team in the habeas cases was administered by USDI (US Defense Intelligence), Cdr. Ruiz began to explore if one of the missions of JTF GTMO was intelligence collection and analysis. The prosecution objected on relevance grounds, which the judge initially sustained but stated that Cdr. Ruiz could come back to it later. Cdr. Ruiz asked for a clarification of what that meant because he wanted it clearly established on the record the grounds for the objection. Ms. Baltes of the prosecution explained that there had been no 505h hearing on the areas she suspected the defense was going, making the objection one of classification. The prosecution asked if Ms. Baltes could have a quick discussion with Cdr. Ruiz, which they did.

At this point, the prosecution could not be heard for approximately 20 or so seconds on the 40 second delayed feed, and the translation feed was allegedly stopped for 15-30 seconds cut, but the Court Security Officer (CSO) had not pushed the button. The light did not go off, nor did the typical white noise that accompanies the CSO officer's use of the button. At this point, Cdr. Ruiz stated that he would not be intimidated by the prosecution anytime a possible mention of the "agency that should not be named" came up, and objected to the cut-off of the video and audio feed. In response, the Judge ordered that the court be closed for a 505h hearing to determine whether the court had to be closed for the presentation of classified matters. The gallery was cleared for this purpose.

Upon return, the prosecution stated that there was no indication of the cut of the feed and that

the lack of sound and translation may have been because Ms. Baltes did not push the microphone to talk, so there was nothing to hear or translate. This issue was left in a disputed state.

Adm. Woods testified that he was not aware that an assistant US Attorney had stated that the habeas privilege team could not participate in military commissions because CIPA did not govern the proceedings. Cdr. Ruiz then asked Adm. Woods if he supported the FBI, DIA, CIDF and Homeland Security, all listed on the JTF GTMO website. [editorial comment: the probable outcome of the 505h hearing]. He acknowledged that JTF GTMO does support those entities. Adm. Woods denied knowing why the provision in the 27 Dec 11 logistic order, requiring that counsel and translators would speak in the same language as the accused to the maximum extent possible, came from. He also acknowledged that the J2 intelligence directorate screens the non-legal mail within JTF GTMO. He did know that legal mail would be screened by SJA personnel until a privilege review team was in place. As to the BLR, he stated that the intent had been to start with the detainees who had current or anticipated charges against them, which included these five defendants and Mr. al-Nashiri, because the military commissions were restarting and they anticipated that they would have an increase in the amount of legal mail. He knew time was of the essence because of the likelihood of new cases. He signed the 22 Nov Revision Memo to bring the procedures concerning "legal mail" into alignment with J. Pohl's 9 Nov 11 order in the al-Nashiri case. The December orders were intended to completely replace the May 2008 Buzby memo that had controlled legal mail and access of defense counsel to the detainees prior to the BLR. He denied that anyone told him to sign the December 27, 2011 order sooner rather than later, but he understood the timeline for the military commission's reconstitution and that made time of the essence.

Mr. Harrington, (counsel for Mr. al-Shibh), asked what he had done to prepare for his testimony, and established that his only legal training was that received as an officer or commander in the Navy. Adm. Woods acknowledged that the 27 Dec. 11 order did not contain any instructions that if defense counsel disagreed with decision of the SJA office on what was "material to the defense," they could present it to him for resolution, and he would not inquire into the substance or rationale of why the defense counsel wanted to bring it in, only that they really needed it, and they understood the security risks of bringing that information into the facility. Adm. Woods has never been the final arbiter either under this order or under a similar provision in the habeas PRT procedures. Adm. Woods stated he anticipated relying on the professional judgment of the defense lawyers and did not anticipate getting into their thought processes, but acknowledged that neither the orders themselves stated that, and that no defense counsel had been informed of that concept. He though an exception for 'case-related materials' would have been too broad. Adm. Woods talked to Col. Roger Drew at SOUTHCOM on the drafts of the 27 Dec 11 orders. Adm. Woods knew the JTF monitored the huts (where defendants and counsel met) in the detention compound visually and was specifically told that they did not do audio monitoring by the JTF Detention Group Commander, COL Donny Thomas. He never visited the control room of E2, but did tour the other E visiting rooms and discussed the similarity of those in E2.

After lunch, Adm. Woods testified as to the four memoranda leading up to the BLR: dated 25 Sep 11, 30 Sep 11, 5 Oct. 11, and 15 Oct. 11. This started approximately one month after Adm. Woods took command, and the intent was to establish what was in the camps for baseline marking so the guards could do a due diligence search and not review the legal bins, so in the future the JTF could control material to be placed in legal bins and search bins without impinging on the attorney-client info. The

inspection was necessary to standardize markings. The defense was given a chance after the seizure and review, to review seized material, mark it and resubmit it.

When Adm. Woods took command, the 8 May 2008 Buzby memo controlled defense access and mail to detainees was in effect, and he continued the policy, explaining that normally on taking command a commander ratifies all existing policies and orders. He viewed the structure of the 27 Dec 11 orders as setting up a system similar to the habeas privilege team, except instead of going to the judge in the event of disagreement, it would come to him to resolve as JTF GTMO until they had a judge available in the case (after referral). He was not sure of the exact set up of the habeas privilege team.

When developing the 27 Dec. 2011 orders he sent drafts to OMC (Convening Authority's office, DoD OGC, and the Chief Defense Counsel's office, and incorporated three of defense counsel's objections. Mr. Nievens (counsel for Mr. Mohammed), clarified that before issuing the 27 Dec 11 order, Adm. Woods sought the Chief Defense Counsel's comment, sending the draft to that office on 20 Dec 2011, with a suspense that he would accept comment only until 22 Dec 11. Despite the two-day suspense, he received a 2-1/2 page response from the Chief Defense Counsel. Adm. Woods acknowledged that the 2008 Buzby memo was in effect at his change of command and that its updating was identified as a turnover issue.

When asked if he understood that he was placing defense counsel in the untenable position of

refusing to comply with the order and being unable to communicate with their clients in a death penalty case, or violating the attorney-client privilege, Adm. Woods recalled being told something to that effect, but felt he was trying to balance the interests of all parties to fulfill his mission of the safety and security of the detention facility. Explaining the two-day suspense over the Christmas holiday, Adm. Woods testified that time was of the essence, explaining that they worked 24/7/365 at JTF GTMO.

Cdr. Ruiz (counsel for Mr. Hawsawi): Adm. Woods acknowledged that he knew time was of

Adm. Woods knew the JTF monitored the huts (where defendants and counsel met) in the detention compound visually, and was specifically told that they did not do audio monitoring by the JTF Detention Group Commander, COL Donny Thomas.

the essence to get the orders signed but disputed the characterization of "eager" to get them signed, and was not aware that Karen Hecker (DoD OGC) wrote that the JTF was extremely eager to put the PRT process in place NLT Friday 23 Dec. 11. Adm. Woods was aware of the Chief Defense Counsel requests that the PRT for military commissions both functioned to assist in classification review and the facilitate the de-

fense function, but acknowledged that the 27 Dec. order excluded classification review as a function.

Mr. Konnell (counsel for Mr. al-Baluchi). Adm. Woods clarified that the purpose of the BLR was to standardize markings and ultimately eliminate content searches of legal items and bins. That the BLR was intended to be a one-time search, and never repeated, with clear markings for future items. Adm. Woods testified that the Buzby memo was in effect since 2008, for approximately three years. The 22 Nov. 11 order was intended to modify the Buzby memo screening procedures for materi-

als taken into the facility and was not intended to impact discussions or defense counsel notes taken into (and removed) for meetings with detainees.

Adm. Woods agreed that the 27 Dec. 11 orders had been cc'd to the OMC, Southcom, OGC, OCDC, and ODC P, DP. Both 27 Dec 11 orders (written communications and logistics orders) had been worked simultaneously. CPT Welsh handled the coordination of the drafts, and Adm. Woods stated he thought they had not directly sent a copy to the Chief Defense Counsel, instead relying on OGC to do any coordination with that office. The draft logistics order was sent about 21 Dec 11, with comments also due on 22 Dec 11 at 1500. Adm. Woods stated he did make changes to the 27 Dec 11 written communications order in response to Col Caldwell's (Chief Defense Counsel at time) comments on three identified issues, but he did not recall what those issues were. He did not recall why he did not accommodate the general objections to the structure—he did get the letter objecting to the legal structure of the PRT because the JTF Commander did not have the authority to order the PRT not to disclose information as he had no authority to discipline the PRT team members. The Admiral was excused. After the break, CPT (then Cdr.) Thomas Welsh, the prior JTF GTMO SJA testified. In response to questions by Mr. Nievens (counsel for Mr. Mohammed), CPT Welsh arrived at GTMO on 10 May 2011. His primary mission was to advise the JTF Commander and staff. As to the BLR, he had discussions and advised Adm. Woods on the BLR. Discussions on the BLR were ongoing when he arrived in May 2011. CPT Welsh was present for the BLR as the guards went through the legal bins and removed the legal bins from the detention cells. He stated that all kinds of things were in the bins, papers, fruit, etc. Some were more organized than others. The defense was not given any notice of the intent to conduct the BLR. The process included the removal of the legal bins from the cells, which were then placed in the conference room. The BLR teams consisted

of guards from E4 to E7. The guards would go through the materials in the bins. CPT Welsh had trained them on what to look for, such as letters signed by defense attorneys and materials in obvious legal pleading format. CPT Welsh said he was the SJA person who advised the guards and was ordered to be present for that purpose, although he was not always present if the guards were engaged in the stamping portion of the review. He anticipated that they would encounter attorney-client privileged material, but the guards reviewed the material, they did not read it. He told them not to read correspondence from defense attorneys, only to verify it was on attorney letterhead and had an attorney signature, then to stamp it but not to look at it. He acknowledged that he guards misdelivered some of the material back to the incorrect detainee. Info on the BLR "got out" to defense counsel, and he thought one of the detainees got a letter out to his counsel through his habeas counsel through the habeas PRT. The plan was to do the BLR then sit down with the defense attorneys to talk over the items that they took. He acknowledged that this raised concerns on attorney-client privilege, absolutely.

The "discussions" on the BLR had been ongoing for several months, and even further back more generally, which was different than "planning" which was the actual planning for implementation. The planning led to what became the 27 Oct. 11 Woods memo on the intent to do a BLR. The development of the 27 Dec 11 orders was a collaborative effort, but Southcom took the lead because they had more time than he did. He was aware of the March 2011 draft protective order put out by the Convening Authority, which was ultimately withdrawn. They did not create language for the 27 Dec 11 orders from scratch, instead, pulling from other sources such as the habeas PRT order from Judge Hogan on the DC district court. The orders defined areas of contraband and what could not be discussed but made exceptions for matters directly related to the defense. He acknowledged that the Buzby memo contained a much

more blanket exception for matters related to the defense, stating that this draft was more detailed.

OGC had "strengthened" it, inserted the language that only applied the "if directly related to the defense" exception to certain portions of the information, rather than across the board. He recommended that Adm. Woods sign the order, therefore he did not have any objections to it. He stated he made an independent legal judgment to recommend the Admiral sign the 27 Dec 11 orders. He did not recall his specific discussion with Adm. Woods. He thought they had derived the "same language as the interpreter and defendant" requirement from the Hogan order, and thought it was designed to ensure that counsel did not allow side conversations between the translator and defense, despite a separate sentence with that specific prohibition. When asked about the distinctions created by the limited exceptions in the new 27 Dec 11 orders, and asked about specific instances where those might be relevant to preparation of a defense in a death penalty case, particularly the 9-11 case, he stated he "can't say he thought it through from the defense perspective." The decision to provide the draft to the Military Commissions Chief Defense Counsel was made at the DoD OGC level. He/they wanted to issue the 27 Dec 11 orders because they were operating under a more limited definition of what constituted legal material under the 22 Nov 11 order, from the 9 Nov 11 Judge Pohl's order so he wanted to "widen the aperture" knowing that military commissions were to become more active if and when the 9-11 cases were referred. They did incorporate some changes from the CDC. He acknowledged that the al-Nashiri order was very narrow in its definition, but that was the basis for the 22 Nov 11 order, but it was not his intention to limit counsel's ability to zealously represent their clients. Had defense counsel come back in they might have reconsidered.

The commissions recessed for the day.

June 21st:

On 21 June, the Commission commenced with the defendants except for Mr. al-Baluchi and Mr. Hawsawi present), there was an issue that Mr. al-Baluchi was not present because of a toothache, and the Judge would not proceed until it was clearly established that the absence was voluntary and that the toothache did not affect the voluntariness of his absence. Therefore, the Commission recessed while the SJA representative returned to the detention facility to explore that issue. CPT Welsh continued to testify.

On return, CPT Welsh continued his testimony with Mr. Konnell for Mr. al-Baluchi examining him. He did not recall who drafted the Non-disclosure agreements for the PRT, they had a copy of the NDA used by the habeas PRT. He did not agree that the nature of the cases, one a civil matter with limited scope, and the other a capital criminal case would have any impact on the intrusion of a PRT on the attorney-client privilege—they would be the same. They initially thought the habeas PRT team could also handle the military commissions work, but no PRT had been created yet. The defense visit to GTMO was expected on 4-5 January 2012, and no defense counsel used the PRT prior to the issuance by the CDC of an ethics opinion ordering all defense counsel not to use the PRT because they could not ethically do so and protect attorney-client information. However, if a defense counsel had disobeyed the CDC's order and submitted matters under the 27 Dec 11 orders, the JTF GTMO commander was the final arbiter in case of dispute on the ability of the defense attorney to discuss with, or provide material to, his client.

He did not review the NDA for the PRT, it may have even been the standard governmental NDA not to disclose classified info. Only Mr. Konnell, of all counsel, submitted defense NDAs, which according to CPT Welsh, enabled the JTF to know who had an approved clearance and was authorized access to the detainees—although it was a redundancy factor, the

JTF did not need access to the NDA's to ascertain security access. Similarly, many other requirements of the 27 Dec 11 orders were not necessary and were not uniformly enforced, such as provision of acknowledgment forms, or local courier letters in addition to DoD courier card, among other examples.

The habeas PRT looks at content under the Hogan order, to include for electronic media brought in for attorney-client meetings, and they have equipment (read-only) in the detention facility to allow review of DVDs or CD (documents). The PRT there can open the files to make sure the contents meets case related and proper marking requirements. There was a discussion on electronic media versus papers, with the agreement to discuss any applicability to review by PRTs to CD (documents only), no videos at this point.

When asked about how he envisioned the military commission PRT to operate, he thought the PRT would have to look at the entire file in order to clear it. CPT Welsh stated that many issues had come up since 27 Dec 11, but that he had not explored updating the 27 Dec 11 memos to take these de facto changes into account, because the issue was in litigation, and he was going to wait for a court resolution. His intention was that the BLR would review legal material and bins once, with the intent to allow guards to identify appropriate material to make future reading of legal material unnecessary. He was not concerned over the transgression of the attorney-client privilege, or the guards providing the info they had seen "all over lord's creation." He acknowledged the guards ranged in rank from E4-to E7 and were not legal specialists, instead, holding other rates (MOSs) in the Navy. The BLR procedures were laid out in the 30 Sep 11 memo, with the 5 Oct. 11 memo providing additional guidance. There was no separate SOP concerning the BLR. CPT Welsh conducted the training for the guards based on the two references listed in the 30 Sep 11 memo: these were the 19 May 08 Buzby memo, titled Visitation Practice Guide, and the

Hogan habeas protective order. The guards were to conduct a " cursory" review of every page of every document and scan long enough to determine what it is.

There was no definition of legal material, but he used the guidance in the two references in his training. According to CPT Welsh, if they saw markings, that was enough, and they could move on. If it was non-habeas legal mail or mail from the military commissions themselves, they were to be deemed ok. If no similar markings appeared they would have to read more to make their determination. Letters from attorneys were ok, but enclosures and attachments were not necessarily so, since they could be "under the guise of" legal mail and otherwise not appropriate. Each enclosure or attachment was also reviewed for content, (i.e. the letter indicating that they were included in a communication from an attorney was not itself enough). CPT Welsh had to be present to resolve any questions by these lay guards if they could not determine on the document's face if it was related to a case. Once completed there were two piles: a legal pile, which was stamped on every page and sent back to the detainee, and an Other pile, which he put in an envelope, which he sealed and kept in SJA custody. His intent was to meet with the defense attorneys and tell them these items raised concerns and ask them to certify they were case related, and if so, they would be marked and sent back in. There was no definition of legal material used, and they trained on the Buzby 2008 memo and the Hogan habeas PRT order. When asked how the guard force knew the material was case related, he stated that was why he was required to be there, and that the guards only put eyes on it, they did not read the material. He used a defacto two-part test: first, that it was a legal matter, and second that it was directly related to the defense of the case. He looked at it long enough to make that determination. For example, there were whole newspapers included when there might be only one relevant article.

Mr. al-Baluchi's materials were removed from the cell on 11 Oct and were all removed at once. They were reviewed/inspected on 14 or 15 Oct 11 by personnel with appropriate clearances. Prior to the 9 Nov 11 order in al-Nashiri, the cursory review under the Buzby memo was done in front of the accused and included fanning the material to make sure there were no paperclips or other prohibited items. After that, the fanning was done in the presence of the defense courier or counsel. After the defense 19 Nov 11 letter objecting to the BLR he did get inquiries on the BLR. He recalled one from the Office of the Chief Prosecutor asking what was happening. He did not recall if he got inquiries from the Convening Authority's office. He understood Judge's Pohl's 9 Nov 11 al-Nashiri order to be a narrow definition of legal mail, not necessarily encompassing the entire universe of legal mail.

He understood J. Pohl's order to establish the universe of protected information, and it was a narrow definition. Regardless, Adm. Woods felt he had a "rudder order" from a judge and wanted to go with that on the 22 Nov 11 Revision memo, until they got a final redone policy to replace the Buzby memo. The development of the order was "socialized" with Southcom and OGC, typically in an email. CPT Welsh understood that he privileged communications from the al-Nashiri order would exclude things normally or previously considered legal mail, such as previously filed legal pleadings in the case, letter from counsel directed to another person, or the Revision memo itself. CPT Welsh did recall other inquiries on the legal mail situation

in Nov. and Dec. He did not recall if he responded or did anything in response to inquiries. Convening Authority may have inquired, but they had decided to apply the al-Nashiri order to all detainees as a matter of policy in the interim period before they could establish a new policy. Drafting for the 27 Dec 11 orders began roughly in Sep. 2011. Southcom, primarily COL Drew and LTC Hackel, were the primary authors, doing the lion's share.

In response to Mr. Harrington's inquiries (counsel for Mr. al-Shibh): CPT Welsh was present when the guards went through the materi-

All bins, both legal and non-legal, were subject to routine searches. There was no prior notice of the BLR to either defense counsel or detainee for the BLR. One detainee asked to speak to the Camp Commander about it, and one spoke to CPT Welsh about it. The detainees were not present in the cells when the material was taken.

al, and if the guards raised questions. It was an assembly line, 1-2 guys looking, 1 stamping and another dating and initialing. They decided to grandfather in other items after the initial review, such as the al-Quds newspaper, as they refined the process since those items had caused no prior problems. That was handled by CPT Welsh, there were no additional governmental eyes on it. All bins, both legal and non-legal, were subject to routine searches. There was no

prior notice of the BLR to either defense counsel or detainee for the BLR. One detainee asked to speak to the Camp Commander about it, and one spoke to CPT Welsh about it. The detainees were not present in the cells when the material was taken.

Adm. Woods participated in the drafting of the 27 Dec 11 orders by directing they be done and giving guidance. CPT Welsh not sure where the first draft came from, but he reviewed it and

offered comment, and conferred with Adm. Woods on its provisions. It was also reviewed by members of SJA Office, Cdr. Strozza and the DSJA Tim MacArthur. He instructed that a copy of the 27 Dec 11 order be given to the existing habeas team, as they had been doing it for years, and he anticipated they would do the military commissions PRT. He did not recall if a NDA was ultimately prepared. The PRT was prepared to start operating on 5 Jan 12 when the defense counsel were scheduled to be on island. The privilege team would have used similar standards to that of the Hogan order on imminent harm to self or others, and would try to contact the defense attorney, but would go to JTF Commander if there was a critical time issue.

The NDA was not sent for defense counsel to review, but that would have been handled in DC, not at JTF level. CPT Welsh can see defense perspective. There were two marking stamps previously used, and the detainees did not have stamps. Once the impasse began with the issuance of the CDC 8 Jan. 12 order not to use the procedures in the 27 Dec. 11 order, they took no further action, as defense counsel ceased submitting legal mail. He acknowledged that an updated order would be helpful, but had declined to address that while in litigation. He also acknowledged that the 14-day notice requirement in the logistic order for access to the client might be difficult to impossible to comply with for defense counsel for matters arising in court or other situations, but he ordered his people to accommodate defense requests if there was no operational reason to deny access.

There was a brief discussion on the ICRC issue, and the government's position was further clarified on the discoverability of the material issue was that they would have to review it to determine if it was discoverable.

After lunch, Cdr. Ruiz (counsel for Mr. Hawsawi) examined CPT Welsh. The 10-12

person SJA office did 75-90% of its work on detainee operations, with 2-4 attorneys on commissions and habeas support, increasing during CPT Welsh's time as SJA; support to intelligence J2 Directorate, and advice on military justice, FOIA, personnel law, and other general matters.

The office also assisted in the delivery of non-legal mail, which otherwise if coming through the USPS could take a long time. The linguists that assisted in the BLR are under the J2 directorate but they do many things in the detention context, assisting with detainee medical issues, communication between guards and detainees, intelligence, or other matters. The J2 oversees the contract under which linguists are provided.

CPT Welsh as SJA was required to be present at BLR (prior testimony was because he was the only one with the appropriate clearance), but LTC Torres, in charge of High-Value Detainee (HVD) affairs was also cleared at that level. LTC Torres did not come to him to discuss his serious ethical concerns on the BLR. There was also a reservist whose civilian job was with the NSA, as an administrative ethics attorney in the SJA Office. Defense counsel may have told him LTC Torres had ethical concerns but LTC Torres did not express those concerns to him. LTC Strozza reviewed and farmed out a review of the 27 Dec 11 orders. He was aware that the Hogan habeas PRT engaged in classification reviews.

The Woods order did not contain that provision, despite CDC request for a PRT that could do that function. He was not aware that the CIA had had input into the Convening Authority's original protective order in March 2011. He was not aware of any conversations between Adm. Woods and Adm. MacDonald. He knew that the determination had been made that if a PRT was desired before a military judge was put on the case, then the JTF commander was the appropriate person to stand it up.

CPT Welsh acknowledged the short suspense given to the CDC on the staffing of the 27 Dec 11 orders, but Adm. Woods had family on the island and wanted to spend time with them. He knew that Adm. MacDonald had visited the island on 1-2 occasions, but he did not recall a conversation on physically separating the habeas and military commissions PRTs, but did know they had talked about separate office space. CPT Welsh stated the PRT was operationally ready to go for the 5 Jan. 12 defense visits to the island and stated that was not because of the federal lawsuit filed seeking injunction to bar its use. The PRT had still not signed the NDAs as of 5 Jan, but that could have been done immediately if necessary.

Ms. Bormann for (Mr. bin-Attash). CPT Welsh agreed that the Buzby memo established restrictions as to a number of members on the defense team allowed at a visit, or the number of defense counsel allowed to simultaneously visit their clients in E2. Under the Buzby memo, written communications were brought into the camp by the defense (joint) courier, and the sealed item was opened by LTC Torres and fanned to check for physical contraband items in front of the HVD, then handed to the HVD. There were many items in the Buzby memo that were not applied with particularity. Discussions concerning the BLR were ongoing on his arrival, but planning began in late August 2011. The 25 Sep 11 memo to SOUTHCOM was drafted by CPT Welsh, and Adm. Woods sent it out. It was "socialized" with several entities, including Mr. Breslin at OGC and the Office of Military Commissions.

There was no response from the Office of Military Commissions. There was no mention of protecting the attorney-client privilege in the BLR planning memo. He may have sent out the 30 Sep 11 memo as well. Under his understanding the PRT was to do a cursory review of everything marked by defense counsel to determine if it fit the definition of legal material and

"directly related to the case," although he acknowledged that he was uninformed what the defenses were in the case, no one from defense had briefed him on their theory. Mr. bin-Attash's bins were seized o/a 11 Cot 11, and back to him the following week after review, and no materials were kept from him, all were returned. There was a stamp specifically designed for the BLR, not previously used.

The stamp indicated it had been seen and cleared by CPT Welsh, he had laid eyes on it to make sure it met the definition. The stamp indicated it could stay in the legal bin. They looked at over 50 bins during the BLR, with hundreds and thousands of pages. It is possible that some pages were missed in the stamping process. When Ms. Bormann learned of these seizures because she was on the island she met with CPT Welsh to express her concerns over the violations of attorney-client privilege. CPT Welsh was also at a meeting with LTC Acuff (KSM), LTC Thomas, Mr. Konnell, and counsel for Mr. al-Nashiri to discuss their view that the search into the content of the materials had breached the attorney-client privilege, even though they understood searches for physical contraband.

CPT Welsh continued the searches despite a 13 Oct. 11 request to stop them by defense counsel, because his orders were to proceed. He also received a letter from defense counsel informing him that the attorney-client privilege had been improperly breached, with adverse effects to their ability to represent their clients, that several clients had refused to meet with counsel because of the BLR searches.

CPT Welsh said he had received the letter but had not responded to it. CPT Welsh stated he had no consent from the Mr. bin-Attash or his counsel to allow review of his privileged material. The CDC was not informed of or involved in the planning of the BLR. The BLR used detention facility's Arab linguists to translate materials to ensure they met the definition of legal



materials. Defense Counsel informed him that they could not send material in knowing it would be seized and read. He had not heard that LTC Torres agreed not to review incoming materials and to stamp them on the back. In 26 Oct 11 phone conversation CPT Welsh indicated incoming material would not be seized and read after an attorney met with a client and brought the material back out of the facility with them, but the next day stamped materials were taken from the defense counsel after a client meeting and reviewed. When informed of this CPT Welsh said he would look into it and get back to her, but never responded to her complaint. He claimed the documents were not stamped when he looked into it.

His only documentation of that was in an informal notebook that he kept that was currently in his household goods on the way to the US. In late October there was no privilege team operating, but a cursory review was done to make sure the documents were somehow related to the case. CPT Welsh also did not respond to a 2-1/2 page email from counsel complaining of translations of direct attorney-client letters into Arabic being denied entry to the facility until translated and reviewed by SJA personnel. After the 22 Nov 11 Revision memo, JTF GTMO continued to refuse to allow counsel to bring in documents unless they met the narrow defini-

tion in the al-Nashiri order if the items did not originate (i.e. authored by) defense counsel, even if defense counsel wanted to send them to the client under their signature as related to the defense. There was a five-week period where nothing except material meeting the very narrow definition of legal material in the al-Nashiri case were allowed in. CPT Welsh did not go to Adm. Woods or SOUTHCOM to raise the seriousness of these issues. On 27 Dec 11 the Woods orders went into effect and on 8 Jan. 12 Col Caldwell's ethics memo prohibiting counsel from complying went into effect. The process has been at an impasse since.

CPT Welsh stated he had cc'd the prosecution on various emails but refused to provide the defense copies of the info provided to the prosecution, stating they could use the discovery or FOIA process. CPT Welsh also drafted a declaration for the prosecution for use by the prosecution on another witness and counseled other witnesses to require a member of the prosecution be present at any meeting.

On examination by the Government CPT Welsh first corrected his declaration in this case that Mr. al-Baluchi had met with his counsel twice at the Detention facility when he had not had any such meetings at the facility. CPT Welsh stated that JTF GTMO was concerned about

materials coming into the camps, and not so much about material coming out because of safety and security concerns—a monologue was ok but a dialogue was not. The Buzby memo procedure for legal mail included the process that the defense courier would receive privileged material from all five defense teams and print it, seal it, and take it to the detention facility.

There were instances under the Buzby memo of materials coming into the camps improperly through legal mail which motivating the desire for a BLR. These allegations included: an instances when 32 photographs of US intelligence personnel with no identifying caption was included in a courier delivery with no markings on them; a photocopy of a document, with only the original marked; and an instance when articles from Inspire Magazine attempted to be sent in by legal mail, although it was unclear if it was intended to go in as non-legal mail, until an email clarification was sought later with defense counsel. In addition, a prior military defense attorney received a letter of reprimand for disclosing the names of two guard personnel to KSM. These were discussed as the basis for command concern on legal mail. One defense counsel from another defense team (not one of these five defendants) got an oral exception to use the PRT to bring in non-privileged legal materials like pleadings. The interim period where nothing was allowed in except matters drafted by and signed by attorneys only lasted 35 days.

Mr. Nievens (Mr. Mohammed): CPT Welsh agreed that after the 27 Nov 11 order, defense counsel couldn't even take in the charge sheet in the case, because the defense had to use the PRT to get anything in the facility. When confronted with defense counsel's responsibilities under the ABA capital litigation guidelines, he agreed that a monologue was unlikely to be useful in meeting those obligations. CPT Welsh did not know if the contraband without exception provisions not allowing certain specified areas to be discussed were unique in the history

of such orders. As to the photographs of the US personnel in KSM cell, CPT Welsh did not know that the district court in the habeas case had not seen anything improper [through the PRT in that case] allowing the material to be seen by KSM. CPT Welsh agreed that there were no markings on the photocopy so no way to determine how they entered the facility, and that at one time in the past documents had been allowed to be shared. As to the Inspire magazine, CPT Welsh was unaware of the language of the charge sheet charging the five defendants of conspiring with Al-Qaeda and incorporating specific statements from that entity. He disagreed that all of the articles in the magazine could be related to the representation of the accused in their defense because of the example of an article entitled "How to Build a Bomb in the Kitchen of your Mom."

Ms. Bormann (Mr. bin-Attash). CPT Welsh acknowledged that in searches of non-legal mail by the J2, some instances of those materials not being marked existed as well, and that sometimes persons screening non-legal mail might make mistakes. The attorney who approached and asked to use the PRT for pleadings represented a defendant who had pled guilty and was cooperating with the government. He also agreed that books coming into the facility can only come in as non-legal mail, and cannot be brought into an attorney-client meeting even for discussion under the policy, even if directly related to the defense.

Mr. Harrington (Mr. al-Shibh), No answer to the question of if only concerned about what is coming into the facility were there restrictions requiring review on attorney notes when leaving the facility. Admitted that book Black Banners had been allowed in the cells, but then removed later on change of policy on books. CPT Welsh agreed that the process requiring defense counsel to negotiate with PRT required disclosure of defense strategy to non-privileged individuals.

Cdr. Ruiz (Mr. Hawsawi). CPT Welsh stated that hundreds of pages of non-legal mail are submitted through the SJA office. Agreed that there was confusion over whether the Inspire magazine had been submitted as non-legal or legal mail, but would have been reviewed regardless, just by different entities. The clarifying email did not explicitly refer to the magazine when it sought defense counsel's guidance on what type of mail it was intended to be. Other defense counsel have received letters of reprimands on these issues, but none were issued here despite CDC investigation of the incident.

CPT Welsh was excused and argument on AE 018, the Government's motion for entry of a privileged written communications order commenced with the government arguing that such an entry was appropriate because it guaranteed an effective balance between defense needs and JTF security needs. The only requires cursory review for markings through a privilege team, with items not approved going back to counsel, who can talk to PRT if they disagree and elevate to the Military Judge for resolution. Non-legal mail would continue to be screened by the J2. The PRT is bound by a NDA under the direction of the Military Judge, with detailed specific instructions on how it is to be reviewed. It is the same as the al-Nashiri order, which is already in place and will allow consistency on how all detainee defendants are treated with aid to all.

The defense request for unfettered access is unsupported in law and does not recognize the legitimate security interests of the JTF as shown in *Bismallah v. Gates*, vacated on other grounds. The proposed order defines contraband similarly to the 27 Dec 11 Woods order. When Judge Pohl asked them if incorporating a similar exception for "matters directly related to the defense of the case," for example, in the areas of jihadist perspectives, activities and philosophies, present and former detainee personnel, would affect the security of the camps, the Government would not commit. Judge Pohl posit-

ed that at some point don't we have to trust the defense to determine what is directly related to the defense at least as to informational contraband.

Mr. Nievens argued that they would submit a new draft of their desired language to the court asap but that he had three problems with the Government's position: First the draft does not reflect current practice at E2. The Judge responded that we'll assume they will follow my orders as issued. Mr. Nievens disagreed that the exception for matters reasonably related to the defense of the case was only encompassed in the three (b, e, and f) listed by the Judge, and that we ought to apply the exception to all categories of information contraband.

The Judge asked if there was not a point where there was a cut-off for legitimate security concerns. Mr. Nievens replied that this case was unique, implicating materials such as political statements that would otherwise possibly be considered inflammatory in a detention facility but were necessitated here by the nature of the charges themselves. He argued that the PRT was ironic because it was neither privileged, nor did they review anything. If properly marked what are they reviewing? The government's proposal also doesn't address the case of aggregated materials being disclosed when they might disclose a defense strategy. If the PRT is mandated then the Court could make their disclosure obligation co-extensive with that of defense counsel under Rule 1.6 using perhaps the crime-fraud exception but not to go as broad as Judge Hogan's habeas order.

Ms. Bormann argued that the aggregation issue was significant, and the reality of the accused and defense counsel interaction sometimes resulted in material being written on by both counsel and accused and that neither had the capacity to stamp the documents during a meeting particularly if the defendant was to retain it and read it after the meeting. Mr. Harrington stated that in a capital case, mitigation

evidence is all-encompassing.

The Court then told counsel they had an interim order in effect and if they did not sign the MOU on classified information by next session, or enter a motion explaining why they could not do so, he might have to consider whether they could continue to represent the defense since classified disclosure is central to this case. He asked Defense to provide their final position on the protective order by next Friday (June 28th), with a Government response due a week later, and that he would expeditiously rule after that point. He also said an order was going out establishing potential dates for hearings in November, December, and January.

The bulk of the week was devoted to taking testimony and other documentary evidence to support the Defense Motions to Dismiss for Defective Referral (AE008) and its Motion for Appropriate Relief to Protect the Right to Counsel by Barring Invasion of Privileged Attorney-Client Communications (AE 032); and finally, the Government's Motion for a Privileged Written Communications Order (AE 18).

The primary witnesses for these motions were

Adm. MacDonald, the Convening Authority, Adm. Woods, the JTF GTMO Commander, and Cpt. (then Cdr.) Welsh, the JTF GTMO SJA. The issue of the ICRC assertion of an absolute privilege was also addressed, as well as the defendant's right to be present at all sessions of the military commission, to include those discussing classified information.

Central to all of the motions are the allegations that procedures established and implemented at the GTMO Detention Facility since October of 2011 have breached the attorney-client privilege, interfered with the ability of counsel to establish an attorney-client relationship with their clients, and have adversely impacted their clients' rights to effective representation of counsel in this capital military commissions case. The evidence taken this week from government witnesses establishes that the series of policies taken by JTF GTMO from October 2011 through the present did have an impact on the defense ability to confer with and send written communications to their clients. The interference implemented by the policies breached the attorney-client privilege through the conduct of the Baseline Review in October 2011, and resulted in the issuance of an ethics opinion by



the Military Commissions Chief Defense Counsel prohibiting counsel from complying with the restrictions established by the 27 December 2011 written communications and logistics orders.

In written instructions issued on 8 and 13 January 2012, the Chief Defense Counsel prohibited counsel from using the procedures established in the 27 Dec. 2011 JTF GTMO orders to communicate with their clients, on the basis that if they complied, counsel would be violating their duty to safeguard client confidences under MRPR 1.6, and their respective State ethics rules. Knowing that persons outside the attorney-client relationship would be reviewing protected documents with no prohibition on disclosure, defense counsel have not been able to communicate with their clients using written communications since January, 2012, and due to the nature of the detention facility on GTMO, written communications are key to the establishment of a relationship with their clients, as in-person meetings are limited both by the circumstances of a detention facility and trial at a remote location such as GTMO, but also by the limitations of the 27 Dec. 2011 orders on their ability to discuss certain information relevant to the preparation of a defense with their clients.

Although the interferences may not result in the Court's conclusion that the referral was defective, they certainly affect the perception of fairness and due process in the procedures that controlled the decision to refer these cases as a capital case. Although the Convening Authority was not required to provide the defense with the opportunity to present matters in mitigation to be considered in the referral decision, once he did so, he is required to provide that opportunity in a reasonable manner.

This is another example of the hybrid nature of the commissions affecting rights that would otherwise be protected by procedures either in UCMJ courts-martial or by the death penalty evaluation process in Article III courts. In a court-martial, the Article 32 process provides an opportunity to present extenuation and miti-

gation evidence to the Convening Authority (and Article 32 officer) on the appropriateness of a capital referral, and an entire post-indictment process exists for prosecutions in Article III courts. The lack of a formal process in military tribunals makes interference with the right to counsel during the pre-referral process particularly concerning.

Whether that interference will be held to be relevant or substantial enough to affect the validity of the referral is an open question, as additional testimony from witnesses in the DoD OGC will be necessary to further flesh out the facts. I have outlined the sequence of orders and actions that have impacted the defense formation of an attorney-client relationship with their clients, but I am forced to conclude that the interferences with defense access to and communication with their clients created the inability for defense counsel to effectively represent their clients, which if not cured will affect the due process rights of the defendants.

A substantial delay in proceeding to trial may be required in order to allow defense counsel the time to form the relationship necessary to defend their client and prepare their defense, a process that has been delayed for more than a year because of the policies established by JTF GTMO. Although the Government has stated that it has requested a trial date in late 2014, would not expect a trial in this case before 2016, due to the extensive discovery in this case, and the interferences with the attorney-client relationship to this date.

It is likely that the Military Judge will rule on the protective order to control privileged written communications, and possibly oral communications between counsel and defendant, within the next month, as all counsel agreed that all evidence had been presented and argument completed on that motion (AE 018). I anticipate that he will establish procedures that are more protective of the privilege, yet also balance the security needs of the detention facility. If access and communications re-

strictions are fixed, even with appropriate review by an insulated privilege team to ensure security requirements, discovery will require a substantial amount of time, and defense counsel may be able to establish effective relationships with their clients during the pendency of an extended discovery period.

The criticality of this case as a demonstration of the validity and legitimacy of military commissions trials makes the ongoing interferences established by uncontested defense evidence from government witnesses even more concerning. Ensuring effective representation for these defendants is essential if their trials are to be perceived as legitimate by not only the US population, but the international community as well. Even more importantly, effective representation is key for the military commissions to actually be fair.

The hearings this week have been focused on taking evidence on the alleged impermissible interferences with attorney-client access and communications that defense counsel argue significantly affected their ability to represent their clients. The defense is trying to establish the sequence of events (and involved parties) involved in changes to access and confidential communications procedures at the JTF GTMO detention facility. The testimony and what I could determine from relevant exhibits and motions established the following timeline. The relevant activities are as follows:

In March 2011, the Office of Military Commissions (OMC)/Convening Authority drafted a "protective order" which attempted to regulate confidential communications between detainee defendants and their defense counsel. The Military Commissions Chief Defense Counsel (CDC) objected to certain provisions of this 4 March 2011 "protective order," (PO). in addition to asserting that the Convening Authority did not have the authority to issue such an order. The JTF GTMO was solicited to request such a policy from the Convening Authority to buttress the decision to issue such a policy. This

"protective order" which included a privilege review team (PRT) based on the habeas review teams in other cases, was withdrawn prior to its effective date of 21 March 2011 and thus never became operative. The PO was withdrawn in part because of the CDC objections.

Rear Admiral Woods, the JTF GTMO Commander as of 24 August 2011, began a review of existing policies at JTF GTMO upon his assumption of command. Anticipating additional support requirements for the renewed Military Commissions, the planning included issues involving the perceived inadequate review and appropriate markings of existing materials, to include legal materials, within the detention facility. Of concern was that the guard force could not readily identify permissible legal and non-legal material allowed to be in the detainee's cells. As a result, in late September 2011, JTF GTMO decided to a baseline review (BLR) of all documents/materials within the detention facility, planned to occur in mid-October 2011. This review contemplated, and ultimately involved, seizure and review of all material/documents in the detention cells, to include detainee's legal bins.

This review was conducted by guard force personnel under the supervision of the JTF GTMO SJA, and was justified under the existing May 2008 Buzby memo, titled Visitation Procedures. In mid-October 2011, all bins, legal and regular, were seized and removed from the detainees' cells with no prior notice to defense counsel or detainee. Material in all bins were reviewed by guard force personnel under the supervision of then Cdr. Welsh, the SJA, to ensure they were properly marked, and met the definition of legal material, to include substantial amounts of material protected by the attorney-client and attorney work product privileges. Once marked, the legal materials were returned to the detainees. Any items deemed not to be legal material or otherwise objectionable were placed in a separate envelope, with the intent of reviewing that material with each defense counsel.

Once defense counsel became aware of this BLR search, they vehemently objected to the breach of their attorney-client privilege occasioned by the SJA's and guards' reading of the legal material.

On 9 November 2011, a hearing was held in the al-Nashiri case and procedures affecting legal mail were litigated. Judge Pohl issued an oral ruling from the bench affecting only the legal mail issue, allowing only review for actual contraband, and proper markings, and requiring return of unmarked material to the defense. In substance the order defined legal mail in that case for that litigated request for relief as: attorney generated handwritten or typed correspondence signed by defense counsel, and other case related materials directly related to the defense.

On 22 November 2011, Adm. Woods, the 1TF GTMO Commander issued a 22 November 2011 "Revision" memo, intended to incorporate the Judge's ruling in the al-Nashiri case and apply it to all detainees. This ruling involved an extremely narrow definition of legal mail from the wording of the Judge's order in the al-Nashiri case (but which was not intended to define the entire universe of protected attorney-client communications in that case). Under this order legal mail was defined narrowly. The order required the review of all legal mail for content and the review any attorney notes taken by the defense during meetings with their client.

Defense counsel continued to object to review of their notes or written materials for content

and markings, and lodged these complaints in numerous meetings, emails and letters. During this period numerous legal documents were rejected by the SJA office (which conducted the review) rejecting documents such as filed pleadings by counsel in related cases, translations of the relevant orders impacting the attorney's abilities to communicate with their clients. Many of their complaints were received by, but not responded to by the JTF GTMO SJ, Capt. Welsh.

The defense also presented evidence that the multiple microphones in the courtroom could not be turned off as to the outside entity, (it was receiving the full ungated audio and visual feed of the courtroom activities) and were so sensitive that they picked up conversations held at the defense tables between counsel and their clients even if defense counsel muted their microphones.

Prior to this change, written communications were governed by the 2008 Buzby memo, which was implemented by the designated SJA High Value Detainee (HVD) affairs person to open the sealed envelope in the detainee's presence, fan the items to ensure proper marking, and evaluate for the presence of physical contraband, or other items such as paperclips that could pose a danger, and then handed to the detainee. The Buzby memo, while having a category of prohibited information contraband, also included a broad exception for items reasonably believed by defense

counsel to be relevant to the defense of a military commissions case.

JTF GTMO S1A worked with the SOUTHCOM SJA and the DoD OGC to write up a new privileged written communications and logistics policy which would control not only written communications with detainee clients, but attorney access to the detainees for meetings as well. The Office of Military Commissions/

Convening Authority was provided copies of these drafts. OGC sent the draft memos to the Commissions CDC for review with a two-day suspense for comment on December 20, 2011. Three of the suggestions were incorporated by the JTF GTMO commander, but the underlying concern on the breach of protected attorney-client information was ignored.

On 27 Dec. 2011, the JTF GTMO Commander signed two orders—one governing client access (the logistics order), and the other confidential communications between attorney and client (the written communications order). In the "information contraband" was broadly defined.

Although some categories of information contraband included an exception if a defense counsel reasonably believed it was related to the defense of a case, several categories of information now included no exception of any kind. If defense counsel wanted to bring or send in, or even discuss those areas with no exception, (s)he would have to go through a PRT process, and if they disagreed, present the information to the JTF GTMO commander as the ultimate arbiter who would decide if it would go in (a procedure that would destroy the attorney-client and work product privileges). Attorney notes were also subject to this procedure after meeting with clients. (Adm. Woods testified he did not contemplate evaluating the defense counsel's justifications, just to ensure that it was appropriately marked, and that they really needed it, even understanding the risks created by its presence in the facility.

However, this limitation was neither included in the policy nor conveyed to defense counsel). Defense counsel did write to inform Adm. Woods that his policies were placing them in the untenable position of having to choose between communicating with their client, or protecting their confidential communication and attorney-client privilege. The introduction of prohibited contraband also included oral discussions between attorney and client, so that if contraband without exception, entire subject

areas were prohibited from discussion, many of which were necessary for the presentation of a defense. Prime examples of this included the prohibition of discussion of historical perspectives on jihadist philosophies or activities or the identity of any current or prior detention personnel.

On 8 and 13 January 2012, the Military Commissions CDC, as supervisory attorney for all Commissions defense counsel, issued an ethics opinion instructing his personnel not to mail items to their clients under the 27 Dec. 2011 required procedures, which included use of a PRT that reported to the 1TF Commander.

The protective orders in the al-Nashiri case were subsequently litigated and the defense counsel litigated the contested 27 Dec 11 orders. Judge Pohl issued an order in that case affecting legal mail, and making the PRT report to the Military Judge. I have not analyzed those orders, although I believe the hearing occurred in January 2013, and the order was issued in February 2013. During the January 2013 hearings in this case, it became apparent that an outside agency, which was an original classification authority, was pushing the 40-second delay button to mute activities occurring in the courtroom without the court's knowledge or approval. This provided substantiation that continued monitoring of the courtroom was being conducted by the outside entity.

The defense also presented evidence that the multiple microphones in the courtroom could not be turned off as to the outside entity, (it was receiving the full un gated audio and visual feed of the courtroom activities) and were so sensitive that they picked up conversations held at the defense tables between counsel and their clients even if defense counsel muted their microphones. This reinforced the defense view that they were being monitored continuously when interacting with their clients, although they had not been able to prove it previously. Judge Pohl ordered the button controlled by the outside agency dismantled and ordered that

they would receive only the gated feed. Courtroom microphones were changed to push to talk, as opposed to push to mute, although there was some evidence that the remaining microphones were sensitive enough to pick up some attorney-client confidential communications.

In the February 2013 hearings, evidence was presented as to the presence of microphones disguised as smoke detectors at the huts in E2 where defense attorneys met with their clients, establishing at least a technical capacity to monitor and record oral communications in these huts between attorney and client in the detention facility, as opposed to the previously understood ability of visual monitoring for safety reasons.

Defense argued that this explained the requirements in the 27 Dec 2011 orders to notify the detention facility prior to a visit as to what language was anticipated would be spoken with the clients, and requiring only one language be spoken with the client to the maximum extent possible. During these Commission hearings, legal bins were seized from the detainee cells while they were in court. These issues delayed the taking of evidence on the underlying motions to deal with these unanticipated developments. The April 2013 hearings were cancelled when defense computer records were deleted from the server accidentally and when a prosecution search for records mistakenly also searched and produced results containing protected defense computer records, indicating that IT procedures segregating defense and other government records were insufficient. Some issues also occurred with the possible disappearance of defense records and work product between the mirroring of the files between servers at GTMO and Washington DC. 17. Early issues regarding presumptive classification of any detainee statements and lack of the defense ability to get a classification review without waiving their attorney-client privilege were also present in the earlier stages of these proceedings and affected the attorney's abilities to communicate with their clients and comply with requirements to protect this putatively classified information.

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