

# Lucia Golletti

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From July 31 to August 6, 2022, I was granted the opportunity to be the National Institute of Military Justice's NGO Observer in the U.S. Military Commission hearings at Guantánamo Bay, Cuba, in the case against Mr. Abd al-Rahim al-Nashiri, who is the alleged mastermind of the suicide bombing of USS Cole. The attack killed 17 soldiers and wounded 39. Mr. al-Nashiri was captured in 2002. He spent four years at CIA "black sites" where he was tortured. He was transferred in 2006 to Guantánamo Bay and is held there. He was formally charged in 2011 and court proceedings have been taking place since then. Current military judge, Army Col. Lanny J. Acosta Jr., permitted a round of public hearings. As an NGO Observer, I was able to attend, observe, analyze, and critique these hearings. I viewed the proceedings in the spectator's chamber, which has a glass panel separating observers from the official courtroom, and there were televisions broadcasting what was happening on the other side of the glass panel on a 40-second audio delay. The purpose of the delay was to filter classified information that may come up during the proceedings. At all times, we were able to see the lawyers, military judge, and the accused, if present.

Some court personnel tested positive for COVID-19 prior to our arrival. One of the individuals that tested positive for COVID-19 was an NGO Representative that was given no option but remain on the island for an additional week. He was able to return with us to Washington, D.C., on Saturday. To mitigate the risk of COVID-19 transmission and ensure the health and welfare of all JTF-GTMO personnel, the hearings were cancelled on August 1-2, 2022.

Court resumed on August 3, 2022, at 9:00 am, and we were permitted to attend. We made our way through security. We were not allowed to draw, sketch, or doodle. We made our way through a corridor with wired fences on both sides, and the courtroom on the other side. There was additional security before entering the spectator room. All individuals that entered this area were screened, including members of the prosecution and the defense team.

Mr. al-Nashiri was required to come to court. Anthony J. Natale, civilian defense lawyer and appointed "Learned Counsel", was in the courtroom. Mark A. Miller, Trial Counsel, and John B. Wells, Managing Assistant Trial Counsel, were also present. Some members of both sides of attorneys were livestreaming the proceeding from Northern Virginia, including Annie W. Morgan, another civilian defense lawyer.

Mr. al-Nashiri's defense lawyer, CAPT. Brian L. Mizer, had filed AE 339X, Application to Withdraw, to leave the case over an alleged conflict of interest matter concerning his

involvement in the *Hamdan* case. CAPT. Mizer had information that supposedly may be helpful to Mr. al-Nashiri, but CAPT. Mizer has an obligation to his former client and therefore he cannot disclose that information.

Also, the Government wanted to use statements made in that case, but the defense argued that it should not come in. The privileged communications that CAPT. Mizer had with Hamdan, a former conflict, extended past the proceedings in the *Hamdan* case. Defense team considered removing CAPT. Mizer as a “nuclear option” that should not be considered until other options are considered.

The defense team had also filed AE 485, Defense Motion to Suppress Statements of Salem Ahmed Hamdan under M.C.R.E. 403, or, in the Alternative, Continue the Proceedings Pending Appropriate Action under R.M.C. 901(d)(3).

The Government filed AE 485A, its Response, arguing that the statements should not be suppressed, and that CAPT. Mizer can mitigate any potential conflict of interest that may exist and therefore he does not need to withdraw from this case. The Government also maintained that the defense team is capable of advising Mr. al-Nashiri without bringing forth independent legal counsel.

Judge Acosta was attempting to build a record of the potential conflict of interest. He asked Mr. al-Nashiri if he knew and understood of the potential conflict. Mr. al-Nashiri, with the aid of his translator, responded that he did, at least to an extent.

In addition, Judge Acosta clarified to Mr. al-Nashiri that he has the right to a detailed military defense counsel; a civilian “learned” counsel; to proceed with no conflicts of interest; to agree to go forward with any conflicts of interest that may arise (as long as the other party agrees, too); and to privileged communications between his attorneys.

There were back and forth arguments on the admission of statements at this time. Judge Acosta sought for identity of each statement from the *Hamdan* case to be discussed, individually. Judge Acosta refused to group all and address it as such. In doing so he made clear that the court must determine the admissibility of each statement. Judge Acosta ruled that even if CAPT. Mizer did not want to disclose those statements made with Hamdan, that they are coming in. As for other determinations, Judge Acosta needed time to review and make a ruling.

The rest of the proceedings centered on FBI/NCIS agent testimony, which the Government wanted to use at trial should one happen. There was a question as to whether the Confrontation Clause, which applies to all U.S. States, applies in Guantánamo.

Before beginning with the witnesses, the defense team stated that discovery had not been provided. The Government clarified that the defense team had requested additional discovery and that it had not provided that discovery, yet. However, the Government suggested that the defense could still cross-examine the witnesses without that additional discovery and that, if on a later date, the defense would like to question again, they could.

The defense team asked if all of the testimony will be open court (i.e., if the public will be able to hear/see it), and the Government said that only a small portion would be closed session. The bits that would be closed session dealt with how the government handles foreign government relations. The defense further added that they had short notice on the witnesses and documents relating to them, but the Government asserted that only short notice was given on the additional discovery. Judge Acosta made clear that he expects the Government to speak "with one mouth" and to be consistent in discovery disclosures, meaning that if discovery provided to the defense team of the 9/11 cases was given, then it should be as forthcoming with al-Nashiri's team. The Government asserted that this may not be possible because the information given in the other capital case features different positions on issues and protective orders. There was also an issue as to the Government's "inadvertent disclosure" of former CIA Director Gina Haspel in an official memorandum. The Government first states that it was an "inadvertent disclosure" that should never have been given to the teams of the 9/11 cases, and then reduced it to a mere "error" on their part. This was an example of the turbulence between the prosecution and defense on the disclosure of discovery. Judge Acosta addressed this issue, and future ones. He stated that there would be a conversation with the OCAs "in this room" if these problems continued.

At about 11:00 am, the witnesses were called. There was a total of three witnesses that were called, but we only heard from two of them, and partly. The names of the witnesses will not be disclosed until permitted.

The first witness was an FBI agent ("FBI Agent X"). He was in charge of locating individuals in foreign countries. He stated that that the services used were LexisNexis, among others. He also reached out to different agencies, such as Custom and Border Patrol. FBI Agent X was unable to locate the people he was told to find. He also stated that no Yemen or Arabic databases were used, nor were different ways of spelling a name tried to facilitate the search. The defense team questioned the methods used by FBI Agent X, referencing standard procedures and investigatory efforts employed by average agencies. FBI Agent X said that people in the Yemen government were asked, but there were "no hits." Mr. Natale, on behalf of the defense team, mentioned that there is a lot of conflict between Yemen and the United States and that it was unlikely that that country would collaborate with FBI Agent X. Given that information, Mr. Natale asked FBI Agent X if he took that into consideration. It appeared that he did not. Mr. Natale asked if there were other efforts made to find those people. FBI Agent X said there was not. Besides this line of questioning, Mr. Natale asked if the process for questioning fugitives was different than for witnesses. FBI Agent X said it was.

The next witness was also an FBI Agent ("FBI Agent Y"). The use of Form 302 was referenced several times, even with FBI Agent X on the stand. A 302 is a form used by FBI agents to summarize an interview. In other words, it memorializes an interview. Defense team appeared skeptical as to the accuracy of 302s. FBI Agent Y reviewed the 302s.

FBI Agent Y worked with the FBI since 1996. Before that, he was an enlisted Marines. FBI Agent Y also served as a "Ligat", which is a representative of the FBI in the respective country he or she is within. Defense team asked him if family members in the country he was in were "kidnapped" for compliance. The prosecution argued that the use of the term "kidnap" was

argumentative and objected. Questioning continued. FBI Agent Y said that the individuals were "taken into custody." Defense asked if someone could be taken into custody without probable cause, and FBI Agent Y responded, "No." The defense asked if FBI Agent Y observed the interviews, and he replied with, "No."

The rest of the proceedings were closed off. There were two motions that would be argued, as well as testimony from another expert. NGOs and the general public were not allowed to listen to this information.

As for a cumulative analysis of my experience within the courtroom, I can accurately say that there were NGOs, reporters, and family members of the victims of the USS Cole in the proceedings. It was also apparent that there were mixed emotions. Judge Acosta appeared to handle the proceedings fairly in light of arguments from both sides of lawyers. I also find that the defense team was zealous in their representation of the accused and were trying their best to resolve the potential conflict of interest issue. Apart from that, the defense conducted a thorough cross examination of the Government's witnesses. On the other hand, the Government is expected to be more forthcoming in their discovery responses, and Judge Acosta will be expecting this in future proceedings.