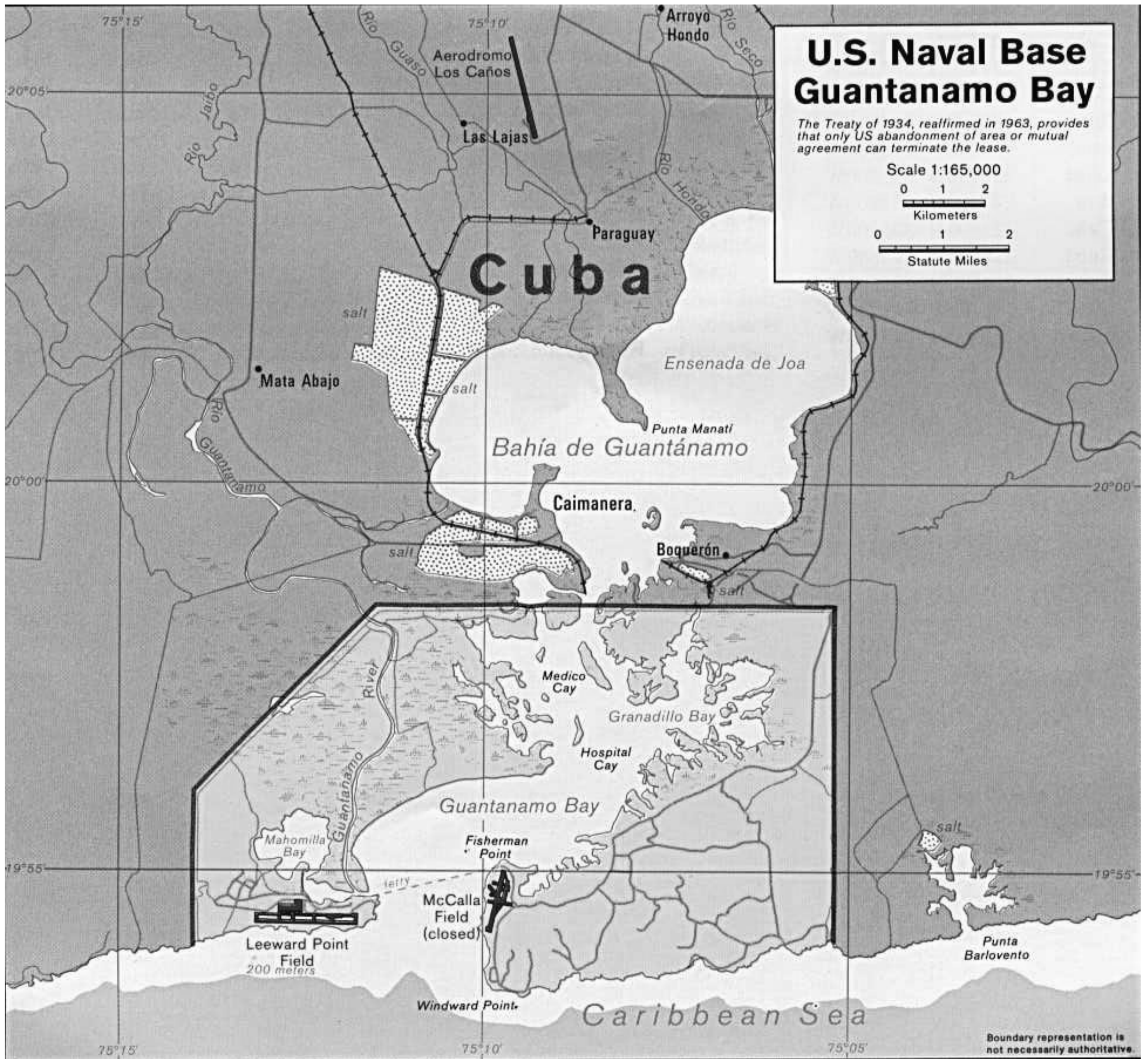
**NIMJ Reports from**

# GUANTÁNAMO

Volume 8


U.S. Naval Base
Guantanamo Bay
The Treaty of 1934, reaffirmed in 1963, provides that only US abandonment of area or mutual agreement can terminate the lease.
Scale 1:165,000
Kilometers
Statute Miles
Cuba
Arroyo Hondo
Aerodromo Los Caños
Las Lajas
Paraguay
Mata Abajo
Ensenada de Joa
Punta Manatí
Bahía de Guantánamo
Caimanera
Boquerón
Medico Cay
Granadillo Bay
Hospital Cay
Guantanamo Bay
Mahomilla Bay
Fisherman Point
McCalla Field (closed)
Leeward Point Field
Windward Point
Punta Barlovento
Caribbean Sea
Boundary representation is not necessarily authoritative.

# PREFACE

The National Institute of Military Justice (NIMJ) was founded in 1991 to advance the fair administration of military justice and to foster improved public understanding of the military justice system. Following President George W. Bush's order that authorized military commissions, NIMJ studied and commented on the procedures established to hold and prosecute detainees by the Department of Defense. NIMJ continues to appear regularly as amicus curiae in cases involving detainee issues, to publish reports related to the military commissions, and to educate the public on the military commissions through its website, www.nimj.org.

The Department of Defense invites a few non-governmental organizations to observe military commissions in an effort to satisfy the right to a public trial. As part of this program, NIMJ has been sending observers to the military commissions at the U.S. Naval Base at Guantanamo Bay, Cuba, since 2008. While several other organizations observe the proceedings, NIMJ's observations are unique because of the military justice background of NIMJ board members and fellows. NIMJ's observers attempt to put the proceedings in the appropriate historical, legal, and military context.

Each field report published in this document was written by an NIMJ observer. Each observer provides a personal perspective on the proceedings. The observers included long-time military justice practitioners, academics, and law students—many of whom have since become judge advocates.

We would like to thank all of our observers. They donated a significant amount of their personal time to provide oversight of our government's actions in a hidden corner of the world, and their service benefits us all. We also thank Angelo Schibeci and Jennifer Croslow, Florida International University College of Law students, who helped prepare this volume.

# 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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# ANGELO SCHIBECI



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**17 November 2021**

Defendants Present: Khalid Sheikh Mohammed, Mr. Walid bin 'Atash, and Mr. Ramzi bin al Shibh. Mr. Ammar al Baluchi and Mr. Mustafa al Hawsawi waived their right to be present on 17 Nov 2021.

David Bruck (attorney for Mr. Ramzi bin al Shibh) opened with administrative matters. Mr. Bruck informed the court that Mr. Shibh did appear in court today because he slept well the night before, this is a rare occurrence, and that Mr. Shibh suffers from sleep deprivation. Mr. Bruck also noted that recently the camp commander declined to meet with Mr. Bruck regarding these complaints from Mr. Shibh. Mr. Bruck refiled a request with the court to renew an order to stop the actions at Camp 5, where Mr. Shibh is being detained, which has caused sleepless nights. Mr. Bruck closed by explaining that the prosecution will likely claim that Mr. Shibh is delusional and should take the medication prescribed, and added that Mr. Shibh has taken every antipsychotic forced onto him involuntarily, yet Mr. Shibh continues to be deprived of sleep.

On another note, Mr. Bruck informed the court that he understands that photos have been taken of a camera inside the client and attorney room. This is in response to the detainees' complaints that the cameras not only video record the meetings (for safety reasons) but also record the conversations of which are to be confidential between only the client and their attorney. More to follow.

On 11 November the court held oral arguments for eight motions.

*Government's Hostilities Oral Argument*

In order to charge the accused with war crimes, it is necessary to find that the United States was at war. Mr. Trivett opened oral argument for the Government explaining that the Government has reviewed a tremendous number of documents using over one-hundred people to do so. From August of 1998 to 2001, the Government argued, there were no kinetic attacks or strikes

against al-Qaeda. However, the Government relied on the U.S.S. Cole bombing in 2000 and the USS Sullivans' attack to say that there were hostilities between the U.S. and al-Qaeda. Further, the Government argued there was a great deal of behind the scenes planning for multiple operations. Although the Defense argued there is no temporal limit to the charge sheet, the Government argued there is, from 1996-2001.

In response to the Defense's argument that the U.S. military did not decide to use other platforms or military forces during this time, the Government argued that it is not determinative. Rather, at the direction of the Joint Task Force, there could have been a direction to focus on submarine use and there may have been two wars that at times were fought in tandem. Closing, the Government reassured the court they had turned over everything they could under their legal authority.

Judge McCall asked the Government if they were willing to stick to the fact that there were no carriers or, for example, B1 bombers used against al-Qaeda before 7 October. The Government agreed, stating that giving the Defense the information regarding what other military operations were underway at the time is not relevant, and would bring confusion. Mr. Trivett stated that this inquiry is at the core of whether we were at hostilities with al-Qaeda, and if so, when.

*Defense's Hostilities Oral Argument*

Lt Corey Krzan explained that the Defense believes it is important for the panel members to see that, in order to make a hostilities determination, it is necessary to see all the complexities of the U.S. and their movements during this time. Actions were not taken by the U.S. that are usually taken in the international community when a nation is at war. Further, an accused can be tried by a military commission, killed, or detained only during a time of war.

Lt Krzan explained that the Government's argument of self-defense would likely fail because under UN Charter Article 51, self-defense can only be used if in response to another state. Here, al-Qaeda was not a state but rather a non-state actor.

In all, the Defense asked the court to compel discovery from the Government, complaining that the Government has not given enough over for the Defense to present a successful hostilities argument. The Defense wanted to discover all the things that the military was doing at that time in all of its organs to be able to draw a distinction between humanitarian efforts and anti-terrorism efforts.

Although the Government argued that training camps indicate hostilities, the Defense argued that the missile strikes of training camps were aimed at killing Osama bin Laden, who was a non-state actor. Further, arguing that the discovery of unexecuted orders would illustrate that there were no protracted acts of armed violence or hostilities, the Defense argued that it is necessary to learn from the Government what training camps were targeted so they can trace the strikes that were an effort to kill Osama bin Laden.

The Defense also argued that it is necessary to see what orders the military relied on or acted on. The orders and conversations that the Government relied on paint the entire picture outside the Department of Defense. The Defense also questioned whether summary memorandums sufficed instead of the full documents and their attachments. The problem here is that

the Defense argued the Government had redacted relevant information from the summaries. In closing, the Defense asked the Court to reconsider the previous order which approved summary memorandums.

The Defense then shared with the court a harsh reality that the former Director at such "CLAMO Vaults" had told the Defense team that only two visits were made by the Government for a previous case. Thus, the Defense argued that the Government fell extremely short of its claim that they have made "herculean efforts" as stated in court. The Defense closed stating that the current Director states it is still a mess and no visits have been made to such vaults.

Mr. David Nevin, on behalf of the defense, then argued about hostilities.

First and foremost, the Government has an obligation to fulfill discovery obligations no matter how voluminous the request is. At the end of the day, the number of pages means nothing to the Defense team.

In regard to the carrier strike groups, Mr. Nevin explained that to answer one of the legal factors regarding hostilities, it is necessary to know what was and was not used during this time. At this moment, it is important to note that Mr. Nevin reminded the Court that a previous judge in the matter has determined that a finding of hostilities (or not) applies to all the defendants in the case.

Mr. Nevin closed by stating, "At the end of the day, the Government wants to Kill KSM if they can. Therefore, it is a capital case and it should be treated as such."

Mr. Edwin Perry, on behalf of the defense, followed stating that even though the Government is voicing that their discovery requests are unworkable, the work has been done before by this court, and it must be done.

*A right to be present at any proceeding or hearing.*

Judge Pohl had previously ruled that KSM can be excluded from such closed proceedings, including during testimony from individuals involved in his torture. Further, Judge Pohl ruled that if the accused is not the source of the classified information, then the accused has no right to be present and thus can be excluded.

Mr. Gary Sowards started by explaining that this motion has to do with an individual's Fifth and Sixth Amendment Constitutional rights. For the accused, there is a primary issue as to whether the torture the accused endured for years and the degree of such toture is relevant to a decision about whether statements made were voluntary. Mr. Sowards argued that the identity of the people involved is a part of the theory that the Defense is trying to develop regarding the outrageous government misconduct.

Mr. Sowards argued that not only should these commissions be fair, but they should appear fair from the outside as well. Just because we are three hours by plane ride from D.C. does not mean that the Constitution does not apply.

Mr. Sowards concluded his argument and used the following example to show why it is necessary for KSM to be present during proceedings: Let's say a doctor gets on the stand and says that KSM was not tortured and that only enhanced interrogation techniques were used. We can ask KSM to show the scars on his wrists from being hung and ask the doctor to explain how those scars happened if there were only enhanced interrogation techniques used.

Mr. James Connell, on behalf of the Defense, followed by explaining that the Government had invoked national security privileges regarding the gender of a witness, but had not invoked the same for the gender of certain other individuals. Further, reiterating the position

That the Fifth and Sixth Amendments of the Constitution do apply at Guantanamo Bay, and that means the right to be present also applies.

Mr. Connell argued to the Court that GTMO is defined as part of the U.S. and Congress did not exclude GTMO when it had the chance to (as it did exclude the canal zone). Mr. Connell explained from personal experience that he can recall when he was working as a Federal Public Defender and a defendant who stole a pack of cigarettes from a military base ended up in a federal court because the base was a federal jurisdiction.

KSM's Defense team paused the Court because KSM was complaining that there was a white noise in his headphone making it difficult to understand the interpreters. Judge McCall instructed IT to come into the courtroom and resolve the issues. IT replaced the battery pack and fixed the noise. Court then resumed.

Mr. Connell continued to explain any other person tried on this territory had the right to presence. The only reason the right of presence would not be appropriate would be if the right was impractical and anomalous. In the Philippines, General Order 58 provided for the presence at court because the right was not impractical and anomalous. In Germany, Mr. Connell told a story where an Article III judge had a trial in Germany with a jury. The Defense then explained another case where the right for presence was provided for because Article 39(b) of the UCMJ applies to an Article 21 military commission.

Under the Military Commissions Act of 2009, the accused has a right to be present except when the Military Judge closes the court to the public on a finding that there is a safety concern or classified information is to be discussed. Further, based on the Defendant's behavior, a Judge can also exclude a defendant from a hearing or proceeding in order to prevent disruptions of the proceeding or to safeguard the physical security of someone else. Thus, Mr. Connell argued that Congress intended a robust right of presence.

*Government's Rebuttal to the Right to Presence*

Maj Jackson Hall argued that the Defense's argument failed procedurally, legally, and practically. Most importantly the Defense's request failed because it pierces the Government's privilege to classified information. It was the Government's position that Judge McCall should not have to make such a decision as to whether or not the Constitution applies at GTMO, rather the Judge can punt the question as judges before him have. The Government stated, "Things have only gotten more open in the last seven years; not more closed."

Maj Hall continued to argue that the Defense's argument failed legally. Congress made it clear to the Military Commission to follow CIPA. Under the MCA an accused can be excluded in order to protect classified information.

Their argument failed practically because the order is too broad and there is no way to discern if the accused is the source of the information. In response to Mr. Soward's example about KSM's scars on his wrists, the story is not classified and could have been similarly addressed in open court regardless of the Defense's motion.

*Defense's Rebuttal to the Government's Arguments*

Mr. Sowards shared his concerns with the Court about imagining how long this process will actually play out. The Government will just continue to punt these types of decisions to the

the Judge and try to make the Judge decide whether the evidence is relevant. This speaks to how the Government is willing to shift its responsibility to someone else whenever it can. The Defense asked the Court to protect the accused in a way that will not impair the accused's rights to a fair trial.

Second, the Defense argued that the Government misrepresented the meaning of 949(P)(1)(i)(b). This should be read that information that is obtained before trial is considered evidence even if obtained during that pre-trial phase. Mr. Sowards shared the following story about just how unfair and impractical this process has played out for the Defense teams: Early on, before a public report by the CIA was released, if the Defense team wanted to know their client's names of his children, it was presumptively classified. This meant that if they wanted to use that information, they would have placed the document with the names in a double-sealed envelope, placed it in a controlled bag, then placed it in a safe. Then if they wanted the document to be used in D.C., the Defense team would have to have the document carried all the way to D.C. to be read in a SCIF. The Defense commented that it was extremely difficult to even get photos of KSM's scars on his wrists in order to preserve that evidence, and the scars faded away over the years.

Ms. Rita Radostitz followed by stating that if the Government plans to present any part of the information in an open session, then they must continue to do so for the remainder of that issue. She explained that in previous sessions the Government started arguments in open session but then moved for Defense's cross-examination to take place during closed session. Ms. Radostitz argued that it only allowed the public to hear one side, the Government's side. The previous Judge ruled that counsel could not go to closed court after first being in open court because it undermines transparency. The Defense closed, stating that the Government intentionally solicited an opinion of the Camp 7 Commander in open session and then closed the session which demonstrated how the Government is allowed to weaponize the classification of information in order to solicit a certain public opinion.

Mr. Connell followed. He argued the challenges the Defense is making to the redaction of certain discovery material the Government has turned over. During this argument, Mr. Connell compared discovery material surrendered by the Government to the same documents which had later been released to the public by the CIA. This argument would be later developed the next day in court.

Mr. Trivett explained on the Government's behalf that the Senate Select Committee's report and Camp 7 Commander's opinion are in disagreement. Further, the Government is simply replying to what was already on the table.

> The Government stated, "Things have only gotten more open in the last seven years, not more closed."

**18 November 2021**

Present: KSM

Absent: the remaining accused.

This open court session discussed: black sites, access to the names of detention facility personnel, the preservation of Camp 7, the Defense's access to Camp 7, and the Defense's motion to

compel the discovery of conference detainment reports.

Mr. Connell first shared with the Court that the Defense team had created and shared a 400-page spreadsheet that both the Government and the Military Commission can use to find documents in the record.

*FBI and CIA Cooperation*

The Defense's motion to be present at agents' testimony about their presence at black sites.

The Defense began by stating that the Defense requests a list of all agents at black sites immediately 30 days before or 30 days after bin 'Atash was at a black site location. The Defense frther requested all documents from the Government that the Government knows or reasonably should know that shows cooperation between the FBI, CIA, and DOD to get statements from the accused. The Defense argued that the documents 30 days before may show agents preparing the black site locations or preparing questions for the accused. The documents 30 days after may show agents "hot-washing" the results of the black sites and discussions about ways such sites could be improved.

. . . the Defense team had created and shared a 400-page spreadsheet that both the Government and the Military Commission can use to find documents in the record.

Mr. Connell addressed the Defenses' motion to compel discovery of FBI and CIA cooperation. First, Mr. Connell demonstrated how in 2015, when asked by the Defense, the Government hid the fact that they knew that the FBI cooperated and were interacting with three of the five co-defendants. He was able to demonstrate this by comparing the redacted versions offered during discovery by the Government to later publicly released unredacted documents. In the unredacted documents, it showed that the Government prepared questions to ask KSM during his time at black sites. Also, the Government redacted certain documents and location tracking numbers which the Defense had requested from the Government in order to better trace the documents and determine their meaning. These tracking numbers, the Defense argued, are necessary to be able to understand the FBI's flow of information, and it is clear the Government is trying to inhibit that. Mr. Connell closed by discussing how FBI agents became CIA agents at black sites.

Mr. Trivett, on behalf of the Government, explained to the Court that they had discovered only nine FBI agents were temporarily detailed to the CIA, five of which were turned over to the Defense. The other four did not have either direct or indirect contact with the accused and thus were not turned over to the Defense.

Mr. Trivett also commented that although they knew that this kind of detailing occurred, they did not necessarily know that those agents were part of their current operations. However, the Government did admit that there is an inconsistency with the redacted materials and claimed that it must have been an administrative error or oversight.

Judge McCall questioned the Government on their plan to address these inconsistencies. The Government stated it would take a look at the documents the Defense had directly indicated in court, but that they would not go back to every single document and do the same.

The Government then closed by arguing that the RDI program starts once an accused is released from a foreign sovereign nation and is turned over to the U.S.

The Defense then followed by urging the Judge, when writing orders, to be broad in defining the definition of a black site. The Defense stated that the government sometimes may only define the black site as the 4 walls and what is inside those walls where the detainee was held. The Government will try to exclude all surrounding areas. After the Judge asked for further explanation, the Defense further elaborated that affiliated shops that were near the black site location may have been used for hot washing and briefings. For the Defense, this is a location they would want to know about and have the opportunity to discover.

Next, the Defense argued that the Government should produce a list of FBI agents that were supporting, but maybe not detailing, the accused's engagements. For the Defense, it is clear they want all involved in the support and execution of any questioning of the accused.

Mr. Connell followed, stating that the Government withheld 91% of all the 9/11 investigative documents, adding that the Defense has only been given a very tiny portion of a large number of documents. The Defense continued to elaborate stating that the Government only argues that they had nine FBI agents detailed to the CIA. But for the Defense, they argue that detailing is in fact common and there were more than nine.

Next, Ms. Denny LeBoeuf, defense attorney for KSM, argued that the case law and rules do not require the Defense to specifically show what they need in discovery. Rather, she argued, there is an ongoing obligation on the Government to allow the Defense to revisit discovery that has already been done.

*Identities of CIA agents present at black sites.*

Ms. Radostitz, on behalf of KSM, argued that under the Military Rules of Evidence, no statement obtained by torture or cruel inhumane and degrading treatment shall be admissible. Here, the Defense asked for the names, address,

phone numbers, and other information for the 50 guards because they argued it makes it nearly impossible to investigate them or do background checks on them.

The Government responded by stating that the people they have brought forward are those that the Government discovered were at the camp, but the government further stated that they did not narrow it down to the individual detainees and their engagement with certain agents.

Preserving the evidentiary value of and access to Camp 7.

Ms. Alka Pradhan, on behalf of Mr. al Baluchi, opened by stating that many of the motions have to do with Camp 7. In general, the Defense wants Camp 7 to be protected by order, for defense access, and that the Government be sanctioned for the destruction of evidence at Camp 7.

In 2013, the Defense requested a visit to Camp 7 and the Judge ordered a 12-hour window to allow the Defense to gather information on confinement spaces and any adjoining cells. At Camp 7, the JTF did not allow the Defense teams to access what the defense argues were "adjoining cells."

In 2014, the Defense made a second request to look at the adjoining cells, which the Government denied. In 2015, the Defense asked again, and the Government denied it again. In 2019, the Government invoked national security over all the evidence; meanwhile, the condition of Camp 7 was rapidly deteriorating. In 2019, Camp 7 was falling apart, and the commander made a request for funds to repair or replace Camp 7. The Defense argued that there were sewage leaks, cells sinking, detainees being locked in water and mold, electrical blackouts, plumbing backups which leaked into the cells, and water stoppages for 12 hours. During COVID in 2020, there was either a lack of hot water or extremely hot water, with no in-between. As a result, the Defense argued that there was a lack of hygiene for the detainees because of such water issues. The Defense further explained that such issues were triggers related to their torture and added that a denial of sanitation is particularly problematic because it creates difficulty for the detainees to practice their religion.

In 2021, the detainees were moved from Camp 7 to Camp 5. A week later, the Defense filed a preservation order for Camp 7.

Ms. Pradhan continued asking the court for a preservation order, in addition to 80(g), of Camp 7. Further, the Defense is worried that the Government is going to destroy evidence when it "sanitizes" it. In this light, the Defense is asking for access to Camp 7.

On behalf of the Government, Mr. Trivett responded to the Defense's arguments on Camp 7. First, the Government stated that they are willing to let the Defense go to Camp 7 one last time (and what may be a second time for some) by 31 March. Further , he stated that the Government is willing to allow one trip per defense team.

Then the Government argued that the operation rooms or where equipment was stored were not discoverable and that they will not allow the Defense in those rooms because they are not relevant.

For the Defnese, Ms. Pradhan then returned to arguing that the Defense still asks for a preservation order on Camp 7. The Defense argues that the Government is reading "cells" in a very technical sense. But the Defense is saying that these cells that were used are discoverable. Ms. Pradhan closed stating, "If we don't find a systemic solution to this, my kids will be litigating these same issues in 20 years."

Mr. Sowards, on behalf of the Defense, then concluded that they have shaky confidence in the American justice system.

Lt Col Nicholas McCue, who has only been there for three weeks, then argued on behalf of KSM and the Defense. Lt Col McCue explained that the Rules of a Military Commission require a preponderance of the evidence standard. Further, under American Bar Association's Rule 4.1 (b), in a capital case, the guidelines say to provide all reasonably necessary experts for a defense. He then closed arguing that the fairness of a military commission depends on the adequacy of the defense counsel's ability to access resources. Further stating that the Defense needs to be "fully resourced," Lt Col McCue then asked the court to abate the proceedings in relation to his client until his analyst's clearance was obtained to be able to work.

The Government then responded by stating that they are doing everything they can to get the analyst cleared and have contacted the right people when they were told about the issue. The Government added that they are careful and hesitant about getting involved with Defense's team packages because of PII, but that they will try to get an update from higher up on the package.

Lt Col McCue then responded that although the Defense team is functional, they are not fully resourced.

# MICHAEL J. MOFFATT

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At the end of an illuminating and distressing week of hearings in the Al-Nashiri case, the paradoxes at Guantanamo Bay continue to unfold. Currently, a Commission is hearing arguments rooted in a bid to suppress evidence allegedly tainted by coercion and seeking to have the death penalty taken off the table.

Clean-shaven and in Western dress, last Monday, Al-Rahim Hussein Al-Nashiri made a brief appearance in what has been labeled the most modern courtroom in the world. After the alleged "mastermind" of the terrorist attack on the U.S.S. Cole had left the room, his lawyers proceeded to ask a witness whether he could confirm that Al-Nashiri was the "dumbest terrorist" a high-ranking CIA official had ever met. While the witness, Dr. James Mitchell, could not oblige in this respect, he did have significantly more remarkable testimony to offer.

Recalling Langley's first attempts to persuade him to contribute to the development of enhanced interrogation techniques, Dr. Mitchell described how he eventually overcame his reticence and mustered the "guts" to do what he considered needed to be done to prevent thousands more Americans from being murdered in terrorist attacks. Behind layers and layers of technological and physical security measures, the courtroom stared at a screen, watching as counsel for the accused, Anthony Natale and Dr. Mitchell, the latter located at a remote, undisclosed, location, proceed down the rabbit hole of two decades of the War on Terror.

Originally, the techniques had been developed to teach Air Force recruits how to withstand interrogation at the hands of the enemy. It was important to apply them properly—there were precisely defined limits for periods of sleep deprivation, decibel levels on loudspeakers had to be carefully monitored and a correct slap demanded a spreading of the fingers as well as exact targeting of the cheek. The properties of the "walling wall" and dimensions of both the "big box" and the "small box" that Dr. Mitchell and his fellow psychologist, Dr. Bruce Jessen, built, were regulated as carefully as the brightness of the lamps that al-Nashiri eventually learned to avoid by voluntarily crawling

into the small box. The same was true for the frequent short, occasional 20-second, and rare 40-second "pours" that Dr. Mitchell controlled.

Once, as he was "expelling water from his sinuses," the scrawny al-Nashiri almost slipped out of the gurney to which he was strapped. This was the last time that al-Nashiri was waterboarded. Dr. Mitchell was adamant about interrogating "by the book." For this reason, he became furious when "NX2" appeared at one of the ten black and other interrogation sites that al-Nashiri had been transported to and started applying unsanctioned techniques from Korea, Viet Nam and South America. A belt to strap Al-Nashiri's wrists behind his back as he was suspended from the ceiling; a broomstick secured in the back of his knees as he was shackled and bent over backward; a stiff-bristled brush to rigorously scrub both ends of the digestive system; a garden hose to "force feed" from the back end; and finally a loaded pistol and a power drill for a mock execution—these were tools and methods of which Dr. Mitchell did not approve.

After shouting matches with NX2 and his own involuntary confinement, Dr. Mitchell protested in Langley and succeeded in bringing the "hard times" to an end. Still, years later, when Dr. Mitchell was called to sit in while al-Nashiri was being questioned by the FBI rather than interrogated by the CIA, he did offer the occasional reminder that it would be better to avoid a return to the "hard times." In these later years, Dr. Mitchell would bring al-Nashiri new novels to read and ensure that he could share meals with the other detainees. Once, when al-Nashiri requested that Dr. Mitchell bring him a Big Mac from the Guantanamo Bay McDonald's and was reminded that the dish he requested likely did not meet Halal standards, Nashiri replied "I don't want you to tell me if the Big Mac is Halal, I want you to bring it." In a very odd way, it seemed that Dr. Mitchel had evolved from being a tormentor to a protector, and finally a friend of an Americanized al-Nashiri.

. . . al-Nashiri replied, "I don't want you to tell me if the Big Mac is Halal, I want you to bring it." In a very odd way, it seemed that Dr. Mitchel had evolved from being a tormentor to a protector, and finally a friend of an Americanized al-Nashiri.

Strange as it may seem, this type of perplexing contrast is not unusual at the Guantanamo Bay Naval Station. In some respects, it is an idyllic place, with many features of a suburban American town or a holiday resort, inhabited by warm and hospitable people that look forward to the Mongolian barbecue on Wednesday nights and snorkeling in the Bay at the end of their shift. At times, one does forget about the tortured detainees, several of them likely America's greatest enemies, being held at an undisclosed location on the island.

Certainly, much time has passed since the first of them were brought to the island shortly after the towers came down. The cages at Camp X-Ray are now completely overgrown and the orange jumpsuits are associated with a very different set of prisoners. Still, for all the efforts

to ensure that various structures on the island, most notably the Expeditionary Legal Complex, are of a temporary character, there is a palpable element of permanence to the site. One suspects that even when this most technologically sophisticated courtroom in the world has been razed, it will not be possible to un-ring the deafening bell of hypocrisy that was sounded here.

For two days, the military judge, counsel for the witness, the defense, and the prosecution deliberated on how to get al-Hila into the courtroom. His attorney explained that al-Hila was prepared to testify—under the condition that he be called before the beginning of Ramadan, which had just ended. There was great uncertainty regarding the available legal techniques to produce the recalcitrant witness. Does the judge have the power to issue a subpoena against a "foreign national which … may or may not be on government soil"? Can the judge issue an order or a writ to compel attendance? One member of the prosecution teams noted that, at home, "[w]hat I issue are writs of habeas corpus, ad testificandum, then I issue it to the sheriff of Orleans Parish, or Plaquemines Parish or to the … federal facility, and they bring that individual to me."

Cut off from the remaining island by a barbed wire fence and the "cactus curtain", a great many things must be imported to Guantanamo Bay—from fuel to compensate for the unmaintainable windmills, to the lettuce in the three Subway sandwich shops on base, and also the legal concepts at a venue that was chosen precisely because core tenets of American and international law supposedly did not apply there. Apparently, when it is convenient, certain rules of U.S. law do intuitively operate on the island—but not the most fundamental guarantees of a fair trial under the U.S. Constitution, international human rights law, and international humanitarian law. At the end of these two days, many things remain uncertain, but one thing is clear—some remarkably fundamental questions have yet to be resolved in these proceedings, including those of State sovereignty and the applicable law.

On the last day of the hearings, a bearded man in the courtroom donned a long white robe, black vest, and a traditional Yemeni head wrap. He refused to directly answer the questions of the judge, and he insisted on an opening statement: "First of all, praise be to God Almighty. He is the creator of everything, and He is able to do anything. … God Almighty … prevented injustice among mankind. Whenever any injustice occurs, He created people who are able to correct the injustice, and … these people are the judges. Regardless of … whether they are civilian … judges or military justice, they are supposed to be fair. And regardless of the circumstances, a judge needs to be fair. And when that judge is fair, he will find what pleases him in this world and in the afterlife. But if he's unjust, he will find unpleasant things in this life and in the afterlife. That is why we hold the judge in a very high regard. And that's why I respect judges very much, and that is why I expect the judge to give me due respect, regardless of the circumstances or of the audience."

As his attorneys attempted to dissuade him from proceeding with his statement, al-Hila continued: "I want to say something very important on the topic that I am here for. I'm not here … for you to take whatever you want from me and then you throw me in the trash. I've been here 20 years suffering because of these topics. I was kidnapped from Egypt … I and

my family have suffered greatly and we, to this day, … are still suffering. We have paid a huge price and, up to now, we're still paying that huge price … I ask the judge now, why am I here now? Am I … charged with anything? Is anyone … here from all of these high officials and from the press and from the people with authority and from the U.S. government have anything to charge against me? … I have nothing to hide. I'm just afraid that there are some evil people here who will take my answers … and manipulate them against me. … after 20 years of suffering and from lying and all kinds of manipulation. Twenty years I have been telling people if you have anything to charge against me, then take me to a court and bring the charges officially and formally against me. … Give me the right to defend myself, and so it would be an open trial and not a trial that is done under the table or in secret. An open trial that the American people all can see, so that they could know where is the real terrorism. And if you could not, let me go. It's been 20 years already. And you as a judge know, 20 years is like a life sentence. There's no crime that I have committed." After counsel clarified that al-Hila has asserted a right against self-incrimination, he is not questioned further and the Court adjourns.

As the observers prepare to leave, there is a sense of sadness in the gallery. The island is home to many of America's greatest enemies, some implicated in the crime and defining moment of a generation—no punishment can remedy what they have done. After the revenge exacted against these men and others swept up the War on Terror over the past twenty years, there is now evidently a tremendous and laudable effort to deliver justice—to the defendants, the families of the victims, and the American people. But it is far from clear that justice can indeed be served under these conditions. Is a fair trial possible, before a military judge, military prosecutors, and military defense counsel at a military venue that was chosen precisely because it was believed to accommodate a circumvention of the rule of law?

Having faced the old conundrum of the wisdom of Guantanamo, in a new courtroom, where legal concepts are selectively borrowed to both accomplish and defeat justice, one does return home feeling blue. Perhaps, to regain the moral authority that existed before 9/11 derailed the American project, it will be necessary to finally divorce this place.

# LUCIA GOLLETTI

*Abd al-Rahim Hussein al-Nashiri*

**31 July-6 August 2022**

*Lucia Golletti is a J.D. Candidate at the University of Miami School of Law. She holds a Bachelor of Science in Business, with a concentration in Marketing and a minor in Sociology. She has conducted extensive research as a law student on the juror recantation phenomenon in capital litigation cases, as well as juror cognitive behaviors in civil and criminal trials.*

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 U.S.S. Cole. The attack killed 17 soldiers and wounded 39 others. 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 today. He was formally charged in 2011 and court proceedings have been taking place since then. The 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, the military judge, and the accused, if present.

Some court personnel tested positive for COVID-19 prior to our arrival. One of the individuals who tested positive for COVID-19 was an NGO Representative who was given no option but to 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 canceled 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 the 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. Mr. Mark A. Miller, Trial Counsel, and Mr. John B. Wells, Managing Assistant Trial Counsel, were also present. Attorneys from both the prosecution and defense live-streamed the proceeding from Northern Virginia, including Ms. 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 they should not come in. The privileged communications that CAPT Mizer had with Hamdan, a former conflict, extended past the proceedings in the *Hamdan* case. The 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, 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 of and understood 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 the 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 the statements made with Hamdan, that they were 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 within the United 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 at a later date, the Defense would like to question again, they could.

The defense team asked if all of the testimony would be in 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 expected 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

Judge Acosta made clear that he expected the Government to speak "with one mouth" and to be consistent in discovery disclosures. . .

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 stated 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 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 Yemeni 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 Yemeni 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. The 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 Marine. FBI Agent Y also served as a "Ligat", which is a representative of the FBI in the respective country he or she is within. The 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." The 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 U.S.S. 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' lawyers. I also find that the defense team was zealous in their representation of the accused and tried 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.

# JESSIE CHIASSON

*Abd al-Rahim Hussein al-Nashiri*

**6-13 August 2022**

*Jessie Chiasson is a rising 3L at the University of Miami School of Law, originally from southern Virginia. She attended the College of William and Mary where she obtained a bachelor's degree in Religious Studies.*

From August 6-13, 2022, I participated as an observer sponsored by the National Institute of Military Justice at the pre-trial hearings involving the United States prosecution of Abd al-Rahim al-Nashiri, the alleged mastermind of the USS Cole bombing. The attack killed 17 U.S. sailors and injured over 40 other crew members. Al-Nashiri is charged with multiple capital offenses and thus the government is pursuing the death penalty.

I traveled from Joint Base Andrews to Naval Station, Guantanamo Bay, Cuba on August 6, 2022. On that same day I received my first look at the Expeditionary Legal Complex where the pre-trial hearings in the case of United States v. al-Nashiri were to take place. Courtroom II is a multi-defendant courtroom that was specifically designed with a separate viewing gallery for the public. Two panes of glass and a forty-second delay prevent the media and public from receiving any classified information that may come up in open court.

The first open session of the week began at 9:00 on Monday morning. After passing through multiple security checkpoints, I arrived at the gallery with my escort. Mr. al-Nashiri strolled into the courtroom so casually I almost missed it. He was escorted by two military guards and wore a loose, basic button-up. He greeted his learned counsel, Tony Nataly, with a smile on his face and even hugged a female member of his team. When court began, I had an odd feeling. There were just three lawyers, the judge, the accused, and the ever-rotating crop of military guards in the courtroom. The majority of the attorneys and witnesses were appearing remotely from the courtroom annex in Crystal City, Virginia. The gallery was equally sparse with only two observers (including myself), two media members, and one victim's family member. The gravity of this case juxtaposed with the low turnout was jarring.

The third week of the three-week session began on August 8, 2022, with former Special Agent Amar Barguti, an investigator in Yemen who pursued leads regarding a beached boat and who bought the boat. Barguti claims that his interviews yielded an identification of the accused. Next was the testimony of former

Air Force Office of Special Investigations Agent Christin Lange. She was a member of the FBI "clean" team tasked with interviewing several detainees—including al-Nashiri—following their arrival to Guantanamo Bay and transfer into the Department of Defense's custody. For context, prior to al-Nashiri's detainment in Guantanamo, he was dragged through a secret network of black sites by the CIA. During that time, he was subjected to multiple torture techniques in order to extract intelligence. Any statements made by al-Nashiri and the other detainees during this time are inadmissible since they were derived from torture. The FBI team was tasked with obtaining statements from al Nashiri that would be admissible in court.

I heard the direct and cross-examinations of three members of this team: Agent Lange, former Special Agent Bob McFadden, and former Special Agent Steven Gaudin. The linguist from the team testified the week prior. All of them stressed the voluntary nature of the FBI interviews—that the detainees directed the pace and content of the conversation. Lange specifically testified that al-Nashiri was excited to speak to them and was engaged in the conversation. She confirmed a quote al-Nashiri provided during this interrogation: "[al-Nashiri's] happiness would be commensurate with the number of Americans killed in an attack."

The judge was visibly annoyed when he was informed that discussions about any overseas interaction between Special Agent Gaudin and Abu Zubaydah must take place in a closed session.

Special Agent McFadden testified on August 9, 2022. He testified about the nature of four interviews he conducted regarding the same boat as Barguti. The entirety of his testimony this day concerned what each witness had to say about their attempt to sell the motor. He did not testify on that day about his involvement with the FBI team.

The proceedings on August 10, 2022, were delayed until noon following a closed chambers conference between the defense, prosecution, and judge. The first issue taken up by the commissions during the open session was a glaring conflict of interest issue with defense attorney Captain Meiser, as he formerly represented Hamdan. Meiser submitted an ex parte declaration to the judge requesting to withdraw, while both defense and prosecution teams argued to keep him on the case until after they litigated AE 481 and the hearsay statements in question. Following a recess, the commission decided to defer its decision and agreed to the solution of walling Captain Meiser off from the conflict. Then former Special Agent Gaudin was called to the stand. His testimony would take the remainder of the week. The government began with extensive questioning of his work in Nairobi, Kenya, after al Qaeda's 1998 embassy bombing.

August 11, 2022, kicked off with Special Agent Gaudin again. The judge was visibly annoyed when he was informed that discussions about any overseas interaction between Special Agent Gaudin and Abu Zubaydah must take place in a closed session. The defense attorney, Katie Carmon, was equally annoyed and pointed out that Special Agent Gaudin discussed his interrogations of Abu Zubayduh for a popular documentary, *The Forever Prisoner.* She contended that everything she planned to include in her questioning during the open session was from a publicly available, unclassified document. She invoked the right of the public and al-Nashiri to see the testimony since the trial was meant to be as public as possible. The prosecution had no control over this, as the prosecution has to do the Original Classification Authority (OCA) says. The prosecutor could not even mention in open court which OCA invoked the privilege. Judge Acosta said that the commission was one step closer to ordering the OCA into court to testify on the witness stand.

Special Agent Gaudin's open testimony continued until around 6:30 PM. Eventually, he discussed his interaction with al-Nashiri and echoed that the detainees were

eager to speak to them. He testified they were well treated and that al-Nashiri seemed well. Special Agent Gaudin claimed that al-Nashiri did not complain about his confinement in Guantanamo nor did he have complaints about the guards. Special Agent Gaudin also claimed to have typed up a separate report that included abuse allegations from al-Nashiri's time in CIA custody.

August 13, 2022, began with a closed session at 9:00 AM and an open session around 1:00 PM which concluded at 1:30 PM. The final day was mostly a logistical discussion about where to begin when court resumes in October. The commission withheld any ruling on the testimony it had heard, and Judge Acosta called the commission into recess.

# DAVIS WRIGHT

*Abd al-Hadi al-Iraqi*

**9-16 September 2022**

*Davis Wright recently graduated magna cum laude from the University of Georgia School of Law (J.D. Class of 2022). During his time in law school, Davis was the Executive Articles Editor for Volume 50 of the Georgia Journal of International & Comparative Law, co-founder and co-president of the Privacy, Security, and Technology Law Society, and participant in the 2021 Philip C. Jessup International Law Moot Court Competition. He works for Jones Day in Atlanta, Georgia.*

From September 9 to September 16, 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-Hadi al-Iraqi, although he prefers to be referred to, and I will refer to him, as "Nashwan Abdulrazaq Abdulbaqi al-Tamir." Mr. al-Tamir was captured in Turkey in late 2006 and held at a CIA black site for five to six months. After this time, he was transferred to the detention facility at Naval Station Guantanamo Bay. In June 2022, Mr. al-Tamir pleaded guilty to the "war crimes of attacking protected property—a U.S. military medevac helicopter that insurgents who answered to him failed to shoot down in Afghanistan in 2003—and of treachery and conspiracy connected to insurgent bombings that killed at least three allied troops, one each from Canada, Britain and Germany." *See* Carol Rosenberg, *Commander of Afghan Insurgency Pleads Guilty at Guantánamo Bay*, N.Y. Times (June 13, 2022).

Due to this plea, the hearings I was able to attend were presentencing hearings. The first day of hearings was held on September 12, 2022. In the courtroom, there were several rows of attorneys and staff for both the prosecution and defense counsel. Mr. al-Tamir sat unmoving but attentive in his "comfort chair." He also had a wheelchair and gurney at the ready in case he had any medical issues. The observers and media were held behind glass in a separate room. There were monitors that displayed close-ups of those speaking and the audio was on a time delay of about 40 seconds. Presumably, the delay was in order to filter out any classified information that may have been stated or outbursts from detainees, although neither of these scenarios occurred. The air conditioning in the observer room was not working, which led to a fellow observer having a heat-related medical issue. After this, the commission moved the observers to a separate building with working air conditioning that had a feed of the courtroom proceedings. This was an imperfect solution as we had a feed of the delayed video and audio but could not view the courtroom live through the glass as when we were in the observer room. This later led the defense counsel to object to

the conditions in the room and raise concerns regarding the transparency of Mr. Al-Tamir's hearing due to the lack of observers in the observer room.

The lead attorney for the defense was Susann Hensler. The lead attorney for the prosecution was Douglas Short. Most of the hearing was spent on a dispute regarding Mr. al-Tamir's healthcare access. Mr. al-Tamir has previously had five spine surgeries due to a degenerative spine disease. He may need a sixth. However, the only MRI machine that he has access to at Guantanamo Bay, which is necessary to evaluate his spine, is broken. He also needs a DEXA scan, and the base does not have the capability to provide one.

The deputy branch chief previously stated in an affidavit that the CT scan machine could do the DEXA scan once the software was downloaded to the machine. He also stated that the government would award the MRI machine contract by September 9, 2022. There was a dispute over whether this award was given by this date. Defense counsel showed a printout of the contracting website that showed no contact awarded. However, the prosecution later informed the court that the contract was awarded but that there was a problem with the website in showing the award. It is estimated that both the MRI machine and CT machine will be updated by December 2022. The judge also previously ordered that the government provide bi-weekly status updates on the procurement of the MRI machine and DEXA scan.

Defense counsel had concerns over this timeline, however. They believed it was unrealistic that the MRI machine would have a contract awarded, fulfilled, shipped, and operational by the government's estimate of December 2022. Due to this, they wished to have the Senior Medical Officer (SMO) testify about Mr. al-Tamir's current health (the SMO is essentially Mr. al-Tamir's primary care physician). AE214 (R). They also wished to have the chair of the Senior Medical Advising Committee testify, because the defense counsel believed that the committee had information regarding the procurement and administration of the MRI machine. AE214(Q). Defense counsel was concerned with the procurement because the last time an MRI machine broke, it took five years to have a new machine become operational.

The prosecution took issue with these requests for testimony. They argued that it was outside the scope of the commission to interject themselves into the procurement and administration of the MRI machine. They argued that the government had admitted Mr. al-Tamir needed the machine, and the timing of that procurement was not a matter for the court, but up to the people in charge of contracting. The prosecution urged the court to not be paternalistic and stated the issue was non-justiciable as the Senior Medical Advising Committee was a policymaking body with which the commission should not involve itself. Regardless, the prosecution argued, the defense counsel's argument was not ripe as the promised time of December 2022 had not passed. In sum, the prosecution argued that the procurement of the MRI machine had no relevance on whether Mr. Al-Tamir's sentencing should continue as it was not affecting his participation in his case. The defense counsel pushed back on this argument as Mr. al-Tamir's health directly affects whether he can attend the commission sessions, and his health also affects where he can be resettled as part of his sentencing.

The judge, in responding to the defense counsel's motion for the new testimony, asked to

what end he would be granting the testimony. In other words, what relief did the defense counsel seek? Previously, the defense counsel's motion asked for abatement of the proceedings until the MRI machine and DEXA scan were provided. However, the defense counsel stated they were no longer seeking this relief now that Mr. al-Tamir had entered a guilty plea. In response to the judge pushing defense counsel for a straight answer, the defense counsel stated that it was impossible to fashion the request for relief before the testimony was heard, as the relief would depend on the information gained during the testimony.

> Defense counsel was concerned with procurement, because the last time an MRI machine broke, it took five years to have a new machine become operational.

Toward the end of the hearing, the judge turned toward the schedule for the rest of the week. The prosecution had requested that a 505(H) hearing, a classified session without observers and media, be held if there was new testimony to be heard by the commission. Neither the defense counsel nor the prosecution believed a classified session was necessary if no new testimony was to be heard. On Tuesday, September 13, 2022, there was a classified session held, and as an observer, I was not allowed to attend. Although we received no official word as to whether either or both of the defense counsel's motions for new testimony were granted, I would assume at least one of the two motions was granted due to the classified nature of the September 13, 2022, session. There were no sessions held on Wednesday, September 14, 2022, only "legal meetings".

# JASON GROVER

***Abd al-Rahim Hussein al-Nashiri***

**3-10 December 2022**

*Jason Grover is a Fellow of the National Institute of Military Justice. He was an active-duty Navy JAG officer from 1998 –2012. In 2007, he was selected as an expert in the Navy's first selection for the Military Justice Litigation Track, and in 2012 was certified as a National Institute of Trial Advocacy trainer. During his time in the Navy, he served as a trial defense counsel, appellate defense counsel, and three tours as a trial counsel. He represented two Marines on death row, representing one of them as individual military counsel in his capital retrial. From 2008–09 he served as the Department of Navy's Capital Resource Counsel providing support to trial-level defense counsel in potential capital cases. In 2006, he was one of four co-founders of the military justice blog, CAAFlog. Since 2012, Jason has served as the Counsel for Trial Litigation in the Mine Safety and Health Division of the Department of Labor's Office of the Solicitor where he oversees national trial-level litigation under the Federal Mine Safety and Health Act. He also serves as a Special Assistant United States Attorney for criminal Mine Act cases in four different United States Attorney's Offices. This was his second trip to GTMO as an observer.*

**Monday, 5 December 2022:**

The hearings opened with a problem with the audio in the Remote Hearing Room (RHR). The prosecutors in the RHR reported that they were hearing al-Nashiri's translator over everything else. The military judge was forced to delay the proceedings for several minutes as the technical staff worked out the audio problems for the RHR.

In the gallery were five victim family members. There were two members of the media, Mr. John Ryan with Lawdragon, and Ms. Carol Rosenberg with the New York Times. In addition to myself, three other NGO observers were present: a law student from Columbia Law School with Judicial Watch, a LL.M. from Georgetown University Law Center, and a retired New York City trial judge on behalf of the Criminal Section of the American Bar Association. RDML The government's chief prosecutor, Aaron Rugh, JAGC, U.S. Navy, was also attending, sitting in the gallery the first morning.

After the audio problem had been sorted out, the military judge turned to AE 531, a defense motion to disqualify the military judge for personal bias and the appearance of bias pursuant to R.M.C. 902. There was initial confusion over AE 339JJ, a Defense Notice of Assignment for Mr. Adam M. Thurschwell as Special Counsel. Mr. al-Nashiri's Learned Counsel, Anthony Natale, listed Mr. Thurschwell as possibly being involved but said that he did not need to be sworn. When pressed by the military judge, Mr. Natale said he was a special appellate counsel in case the defense team needed him for an appeal, but he represented the counsel, not al-Nashiri. The military judge continued to question whether Mr. Thurschwell needed to be sworn in and who he actually represented. After several confusing exchanges, the matter was dropped, and the military judge continued saying if Mr. Thurschwell was not talking then he was not swearing him in.

Mr. Natale then announced that the defense had no evidence to present on AE 531 and no argument. The defense stood on the pleadings. He did cite one additional case for the military judge to consider, a 2014 case from the Ninth Circuit.

Colonel Acosta, the military judge, asked Mr. Natale if he wanted to voir dire. Mr. Natale declined, again stating he was resting on the pleadings. The government then mirrored the defense, declining to present any evidence on AE 531 or make any argument. Once again, the military judge asked the government if they wanted to voir dire. The government declined. The military judge asked a second time, appearing to desire to respond to voir dire questions, but the government continued to decline. The military judge ended the discussion by saying the Commission would take the matter under consideration and expected to issue a ruling by the end of the day.

The military judge next addressed AE 529, a motion to comply with discovery. Mrs. Katie Carmen, one of al-Nashiri's civilian defense counsel, referenced four "buckets" the government reported were "in process." Mr. John Wells, the government's lead prosecutor, confirmed that the buckets were in a security review. The military judge expressed some frustration over the process taking too long and admonished the government. He expected the security review to proceed with some pace.

The military judge then referenced AE 337 and said he would conduct an *ex parte* closed session with the government.

At this point, Mr. Natale rose and requested a stay of the proceedings until the Commission ruled on AE 531, the motion to disqualify the military judge. The military judge questioned the necessity of a stay and Mr. Natale expressed concerns over an appellate court viewing his participation in any other matter as a waiver of his motion to disqualify. He argued that "belts and suspenders are the way to go."

The military judge decided to recess for the rest of the day until his ruling in AE 531, with the exception of conducting the *ex parte* session with the government regarding AE 337.

**Tuesday, 6 December 2022:**

The Commission met in a closed session in the morning. At 12:40 PM, the military judge opened the proceedings. The defense called Col Matthew Jemmott, USA, the commander of the security detail to testify on AE 359, a renewed motion to allow al-Nashiri to spend the night in a modified cell in the vicinity of the Expeditionary Legal Complex (ELC) rather than in the prison because of difficulties with transporting him. Mrs. Annie Morgan, one of Nashiri's civil-ian lawyers, walked the colonel through his background and past assignments in corrections. He had previously commanded the Northwest Joint Regional Correctional Facility and had been the operations officer at the prison in GTMO 2011 – 2012.

The colonel testified to denying the defense request in AE 359HH without ever reading it, but he had been briefed on it. He testified he was aware of the large holding cell in the vicinity of the ELC that had been built for another prisoner in a different case, but he did not know how many times it had been used or its history. He testified he denied two defense requests to use that holding cell despite being urged to consider it by the military judge in a ruling previously because of al-Nashiri's motion sickness. In denying the request, the colonel testified he relied upon his manning, security, and risk of allowing al-Nashiri to sleep in the holding cell during court hearing weeks. He later modified his description of his denial, saying it was based on "security, manpower, and logistical requirements." He described his command as having been "tasked" with specific requirements and this was not one of those requirements. When pressed on whether he would allow al-Nashiri to use the cell if ordered by the military judge, he answered "no," stating he would follow the orders of his operational commander.

On cross-examination, the government attorney, Major Romeo, USA, focused on how the recommendation was briefed to Colonel Jemmott and ended with Major Romeo asking, "If you could accommodate the stay, would you?" The colonel responded, "Yes."

The military judge then closed the remainder of the colonel's testimony for approximately two hours.

When the court resumed in open session, al-Nashiri was not present, having voluntarily removed himself because he was not feeling well.

The military judge then heard arguments on AE 359 in an open session. Mrs. Morgan argued that despite the military judge's strong encouragement to the prison commander to approve a stay, he had continued to deny the defense requests. She pointed out that al-Nashiri suffers during transport and it affects his ability to attend or participate in the hearings. She argued that the decision on his staying was outside a reasonable decision-making process, pointed out that the holding cell had been used in other cases, and that the government's plan to conduct both al-Nashiri and the 9/11 cases at the same time with the same staff belied the argument about a lack of manpower. Morgan argued, "There is nothing we can do to get to 'yes' and that is different than from other detainees."

When pressed on whether he would allow al-Nashiri to use the cell if ordered by the military judge, he answered, "no," stating he would follow the orders of his operational commander.

Major Romeo responded by citing the number of times al-Nashiri chose not to attend the proceedings. When the military judge asked about the additional courtroom being built, Major Romeo responded, "I'm not in a position to

say.” The military judge grew frustrated, responding, “You are standing up for the United States–you are in a position to say what we can all see.” The government closed, arguing the defense had not provided evidence that the commander had failed to comply with logistical, security, and manpower requirements.

There was no rebuttal argument and the military judge said he would take the matter under consideration.

**Wednesday, 7 December 2022 to Friday, 9 December 2022:**

The rest of the week was dominated by one witness and one issue. Special Agent (SA) Khoury, a former FBI special agent, testified over the next three days from the Remote Hearing Room. SA Khoury participated in the FBI’s investigation from the beginning, getting assigned to Yemen from his normal Field Office in Boston in October 2000. SA Khoury is a native Arabic speaker and he conducted at least 116 interviews of witnesses and subjects as part of the FBI’s U.S.S. Cole investigation. His testimony was a continuation of the October 2022 session.

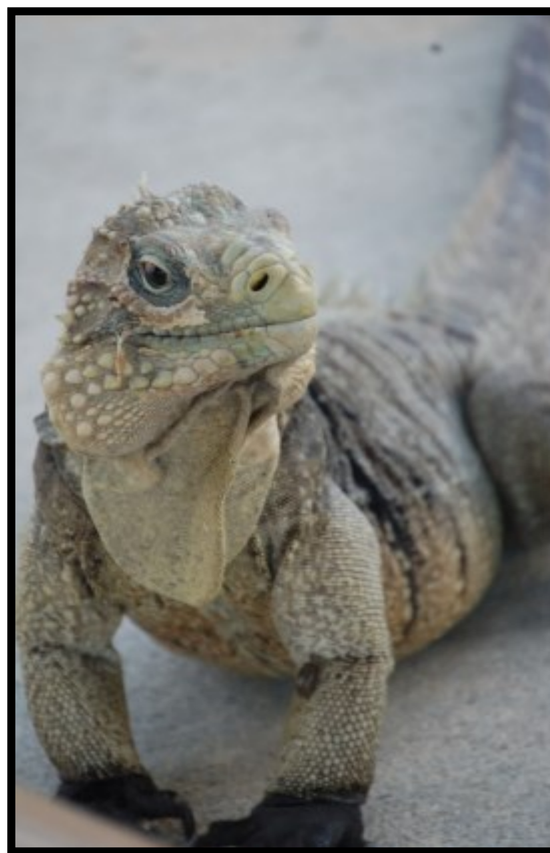
Mr. al-Nashiri was not present, and the military judge determined he had knowingly and voluntarily waived his right to be present.

The government was proffering SA Khoury to present the hearsay statements. In essence, the government intends to rely upon hearsay statements from his interviews in 2000 and 2001. SA Khoury’s testimony was broken into blocks related to specific witness interviews. The first block was a continuation of evidence presented in the October 2022 session.

Each block had the same general format. The government asked SA Khoury if he participated in a witness interview and then set the background for the interviews. Each interview was conducted at the Political Security Organization (PSO) Headquarters in Aden, Yemen. The witnesses were brought by the PSO to their headquarters where the FBI, including SA Khoury, interviewed them in the presence of PSO officers.

The witnesses all had made previous statements to the PSO outside the presence of the FBI. At the beginning of their interviews, the witnesses would adopt those previous statements. The government would ask SA Khoury about the appearance of the witness, whether they seemed clean or in fear, or if there was any -thing concerning or alarming about their appearance.

Then the government would ask SA Khoury why that particular witness was important. SA Khoury would then generally describe what



that witness offered or why they were being interviewed. The government would then ask for details, including whether the witness provided any relevant descriptions. SA Khoury could not remember the details approximately 20 years later, so the government would provide him with his "302"–the FBI form upon which details of the interview were recorded. SA Khoury described a "photo book" that was used to show witnesses and many of them identified various suspects in the photo book by number. SA Khoury was then asked which person was associated with the relevant number.

The defense would then cross-examine SA Khoury on several identical issues. First, they would point out that SA Khoury did not know in what conditions those witnesses had been held or if they had been held at all. He did not know what promises the PSO had made to them or their families, or what threats may have been made to them or their families.

Most tellingly, the defense would establish that SA Khoury didn't remember these witnesses at all. He was testifying based on his memory of reviewing his 302s this summer. Several times over the next three days, he confirmed he was not testifying from a refreshed independent memory, but rather by what he remembered from reading his 302. The defense would then highlight that SA Khoury had made no attempt to preserve contact information for the witnesses and he was aware of no efforts to ensure that they were available for a trial in this case.

This procedure was repeated again and again over the remaining three days of the session.

The first witness interview SA Khoury described was one of the "Beach Boys." The "Beach Boy" witnessed the removal of a sunken boat in January 2000 from the water in Aden. He described men pulling the boat out of the water to get it on a trailer. He was not sure whether it was two or three men who pulled the boat out of the water.

The next witness worked for the harbor authority in Aden and was notified of the U.S.S. Cole's plan to come to Aden two days before arrival at port. He described his duties as a husbanding agent dealing with the U.S.S. Cole's trash and getting fuel. He also described a paperwork issue relating to the permission of the U.S.S. Cole to enter the harbor that was resolved by calling the American Embassy. Strikingly, he described actually being onboard when the U.S.S. Cole was struck and having seen two people approach the U.S.S. Cole in a boat. He looked at the photo book of suspects but could make no identifications.

The first time the defense cross-examined SA Khoury, it covered these two witnesses as well as five others that he had described in the previous session. On cross-examination, SA Khoury acknowledged that the investigation was rushed and under pressure. He described a daily concern of being forced to leave Yemen by the Yemeni government and receiving threats from government officials friendly to al-Qaeda. He acknowledged that the PSO contained senior leaders who were known al-Qaeda sympathizers or associates.

During the initial cross-examination, the defense also brought out that SA Khoury had been disciplined in 2006 with five days without pay following a finding that he had abused his

position when he wrote a letter to the Customs and Border Protection on behalf of his cousin who had been attempting to enter Lebanon with $38,000 of undeclared U.S. currency. SA Khoury had written the Customs and Border Protection agent on his official FBI letterhead in support of his cousin who he said was taking the money to his granddaughter's wedding.

It was utterly clear to everybody that SA Khoury did not remember the details of his over-twenty-year-old investigation and he was testifying solely based on his reviews of the 302s.

The Department of Justice's Office of Professional Responsibility had made a finding that SA Khoury's explanation was "not credible."

After a lunch break, the march of descriptions of witness interviews continued.

Next was a witness who worked in a supply shop in the marina in Aden. Another worked in a passport office in Aden. Another was also a "Beach Boy" who saw men recover a boat. And then another who saw men pull the boat out of the water in January 2000.

SA Khoury described witness interviews with a witness who had found a house for men to rent and a security guard near the house. Neighbors were interviewed and described a boat being kept in the back and a metal fence being built to hide the view of the boat. A witness described repairing the boat that had salt in the carburetor. A member of the Ministry of Fishing described men attempting to repair a boat.

The parade of witnesses of whom SA Khoury had no independent memory continued. A neighbor described the men in the house with the boat as "unfriendly and secretive."

At one point SA Khoury admitted that they had interviewed no women as part of the investigation.

Another group of witnesses focused on a second house rental, one on a hill overlooking the harbor. SA Khoury described the 302s from the interviews with the owner of the house that rented it to two men, a rental agent who found the house, and the owner's son who described the men. Another witness testified to owning a repair shop that repaired a white Nissan matching the description of the truck that towed a boat out of the water. Another husbanding agent was described, as well as a fisherman who saw a white Nissan towing a boat. Witnesses described a phone kiosk near the rented house on the hill where the renters were seen making phone calls, including one where a witness overheard mention of "the Sheik."

The parade of witnesses of whom SA Khoury had no independent memory continued.

Finally, late Friday afternoon, the military judge halted the parade of witness statements. He directed SA Khoury to attend the next session in February 2023 to continue the testimony.

What was most striking to me about all these witnesses is how open and honest SA Khoury was in describing how much he did not remember. Over three days, the government presented dozen questions. It was utterly clear to everybody SA Khoury did not remember the details of his over-twenty-year-old investigation and

he was testifying solely based on his reviews of the 302s. The military judge will not rule on the admissibility of these hearsay statements until SA Khoury completes his litany and the parties brief the issue, focusing on each individual witness.

Friday afternoon ended with a discussion of the use of statements the former detainee Hamdan made early in his detention about al-Nashiri. These are the statements that created the conflict that drove CAPT Brian Mizer, JAGC, USN off the case as al-Nashiri's lead military counsel. The defense requested live witnesses to litigate the admissibility of the statements that the government desired to rely upon in the transcripts of Hamdan's trial. The parties then engaged in an argument about the application of the principle that "Death is Different," with the government making the claim that the principle only applied to the sentencing portion of the case. The military judge heard the arguments but made no ruling and adjourned the proceedings to February.

# ANDREA DE SÁ

*Abd al-Hadi al-Iraqi*

**11-18 February 2023**

*Andrea de Sá is a practicing attorney in WilmerHale's National Security Group. She is a graduate of the Yale Law School, where she served as Student Director of the Yale Law School Supreme Court Clinic and completed legal internships with the U.S. Department of State Office of the Legal Adviser, the U.S. Department of Defense Office of General Counsel, and the National Security section of the U.S. Attorney's Office for the Eastern District of New York.*

**Editor's Note: Numbers in parentheses, for example, "(4)," indicate an associated end note.*

From February 11 to February 18, 2023, I served as a legal observer for the U.S. Military Commissions at Guantanamo Bay, on behalf of the National Institute of Military Justice. There, I observed hearings for the accused charged under the name Mr. Abd al-Hadi al-Iraqi (hereafter "Abd al-Hadi"), also known by his legal name, Mr. Nashwan Abdulrazaq Abdulbaqi al-Tamir.

Mr. Abd al-Hadi is a high-value detainee who has been held by the U.S. since his capture in 2006. In 2014, he was formally charged with five war crimes stemming from his role as one of Osama bin Laden's top deputies. (1) The charging documents allege that Mr. Abd al-Hadi commanded al-Qaeda's operations from Kabul and served as al-Qaeda's liaison to the Taliban. The highlights of the charging documents include allegations that Mr. Abd al-Hadi orchestrated several suicide bombings targeting U.S. and coalition forces, attempted to acquire chemical weapons, and assisted the Taliban in the destruction of the Buddha statues near Bamiyan.

In May 2022, Mr. Abd al-Hadi signed a Pretrial Agreement (PTA), in which he agreed to a stipulation of fact and pleaded guilty to four of the five original charges. In exchange, the government agreed to seek a sentence between 25-30 years (to run from the date of the plea agreement) and to pursue a transfer to a third-party foreign nation that would honor the terms of the agreement. After sentencing, it is widely suspected that the Convening Authority responsible for overseeing the Commissions will lower his sentence to 10 years.

The plea offer was part of a renewed push by the Biden Administration to close the Guantánamo detention facilities, which are not equipped to handle the complex and costly medical needs of its aging detainee population. Mr. Abd al-Hadi, now in his sixties, is the central example: For decades, he has suffered from a spinal compression disease, and has undergone six surgeries while in detention–five on his spine and one to address a life-threatening blood clot following one of the operations.

But the Naval Hospital at Guantanamo Bay is ill-equipped to handle Mr. Abd al-Hadi's medical needs. (2) Because successive National Defense Authorization Acts (NDAAs) have prohibited the transfer of detainees to the United States for any reason (including medical care), the U.S. military has spent millions on so-called "expeditionary medicine"–airlifting neurosurgeons and two MRI machines (both now broken) for Mr. Abd al-Hadi's surgeries.

In November, Mr. Abd al-Hadi underwent his latest emergency surgery, and many wondered about his ability to appear in court just three months later. When Military Judge Lt. Col. Rosenow began the first day of proceedings, he reminded the parties, on the record, that Mr. Abd al-Hadi had a right to be present, and had been granted certain accommodations, including being able to adjust his position in his seat, stand up, walk around the defense area, access approved medical devices, and could even participate in the proceedings remotely.

Because successive NDAAs have prohibited the transfer of detainees to the United States for any reason (including medical care), the U.S. military has spent millions on so-called "expeditionary medicine"-airlifting neurosurgeons and two MRI machines (both now broken) for Mr. Abd al-Hadi's surgeries.

Mr. Abd al-Hadi used these accommodations. When he arrived, Mr. Abd al-Hadi was brought into the courtroom by wheelchair and was transferred to a hospital recliner with a heating pad resting over his back. At times, he stood up and, with the help of a walker, paced about in circles or stood in place doing calf raises. A hospital bed was set up in the back of the courtroom, which he would later use to sleep during the breaks. Notwithstanding his ongoing recovery, Mr. Abu al-Hadi seemed alert, and capable of answering questions posed by the military judge.

The week's hearings were meant to ensure that there was a true "meeting of the minds" on the PTA, and in particular, the scope of Articles 11 and 12 of the PTA, which cover waivers of legal claims and waivers of discovery, respectively. Military judge Lt. Col. Rosenow observed that earlier attempts to clarify the terms and scope of the waivers had not avoided litigation. He reminded the parties that as a military judge, his role was not to interpret the text of the PTA the way that one might interpret an act of Congress, but rather, his role was to ensure that the negotiated agreement meant the same thing to both parties and then to enforce those agreed-upon terms.

Because there were still many motions that were outstanding, Lt. Col. Rosenow ordered the parties to complete a form indicating, for each outstanding motion, whether the request for relief had been waived by the accused as a condition of the PTA; whether it was separately waived, withdrawn or otherwise mooted; or whether it still stood for consideration. He then offered a tri-partite path forward:

First, where both parties agreed the matter had been waived by the PTA, or otherwise waived, withdrawn, or mooted, the Commission would

confirm that such waiver was not otherwise prohibited by law, and accept it.

Second, where both parties agreed that the matter had not been waived, the Commission would evaluate the underlying request for relief on the merits.

Third–and most importantly–where the parties disagreed about whether a matter had been waived, the Commission would interpret the ambiguity in favor of the accused and would reach the merits of the issue.

Of course, either party could also withdraw from the PTA or seek to negotiate amendments to it. (3)

The parties returned the signed form several days later, which showed that of the 52 remaining items, the parties' disagreements centered mostly on the applicability of waiver to several outstanding motions for medical discovery.

When the parties then reappeared before the court, Lt. Col. Rosenow sought to confirm whether the prosecution had conferred with the Convening Authority as to whether it "desires to maintain the pretrial agreement, as clarified through this process, and with an understanding of how the Commission plans to proceed." The Convening Authority, which has no analog in civilian court, is empowered to determine the charges that will go to trial, approve pre-trial agreements, pick the panel of military jury members, and grant sentencing clemency or mitigation.

After initially agreeing that the Convening Authority understood and agreed to how the Commission would proceed–to reach the merits of the medical discovery claims–the prosecution then retracted, stating that it "cannot speak on behalf of the Convening Authority right now" on the medical discovery claims because its position had been they were "absolutely waive[d]."

The defense counsel, Ms. Susan Hensler, observed that the parties were "caught in a loop" and reminded the Commission about what was really at stake: that more than three months after his most recent surgery, Mr. Abd al-Hadi still had not yet received copies of MRIs, radiology reports, operating room notes, or follow-up imaging. The defense team understood that there were "significant problems that flowed from that operation" but were not able to get more information. Ms. Hensler further explained the records were necessary for Mr. Abd al-Hadi to be able to make informed decisions about his own health. The records are also important for the negotiation of a transfer to another country that might care for him. Ms. Hensler argued that discovery needed to be compelled because the government was no longer working in good faith to release the records, and the defense could no longer rely on the prosecution's promises.

> The convening authority, which has no analog in civilian court, is empowered to determine the charges that will go to trial, approve pre-trial arrangements, pick the panel of jury members, and grant sentencing clemency or mitigation.

The prosecution proposed an amendment to the PTA that would carve out the medical discovery claims that the court was already inclined to allow; in other words, an agreement to agree on what the parties had already previously agreed, both in writing and on the record.

The parties then recessed to allow time to negotiate an addendum to the agreement with the approval of the Convening Authority. Ms. Susan Hensler prepared three possible versions of the addendum and emailed them to the Convening Authority. The CA responded: "We think there may be a misunderstanding. The CA is not inclined to re-enter into negotiations with regard to the PTA. Positively, however, the CA is prepared to express in writing his decision to maintain the PTA, with an understanding of the parties' accounting provided in AE 217M (Sup) as well as how the commission intends to proceed."

The Commission reconvened, but this time, without Mr. Abd al-Hadi, who was feeling unwell. Although he was permitted to participate remotely, the closed-circuit TV networks were not working. The parties engaged in a colloquy about whether his medical fatigue constituted an involuntary waiver of his right to be present, but the defense ultimately assured the Commission that he was voluntarily absent and wanted the agreement to go forward.

The agreement, Exhibit 217N (not yet publicly available) would allow medical records after June 2022 to be released to the defense "following appropriate classification review."

The Commission recessed and is expected to meet next on June 5, 2023.

*Endnotes:*

(1)Mr. Abd al-Hadi was charged with Denying Quarter under 10 U.S.C. § 950t(6), for ordering subordinate forces to take no survivors; Attacking Protected Property under 10 U.S.C. § 950t (6), for his involvement in an attack on a clearly designated medical helicopter attempting to evacuate casualties; Using Treachery or Perfidy under 10 U.S.C. § 950t(17), for his involvement in three separate suicide bombing attempts that resulted in the death or injury of German, Canadian, British, and Estonian forces; Attempted to Use of Treachery or Perfidy under 10 U.S.C. § 950t(28), for his involvement in an attempted suicide bombing of a U.S. military convoy; and Conspiracy, under 10 U.S.C. § 950t(29), for knowingly conspiring and agreeing with Osama bin Laden and others, to conduct war crimes to force the U.S., its allies, and non-Muslims out of the Arabian Peninsula.

(2)As reported by Carol Rosenberg of the New York Times, in June, the chief medical officer evaluating detainee health care at Guantánamo, Capt. Corry Kucik of the Navy, testified that the base lacked the ability to reliably conduct Mr. Abd al-Hadi's operation, and that some surgeons might not want to risk their license doing it. In speaking to residents, I learned that the hospital on base is really more like a clinic, with

limited capacity for surgical procedures beyond routine appendectomies. Members of the military and contractors (mostly Jamaican and Filipino workers), who are routinely sent elsewhere for medical treatments.

(3)AE 098C, ORDER, Emergency Defense Motion to Compel Immediate Production of Medical Records; AE 098F, Defense Motion for Appropriate Relief Relating to AE 098C; AE 099CC, Defense Motion to Compel Production of Discovery; AE 099CC (Sup), Defense Supplement to AE 099CC; AE 199, Defense Motion to Compel Production of Discovery Regarding the Chief Medical Officer; AE 199 (Sup), Supplement to AE 199; AE 2l4S, Defense Motion to Compel Production of Additional Medical Records.

# ELIZABETH D. WISEMAN

*Elizabeth D. Wiseman received her law degree from the NYU School of Law in 2022. Ms. Wiseman is interested in both criminal law and national security law.*

**Editor's Note: Numbers in parentheses, for example, "(4)," indicate an associated end note.*

Mr. al-Nashiri is a Saudi national of Yemeni descent facing various charges arising out of the attack on the U.S.S. Cole in October 2000 in the Port of Aden, Yemen, (1) and the attempted attack on the U.S.S. The Sullivans in January 2000. (2)

The hearings for the week of February 20-24, 2023 covered a broad array of legal issues and topics ongoing in the U.S.S. Cole prosecution. (3) As a background, al-Nashiri has been detained by the U.S. government since 2002 (4) and was charged in 2011. (5) The prehearings have faced a number of setbacks, including the invalidation of over two years of a prior judge's decisions in 2019 due to his concurrent attempts to gain a seat as an immigration administrative law judge with the Department of Justice (6) and the abrupt departure of the lead prosecutor in 2022 due to his attempts to use evidence derived from torture in contravention of a Biden administration policy. (7) In 2017, al-Nashiri's defense team quit en masse after they discovered a microphone hidden in the wall of the room in which they talked with their client, and were subsequently forbidden by the judge to discuss the microphone with their client. (8)

The current judge, Colonel Lanny J. Acosta, Jr. of the U.S. Army, reiterated at the start of the week his plans to retire effective October 1, 2023, and his intentions to finish taking all evidence and rule on any motion fully briefed before retirement. Col. Acosta has served as Chief Trial Judge since July 1, 2021. (9) The majority of the hearings for the week were held in open court; the court was closed for an afternoon session on Friday, February 24, 2023, for the testimony of medical expert Sondra Crosby, which the gallery was led to believe would touch upon classified discussions of torture and CIA black sites. At the time of the writing of this report, transcripts for only four of the five days are publicly available: February 20, 2023, (10) February 21, 2023, (11) February 22, 2023, (12) and February 24, 2023. (13)

I observed that the search functionality of the docket website is limited and at times both under-inclusive and over-inclusive for search terms, and the availability of the briefs and associated exhibits is extremely limited. Even when published, most documents are heavily redacted. Redactions that were made a decade ago in early

documents do not seem to have been revisited, as increasingly more documents and information have been declassified and released. The docket website is also slow to load and the buttons to toggle certain results displays do not always seem to work consistently. Overall, this makes achieving transparency to the public difficult, and as an observer, it made it difficult to connect the subject matter of the hearings to the underlying docket documents.

**Allegedly Recanted Statements from Other Detainees**

The most significant issue of the week related to the defense's motion to compel discovery and to dismiss the capital referral in the case related to the proposed testimony of two detainees: Sanad Yislam al-Kazimi (15) and Mohammed Ahmed Ghulam Rabbani. (16) This issue was dealt with over the span of several days.

The defense team became aware in 2021 of meetings between these two detainees and the government that took place in 2018. The defense alleges that the detainees recanted their prior statements in these meetings, due to the prior statements being the product of torture and other inhumane treatment. As such, the failure to produce evidence favorable to the defense would constitute a Brady violation. The judge asked the defense to substantiate their claims of recantations, and the defense demurred, claiming the work product privilege over their documentation but stating that they would be happy to file the document either *ex parte* to the judge or on the docket after the prosecution team has responded to the motion to compel.

The prosecution team characterized the Rabbani and al-Kazimi statements as potentially inconsistent rather than recantations, and they were reluctant to firmly state whether they planned to use live testimony or hearsay testimony for these individuals. They stated both that they believed that, as inconsistent statements, they had no obligation to turn the material over until the time of trial, and that they had been unable to locate any material supporting documentation of the substance of any meetings or the alleged statements. The prosecution admitted to some meetings occurring in 2018 but stated that either meeting *only* occurred with Rabbani or that "more meetings" occurred with Rabbani. The prosecution team stated that the attorneys may have only been present at the start of the meetings, but not for the entirety of the meetings, and that they were unable to locate any FBI notes regarding the meetings. Additionally, the prosecution team stated that they are not *personally* aware of any promises being made, but that they did have email correspondence with al-Kazimi's counsel related to whether the government would assist al-Kazimi with a favorable location of detention following his release and expressed uncertainty as to whether al-Kazimi's counsel ever discussed such offer with their client. The Judge appeared frustrated at the government's lack of clarity on the facts and the lack of documentation of events that involved the government in front of the court. Given the history of professional ethics issues, confirmed on the part of a former judge and alleged on the part of a former prosecutor in the case, it was concerning to see the government team treat the allegations of a Brady violation with a lack of urgency and without a sense of accountability over not just their personal knowledge but rather any knowledge that exists within any government agency.

The judge firmly stated that all offers of cooperation must be disclosed, that all offers of cooperation must be assumed to be communicated from a detainee's counsel to the detainee, and that evidence relating to the reliability of the witness must be interpreted broadly. When discussing the issue later in the week, the judge requested the prosecution to "go into the minds of the people" present at the meetings and create documentation of what occurred at the meetings, if such documentation does not currently exist. The government affirmed that they would make a preliminary production following a security review of documents.

To complicate matters further, Mohammed Ahmed Ghulam Rabbani—a prolific artist while in detention, whose Guantanamo artwork the government later claimed was government property (17)—released from detention along with his brother, a fellow detainee, on the Thursday of the week of hearings. (18) As prior detainees have been reluctant to testify in a manner unfavorable to the U.S. government while in ongoing government detention, due to fears of retaliation or unfavorable treatment in release decisions, more information regarding the content of Rabbani's various statements over the years or offers from the government may be forthcoming now that he is released. (19) Further, the government's assertions earlier in the week that Rabbani may yet testify live at trial lacked, in hindsight, credibility or coordination.

The substance of the defense's motion and the government's reply, docket numbers AE 535 and AE 535C respectively, are unavailable publicly due to an ongoing security review. (20) The judge also commented negatively on the defense's missing deadlines in filing their initial motion and their follow-up motion to compel. The defense claimed that the delay was due to good faith efforts to coordinate with the government on the production.

**Hearsay Statements From the Investigation in Yemen**

Hearings regarding the admissibility of hearsay testimony from interviews conducted in Yemen immediately following the bombing of the U.S.S. Cole have been ongoing for several years, with testimony taking place over the past few months. (21) The prosecution team seeks to admit statements from approximately 118 witnesses that FBI and NCIS agents interviewed in the original investigation in Yemen who are now unavailable to testify at trial. This week covered thirty of those statements, with two agents, Retired NCIS Agent Kenneth Reuwer and former FBI Agent Andre Khoury, testifying over the course of several days. Some of the individuals whose statements they represented to the court included:

The owner of a gas station in northern Yemen who interacted with men who left a boat, allegedly the one used in the bombing, at the edge of an adjacent empty plot of land for several weeks.

A taxi driver who was paid to drive a boat, of the same description, from northern Yemen to Aden, a city in southern Yemen.

The family member of a homeowner who rented the home to the men accompanying the boat for a short period of time.

Drivers of flatbed trucks who were hailed down by a man to assist with moving the boat on separate occasions.

The owner of a crane company and his employees who, on various occasions, assisted in lifting the boat out of the water (or the sand where

it was stuck) and placed the boat in the water on the day of the bombing.

A fisherman who snorkeled near the Little Aden Bridge (referred to as the "Al-Baraka Bridge") and saw the men, their car, and their boat on two occasions entering and/or exiting the water.

The policeman stationed at the Little Aden Bridge near the boat dock, who reported a car parked and unattended for an extended period of time following the bombing.

Boatmen and employees of the company contracted to provide fuel and water to U.S. Navy ships who were either on the water or assisting in refueling at the time of the explosion and were on-site for the aftermath of the bombing.

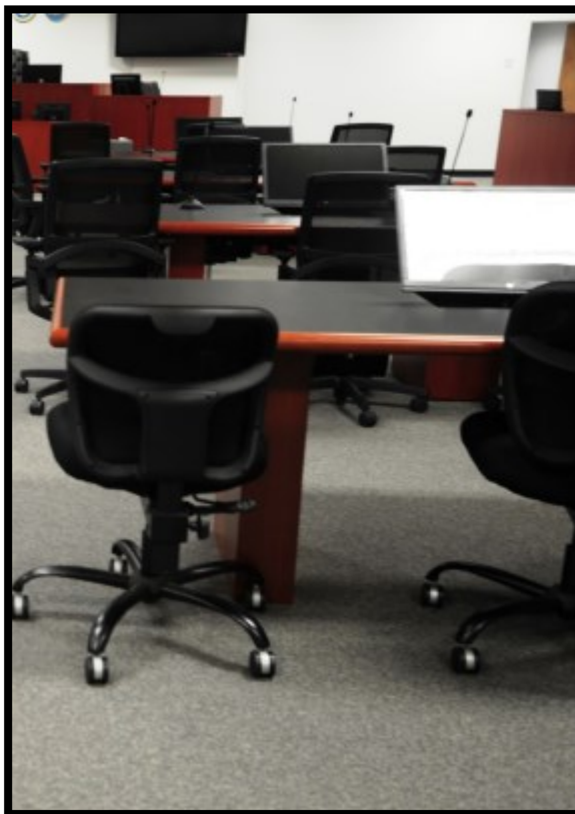
Their testimony highlighted the difficulty of conducting such a complex and expansive investigation under the supervision and control of a foreign sovereign. At times, individuals in the Yemeni government who sympathized with extremists actively obstructed their investigatory progress; at times, individuals sympathetic to the U.S. provided them with additional assistance and information unofficially. The U.S. and the Yemeni governments had a Memorandum of Understanding ("MOU") in place that restricted the agents from operating independently, and the defense highlighted this as a key factor in decreasing the reliability of the hearsay statements. The agents were not told how the Yemeni Ministry of the Interior ("MOI"), which controls a paramilitary force, or the Yemeni Political Security Organization ("PSO"), an internal security organization led by the Yemeni military, identified these witnesses. They were not able to verify the identity of the witnesses independently, photograph or fingerprint them, or verify their addresses or contact information. They did not know if the witnesses were comingled with other witnesses or suspects, nor if either they or their families were either threatened or promised anything in return for their testimony. Yemeni law enforcement officials were present at all times during the interviews, including at least one senior officer from the Yemeni military.

There were small moments of humor and humanity sprinkled throughout the testimony, despite the heaviness of the content. One of the boatmen in the Port of Aden did not observe the boat containing the explosives approach the U.S.S. Cole because he was "mesmerized" by the Navy women on the deck of the ship. Other locals rushed to help rescue and assist the injured and dying amidst the chaos of the explosion and awareness of the risk to their own health.

The two agents differed in their testimony as to whether the witnesses read prepared statements at the start of the interviews, although both noted that the witnesses—to their observations—appeared to be there voluntarily and willingly, without being in the custody of either the MOI or PSO. They generally noted factors such as the witnesses wearing clean clothes, lacking any visible signs of physical abuse, lacking any physical restraints, and presenting a cordial demeanor. They noted the differences between custodial interviews with suspects in which they participated and non-custodial interviews with witnesses: location, appearance and attire, restraints, and more. Both agents relied heavily on the FBI Interview Report Form 302s ("302s") that were generated following the interviews to recollect these interviews, which had occurred over two decades prior. Agent Reuwer, in particular, required his recollection to be refreshed numerous times throughout

both direct examination and cross-examination as to the details of each interview. Both admitted that their memories of the details of each individual interview after such a long period of time are limited.

The defense team paid particular attention to a few issues. First, one witness was in Yemeni custody at some point prior to the joint FBI/NCIS interview, which was documented in a non-testifying agent's notes but not the formal 302 reports. Second, one witness was potentially comingled with a suspect, the latter of whom was the brother of an individual eventually detained at Guantanamo;. Third, the choice of the agents to include additional details in the 302s to help cross-reference information, which the defense characterized as "editorializing." And, fourth, how the agents reconciled differences in the descriptions of the boat, the car, and the individuals between the various witnesses.



Later in the week, an FBI supervisor on the Joint Commission Task Force named Mary S. testified about efforts made to locate these witnesses since the original interviews, in order to establish their unavailability. She compiled a list of witnesses interviewed in 2000 and 2001 and has coordinated with various federal agencies including the Department of State as well as Customs and Border Protection to identify whether any of the individuals are now located within the United States. She has run additional public records searches to see if their overseas locations can be determined. Due to the civil unrest and eventual civil war that broke out in Yemen, the U.S. Embassy and the U.S. Ambassador to Yemen have been located in Riyadh, Saudi Arabia since February 2015. While the U.S. Ambassador to Yemen has requested the Yemeni government for access to these witnesses, the Yemeni government claims that the Houthi rebels destroyed all Yemeni documents related to this investigation when the Houthi captured the Yemeni capital of Sanaa. The team has made diplomatic overtures to other, unnamed countries for assistance that have been unsuccessful.

The defense questioned Agent Mary S. on the efforts made between 2001 and approximately 2019 to either track or keep in touch with these witnesses should the need for them to testify arise. The lack of efforts during this time period contributed to the defense's narrative that no plan to have these witnesses testify was ever contemplated or attempted. Mary S. stated that more invasive tactics, such as escalating witness location attempts through INTERPOL, would be inappropriate given the lack of concrete identifying information available and the law enforcement intrusion this might incur on the lives of other similarly named individuals both in the U.S. and in other countries.

The government attempted to notice the hearsay statements in the record in AE 166 (22) and 166A, (23) in 2013 and 2014 respectively. The defense filed motion AE 319 (24) in 2014 to exclude those hearsay statements. The defense filed a related motion at AE 328, in 2014, seeking to restrict the hearsay testimony at trial to only the hearsay that the government has attempted to introduce in AE 166 and 166A, and to require each agent to testify individually as to the hearsay statements that they observed, rather than a consolidated number of agents testifying as to what information they collectively obtained. (25) The government opposes this motion. (26)

**Photo Identifications of al-Nashiri**

In tandem with challenging the hearsay statements presented by the agents above, the defense team is also separately challenging the hearsay identifications of al-Nashiri in the photobooks used during the investigation in Yemen.

Former FBI Agent Andre Khoury testified regarding the choice to use a photo book (a set of materials in which multiple suspects are individually displayed and the witness is asked if they recognize any individuals) during the investigation instead of a photo array (a set of materials in which a single suspect is displayed alongside multiple other similarly looking individuals and the witness is asked which individual is the individual that they saw or encountered). The defense team maintains that the use of a photo book, instead of a photo array, is unduly suggestive, and that even if other hearsay statements by unavailable declarants are admitted as evidence, their photo identifications of al-Nashiri should not be admitted.

The testimony regarding hearsay declarants generally established certain facts about the photo books: there were at least two versions that Agents Reuwer and Khoury were aware of and used. The two versions they used differed by only a few photographs. They disagreed about whether one of the photos removed in the second version was a composite photo or a photo of a single individual. The defense prompted Khoury to reiterate several times on the record that he believed a particular photo was not a composite after Reuwer had identified it as such days previous. Reuwer was not certain as to why the particular photos had been removed. Khoury remember that one photo had been removed due to national security concerns about the origin of the photo.

Agent Khoury testified that photo books are best practice in investigations of this size and scope;. He has used hundreds in various investigations during his over two decades as an agent and has used photo books in similar investigations that he participated in, such as the 1998 Kenya and Tanzania ("KenTan") embassy bombings. The photo books used were considered FBI work products, with DOJ input. The DOJ's involvement was to ensure that the photo book was built and used in a way that facilitated an eventual criminal prosecution. Agent Khoury helped assemble the first and second versions of the photo book, which he referred to as the "Aden Bomb Book." The version of the Aden Bomb Book used during an interview was generally noted in the corresponding FBI 302.

The Aden Bomb Book contained photos of several different individuals that the FBI suspected were involved in the attack on the U.S.S. Cole. Several photographs of the same individual were used at times, showing them with different features (e.g. longer or shorter beards, mustaches, glasses or no glasses, different body

weights, etc.). Three photos of al-Nashiri were used in the original Aden Bomb Book: a photo from his Yemeni driver's license registration, a photo that they had used in the KenTan investigation, and a photo that the Yemeni authorities had given them. Khoury reiterated several times that while the Yemeni authorities provided photos that the FBI could choose to use if they wanted, the Yemeni government (neither the MOI nor the PSO) did not exercise any control over the creation or use of the Aden Bomb Book. Khoury described generally how he selected photos to ensure that none were repetitive, overly suggestive, or inconsistent with the photobook as a whole.

When using the photo book, Khoury stated that he always asked witnesses for descriptions of the individuals before showing any photos in order to ensure that the photos they ultimately selected aligned with how the witnesses were able to describe the individuals verbally. He further explained how this was a useful practice given the size and scope of the scheme, and the initial uncertainty on the behalf of the investigators as to who was involved. He stated that photo arrays are better investigative tools when the identity of the suspect is known and the number of individuals is limited.

The substance of the defense's motions and the government's replies are contained in the 461 series; the latest filings are yet unavailable to the public due to an ongoing security review. However, portions of two early defense filings are available in heavily redacted versions, including the defense's original motion, AE 461, (27) and the defense's reply to the response, AE 461 H. (28) While the government's response, AE 461C, is also purportedly available online in redacted form, the website links directly to the defense's original motion instead.

**Inadequate Medical Records**

The defense seeks dismissal of the capital charges due to incomplete and misleading medical records, and to compel the medical care providers on base to testify related to the defendant's medical records. The underlying motion alleges that the medical records maintained by the government omit key details that pertain to al-Nashiri's physical and mental condition, conditions that the defense attribute to the torture and other inhumane treatment that al-Nashiri experienced while in CIA custody. Without such records and proper documentation, the defense team asserts that should al-Nashiri be found guilty and face sentencing, the court will be unable to properly determine whether the death sentence is merited under the totality of the circumstances.

Specifically, the defense sought the testimony of the NSGB Chief Medical Officer ("CMO"), the NSGB Senior Medical Officer ("SMO"), the on-base psychiatrist, and the interpreter present at particular medical appointments and the subsequent entries in the medical records. While the defense team knew the locations of each individual and whether they were on-island and available, the prosecution team did not know the location of the CMO and stated that the SMO only had limited availability due to a medical condition of his own. The judge requested the prosecution team to call the CMO's office at the next break to ascertain his location and seemed frustrated by having to make such a request.

Later in the week, the judge asked the defense to justify why they would like to speak to these individuals and mischaracterized the motion as being late. The defense team clarified the timeline and relayed an anecdote in which al-Nashiri allegedly described an incident of tor-

ture that related to a current injury to the SMO through the translator. The incident was allegedly never documented in the relevant medical records. The defense team advocated that as the SMO's supervisor, the CMO would have broad knowledge about whether and how trauma histories are conducted, and that the psychiatrist on base would have relevant knowledge about whether a trauma history related to al-Nashiri's psychiatric complaints was ever recorded.

Similarly, towards the latter end of the week, Dr. Sondra Crosby testified for the defense on this issue, establishing the government's failure to create and maintain a comprehensive trauma history. According to Dr. Crosby, a comprehensive trauma history that documents the medical, psychological, and social complications from trauma is a widely accepted standard of care and critical to treating symptoms and consequences of trauma. A comprehensive trauma history document also helps integrated care and continuity of care. She described it as a "living document" that develops over time as the victim develops trust with the medical care providers and shares more details. It enables the sharing of a common trauma history across all specialists and care providers so that the survivor of trauma does not need to share the same details over and over again, which is a re-traumatizing experience in and of itself.

Dr. Crosby is an acknowledged expert in medical care for torture victims and survivors and has been working with al-Nashiri since 2013. Despite this, she has not been able to see all of al-Nashiri's medical records, as the government has withheld mental health records and narratives related to the torture events and their impact on al-Nashiri. The government did not dispute this statement. She noted a failure on the government's part to develop a trauma history, which the government also did not dispute. Dr. Crosby alleged that this failure further leads to ongoing substandard care, as the SMO on-base rotates every nine months, and each new SMO starts fresh by attempting to extract a trauma history from al-Nashiri and treat him accordingly. According to Dr. Crosby, Al-Nashiri has a low level of trust in the government medical staff, and it is retraumatizing for him to repeatedly describe the same medical issues to new individuals. Dr. Crosby has requested to meet with the military medical staff repeatedly over the years, to share both her experiences and resources treating survivors of torture as well as to share, with al-Nashiri's permission, particular details she has gleaned from him over the years and the trauma history document she had built based upon those discussions. No SMO has agreed to meet with her. The government does not dispute this set of facts. Further, Dr. Crosby stated that she is aware of details of al-Nashiri's medical condition and medical and torture history that she has not seen documented in the military medical records.

The government challenged Dr. Crosby on her evaluation of the credibility of al-Nashiri's statements regarding his medical conditions. They asked her about her experiences with malingerers, or individuals who made up or exaggerated medical claims in order to qualify for asylum or refugee status, at her medical clinics in Boston. They suggested that a recently aggravated shoulder injury was due to al-Nashiri's exercise routine in detention in combination with a childhood bicycle accident. Having opened the door to this line of questioning on cross-examination, the defense team asked on re-direct examination whether a different

possible source of this injury was his time spent, days at a time, hanging from the ceiling with his hands over his head and his feet dangling and barely touching the ground. The defense counsel was very effective in his lawyering on this point, demonstrating the pose physically, which requires the judge to narrate his physical actions into the official court record. Dr. Crosby agreed that this was a possible source of the current injury and a more likely cause than a childhood bicycle accident. Dr. Crosby maintained that she found al-Nashiri's assertions of his physical and mental conditions to be both credible and also corroborated by the Senate Select Committee on Intelligence's (SSCI) Study of the CIA's Detention and Interrogation Program released in 2014. (29) Part of the government's cross-examination was conducted in a closed session in the afternoon of Friday, February 24th.

At the prosecution's request, the judge ordered the defense team to turn Dr. Crosby's trauma history document over to the prosecution, as she relied upon it during her testimony and thus, they are entitled to its production. The defense agreed to do so but asked if the Judge would also order the prosecution to use the document both as evidence and for the ongoing medical treatment of al-Nashiri, or in the alternative to mandate a meeting between Dr. Crosby and the military medical team treating al-Nashiri. The judge stated that such an order was outside the scope of his authority. The government also asked for Dr. Crosby to turn over any psychological records in her possession, which the Judge refused to order.

The substance of the defense's motions to compel witnesses and the government's response regarding the compulsion of witnesses in support of the motion, docket numbers AE 534F, AE 534G, and AE 534H, are unavailable publicly due to an ongoing security review. The defense's underlying motion to dismiss, AE 534, is also unavailable publicly due to an ongoing security review.

**Suppression of Custodial Statements Made by al-Nashiri in January, February, and March of 2007**

Dr. Sondra Crosby also testified regarding the CIA's forced rectal feeding of al-Nashiri, which lead to eventual statements of admission that the defense seeks to suppress. This issue garnered media coverage as a significant issue of the week's hearings. (30) The Biden Administration has a policy of rejecting the use of testimony obtained from torture. (31)

The substance of al-Nashiri's statements was not addressed or discussed, nor are the briefs publicly available to discern the context of the statements. However, prior media coverage of the pre-trial hearings provides limited context: FBI agents interviewed al-Nashiri soon after he arrived at Guantanamo from CIA custody in order to obtain a confession free from the taint of torture. (32) The defense argues that the experiences of torture trained al-Nashiri into a state of learned helplessness, and to tell U.S. personnel whatever he believed they wanted.

Further, despite al-Nashiri telling his FBI interrogators during those three days of interviews about the torture he experienced, the agent memos from those interviews, which the prosecution seeks to enter as evidence, omit any reference to torture.

The specific purpose of Dr. Crosby's testimony, in this broader context, was to establish that forced rectal feeding is a form of torture and inhumane treatment, and to establish that this form of torture was used on al-Nashiri while he was in CIA custody. Mr. al-Nashiri first told Dr. Crosby about the forced rectal feedings—and an incident in which he was sodomized with a broomstick—in 2013. CIA records documented, at minimum, the forced rectal feedings. Dr. Crosby has previously not been permitted to speak in open court regarding these events.

The defense sought to qualify Dr. Crosby as an expert on hunger strikes and forced feedings, which the government argued she was unqualified to testify about and they were unprepared to receive. The judge struggled to resolve the issue of her qualifications and notice but ultimately determined her testimony could proceed as an expert on torture and as a medical doctor specializing in internal medicine.

Dr. Crosby detailed repeated events of what she described as anal sexual assault that occurred at a CIA black site, relayed to her by al-Nashiri and later corroborated by the SSCI Report on Torture. She described an experience wherein al-Nashiri was hung shackled with his arms over his head and sodomized with a broom and multiple experiences wherein al-Nashiri was allegedly "force fed rectally" while shackled over a chair.

She explained in great detail how rectal feeding was a medically invalid procedure that effectively functioned as sexual assault. These incidents occurred after al-Nashiri had only refused five meals over the course of three days, meaning that he did not meet the medical definition of a "hunger striker." Instead, he fit the medical definition of a "food refuser." He was refusing food because he believed that the CIA personnel were medicating him through the food, which also did not qualify him as a hunger striker but instead as a food refuser. As such, force-feeding was not medically required. Further, the method of force-feeding utilized—rectal force-feeding—is widely recognized and accepted as not medically or anatomically effective for providing nutrition. The rectum cannot—and does no—absorb nutrients, and no tube can reach far enough into the digestive system to deliver the nutrients to an organ that does absorb nutrients. While rectal *hydration* is possible, and utilized only in extreme and urgent situations, rectal *nutrient absorption* is not possible. Thus, Dr. Crosby characterized the forced rectal feedings as effectively sexual assault disguised as a medical procedure.

The defense showed a photo of a mannequin replicating the position that al-Nashiri was placed in to facilitate the forced rectal feeding. He was stripped and bent naked over the chair with his hands and feet shackled to the floor. An endotracheal tube 7mm in width—typically placed in the trachea (throat) to intubate a patient having difficulty breathing—was inserted into his rectum. The defense presented an endotracheal tube of the same measurements used for the rectal feeding in court, and Dr. Crosby demonstrated how it would be typically used. The CIA operatives delivered 400-500 cc's (about the amount in a 16-ounce water bottle) of Ensure, a dietary supplement, through the tube into al-Nashiri's body over the course of

30 minutes. Following this, they left the tube in place for about another 30 minutes to "ensure absorption." In actuality, al-Nashiri's body expelled the Ensure liquid externally rather than absorb it. The government did not appear to dispute any of these events.

Dr. Crosby testified that al-Nashiri experienced this "forced rectal feeding" as a rape and a violent assault and that he suffers from the experience both mentally and physically to this day. She testified that he suffers from chronic PTSD, including difficulties with trust and other psychological symptoms, as well as physical ailments such as back pain, chronic abdominal pain, including IBS, and recurrent rectal issues including issues with defecation.

The prosecution team cross-examined Dr. Crosby and asked her about documented issues al-Nashiri experienced prior to U.S. custody, such as constipation. They additionally asked her about her prior statements that "complex PTSD is outside of [her] range of experience." She explained that while she feels comfortable diagnosing complex PTSD, or any complex psychiatric disorder, she would refer treatment of such to a specialist.

The substance of the defense's motion and the government's reply, docket numbers AE 467 and AE 467C respectively, are unavailable publicly due to an ongoing security review.

**Mr. al-Nashiri's Presence in the Courtroom**

Whether or not al-Nashiri was or would be present for the proceedings was a recurrent issue of concern for the court. The defense team previously filed motions for al-Nashiri to be temporarily housed in the Expeditionary Legal Complex (ELC) rather than the detention facility on base for the duration of the hearings so that he did not have to be transported daily to and from the ELC. The enclosed space of the transport van and the shaking of the vehicle causes al-Nashiri to experience flashbacks to experiences of "enhanced interrogation," such as when he was forced to spend time in a small, confined box where the back of his head was repeatedly slammed into a burlap-covered wall (34) and other symptoms such as nausea and dizziness. The judge denied those motions.

The defendant requested to be excused at several points throughout the week. First, he asked to be excused on Tuesday afternoon to be treated for a sinus infection and listened to the hearings through an audio set in a back room while he was being treated. The government did not dispute the existence of the sinus infection or the required absence for treatment. Mr. al-Nashiri did not appear on Wednesday due to allegedly not wishing to experience the transport van. The judge ruled this to be a voluntary waiver of his right to be present, rather than a medical inability to be present. On Thursday, al-Nashiri asked to be excused for the afternoon session in which Dr. Crosby would testify regarding his history of trauma and the anal sexual assaults he experienced while in CIA custody. The judge asked al-Nashiri to reconsider and encouraged him to attend. To an observer, while encouraging the accused to be present in court as much as possible seems like a solid policy as a general matter, in the context of Dr. Crosby's testimony in which she explained that forcing al-Nashiri to discuss and be exposed to the facts of his trauma was, in fact, re-traumatizing itself, the judge's encouragements in this particular instance came across as insensitive.

The substance of the defense's renewed motion to have al-Nashiri housed at the ELC and the government's reply, docket numbers AE 359II and AE 359 JJ respectively, are unavailable publicly due to an ongoing security review.

My discussions with members of the military and site operations crew revealed that a different detainee had once been housed at the ELC overnight against his will because the military alleged they did not have enough security personnel to effect the daily transfer by van from the detention center to the court complex. Their current understanding, however, was that al-Nashiri's requested overnight stay at the ELC was now opposed on the grounds that security personnel was insufficient to provide overnight security services to the detention center and the ELC.

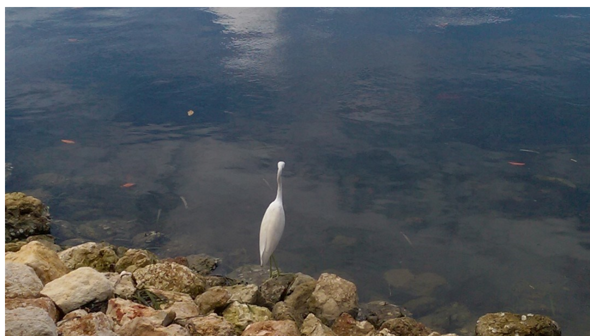
**Inconsistent Discovery Productions Across Military Commission Prosecutions**

The government has produced sets of documents for other defendants and their counsel in ongoing military commission prosecutions that the defense team seeks to have produced for them as well. The hearings briefly touched upon discovery provided to Walid Muhammad Salih Mubarak bin Attash ("Khallad") and his counsel as part of the ongoing pre-trial proceedings in the 9/11 *United States v. Mohammad, et al*. case.

Reading between the lines of this motion combined with the motion discussed above alleging a Brady violation, in a mosaic theory manner, it is possible that the al-Nashiri defense team is aware of documents that have been produced for other defendants but not for their team specifically that relate to the al-Kazimi and Rabbani statements.

The substance of the defense's motion and the government's reply, docket numbers AE 444D and AE 444G respectively, are unavailable publicly due to an ongoing security review. (35)

The government moved to consolidate the 444 series and the 529 series in 444F. The 529 series is a similar defense motion to compel the government to produce documents to the al-Nashiri team that were previously produced for other defense teams in the 9/11 trial. The 532 series was also discussed in conjunction with the 444 and 529 series and is a similar legal issue related to a set of documents for an individual named Abdul al Salam al Hila (aka Al-Hilah).



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# ALI BEYDOUN

*Abd al-Rahim Hussein al-Nashiri*

**25 February 2023**

*Ali Beydoun serves as a Counsel for Civil Rights and Appellate Litigation at the US Department of Labor. He has also served as the director of the UNROW Human Rights Impact Litigation Clinic at the Washington College of Law. His litigation work in domestic and foreign tribunals and forums includes representing U.S. citizens incarcerated under illegal immigration detainers, conducting investigations and report submissions to the United Nations on behalf of Tamil victims of the 2009 genocide, and advocating for Chagossians seeking redress for forced exile and torture by U.S. and U.K. government officials. He has lectured on his human rights cases at the University of Madras in Chennai, India, Universidad Nacional de Itapúa in Encarnación, Paraguay, Universidad de Centro America in San Salvador, El Salvador, and several U.S. law schools. He has also given lectures on Capitol Hill, in UK Parliament, and several South American Senate Panels on judicial and accountability initiatives possible under international law.*

From February 25 through March 3, 2023, I participated as an observer sponsored by the National Institute of Military Justice at the second week of pre-trial hearings involving the United States prosecution of Abd al-Rahim al-Nashiri, the alleged mastermind of the USS Cole bombing. The attack killed 17 U.S. sailors and injured over 40 other crew members.

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 Guantanamo Bay and is currently held there. Mr. al-Nashiri was formally charged in 2011 with multiple capital offenses and thus the government is pursuing the death penalty. These court proceedings have been taking place since then. The current military judge, Army Col. Lanny J. Acosta Jr., permitted a round of public hearings allowing NGO Observers, like me, 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. Four other NGO observers were also present, as well as the victims' family members, who privately observed the hearings and were separated from the NGO observers by a partition. At all times, we were able to see the lawyers and the military judge. The accused, who is allowed to attend the hearings in person, opted to listened to the proceedings from a separate area on Days 3 and 4 of the hearings and waived his attendance for the Day 5 hearing.

Day 1 of the hearings started with testimony related to the defense Motion to Suppress Statements of Walid Muhammad Salih bin Mubarak bin Attash (*nom de guerre* "Khallad"), a prisoner held in extrajudicial detention at the United States' Guantanamo Bay detention camp. The government suspects he played a key role in the bombing of the USS Cole as it docked in the Port of Aden in Yemen as well as of significant involvement during the early planning stages of the 9/11 attacks. The defense team hopes to use the testimony of witnesses in support of its motion to suppress the federal interrogations of Khallad at Guantanamo in 2007, years after his capture in 2003.

The defense team began the hearing by calling former NCIS agent Robert McFadden to the stand to testify. He appeared via a live feed from a remote location in Northern Virginia. During his testimony, Agent McFadden said that by the time of his 2007 interrogation of Khallad at Guantanamo, he had a "general awareness" of the CIA's "Enhanced Interrogation" program but not specifically what was done to Khallad. He discussed the shared computer files that federal agents would review before conducting interrogations of former black site prisoners at Guantanamo in 2007. Prosecutors referred to these interviews as "clean team interrogations" because they were meant to replace prisoners' statements that defense lawyers argue were "dirtied" (deemed tainted and could not be used in court because they were elicited while the detainee was subjected to CIA EITs—enhanced interrogation techniques). Agent McFadden said that he did not recall being briefed on the EITs during his work at the task force prior to his interrogations of high value detainees at Guantanamo circa 2007. Regarding the 2007 interviews, Agent McFadden said he was directed not to ask Khallad about his time in CIA custody. Additionally, if a prisoner claimed of CIA mistreatment or abuse, agents were instructed to segregate those claims in a separate report. Agents were specifically instructed not to use Miranda in the "clean team interrogations." Instead, the agents were given a "modified rights" checklist.

The defense lawyer asked Agent McFadden if he knew by the time he was "clean team" interviewing in 2007 that there had earlier been a black site at Guantanamo Bay. Agent McFadden confirms that he knew in advance that al-Nashiri was previously held at Echo 2 (where CIA EIT techniques were used to interrogate inmates) at Guantanamo Bay—the same place where he performed clean-team interrogations. In recalling his interrogations of Khallad, Agent McFadden referred to Khallad's family—the Bin Attashes of Yemen, then Saudi Arabia—as a kind of jihadi "royal family." Khallad's father had a glowing reputation for fighting communists during the Yemeni civil war and for subsequently sending sons to train and fight with bin Laden. He also recalled being told the specifics that Khallad recounted planning "the Boats Operation," which originally targeted oil tankers and maybe an aircraft carrier, but ultimately targeted the USS Cole. Khallad developed the plot with al-Nashiri and a Yemeni national named Hadi Dilkum, who helped acquire explosives. Upon cross-examination by the federal prosecutor, Agent McFadden testified that Khallad's interrogation at Guantanamo was voluntary, even after over three years in CIA black sites. He said Khallad voluntarily spoke to him and that the prisoner came across as "very bright, friendly, affable, [and] enthusiastic to be there at each session." The public session of the court hearings concluded at the end of Agent McFadden's cross-examination and went into a closed session for the rest of the day.

Day 2 of pretrial hearings mostly focused on defense motions relating to suppressing hearsay evidence relating to the USS Cole case. The first witness was a Navy doctor who serves as the prison's senior medical officer (SMO) for the high value detainees (formerly CIA black site prisoners). He denied seeing any records for al-Nashiri from his 2003 to 2006 CIA detention. He testified that he oversees "safe, legal and humane primary care to the detainees to the best of our abilities." About his preparation to assume duties as SMO, he said that

he was told that all of his patient (detainees) had experienced CIA enhanced interrogation which, he voluntarily added, "has been characterized as torture."

During questioning about al-Nashiri's shoulder pain and injury, which doctors at the prison attribute to his over-exercising with 75-pound sandbags, the SMO was asked whether it was related to al-Nashiri's treatment while he was in CIA custody. The SMO said that he has reviewed al-Nashiri's records dating back to his return to Guantanamo in 2006 and that he has seen no evidence that anyone on the Guantanamo medical staff took a trauma or torture history of al-Nashiri. He did say he reviewed some International Committee for the Red Cross reports about what the prisoners claimed happened to them and remembers reading that al-Nashiri had been shackled by his wrists and hung from the ceiling in CIA custody and that he was held in a small box for days, but he did not recall seeing any mention of such specific treatment in al-Nashiri's medical records. At the end of the SMO's cross-examination, the court ended the hearings on the motions and took up a defense challenge to over-redactions of transcripts of public sessions.

For that argument, the defense attorney team asked the judge to abate the proceedings until the issue of over-redaction is fixed, warning that the harm is to the defendant, the public, and future witnesses. Judge Acosta postponed a decision on abatement. He said he "expects consistent application of the classified guidelines across all the transcripts as we go forward with a view of making them as unclassified as possible, not just for the accused but for the public as well."

Day 3 was filled with defense motions for the suppression of hearsay evidence. The motions involved the presentation of two former FBI agents who investigated the 2000 US embassy bombings in Kenya and Tanzania, and later, the USS Cole bombing. Both agents offered testimony regarding the US law enforcement partnership with the Yemeni governmental agencies (YGA) who were assisting with the USS Cole bombing investigation.

The agents discussed the process for interviewing witnesses by which YGA would arrange for US agents to meet with and interview persons who witnessed some relevant evidence regarding the investigation.

Of note was the testimony of the second FBI agent, Agent Bangert, who recounted how YGA gave the US agents the impression of "knowing where to look and who was likely a part of [the USS Cole bombings]" and quickly located and provided witnesses for the agents to interview. The agents were unaware of how the witnesses were found, how they were treated prior to being transported for the interviews, if any threats or promises were made in exchange for their statements, or how the witnesses could be located for subsequent questioning, if needed. After the interviews, which took place in the presence of the YGA officials, the agents never confirmed the identity of the witnesses, visually or audibly recorded their statements, or photographed any of them. The agents would have exclusively relied on the YGA to provide them with these same witnesses if any further interviews were necessary.

> The agents testified that no witness was ever recalled for further questioning or was ever seen again by US agents.

The agents testified that no witness was ever recalled for further questioning or ever even seen again by US agents. As Agent Bangert testified, "the [YGA] never steered us in the wrong direction" but later added that several of the suspects detained by the YGA were later released without notice to the US agents. The agent opined that his impression was that YGA wanted to appear cooperative with US law enforcement because "they feared retaliation if they were later found out to be complicit [in the USS Cole bombings]." At the conclusion of the agent's testimony, the judge recessed for the day.

Day 4 consisted entirely of evidence presented to support the defense motion to exclude the hearsay statements of the nine YGA witnesses. These statements consisted mostly of eyewitness accounts of the minutes immediately before and after the attack on the USS Cole. The witnesses included the Port of Aden harbor master, tugboat pilots and captains, and bystanders at the harbor at the time of the explosion. After the last hearsay statement was reviewed and testimony about it was presented, the judge recessed for the day.

Day 5 was the final day of hearings for the week and involved the testimony of NCIS Special Agent Emley (testifying in "light disguise"—a black face mask covering a fake grey beard and Boston Bruins ballcap). He took part in the 2007 interrogation of Khallad, he thinks, because of his cultural knowledge of Islam and his linguistic expertise. Agent Emley, who in 2007 was relatively new to NCIS, said he considered Khallad to be important to the USS Cole bombing investigation because he "helped establish the bedrock of the plot itself."

Agent Emley testified that he knew Khallad had been held by the CIA and "subjected" EIT. He didn't know "what Khallad had endured" but was aware that EITs included waterboarding and "techniques that law enforcement officers were not allowed to use." Agent Emley said he only learned during the Khallad interrogation that the CIA also used unauthorized enhanced interrogation techniques. He said he never learned when and where the CIA last interrogated Khallad. Upon cross-examination, the defense lawyer asked about the process of preparing a report of the interrogation of Khallad in 2007. Agent Emley admitted that allegations of CIA abuse were segregated in a second document and were not included in the account of their interrogation. He recounted that after each day's interrogation, he, Agent McFadden and two other interrogation team members would "hotwash" (a term used to denote the sharing and comparing of information in a free and unstructured conversation) in their car on the way to a secure facility to write up the information obtained day. Their four-day encounter was reduced to a 60-page letterhead memo. Following the defense attorney's cross-examination and the prosecutor's redirect, the court went into an extended lunch recess followed by a closed session for the classified questioning of Agent Emley, which the public could not see. This testimony was part of the defense motion to help the judge decide whether to let the agents testify on the Khallad interrogations or to suppress their testimony. That concluded the open hearing sessions for the week.

In my opinion, I saw mixed hope and expectations in the courtroom. While it was hopeful to witness such zealous advocacy on both sides, I also noticed a mixture of legal strategies which simultaneously tempered and fueled the any expectation that justice can be served in these proceedings.

There is a palatable sense amongst the NGO observers and victims' family members that the defendants should be held liable for the acts they are accused of committing, but that they are also deserving of a fair judicial process that reviews the conduct of the system as well as their own behavior leading to the attacks.

Judge Acosta appeared to handle the proceedings fairly (if with a very light touch). He considered arguments from both sides of lawyers, but he also appeared reluctant to make difficult rulings that would help move the pretrial hearings along towards. At various times after motions were argued, rather than offer a ruling, the court would ask both sides to "sit down together" and put together an agreement to present to the court. While agreement on pretrial matters is the best way to move things along, there seemed to be very little chance that both sides would be able to make a deal on any issue—especially with motions relating to allowing statements regarding the detainee abuse, violations committed during the investigation, and issues regarding the commission's jurisdiction considering conflict-of-interest issues that continue to arise. 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.

> There is a palpable sense amongst the NGO observers and victims' family members that the defendants should be held liable for the acts they are accused of committing, but that they are also deserving of a fair judicial process . . .

# Olivia Powell

*Abd al-Rahim Hussein al-Nashiri*

**8 April 2023**

*Olivia Powell is a 3L at the George Washington University Law School, concentrating in U.S. National Security and Foreign Relations Law. She is also a final semester master's candidate in Security Studies at Georgetown University, where she focuses on Terrorism and Substate Violence. She is academically interested in the intersection of the international law of armed conflict with national security and human rights, and she previously interned at the Military Commissions Defense Organization.*

I traveled down to Naval Station Guantanamo Bay from April 8-15, 2023, as one of three NGO legal observers—the other two representing Georgetown University Law School and Indiana University Law School. We were sent here to observe pretrial hearings in the al-Nashiri Commission, regarding the 1999 bombing of the U.S.S. Cole. The NGOs viewed four days of the Commission from an observation room located behind windows at the back of the court, hearing sound on a 40-second tape delay to prevent the accidental spillage of confidential information. Also present in the observation room were three journalists, including Carol Rosenberg of the New York Times, and three escorts. On some hearing days, additional military personnel joined to watch.

This week was, according to one of Mr. Nashiri's defense counsel, historic. The hearings focused on two defense motions to suppress Mr. Nashiri and alleged co-conspirator Mr. Bin Attash's statements given to the FBI "clean teams" upon final arrival to Guantanamo Bay after leaving the CIA's RDI program. This week thus featured testimony from Agent Bob McFadden, an NCIS Agent who conducted post-attack interviews of suspects in Yemen, as well as Dr. Bruce Jessen, one-half of the psychologist team who recommended the Enhanced Interrogation Techniques (EIT) program to the CIA.

The hearings were canceled on Monday because of a technology issue, but they began in earnest on Tuesday morning. This week, all the testimony took place in a Remote Hearing Room in Northern Virginia but was broadcast to Guantanamo via CCTV. Mr. al-Nashiri was present in the courtroom at the beginning of the day, wearing a tan uniform and chained to the floor. After some initial discussion over discovery and the scheduling of witnesses, the day's primary testimony began. Mr. al-Nashiri voluntarily absented himself from the room before Agent McFadden took the stand. He did not return all week.

Agent McFadden testified primarily regarding his interview of Fahd al-Quso in January 2001. Al-Quso was killed by a U.S. drone strike in Yemen in 2012 and is thus unable to testify him-

self. Agent McFadden interviewed al-Quso during his time in Yemeni custody at the Political Security Headquarters, shortly after the U.S.S. Cole bombing. Yemeni guards were in the room during the interview. Mr. al-Quso seemed to have a personal connection to one officer, who whispered in his ear and kissed him on the cheek at the start of his interview—an interaction that led to a change in demeanor. Agent McFadden noted that he Mirandized al-Quso multiple times throughout the interview and that al-Quso verbally waived his rights on every occasion.

Mr. al-Quso described his relationship with al-Qaeda to Agent McFadden. He had traveled to Afghanistan in 1998 to train with al-Qaeda and had met with Bin Ladin at a guesthouse in Pakistan. He later attempted to travel to Singapore to deliver funds ostensibly to secure a new leg for Mr. Bin Attash, although Agent McFadden speculated that the funds were to be used in an operation. On the day before the U.S.S. Cole bombing, al-Quso attended what Agent McFadden termed a "terrorist luncheon"—a meeting of local jihadis and members of al-Qaeda core. Agent McFadden had asked al-Quso to identify pictures of suspected al-Qaeda members, including Mr. al-Nashiri, but al-Quso was unable to identify him, only mentioning Mr. al-Nashiri's aliases.

Agent McFadden testified that al-Quso was supposed to videotape the U.S.S. Cole bombing, but that he missed the event because he had not received the page in time; rather, the attack occurred while he was on the way in a taxi. When Agent McFadden asked if al-Quso had filmed the attack or knew who had done so, Yemeni authorities stopped the interview, alleging that this was information unknown to them.

The defense's cross-examination of Agent McFadden focused primarily on the relationship between al-Quso and the Yemeni officer who kissed him on the cheek. The defense also asked several pointed questions as to whether Agent McFadden believed that al-Quso's role was bigger than he let on. Given al-Quso's eventual death by a targeted drone strike, admitted contact with those intimately involved with the attack, as well as his "enthusiasm and knowledge" of the plan, the defense seemed to want to frame al-Quso as the "mastermind" of the U.S.S. Cole bombing rather than Mr. al-Nashiri.

On Wednesday, the defense called Dr. Bruce Jessen to testify about the CIA's Enhanced Interrogation Techniques (EIT) program. Notably, General Thompson, Office of Military Commission's (OMC) Chief Defense Counsel, was present in the remote hearing room. Dr. Jessen took the stand regarding two defense motions to suppress. He was provided with copies of his prior testimony, as well as "crosswalks" with unique identifiers and pseudonyms for confidential Black Site locations and CIA personnel.

The day began by first clarifying public misconceptions about the Rendition, Detention, and Interrogation (RDI) program and Dr. Jessen's role in it. He was adamant that he had not *designed* a program, but rather that he had provided recommendations to the CIA. Most of this first day of Dr. Jessen's testimony focused on his educational and clinical background, as well as his training in the military's Survive, Evade, Resist, Escape (SERE) program. He broke down the safety procedures present in SERE, as well as its underlying goals. The defense asked several questions on "abusive drift," or when interrogators go too far. Dr. Jessen noted that

"you don't have to be a sociopath" to break down in the system, expressing that abusive drift is a part of human nature and that there is a strong risk of it in the "real world" where there is no oversight.

Dr. Jessen also discussed how the SERE program transitioned into the beginning of the CIA's RDI program. He testified that in 2002, he was contracted with the CIA to deploy to Black Site Green, where he was involved in the interrogation of Abu Zubaydah after the DOJ ratified the proposed EITs. Perhaps the most compelling part of the day was when the defense counsel asked Dr. Jessen to demonstrate several of the EITs on her: attention grab, facial hold, and slap.

Dr. Jessen concluded his first day of testimony with a discussion of how psychological conditioning techniques were applied in the Black Sites. The goal, he stated, was to use the EITs to show detainees that their cooperation was the only way out of the situation. He discussed how interrogators and debriefers would use various reminders of the EITs to keep detainees compliant after they had moved to the debriefing stage, to remind them that they did not want to "go back to the hard times," as Jessen termed it.

The goal, he stated, was to use the EITs to show detainees that their cooperation was the only way out of the situation. He discussed how interrogators and debriefers would use various reminders of the EITs to keep detainees compliant after they had moved to the debriefing stage, to remind them that they did not want to "go back to the hard times," as Jensen termed it.

On Thursday morning, Dr. Jessen's second day of testimony, the conversation shifted to a broader discussion of the Black Sites. Dr. Jessen alleged that there were two concurrent programs running—the RDI program, and another, more unofficial program that engaged in "unauthorized tactics." He also discussed how memory is formed, including how recall can be influenced and made more difficult by heightened emotional states.

The afternoon of the second day focused on walking through the detention and rendition of Abu Zubaydah and al-Nashiri, including descriptions of the EITs and unauthorized techniques that were applied to them. Dr. Jessen discussed the environment of each Black Site: for example, Black Site Green had lights on constantly, no windows, loud music, no beds or sheets, and cold temperatures. When discussing the application of EITs, Dr. Jessen acknowledged that "any physical pressure applied to the extreme can cause severe mental pain or suffering," and admitted that some of the detainees may have been afflicted.

The final day of Dr. Jessen's testimony continued with a discussion of the specific EITs applied to Mr. al-Nashiri, his rendition through various Black Sites, and the process by which he was deemed mentally fit for EITs. Mr. al-Nashiri was again not present in court and asked to remain in his cell. A lieutenant

colonel with the JTF testified that Mr. al-Nashiri did not feel well from traveling the past few days to watch the hearings from a back room and that he had waived his right to appear.

The defense performed another demonstration, this time of confinement boxes—a technique that was used frequently on Mr. al-Nashiri. The defense counsel placed herself into the box for a few seconds, and then immediately asked for a comfort break. Dr. Jessen was concerned that she would ruin her suit by entering the box. I was struck by the juxtaposition of the reenactment with the testimony regarding the real thing—Mr. al-Nashiri was held for 16 hours at times and was usually held without clothing. Dr. Jessen also discussed how Mr. al-Nashiri was waterboarded, and the safety concerns that caused him to stop use of the technique on Mr. al-Nashiri.

On cross-examination, the prosecution asked Dr. Jessen to discuss the mental health of Mr. al -Nashiri and Mr. Bin Attash, seeking to get Dr. Jessen to claim that they did not manifest any clinical symptoms of PTSD. While the judge sustained an objection regarding this specific question, Dr. Jessen did testify to the lack of visible symptoms, although he admitted on redirect that PTSD is not always visible to a third party. The day concluded with questioning by the judge on the specific conditions in the Black Sites.

Overall, my week at Guantanamo Bay and the Commissions was fascinating. Having spent much of my academic career studying the RDI program and the War on Terror, it was very striking to hear firsthand testimony from someone who played such a vital role in it all. I had never heard the RDI program discussed in such depth, and the reenactments and testimony had a strong impact on me. I am glad that I could be a part of keeping these Commissions open to the public—we cannot learn from mistakes or achieve our national security goals if Guantanamo operates in the dark.

# Javier Ortiz

*Nurjaman*

**24 April 2023**

*Javier Ortiz is a third-year law student at Florida International University. He is interested in trial work and military justice, and will be joining the US Army JAG Corps upon graduation.*

**Editor's Note: Numbers in parentheses, for example, "(4)," indicate an associated end note.*

Naval Base Guantanamo Bay is an odd place. The people are cheery. The weather is tropical. Florida Keys Chic is the appropriate dress attire for most events around the island: flip-flops, a t-shirt, shorts, and your favorite sunglasses. Sunscreen is a must. A cold beer is not hard to find. Fishing excursions are cheap. And the island offers its visitors rocky beaches perfect for water sports or sunbathing. GTMO even houses a couple of restaurants that serve island cuisine. It sounds and almost feels like a resort if you can get past the barbed wire and "no photography" signs. It is easy to forget why one is even on GTMO—what need is there for human rights observers somewhere like this?

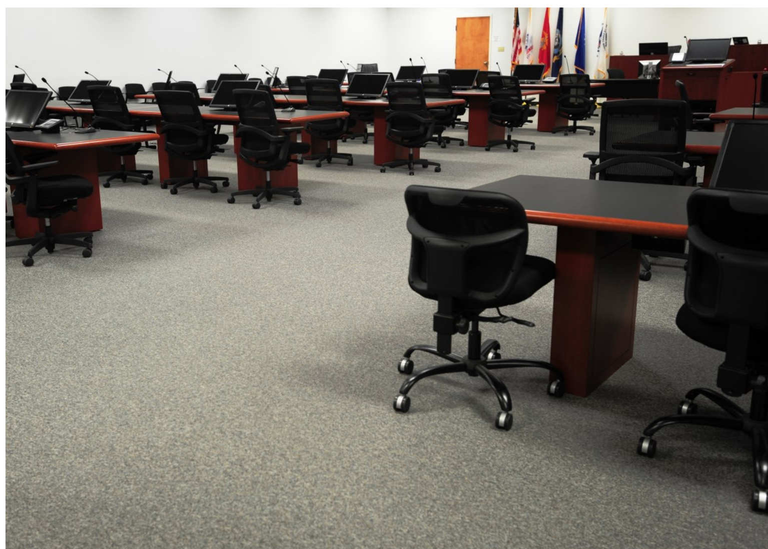
Observers from various organizations were invited to GTMO for the Nurjaman, et al. hearings the week of 24 April 2023: the National Institute of Military Justice, Judicial Watch, the American Bar Association, and Georgetown Law. Nurjaman and his co-conspirators, Mohammed Nazir Bin Lep and Mohammed Farik Bin Amin, are accused of orchestrating and carrying out the 2002 Bali Bombings in Indonesia. (1) The three men were detained in 2003, tortured in a black site, transferred to GTMO in 2006, and reinterrogated by an FBI "clean team." (2) After almost twenty years of confinement, in 2021, the United States referred charges against them. This week's hearings were the first in this case since their arraignments. The wheels of justice turn slowly, and for 20 years, they have not turned at all in this case. That is a shame for the Accused and the bombing victims' families and friends.

**Day 1—24 April 2023**

The Judge opened the proceedings to a full court at 9 am Monday. All three accused were present alongside their defense teams. Across the aisle sat the Prosecution. Behind the Defense, in a separate room, were the observers, several members of the media, and the families of four UK men who were killed during the Bali bombings. (3) The first matter the Judge addressed was his imminent departure from the case—he was assigned to head

the Navy's Defense Services Office West. These hearings would be his last. Next, the Defense moved to excuse an interpreter (referred to as "Interpreter 7") from the case. Interpreter 7 previously worked for the Defense but took a position as a Commission interpreter. The interpreter allegedly disparaged the Accused—the Defense argued that the Commission's continued use of Interpreter 7 "looked bad." However, when pressed, the Defense could not show any prejudice suffered from Interpreter 7's involvement in the case. On this basis, the Judge denied the Defense's motion.

The Judge moved on to the next dispute, as he put it, the Defense's request to receive "discovery of the discovery" from the Government. (4) According to the Defense, it has struggled to receive basic evidence from the Government, including but not limited to, witness statements, Accused statements, and other exculpatory evidence. To understand whether the Government's delay is justifiable or unjustifiable, the Defense requested basic information regarding the Government's attempts, if any, to comply with the Commission's orders compelling discovery. If an inexcusable delay occurred, it likely impacts the case's sentencing phase. Naturally, the Government opposed such oversight, citing the complexity of gathering documents from equity holders. It promised to produce additional documents after the hearings and conclude all discovery by January 31, 2024. The Defense rebutted: this sounds "third world to me; this is America, we can do it if we want to [nothing is] too big or too complex . . . go big or send these men home." The Judge took the Parties' arguments under advisement, and the Commission was adjourned.



**Day 2 —25 April 2023**

The second open session began with the Defense seeking to compel the discovery of witness statements, precisely, that of Imam Samudra, who was found guilty and executed in 2008 for his central role in the Bali bombings. Although complicated, the Defense's argument boiled down to three points: first, Nurjaman requested statements from Imam Samudra in 2007 to defend himself in a US Combatant Status Review Tribunal (6); second, the United States was investigating the Bali Bombing since 2002; and third, the United States interviewed other prisoners in the same prison as Imam Samudra in 2008 but apparently not him. Whether the United States procured such statements is presently unknown. The Prosecution represented that the statements do not exist after asking other government agencies and reviewing their files. That is a problem. Imam Samudra allegedly took sole responsibility for the Bali Bombings and even downplayed Nurjaman's involvement (if any). In essence, exculpatory evidence was deliberately spoiled or, at

best, negligently allowed to expire because the United States knew Imam Samudra would be executed in 2008. Still, the spoilation of evidence was not directly at issue; rather, only whether the Prosecution should be compelled to produce such statements, if they exist.

The Court then heard arguments on whether dismissal was appropriate for violation of speedy trial rights. The Government skillfully argued that the Defense had waived such relief after requesting a stay of proceedings when charges were referred and initially requesting the trial be scheduled for 2029. The only Defense team not to do so was Team Bin Lep, led by former Navy JAG Brian Bouffard. Still, arguments in favor of dismissal likely fail.

**Day 3 —26 April 2023**

On the last day of open Commission sessions, the Judge heard oral arguments on a series of motions to dismiss for interference with interpreters. The interpreters who are appointed to each defense team are government contractors (A2 Federal). A2 Federal assigns interpreters directly to a defense team or to a pool of interpreters who act as "backups" if the teams' interpreters are unavailable or if A2 Federal believes a change is necessary. This contractor controls the pool and team assignments, and therein lies the problem. The Defense argued that interpreters were arbitrarily swapped, without their knowledge or consent, by A2 Federal. In some instances, A2 Federal swapped out for inferior interpreters, causing a waste of resources and time. Most importantly, A2 Federal's surprise swaps made it challenging to foster trust with the accused.

The third point—the Defense's inability to effectively communicate with their client—affects the Accused's ability to defend themselves, thereby offending due process. Christine Funk, lead defense attorney for Team Bin Amin, argued that the Accused need dedicated interpreters to effectively inquire into the darkest aspects of this case. She needs to ask how the CIA raped her client, how they threatened to rape his mother, how long he was chained to a wall and forced to defecate on himself, if he was waterboarded or force-fed, for how many years he did not see the sun, or if he suffered other torture methods. "These are not conversations that happen in polite society," Ms. Funk said. The Defense needs a consistent team that understands the case and can be trusted by the Accused as their voice—the revolving door of interpreters the Defense has been afforded thus far makes it impossible to extract such delicate information from the Accused tactfully.

The Government's only rebuttal to Ms. Funk's argument was, "Whoever cuts the checks has control [over the interpreters]." Cutting checks cannot be why we abandon due process and American values. It should not strip someone's right to defend against the Government's allegations. If the Government is unchecked and fundamental rights erode, what difference is there between the GTMO commissions and a neighboring Cuban criminal court? (7) If we do not uphold our values in GTMO and afford all detainees a fair process, we set a dangerous precedent. All enemies of the state can be treated less than human, subjected to torture, and defenselessly held against their will indefinitely. And this is not to say that the Accused are palatable or even innocent men. If convicted, they murdered over 200 innocent civilians in cold blood. Still, a fair process is required because once one domino falls, others follow. Yet, dismissal is unlikely because of interpreter interference. Instead, the Judge should afford the

Defense operative control over interpreter assignments—an appropriate remedy. Additional hearings are scheduled in July but are expected to be pushed into the fall or early 2024.

*Endnotes:*

(1) 202 people were killed in the Bali Bombings. The subject accused are not the only individuals connected to the bombings. Indonesian authorities, working with the Australian Federal Police, arrested, convicted, and in some cases executed, other terrorists associated with the bombings.

(2) Evidence procured through torture is generally not admissible in court. FBI clean teams were utilized to procure admissible statements from GTMO detainees—most defense teams argue that all statements procured after torture occurred are still inadmissible as torture taints any future statements.

(3) Pictures of the men were taped to front-row chairs and could presumably be seen inside the courtroom.

(4) In simple terms, discovery is the exchange of evidence between parties.

(5) Equity holders are other government organizations possessing documents relevant to this case. Some of these include the CIA and FBI.

(6) The CSRTs, as they're referred to, were proceedings held in GTMO to determine whether detainees were properly designated as enemy combatants.

(7) Speak to any exiled Cuban: most know a political prisoner subjected to similar conditions to the GTMO detainees but for far less. My own Great Uncle, Rafael Daniel Castineira, was one. He spent over a decade detained and was regularly beaten, so much so that he limped for the remainder of his life. His great crime: openly denouncing Fidel's communist government.

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