

Dispatch from GTMO
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Day 1: Monday, August 19, 2013

At 0900, *United States v. Mohammad, et al.* resumed at Camp Justice in Guantanamo Bay, Cuba. The case, widely known as “the 9/11 trials,” involves charges against Khalid Shaik Mohammad, Walid Muhammad Salih Mubarak Bin ‘Attash, Ramzi Binalshibh, Ammar al-Baluchi, and Mustafa Ahmed Adam al Hawsawi. All five men are accused of plotting the attacks of September 11, 2001, that led to the deaths of nearly 3,000 people in New York, the Pentagon and Pennsylvania. This week will involve another pre-trial session, during which Colonel James L. Pohl, the presiding judge in this case, will hear pretrial motions from both the prosecution and the defense.

Upon arrival, the Non-Government Organizations (NGOs) received a general statement from chief prosecutor Brigadier General Mark Martins, addressing several issues that are likely to come up in this week’s proceedings:

- The topic of closed proceedings, or proceedings that bar any members of the public from the courtroom. The statement included assurances that sessions would only be closed when disclosure of relevant information to the public would “reasonably be expected to damage national security” as recently held in *United States v. Al Nashiri*, AE 092H. The statement was also quick to point out that 99 percent of proceedings have been open to the public, and even closed sessions are required to be transcribed, although large portions of the transcript may be redacted to withhold information potentially damaging to national security.
- Attorney-client privilege in the context of military commission proceedings, a topic that has come under fire since listening devices were discovered in conference rooms used by detainees and their defense attorneys. It was pointed out that the judge in the *Al Nashiri* case found that there had been no monitoring of attorney-client communications at Guantanamo Bay for at least two years prior to the ruling. The judge also ruled that there was no merit to allegations that the government had monitored the defense team’s Internet activity in relation to the case. However, the issue is ongoing. The judge’s ruling in *Al Nashiri* is not dispositive for *Mohammad* and the issue is sure to be brought up on an almost daily basis as the hearings continue, especially since we’ve barely scratched the surface on the attorney/client privilege.
- The legitimacy of military commissions compared to federal court trials. General Martins was quick to point out that military commissions are not a substitute for civilian trials, but rather a tool to be used in a narrow set of circumstances. Those circumstances involve a non-citizen that is an unprivileged belligerent who is captured abroad and charged with violations of the law of war. Whether the defendants in *Mohammad* fit this tight description is up for debate, but according to the official government record they do (although the defense continues to contest this finding).

We were through security in time to see the accused enter the courtroom in the order that they are listed on court documents (as they are listed at the top of this article). KSM, Mr. Bin ‘Attash, and Mr. al Shibh entered the courtroom wearing military jackets. Guards checked each of their chairs before bringing them into the courtroom. The accused were read their rights to appear and waive their appearance, which they acknowledged. Mr. Al Hawsawi’s lead attorney immediately requested that his client be allowed to return to his cell after the lunch break due to a preexisting neck condition that makes it uncomfortable for him to sit for extended periods of time. The judge questioned Mr. Al Hawsawi to ensure that he was voluntarily waiving his right to appear, and made arrangements for transportation during the lunch break.

The morning session was dominated by Mr. al Hawsawi’s defense team, which examined two witnesses in support of the defense motion to dismiss the case: first, James Fitzgerald, an FBI special agent assigned to the Counterterrorism Unit headquartered in New York. The defense established that the witness interrogated Mr. al Hawsawi at Echo 2 in Guantanamo Bay in January 2007 in relation to the 9/11 attacks, and is to be used by the prosecution in its case against Mr. al Hawsawi. The defense raised the issue of whether Special Agent Fitzgerald had properly assessed Mr. al Hawsawi’s proficiency with the English language at the time of interrogation. The examination was largely uneventful as it became clear that Mr. al Hawsawi was proficient in English and the witness most likely properly assessed the situation before the interrogation. By the time the witness left it was fairly clear that the defense had not made any progress. The defense called on another FBI agent to testify on the same topic and it ended with essentially the same results.

About the only memorable part of this examination came when the defense attorney attempted to raise a separate issue in the middle of his line of questioning. The government had turned over Special Agent Fitzgerald’s notes from the interrogation during discovery, but had blacked out all but a few lines from 50+ pages of notes. The government’s explanation for these “black outs” was that the document had become unclassified only after certain redactions were made. The defense argued that the entire document was relevant and had to be disclosed, as the complexity of the interrogation would be relevant to Mr. al Hawsawi’s ability to communicate effectively. The judge ultimately found that this was an entirely separate issue to be decided at a later time. The argument will most likely be heard tomorrow.

The rest of the morning session was spent discussing a Memorandum of Understanding (MoU) that had been issued to each defense team at a previous hearing in January. The judge had issued a protective order compelling each defense attorney to sign the MoU acknowledging that they understood and would comply with a separate court order regarding classified information held by the prosecution. To put it simply, each defense attorney was required to sign this MoU before gaining access to classified discovery from the government. To date only Mr. al Baluchi’s defense team has signed the MoU. The other four teams refused to do so until a ruling is made on a motion to change the language of the underlying court order to protect the classified information.

Mr. Bin ‘Attash’s attorney, Ms. Bormann, laid out two separate arguments for not signing the MoU in accordance with the protective order:

- That the MoU was superfluous given that sharing classified information is already illegal, plus other court orders were outstanding issuing the same requirements as the MoU.
- She could not ethically sign the MoU since the proposed changes to the underlying court order could be outcome-determinative and must be resolved first since this is a death penalty case.

Mohammad's attorney joined the fray and pointed out that the MoU requires the defense teams to act on behalf of their clients without showing their clients most of the evidence against them. The issue in his mind was trust. He asked the judge how his client was supposed to trust anyone associated with the American government after listening devices were found in conference rooms used by detainees and their attorneys.

Mr. Al Baluchi's attorney added that although he had signed the MoU, he had received some 400 extra words out of thousands of pages of documents, essentially mooting the MoU altogether.

After a lunch break, the hearing resumed with Mr. Bin 'Attash absent. When questioned, his attorney told the judge that he had remained in the holding cell due to an illness and could not be present in the courtroom. This derailed the arguments taking place before lunch and the issue became whether he was voluntarily waiving his right to appear by not showing up. The judge seemed to think that it was not the case, since Mr. Bin 'Attash expressed a desire to be in the courtroom but physically could not be there. The government petitioned the judge to transport Mr. Bin 'Attash back to the courtroom to voluntarily waive his appearance as Mr. al Hawsawi had done earlier in the morning. The defense fought this idea, stating that the hearing should be delayed until he was fit to return to the courtroom.

Since there was a dispute, the judge called on Mr. Bin 'Attash's doctor to testify as to his condition. After hearing testimony that Mr. Bin 'Attash was indeed suffering from an illness, the judge made the decision to close the hearing for the remainder of the day. We were ushered out of the building at roughly 1600. The hearing will resume tomorrow at 0900.