Dispatch from GTMO
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Day 2: Tuesday, August 20, 2013

At 0900 this morning, *United States v. Mohammad* resumed at Camp Justice in Guantanamo Bay, Cuba. Monday's proceedings got a bit bogged down between health concerns with Mr. Bin 'Attash and Mr. al Hawsawi and testimony that seemed to reinforce what we already knew about Mr. al Hawsawi's proficiency with the English language. Overall I would say that the tone of yesterday's hearing was one of frustration given that most of the motions on the docket never made it to oral arguments. Nonetheless, some progress was made today.

The only accused to make an appearance during the morning session was Mr. Binalshibh. The rest had elected to voluntarily waive their right to appear and the Commander acting as liaison between the commission and Camp 7 testified that they had been notified of their rights and signed a document stating that they were waiving them. After only two days I've noticed how much time is wasted attempting to account for all five of the accused. It's hard not to wonder how much further along these cases would be if the government had elected to try them separately.

Once we got past roll call, oral arguments began on the prosecution's motion for access to the defense teams' information. The topic of MoU's (which was already covered yesterday) came up again. This time the defense asked for clarification on whether or not MoU's signed by non-detailed counsel for the defense had to be turned over to the prosecution. It was pointed out that the prosecution has no equivalent duty to disclose MoU's to the defense. Mr. al Balushi's team, the only team to sign the MoU, provided evidence that the prosecution had deleted an e-mail containing the team's electronic copy of the signed MoU without reading it. The prosecution claimed that they had received two copies and deleted the extra, but one would think that with the way the government is clinging to classified documents, there would be some type of acknowledgment before today's hearing that they had received the only signed copy of the MoU.

The defense also pushed for clarification of the court order underlying the MoU. This is when I began understanding the extent to which the government's classification system is gumming up the works in this case. The defense claimed that three separate entities, including the court, CIA, and independent government agents, have three different interpretations on how to handle the classified documents in question. This presents obvious problems since the defense then has to choose which interpretation to rely on. If they choose to use the court's interpretation, they may be violating other government regulations set forth by the CIA. If they choose to use the CIA's interpretation, they could be in direct violation of a court order.

The defense pointed out that even leaked information that literally everyone in the world has access to at this point must be handled as classified. They are essentially in no-man's-land until the issue is resolved and they have some direction on how to handle the information. The only silver lining is that it's difficult to be in non-compliance when the government refuses to hand over classified information in the first place.

The topic of classification reared its ugly head later in the day when the defense presented its argument in relation to a motion to clarify open-source handling. This dealt with info that was not leaked and never belonged to the government, meaning that it was never classified and is technically in the public domain. With the current rules laid out by the OMC, the defense has to treat news articles, NGO reports, and the like as classified information. What that means is that the government is essentially finding a way to classify information that it never possessed in the first place. This again tied into the earlier argument regarding the handling of classified information. Mr. al Balushi's lead attorney pointed out that he wasn't even sure how to discuss a news story that was loosely related to his case with his wife. This presents obvious problems as the defense prepares for arguably the most important and complicated criminal case in the history of this country.

On another note, just after the lunch break, the court found itself discussing more unforeseen topics. Mr. Binalshibh notified his attorney that he wanted to return to the camp because of a problem with his lunch. It quickly became apparent that there were some underlying issues involving a previous court order. Apparently Mr. Binalshibh had complained some time ago about loud music and vibrations in his cell that made it impossible for him to sleep or focus on anything. Despite and apparent lack of evidence to back his claims since the defense teams were not allowed access to Camp 7 at the time, plus denials by the prison guards, the judge issued an order to the prison staff to either cease or continue to not engage in the complained-of behavior. Mr. Binalshibh alleged that the treatment had continued despite the court order. There was a clear disconnect between what Mr. Binalshibh was alleging and what the government was denying, showcasing yet another problem with denied access to the detainees for the defense team. The argument quickly deteriorated into a he-said-she-said debate until the defense agreed to speak to the prison staff about the issue before seeking another remedy from the judge.

The day closed out with oral arguments on a motion to allow client participation in his defense. Again, the defense needed clarification on an ambiguous rule regarding the extent to which its clients can view the evidence against them. Under the current rule the defendants are not allowed to view statements that they gave to the government after capture. Yes, you read that correctly. Detainees are denied access to transcripts of their own interrogations. As the defense pointed out, that makes it a little difficult for the accused to clarify or fix any errors that may appear. This presents a pretty formidable problem in any case, let alone a death penalty case.

I should mention that we don't see resolutions on most of these issues during the hearing. We're only hearing the oral arguments and the decisions are not handed down right away in most instances.

The hearing lasted a little longer than yesterday and we finished up at around 1800. We were lucky enough to have an hour to talk to General Martins again. There was one question in particular that I found especially interesting. General Martins had talked briefly about the United States' ability to indefinitely hold enemy combatants without trial for as long as there are hostilities between the U.S. and Al-Qaeda. So why are we going to the trouble of trying these five men when they have no legitimate chance of being released in the first place? There didn't seem to be much of an answer. Obviously because of the nature of the case we want to see justice handed down to those responsible, and General Martins harped on the importance of trials

for the rule of law in general. But I have to admit, watching these proceedings doesn't lead me to the conclusion that the government is all that interested in promoting the rule of law. I would have loved to hear more from General Martins but his understandably busy schedule forced him to leave before we could go any deeper on the topic.

Overall, today went fairly well compared to Monday. We were able to hear arguments from the docket instead of spending the day trying to figure out whether a detainee was leaving voluntarily or involuntarily, although there was still plenty of that. I'm sure there will be more of that tomorrow when we reconvene at 0900. I'll leave you with perhaps my new favorite quote, straight from the mouth of the honorable Judge Pohl (presiding over these hearings), in response to a statement made by the prosecution: "I don't find that to be logical, but logic is not a benchmark of this process."