

Dispatch from GTMO
Christopher A. Whitten '15
Seton Hall Law Center for Policy & Research

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Only KSM and Mr. al-Baluchi were present this morning at *United States v. Mohammad* resumed in Guantanamo Bay, Cuba at 0900. The Commander again testified in regard to the absent detainees and informed the court that two of them had expressed wishes to be present for the afternoon session.

We heard what I think was the most interesting and frightening issue so far this week, and there have been a lot of frightening issues so far. The hearing began with oral arguments on a motion to compel in regard to another motion to dismiss based on defective referral. The motion at hand asks the judge to issue an order compelling a former member of the Office of Military Commissions (OMC) to testify on a previous investigation into mail monitoring at GTMO. It appears from the defense's argument that a court order required Admiral McDonald, the previous head of the OMC, to investigate allegations of mail monitoring at Camp 7. It also appeared that he had left the investigation up to his legal assistants, who either led a poor investigation or did not investigate at all. Those assistants reported to Admiral McDonald that the investigation uncovered no illegal monitoring. Today, the defense alleged that this was not a true representation of the investigation and requested that the judge compel one of the legal assistants to appear in court and testify about what actually happened.

The defense argued that because the investigation falsely found no wrongdoing on the part of the guard staff, mail monitoring continued and gave them little or no access to the accused in this case. What complicates things further is the fact that we are dealing with a death penalty case. In order for a death penalty case to be referred to the judge, learned counsel, or counsel approved to handle death penalty cases, must represent the accused. The defense claimed that the failed investigation allowed a breach of the attorney/client privilege to continue, meaning that learned counsel had no opportunity to effectively represent the detainees. To sum it all up, the defense is saying that case never should have been referred to a judge because the detainees never had access to an experience death penalty litigator.

Assuming that the judge grants the motion to compel and the court hears testimony that the OMC allowed a breach in the attorney/client privilege to continue, and then grants the motion to dismiss based on the defective referral, the prosecution would be forced to re-file the case. The raised the problem that since the mail monitoring is ongoing, there would be no judge to compel the guard staff to stop. If the guard staff continues to monitor mail after the new case is filed, we're right back in the same position we're in now. It follows that the government would probably put a stop to mail monitoring on its own since it wants the accused convicted so badly, but it's still an interesting question to ponder. Of course, there's a good chance we won't even

have this problem since we don't know whether the judge will even compel the witness to appear. And even if he appears, we don't know that he would provide testimony that would get us to that point. But it's something that needs to be resolved as quickly as possible.

Since the court was already on the topic of monitoring, Mr. al-Hawsawi's team argued another motion to compel. This time the underlying issue was the search and seizure of legal documents from Mr. al-Hawsawi's cell during a meeting with his attorneys. The defense asked the judge to compel the liaison between Camp 7 and the commission to testify in regard to the seizures, who authorized them, and where the authority to conduct them came from. They argued that the seizure of what should have been protected legal documents amounted to unlawful influence, meaning interference with the defense counsel's ability to defend its client. In a separate but related motion, Mr. al-Hawsawi's attorney specifically requested an order halting unauthorized searches.

To complicate matters once again, the prosecution had previously alleged that the taskforce responsible for collecting the data from the seizures, as well as the other surveillance methods at GTMO, had been disestablished. This was apparently not the case as the defense claimed that testimony from the witness would rebut that claim. As always, we'll have to wait for the decision to come down before we find out if any of this will happen.

The rest of the day dealt directly with the attorney/client privilege issue that's been plaguing the proceedings since Day One of this case. KSM's lead attorney set the table by explaining a few circumstances where communications between he and his client would not be protected. First, any letter from KSM to a potential witness that would introduce his attorney as a person the potential witness could trust would have no protection. The guard staff at Camp 7 would have free reign to view that message and any of its contents, and possibly block it from being sent. Second, no media of any kind, even if perfectly relevant to the case, is protected. This means that if one of the attorneys sees a magazine article pertaining to the case and wants to ask his client about it as part of the defense strategy, the guards at the camp have the right to block it.

The attorney/client privilege was established to help foster a relationship between the attorney and client, and nowhere is that relationship more important than a death penalty case. Factor in that the detainees probably don't trust any legal counsel supplied by the American government, plus the well-documented surveillance issues at GTMO, and communication is about the only tool the parties have left to build any sort of trust. As KSM's defense put it, the government decided to provide the detainees with the most effective counsel possible, so let the counsel proceed so that these proceedings may be viewed as legitimate. The defense's plan was essentially to break down all barriers standing in the way of the attorney/client relationship and allow the process to work as it would in an Article III court.

The prosecution obviously saw things differently. It called on the judge to maintain the current system where guards meticulously search through any and all items entering and exiting the

detainees' cells for physical and content-based contraband. The prosecution specifically mentioned two separate times where contraband found on detainees put personnel in danger. The first incident mentioned involved a ballpoint pen refill cartridge hidden in the binding of a book possessed by a detainee. The second incident involved a detainee in possession of *Inspire Magazine*, apparently known to contain Al-Qaeda propaganda. The prosecution used these incidents as support for a robust security system where every last item, whether legal or personal, is inspected and subject to random search and seizure. In the prosecution's eyes, the only thing in the defense's proposed plan differentiating contraband from allowable legal materials would be the attorneys' judgment. It was also stated that giving the five detainees unrestricted access to communications, even with their attorneys, would be ludicrous.

After the prosecution ended its statement, the judge decided to end the hearing for the day. We left the courtroom at roughly 1630 to return at 0900 tomorrow.