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Reflections on the Hearings

In August of 2013 I had the opportunity to travel to Guantanamo Bay to represent Seton Hall Law's Center for Policy and Research as an NGO (Non-Governmental observer) at the 9/11 trials. In particular, I was able to watch one of many pretrial hearings in the case of the *United States v. Mohammed*, in which Khalid Sheikh Mohammed (also known as "KSM"), Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali (also known as al-Baluchi), and Mustafa Ahmed Adam al Hawsawi are named as defendants. The five defendants are accused of plotting the 9/11 attacks that led to the deaths of nearly 3,000 people in New York, Virginia, and Pennsylvania.

A few days before our flight to Cuba we received invitations to a barbeque hosted by the defense teams, so once we landed, unpacked, and got settled, we loaded into vans and headed to their quarters on the opposite side of the base. The defense team members spend most of their time preparing for the hearings or talking to the media, so it was nice that they allowed us to meet them and pick their brains for a little while. I know that not all Americans feel this way, but there is a fairly large number of people in our country who do not agree with what the defense teams do and I can understand why. After all, the defendants are accused of truly heinous crimes. But it is important to remember that the defense attorneys were hired and appointed by the government to uphold the law and make sure the prosecution actually proves its case. It is difficult to accept sometimes, but we have bought into a justice system where even the worst criminals are entitled to a fair defense.

The hearings resumed at 9:00 a.m. on Monday, August 13. Due to the nature and location of the case, hearings are normally held for one week each month. Getting into the courthouse is a lot like going through airport security. No cell phones or electronics of any kind are allowed and we had to go through multiple security checkpoints every day to get to the gallery. Everyone not directly participating in the trial sits in a separate room in the back of the building. We were able to see the courtroom but were screened by soundproof glass. Video and audio feeds were played into the gallery on a 40-second delay. A CIA official was stationed right next to Judge Pohl (presiding at these hearings), hovering over a button that cuts the feeds to the gallery in case either side discusses classified information. Luckily, the feed was never cut during my trip, although we were ushered out of the courtroom on Monday afternoon so the court could hold a closed session regarding the medical status of Bin 'Attash.

This was a bit concerning to me. The government has claimed from the beginning that these military commissions were designed to promote justice and transparency. They fly NGOs and the media down for every hearing so the world can see what is happening at the commissions. However, nobody even knew that the CIA would have the ability to cut feeds until the first time it happened. Even Judge Pohl was taken aback. I understand that the trials are dealing with a massive quantity of classified information. I have no

doubt that some of the classified information pertains to American national security. But if transparency is the goal, one would think that the man presiding over the hearings would have some idea that a third party has the ability to censor certain information. It did not take me long to realize just how lacking these military commissions are in transparency.

Most of the hearing was fairly dull, as most cases are in the pretrial phase. There was a lot of arguing by both sides regarding the order in which motions would be heard. A majority of the hearings would be typical in just about any court. But part of the trouble was something fairly unique to the commissions. There was recently a change in the numbering system used to classify motions, and neither side seemed to fully grasp the logic behind the new system, which is remarkable because we are not talking about lawyers fresh out of law school without any experience. Because the government is seeking the death penalty, it is required to provide the detainees with lawyers experienced in death penalty cases. Nonetheless, the people charged with organizing arguably the most important trial in U.S. history are having trouble coming up with a motion classification system that even the most experienced attorneys can understand. As you can imagine, it was even harder for those of us not involved in the case to keep track of what was happening.

Another problem that came up often involved detainee attendance at the hearings. The prosecution and defense agreed that the detainees only have to be present on the first day of each week of hearings. On any other day, they may voluntarily waive their right to appear. This might not sound all that important, except for the fact that the detainees also have a right to participate in their defense. If they decide not to or are unable to appear and do not voluntarily waive those rights, it is unclear what the next step is even though the only two options are to suspend the hearing or continue without the detainee. That came into play early Monday as al Hawsawi and Bin ‘Attash have medical conditions that make it difficult for them to sit through an all-day hearing. The question for the commission was whether the defendants were voluntarily waiving their right to appear when they did not attend due to their medical conditions. To me, it would seem logical that a detainee in that position cannot voluntarily waive that right, but the hearings continued anyway.

It is important to remember how much money the government spends on these hearings. A normal death penalty case costs a mind-boggling amount of money. The amount of money involved in the commission is no doubt, much, much greater because the government is paying for civilian defense counsel, not to mention the travel expenses to transport everyone to Cuba for every hearing. It is not likely that they are going to suspend an entire week of hearings if it is not due to a life-or-death situation.

This also raises another problem with the prosecution’s strategy in this case, which is the consolidation of five separate cases into one trial. If the government had decided to try each detainee separately, the absence of one detainee would not affect the other four. Instead, the commission spent valuable time litigating something that should have been figured out months ago.

Once the commission got past the issue of absent detainees, it addressed a number of motions that involved two of the issues that have been plaguing the commissions since they began: the piercing of the attorney/client privilege, and over-classification of evidence. One of the more controversial motions involved what are referred to has Memoranda of Understanding (MoU). In a previous hearing, Judge Pohl issued an order instructing the defense teams not to share with their clients any discovered classified evidence given to them as part of discovery. This presents a problem because the judge's order deprives the defendants of access to information that could materially alter their ability to advocate for themselves and therefore impedes their ability to exercise their right to participate in their own defense.

Again, I understand the need for some level of secrecy. I also understand that the government cannot hand over every piece of classified information to accused terrorists. The problem is that Judge Pohl's order will not even allow the detainees to view transcripts of their own interrogations. This means that they cannot point out errors made by interrogators or explain why they answered a certain way. There have also been allegations that the defendants may have given statements under duress after torture sessions, which makes this even more problematic.

The MoU is a document that the court ordered each defense team to sign, to acknowledge that they understand the previous order and will abide by its stipulations. However, as counsel for Bin 'Attash, Cheryl Bormann, indicated, the defense teams would have already been bound by the original court order so there is no need for the MoUs. She also pointed out that there are ethical problems surrounding the MoU. Most importantly, she noted that if she would personally be denying her client his right to participate in his defense by agreeing not to show him certain evidence against him.

Four out of the five defense teams refused to sign the MoU until their questions were answered and the language in the document was clarified. But it does not seem to matter whether they sign the MoU's. Yet rather than open the floodgates to classified evidence, however, after James Connell, Counsel for Al-Baluchi, signed the MoU, he has received less than 500 words of classified evidence from the government – a minuscule amount considering there are already thousands upon thousands of pages worth of documents pertaining to this case.

The problems did not stop there. The court addressed another motion pertaining to privileged communications between the attorneys and detainees. Apparently there have been issues with guards seizing what should have been privileged communications from detainees' cells during meeting with their attorneys. There seems to be a disconnect between what the court considers to be allowable communications and what the guard force at Camp 7 considers contraband. Again, this goes back to the right that detainees have to participate in their own defense. But it also raises concerns about how faithfully the attorney/client privilege is honored at Guantanamo Bay. This fundamental principal of our justice system was previously called into question after a well-documented

incident concerning the discovery of listening devices in meeting rooms used by attorneys to speak with clients.

Luckily, it does not seem like the problem pertains to *all* communication. Most of the arguments had to do with different types of media that attorneys try to share with their clients. For example, as media outlets continue to cover the commissions, it is likely that a publication such as *The New York Times* could write an article containing information relevant to the case. As KSM's counsel David Nevin explained, this could spark a memory or give the detainee a chance to clarify something that could potentially change the outcome of the case, or more likely the severity of the sentence. It would be classified as attorney/client communication because the attorney could probably write notes or circle certain passages of interest for the detainee to look at. As Mr. Nevin also pointed out, this type of communication would be allowed under normal circumstances. After all, it's not like the attorneys are trying to provide their clients with reading material for entertainment value. But under current rules, the guard force at Camp 7 has free reign to read and confiscate these materials.

As in the previous arguments, I can see the government's side here. There's a need for security in the detention camps. Nobody is asking the guard force to stop searches altogether. I don't think anyone would argue that it's perfectly acceptable to search for contraband. What's unacceptable is blatantly breaching the attorney/client privilege and seizing material relevant to the case.

Ms. Bormann brought up another good point in relation to this problem. In order for this to be considered a "fair" commission, the defense attorneys must be able to carry out their jobs. That cannot happen without some level of trust between the attorneys and defendants. The detainees will just wait until the trial is about to take place and then fire their counsel, slowing down this process even more. The question is, how do we expect the detainees to put any trust into lawyers given present circumstances? First off, the detainees are going to immediately question anybody appointed by the government to represent them. Second, the detainees are fully aware of the listening devices that were discovered earlier this year. Now the government is confiscating their communications with the attorneys. Not exactly the best climate for building trust.

Plenty of people would ask why the government is giving these rights to suspected terrorists in the first place. Again, my answer would be that this is our system. We give these same rights to the most heinous domestic murderers and sex offenders because that is what our Constitution guarantees. The government cannot simply throw out the rules when it is convenient. Although the government would clearly disagree, it does not appear that following the rules would be detrimental to the case. The government is not necessarily covering up a lack of evidence; it is covering up evidence that would be embarrassing if released to the public. And all it is doing is teeing up the defense for appeals if and when the detainees in this case are convicted. We should be demanding more transparency and more rule- following if speedy justice is the goal.

The last major issue to arise during my time at Guantanamo Bay revolved around continuing IT problems experienced by the defense team. Strangely enough, the prosecution does not seem to be experiencing any of the same issues as the defense even though their systems are on the same network. Problems for the defense include disappearing e-mails, files, and a complete inability to do work on the case on government computers. Nobody seems to be able to explain to them where their files went. There are whispers that the government is intercepting e-mails and seizing files, but any evidence of that would be controlled by the government. Each defense team testified that it was taking anywhere between two and ten times longer to complete motions than it would without the IT issues. It is nearly impossible to deal with a case this size with these types of delays, especially when the prosecution has fully-functional IT network at its disposal.

It has gotten to the point where the defense teams have been issued orders not to use their government computers to save any work-related files. They also cannot use government e-mail addresses, issued specifically for use in representing their clients, for privileged communications. To give you an idea of what they are working with, here is an explanation of how they collaborate on motions: The attorney working on the motion saves it to an external hard drive. He then gives it to one of his paralegals, who has to drive to a Starbucks or hotel lobby with a Wi-Fi connection. Remember, the attorneys cannot use the government's network for this. The paralegal then has to upload the information from the external hard drive to a personal computer. From there, it is e-mailed to the recipient's home e-mail address. Once that is complete, the attorney who drafted the motion e-mails the recipient and tells them to check their home e-mail account. It seems like we should have these problems solved by 2013. Instead, the defense has to face yet another problem in doing the job assigned to them by the U.S. government. This is a problem that would cripple a team of lawyers in any case, let alone a case this complicated.

I'd like to reiterate that the prosecution is not experiencing these problems. They are able to work at a normal clip while the defense is bogged down by this additional burden. But don't worry; the government is taking care of it. They're working on getting the defense team a completely separate network supposedly unmonitored by the government. It'll only take a minimum of 110 days from the time the government decides on one of three potential plans, finds the staff and budget to do it, and hires supports staff.

I'd like to conclude by addressing an issue of my own that has been on my mind since I first arrived in Guantanamo Bay. I'd heard the criticisms of this military commission in the news and I'd read some of the transcripts. I knew that I was walking into something difficult to follow closely. But the sheer amount of delays, reference to prior and future motions that NGOs and the press cannot have immediate access to, closed hearings, and general over classification in regard to this case make it nearly impossible to follow the trial in a detailed fashion. I had my eyes glued to the proceedings for four days and I still did not have a grasp on something as simple as the numbering system used for the motions. Apparently the court doesn't either since they spent about a half hour arguing over how to properly name and file motions, joinders, and supplements. You would

think that an agency charged with trying one of the most important trials in our country's history would have the competence to come up with a simple, understandable numbering system. You would also be wrong.

In addition to that, I can't tell you how many times the judge has stopped an attorney mid-sentence to take a 15-minute break that turns into a 30 minute break because of some unforeseen problem. We had to stop the proceedings twice on the second afternoon so two detainees who had voluntarily waived their right to be present at the hearing could be brought in during an oral argument instead of during the lunch break as the judge had planned.

So what's my point? Accessibility is more important now than it's ever been. This is exactly why we need the media and NGOs at Guantanamo Bay. Sure, transcripts are published on the OMC's website, but transcripts can't paint a full picture of what is happening here. They don't describe the frustration on Judge Pohl's face as he deals with yet another unforeseen delay in the hearing. They don't show the interactions between the detainees and the defense teams. And they're certainly no substitute for the personal meetings we've been able to have with both the defense and the prosecution. So we need to be here. This isn't some charade so the government can say they gave the public access. We really do have access. For as much as we complain about government secrecy, this is one of the few chances we have to peek behind the curtain and see what's really going on down here. How many times do you think the government is going to charter flights and invite members of the public to a military base just to criticize what they're doing? So we have to keep taking advantage. We have to keep coming down here until there's a resolution. This opportunity is simply too important to pass up.

I'll leave you with perhaps my new favorite quote, straight from Judge Pohl. He said this in response to a statement by General Martins. He said, "I don't find that to be logical, but logic is not a benchmark of this process."