

Dispatch from GTMO

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Today ended a week of pre-trial hearings for the five men accused of plotting the 9/11 attacks. Court began promptly at 9:00 am with all of the accused absent from the proceedings. Attorney David Nevin, representing Khalid Sheikh Mohammed, took the floor first, and asked the judge to reconsider the motion-schedule set in place over the next few months. Presiding judge James Pohl was not happy. "Certain issues keep being kicked down the road, that prevent things happening," he said. "This got kicked down the road for 10 years," David Nevin replied, "and now we are expected to go in over-drive? There are many, many structural issues that must be litigated and this stuff takes time . . . we are in untested waters." Then Cheryl Bormann took the floor. She explained that should the judge leave the current motions-calendar in place, she will have only one paralegal in October. After one hour, the court resumed hearing Motion 155.

Ronald Bechtold, Chief Information Officer for the Secretary of Defense and a witness for the prosecution, returned to the bench. He explained that the government was in the process of doing routine maintenance to their computer systems around the time of the replication process and that the maintenance may have interfered with the successful transfer of defense files. Approximately 10 minutes into Mr. Bechtold's testimony, an alarm went off in the courtroom. Someone had brought a cell phone into the courtroom that was connecting to a satellite.

After a 10-minute recess, court resumed. Mr. Bechtold told the court that in his professional opinion, the defense teams should have been using a logging feature on their computers to safeguard their files. "If you really want to assert positive control over your data, why not use the tools already built into technology today?" he asked.

Over the next several hours, the prosecution questioned Mr. Bechtold regarding his interaction with the Office of the Chief Defense Counsel, whether Starbucks had a safer network than the government and whether providing the defense with a brand new server would be both practically and economically feasible. The testimony was largely duplicative of earlier statements made by both Mr. Bechtold the day prior as well as all of the other witnesses called to the stand. Judge Pohl appeared angry and admonished the prosecution for failing to raise any new arguments.

The climax of today's events came during the cross, however, when defense attorney James Connell cross-examined Mr. Bechtold. Mr. Connell asked Mr. Bechtold questions that seemed totally irrelevant, such as where he has been while here in Guantánamo and about when he is going to retire from his position in Washington D.C. Judge Pohl sustained several objections raised by the prosecution on relevance grounds and appeared even angrier than he had been before. "What is it that you want?" he asked Mr. Connell abruptly. "Parity, Judge," the defense said. "Parity?!" Judge Pohl started yelling. "I thought you don't want what the government has!" At that point, several members of the defense team looked at one another. Several of us in the gallery looked each other, too.

It was clear that Mr. Connel had dug himself into a hole. “Well, not exactly,” he said. Over the next 30 minutes, Connell attempted to explain what he meant by parity, though it was clear that he was fumbling. “Let me ask you this question,” Judge Pohl said. “Do you believe that you need to follow Colonel Mayberry’s orders or mine?” he asked. Connell appeared confused. “Well, I am learning about the military system every day,” he said. “Look,” Connell said. “What I am trying to get at is human error.” “Oh,” said Judge Pohl, “so do you want me to take judicial notice that humans make errors?” “What is it that you want?” Judge Pohl asked over and over again.

While today’s testimony was largely repetitive, over the course of the day, the court saw the defense “tank.” They were unprepared, off-topic, and could not clearly articulate about what they were requesting. First, they asked for a full abatement of the proceedings. Then, they asked for abatement only if Colonel Mayberry did not lift her orders to stop using the government server. Then, they asked for an abatement based upon a hypothetical timeline. The defense attorneys had difficulty understanding some of the most basic elements of witness testimony: that the government monitors emails for malicious *logic* as opposed to malicious *content* and that Colonel Mayberry issued a *directive* to defense teams as opposed to an *order*. It was pathetic. People in courtroom and people in the gallery were becoming very frustrated.

At 6:00 p.m., David Nevin tried to save the defense’s motion. “It’s like our house burned down,” he said. “That’s ridiculous,” said Judge Pohl, “because if a house burns down, it loses total functionality. You did not lose total functionality.” Nevin and Judge Pohl went back-and-forth about the defense’s faulty comparisons. Then Judge Pohl asked Mr. Nevin what legal standard governed the motion. “Is it a reasonably secure standard? A 100 percent secure standard? *Do you even have a legal standard?*” Judge Pohl asked. He was unable to answer the judge’s question.

Today’s hearing was an embarrassment. It was slow-moving, largely circular, and seemed to miss the defense teams’ bottom line: that confidentiality has been breached and that, as a result of technology glitches, they are unable to practice the law and defend their clients. Who has the defense files, why they were taken and when they will be returned are still unknowns.

Court ended at 7 p.m. with many unanswered questions.