

Dispatch from GTMO

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Day 4: September 17, 2013

(Court in Recess)

Day 5: September 19, 2013

Court was back in session after a day-and-a-half recess. Two of the detainees, Ramzi Ben al Shibh and Walid bin Attash were present in the courtroom, after having not waived their rights on Monday to be present at this week's hearings. Judge Pohl began by hearing the testimony of Commander Masuco, who verified that he had read to the three detainees not in the courtroom their rights about bring present. Then, Judge Pohl allowed attorneys representing Ramzi Ben al Shibh to come forward.

The attorneys stated that their client did not intend to be forcibly removed during Monday's proceeding; rather, he wished to draw attention to his inability to "meaningfully participate" in the hearing. "He was attempting to describe ongoing abuse that affects his ability to meaningfully participate in his defense," his counsel argued. Judge Pohl rebuked them: "I don't care, Counsel – that's not the way my courtroom runs. I do not litigate with the accused." "Even if my client is present in the courtroom," counsel argued, "he cannot sleep. He cannot think." "Our default position," Judge Pohl said, "is that JTF does no wrong. Mr. Ben al Shibh has been found not to be delusional." "Well, Your Honor," counsel continued, "I would like this commission to ensure that orders are being complied with. What is happening has adverse consequences on the attorney-client privilege." Back-and-forth between defense counsel and Judge Pohl on this issue lasted for almost 25 minutes.

During the rest of today's hearing, chief defense counsel presented evidence to support Motion 155, which concerns the defense teams' ability to work off a secure electronic server. The defense counsel testified that the problems they have experienced for months with e-file sharing and e-communication have only gotten worse. They discussed extreme difficulty recovering files off of the CODC's "O" and "H" drives, which contained information about witnesses and case strategy. Defense lawyers, including Cheryl Bormann, stated that the drives contained "very privileged information" that were "tanked." They asked Judge Pohl to abate the pre-trial hearings of Khalid Sheikh Mohammed and four other 9/11 co-conspirators, stating that they cannot reasonably move forward until they are equipped with technology that allows them to share files in a way that honors the attorney-client privilege.

The first witness called to the stand, Colonel Karen E. Mayberry, testified that the defense will likely not be able to recover their files until the end of the year. She testified that her April 2013 order for the defense to cease using the government shared server remains intact until further notice. Mayberry stated unequivocally: "We've got more issues now than we did then." She testified that by April 4, she "no longer had confidence in the system that we [the government] use[s] to protect the material. We had to stop using the system."

Defense files became unsecure, she explained, during a process of "replication," when the government tried to move massive amounts of e-files from Washington D.C. to Guantánamo Bay. Some documents

vanished, others that were never before seen turned up, and apparently, the prosecution was even mistakenly given access to defense files at one point during the transfer.

Colonel Mayberry suggested that the prosecution may have gained access to real-time monitoring of defense files collected in the replication process, including 1) the name of the person who accessed a particular file; 2) the location of the user; 3) the address of the user; 4) the search terms used; and 5) the duration of time spent by the user accessing files. The defense testified that when opening some of the files, attorneys noticed a “date of modification” that did not coincide with days that they had worked on the documents. They also speculated that upwards of 541,000 emails may have reached people outside the attorney-client privilege.

Much of today’s discussion revolved around how, as a result of the glitches in technology, defense lawyers have had to work on personal laptops after normally-scheduled business hours and share data on home servers and public servers, like those at Starbucks. Both the prosecutor and the judge questioned whether the defense’s system violates attorney-client privilege even more than the breaches happening across government servers. They also question which system – using the government server with glitches or using a public server (like one at Starbucks) – best comports with American Bar Association (ABA) Rule 1.6, which states that attorneys “must protect confidentiality.”

Over the course of today’s hearings, key themes and questions regarding confidentiality, professionalism and security emerged. Yet, there also was significant discussion regarding the extent to which the present military commission is truly adversarial. From a law student’s perspective, the events that transpired emphasized the heavy-handedness of the government. Why, for example, didn’t the government acknowledge what was happening to the defense? Had the government conceded the defense’s point, it would not only have created a more robust hearing, but it would have been a signal that these military commission proceedings are fair and credible. “I’m not asking for a different set of rules. I am asking for rules that work,” Colonel Mayberry said as the day closed out.

In the evening, General Martins met with us to discuss his outlook of the use of military commissions to try this case. Speaking in absolutist terms, he told us that the present military commission is not a new type of proceeding – that it has been around since the 1700’s and that significant precedent exists with respect to how to try cases such as the one he is currently engaged in. He explained that military commissions may, in some cases, be more lax with respect to following the Rules of Evidence and that they uphold the “same values espoused in civilian courts.” Interestingly, he added that jury members in military commissions are no smarter or more qualified than jury members in civilian courts (a sharp distinction from that which we heard a few days ago) and that military commissions are adversarial in nature. General Martins provided an interesting perspective on today’s events that, although not very detailed, displayed his commitment to the current processes at Guantánamo.