

Monday, October 22, 2012

Hearings began in GTMO for Abd al-Rahim Hussein Muhammed Adbu Al-Nashiri, accused of participating in the attack on the USS Cole in October 2000, under threat of the storm that became Hurricane Sandy.

Tuesday, October 23, 2012

I arrived in Guantanamo Bay, Cuba with few expectations and a lot of curiosity. When we assembled on the morning of the first day of proceedings for Mr. Al-Nashiri, the bugle call and national anthem caught me off guard. And as the Star Spangled Banner began to play, I found that I had mixed emotions. Never before can I remember listening to our national anthem with feelings other than pride or gratitude that I could call myself an American. That day, in addition to those feelings of pride and gratitude, I also felt doubt. Doubt that the US was doing the right thing here in Cuba, whether we were living up to American standards. It was an uncomfortable feeling, but it also reminded me why I was there, why NGOs are invited to witness the proceedings. We go to encourage justice and point out where justice is lacking. We are there to question the proceedings and promote legitimacy.

After the anthem concluded, our group of NGOs, military commission personnel and military escorts made our way to the courtroom. We zipped quickly through the security checks and entered the gallery. We were followed by family members of victims. Those missing from our number however were the media. Although there were a number of journalists in GTMO last week for the hearings of KSM, only three remained in Camp Justice for Mr. Al-Nashiri's hearings and none attended the proceedings on Tuesday.

As many people may be aware, observers in the gallery are not privy to a live audio feed of the proceedings. Although we view the courtroom through large windows, our audio feed is delayed by 40 seconds to ensure no classified information escapes the hearings. Instead, televisions play the proceedings on a 40 second delay. Although I wanted to watch the arguments live through the windows, I found myself needing to focus on the television screens in order to keep up. The strangest part of this delay comes when the judge enters and leaves the courtroom. We relied on visual cues only to rise when the judge enters and leaves, and had to remember to stop ourselves from repeating the same motions when the audio came through 40 seconds later.

Right to be Present

Prosecution began Tuesday morning by addressing Mr. Al-Nashiri's absence from the courtroom (Motion AE099) and called an Assistant Staff Judge Advocate to testify about her conversations with the accused that morning. The ASJA explained that she had gone to speak with Mr. Al-Nashiri and had explained to him his right to be present during the proceedings, and that when asked if he wished to attend, the accused responded that no, he would not like to and then signed a form to that effect. Mr. Al-Nashiri also included a brief note in Arabic explaining that the

reason he was not attending was to protest the use of belly chains during his transportation to the courtroom. Prosecution then submitted that belly chains would not be used in the transportation of Mr. Al-Nashiri and that the accused was aware of this fact.

Under the law, Mr. Al-Nashiri must “knowingly, voluntarily, and intelligently” waive his right to be present at the commission hearing. Prosecution argued that the waiver Mr. Al-Nashiri had signed that morning was not a sufficient waiver, as it was not clear that the accused knew that he could change his mind at any time and attend the proceedings. Prosecution continued that the commission must impose every presumption against the waiver and that because this waiver was not in open court, it was not sufficient.

Defense began right from the start dropping the term “torture” whenever possible. They argued that Mr. Al-Nashiri was not exercising his right to be present because of the use of belly chains and the re-traumatization of torture that occurs with their use. Defense then requested that the commission defer determination of this issue until a medically-appropriate examination can be made of the accused, in order to determine what the full effect of belly chains would be. Defense suggested that if Mr. Al-Nashiri’s current waiver was not sufficient, the parties and Judge Pohl could visit Mr. Al-Nashiri in his cell to avoid the use of chains altogether. Judge Pohl was not receptive to this argument.

Judge Pohl expressed concern that by allowing Mr. Al-Nashiri to choose to waive his right to be present, that the commission was perhaps allowing the accused to frustrate the case. Defense disagreed, noting that this waiver is allowed under the law.

Next, the parties discussed how often Mr. Al-Nashiri would need to be reminded about his right to be present. It was noted that the accused had not been present in front of Judge Pohl since April of this year and that without establishing a particular time limit, this was considered to be too long. Judge Pohl expressed an interest in being on the “safe side,” to which Defense indignantly replied that a forced extraction of Mr. Al-Nashiri would not be acting on the “safe side” for the accused.

Judge Pohl then addressed the motion for continuance to allow for a medically-appropriate examination of Mr. Al-Nashiri (AE122) before the Judge ruled on AE099. Finally, Defense encouraged Judge Pohl to consider the commission’s order in the KSM case regarding presence. Defense noted that although it did not contain precedential value, the commission could still consider it as persuasive authority.

After the arguments were completed, the commission recessed for 15 minutes, after which Judge Pohl returned with his rulings. Prior to giving his decision, however, Prosecution asked to make an additional point, which the Judge allowed. Prosecution made clear that in April, the instructions given to Mr. Al-Nashiri regarding his right to change his mind even after he declined to attend a proceeding were not the same as the current instructions. As a result, Prosecution was even more adamant that Mr. Al-Nashiri be brought to open court to waive his right to be present.

Judge Pohl then proceeded to deny AE099, finding that a waiver of presence was allowed in this case. He did find, however, that Mr. Al-Nashiri needed to be reminded of his rights in open court before these proceedings could continue. The commission was recessed for the remainder of the day. Although Defense repeatedly asked for a medical assessment prior to any forced extraction of Mr. Al-Nashiri and also indicated that they had additional information that they would like to share with the commission in camera, Judge Pohl denied both and ordered Mr. Al-Nashiri to be present at the next session of the commission. Judge Pohl did order Prosecution to help Defense meet with Mr. Al-Nashiri that afternoon, in order to inform the accused of the commission's decision.

Because the proceedings concluded so early in the day, we were able to tour some of the island. We asked for a "windshield tour" of Camp Delta, however our request was denied. Due to preparations for the hurricane, they couldn't accommodate a tour through the camp. Although understandable, it was still disappointing.

We visited Radio GTMO and, most interestingly, Camp X-Ray. We were only able to look at the camp through the windows of our van and were forbidden to take any pictures. The camp was incredibly overgrown and in disrepair. It was almost as though they hoped the plants and vines would continue to cover the camp until there was nothing left to see. What struck me most about Camp X-Ray was its size – it was so much smaller than I expected. I knew I would see the fenced in cage-like cells, but it didn't make me feel any better to witness it. There is a part of me that wonders how many people would be relieved if Hurricane Sandy completely obliterated the remnants of Camp X-Ray.

Wednesday, October 24, 2012

Amid questions of evacuations, hearings for Mr. Al-Nashiri continued on Wednesday. It was apparent that all sides wished to make progress, rightly concerned that this would be the last day of hearings for the week.

Waiver in Open Court of Right to Presence

Mr. Al-Nashiri was present at the commission hearing and appeared calm as he entered. He was handed a suit jacket by Defense, which he wore atop his clothes. The accused immediately expressed dissatisfaction with the chair provided for him, which was a stationary leather chair. That chair was quickly exchanged for a desk chair like those that counsel sat in.

Soon after Mr. Al-Nashiri arrived, Defense and Prosecution met with Judge Pohl in his chambers, presumably about scheduling. When both sides returned to the hearing room, Judge Pohl began the process of reminding the accused of his right to be present. Judge Pohl asked him numerous questions regarding his right to be present to which Mr. Al-Nashiri responded that he was aware of these rights. The accused then intimated that perhaps he wasn't coming to the hearing because he may have been facing threats from the camp. Judge Pohl was immediately

concerned that perhaps Mr. Al-Nashiri's waiver was no longer voluntary due to this information. Mr. Al-Nashiri then asked to give a statement, which the Judge permitted.

According to Mr. Al-Nashiri, it has been ten years since anyone has heard what he had to say. He wants to continue to attend all hearings and defend himself; however he expressed concerns over the uncomfortable chairs, bad car rides that cause him to be sick, attacks from prison guards, and belly chains. These complaints were met with skepticism and irritation by family members of victims of the USS Cole bombing, seated in the gallery with the NGOs. Mr. Al-Nashiri then requested that Judge Pohl tell the guards to stop the aggressions and thanked him for treating the detainees well while they are in the court. Although he wanted to continue, Judge Pohl stopped Mr. Al-Nashiri from bringing up issues that could be raised by counsel. The accused heeded Judge Pohl and concluded by stating, "I do intend to attend all future sessions, but if the guards do not treat me better, I have the right not to come and let the world know that the judge sentenced me to death because I didn't show up to court due to chains."

Prosecution then asked Judge Pohl to reiterate to Mr. Al-Nashiri that he has a right to change his mind and attend on-going hearings that he initially declined to attend. When Judge Pohl asked the accused whether he understood this, Mr. Al-Nashiri agreed that he did.

Statements Received by FBI from Yemeni Government

The commission moved next to a motion to compel statements obtained by the FBI from the Yemeni government during its investigation of the USS Cole bombing (AE115). According to Defense, immediately after the bombing, the Yemeni government took statements from at least 35 witnesses to the attack. When the FBI arrived to conduct its investigation a few months later, Defense believes the FBI received all of these statements in order to conduct additional interviews of these witnesses. Because it was the intention of the FBI to use the investigation to prepare for an Article III court, Defense found it incredible that the FBI would not have retained the statements shared by the Yemeni government. Defense then requested Judge Pohl order the Prosecution to turn over the statements or provide a witness to explain why the statements cannot be turned over.

Prosecution argued that Defense had grossly mischaracterized the issue and that all statements had been turned over or would be turned over once cleared. Judge Pohl then granted the motion, which simply asks Prosecution to turn over any statements they have in their possession, which the Prosecution had contended they had already.

Information Surrounding Drone Attack on Al-Harithi

Next the court addressed Defense's motion to compel information regarding the death of Quad Salim Siman Al-Harithi, particularly the information that indicates the reason for killing Mr. Al-Harithi. According to Defense, there is public source information that suggests Mr. Al-Harithi was targeted by a drone strike because he was the mastermind behind the attack on the USS

Cole. If this is true, this information could be exculpatory and mitigating for Mr. Al-Nashiri. Defense is concerned that because Prosecution has expressed the opinion that the information will not be mitigating, that perhaps Prosecution has not shared information in their possession with Defense.

Judge Pohl questioned Prosecution, asking whether they are making determinations on the documents' relevance before turning them over to Defense. Prosecution denied this, noting that they were not making decisions based on mitigation. Defense then concluded, asking the court to order Prosecution to review any dossier prepared on Mr. Al-Harithi and double check with all the agencies that requests for information were sent to.

DIVO Funding

The next motion in front of the court was AE107, a motion to compel the Convening Authority to fund Defense-Initiated Victim/Survivor Outreach (DIVO) Liaisons. Defense argued that this was a way for the families to speak to Defense and that there were three witnesses necessary for the argument that the DIVO funding motion should be granted. However, there have been problems with each of these three witnesses, Joy Ehlenfeldt, Tammy Krause, and Karen Loftus. Ms. Ehlenfeldt was denied as she was deemed not necessary or relevant to the determination of AE107. Ms. Loftus was denied as not necessary as a fact witness to determine AE107. Ms. Krause was denied as not necessary as an expert witness to determine AE107.

Defense explained that they had received an email relating to a different witness that laid out the preferred procedure for requesting experts. Under this procedure, the Defense was to request approval from Prosecution, and then submit the request for fees to the Convening Authority. Here, Defense argues that Prosecution approved Ms. Krause and then the Convening Authority denied the funding request. Prosecution responded, arguing that the email providing the procedure in question related to an expert contractor that the party wants to produce as an expert witness. As this was not the case here, Prosecution argued that Defense failed to follow the appropriate procedure.

At this point, Judge Pohl made the decision to hold off on AE107 until the motions to compel witnesses are addressed. Both sides decided they would stand on their pleadings for the motion to compel witnesses for AE107, with additional ex-parte submissions.

Presumptive Classification

The court then moved to discuss AE112, regarding presumptive classification. Because this had been addressed in the KSM proceedings the previous week, Judge Pohl asked the parties if this remained an issue. Prosecution informed the court that they had offered the same order as had been proposed in the KSM proceedings. The modification would remove the three mentions of the term presumptive classification. Under the previous protective order, Defense was required to presume that everything Mr. Al-Nashiri said was classified. After this change, Defense would

still need to treat information that has been classified as classified, however it would release Defense from treating unclassified information as classified. Both sides agreed to this change; however Defense expressed concern that Prosecution may take a long time to file the new order. Judge Pohl then asked the Prosecution to file an amended protective order within two weeks; otherwise he would assume the parties remained operating under the current protective order. At that point in time, Judge Pohl would be forced to address the merits of the existing protective order and the argument of why it should be amended and then proceed to amend it himself.

The commission then recessed for lunch and prayers.

Due Process Violation Resulting from Lack of a Neutral Convening Authority

The court resumed after lunch with AE177, a motion to dismiss due to due process violations as a result of a lack of a neutral convening authority. Defense stated they were making a systemic argument, not an as-applied argument. Defense pointed out that the Convening Authority has conflicting roles and duties, which range from the decision to charge to selecting the members to selecting the chief judge to funding the trial, judiciary and defense offices to, finally, making the decision on post-trial clemency.

Defense argues this system can work in courts martial because there is an aim of “good order and discipline” that is not found in military commissions. Courts martial are conducted by the Commander, who must consider things like the efficiency of the unit to fight wars. Here, the Convening Authority does not have these other functions.

Defense then pointed out that the MCA does not actually mandate these procedures, and there is no indication that there must be only *one* convening authority or that other parties, such as the judge, cannot take over certain functions to maintain the neutrality of the convening authority. Defense referenced Ms. Krause, of the earlier motion on DIVO specialists, pointing to the fact that the Convening Authority had the ability to deny funding to a witness needed to prove that the Convening Authority was wrong in that case.

Prosecution rebutted Defense’s challenges, arguing the structure does not violate due process. Prosecution pointed out that the decisions of the Convening Authority can and have been reviewed by Judge Pohl. Finally, Prosecution argued that the cases relied upon by Defense were either mis-cited or inapplicable in this case.

Referral of These Charges Were Not in Accord with Applicable Law

Next, the Court heard Defense’s motion to dismiss, arguing that these military commissions do not have jurisdiction over this case. Defense contended that Military commissions are limited in jurisdiction, extending only to those hostilities subject to the laws of war. When the USS Cole was bombed, President Clinton made clear that this was a peacetime attack and Congress did not declare war. According to Defense, because it is up to the political branches to determine when

the country is “at war,” this statement by the President is binding on the courts. Therefore, Defense argued, the MCA does not reach these charged offenses. Defense does note that this does not mean Mr. Al-Nashiri cannot be charged, and that he could be tried pursuant to the pending indictment in the Southern District of NY, under federal law.

Defense argued that the Convening Authority, Admiral McDonald, had “rewritten history,” by finding that the US had been “at war” at the time of the USS Cole bombing and bringing these charges against Mr. Al-Nashiri. Instead, Defense claimed, there is a need for certainty and consistency of history. Defense expressed concern that if the United States goes ahead and “short-circuit[s]” the procedures that are in place, that other countries will as well. When asked by Judge Pohl whether this decision would really change what other countries would do, Defense responded seriously that it would. According to Defense, in many countries outside of the US, they are concerned and disappointed by the secrecy at GTMO and perceive these proceedings to be expedient, secret justice. Defense argued that countries will be able to use this decision in the future and point to it to justify their acts.

Prosecution responded that although Defense was correct that the determination of whether the country is “at war” is a political decision, the judicial branch has not required the government to show the charged offenses took place in the context of war in Military Commissions. Instead, Prosecution must provide that the actions took place in the context of *hostilities*. Prosecution argued that Admiral McDonald did not rewrite history and claim that the US was at war in 2000, but rather found that these offenses took place in the context of hostilities. Prosecution concluded by noting that this is a question of fact for the members to decide, not a question of law for the court.

Defense then reiterated to the court that Admiral McDonald acted *ultra vires* when he charged Mr. Al-Nashiri under a Military Commission, because the US was not “at war.”

The court then recessed for 15 minutes. Near the conclusion of the recess, word came down from the Judge that proceedings would be recessed for the remainder of the day, amid weather concerns. A decision about Thursday’s proceedings would not be made until the following morning.

That night, we were moved out of the tents and into townhouses on another part of the base due to the impending hurricane.

Thursday, October 25, 2012

After two postponements on Thursday morning, Judge Pohl cancelled the proceedings for the remainder of the week. We spent the day waiting for the all-clear signal allowing us to head out onto the roads and, once that was given, touring other parts of the island with our military commission personnel and military escorts. Still forbidden from taking pictures, we did head to the top of J.P.J. Hill, atop which we could see for miles in every direction. While there, our

escorts pointed out some Cuban guard towers and explained where Cuban land began. When questioned about Camp Delta however, we were simply told that we could not see it from our position, but were pointed in a general direction. That night, we began to prepare to return home.

Friday, October 26, 2012

We began our departure day by loading into the vans by 6:30am, in order to check out of our townhouses and catch the ferry back to the other side of the bay, where the airport is. Easier said than done, however. Due to Hurricane Sandy, the ferry wasn't able to land or dock, as sediment had made the area too shallow. After our 9am flight time came and went, with us still stuck on the wrong side of the bay, we finally got word around 10:30am that we were leaving. We loaded up everyone and a few vans onto the ferry, and began to make our way to an alternative landing area.

After we landed, we began an approximately 8 mile drive to the airport. Interestingly, we rode alongside the barbed wire fence separating the US Naval Base from Cuban land. Although the Marines in the guard towers seemed wary of our presence, we relished the opportunity to see a little bit more of the island before we headed out. For most of us, this might have been our only opportunity to travel to Cuba in the foreseeable future, and we had a great deal of curiosity about what was beyond that barbed wire fence.

After taking our scenic route, we arrived at the airport just in time to wait some more. We boarded the plane sometime between 2 and 3pm, with the knowledge that there was a limited time window left for the plane to take off because the flight crew would time out at 4pm. The pilot came on over the cabin to let us know that we would be off just as soon as they received their flight plan via email. And then, as we should have predicted after the week we had had, the power went out. By 3:30, we were all getting visibly nervous. We weren't going to believe we were heading home until the plane was airborne. Some even disagreed with that, saying they wouldn't believe it until we touched the ground at Andrews AFB. Luckily, someone had a GTMO cell phone and a calling card, which the pilot was able to use to get our flight plan.

Cheers rang out once the plane took off. We were relieved to be leaving Cuba, heading home from a week that had been turned upside down more than once. But, in the end, it was just five days. Sure, I had to be escorted if I wanted to leave the general area where we were staying, but my escorts were kind and accommodating, taking us anywhere we asked so long as they had the ability to do so. So compare my five crazy days in GTMO, with over a decade for some detainees. I have a feeling that if and when a detainee gets to leave GTMO and either returns home or is accepted by a third country, that he doesn't truly believe it either, until that plane touches down.