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Provocative, Human, Eclectic

Observations

The GTMO 9/11 Military Commission Proceedings

By William Weinstein

Along with 10 other representatives of non-governmental organizations, I was given the opportunity to travel to the Guantanamo Bay Naval Base ("GTMO") to observe the military commission hearings held October 22 to October 25 in connection with the government's prosecution of the five individuals jointly charged with the 9/11 attacks and their tragic consequences: alleged mastermind Khalid Shaikh Mohammad ("KSM"), Walid Bin Attash, Ramzi Bin al-Shibh, Ammar al Baluchi (a/k/a Ali Abdul Aziz Ali), and Mustafa Ahmed al Hawsawi.

Our diverse observer group ranged from law students to a retired Army Brigadier General, and included a former military prosecutor and a current state district attorney, representatives of the ACLU, the Brennan Center for Justice, Human Rights First, and Judicial Watch, and a member of the Board of Governors of the American Bar Association. As a member of the Federal Courts Committee of the New York City Bar Association, I attended without any particular orientation or agenda, with the principal intention to compare the operations of the military commission with the federal courts, in which much of my legal practice has taken place.

At GTMO

Our group of observers, along with the families of 9/11 victims and survivors, watched video and audio feeds of the courtroom proceedings on several television screens in a gallery behind five panels of clear, soundproofed plexiglass. The video and audio feeds were transmitted after a 40-second delay, allowing remarks to be translated and screened for classification review before being transmitted to us. In the event of an improper disclosure of classified information, the presiding judge or courtroom security officer could activate rotating "red lights" to close off the proceedings and prevent exposure to those in the gallery.

According to the prepared opening remarks of Chief Prosecutor Brigadier General Mark Martins, by the commencement of the October hearings, 129 substantive motions had been briefed, with eight mooted, dismissed, or withdrawn, 30 submitted for decision, and 67 motions ruled on.

The Motions

Forty-one motions were identified on the docketing order for the October 22 to October 25 hearings. Most of the motions tended to fit into one of three categories: (i) motions seeking to prevent the government from affirmatively interfering with the attorney-client relationship and the privileged communications between defense counsel and the defendants; (ii) motions to obtain or preserve physical and written evidence regarding the government's program of "Rendition, Detention and Interrogation" ("RDI") and its use of "Enhanced Interrogation Techniques" on the defendants — torture — including the facilities in which the defendants were detained and tortured, and bodily evidence of the torture; and (iii) motions to dismiss or abate the proceedings because of violations of statutory, military, constitutional and/or international law, including international laws prohibiting torture. A number of motions were interrelated, and substantially all of the 41 motions were argued during the hearings, in two instances accompanied by live witness testimony.

From the first day, it was clear that the stated military commission goals of “transparency,” “fairness,” and “justice” in the prosecution of the 9/11 defendants cannot be achieved with certainty of results and finality any time in the determinable future, not because of any inherent defect in the nature of military commission proceedings, but because of the complications and consequences of the government’s ongoing classification of the documents and information relating to the RDI and torture, and the restrictions on defense counsels’ access to and use of the classified information.

That the torture is inextricably intertwined with the commission proceedings is most directly a result of the fact that the proceedings are capital prosecutions seeking the death penalty against all five defendants. As presiding Judge Colonel James Pohl candidly stated during the hearings, “[O]bviously, in a death penalty case, mitigation is always relevant. In fact, it may be the most relevant part of the entire case ... anything that you believe is relevant to your presentation on findings and/or sentence."

That the United States used RDI “black sites” and torture in connection with the 9/11 defendants obviously is no secret. The CIA’s May 7, 2004 Special Review report on Counterterrorism Detention and Interrogation Activities from September 2001 to October 2003 — the CIA torture report disclosing its rationale for the purportedly legal and illegal ranges of physical and psychological abuse and degradation that could be used in RDI — was made public years ago, and is now readily accessible on the web. The CIA torture report confirms, for example, that 9/11 defendant KSM was waterboarded 183 times in March 2003, which Senator McCain described in 2007 as “not a complicated procedure. It is torture.”

Controlling Information

Our observer group was exposed to the consequences of the government’s attempt to control the RDI and torture information virtually at the beginning of the first day’s hearings. Judge Pohl was confronted with an issue that he stated he has had to deal with “again and again and again”: the searches and seizures of the defendants’ privileged legal files in their cells and other attempts by military and non-military personnel to access or control privileged communications that include, *inter alia*, RDI and torture-related classified information.

In this particular instance, defense counsel charged that while she was meeting with her client at the end of September, military personnel entered the defendant’s cell, removed properly marked privileged legal materials from the legal bin in which all legal materials are to be maintained, and translated and read them, and that as a result, the defendant had stopped writing legal-related letters to his counsel, for fear his retained copies would continue to be seized. As we learned, these searches and seizures of legally privileged documents and other attempts to invade the attorney-client privilege extended back almost two years.

In October 2011, military personnel unilaterally seized and fully read all of the papers in the defendants’ cells — including substantial privileged legal materials — in what was described as a “baseline” review to determine the legal or non-legal, and classified or non-classified, nature of every seized document to confirm that the documents bore stamps in accordance with the marking conventions imposed by the military Joint Task Force (“JTF”), which has overall responsibility for running the GTMO detention operations.

In January 2013, defense attorneys discovered surveillance devices disguised as smoke detectors in the huts where defense counsel met with their clients. On January 28, 2013, during courtroom proceedings, there was an unauthorized “red light” activation by someone other than Judge Pohl or the courtroom security officer (presumably an original classification authority or other intelligence agency monitoring the proceedings), that required Judge Pohl to order changes in the courtroom audio system to prevent future such occurrences.

Another wide-scale seizure occurred again, in mid-February 2013, while the defendants and their counsel were attending commission hearings. Military personnel seized all of the defendants’ privileged and other legal papers, both to determine whether they were properly marked and contained in the proper legal and non-legal bins, and to locate any physical contraband. Some physical contraband — a metal pen refill, three pencils, and some zip ties — were found during the searches, confirming the genuine security issues the GTMO military personnel face on a daily basis. But both the physical contraband and the propriety of document marking could be visually observed, and there was no legitimate reason that the legal materials should have been removed from the defendants’ cells. In fact, the next day Judge Pohl directed military personnel to return the seized legal materials to the defendants, although legal files of defendant Hawsawi were not returned for a number of weeks, causing additional proceedings during which his counsel tried to establish the reason for the delay —

including as part of the hearings we observed, though no answers were then provided, necessitating more requests and motion practice for the production of witnesses with knowledge and relevant documents regarding the seizure.

Security Interests

These searches, seizures, and attempts to control the torture-related classified information were directly related to decisions by the military to place security interests above the constitutionally-mandated protections of attorney-client privileged communications. On December 27, 2011, orders were issued by the GTMO JTF Commander requiring defense counsel to agree that, to be able to communicate and meet with the defendants, all mail correspondence between counsel and the defendants, and all written materials to be brought by counsel into or out of meetings with the defendants — including case-related privileged legal materials — were required to be screened for "contraband." The December 27th orders additionally obligated the screeners in some instances to disclose the screened privileged material to the JTF Commander for possible further dissemination — presumably to military or non-military intelligence personnel. The orders also barred defense counsel from discussing certain topics with the defendants even if directly related to the case and their defense.

Because the December 27th orders violated a slew of applicable military and civilian attorney ethics rules, the Chief Defense Counsel of the Office of Military Commissions issued a memorandum on January 13, 2012 prohibiting all military commission defense counsel from agreeing to or complying with the orders. The Chief Defense Counsel's January 13, 2012 directive was subsequently confirmed by the February 19, 2012 opinion of the National Association of Criminal Defense Lawyers that compliance with the December 27th orders would be unethical.

It must be emphasized that there have never been allegations that the contents of the seized and reviewed legal materials were actually provided to the prosecution team — they were being seized for intelligence purposes — eight years or more after all five defendants had been "rendered."

On November 6, 2013, shortly after we left GTMO, and more than 22 months after the GTMO JTF Commander issued his December 27, 2011 orders mandating the override of the attorney-client privilege and materially impeding counsels' defense preparation, Judge Pohl issued an order designed to countermand the December 27th orders, by excluding from the definition of "contraband" virtually all information that was directly related to the commission proceedings against the defendants, even if it related to their detention and torture. Judge Pohl's order also transferred control of the review of legal mail from GTMO military personnel to the military commission itself, accompanied by stringent guidelines effectively prohibiting the review of legal mail for anything other than physical contraband and proper markings. As a result of Judge Pohl's order, for the first time in November 2013 defense attorneys were permitted to discuss any topic with the defendants so long as it was related to the case, and can now communicate confidentially with their clients by letter, with the logistics for telephone communications currently being worked through.

Protective Order #1

At the time we attended the hearings, the commission procedures regarding the handling of certain classified information were set forth in a February 9, 2013 document called Amended Protective Order #1 (the "Protective Order"). Although all defense counsel have classification clearances to receive and review the classified RDI and torture information, the Protective Order requires them to expressly agree in writing to comply with its terms to be entitled to receive the information. One provision of the Protective Order, however, had, up to the time of the hearings we attended, substantially impaired the ability of defense counsel to fully represent the defendants, or even to receive the classified information for review.

Specifically, the Protective Order included within the definition of "classified information" the "observations and experiences" of the defendants regarding the RDI and torture techniques applied to them. Furthermore, because virtually all of the RDI and torture information was classified, then under the Protective Order what the defendants tell their counsel about their torture cannot be publicly confirmed or denied by defense counsel — even if the information was otherwise widely available in public sources, such as the Constitution Project's Task Force report derived from unclassified sources. Indeed, for defense counsel to do so would constitute an unauthorized disclosure of classified information that could violate criminal laws and subject them to criminal prosecution. Thus, the "observations and experiences" provision, combined with the continuing classification of the RDI and torture information, is another barricade precluding defense counsel from meeting their ethical and

constitutional obligations in these death penalty proceedings to seek alternative sources of mitigation evidence.

Motion to Dismiss Under International Law

Among the many motions relating to the RDI and torture we heard argued was a joint motion by all defendants to dismiss the case against them because the Protective Order, including the "observations and experiences" provision, prevents defense counsel from seeking alternative sources of mitigation evidence, and violates their rights under international law (including the United Nations Convention against Torture ("CAT")) to bring claims for redress in a domestic or international forum based on their torture, as well as the right of defense counsel to assist with those claims.

Defense counsel contend that international law *obligates* both defense counsel and a tribunal — including the military commission — to report acts or alleged acts of torture in violation of CAT to international bodies. But because the Protective Order and the classification of the RDI and torture information regardless of source prohibits defense counsel from meeting this reporting obligation, as well as limiting their ability to adequately represent the defendants because of the prohibition against publicly communicating about the defendants' torture, defense counsel for four of the defendants refused to agree in writing to comply with the terms of the Protective Order. In the absence of this agreement, defense counsel are precluded from receiving relevant classified material the government might otherwise be prepared to produce. So the proceedings have been further deadlocked and delayed.

Decisions Issued

On December 16, 2013, Judge Pohl issued several rulings on the defendants' joint motions to dismiss. In one ruling, Judge Pohl denied the motion principally asserting that the inclusion and classification of the RDI and torture related "observations and experiences" of the defendants in the Protective Order prevented defense counsel from seeking alternative sources of mitigation evidence, stating that the commission lacked the authority to override the OCA. Nevertheless, Judge Pohl agreed to amend the Protective Order by removing the challenged language, but also inserted a new provision requiring defense counsel to provide notice if any defendant "intends to make statements or offer testimony at any proceeding" (emphasis added). Thus, it is unclear whether the removal of the "observations and experiences" provision will actually allow the defendants to communicate with foreign government officials, medical care providers, human rights authorities and media regarding the RDI and their torture, and whether they will be able to affirmatively pursue torture-related claims in an appropriate public forum, or whether the government will continue to prevent that from happening.

Furthermore, as Judge Pohl also stated in this ruling, his decision to remove the "observations and experiences" provision "does not lessen in any sense the responsibilities of counsel to fulfill all the obligations inherent in possessing a security clearance." Thus, because defense counsel still are required under the Protective Order to treat the defendants' RDI and torture-related observations and experiences communicated to them as classified, the ruling does not remove the restrictions on their ability to publicly discuss or investigate the facts regarding the defendants' torture in connection with the development of the torture-related defense and sentencing mitigation. Nor does the ruling remove the restriction on their obligation to report the torture in violation of CAT to international bodies, and that same issue could continue to prevent defense counsel from agreeing to the Protective Order so as to be entitled to receive the classified information.

Judge Pohl also issued a ruling on December 16, 2013 denying the defendants' joint motion to dismiss asserting that the Protective Order and its requirements for handling the classified RDI and torture-related information, including the defendants' observations and experiences, violates the defendants' rights under international law (including CAT) to bring claims for redress in a domestic or international forum based on their torture, as well as the right and ability of defense counsel to assist with those claims and to develop mitigation evidence. For the purposes of deciding the motion, Judge Pohl stated that he "accepts as true [that] the treatment of each [defendant] at the hands of 'agents of the United States' during relevant times ... could be viewed as a violation of the Convention Against Torture." With respect to CAT, he held that the treaty was not "self-executing," and that the absence of implementing federal legislation means that the defendants were not entitled to relief in federal courts. Additionally, Judge Pohl held that there was no private right of action under the federal statutes defining and criminalizing torture, 18 U.S.C. §§ 2340 and 2340A. Third, Judge Pohl held that even assuming torture is prohibited as a jus cogens norm of customary international law, that law is not part of domestic U.S. law in the absence of implementing legislation, and thus was not a ground for relief by the

commission under the provisions of the Military Commission Act of 2009. Finally, Judge Pohl held that responsibility for the classification of the RDI and torture-related information, including defendants' observations and experiences, rests with the OCA and cannot be overridden.

"Torture"

During the 21 hours over four days of hearings that we observed, the word "torture" appeared in the transcript 293 times. Regardless of the government's classification of torture, Judge Pohl publicly accepted as true that the defendants were tortured for the purposes of their joint motions to dismiss, although he rejected their argument that the torture could support dismissal under U.S. and international law in connection with their prosecution. Torture has permeated the entirety of the 9/11 military commission proceedings, and its classification has bound defense counsel and the commission in one big Gordian knot. Yet the government has continued to adhere to its classification of the specific techniques of torture and degradation inflicted on each defendant, along with the other relevant RDI information.

Ironically, only one of the 41 motions on the October 22 to October 25 docket might be considered "mundane" in the context of all court proceedings, federal or otherwise, and was not addressed until close to the end of the last day of the hearings: the prosecution's motion for a trial scheduling order. The prosecution proposed the resolution of all legal, discovery, and evidentiary motions by August 2014, with four more months after that for defense counsel to prepare for trial, with *voir dire* and the seating of a panel in January 2015. The proposal was extremely optimistic, at best, given the fact that defense counsel were not even able to freely communicate with their clients about privileged matters until this past November, and that there still are major barriers to the receipt and use by defense counsel of the classified RDI and torture information in connection with their development of the defense and mitigation.

In fact, numbers provided by the defense regarding the current status of discovery showed that the proposed schedule was impossible. Just in terms of "straightforward" discovery requests, as of the October hearings there were 67 pending defense discovery requests, some going back to July 2012, where defense counsel still were waiting for a firm response from the government. Several requests dating from October 2012 involve unfulfilled government agreements to produce, and 21 requests were "in production" — *i.e.*, where something had been produced but the parties were in continuing discussions about its sufficiency, including issues of excessive redaction. Additionally, as of the October hearings there were 13 pending motions to compel. Seventeen discovery requests were actually satisfied and complete.

The Trial Conduct Order

After the hearings, to move that discovery along, Judge Pohl issued a "Trial Conduct Order" on November 7, 2013 requiring an interim response to a discovery request within 14 days, and a final answer within 28 days. The failure to provide a final answer within 28 days will be deemed a "constructive denial" entitling the requesting party — *i.e.*, the defense — to move the commission to compel production. Note, however, that the judge's solution where there is no timely, definite, final answer places the burden on the defense to speculate in a motion to compel why the requested information is not being produced.

Far less "mundane" or "straightforward" is the vast scope of the discovery that defense counsel still must undertake. As defense counsel noted, the government has been preparing its case for years with coordination among multiple government agencies and foreign governments, and it already has been tried in large part in connection with the prosecution of Zacarias Moussaoui, the "20th hijacker," who was not part of the RDI program, and who pleaded guilty, thus limiting the need for discovery to sentencing and mitigation.

Defense counsel in the 9/11 prosecutions, however, in many respects are starting from scratch in a case where their investigation spans five continents and 17 countries. To further illustrate the differences, defense counsel observed that while only some 9,000 pages of FBI "Form 302" reports had been produced in these proceedings, 180,000 Forms 302 (not just pages) had been produced in the Moussaoui proceedings. Furthermore, FBI reports that already had been reviewed and tendered to Moussaoui's counsel in those proceedings still were going through a classification review in the 9/11 proceedings.

Conclusion

There is a tendency these days to place the blame for the delay in our ability to obtain justice with respect to the

9/11 defendants at the door of the military commission. It is, however, the torture and its continuing classification and concealment by the government — by far — that creates the greatest uncertainty whether the government's prosecution of the 9/11 defendants will be successful and achieve finality.

The determination by the Original Classification Authority to classify the RDI and torture is binding both on the military commission and the federal courts, so there is no "benefit" to a change of forum in that crucial respect. Defense counsel are pursuing the prescribed administrative procedures requesting that the OCA declassify the information. And on October 22, the first day of the hearings we attended, all defense counsel wrote an impassioned letter to President Obama, citing to his June 2011 statement reaffirming the commitment of the United States to the tenets of CAT and domestic law and their prohibition against torture, and asking the President to remove the classification restrictions on the RDI and torture information relating to the 9/11 defendants, to enable counsel to fully and faithfully discharge their defense duties in order to achieve "true transparency and meaningful justice" in the commission proceedings.

The ultimate in cognitive dissonance may occur if, as a result of Judge Pohl's recent order, the defendants are now free to discuss and pursue their torture related claim in a public, international forum, but the same information continues to be classified by the OCA.

As defense counsel for KSM pointed out, the prosecution's unrealistically short pre-trial schedule would be another ground to challenge the results in *habeas* proceedings. Because of the delays to date resulting from the classification of the torture — not to mention what certainly seems like old-fashioned "stonewalling" by the government — and because of the vast international scope of the investigation and discovery of evidence and witnesses by defense counsel necessary to discharge their defense duties, a projected start date for the trial of the defendants no earlier than January 2016 is both likely and realistic. A trial lasting for one year through commission findings and sentence takes us to 2017. Then there are the direct appeals, first to the Court of Military Commission Review, then the U.S. Court of Appeals for the District of Columbia, and probably next the Supreme Court. And then, because of the issues regarding the torture and the impairment in the effective assistance of counsel resulting from its classification, *habeas* proceedings in the U.S. District Court for the District of Columbia are certainly a strong possibility, with appeals again to the D.C. Circuit Court of Appeals and the Supreme Court. That leaves us with a time frame concluding more than two decades after 9/11 with no strong assurance of finality.

To this writer, it seems that there is only one solution. President Obama could cut this Gordian knot, declassify the specific information regarding the detention and torture of the 9/11 defendants necessary to their defense, enable defense counsel to fully and faithfully discharge their sworn duties under the Constitution, and eliminate the uncertainties and substantial, wholly unacceptable litigation risks that the government's continued classification and concealment of the torture creates. It must be the paramount concern of the entire government to ensure that the victims of 9/11 and their families and loved ones, whose losses are irreparable, and all citizens of the United States and the world who share their loss and the horror of 9/11, are finally able to obtain lasting justice. If "justice delayed is justice denied," then in no other case can the delay of justice be more damaging to the shared interests of the American people. A do-over is not acceptable.

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