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Published on *TriCornerNews* (<http://tricornernews.com>)

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The 9/11 capital prosecution at Guantanamo — progress at last

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(9/11 Military Commission Proceedings, Day 4 — Oct. 22)

By Charles R. Church

The normally calm and patient Judge Pohl had both six-guns drawn. Since an impending closed hearing involving the court and defense counsel would deal with classified information, he would tolerate no further delay. The legal team for Ramzi Bin al Shibh (RBS) has refused for years to sign the Memorandum of Understanding (MOU) binding them to the terms of the protective orders entered by Pohl setting forth the many restrictions on the handling of sensitive information. All other defense attorneys in the case had signed the MOU. Yet James Harrington, RBS's lead counsel, standing squarely in Pohl's sights, advised the court that his client had not approved his team's doing so.

Pohl would have none of it. He previously had issued an Order to Show Cause offering Harrington and his team two choices: sign the MOU, or explain to Pohl how they could effectively represent RBS without having access to classified information, which plays a major role in the case. The time for deciding had arrived. Harrington asked for a short recess to consult with his client one final time. Given the importance of the decision, Pohl allowed 45 minutes.

Since attempting to convince Pohl that effective representation could be provided to RBS in this capital case by attorneys with no access to classified information would amount to a fool's errand, the real decision was whether to sign the MOU or hit the road. If Harrington and the others refused to sign, they could no longer represent their client. The case, already long in the tooth, cannot proceed without their signing the MOU, and Pohl is committed to moving the case. Yet the dismissal of Harrington also would mean significant further delay in RBS's prosecution, which — along with the proceedings against the other four 9/11 defendants — has just been stalled for over 18 months. Commission rules require that each defendant have "Learned Counsel" — a lawyer with expertise in capital cases — on his defense team. Hence, a death penalty case lawyer willing to devote much of his/her life to RBS's defense for several years would have to be found, obtain a security clearance, and be detailed to replace Harrington. Very possibly, Pohl would not tolerate such a delay, and sever RBS's prosecution from the 9/11 case.

After the recess, however, Harrington advised Pohl that RBS had abandoned his longstanding opposition to his lawyers signing the MOU, surprising many — perhaps most — attorneys familiar with the case. On that positive note, Pohl ordered a recess for the day after an hour and 45 minutes of hearing time, those 45 minutes having been devoted to the recess granted for Harrington to confer with his client.

The next evening, I spoke with the genial Harrington at O’Kelly’s, the “Irish pub” operated by Jamaicans on the base, asking him how he felt about still being employed. He laughed and told me that today dealt with only one of his four “chances” to be kicked off the case. His next chance would come the following Monday, when the first item on the court’s docket for the week I attended finally would be reached a week later: whether the FBI’s clandestine infiltration of his team by interrogating a member and forcing him to sign a non-disclosure agreement created a conflict of interest for Harrington and his team — represent RBS zealously, as they ethically are required to do, or pull their punches because they may have been targeted for potential criminal prosecution. If Pohl finds such a conflict, then Harrington and the rest of his team would be required to go.

Actually, that issue was debated that Sunday — the day after I flew out — and on Monday. The court’s transcripts shed light where darkness had ruled. An alphabet soup of government agencies, including the FBI, had conducted three investigations focused mainly on Harrington and his team, to determine whether they had committed crimes or other wrongful acts. These were sparked, at least in part, by a phone call placed by a team member to RBS’s brother, conveying the accused’s wishes to his nephew that he have a successful year in school. Standing alone, that seems ridiculous, especially since lawyers have a duty to keep an accused’s family informed. But one of the primary concerns — nay, obsessions — attending the military commission proceedings is secrecy. And some may recall Lynne Stewart, the radical defense lawyer, who was sentenced to a five-year prison term for passing messages from her client, the notorious “blind sheikh” Omar Abdel-Rahman, to his followers in Egypt. Finally, if you wish to partake of the near-paranoia surrounding secrecy at Gitmo’s courts, might the message to RBS’s nephew have been a code?

As the Miami Herald’s Carol Rosenberg reported on Oct. 26, Pohl decided that Harrington and his team had no conflict. The government had closed its investigations, and had no intention to prosecute “at this time.” But the judge directed that the government provide information on the investigation to the RBS team. Harrington has declared that he will make his own decision on the existence of a conflict, never mind Pohl’s finding. If he decides affirmatively after reviewing that information, then RBS would have to decide whether to waive the conflict, or dismiss him.

Charles R. Church is a human rights lawyer who, as a Senior Fellow at the Center for Policy and Research, Seton Hall Law, recently spent a week at Guantanamo, serving as an observer/journalist at pretrial proceedings for the 9/11 case.

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