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Monitoring Of Attorney-Client Communications At Issue In Nashiri Hearing

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The audio monitoring unit discovered at Guantanamo by defense attorneys representing the 9/11 accused. The microphones, which resemble smoke detectors, were mounted to a ceiling in meeting rooms at part of the prison complex known as Echo II.

At 0845, the accused was escorted into the chamber and to his seat. He chatted with lead defense counsel Rick Kammen and a translator.

Aside, not previously mentioned: In the gallery, a section to the right is reserved for family members. A curtain may be drawn to separate them from the rest of the gallery, presumably to protect their privacy during emotional moments.

At 0903, Judge James J. Pohl took the bench.

Renewal of defendant's motion to dismiss the charge of terrorism

Although the D.C. Circuit's decision in Hamdan II, holding that "material support for terrorism" is not an offense cognizable by a Military Commission (MC) for pre-2006 acts, does not directly apply, its reasoning does. The court reasoned that pre-2006 offenses must be based on established international law of war principles. Under treaties, conventions, custom and the like, which provide the basis for such principles, "terrorism" appears only as a broad category under which specific offenses are found; it is not a separate cognizable offense. Such was the argument of Major Daniels, the slender black female Air Force Officer who appeared for the defense.

Discussion ensued on the effect of Al Bahlul, a case decided by the Court of Military Commission Review (CMCR) in which the conviction was ultimately reversed based on Hamdan II, and is now pending in the D.C. Circuit awaiting an *en banc* hearing (a hearing by all judges on the court, not just a select panel) for conspiracy. Ultimately, all concerned, including Judge Pohl, agreed that Hamdan II provides the guidance for this motion.

Brigadier General (BG) Mark Martins disagreed with defense counsel, arguing that international law of war precepts have recognized "terrorism" as a separate offense "for a long, long time." And blowing up a ship in the harbor of a busy city, filming that explosion and circulating the film to cow the population and influence government policy falls into the "sweet spot" of that cognizable offense.

Judge Pohl reserved his decision, meaning he will rule after further review of the law and/or relevant evidence.

Defense motion asked MC to find that Sec/Def Rule 703 violates statutory and constitutional due process norms

Reduced to its essentials, this motion sought to free the defense team of the current requirements for obtaining the attendance of witnesses and production of evidence. Right now, they must first provide a synopsis of what a witness would say, for example, to satisfy the government of the relevance of his/her testimony, before a subpoena may be issued. No such burden is placed on the government. If the government objects to issuance of the subpoena, of course defense counsel may apply to the judge. In the meantime, however, they have disclosed work product and strategies to the government. Defense counsel sought a system like that available in Federal Court, where blank subpoena forms may be obtained (by the Office of Chief Defense Counsel, it seems) without the need for any filtering by government counsel.

Judge Pohl was concerned about when the relevancy of the proffered testimony would be established. Under the defense's position, that point would arrive when the witness begins to testify, and the government objects to relevancy. Again, he reserved decision.

Defense-Initiated Victim Outreach (DIVO) specialist

The defense asserts, and the government agrees, that there are approximiately 300 victims and relatives of victims from the Cole attack. The defense wants to retain a DIVO to contact these people, and Judge Pohl wanted to know more about what a DIVO does, how one operates, etc. The defense proffered Professor Jody Madeira of Indiana University's Maurer School of Law, who has extensively researched the process, but Judge Pohl insisted on testimony from an actual DIVO. Not having been able in the short time available to locate a DIVO willing and able to testify, Kammen provided an extensive offer of proof as to what the professor would say.

Greatly distilled, a DIVO would act as a liaison between the victims and relatives and the defense team to explain to the families that, while the defense is representing a man charged with the capital crime, such in no way implies any denial of the magnitude of their losses. In my view, aside from being having potential benefit for the families, the practical benefit for the defense may be that, in the penalty phase of the case, the families may be testifying. If they have a better understanding of the defense's enterprise, and have received sympathy from the defense team along the way, such might favorably influence what the families say at that point.

Judge Pohl seems inclined to grant the relief, but the factual underpinning he will need remains to be provided.

Monitoring of attorney-client discussions

Capt. Thomas Welsh, Staff Judge Advocate, Joint Task Force Guantanamo's Detention Group (JTF-GTMO), was called to the stand to testify. He came to GTMO in May 2011. He visited Echo II, the facility where high-value detainees meet their attorneys, during his first couple of months. He did not go into the meeting rooms at the time. Before the issue relating to monitoring arose, he did visit the rooms themselves. He did not notice the smoke alarms on the ceilings.

There is a non-smoking policy at Echo II, and both detainees and counsel (and anyone else using the rooms) would be searched for matches or other materials capable of starting a fire. In short, there is no real need for smoke alarms.

Welsh was combative throughout most of his direct examination. While Kammen did not ask Judge Pohl to declare him a hostile witness so he could ask leading questions, he in fact asked many leading questions and the judge overruled most of the objections to them. The end result was about the same.

Welsh first became aware of the audio monitoring capability for the Echo II rooms in January 2012. He encountered an FBI agent in the control room listening to a non-privileged conversation involving FBI members and lawyers for both sides in a detainee case. He voiced his concern to Joint Defense Group (JDG) Col. Donnie Thomas that attorney-client discussions might be monitored. Thomas told him that they do not monitor attorney-client meetings. Welsh made no effort to confirm that such monitoring wasn't happening.

Welsh spoke to FBI agent de la Roca, who told him that monitoring was standard practice for meetings between FBI personnel and non-FBI lawyers.

Kammen showed the witness a 12/27/11 order, governing logistics for meetings in those rooms, including lawyer-detainee meetings. Welsh helped draft it. The order contains a provision requiring lawyers to advise what language would be used in the conference. That provision was never rescinded. On cross examination, Welsh testified that the provision never was enforced. A specimen Detainee Visit Request form was introduced and it contained no space for identifying the language to be spoken. That form has been used throughout Welsh's tenure.

Col. John Bogdan, Commander, Joint Detention Group, took over from Col. Thomas in June 2012. Welsh briefed him, but not about the audio monitoring capacity.

There is no way to tell whether the equipment has been used; no automatic record is created, nor is

there even a log.

On 2/1/13, as he learned seven days later from a blog, Judge Pohl ordered that no one touch the monitoring system. Before he learned that, Col. Bogdan had caused the power to be cut off.

The audio monitoring capability existed until February 2013, when the defense filed its motion.

On cross by Navy Cmdr. Andrea Lockhart for the prosecution, Welsh stated that Echo II was used for a variety of meetings. Medical specialists and International Committee of the Red Cross representatives convene there, in addition to lawyers and detainees.

When the matter of potential monitoring came up late in January 2013, defense counsel was provided a chance to talk with Bogdan. Three attorneys from the Nashiri team attended. Bogdan told them there had been no monitoring. They went to the Echo II facility, where the defense talked to guards, who denied monitoring. They inspected the control room as well. All of this access was provided with no time limit.

Welsh never heard that monitoring was happening, nor did he ever see any.

Col. Bogdan testified next. His transition period, while Thomas remained, was brief. Basically, his staff briefed him. He was briefed regarding video monitoring equipment only – he was not briefed regarding audio monitoring equipment. He toured the facility, including the Echo II rooms. He did not notice the audio control and reception equipment in the control room. Nor did he notice the smoke detectors in the conference rooms. He agreed on the existence of the "no smoking" policy. And matches and other fire-starting items would not be allowed into the rooms.

In military parlance, Col. Bogdan "owns" the Echo II facilities. He first became aware of audio monitoring equipment in the conference rooms in January 2013. He talked to Welsh on 1/13/13 and Welsh initated a written policy that no audio monitoring was to occur. Prior to that, there was a verbal policy. He told the camp commander, Lt. Col. Mark Tibor, to get details on the full extent of the audio monitoring capability. Col. Bogdan ordered that the wires for the system be disconnected to ensure that the system could not be operated. He did not order a search for records regarding use of the equipment. He does not know whether such records existed.

Repairs to the audio monitoring system were made in early December 2012 without Col. Bogdan's knowledge. An upgrade of the Echo II facility was being conducted and and the wires to the audio equipment mistakenly were cut. The camp commander, Lt. Col. Tibor, had ordered the repair.

Special Agent de la Roca told Bogdan that the audio monitoring system was in the Echo II facility in 2008 when the FBI turned it over to the military. Col. Bogdan has no knowledge of any attorney-client monitoring.

In response to a question by Judge Pohl, Col. Bogdan said that the audio monitoring equipment has been removed, except in one hut, where no attorney-client meetings take place.

Kammen asked the court to enter an order that:

1. no audio monitoring be conducted of attorney-client discussions in Echo II; and

2. any time a member of the Nashiri defense team is using the conference room, he/she may inspect the room for audio monitoring equipment. (That only would entail opening a hatch, he said).

The restriction against spiral notebooks, redux

Judge Pohl ordered earlier in the week that Col. Bogdan, the author of the restriction, provide testimony about it.

Col. Bogdan believes that spiral notebooks are dangerous, in that the wire could be used to form a garotte or weapon. He acknowledged that attorney-detainee conferences take place under constant video monitoring. Guards inventory what goes into the room with the lawyer and what he/she brings out. Pens and eye glasses, from which weapons also could be fashioned, are not restricted. Before and after a lawyer meets a high-value detainee, he/she is frisk- searched and "wanded." Col. Bogdan, however, simply wants his people to have one less thing to worry about.

Bogdan's predecessor, Capt. Thomas, never banned spiral notebooks. Detainees are allowed to wear glasses and to have writing instruments.

Finally, in a dramatic gesture, Kammen approached the witness with a spiral bound notebook, placed it before Col. Bogdan, and said: "Make a garotte out of this." Judge Pohl, however, interceded.

On cross, Col. Bogdan stated that plenty of incidents take place where detainees fashion weapons out of other materials.

Judge Pohl asked Kammen a key question: "What prejudice have you suffered if you are required to use non-spiral notebooks?" Kammen argued that changing his mode of operation would hinder him. When using a three-ring binder was suggested, Kammen asked Col. Bogdan if that could be taken in the room: "I'd have to see it," the witness replied.

Pohl also was concerned about substituting his judgment for the camp commander's on how it should be run. He reserved on the motion.

Scheduling

The court and counsel scheduled further dates for pretrial matters through most of the remainder of 2013.

Attendance of Al Nashiri at a closed hearing the next day

For the hearing, which would involve classified material for which Nashiri was not the source, Judge Pohl ruled that the accused would not be permitted to attend. Kammen told the judge that Nashiri did not wish to be excluded from any part of a proceeding intended to kill him, listing several legal bases supporting his right to be present. He also said that Nashiri wished to address the court personally. Judge Pohl denied that request.

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