

## At Guantanamo War Court, A Question About Classified Information

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### Pre-Trial hearing for Abd al-Rahim al-Nashiri, Day 2

At 0845, two guards, each with a hand on one of Nashiri's shoulders, escorted the prisoner to his seat. At 0904, Judge James P. Pohl took the bench.

### Classified information and Al Nashiri



Major Allison Daniels, a thirty-ish woman, argued this motion on Nashiri's behalf, which dealt with the prisoner's right to be present when classified material was being presented or discussed. Under the existing rules, Nashiri has the right to be present, except when: (a) he voluntarily waives that right (as he would do in the afternoon), or (b) his disruptive conduct interferes with the proceedings. Those rules, however, might collide with the statute(s) governing access to classified information.

No one questions Nashiri's right to be present during the case in chief, no matter how sensitive the evidence or discussion might be. So the

argument revolved around whether he enjoys that right during the "interlocutory" phase of the case. Major Daniels based her insistence that he does have the right on "fair trial" and "effective assistance of counsel" grounds. How could the defense team operate efficiently without the ability to consult with its client? She offered no case law to support her position.

Pohl narrowed the dispute during his colloquy with both counsel. Where Nashiri is the source of classified material presented by his lawyers, he has the right to be present. Such also would appear to be true when, as lead defense counsel Richard Kammen put it, Nashiri was "exposed" to the classified material; Kammen was referring, it appeared, to his torture. But when the government presents classified information in other instances, he does not have the right to be present. Judge Pohl reserved on the motion.

### Testimony on IT issues

Brian Broyles, Office of Chief Defense Counsel (OCDC), was the witness ordered by Judge Pohl to appear in connection with the defense team's Motion for Abatement argued the day before. (Kammen made clear today that all the motion sought was a continuance until the "insecurity" relating to IT matters could be remedied). Broyles' testimony dealt with these IT issues:

1. Network replication: Pre-9/11, GTMO was a small installation, with narrow bandwidth for its Internet service that was not sufficient for JTF needs. A system was set up to replicate at GTMO the contents of the system in D.C. Software was set up to keep both systems updated. The GTMO server, in three discrete events, directed the D.C. server to match its contents, thus deleting data in D.C. The Office of the Secretary of Defense Computer Information Officer (OSDCIO) quantified the loss at 7 gigs. It's not clear whether the data is defense or prosecution material. They only know that data has been lost.

The problem remains unresolved. They did turn off the software that allows for replication so further losses would not occur. They are comparing the data available on 6/10/13 to data in the system on 12/28/12, a date on which they know the system was working properly. When they determine what files are missing as of 6/10, they will ask the relevant defense team if: (1) deletion

was intended; (2) it has the file elsewhere; or (3) the file is missing. Broyles was not confident that they would be able to restore files found to be missing. All defense teams are expected to report next week.

As an ultimate solution, fiber optic cable is being laid to increase the speed of the D.C.-GTMO communications.

2. Investigation Search Request (ISR) problem: pursuant to directive, all data should be saved on network drives, which can be backed up, and not on hard drives in individual computers, where it cannot. The OSDCIO bank of servers does not differentiate between prosecution and defense files. ISRs can be initiated by Congress, pursuant to court order, or by any agency. Broyles and others became aware of a problem in the case against Ibrahim Al Qosi in which the court ordered production of emails between prosecution and defense counsel in that case. The search should have been very narrow. But the search, improperly, returned emails **between** defense counsel about that case. Broyles was told this resulted from a failure by OSDCIO staff to follow standard operating procedures (SOP).

Two more searches in the case brought incorrect results, both as the result of failures to follow SOP. At that point, Col. Karen Mayberry, Office of Chief Defense Counsel,, directed that defense counsel were not to use emails for privileged information.

The current proposals for solving the problem are:

1. Defense counsel would have a separate, dedicated IT system, which Mayberry would monitor. Contracts are being "let," but they have not yet been approved. Construction would take 45 days from signing of the contracts. All told, in an ideal world, 60 to 90 days are needed for completion.
2. As noted, the monitoring currently done by OSDCIO would be performed by Mayberry's office.
3. ISRs no longer will be allowed absent approval from Mayberry's office.

On cross by Navy Cmdr. Andrea Lockhart for the prosecution, Broyles stated that he was unaware of any privileged material from the Nashiri case going to the government. He is aware that the prosecution had access to Nashiri files, but he does not know whether it used that access. He believes the prosecution did not, since he fixed the problem within minutes of discovery.

Judge Pohl, in his questioning, addressed what a defense certification had claimed to be 541,000 of its emails going over to the prosecution. Broyles said the number had to mean "hits," not files or emails. And he is not aware of any emails going to the prosecution.

At the start of the afternoon session, though he had suggested he would want testimony from a number of witnesses on the IT issues, Kammen rested.

### **Nashiri waives attendance at afternoon session**

We returned from lunch at 1315. The accused was not brought in, and nothing was happening. At 1400, it was announced that the accused had elected to remain in his holding cell for the afternoon session. His "back was sore." He would watch the proceedings on TV, even though—as he was advised in Arabic—the audio would be in English. Nashiri signed a waiver to such effect.

### **Afternoon proceedings**

Kammen, made clear that his Motion to Abate Proceedings that was argued yesterday merely sought a continuance until the IT problems were solved. Given the testimony, he agreed to proceed instead, since it appeared clear that the problems should be resolved before they were done arguing the motions on the docket.

### **Motion to dismiss conspiracy charge**

Major Daniels, for the defense, moved for dismissal of the fifth charge, alleging conspiracy to commit the crimes of terrorism, murder in violation of the laws of war and perfidy. She based her argument on the D.C. Circuit's ruling in the case of Salim Hamdan that "material support for terrorism" is not a violation of international law of war principles and thus not triable by military commission for conduct pre-dating the 2006 Military Commissions Act. The same reasoning, it appears, would apply

to the conspiracy charge. The government agreed to this relief, provided that the underlying specifications for that charge would be preserved as background allegations for the remaining charges. The defense refused to agree to this condition, and insisted that the government would have to withdraw the charges and re-swear to new ones. Along the way, however, she agreed with Judge Pohl that Nashiri, notwithstanding the dismissal, would still be exposed to a finding of vicarious liability for the acts of others, under a number of theories.

Brigadier General (BG) Mark Martins, arguing for the government, pointed out that, from the beginning, Nashiri was being prosecuted for crimes arising from a joint enterprise.

Judge Pohl reserved decision on the motion and will rule at a later time, after reviewing law or additional evidence.

### **BG Martins meets with observers**

At 1900, after a lengthy proceeding dealing with classified material extending to about 1800, Martins spent an hour with us. In the context of a Q&A session, he continued his campaign to establish the necessity for, and integrity of, military commissions.

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