Dispatch From Guantanamo: Can Spiral Notebooks Be Used As A Weapon?

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Abd al-Rahim al-Nashiri, alleged mastermind behind the USS Cole bombing

Pre-trial hearing for accused USS Cole bomber, Abd al-Rahim al-Nashiri—Day 1

Guantanamo Bay, Cuba — The large courtroom has six, four-seat defense tables in a column, to the left of the courtroom, facing the front. The seat on the farthest left has a ring bolt beneath it, with a chain (concealed from the panel), for use if necessary. A column of five, three-seat desks sits on the right, with a box for the panel ("jury" not being the correct term) to its right. The bench, of course, is located at the front. Seats line the walls, looking outward. Say 24 on the left, and maybe 8 on the right to the front of the panel box. Military men sit in those chairs, all or most having earpieces, to provide security. They wear no visible sidearms, but our tour guide from the day before would not say whether they are armed. They rotate out every 15 minutes or so, to stay alert.

Al Nashiri (said NASHiri by most) was escorted in. Clad simply all in a white, with a loose but pressed shirt and trousers. He appeared well-nourished, though a bit pale in the morning. No obvious sign of the PTSD and depression found by those examining doctors. Later in the day his color appeared normal. A journalist who has seen him before observed no apparent change in his condition. On his arrival, Nashiri checked the earphones that he would wear to obtain a translated account. A small speaker is fixed on the counsel table before him, and the translated version comes from that as well. Some defendants, our guide had told us, refuse to don the earphones, saying they remind them of their tortures. Our guide also told us that the accused has his own translator to ensure that the court's translators are giving an accurate account. (Translators work remotely, from an undisclosed location. Some of them have relatives in the Middle East, so their identities are protected).

Nashiri talked to one of his lawyers, using emphatic gestures while speaking, but he appeared composed. Late in the afternoon, when lead counsel Rick Kammen was talking to Judge Pohl from the counsel table, Nashiri stood and reached over to turn the long-stemmed mike toward him.

Judge Pohl took the bench at 0900 sharp. From the gallery, separated from the courtroom by a soundproof glass partition, we can watch the actual proceedings, with the difficult-to-get-used-to 40-second delay in the audio feed, to ensure that classified information does not reach the gallery. TV monitors provide simultaneous audio and video and are easier to follow. On the bench, a red "hockey light" is affixed, and if classified information is disclosed it will be activated by Pohl, and the audio feed will be stopped. Pohl has an advisor sitting just below him to warn of such events.

Commander Lockhart, a 40-ish blonde female, sat in the lead seat for the military. Brigadier General (BG) Mark Martins sat next to her; he would argue the most important motion of the day. About a dozen other lawyers sat in the tables behind them.

As said, Rick Kammen is lead counsel for the accused, and six or eight others sat at the defense tables. Only one of them, a young (in her early 30s?) black military officer handled a motion; Kammen did the rest, tirelessly and to good effect.

Pohl questioned Nashiri briefly about the replacement of one member of his legal team; the prisoner gave short, courteous answers.

Pohl impressed me as intelligent and calm. He is very familiar with MC rules. He crisply dealt with matters in a low-key way. He repeatedly distilled arguments to their basics. But he has a firm hand; when Lockhart—once too often—stood to correct Kammen during his argument, Pohl told her not to interrupt anymore; he would hear her at the end. Only in the afternoon, while dealing with two discovery motions, did Pohl seem too willing to let the argument drift, and for way too long.

Counsel argued the motions relating to the IT issues early on. While cast by the defense as a Motion to Abate Proceedings, such relief was not pursued at this juncture. Rather, the court dealt with requests that he order testimony by various persons, who could shed light on what happened and why.

The three IT problems (which have been reported widely in the media) are:

1. The missing data. Six gigs of "what appears to be defense material" were claimed by Kammen to be missing from a "mirror" system. (Lockhart termed it a "replication system.") Defense counsel have a computer system that allows them to work on motions, etc. both in DC and at GTMO. The wrong component of the systems, it was explained, evidently thought itself dominant and erased data on the other system that it lacked. Two million files are missing, though what portion relates to the Nashiri case is not clear. Lockhart represented that the government has a file list current through 12/28/12. They need to "compare," (compare what to what was never made clear) but she thinks that no defense files are missing until that date. Kammen disagreed, but amid all these factual representations by counsel the key was that the court ordered a witness to testify.

2(a). Lack of security. (Pohl grouped this and the next issue into the "Al Qosi" problem, referring to a case in which the MC authorized a search and potentially privileged material was swept up as well). In 2010, 7 gigs of defense files migrated to the government's system. Which cases the material relates to is not currently known. Kammen claimed no impropriety. It appears that the government had the right to search for some defense material, but inadvertently (through lack of training) gathered privileged information as well.

2(b). Pohl long ago had authorized certain government monitoring, and it appears these boundaries were exceeded. (What kind of monitoring and what actually occurred was left vague).

Pohl ordered testimony of a Mr. Broyles, who was said to have global knowledge of these matters. A member of the government's privilege team may be added. Pohl reserved on the rest, including Col. Karen Mayberry (Office of Chief Defense Counsel), until after the ordered testimony was obtained.

Also, according to Lockhart:

a. Defendants would get their own dedicated IT systems, with monitoring by Mayberry;

b. No further government monitoring would occur until Mayberry approved a system for that.

3. Past and future monitoring of attorney-client meetings. Kammen claimed huge inconsistencies in the accounts relating to the listening devices in the smoke alarms (e.g., ignorance of systems claimed, but records show repairs to that system). Lockhart argued that, while inconsistencies do appear, there is zero evidence of anyone listening to attorney-client discussions. "There never was, and there never will be monitoring." The capability exists, "just as it does in all federal holding cells." (Is Echo II a holding cell?) Pohl ordered testimony by two persons, including Colonel Bogdan (JDG Commander), denied same for an FBI agent and deferred ruling on two others.

Spiral notebooks: A potential weapon?

A new order at the base includes within "contraband" spiral notebooks, which happens to be what defense counsel use when talking with Nashiri.

The young officer stuck with arguing the motion was persistent, arguing about the potential for physical harm. After all, the spiral could be fashioned into a weapon. This, despite pens being OK, and inventories of all items being taken before and after the meeting.

He had one thing going for him, the ease with which defense counsel could switch to other

notebooks or pads. And one thing more, the deference owed to the detaining authority. Pohl decided to ask Col. Bogdan about it when he appeared for other testimony.

The Big Issue: the Confrontation Clause

Kammen put the question thusly: whether the right of confrontation in the Sixth Amendment applies to the Military Commisions (MCs) in capital cases. In other words, do the provisions governing the admissibility of hearsay in the MCA, which extend far beyond the exceptions in the traditional hearsay rule, conform to the Sixth Amendment?

Kammen, curiously, cast the motion as one requesting the court to take judicial notice that the Confrontation Clause applied to MC proceedings. (Perhaps the declaratory judgment procedure is not available in such cases?) When BG Martins challenged the judicial notice form of the application, Pohl urged him to move on.

The crux of the problem, as stated by Kammen, is that the defense needs ample warning of situations in which the government will seek to call, say, an FBI agent to read his report on an interview of a third person, or—worse—read the report of another agent dealing with such a thing. Resources would need to be devoted to meet such evidence, which otherwise would be inadmissible. And what hearsay would be deemed "reliable," as the MCA rule requires? "We'll have to make it up as we go."

And what happens where, as has occurred in the case of one witness, the government has killed him in a drone attack? (Kammen once said "murdered," which brought Martins to his feet).

Pohl kept asking whether Kammen wanted him to find the MCA's hearsay rules unconstitutional, and Kammen—realizing how daunting that would be—demurred, urging he just want a ruling that the Confrontation Clause applied to the proceeding.

Martins pointed out just how much Kammen wanted the court to do. That is, declare the MCA itself unconstitutional, despite its Article I underpinnings. In effect, the accused was seeking a finding of facial unconstitutionality—the hearsay provisions are invalid under any set of facts. Or if the motion simply seeks to exclude specific evidence, it is not remotely ripe.

Kammen kept asking how he could defend Nashiri's life. Vast resources would be required to investigate the facts surrounding the proffered testimony of many witnesses; millions would have to be paid by the government, in this time of sequestration. And he would need plenty of notice—he mentioned two years as enough—to conduct the investigations. Yes, the government had provided 270,000 pages of discovery, but all of the evidence is hearsay.

Pohl asked Martins when the government would list its witnesses under the hearsay rule, and Martins ducked the question, other than to refer to the rule itself. Pohl did not explicitly rule from the bench, but it seems a sure bet that he will deny the motion. Possibly, if he can find a way under the MCA to increase the notice period under the hearsay provisions, he will do that.

Pohl's Need for A Tighter Rein

Two discovery issues were given far too much time:

1. Kammen moved to require the turnover of documents provided to Nashiri's habeas counsel in response to an order in that case requiring that all evidence tending to contradict the government's contentions be furnished. Habeas counsel has told Kammen that he "really needs to see the documents," but a protective order forbids them from providing copies. Rather than simply order Lockhart to obtain and provide copies herself, Pohl allowed her a lengthy speech about her confidence in the government's system for inquiring directly to stakeholders to respond to defense discovery requests. He seemed inclined to order that Lockhart get the material and review it for discoverability, but did not explicitly rule.

2. The defense also moved for an order seeking to review the actual requests by the prosecution to the various stakeholders for information to respond to defense discovery requests. The concern is that defense requests are not faithfully being communicated to the agencies and others who must provide the information. This prompted interminable wrangling, with Pohl not hinting how he might dispose of the matter.

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