

# MILITARY COMMISSIONS UPDATE

BY MASON C. CLUTTER

## The Alleged U.S.S. Cole Bomber

One word comes to mind when reflecting on the latest military commissions proceedings at Guantánamo Bay, Cuba: frustrating. It is frustrating that time and money continue to be spent debating issues that, while well-settled in federal courts, are cases of first impression in this now third iteration of the military commissions. Procedural issues that greatly affect the ability of the defense to provide zealous representation remain unresolved after 10 years. The process is basically starting from square one again, and this is frustrating.

On Jan. 17 and 18, 2012, the military commission of the alleged U.S.S. Cole bomber Abd al-Rahim al-Nashiri reconvened for motions hearings. It was like déjà vu as Judge Pohl brought the commission to order and began arguments on motions that one thought were settled during the arraignment in November 2011. The issues included defense access to resources and allegations that members of Joint Task Force Guantánamo (JTF-GTMO) — the body responsible for the detention operation at Guantánamo Bay — continue to violate al-Nashiri's attorney-client privilege by reading the content of his legal mail, this in light of Judge Pohl's November order to stop reading al-Nashiri's attorney-client privileged mail.

After writing a joint letter to the Convening Authority (CA) — the person in charge of the military commissions — and requesting that he allow the defense to make in camera, *ex parte* requests for resources, such as expert assistance, the parties returned to Judge Pohl and informed him that the CA denied their request. Still unsure of his authority to order the CA to do anything, Judge Pohl instructed the defense to submit requests for resources to the CA, with notice to the prosecution — as required by military commissions and courts martial rules — but to avoid including any privileged information in the requests. If the CA denies a request for resources on the grounds that it is insufficient, i.e., not

enough information as to why the defense needs the expert assistance, the defense can then go back to Judge Pohl and make a request for resources.

While this ruling appears to prevent Judge Pohl from stepping on the CA's toes, it does nothing to make the commissions process more efficient, and, in fact, will only serve to delay the proceedings. The defense remains concerned that it is being forced to turn over its trial strategy to the prosecution by way of these detailed requests for resources and does not believe that the CA and the prosecution should get a "vote" on which resources the defense actually needs. It should be noted that the prosecution has not opposed the defense's motions on this issue. The defense argued that this is contrary to the practice in federal courts, but Judge Pohl responded that if Congress intended to make the two systems similar in this respect, it could have clearly done so. It did not. However, Congress did note that capital cases should be fully resourced pursuant to Article III laws, although it did not spell out the details, which may make this a strong issue for appeal.

Of equal concern to al-Nashiri's counsel and other counsel to so-called "high value" detainees are two orders issued by the Commander of JTF-GTMO requiring all counsel to submit any written communications, including attorney-client privileged communications, to a government "Privilege Team" made up of attorneys, law enforcement and intelligence personnel, translators and interpreters. In January, Chief Defense Counsel Col. Jeffery Colwell instructed all military counsel not to submit attorney-client communications to the Privilege Team for review because doing so would violate their ethical obligations to maintain client confidences. This instruction did not apply to al-Nashiri's lawyers because they were subject to Judge Pohl's Nov. 9, 2011, order instructing JTF-GTMO to stop reading al-Nashiri's attorney-client privileged mail, and permitting review of privileged mail for physical contraband and appropriate stamping by defense counsel. The government, however, requested that



Judge Pohl apply the Commander's orders to al-Nashiri.

On Feb. 10, Judge Pohl entered his own order to cover al-Nashiri. The al-Nashiri order provides for Privilege Team review only for physical contraband and appropriate markings; "plain view" review is prohibited as it could require reading the content of communications, in violation of the attorney-client privilege. Team members are now bound by a nondisclosure agreement to protect attorney-client communications, and the military judge is the final arbiter of issues arising under the order. Any information contraband discovered by the Team in their limited review must not be shared with outside agencies without first consulting with the judge. Judge Pohl stressed that defense counsel are under strict legal and ethical duties not to disclose classified information, and they must be trusted to uphold their duties.

NACDL's Ethics Advisory Committee issued an ethics opinion addressing defense attorneys' ethical obligations in light of the Commander's orders. NACDL's Board of Directors approved the opinion on Feb. 19, and the opinion is now available on NACDL's website

(www.nacdl.org/gtmoethicsopinion). The opinion advises counsel that they may not ethically abide by the Commander's orders and provides counsel with substantive legal arguments that should be made in challenging the orders. The opinion is helpful to counsel whose clients remain subject to the Commander's orders, including 13 other "high value" detainees, such as the alleged 9/11 defendants.

Finally, Judge Pohl addressed a complicated issue regarding procedures to protect classified information in the Military Commissions Act of 2009. While Chief Prosecutor Gen. Mark Martins continually asserts that the procedures to protect classified information are virtually identical to the procedures used in civilian court under the Classified Information Procedures Act, there is one remarkable difference that is at issue in al-Nashiri's case — the prohibition on requests for reconsideration of the judge's ruling that a summary of classified information provided by the government is adequate for the defense to make its case. Given the fact that al-Nashiri faces the death penalty, and the fact that they have not yet reviewed nearly 70,000 pages of discovery produced by the government, defense counsel argued that this prohibi-

tion on reconsideration greatly prejudices their case and requested that they be allowed to review the summaries before the judge ruled on their adequacy. The defense also asked Judge Pohl to delay making such adequacy determinations until a time after which the defense has adequately investigated its case and prepared its defense, arguing that it is simply too early in the trial process to know whether such substitutions are adequate for the defense to make its case. Judge Pohl denied these motions, but granted a defense motion to provide him with *ex parte* information regarding the defense's trial strategy for his use when considering the adequacy of the summaries of the classified documents. Counsel has until April to submit this filing.

While the Obama administration goes to great lengths to stress that the revisions to the Military Commissions Act of 2009 have brought the military commissions system in line with traditional criminal courts, the issues litigated to date in the al-Nashiri case — the first case brought under these new rules — demonstrate otherwise. Commissions advocates argue that they are necessary to deal with evidentiary issues that arise from the exigencies of the battlefield — issues such as

*Miranda* and hearsay. However, these issues are not being addressed by the commission. Instead, the commission is spending most of its time addressing issues already settled in federal court and not at all influenced by battlefield necessities. In fact, al-Nashiri was not captured on the battlefield, and his alleged crimes were committed prior to 9/11. These dispositive jurisdictional and legitimacy issues will be raised at subsequent hearings in April, when the commission will also likely continue to consider issues involving defense access to resources and alleged violations of the attorney-client privilege. ■

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