

Al Nashiri Hearings October 31, November 1 and November 3

The hearings in Guantanamo Bay in the Al Nashiri proceeding during the week of October 30 were rather dramatic. The hearings had been scheduled on short notice after al Nashiri's entire civilian defense team withdrew from the representation. The withdrawal was triggered by evidence that attorney client communications in another Guantanamo case had been improperly monitored by the government, and the al Nashiri team had not been able to satisfy themselves that their own attorney client communications were secure. The hearings were scheduled in part to address whether the defense team was properly excused and how, if at all, the case should proceed in the absence of learned counsel in this capital case.

In the course of the proceedings General Baker, the Chief Defense Counsel for all of the Guantanamo cases, was found guilty of contempt and was taken from the courtroom to confinement. We also heard the testimony of an FBI agent who interrogated al Nashiri, Khalid Sheik Mohammad and other persons held as alleged terrorists. He testified that al Nashiri confessed to involvement in the USS Cole bombing and that the other persons interrogated also described al Nashiri's role in the Cole bombing and other terrorist acts. Civilian defense counsel was offered the opportunity to appear by video conference for al Nashiri during the agent's testimony, but did not appear. Carol Rosenberg of the Miami Herald says that the decision to offer that form of participation was prompted by the Pacific Council recommendations.

October 31:

The court, Judge Spath presiding, began the proceedings by noting that the defendant was present pursuant to court order because the subject of the hearing required his presence. He further noted that civilian defense counsel were absent and that General Baker, Chief Defense Counsel for Guantanamo, was present but had not entered an appearance in the matter.

The court then said that he had held an 802 session (informal off the record discussion of administrative matters) on Sunday which the civilian defense counsel failed to attend. In that session he had requested briefing on how the case should proceed. The prosecution filed as ordered; the defense sent an email saying the case could not proceed in the absence of Learned Counsel (counsel experienced in capital cases) but declined to file formally. The judge rejected the email submission. General Baker filed an affidavit. The substance of that affidavit was not disclosed except to indicate it provided an explanation of his decision to approve civilian defense counsel's request to withdraw.

The judge then recited his Findings of Fact:

1. Mr Kammen, chief civilian defense counsel (Learned Counsel), having learned that the government had covertly listened in on conversations between a different defendant and that defendant's counsel, took the position that he could not have any conversations with his client until he could assure himself that there had been no similar violation of the attorney-client privilege in this case.

2. Defense counsel moved for disclosures of intrusions into attorney client communications. The court denied the motion seeing no evidence such intrusions had occurred in this case.

3. Defense counsel moved for evidentiary hearings in order to test whether there had been any such intrusions. The court denied the motion saying he saw no evidence of intrusions.

4. Defense counsel moved for permission to meet with the client at defense counsel's offices outside of the security area on Guantanamo. The court denied that motion but allowed meetings in the courtroom or any other area within the security area.

5. Defense counsel submitted a request to General Baker for approval to withdraw from the representation. General Baker approved the withdrawal.

6. The court ordered defense counsel to appear at these proceedings and ordered General Baker to file a pleading to demonstrate his authority to approve the withdrawal.

7. General Baker filed an affidavit relating to his granting of the approval.

The court found no good cause for withdrawal because there was no evidence of intrusion into the privilege in this case. The court then announced that the case would move forward unless the defense obtained a writ to abate.

The court ordered General Baker to take the witness stand to testify regarding the affidavit he had filed. A Mr. Sundel, Acting General Counsel for the Marine Corps. Department of Defense Counsel, rose to explain that General Baker was refusing to testify because of an assertion of privilege under Section 501 B. Under that section no appearance is required to invoke the privilege. He further argued that a lawyer is ethically obligated to pursue all of his appeals before disclosing attorney client communications. The court argued that because General Baker filed an affidavit he had waived his privileges to the extent of that filing and must testify. He asserted that he would carefully avoid questions that might require invocation of the privilege. When Mr. Sundel attempted to argue the point, the judge said: "Mr. Sundel, you have no standing here. Sit down."

General Baker asked the court if he might suggest a way to move forward. The judge refused and ordered him again to testify. The general refused. The judge then ordered him to rescind his approval of the withdrawal. He refused.

The court then ordered defense counsel to file a brief on how to proceed. General Baker said he understood the order. The court also ordered the defense to communicate his order to civilian defense counsel to appear. General Baker said he would consider the order.

The court briefly raised some questions about what types of proceedings could be conducted without Learned Counsel in a capital case. He noted that the statute requiring such counsel included the provision that it be practicable to provide such counsel. He found it not practicable in this situation. He ordered the detailed military counsel, Lt. Piette, to be present and defend the accused. Lt. Piette agreed that he would do so to the best of his ability but protested his competence for that task.

The judge announced that there would be a contempt hearing on November 1 to consider contempt charges against General Baker, Mr. Sundel and Lt. Piette. The charges against Mr. Sundel seem to have been based upon his attempt to argue on General Baker's behalf without formally appearing in the proceedings, but the judge also complained that Mr. Sundel repeatedly addressed the court at "Colonel" rather than "your honor" or "judge". The charges against Lt. Piette related to the defense decision to send an email rather than a formal filing in response to the judge's order at the conclusion of the 802 to file a statement of the defense position regarding how the case should proceed.

Contempt Hearing: November 1

The court announced that these would be summary contempt hearings pursuant to 10 USC Section 950t and Rules 809 and 809c.

The court began by stating that General Baker did not have the authority to dismiss civilian defense counsel. General Baker asked to be allowed to object to the proceedings, contending that the court had no jurisdiction. The court stated: "You are not a party. You cannot be heard." When General Baker said, "I want to be clear. You will not give me an opportunity to be heard." The court replied that he would not allow General Baker to state his objections because he had no right to be heard in a summary proceeding. Carol Rosenberg of the Miami Herald, who had spoken to General Baker prior to the proceedings, reports that he would have argued, at least in part, that a military tribunal established to try war criminals has no jurisdiction over him.

The court conceded that Mr. Sundel had correctly argued a lawyer's duty to exhaust all appeals prior to disclosing privileged information but concluded that the proceedings had to move forward in the meanwhile unless stayed. The court noted that General Baker has recused himself in this case because of conflicts.

The court observed that the trial judge has broad jurisdiction to enter orders related to privilege and that those orders must be obeyed unless and until overturned by an appellate court. He opined that havoc would otherwise prevail and defense counsel could effectively dismiss any case.

The court then declared the approval of the withdrawal of civilian defense counsel to be null and void and ordered civilian counsel to appear and explain their reasons to be excused.

The court recited his findings of fact to show that there had been a willful refusal to obey his orders, that it had taken place in his presence and that the refusals had disturbed the proceedings (elements necessary for a summary contempt violation). He sentenced General Baker to 21 days in confinement to quarters, or such other place of confinement as the Convening Authority might select, and fined him \$1,000. General Baker was taken into custody at the conclusion of the proceedings. The court stated that he would send the transcript to the Convening Authority for review as quickly as possible.

The court did not find Mr. Sundel in contempt. The court also ruled, because military defense counsel, Lt. Piette, had filed the required pleading regarding how to proceed, such counsel was not in contempt. In that pleading, Lt. Piette reportedly said that he would appear on behalf of the defendant but would ask no questions of witnesses and take no active role. The judge characterized that as a "strategy" and said that it was unlikely to be in the defendant's interest.

The court scheduled a hearing for Friday morning to take the testimony of a prosecution witness and hearings for the week of November 6 to take the testimony of Al Darbi. He indicated there would be hearings in January to take testimony from four C.I.A. witnesses.

It is my understanding that, even in a summary proceeding, a defendant in a contempt proceeding must be given notice and an opportunity to be heard. That is true even in a civil contempt proceeding. The rules are stricter for a criminal contempt proceeding. I am no expert, and the line between civil and criminal contempt is apparently not clear, but here the fine goes to the government and the confinement seems to be to punish and not to compel compliance; accordingly, I would consider this to have been a criminal contempt proceeding. The court's refusal to allow the defendant to be heard would therefore probably not pass muster unless the rules are substantially different in these military proceedings. Even if they are different, surely minimal due process would require an opportunity to be heard.

Clearly there will be issues about how much, if anything, can properly be done in the absence of counsel experienced in the handling of capital cases. The judge was careful to state that he regarded the matters he is currently scheduling to be within the expertise of even a very inexperienced attorney, but they include cross examining what I believe to be key government witnesses in depositions. The judge also found that provision of Learned Counsel is not practicable in the near future, if at all. A high percentage of military tribunal proceeding convictions are overturned in capital cases, often on grounds of ineffective counsel. That would seem to be a cause for concern here.

November 2

We were not able to attend any hearings on November 2. Attorneys for General Baker filed a habeas petition for General Baker in federal district court in D.C., and al Nashiri's lawyers petitioned for a TRO to prevent the case from moving forward without learned counsel. The petition for a TRO was denied, but there will be a hearing on a request for a preliminary injunction.

Hearing November 3

The defendant was present, as was Mr. Miller, civilian counsel for the prosecution and other members of the prosecution team. General Martins was absent. Lt. Piette appeared for the defendant. No other defense counsel were present. The court had arranged for video conferencing so that civilian defense counsel could attend by video. Carol Rosenberg reported that the court's decision to allow defense counsel to be treated as present when participating by video conference was based upon the Pacific Counsel recommendation. Defense counsel did not, however, choose to participate.

The judge observed that he has been told that new counsel, experienced in death penalty cases, could be available within 30 days. That could be relevant to the petition for an injunction to stay the proceedings because 30 days seems a modest delay in the context of this proceedings already marked by years of delay. Further, in observing that learned counsel could be available in so short a time, the court could cast doubt on its finding that it was not practicable to have learned counsel present for the ongoing proceedings, including the testimony of Agent Gaudin. As the following summary shows, Agent Gaudin's testimony could be considered very important. Thirty days, however, is probably not the right time period to consider. It may be that new defense counsel could be retained within that time, but such counsel would still have to receive security clearances and have time to come up to speed on the case.

Testimony of FBI Agent Gaudin

The court called agent Gaudin to the stand. Lt. Piette objected to taking his testimony on the grounds that the court was treating agent Gaudin as a witness called by the defense. Lt. Piette pointed out that he had been listed as someone the defense wished to have available to be called, but the defense had not in fact called him and did not intend to question him. The judge asked the prosecution to call him, which they did. Lt. Piette also objected on the grounds that he was not qualified to be the sole defense lawyer in a capital case. He is four years out of law school and has never participated in a capital case. The judge asked him how many cross examinations he had conducted (maybe three or four dozen) and how many direct examinations (perhaps two dozen). Lt. Piette said that he would state his further objections to proceeding outside of the presence of the witness.

Mr. Miller conducted the direct examination. He established Agent Gaudin's credentials as an agent with 26 years of experience. As part of his experience, Agent Gaudin had been involved in investigating the bombing of the US embassy in Nairobi. In the course of that investigation he had interviewed one of the suicide bombers, Mohammad al Alali, who had survived. That bomber said that he had been assisted in obtaining a false Yemeni passport for the mission by a man he knew as Bahlul. The agent showed al Alali photos of a number of persons, from which he identified Bahlul as al Nashiri. He said that the driver of the suicide truck, who did die in the attack, was al Nashiri's cousin. He said that he was told that Al Qaeda in Yemen was planning an attack on a US naval ship.

Subsequently, after the attack on the Lindberg, Agent Gaudin was involved in that investigation. He received information regarding questioning of al Darbi in Afghanistan. They had discovered several false identification documents with pictures. Al Darbi told them the people pictured on the documents were members of al Nashiri's cell in Yemen. Agent Gaudin assisted the Yemeni in prosecution of al Nashiri in absentia in Yemen where he was convicted and sentenced to death.

After another alleged terrorist, Khalid, and al Nashiri had been captured and moved to Guantanamo, Agent Gaudin interviewed both separately. It was not clear from Agent Gaudin's testimony, but it appears that the "Khalid" to whom he refers is Khalid Sheik Mohammed.

Agent Gaudin said that both Khalid and al Nashiri were very carefully advised that they did not have to talk, that what they said could be used against them and that no negative inferences would be drawn if they chose not to answer questions. He did not say that they had been offered the right to counsel. In describing both, he said they appeared clean and healthy and did not complain of any mistreatment while at Guantanamo Bay.

Khalid admitted to being involved in planning attacks on ships, embassy attacks and the 9/11 attacks. The plan was to attack four ships, and al Nashiri was responsible for one of the areas being surveilled for targets. It was al Nashiri's role to direct one of the attacks.

Agent Gaudin testified that al Nashiri admitted his role in the Cole attacks.

Agent Gaudin also testified that he had interviewed Jamal al Bedawi, who was convicted in Yemen of involvement in the Cole bombing. When giving Bedawi his rights, he gave a full Miranda warning including advising him of the right to counsel. He agreed to be questioned but refused to sign a statement. Bedawi had a team of people preparing for an attack on a naval vessel. Al Nashiri had another team doing the same thing. He referred to Al Nashiri as Bahlul al Harasi, but selected a picture of al Nashiri as that person. Agent Gaudin identified al Nashiri in the courtroom as the person al Bedawi identified.

The prosecution introduced Exhibit 327G, a copy of the report the FBI prepared of the Badawi interrogation. Three paragraphs refer to the Cole bombing, and Nashiri is referred to two or three times. The references to al Nashiri in the report were not derived from the al Nashiri interrogations. In making the latter point, the prosecution is apparently trying to establish that this testimony is not tainted by the torture of al Nashiri as al Nashiri's own testimony may be.

The defense did not cross examine.

Lt. Piette's Statement for the Record

Lt Piette asked to be permitted to make a statement for the record regarding his decision not to participate. He objected to the court's repeated characterization of this as a

defense strategy. He pointed out that the developments that created the situation were not caused by the defense. He said that to go forward when he was not qualified to do so would be “gunducking”—the worst thing a sailor could do. Apparently that means failing to go through the checks and procedures necessary. The court responded that taking away al Nashiri’s lawyers was a greater denial of al Nashiri’s rights, and he blamed General Baker for that.

The judge repeatedly stressed that he did not intend to go forward to trial without learned counsel but opined that the steps being taken in the short term did not require experienced counsel—any qualified lawyer should be able to do it. Lt. Piette responded that in a capital case “all the pieces matter.” “Everything could affect the sentence in ways that I do not understand.”

Mr Miller made a very aggressive argument for moving forward. He accused all of the defense team of engaging in a “scorched earth” strategy. He contended that the ethics opinion defense counsel had received, opining that they could not ethically continue the representation, was phony. He accused General Baker of “conspiring with defense counsel to concoct a [fraudulent] basis for withdrawal...”

Lt Piette made a dignified final statement asking that the cynicism stop. He said all lawyers involved in the case care about justice, getting to the truth and fulfilling their obligations to their client. Judge Spath objected to this as to the absent lawyers asserting again, as he had done repeatedly all week, that they cannot simply disobey his orders.

Later in the day, the Convening Authority released General Baker saying that his punishment would be deferred. On that basis the federal district judge in D.C., who was about to rule on the general’s habeas petition, said that he would take the petition under advisement to give the military a chance to clean up the matter itself. General Baker had argued that Judge Spath lacked jurisdiction to hold him in contempt. There are questions about whether the Convening Authority’s power of review includes the power to reverse the finding of contempt or whether its power goes only to the punishment. This matter will thus continue, first in the Convening Authority and then perhaps back in federal court.