

Pacific Council

ON INTERNATIONAL POLICY



Observer Dispatches

Guantánamo Bay Hearings, March 11-18, 2017

United States v. Abd Al Rahim Hussayn Muhammad Al Nashiri

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General Observations

The courtroom is about a five-minute walk from our tents. Court begins at 9 a.m. so we leave our tents at 8:15 in order to go through multiple security screenings before we enter the courtroom.

The courtroom is kept very, very cold. Dress code is business casual. The observation area is separated from the courtroom by a wall with five large Plexiglas panels. There are five screens above the glass panels. The feed to these screens is delayed by 40 seconds so watching the movements beyond the glass panels is different from what we see on the screens. Forty seconds are surprisingly long! The delay handles any classified comments made that observers are not cleared to hear. Although it did not occur when we were present, there is a red light on the bench that goes on to denote classified information and the judge immediately clears the area. There are five service flags and one American flag behind the bench. At least six cameras are strategically placed around the courtroom for security reasons. The courtroom is set up for those accused in the 9/11 attack so there are six tables running the length of the courtroom for the defense and six more for the prosecution. During the week of March 13, 2017, only issues relating to al Nashiri were heard; therefore, much of the courtroom was unused. We sit behind the glass panels—a long distance to the front of the courtroom.

Signs posted in the observation area read as follows: “No drawing, sketching, doodling, etc.” “No classified discussions in this area.” “No binoculars or other visual enhancement devices.” There is also an electronic clock in the area visible to the observers. The observation area is tiered. Media sit in the front row, NGOs and other visitors in the remaining chairs. We are assigned numbered seats. There are two uniformed escorts who sit with us each day. We learned our escorts were reservists. Sleeping or slouching is prohibited. If someone nods off, they gently rouse you and suggest a walk outside. The escorts accompany you outside if you use the restroom or any other reason. A small refrigerator in the NGO area is filled with bottles of water and you can get up to get one. Water is the only drink that can be consumed in the observers’ area. Cough drops are allowed but no candy or other items.

The observation area itself is divided by a curtain. The victims’ families sit apart and are generally kept apart from the NGO observers. They have their own area of the airplane that takes us to and from Guantánamo, their own transport around the island, and their own tent area, including latrines and showers. A number of the sailors who were aboard the USS COLE were present as well as families from those killed.

Day One of Court Proceedings – March 13, 2017

We arrived in the observation area of the courtroom, sitting in our pre-assigned seats. It is the second week of a two-week session in the military commission of *United States v. Abd Al Rahim Hussayn Muhammad Al Nashiri*. The prosecution and defense teams slowly filter in. Al Nashiri is brought into the courtroom in chains by two guards at 8:50 a.m. The chains are removed. He is known as the Accused (not the Defendant). He is wearing light-colored pants and shirt, and a dark jacket. He puts on earphones to hear the translator. His team of lawyers speaks with him. At 9:04, as we watch through the Plexiglas window, Air Force Col. Vance Spath, enters. *All Rise*. But there is a 40 second delay! Our screens don't show it yet, so a different uniformed escort in the observation area orders us to rise; otherwise, we would still be seated due to the 40 second delay.

As the alleged architect in al Qaeda's bombing of the USS COLE warship at Aden harbor in Yemen on October 12, 2000, al Nashiri is charged with conspiracy, murder, terrorism, and other violations of the law of war, including perfidy. Seventeen sailors were killed and many others injured in the bombing. He is also charged with the attempted bombing of the USS The Sullivans, and the bombing of MV *Limburgh*. On the prosecution team is Chief Prosecutor Brig. Gen. Mark S. Martins (responsible for all detainees' prosecutions at Guantánamo), former Asst. U.S. Attorney Mark A. Miller of New Orleans, Col. Wells (Army) and Maj. Pierson (Air Force). On the defense team, there is a Learned Counsel, appointed by the military commission in cases in which the accused faces the death penalty and paid for by the Department of Defense. For al Nashiri, Learned Counsel is Rick Kammen. Other defense team members are Lt. Comm. Jennifer Pollio, who is a Navy JAG officer, plus Mary Spears and Rosa Eliades, attorneys from private practice hired by DoD. After a discussion of issues previously taken under consideration by the court, the proceedings focused on admitting evidence that had been recovered from the USS COLE and surrounding area.

First to testify was FBI Special Agent William Mark Whitworth. He explained items were labeled either Q for questions or K for known, plus a lab number that was unique to that group of evidence. There were photographs of debris, including fiberglass that likely—as was testified—was not part of the USS Cole. Detailed descriptions regarding the process, including protocol or guidelines for collecting handling, labeling, and preserving evidence and the chain of custody was given by this witness and other witnesses, who were former and current Special Agents for the FBI.

FBI Special Agent Tom O'Connor, evidence collection team leader, testified. He identified a large number of photographs of evidence. The judge said he is doing a balancing test: no photo so far is prejudicial. O'Connor resumes describing the process of evidence collection and storage including human remains. Each time a

human remain is found, a U.S. flag is placed on the body bag, brought to the deck and all personnel, including FBI agents, would stay for a short ceremony.

Retired Special Agent Jane Rhodes-Wolf testified about the chain of custody for the evidence being collected.

Asides from Day One

Upon resuming proceedings after a short break, Judge Spath said he is “tired of talking about this. From now on, coffee, water, or soda IS allowed in the courtroom! Every judge in the world gets to decide what goes on in his courtroom!” Unfortunately, that did not apply to us in the observer area.

Day Two of Court Proceedings – March 14, 2017

Al Nashiri was not present in the courtroom. Col. Wells moved to the podium to swear in, then question a JAG lawyer responsible for retrieving al Nashiri. He testified that he went to get al Nashiri at 6:45 a.m. for court but al Nashiri stated he did not want to attend the proceedings. He read al Nashiri a Statement of Understanding to be Present. A waiver was translated from English into Arabic and signed by al Nashiri. Defense counsel concurred. The judge made a finding that it was voluntary and knowing.

A witness from the previous day, Special Agent Jane Rhodes Wolfe, was recalled to the stand. She continued to testify about the chain of custody. One of the evidence bags was unreadable so she was unable to identify it. She noted that it was almost seventeen years old and was filthy. A short recess was called in order to open bag to read the information on label. The person opening the bag had to don a hazardous material suit. Defense began its cross and the Special Agent agreed that the information was the same. After cross examination, Judge Spath had questions about signatures vs. no signatures. No evidence logs and no grids have been found by prosecution so none has been turned over to the defense. Yet another prosecution witness testified to some of the same issues.

After a short break, another FBI agent from the Evidence Response Team testified that he was among the first group of agents to arrive at the scene of the bombing. He found sailors working to keep the ship afloat; the “smell of death was everywhere”; the galley was over 100 degrees; there was tremendous destruction; “the smell of diesel and sailors was in the air.” They put on Tyvek suits and heavy boots.

FBI Special Agent Tracy Kneisler, a member of the counter-intelligence squad testified that they first searched the beach and found a lot of debris such as life rafts, preservers, etc. from the USS Cole. She said there was “rotten food, no air conditioning; it was very hot with the smell of diesel and human remains everywhere in the air. Many people were on the deck because there was no air

conditioning and it was very hot. Most of the evidence we collected was fragments of fiberglass, no bigger than my hand.”

Day Three of Court Proceedings – March 15, 2017

Al Nashiri was again not present. Lauren McCall from the legal office responded to Col Welles questions that al Nashiri did not want to attend. A Statement of Understanding to be Present was read to him in English, translated into Arabic. He waived his appearance and signed it. Defense concurred. The judge made a finding that it was voluntary and knowing.

Learned Counsel Kammen noted two items. Defense experts who are working with the FBI exhibits that were not used, would like to use the courtroom after this session is adjourned.

The second item is that a filed petition for *certiorari* in the D.C. circuit that had been classified, has now been declassified. Based on this change, torture is now public. Kammen will file today for the failure of government to provide §120 material. The judge asked, “Assuming we finish early as noted, if prosecutors can agree to work with defense? Regarding the de-classified information, if producible to defense under §120, how will that impact proceedings?” He then set trial order for 2018. “As we work through trial, witness lists are developed and exchanged moving to trial. It will take months to seat a jury while we work on motion practice. Figure out “no go” dates in 2018. I’ve had three years to see what this universe is...”

Defense cross examines Tracy Kneisler, the witness from yesterday. She is questioned about issues related to chain of custody including security of the place where the evidence was stored. She is asked about an evidence log but did not recall. It’s a guideline to have them; just a best practice. She reiterated that she never signed someone else’s signature. Prosecutor Miller questioned whether the integrity of the evidence is ruined by lack of an evidence log. Kneisler responded, “No.”

After a short break FBI Special Agent Edmond Gerard Cronin, experienced in bomb technology, testified. He noted there was complete destruction of the galley with a gaping hole in the side of the ship. There were items found that were not native to a U.S. warship. The ship was struggling to remain upright; three sailors were still missing and divers were looking to retrieve their bodies. The evidence was taken off the ship at the end of the day. Eventually, it was flown in a C-5 aircraft to Germany, secured for the night to ensure no tampering, then flown to Andrews AFB. Cronin was asked by the defense to explain the difference between bomb technicians and explosive technicians. He said bomb technicians went to hazardous device school. Prosecution called FBI Special Agent Kevin D. Finnerty from the Washington field office. He said that, while he went home to gather his personal items so he could leave immediately, another team got the needed gear together. After negotiation, they agreed to allow the Yemenis to go through their gear so they could get off the

plane in Yemen. Finnerty's team searched the shorelines while an assessment was being done. They only found a rope. A determination was made to search the ship for body recovery. Mud divers would be involved. It was extremely difficult because there were three missing sailors. In the galley, there were decomposed bodies, maggots, body pieces that had to be pulled from some areas; and the power was off and on.

On cross examination, he said that after body recovery, they were assigned to different area for collection of items. Someone from the crew stands by the sifter determining what to keep, what to put aside if it came from the Cole. Bomb techs were swabbing the walls before they got on the ship.

The Commission was called to order after a short break. Special Agent Jane Rhodes-Wolf was re-called. She said there was a briefing room below deck that held evidence and that it could be secured. Later, evidence went to a Conex trailer on shore in the Marine encampment. A boat would land with items each night. Each item had its own unique number. Only names of FBI personnel, not non-FBI personnel, were entered on a form in order to contain and track the evidence. The prosecution called FBI Special Agent Dayna Vetter Sepeck, who was the evidence custodian. She noted the evidence room was assigned; it needed to be secure, non-wet, etc. There was a suite of rooms that included a desk; another area for storage; and another area for drying items. Her assistant was Ignacio Mendazabel who is with the FBI but not an agent. It was a crime scene so all the supplies we needed had to be brought over there. The ship was staying afloat; there was human remains recovery; and all the crew was there with the FBI so it was emotional and difficult.

On cross examination she said that they did have an evidence recovery log. She last saw it in Yemen when it was turned over to team leads from the Washington Field Office. She said Jane Rhodes assisted occasionally but she (Dayna Vetter Sepeck) was in charge.

Day Four of Court Proceedings – March 16, 2017

The Commission was called to order at 9:02 a.m. Al Nashiri again was not present. The same procedure from previous days was followed; however, al Nashiri asked that he meet with his attorneys this afternoon after court.

Judge Spath asked if either side wanted to go through each exhibit again. Do they want to move for admission of all exhibits? (The prosecution was laying evidentiary foundation for 176 physical items). Defense moved to compel Donald John Sachtleben to testify. (Former FBI agent Sachtleben is currently in federal prison serving a term of 12 years for leaking top secret information about a foiled airline bomb plot in Yemen and on child pornography charges).

The prosecution moved to admit the documents (not exhibits yet). The defense objected. Are the documents offered as business records, or what? "Once these are in, the exhibits are in. It is unprecedented that we don't even know who are the collectors of the evidence."

The Judge asked the foundation. Is it §901? How did the items get from the Conex to the United States? How did the items get from Andrews AFB to the lab?

Jane Rhodes-Wolfe was recalled. She said the Conex box on shore was within the Marine base. It was locked. At the end of the day, there was a team effort to put the evidence in the box. After security issues in Yemen, it was decided to move the Conex box in a rope harness to the USS Tarowa. NCIS was on board. The evidence was secured in the brig, tape put over and around the brig, checked daily. It was transported by helicopter to fly into Oman. From there it was put on a charter flight with the sailors from the USS Cole. Rhodes-Wolfe watched the evidence being put on the plane. It flew to Ramstein, Germany, where the evidence was secured for the night. It was reloaded on a charter plane to Norfolk, and on arrival, met by FBI agents from the New York field office who took charge of the evidence.

Defense noted there was no documentation after it left the marine base in Aden, Yemen. He asked Rhodes-Wolfe about a report she wrote on November 8, 2000. Items were transferred from the USS Cole to the Conex box from October 17-26, transferred to the USS Tarowa on October 25. She cannot recall how the Conex box looked or whether it was refrigerated—or how it was locked. She does not know where the chain of custody document was maintained but it should be completed as contemporaneously and practical as possible. Records are inconsistent as to dates October 25 and 26. The handwriting was not Rhodes-Wolfe; it was probably Dayna Vetter Sepeck.

Prosecution called FBI Sp Agent Kelly Barebeau Vanarsdale. She noted that it was important to validate signatures. Defense received confirmation from her about the importance of one's own signature and putting in an accurate date.

Judge Spath moved the May hearing and moved depositions of Al-Darbi, another Guantanamo detainee, from the first week in July to second week in July. (A plea agreement with Al Darbi was made in return for his testimony. He can serve his sentence in Saudi Arabia in the "rehabilitation area." Al Darbi has also been charged in the Limburg attack in 2002. The prosecution wants to videotape his deposition but Al Nashiri's defense objects and wants to cross examine him in person). The judge extended the September session to three weeks beginning week of September 11 to provide notice and request for witnesses; to start appellate exhibit 166 hearsay motion; other motions; and a 335c parent motion to give government opportunity regarding voluntariness. Also, there will be a two-week period in November; then the order for 2018, the trial order encompassing how to seat the panel; schedule more motions. Many people need security clearances. Lt. Com Polio will be replaced in August, due to a military re-assignment.

The judge wants to move forward in an efficient manner, emphasizing his court is a “no torture zone.” (This refers to excluded evidence obtained via torture or cruel, inhumane, or degrading treatment). Inefficiency is five years or more of prosecution’s “scorched earth” discovery. The judge wants remedies. (According to Chief Prosecutor Mark Martins in remarks made on March 5, 2017, the government has provided more than 267,740 pages of discovery to the defense. Also, as of September 30 of last year the government has proposed many thousands of pages to the Judge for provision to the defense, once appropriate Judge-approved substitutions are made, so as to protect classified information).

Learned Counsel Kammen noted that they will need more than 10 linguists if going to trial in 2018. If “Big G wants to go to trial, then Big G needs to assist.” An example given is the need for an MRI machine. (Big G is the federal government).

The Prosecutor said the government wants to move forward, too.

This is the end of the second week of the two-week session in the matter of al Nashiri.