Guantanamo Bay military judge arrests military defense lawyer

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A series of events involving the defense of Guantanamo detainee Abd al-Rahim al-Nashiri has exposed the dictatorial and brazenly anti-democratic methods being employed by the military as they continue to prosecute detainees through Military Commissions.

The three civilian attorneys for al-Nashiri resigned from the defense team on October 11, 2017 over a classified ethical conflict. The attorneys, Rick Kammen, a longtime death-penalty defense lawyer, and his colleagues Rosa Eliades and Mary Spears, indicated that past and potentially ongoing surveillance of attorney-client conversations, as well as rules that made it hard to communicate with their client, rendered it impossible for them to represent him properly.

Because of rules imposed upon them by the military, al-Nashiri's lawyers are prevented from revealing in public any details about their complaints. In the past, however, it has come to light in other detainee cases that additional forms of surveillance included the government placing a FBI mole on a defense team, and the secreting of listening devices in rooms where defense attorneys and clients would meet, as well as in court rooms.

Al-Nashiri is accused of orchestrating the October 12, 2000 suicide bombing of the USS Cole, a warship off Aden, Yemen, that killed 17 US sailors. He has been in US custody since 2002 and is facing the death penalty.

Marine Brigadier General John Baker, who is the second highest-ranking lawyer in the Marine Corps and is the chief defense counsel for Military Commissions, had sent the chief prosecutor a memo on June 14, 2017 stating that he feared defense communications with clients might be compromised. Baker said he had information suggesting that surveillance had continued or had been restarted. "I am not confident that the prohibition on improper monitoring of attorney-client meetings at GTMO as ordered by the commission is being followed," said Baker.

On June 23, the defense filed a classified motion that sought permission to give al-Nashiri information about the alleged intrusions into attorney-client communications. The nature of the alleged intrusions has not been specified in any un-redacted public court documents. The military judge in charge of al-Nashiri case, Air Force Colonel Vance Spath, denied the motion.

In July, the defense tried to compel discovery of evidence related to alleged intrusions and asked for an evidentiary hearing. Col. Spath again denied both motions in classified rulings.

This issue came to a head on October 6, when al-Nashiri's three civilian defense attorneys asked Brig. Gen. Baker to relieve them from the case because of their undisclosed ethical concerns. Baker granted their request, leaving al-Nashiri with a single military lawyer, Navy Lt. Alerac Piette. Because al-Nashiri could receive the death penalty if convicted, the rules governing Military Commissions state that a defendant facing such a sentence must have counsel with prior experience in a capital case. Lt. Piette, however, had never served on a capital case and thus by the military's own rules could not represent al-Nashiri without other death penalty qualified counsel.

Col. Spath, on October 29, then ordered the civilian attorneys who had weeks earlier been relieved from the case by Brig. Gen. Baker to appear for proceedings in al-Nashiri's case. When they failed to do so, Col. Spath ordered Brig. Gen. Baker to rescind his order to excuse the civilian defense lawyers or to testify about their absence. Brig. Gen Baker refused, asserting that military law gives him the authority, as chief defense lawyer for Military Commissions, to release the attorneys. He also refused Spath's order to testify, citing privilege.

On October 31, Spath found Baker in contempt and ordered him to 21 days confinement in his quarters, a trailer behind the courthouse at the Camp Justice compound at Guantanamo and to pay a fine of $1000.

Meanwhile on the same day, al-Nashiri filed motions for an injunction and a temporary restraining order, asking for a halt in his proceedings. He asserted that continuation of the hearings without adequate legal representation would cause him to "suffer irreparable harm."

On November 1, Judge Royce Lamberth of the US District Court in Washington, D.C denied these motions and al-Nashiri's pre-trial proceedings commenced on Friday, November 2.

During Friday's proceeding al-Nashiri was "represented" solely by defense attorney Piette, a 2012 Georgetown Law graduate who was a Navy SEAL at the time of the Cole

bombing. Piette, however, acted in a principled manner by refusing to question a witness or take depositions, declaring himself not competent to litigate in the absence of a death-penalty qualified defender. “My duty is solely to the interest of Mr. al Nashiri,” Piette told Col. Spath, repeatedly saying that as a lawyer with no capital experience he was not qualified to participate without a death-penalty defender in court.

Piette asked the judge to not look at the absence of Kammen, Eliades and Spears, the civilian lawyers, through the prosecutor’s cynical claim that their absence was a delaying tactic, or was a trial strategy of choice. But, rather, that their absence was compelled because they are “attorneys who care about their client, care about their job, care about justice, and aren’t willing to give up those things.”

Also on November 1, attorneys for Brig. Gen Baker filed a habeas corpus petition in Washington D.C. federal court asserting that Col. Spath had illegally detained Baker by exceeding his authority under the Military Commissions Act of 2009.

On Friday November 2, just before this matter was to be heard, Baker was released by the senior Pentagon official overseeing Military Commissions, Harvey Rishikof, who suspended Baker’s sentence pending a review.

Pentagon spokesman Air Force Maj. Ben Sakrisson said Baker was delivered a letter Friday afternoon “notifying him that the imposition of the remainder of his sentence was delayed until [Rishikof] makes a final decision on the matter.”

Upon being notified of Baker’s release, US District Court Judge Royce Lamberth declined to rule further on Baker’s case during the hearing Friday, saying the military official in charge of the war court showed “good faith” by releasing Baker. But he implied that if the military didn’t take further action in a “reasonable” amount of time, he might take action later. “I’m not going to stand down, I’m simply going to give the military time to clean up its own act,” Lamberth said. “And its first step was a good one.”

Michel Paradis, a civilian appellate lawyer who works for Baker, said that while Baker’s release was a positive step, the deferred sentence was still problematic. Paradis said under his understanding of the law, the military authority that ordered Baker freed does not have the power to overturn his conviction. “At any time, the [authorities] can re-impose the sentence on him,” Paradis said—even a decade from now. As he goes about his duties as chief defense counsel, the possibility of having to go back into detention will be “a sword over his head.”

Al-Nashiri’s civilian defense lawyers were also targeted by Col. Spath as he ordered defense attorneys Rosa Eliades and Mary Spears to appear at a government facility in Alexandria, Virginia at 9 a.m. on Friday and then later ordered that they and Robert Kammen, who had served as the lead attorney on the case, appear at the Virginia facility on Monday November 6.

On Friday afternoon, in response to the military’s attempt to impose its authority on civilians, US District Judge Tanya Walton Pratt acted on what was essentially a preemptive habeas corpus petition submitted by Kammen’s lawyers in Indianapolis, where Kammen has his law practice.

Judge Pratt then issued a two-part restraining order on Spath, Rishikof and Secretary of Defense Jim Mattis that prohibits US Marshals from seizing Kammen and bringing him before Spath until she could, in Indiana, “hold a hearing on the merits.”

Pratt then froze “any purported requirement”—pointedly not using the judicial word “order”—for Kammen to appear at war court headquarters in Virginia. Pratt gave Justice Department lawyers 21 days to respond in writing to her instructions. Spears and Eliades have filed similar petitions in Illinois and Virginia.

“There is a possibility that they will be thrown in jail for defending their clients’ rights against government intrusion,” said Alka Pradhan, a Defense Department attorney also assigned to represent Guantanamo detainees. “From the beginning, the military commissions were meant to ensure quick convictions and the defense has held them off for this long to try to ensure some sort of constitutional adherence. But this is where the real clash begins. The U.S. government is actually beginning to jail the people they have tasked with providing zealous representation of these individuals.”

This latest and most flagrant clash between the constitution and Military Commissions is a vivid expression of how the existence of democratic rights is increasingly incompatible with the authoritarian methods of rule on which the ruling class is becoming ever more dependent.

The Military Commissions, codified into law by the Obama administration in the Military Commissions Act of 2009, make a mockery of the Bill of Rights. In these proceedings virtually every basic right afforded a criminal defendant by the US Constitution is either absent or ignored. The al-Nashiri case illustrates how these authoritarian measures are being used not only against “enemy combatants,” but against attorneys attempting to defend them as well.