Human Rights Watch

Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

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Public Facing Advocacy Writing

This year will mark the twelfth anniversary of the September 11, 2001 attacks, yet the five men accused of planning those attacks may not go to trial for years. At Guantanamo, where a military commission has been created to try the accused, the prosecution and defense are still arguing basic procedural issues, like how the defense lawyers can communicate with their clients.

In August, I watched at Guantanamo as days of argument were devoted to preliminary issues such as which witnesses should be compelled to testify, to what types of information parties are entitled, and whether the military commission itself violates the US Constitution. But the proceedings were dominated by constant complaints from defense counsel about a lack of access to important information and attempts to resolve procedural issues.

The prosecution and defense were still arguing over proposed rules about how defense lawyers can write or send mail to their clients. Almost two years ago the defense challenged a set of rules imposed by then base commander Rear Adm. David Woods. At that time, the chief military defense counsel, Marine Col. Jeffrey Colwell, so objected to the rules that he instructed military attorneys under his command not to**comply with them**. The Woods orders are still in place and the defense is still abiding by Colonel Colwell's instructions not to comply. They require that the defense submit materials designated privileged attorney-client communications to a "privilege team" for review. This team consists of Defense Department lawyers and intelligence personnel. Colwell wrote in a memo at the time that abiding by the orders would be a violation of the rules of professional conduct. "You can't defend your client without being able to communicate with him confidentially," Colwell**said at the time**. "Without that, the system fails."

The issue is not just about who reviews privileged material but also what types of material and sharing of information can be prohibited. The Woods order prohibits "information contraband" that, according to the order, includes information on "[c]urrent political or military events in any country; historical perspectives or discussions on jihadist activities, including information generated or distributed by or on behalf of foreign terrorist organizations, individuals or groups engaged in terrorist activities, to include material such as 'Inspire' magazine." It also includes any information about US government personnel who have been involved in the defendant's detention, both current at Guantanamo and past when they were in secret CIA custody." In short, the Woods order prohibits defense lawyers from exchanging information by mail and discussing with clients activities and personnel that they say are at the heart of the charges against them, hindering their ability to prepare a defense.

Objections over how written communications should be handled have permeated every aspect of the case from the outset. Even before charges are brought in the military commissions system, defendants can argue to the convening authority the military official who approves charges that even though prosecutors have requested the death penalty, the maximum punishment should be life in prison. Defense teams have argued that the Woods order hampered their ability to effectively communicate with their clients and therefore make such arguments to the convening authority. All five of the 9/11 defendants were held in secret CIA custody and subjected to torture or other ill-treatment, factors that the convening authority may consider when referring charges. A prior convening authority in 2008**dismissed charges**against another defendant accused of being involved in the September 11 attacks, because he had been subjected to torture in US custody. At the end of the week, though both defense and the prosecution had proposed alternatives to the Woods order, there was still no resolution of the issue and the Woods order remained in place.

Beyond the written communication issue, the military commissions have been plagued with a host of other issues affecting protection of attorney-client communications. In February, defense attorneys**discovered listening devices**disguised as smoke detectors in attorney-client meeting rooms. Additionally, proceedings were halted because a courtroom feed to the media and observers that supposedly only the judge was able to control was cut off by an unnamed US agency, presumably the CIA. Then in mid-April, hearings were further delayed by two months because an enormous number of prosecution and defense**files disappeared**from the server that both legal teams are required to use to process the highly classified documents in the case. This prompted another instruction from the current chief defense counsel, Air Force Col. Karen Mayberry, to all military defense lawyers under her command, to stop using their government computers for sensitive information. As of last week, problems with the server had still not been fixed. The military judge in the case,

Army Col. James Pohl, has warned that**he might suspend trial preparation**if the government does not fix the problems.

With all these issues unresolved, defense attorneys contend that the current military commission system prevents them from being able to appropriately protect the attorney-client privilege.

These issues would never have arisen if the defendants had been prosecuted in federal court the way US Attorney General Eric Holder announced they would be in November 2009. If problems arise there, federal courts have over 200 years of precedent to rely on, and federal judges have experience trying complex cases, including terrorism cases. Although Congress has barred the transfer of Guantanamo detainees to the US for trial, a new proposal to lift those restrictions will be considered by the Senate this fall. Senators considering lifting the ban would be wise to pay attention to the pre-trial proceedings in the military commissions so they can see that the government has created there a justice system that provides no justice at all.

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A Roadmap to Justice for CIA Torture

How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy