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## Defense Lawyers in 9/11 Case Face Huge Hurdles

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It's been nearly impossible to follow all the arcane procedural arguments being made in the 9/11 military commission pre-trial hearings at Guantanamo Bay this week. But one thing has become clear: defense lawyers representing the five co-defendants in what may be the most important trial in U.S. history are subjected to unprecedented restrictions on the ability to communicate with their clients and infringements of the attorney-client privilege that would be unheard-of in a regular federal court. If that sounds like a technicality, it's not. In fact, it pervades the ability of defense lawyers to fairly represent the five accused men in this death penalty case.

Take, for example, the court discussion Wednesday morning, where lawyers complained they couldn't communicate with their clients in the period before the military commissions' Convening Authority -- the person who decides the charges -- decided to seek the death penalty against all five men accused in this case.

Before deciding on the charges, the Convening Authority reviews a report from a legal advisor that would normally include, among other things, what's known as "mitigating evidence" -- evidence that would weigh against seeking the death penalty.

In this case, that evidence is about the defendants' torture in CIA custody. As Cheryl Bormann, lawyer for Walid bin Attash, put it in court on Wednesday: "As we know, torture is a huge issue in this case, and is probably the cornerstone of mitigation." Yet the pretrial report prepared by the legal advisor to the Convening Authority "made no mention of torture," said Bormann. That report remains privileged; no one without a security clearance can see it.

The report didn't mention torture, argue the defense attorneys, because the defense teams could barely communicate with their clients to ask them about their experiences. In particular, the specialized death penalty lawyers were unable to gather evidence from the accused.

That's in part because, pursuant to Guantanamo Bay prison orders, all mail to and from the five suspects was being monitored by the government. Because attorneys are ethically required to keep confidential all communication with their clients, the Chief Defense Counsel for the military commissions instructed defense lawyers not to communicate with the men by mail.

Personal access to these "high-value" detainees kept at the most secure camp in Guantanamo, meanwhile, was extremely difficult and rare.

So even though the military commission rules say anyone facing capital charges is entitled to specialized counsel with death penalty experience, defense attorneys say those lawyers weren't actually able to participate.

As David Nevin, Khalid Sheikh Mohammed's lawyer, explained to the judge: "The rules require 'representation' by death penalty qualified counsel, not just appointment of one."

What's more, anyone without a security clearance was forbidden from speaking to the detainees about their treatment in secret CIA custody, which the government has insisted is classified. Due to long delays in obtaining security clearances, that meant much of the defense team, often including those with death penalty expertise, could not speak to the men about the issue central to their mitigation claim.

Nevin on Wednesday expressed his outrage: "No protective order in the history of the world has ever forbidden defense counsel from talking" about core issues with their client. "Whatever else representation means it means being able to talk to the client," he told the judge, Army Col. James Pohl. "We're prohibited from doing that."

In addition to the government-monitored mail, detainees' phone calls are monitored and their cells are routinely searched and documents confiscated. Those documents often include legal documents received from their lawyers, which are supposed to be confidential.

Lt. Commander Walter Ruiz, representing Mustafa al-Hawsawi, on Wednesday argued he wants to call a government witness who can explain why prison guards seized letters he'd given his client and handwritten notes his client had taken.

"Notes were torn out of Mr. Hawsawi's notepad and taken," said Ruiz. "That affects how counsel communicates with our client."

It also impairs development of the lawyers' relationships with their clients. "We are charged with developing a relationship of trust with our clients," said Nevin on Wednesday afternoon, explaining that American Bar Association guidelines require that in death penalty cases. "As you know, these men were tortured by officials of the U.S. government. Now I show up as an American and say, 'we're from the government, we're here to help you,'" he said. "It's been a challenge for us."

Another obstacle for defense lawyers is their inability to call government witnesses without the prosecution's approval. Defense lawyers have been arguing this week for, among other things, the opportunity to call witnesses who advised the Convening Authority on the decision to seek the death penalty in this case.

In a civilian federal court in the United States, defense lawyers can issue a subpoena ordering a witness to appear. There's no comparable authority in the military commissions. While prosecutors can call any government witness they want, government officials can refuse to speak to the defense, and prosecutors can oppose the interview. Defense lawyers then must argue to the judge in court (often at great length, as we're seeing this week) why the particular witness is important to their case.

That led to the odd spectacle on Wednesday of a prosecutor urging Judge Pohl to refuse to order the testimony of a particular government official -- because the defense lawyer asking to question the witness couldn't tell the court in advance what that witness would say.

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