

THE SECRETS MILITARY COMMISSIONS KEEP THAT CIVILIAN COURTS DON'T

As I mentioned in my earlier post on the new Gitmo protective order, DOD is reportedly preparing to charge Abd al Rahim al-Nashiri for his role in the Cole bombing for trial in a military commission. That's worth keeping in mind because the Gitmo order is largely based on the protective order the DC District Court uses for habeas cases. The Gitmo order chose not to simply adopt the DC District order, though, suggesting the differences may have been crafted for people like al-Nashiri.

While some of the changes are just procedural, others are more telling. A central difference is the assertion that everything a High Value Detainee says will be presumptively treated as Top Secret/SCI (an update to the DC District order, issued before Abu Zubaydah's lawyers got materials in his habeas case, includes treatment of TS/SCI information). So anything al-Nashiri tells his attorney about the torture he suffered—including the torture still allegedly being investigated by DOJ—will be considered TS/SCI.

In a similar vein, the prohibition on sharing detainee statements in classified documents I mentioned earlier is an addition to the DC District order.

Statements of the detainee that detainee's counsel acquires from classified documents cannot be shared with the detainee absent authorization from the appropriate government agency authorized to declassify the classified information.

Curiously, the Gitmo order includes an extra

requirement before attorneys get access to classified information: that the attorney,

provid[e] to the Chief Defense Counsel detailed verifiable information regarding past employment, including a list of prior case assignments, to ensure against any conflicts of interest with the case to which detainee's counsel is currently assigned.

I'm very interested in what "conflicts of interest" they have in mind. Particularly as it relates to al-Nashiri, remember that there was a JAG investigation into whether Kirk Lippold acted improperly in the USS Cole attack (the investigation was designed not to look at larger questions about rules of engagement because they would reflect badly on our allies in Yemen). In addition, one of the CIA's first uses of a drone to kill someone—with the supposed "accidental" killing of US citizen Kamal Derwish at the same time—was in the killing of Abu Ali al-Harithi. I would imagine the government would want to make sure al-Nashiri's attorneys are completely ignorant about certain details of both of these events. That said, the restriction may well be about making sure attorneys don't know too much about other detainees. In any case, they seem to be using "conflict of interest" where they really want to deprive attorneys who "know too much" of serving as counsel.

The Gitmo order also eliminates a caveat included in the DC order. In the rule prohibiting attorneys from sharing certain information with their clients,

Written and oral communications with a detainee, including all incoming legal mail, shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country

that are not directly related to counsel's representation of that detainee; or security procedures at GTMO, including names of U.S. Government personnel and the layout of camp facilities, or the status of other detainees, not directly related to counsel's representation. [my emphasis]

... the Gitmo order eliminates the exception in cases where this information relates to the lawyers representation of the detainee. I'm particularly interested in this given that Khalid Sheikh Mohammed named detainees whom he had implicated under torture, insisting they were innocent. Preventing any discussion of the status of other detainees would prevent such public revelations at a military commission.

The Gitmo order also includes a prohibition on sharing of information between detainees.

No materials, either Legal Mail or non-Legal Mail, are permitted to be exchanged directly between detainees unless authorized by the JTF-GTMO Commander or, after referral, the military judge. If a detainee in a military commission is authorized to proceed pro se, the military judge may authorize special procedures to facilitate the exchange of information necessary for a pro se detainee to prepare a defense. However, all written materials provided to a pro se detainee must be first reviewed by the Privilege Team under the same standards applicable to detainees represented by counsel.

Much of this order—and this restriction in particular—seems to be a response to the John Adams project, which collected photos of detainees torturers and in some case had them exchanging photos among themselves.

Finally, while the DC order ensured that the

content both face-to-face and phone conversations between an attorneys and their client could not be monitored, the Gitmo order explicitly permits the recording of phone calls between lawyers and their clients.

Any telephonic access by detainee's counsel is subject to appropriate security procedures, including contemporaneous monitoring and recording. Any telephonic access between detainee's counsel and a detainee over either secure or non-secure systems may be subject to appropriate security procedures, including contemporaneous monitoring and recording by the Privilege Team. [my emphasis]

Mind you, as CCR's suit about the wiretapping of attorney-client conversations shows, they've been doing this all along anyway. But now they're making it explicit.