DID ~~CIA~~ OCA CENSOR ANOTHER COURT TRANSMISSION?

Back on January 28, the proceedings of the military commission attempting to try Khalid Sheik Mohammed and co-conspirators were interrupted when an unknown entity outside the courtroom muted the audio feed carried out of the courtroom. The presiding judge was enraged and has held hearings to get to the bottom of the event. As Carol Rosenberg reported on January 31:

> "This is the last time that will happen," the judge said Thursday. "No third party can unilaterally cut off the broadcast."
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> /snip/
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> Pohl never once mentioned the CIA, the agency that controls information about what happened to alleged mastermind Mohammed, who agents waterboarded 183 times, and his four co-defendants. Instead, he referred to the "OCA" – short for the original classification authority – a generic term for any agency of the U.S. government that stamped a document or declared a program Top Secret.
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> "This is the last time that an OCA or any third party will be permitted to unilaterally decide if the broadcast should be suspended. The OCA, any OCA does not work for the commission and therefore has no independent decision-making authority on how these proceedings are to be conducted."

Remarkably, the OCA censoring scandal has now spread to include the presence of hidden microphones the defense contends may have been

used to eavesdrop on privileged attorney-client conversations, but I want to concentrate here on a remarkable coincidence where a second terrorism trial also was disrupted by a sudden, unexplained interruption in a transmission of the proceedings.

The current case centers on the nearly 80 year old, frail imam of South Florida's oldest mosque, Hafiz Khan. He and a number of co-conspirators are accused of funneling money to the Pakistan Taliban:

> One of Mr. Khan's sons, Izhar Khan, 24, the imam of a mosque in Margate, Fla., sat near his father in the jury box. Both men appeared in court for the first time since their federal indictment was unsealed late last week. Neither man entered a plea.The indictment says the defendants conspired to provide material support to a conspiracy to murder, maim and kidnap people overseas, including planning to funnel at least $50,000 to the Pakistani Taliban.
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> The Pakistani Taliban, which the State Department has named a terrorist organization, took responsibility for a suicide attack in Pakistan on Friday that killed more than 80 cadets from a government paramilitary force.

Significant portions of the government's case rest on recordings of intercepted phone calls:

> According to the indictment, a tape-recorded phone conversation has Mr. Khan calling for an attack on the Pakistani Assembly similar to a suicide bombing of the Marriott Hotel in Islamabad, Pakistan, on Sept. 20, 2008.
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> Prosecutors say that in another phone conversation, Mr. Khan "declared his wish that God kill 50,000" American soldiers.

Khan's defense team wanted testimony from a number of people in Pakistan, but they will not come to the US to testify in the Miami trail. Several motions were submitted by the defense and the government on just how testimony could be obtained from these witnesses. The defense wanted to depose the witnesses in Pakistan via videoconferencing, but the government fought that request. The government embarrassed itself a few times in these filings, especially when it argued that the defense had not indicated what language would be used for the depositions and so the government might not have the proper translators present. Further, the government tried to argue that the defense had not adequately shown why the witnesses did not want to come to the US.

In ruling on these many motions (pdf), the judge cut through the government's arguments very cleanly, noting that the government had recorded these very witnesses and cited them in its indictment, so the language they speak is known to the government. Further, the witnesses are co-conspirators in the indictment and so they fear arrest if they come to the US:

> The Court found in its previous order (ECF No. 538) that the Pakistan Deponents are substantially unlikely to appear at trial and that their expected testimony is highly material because it addresses the government's allegations and a central defense theory. As to unavailability, the Pakistan Deponents are beyond the subpoena power of the United States. Four of the Pakistan Deponents have submitted sworn affidavits that they are unwilling to travel to the United States to testify. A defense attorney submitted an affidavit stating that he was told by the fifth Pakistan Deponent—Noor Mohammad, an unindicted coconspirator that the government alleges is a Taliban member—that Mohammad was unwilling to travel to the United States to testify

> unless he received assurances from the United States government that he would not be detained. The Court is aware of no such assurance, which is not surprising given that the government stated that the three Pakistan Deponents who are indicted co-defendants1 “would be detained by American security officers” if they appeared at the U.S. Embassy in Pakistan for a deposition. (ECF No. 390 at 17-18.) This evidence establishes unavailability.

The defense arranged the videoconferencing and all seemed set on Monday. From the Miami Herald before proceedings began:

> Defense witnesses are set to testify from Pakistan in the South Florida trial of a Muslim cleric charged with financially supporting the Pakistani Taliban.
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> The first of up to 11 witnesses will testify Monday from an Islamabad hotel. The testimony will be beamed to a Miami federal courtroom via video hookup. Defense lawyers will ask questions in Pakistan, with prosecutors doing cross-examination using the video feed.

And that first day of the depositions went uneventfully, as reported later by the Herald:

> Testifying via video from Pakistan, a man accused by the U.S. of conspiring with an elderly Miami-based Muslim cleric to funnel thousands of dollars to Taliban terrorists insisted Monday the money was for innocent purposes, including a potato chip factory run by the cleric’s son-in-law.

But Tuesday was a different story, as the transmission was suddenly cut:

> On Tuesday morning, the Internet connection linking a suspected Taliban soldier who was testifying in a video call from Pakistan to a Miami federal courtroom suddenly went dead.

The defense first pointed to Pakistani authorities as perhaps responsible:

> Khan's defense attorney, Khurrum Wahid, explained to the judge by phone that there was "absolutely no problem" until a prosecutor in Miami mentioned the name of the Serena Hotel, where the testimony was being taken, during cross-examination. He noted the hotel staff said "there were some intelligence operatives in the business center here, and they were taking pictures of us and our witnesses."
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> Added Wahid: "I've been told by the hotel staff that it's from outside the building and that … the IP address has been blacklisted by the Interior Ministry, I'm sorry, the Pakistan Telecommunication Authority."

But Wahid then presented an alternative where the US government may have been responsible:

> Then, Wahid pointed a finger of blame at the U.S. attorney's office in Miami for killing the Internet connection: "I'm of the belief at this point that our government, through the prosecutors, is attempting to derail this process."

Given the very recent precedent of "OCA" cutting the feed from Gitmo, Wahid may well be on the right track with his accusation of the US government. However, it's not clear to me that there would be any need for the Miami U.S. attorney's office to be involved if this was indeed a censoring move by the CIA. Since the CIA showed at Gitmo that they will simply act

unilaterally, no cooperation or even awareness by the U.S. attorneys needs to be invoked to explain how the censorship took part.

Meanwhile, the Herald reports that the defense has only until Tuesday to make arrangements for the testimony to take place in a third country such as the United Arab Emirates or be forced to resume the trial in Miami without the witnesses. And there is no further news on who cut the transmission:

> A federal prosecutor said his office contacted an FBI legal attaché in Islamabad, and the official checked with several Pakistani government agencies and the staff at the hotel where the testimony was taken earlier this week. No one had a clue about the mysterious shutdown – whether it was a technical glitch, or the secret work of the Pakistan government or some other entity.

I'm still betting on "some other entity" otherwise known as the CIA.

Update: Marcy's question at comment number one made me realize there also is more information on the circumstances of the cutoff in the defense motion filed yesterday (pdf):

> On the day the proceedings were to start, February 11, 2013, there were no requests by any government agency to stop the proceeding. The position that had been taken since December that no written permission was necessary remained in tack as far as Defense knew. No government agencies sent personal to the location of the deposition which was known to the Interior and Foreign Affairs Ministry's. Testimony proceeded on that date in an uneventful manner with both the agencies knowledge and a good deal of awareness in the hotel of the proceedings. Again these proceedings

> were intended to be and were conducted in the light of day via knowledge of the relevant civilian agencies. Despite these efforts, the video feed of the depositions was terminated on February 12, 2012. The termination occurred the day after the prosecution specifically mentioned in open court that the depositions were being taken in the Serena Hotel on what is to be a closed video feed. Defense counsel is unaware of which agency took adverse actions to shut down the video feed. Defense counsel has made no attempts to conceal this process. There was no need to conceal a process that was both lawful and in knowledge of multiple arms of the Pakistani government. Some factor clearly changed on Monday to precipitate the response the next day.
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> 3. Efforts have been made to determine which agency may have taken the step to terminate the feed. After speaking to senior officials at the Ministry of the Interior and the Foreign Ministry, Defense counsel was advised neither had any knowledge that the feed was terminated until advised by Defense counsel. The official contacted at the Ministry for Foreign Affairs has stated they will look into the matter. Based on the fact that the depositions were obstructed by a termination of the live feed from outside the hotel it is now apparent that the depositions cannot be continued in Islamabad. It has also been found by this Court that the depositions are necessary for Mr. Khan to receive a fair trial.

Postscript: I was remiss in not noting earlier that many thanks are in order to Marcy for procuring the court filings in this case.