Military Commissions:
ISN 10024 Khalid Sheikh Mohammed, et. al., Pretrial Hearings
Week of October 7-11, 2024

Events:
Although the 9/11 pre-trial hearings of KSM, Bin Attash, Hawsawi, and Ali/Baluchi were scheduled for the entire week of October 7, they were canceled day-by-day for reported health issues, process malfunctions, the need for closed hearings, and client-team meetings. The morning of October 7 was also canceled, but an open session was announced starting at 2:00 p.m.

At 2:00 p.m. Attorney Schultz, representing an alliance of media outlets, appeared remotely from the Marc Center in Virginia to brief the judge on a motion to force the full-text release of the plea agreement at the center of Defense Secretary Lloyd Austin's revocation controversy. He argued that the release is in the public interest because the plea agreements have been debated in Congress, discussed online and in the media, and are a matter of much public concern. He also noted that judicial records are required to be published.

The government and the defense teams responded with related arguments as to whether the possibly-withdrawn, possibly-in-effect plea agreements counted as judicial records at present – while also emphasizing the obligation to weigh the value of the detainees' lives against the public interest. Members of the defense teams and the trial team expressed incredulity about agreeing with each other, conceding that:

- In past judicial operations wherein a pretrial agreement was withdrawn, violated, or negated, parties to the agreement have sought a first amendment sealing order as a temporary measure to prevent contaminating the jury or panel pool with biasing foreknowledge. Given the public infamy of the defendants, similar measures would be required since it is a capital case.

- If the pretrial agreement has been properly withdrawn, it is a private document and not a judicial document, so release is not guaranteed. If the pretrial agreement has not been properly withdrawn, it is a judicial document that, by precedent, is not released or available for public reading until a formal plea has been entered and accepted into the record. Since the judge still needs to rule as to the status of the plea withdrawal, release of the plea agreement text is improper at this time.

- There is no time pressure for the release of the pretrial agreement documents, as the press has been receiving information ahead of developments already, during this process. Any time pressure is solely developed by the press media, which has been actively agitating readers about the process and now finds itself without further news to report. An accelerated news cycle does not oblige the commission to rush its own schedule or disorder processes established by precedent.

Schultz used his bookend time to argue that the attachments of the pretrial agreements to other motions, specifically those alleging undue influence of chain of command or political personnel, render the agreements as judicial documents requiring immediate public release. He also stated that "You can't withhold what is already known," which may have been an argument for releasing the details of the agreements since the existence of an agreement was already officially announced to victim family members.

After the judge dismissed Schultz, he discussed the scheduling of testimony by Dr. Wellner in November. The Ali/Baluchi defense team stated that it wanted the testimony time solidified, since it alleged that the government had been deliberately delaying the testimony repeatedly for bad faith purposes. If the time could not be solidified, the Ali/Baluchi team wanted the testimony barred.

The Bin Attash defense team raised the final concern of the session, relaying that Bin Attash is concerned about a change in the guard force's practices that has led them to deliver his mail only in a face-to-face meeting, rather than leaving it for him when he is away. Though this is potentially more secure, Bin Attash and his defense team expressed fear that it would unduly delay legal communication. The judge noted the concern and asked the trial counsel to interface with the guard force on the defense team's behalf to resolve the difficulty.

Observations:
The media alliance motion at the Ft. Meade remote viewing location generated a significant degree of interest as evidenced by the attendance of the OMC chief of staff and several staffers, several staffers from various congressional offices, members of the trial counsel staff, and members of the defense team staffs. Typically, observers at this location consist of a member of the defense team and a representative of Judicial Watch. Reportedly, two members of the news media were also present at Ft. Meade, but a majority attended at the Pentagon and at GTMO in the commissions' gallery. Reports or commentary by the various staffers about the proceeding has not been made public.

In arguing this motion, counsel expressed disappointment that the media representatives, who often operate as their allies, would bring a motion that could be potentially damaging to their clients. The KSM defense team, however, attempted to manipulate the press into having the R.M.C. (Rules for Military Commissions) judicially declared unconstitutional for violating the freedom of the press, which would in turn open avenues for the KSM team to have the entire R.MC. declared unconstitutional, leaving no jurisdiction for a trial of the detainees.

Although the judge did not make a ruling from the bench on the merits of the media alliance's motion, his few questions indicated that he was inclined to issue a ruling after he rules in November on the status of the pretrial agreement withdrawal. For the purposes of the media alliance, this amounts to a denial of the motion at present and a mooting of the motion at the November ruling.

One argument that Schultz made is disturbing, either in that it reflects an astounding lack of subject matter expertise on his part, or that it reflects a blatant attempt at dangerous subversion by the media. Schultz stated that, "You can't withhold what is already known." It is a standard and publicly acknowledged practice within the U.S. government that when classified information is released by a source other than a government official, that piece of information and any information that could confirm or deny it is automatically locked down and never released. This is done to avoid letting enemies and bad actors gauge if a source or a method of gaining classified information is successful or could be used to retrieve legitimately sensitive documents. The government can and actually has a legal obligation to "withhold what is already known."

A number of information leaks throughout the course of the KSM, et. al., pretrial hearings have had salutary effects for the defense teams, in that the defense can control the public narrative by depicting the government as overly restrictive or attempting to hide something nefarious in not releasing any information surrounding the leaked subject. By being able and willing to discuss the leaked-and-now-restricted subject, the defense gains more favor with the media that regards them as more transparent

and as the underdogs. If the media truly does in general believe the portrayed fiction, it is possible that Schultz was not made aware that he should further research information control laws before making such an unintelligent assertion. But if Schultz's statement was actually a representation made by the entire media alliance, it could be taken as an attempt by the fourth estate to wrest power from the government.

Transparency in government is to be desired and pursued within the bounds of the law. The media is not above the law.