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## A MILITARY INJUSTICE

LEGAL ETHICS QUESTIONS AND ACCUSATIONS  
OF SPYING ON THE DEFENSE HAVE STYMIED  
A GUANTANAMO TERRORISM TRIAL

TOXIC TORT WARRIOR  
IMPOSTERS HIDE AS FAKE FIRMS  
RAMSEY CLARK AT 90





PHOTO BY PAUL J. RICHARDS/AFP/GETTY IMAGES

# A MILITARY INJUSTICE

## LEGAL ETHICS QUESTIONS AND ACCUSATIONS OF SPYING ON THE DEFENSE HAVE STYMIED A GUANTANAMO TERRORISM TRIAL

BY LORELEI LAIRD

In 2000, two members of al-Qaida bombed the U.S. Navy destroyer the *USS Cole* in a suicide attack, killing 17 sailors and wounding 39 others. Two years later, Saudi national Abd al-Rahim Hussein Muhammad al-Nashiri was arrested for orchestrating the crime and turned over to the U.S. government.

Al-Nashiri spent the next four years at CIA “black sites” overseas, eventually ending up at the infamous U.S. prison for terrorists at the Guantanamo Bay Naval Base. His current trial, at which he faces the death penalty, began in 2011 and still has no end in sight.

His case was still in preliminary hearings in the fall of 2017, when al-Nashiri’s civilian defense team quit.

Lawyers Richard Kammen, Rosa Eliades and Mary Spears left because they found a microphone in the room



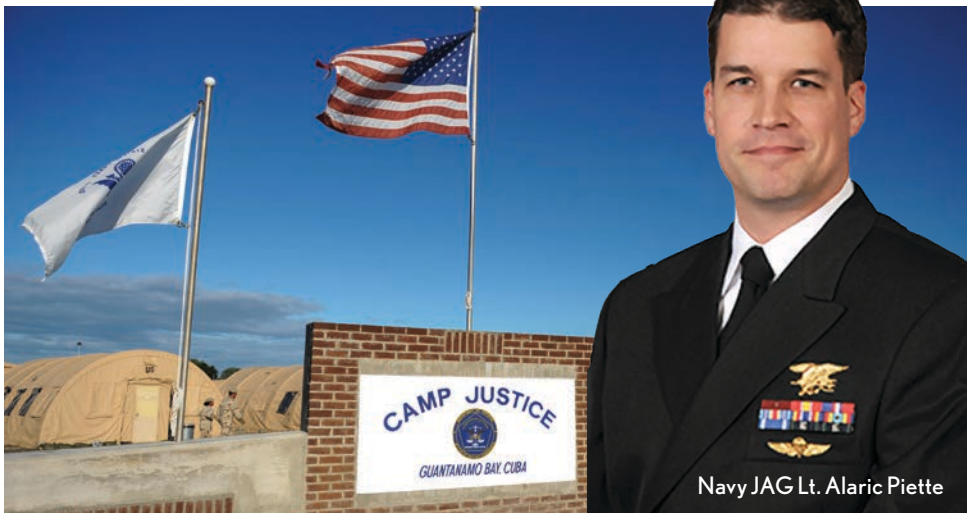
The bombing of the *USS Cole*

where they met with their client. The government says that microphone was never turned on, but thanks in part to a history of spying on defense lawyers at Guantanamo, they didn’t trust those reassurances. After consulting a legal ethics expert, the lawyers decided they had no choice but to quit, even though that left al-Nashiri with no attorneys other

than a Navy JAG, Lt. Alaric Piette, who had never tried a death penalty case. Piette politely but consistently refused to participate in most of the hearings thereafter, maintaining that he doesn’t qualify to defend a capital case under the military commissions’ own rules.

That clearly frustrated the judge, Air Force Col. Vance Spath. The judge made several unsuccessful attempts to compel the attorneys into court—including briefly imprisoning the head of defense at Guantanamo for refusing to order them back. In court, Spath repeatedly said the defense’s ethics concerns were a “strategy” intended to undermine the trial. Finally, on Feb. 16—after what he said was a sleepless night worrying about the case—Spath suspended the proceedings, saying he needed guidance from a higher court.





Navy JAG Lt. Alaric Piette

That guidance may be coming, but observers say it'll be slow—first a trip to the Court of Military Commission Review, an appeals court dedicated to Guantanamo cases, and then a nearly inevitable appeal to the U.S. Court of Appeals for the District of Columbia Circuit. Meanwhile, both al-Nashiri and the *Cole* victims have been waiting for

some kind of outcome for most of the 21st century. That's not unusual for the Guantanamo military commissions—and under those circumstances, some are wondering whether the commissions are still a good idea.

“I think that if this is the way the Military Commissions Act system was intended to function, then somebody ought to take a fresh look at the Military Commissions Act, because the current arrangement is unfair to the families who lost loved ones,” says Eugene R. Fidell, who teaches military justice at Yale Law School and co-founded the National Institute of Military Justice.

#### ESPIONAGE

The *Cole* was docked for refueling in Aden, Yemen, on the day of the bombing.

Members of the crew were lining up for

lunch when a small boat pulled up alongside the much bigger ship. It was so close that sailors on watch said hello to the two pilots.

Then the explosion came. Those who made it out alive describe chaos afterward as water rushed in and the crew scrambled to survive. One sailor told the Norfolk *Virginian-Pilot* in 2010 that he had to swim out into the harbor, glasses blown off and eardrums ruptured, as water rushed into the ship.

Two years later, authorities in Dubai arrested al-Nashiri, believed to belong to al-Qaida, and turned him over to the United States. For

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-EUGENE FIDELL







The U.S. Navy destroyer  
USS Cole

the next four years, he was transferred around CIA “black ops” sites—overseas prisons loaned to the U.S. by foreign governments, where he was subjected to interrogations federal authorities believed fell short of the definition of torture. Those included waterboarding al-Nashiri at least three times; stripping him and shaving him; shackling his arms over his head for extended periods to deprive him of sleep; and force-feeding him rectally. According to a CIA report declassified in 2014, this treatment resulted in “essentially no actionable information.”

In 2006, al-Nashiri was transferred to the Guantanamo Bay Naval Base, where he was eventually charged with orchestrating the *Cole* bombing, as well as the suicide bombing of the French tanker *MV Limburg*. From the beginning, his legal team included Kammen, an experienced death penalty defense lawyer from Indiana who filled the statutorily required role of “learned counsel.” By the summer of 2017, the team also included Piette, the Navy attorney, and assistant defense counsel Eliades and Spears, both currently at the Military Commissions Defense Organization.



Terrorist suspect Abd al-Rahim Hussein  
Muhammad al-Nashiri

A prosecution filing obtained by the *Miami Herald’s* Carol Rosenberg (who won a 2018 ABA Silver Gavel Award for her Guantanamo reporting) details how that team found the microphone where they met with al-Nashiri. After defense lawyers discovered that a different meeting room for defense lawyers had been bugged, military authorities invited the al-Nashiri defense team to have a look at their own room. Piette didn’t expect to find anything.

“It’s difficult to imagine a lawyer for the CIA signing off on something like that,” says Piette, who is stationed in Virginia. “Or any intelligence agency.”

But they found the microphone.

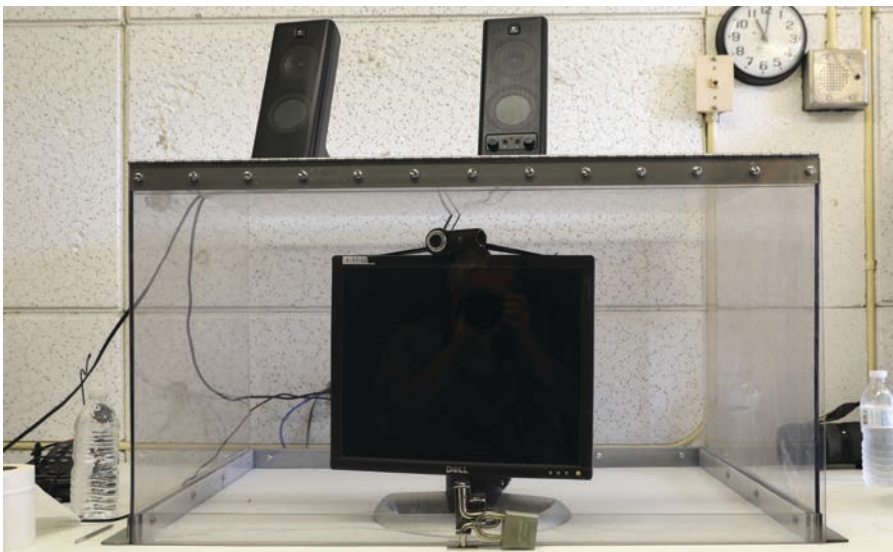
The prosecution filing, dated March 5, explained it was a “legacy microphone” left over from when the room was used for interrogations, and asserts that it was “not connected to any listening/recording device.”

Kammen did not believe this, in part because of a long history of interference in the work of Guantanamo defense lawyers. As he detailed in a later filing in Indiana federal court, the base openly read detainees’ legal mail for two years. In 2013, there was a two-month recess in al-Nashiri’s trial because the government had been caught reading his defense team’s email. The military



The *Miami Herald’s*  
Carol Rosenberg  
receives a 2018  
ABA Silver Gavel  
Award for her  
Guantanamo  
reporting.





A computer monitor allows prisoners to Skype with relatives or attorneys inside the U.S. prison at Guantanamo Bay, Cuba.



The U.S. military courtroom is seen at Camp Justice from behind a glass wall where victims of the 9/11 attack and the media sit to witness the proceedings.

had monitored defense lawyers' on-base internet use and sent some of their files to the prosecution. And in 2014, the FBI recruited a member of the civilian defense team for Ramzi bin al-Shibh, who is accused of helping plan the Sept. 11 attacks.

Piette would have liked to see something demonstrating that there was no spying. Unfortunately, Guantanamo authorities dismantled the room two months after the discovery, removing any chance of independently verifying the government's claims. That happened after Spath denied the defense team's request to investigate the microphone and hold a hearing on the matter.

Spath's reasoning remains classified, but he's said in court that declassifying it would prove his decisions right. (Both Spath and the prosecution team declined to speak to the *ABA Journal*.) Kammen and Piette strongly disagree. Piette likens his reaction to the incredulous looks frequently assumed by the character Jim from the NBC sitcom *The Office*.

"I made this little meme ... of the judge saying that, and then me, and it was Jim's face looking at the camera," he says. "Because how could you think that if this stuff is declassified, anybody is going to be on your side?"

### ETHICAL QUAGMIRE

With the discovery of the microphone, the defense team had a dilemma: How could they talk to their client about his case without violating attorney-client privilege?

The phone was forbidden, they couldn't trust the confidentiality of written communications, and now the privacy of in-person meetings was suspect.

Kammen got in touch with ethics expert Ellen Yaroshefsky, a professor at Hofstra University Maurice A. Deane School of Law who runs the school's Monroe H. Freedman Institute for the Study of Legal Ethics. Her opinion ultimately said the attorneys had no choice but to leave the case.

"It was a very difficult choice," says



Air Force Col. Vance Spath

Yaroshefsky. "But ultimately, if you cannot—and they could not—ensure that they could have confidential communications with their client, and they couldn't even tell their client why they couldn't do that, then

it would be a violation of the rules of professional conduct, and they were required to withdraw."

That's when the case ran into a second major issue: Who had the legal authority to excuse the attorneys? Kammen, Spears and Eliades went to Brig. Gen. John Baker, the chief defense counsel for the Guantanamo military commissions. Under one set of rules for the military commissions, the chief may excuse defense lawyers "for other good cause shown on the record." But the rules of court for the commissions say defense counsel "will not be excused without permission of the military judge."

Professor Stephen Vladeck of the University of Texas School of Law, who teaches national security law, says there are genuinely plausible arguments for both procedures.

"I absolutely think of all the questions [in al-Nashiri's case], this is the one that's perhaps the most closely divided," says Vladeck, who has written about al-Nashiri's case on the Just Security and Lawfare blogs. "The text is ambiguous, and there are sort of decent policy arguments for both."

Spath saw it differently. He ultimately decided that the rule favoring Baker doesn't indicate who decides whether good cause has been shown, and that he himself, as the military judge, had that authority. Then he found no good cause for the excusal, and ordered Baker to rescind his decision excusing the lawyers. When Baker refused, Spath held a con-



Brig. Gen. John Baker

tempt-of-court hearing—at which he didn't permit Baker to speak—convicted him and confined him to quarters (house arrest) for 21 days.

Within three days, Baker's sentence was suspended by his "convening authority," which in military justice terms means someone with authority over the legal proceedings.

But to the civilian defense lawyers, this seemed like a preview of what they could expect if they came back to trial.

Another cautionary tale was the experience of Stephen Gill, a former Navy attorney who worked on al-Nashiri's case at the Pentagon. In 2016, Spath ordered Gill—by then a civilian—to testify about that work. Gill moved to quash the subpoena, and when he got no answer, he didn't go to Virginia to testify.

According to an affidavit Gill later filed, 15 U.S. marshals and five local police officers showed up at Gill's Massachusetts home the next day. They arrested him at gunpoint, flew him to Virginia and jailed him overnight pending his testimony, without a lawyer or even his personal effects. Gill filed an affidavit last fall indicating he plans to sue the federal government.

With all of that in mind, Kammen pre-emptively petitioned an Indianapolis federal court for a writ of habeas corpus, arguing that the military commissions had no jurisdiction over him. Within a week, the court agreed to restrain Spath and the U.S. Marshals Service.

Kammen's co-counsels, Eliades and Spears, took up Spath's invitation to show good cause as to why they couldn't come back to Guantanamo. That route caused more problems. Their

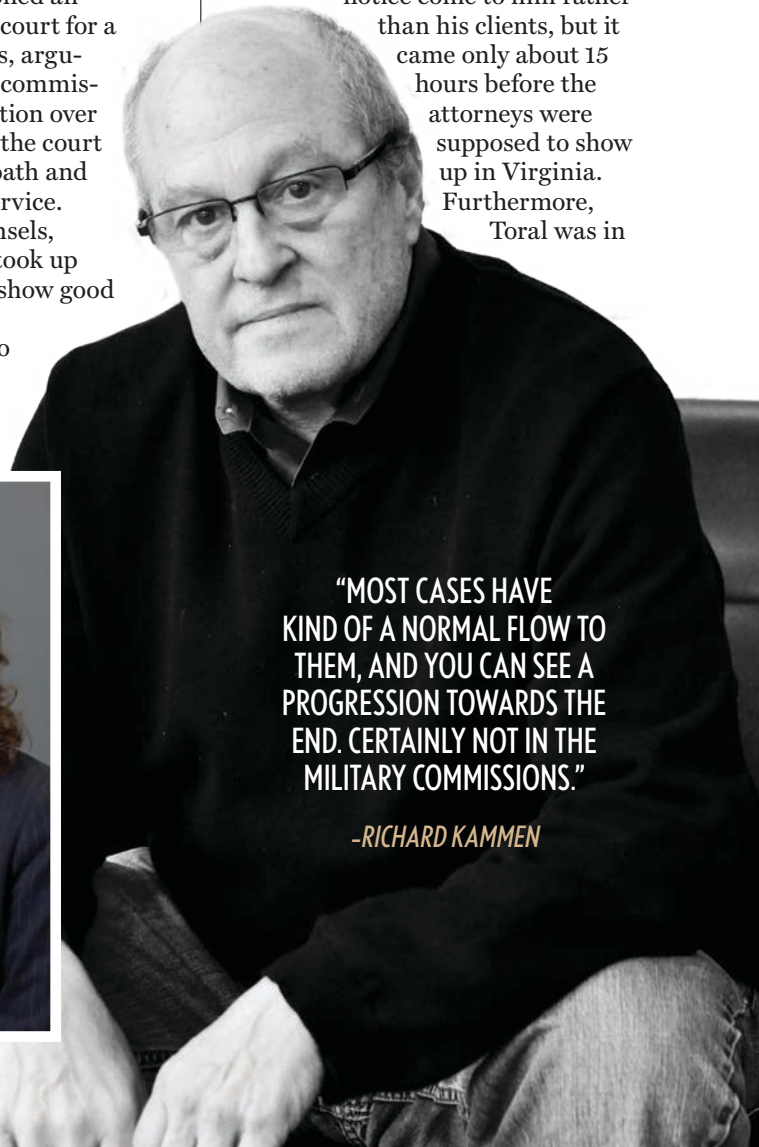
**"IF YOU CANNOT ... ENSURE THEY COULD HAVE CONFIDENTIAL COMMUNICATIONS WITH THEIR CLIENT ... THEN IT WOULD BE A VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT, AND THEY WERE REQUIRED TO WITHDRAW."**

**-ELLEN YAROSHEFSKY**



attorney, Todd C. Toral of Jenner & Block in Los Angeles, says they were improperly subpoenaed: Not only did

notice come to him rather than his clients, but it came only about 15 hours before the attorneys were supposed to show up in Virginia. Furthermore, Toral was in



**"MOST CASES HAVE KIND OF A NORMAL FLOW TO THEM, AND YOU CAN SEE A PROGRESSION TOWARDS THE END. CERTAINLY NOT IN THE MILITARY COMMISSIONS."**

**-RICHARD KAMMEN**



Rosa Eliades



Mary Spears



Lawyers and journalists would reside inside the tents of Camp Justice in Guantanamo Bay, Cuba, during the time of the war crimes trials.



London at the time—where it was 10 p.m. when he was served—and he says the government knew it.

Working overnight, his team convinced Spath to order new subpoenas, and Toral attempted to litigate the underlying conflict over who had the authority to dismiss defense lawyers. He doesn't believe the judge took that seriously.

"Certainly from our perspective, notwithstanding having entered into a briefing schedule on the merits, there wasn't a serious interest on the part of Judge Spath of actually grappling with the merits of the underlying argument," says Toral, a former Marine whose practice normally focuses on complex commercial litigation.

#### JUDICIAL TEMPERAMENT

Indeed, Spath's comments during this time—early 2018—seem to reflect increasing frustration. His comments about the absent defense lawyers were highly critical; he frequently repeated the prosecution's argument that the ethical problem was a strategy for undermining the legal proceedings. He faulted the defense lawyers for "abandoning" al-Nashiri, and repeatedly noted the length of time that Kammen had been on the case and his total compensation.

Piette, as the only defense lawyer left on the case, heard it all firsthand. He'd never left the case because he was waiting on a separate ethics opinion from military authorities. By the time that came back, Piette felt he should stick around in order to get his client new learned counsel.

But in order to do that, Piette had

to avoid being part of any substantive proceedings, insisting for months that he couldn't engage without learned counsel.

"It's the only thing I could do, but at the same time ... it was painful to watch these folks testify without being able to cross-examine them," Piette says. "Even their direct testimony was exposing the just terrific weaknesses in the government's case."

Piette got no understanding from the judge, who pushed back,

**"FROM WHERE I WAS SITTING, IT CERTAINLY LOOKED LIKE THEY DIDN'T EVEN WANT THE D.C. CIRCUIT TO SEE WHAT'S IN THOSE FILES."**

**—STEPHEN VLADECK**



suggesting that Piette bone up on capital defense. Kammen and Piette believe the case became personal for Spath.

"I think he just thought his authority was being disrespected," Piette says. "He would say weird things that ... told me he was taking this more personally than he ought to."

Not long before he ended the proceedings, Spath seemed to be trying to appeal to a higher authority. In mid-February, he questioned senior Pentagon lawyer Paul Koffsky about why he couldn't order the defense lawyers back to court. After that didn't work, Spath suggested calling U.S. Defense Secretary Jim Mattis as well.

Instead, Spath decided the next day to stop the trial. The hearing transcript shows that Spath spoke at length about that decision, saying he hadn't slept the night before and was considering retiring.

He later did retire, effective in November. He was later photographed at a welcome event for immigration judges, triggering a complaint from al-Nashiri's defense team that Spath's desire for the job might have biased his rulings in favor of the Department of Justice, which employs some of the prosecutors. The Justice Department said in September that it can't confirm any hiring before it's effective.

Within a week of Spath's decision, the prosecution appealed to the Court of Military Commission Review, an appellate court created for the commissions. That appeal, which was still pending as of October, focuses on the conflict over who had the authority to



dismiss defense lawyers. Eliades and Spears, as interested parties, moved to intervene.

The CMCR said no, so they appealed to the Court of Appeals for the D.C. Circuit, where al-Nashiri prosecutors opposed them. As part of that appeal, the D.C. Circuit asked the government to file a declaration detailing the microphone issue.

That was on a Friday. The following Monday, the government abruptly reversed its position, mooted the appeal. Its filing said it “seeks speedy resolution of this interlocutory appeal.”

Some military justice observers had a different take.

“From where I was sitting, it certainly looked like they didn’t even want the D.C. Circuit to see what’s in those files,” says Vladeck.

#### ‘NANOJURISDICTION’

Vladeck doesn’t think the government was necessarily trying to cover up improper behavior. He thinks that’s one possibility, along with genuine national security concerns. The problem, he says, is that the public doesn’t know which—and that exposes the government to charges of bad faith it might not deserve.

That’s one reason Vladeck believes trials such as al-Nashiri’s should be in federal court rather than in military commissions. Another is simply that federal courts have well-established precedents and rules—for example, about who may dismiss defense lawyers. In the commissions, Vladeck says, nearly everything is a question of first impression.

Fidell agrees, but he frames it as a question of size. The military commissions are “a nanojurisdiction, with very little law, started from scratch.”

“On its own terms, there’s almost no law in this tiny little jurisdiction,” he says.

And then there’s the speed of the commissions. Though it’s not unusual for complex criminal cases to take time, the military

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—TODD TORAL



commissions have dragged even by that standard. The trials of the 1993 World Trade Center bombers took one to two years in New York City federal court. The Virginia terrorism trial of Zacarias Moussaoui, who represented himself despite questions about his sanity, took about five years. By contrast, al-Nashiri’s military commissions trial is still in preliminary hearings after seven years. Vladeck believes it will go back to the D.C. Circuit when the CMCR is finished, a process that will add another year or more.

It’s not an outlier, Guantanamo-watchers say. The five alleged Sept. 11 conspirators held at Guantanamo were indicted in 2011; they’re in preliminary hearings with no scheduled start date. Also still in preliminary hearings is Abdul al-Haidi al-Iraqi, who arrived at Guantanamo in

2007 and was charged in 2014 with commanding al-Qaida in the early 2000s. His trial has been complicated by serious spinal problems that his lawyers say Guantanamo authorities ignored too long. Majid Khan, a detainee accused of conspiracy and murder in connection with al-Qaida, was captured in 2003, pleaded guilty in 2012 and is scheduled to be sentenced in 2019.

“Most cases have kind of a normal flow to them, and you can see a progression towards the end,” says Kammen. “Certainly not in the military commissions.”

That’s why some military justice observers believe the military commissions aren’t working and should be shut down.

Fidell says he’s come to that conclusion after long deliberation “and watching one *Laurel & Hardy* episode after another in the commissions.” Vladeck always preferred federal court, but he says it’s getting harder to find someone who disagrees with him.

Piette says he started out idealistic about the commissions. When he first served in the Navy, he saw military tribunals working in the former Yugoslavia. But now that he’s been involved, he thinks the delays, the secrecy and the “enhanced interrogation techniques” have made the situation unfixable.

That extends to his own client, who he believes was peripheral at best to the *Cole* bombing. Most of the real masterminds, Piette says, are dead or in custody. He feels that way not despite having been a Navy SEAL at the time—he extended his enlistment expecting to retaliate for the bombing—but because of it.

“It gets me angry, frankly, that the government has sort of sold this line to the victims’ family members that my guy is the guy,” says Piette. “Especially knowing what they know, I find it very offensive. Especially because I’m a sailor.” ■