Written by **Jack Kenny** on August 23, 2012

In Guantanamo Trials, Torture Is Still "Top Secret"

In a military tribunal at Guantanamo Bay, information about the imprisonment and interrogation methods used on the defendants remains classified "Top Secret," prompting their defense attorneys and others to argue that the secrecy requirements undermine the defendants' right to a fair trial. Documents relating to the capture of the detainees and their transfer to secret overseas prisons are also among the items lawyers may not share with the defendants unless the documents are reclassified as "disclosable," *Reuters* news agency reported. Rules governing the proceedings, now in the subject of pre-trial hearings, place other topics off limits, including "historical perspectives on jihadist activities" and "groups engaged in terrorist activities." Since the accused are alleged al-Qaeda terrorists, the restrictions pertain to material and information relevant to their defense, lawyers contend.

"It's sort of an illusory idea, which is that we are going to give you a lawyer but you're not going to be able to talk about the central thing that is important for you to talk about with a lawyer," said David Nevin, one of the lawyers for Khalid Sheikh Mohammed, the alleged mastermind of the September 11 terrorist attacks in 2001. The chief prosecutor disputed that interpretation.

"They can talk to their clients about anything," Brigadier General Mark Martins told *Reuters*. "What they can't do is take a document that may have classified information related to sources and methods and — unless it is cleared as disclosable to the client — they can't show them that document."

That and other restrictions compromise the attorney-client privilege recognized in civilian courts, the lawyers say. While most of them live in the Washington, D.C. area, they are not allowed to talk to their Guantanamo clients by phone. And they say they won't send their clients mail until prison inspectors agree not to read it. Prosecutors, meanwhile, will not turn over 75,000 pages of evidence to the defense attorneys until the judge, Army Colonel James Pohl, issues protective orders aimed at safeguarding the material.

All lawyers, paralegals, and experts for both the prosecution and defense teams must obtain a top-secret clearance and be briefed on what information is classified. The criteria for determining what must remain secret is itself secret. "It is ridiculous," said Army Captain Jason Wright, another of Mohammed's lawyers. "The briefing is classified, so I can't discuss what I can and cannot discuss."

Mohammed and four other men are on trial for plotting the 9/11 attacks. They are among the 168 prisoners still at Guantanamo from a total of 779 captured, primarily in Afghanistan and Pakistan, and

taken to the Cuban island over the past decade under suspicion of supporting al-Qaeda or the Taliban. The CIA took custody of the "high-value" captives and transferred them to secret overseas prisons, where interrogation techniques included waterboarding, keeping prisoners in "stress positions," mock executions, and sleep deprivation.

Pre-trial hearings for the 9/11 defendants were postponed Wednesday because of the approaching Hurricane Isaac. But the secrecy surrounding the tribunal has created a storm of its own, with defense lawyers and civil libertarians challenging the ban on public disclosure of interrogation methods that have been a topic of controversy since the beginning of the post-9/11 "War on Terror" and were the subject of the Detainee Treatment Act, passed by Congress and signed by President Bush in 2005. The legislation bans "cruel, inhuman or degrading treatment or punishment" of prisoners. President Obama in 2009 issued an executive order closing the CIA's secret overseas prisons and requiring the agency to abide by the same rules of interrogation followed by the military. He reneged, however, on his pledge to close the prison at Guantanamo within a year of taking office in January of 2009, and in December 2010 Congress put an end to Justice Department plans to try Mohammed in a civilian criminal trial in a federal courthouse in New York, just a few blocks from the Twin Towers site. Lawmakers voted to ban the transfer of Guantanamo detainees to U.S. soil for any purpose.

Prosecutors in the 9/11 case have argued in court filings that revelation of classified information regarding the capture, confinement, or interrogation of the prisoners could cause "exceptionally grave damage" to the military and intelligence operations aimed at protecting the country from future terrorist attacks. The American Civil Liberties Union has filed a challenge to the rules, arguing that the government may not classify as secret what defendants can claim to have learned from firsthand experience.

"The question here is: Can the government subject people to torture and abuse and then prevent them from talking about it?" asked Hina Shamsi, director of the ACLU's National Security Project. "We don't think the government has any interest in classifying personal observations about conduct banned by the president of the United States."

Critics also contend that "harsh" or "aggressive" interrogation techniques — sometimes called torture — have long since been publicly acknowledged by officials who authorized and implemented them. Former President George W. Bush, for example, wrote in his 2010 memoir, *Decision Points*, that he authorized the waterboarding of "senior al Qaeda leaders." Jose Rodriguez is but the latest former CIA official to have written a book about the interrogation methods. Rodriguez has been defending the procedures in news interviews about his book, *Hard Measures: How Aggressive CIA Action After 9/11 Saved American Lives.* Yet anything the defendants might have said or may yet say about their interrogation is subject to "presumptive classification," meaning their words would be "born classified." Legal motions and other documents in their cases may not be made public unless cleared by a Department of Defense Classification Review team.

The Military Commissions Rules of Evidence say information may be withheld as classified if its disclosure "would be detrimental to the national security." That gives rise to the question of who may decide in a judicial proceeding whether a security interest claimed by the government trumps a defendant's right to a fair trial. The prosecution claims that "the law is clear: the defense may not challenge the government's decision to classify information." But defense lawyers cite this year's Supreme Court ruling in *U.S. v. Reynolds*, holding that: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." Lawyers also argue that information is being

classified not for the sake of national security, but to shield government officials from embarrassment over the negative publicity surrounding the interrogation techniques.

There is little doubt that the doctrine of "presumptive classification" is applied selectively in the interest of the prosecution. In 2009, Reuters reported, the 9/11 defendants sent a note to the judge declaring themselves "terrorists to the bone" who were wearing the charges against them as "badges of honor, which we carry with pride." The note was quickly cleared for publication and posted on the Pentagon's website. While the note may appear to leave little doubt about their guilt, ACLU lawyer Shamsi suggested the defendants are not all that is on trial on Guantanamo.

"The commission certainly will not be seen as legitimate," he said, "if the proceedings revolve around judicially approved censorship of the defendants' accounts of government misconduct."

Photo of Guantanamo: AP Images