THE 9/11 MILITARY COMMISSION MOTION HEARINGS: AN ORDINARY CITIZEN LOOKS AT COMPARATIVE LEGITIMACY

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I. INTRODUCTION OF THE ORDINARY CITIZEN

I thank the Southern Illinois University Law Journal and community for this opportunity to write about *Guantanamo Bay: What Next?* It is an honor to be allowed to share with the reader my personal take on Guantanamo Bay. As I am writing partially about military and national security matters, I believe it is important early on that I dispel one possible misapprehension which might color the reading of this Article. While I have family that served in the military, please note that, while we share almost the same name, I am not the descendant of Benjamin O. Davis, Sr., the first African-American general officer, or Benjamin O. Davis, Jr., the famous African-American Air Force general. I feel it is important that I dispel this possible misapprehension because over my life, on occasion, it has come to my attention that people assume that these persons are my ancestors and this influences how they read or hear my words. Because of my deep and abiding respect for these remarkable military men, along with our current military men and women, I do not wish to be imbued inadvertently by a reader with a knowledge and experience that goes beyond my actual knowledge and experience. I do not seek to be seen as having some special quality due to a false perception of me having this specific anointed military lineage.

* Associate Professor of Law, University of Toledo College of Law. The author watched the feed of part of the October 2012 hearings at Fort Meade, Maryland, and from January 27 to February 1, watched the 2013 hearings at Guantanamo Bay as an observer designated by the Office of Military Commissions of the United States Department of Defense. The author thanks Assistant Professor Elizabeth McCuskey for the idea of infinitalities, Edward Nager for the perceptive view of the Guantanamo coral, and Dr. Trudy Bond for the additional information about deadheads and Guantanamo described below. I am indebted to the other observers, the members of the symposium and audience, and so many others for the exchanges about Guantanamo Bay. The author thanks Brian Lee, Dean Davis, and the staff of the Southern Illinois University Law Journal for all the courtesies provided. All errors are the responsibility of the author. This Article is dedicated to Dorothy Beatrice Quallo Corrin, my maternal grandmother who left Cuba for Ellis Island with her mother and family in 1910. When I landed at Guantanamo Bay, I kissed the ground in her honor, wondering to what extent what I was doing was more about a transcendent family experience than about the issues I will address here. In a sense, this is a fundamental duality that shapes me as I write this Article.

Unburdening myself of misapprehensions from my name, I believe, also assists me in engaging with and possibly persuading the reader of this Article. Not being of anointed national security lineage, I am without some special national security bona fides. Due to my complete absence of ambition to play a role in the American national security structure, I am more an ordinary citizen coming to terms with what has been done than some national security maven dispensing expertise. It is precisely that freedom that comes from being the ordinary citizen without any security clearance that I believe helps to shape my voice in discussing these matters. It is with the voice of an ordinary citizen that I seek to address other ordinary citizens and people around the world. My writing is done with the hope that it serves as a means of demystification for the reader and myself of one small part of the complex world of national security. I hope that demystification helps all of us see more lucidly what is done at Guantanamo Bay so we can evaluate those actors who do have the ambition to be the national security mavens controlling our national security destiny in the current War on Terror and beyond.

Thus, I write as an ordinary citizen about Guantanamo Bay.

II. THE DUALITIES OF GUANTANAMO BAY

While Guantanamo Bay is a place, it is much more than a place. Guantanamo Bay is an idea. And the idea is a very complicated one that I have best found to express as a series of dualities (a colleague said it might be even better to call the dualities "infinitalities" due to their complexity). To assist in understanding these dualities, I start with Annex A, just as I started my presentation at *Guantanamo Bay: What Next?*, the Southern Illinois University Law Journal Symposium.

Annex A – Guantanamo Bay Coral

Annex A is a photograph of a piece of coral that I was permitted to pick up at random and take as a souvenir during a walk down by one of the beaches in Guantanamo Bay. While the colors will not come through in a law review article, just imagine the lighter parts as being white and the darker parts as being red. A day before the symposium, I showed that piece of coral to a friend[1] as I described the experience at Guantanamo Bay, and he pointed to a dark part standing out near the center of the picture of the piece of coral and said, "It's marked US there!" When I pointed this feature out to the people at the symposium, they, as I, immediately saw the "US" that had been formed by the coral. Does the reader see it, too?

Like some type of genetically modified coral, the "US" on this piece, which now sits on my desk, serves as a reminder to all of how deep the U.S. presence in Guantanamo Bay is. Put another way, the U.S. presence in that part of Cuba is longstanding and deep in terms of shaping its physical geography and mores. While in Cuba, whether in or around the commissary, the Subway, the McDonald's, the Galley, the hundreds of military personnel, the tents, the buildings, the barbed wire, the listening and radar posts, the detainee prisons, the guard towers along the border with the rest of Cuba, or the older buildings, one feels the depths of the

1. I thank Edward Nager for this perceptive observation.

American presence. It is U.S. space even if it is not the United States—one aspect of the idea of Guantanamo.

But the "US" in the coral is not only a metaphor for the U.S. presence in Guantanamo Bay. The U.S. presence and what our government does in Guantanamo are done in our name as ordinary citizens. Put another way, the "US" in the coral is "United States," but it is also "us." Through our government's presence and what our government does at Guantanamo, we ordinary Americans are made part of Guantanamo Bay as surely as that piece of coral. This revelation was important for me in eliminating a psychic and spatial distance I certainly felt as someone coming to this somewhat exotic, tropical place from Toledo, Ohio. Toledo and Toledoans with whom I spend every day are present in Guantanamo through the presence and actions of the U.S. government done there. Unlike a temporary base in a distant land, this area feels and is lived in as an American space—possibly as the American Canal Zone was lived in. Possibly not as strong as the U.S. Virgin Islands or Puerto Rico and different from American Samoa or other Pacific territories, but Guantanamo Bay has a distinctly American quality to it.

As one is in this American space, the vestiges of the Spanish-American War and the Cuban presence going back to before the 1903 treaty are another striking duality. From the top of John Paul Jones Hill—the highest point in Guantanamo Bay—one can see past the American guard towers over to the Cuban lands. The governor of that Cuban district and the Commander of the Naval Station have monthly meetings to address the various concerns that arise with regard to their close proximity. One of the topics is the permission for "coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish,"[2] to ply their trade through Guantanamo Bay under a right of innocent passage. To look out over the bay in 2013 and imagine those fisherpeople plying their trade in a manner similar to those at the heart of the 1900 *Paquete Habana* case brings one back to the Spanish-American War, as well as to an appreciation of the vitality of customary international law rules.

As one wanders escorted around Guantanamo Bay, caressed by the warm breeze in a near-cloudless blue sky with sparkling blue-green water and waves pounding on the shore, one experiences another duality. One is in a tropical paradise where the water is warm and one can rent pleasure boats, swim in the beautiful Guantanamo Bay, and enjoy the pleasures of tropical seas, such as snorkeling. As long as one does not point the camera at some facility, one can take pictures at one's leisure of these pleasures of Guantanamo Bay. At the same time, as one gathers these wonderfully

2. The Paquete Habana, 175 U.S. 677, 709 (1900).

enjoyable experiences, one knows that there is another part of Guantanamo. One can visit, but is forbidden from taking photos of, the original Camp X-Ray, where the first detainees were held in January 2002.[3] Its high chain-link fences, topped with razor wire, carry the ghosts of detainees who kneeled in the walkways, even if the facility is now a substantially overgrown and abandoned detention center. While one can see nestled on the other side of the peninsula the buildings that make up the current facilities for the detainees, pictures are forbidden even at the distance from the top of John Paul Jones Hill. While one can see the path one follows through security in order to arrive in the military commission courtroom to observe the 9/11 military commission, the corridors of chain-link fences and razor wire are forbidden to be photographed. The effect is that one has photos in one's hands of the beautiful tropical paradise and one has images in one's head only of the places of detention where one knows torture has been done, where one knows detainees have committed suicide, and where one knows 166 detainees languish today and a significant majority are now on a hunger strike.[4] What is a tropical paradise for me also has to be recognized as a tropical hell for these detainees.

While the other detainees—the Abu Zubaydah or the Mohammed Al-Qahtani—remain invisible, in the 9/11 military commission courtroom, through the soundproof glass, one sees Khalid Sheikh Mohammed, Walid Muhammad Salih bin Roshayed bin Attash, Ramzi bin al-Shibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al-Hawsawi: high-value detainees one knows were tortured in secret CIA black sites. These detainees bear in their bodies, and by extension represent, all the detainees over the past twelve years who are reported to have been tortured (including those still unaccounted for) in the CIA program with the assistance of fifty-four countries around the world at the behest of the United States.[5] Beyond seeing these subjects of that CIA program, one knows that these people are only a few of the persons tortured in what remains a barely secret massive torture machine in detention facilities in Guantanamo, Afghanistan, and Iraq.[6] To see these detainees in the flesh is to have the weight of that

3. *Feature: Guantanamo Bay*, Jurist, *available at* http://jurist.org/feature/2012/01/guantanamo.php (last updated June 12, 2013) ("The first [War on Terror] prisoner arrived at Guantanamo Bay [over] a decade ago, on January 11, 2002.").

4. Steve Vladeck, New Trouble @ Guantánamo: Counsel Letter Re: The Camp 6 Hunger Strike, LAWFAREBLOG (Mar. 4, 2013), http://www.lawfareblog.com/2013/03/new-trouble-guantanamo-letter-re-the-camp-6-hunger-strike/.

5. The most recent study on this torture is AMRIT SINGH, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION (David Berry ed., 2013), *available at* http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf.

6. S. COMM. ON ARMED SERVS., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY xii, xx, xxii (Comm. Print 2008) [hereinafter DETAINEE TREATMENT INQUIRY], *available at* http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf.

torture machine come crashing down on one's soul as one is called to ponder what was done to them.

As one thinks about the assault on their human dignity, in another duality of Guantanamo, one is aware of these specific individuals being charged with devising and executing the 9/11 plot that killed 2976 people. 2976 people killed in a terrorist attack is such an enormous number, so many times more than the Oklahoma City bombing or the Lockerbie bombing.[7] One's memory of 9/11 floods back as one ponders these defendants. And one holds in one's head the thought of the brutality of the treatment of these people and the thought of the brutality of the deaths of the people on 9/11.

As one ponders these defendants, to one's right in the gallery are seated family members of those killed on 9/11, from whom one can feel the gaping hole in their hearts caused by their loss. Having lost a distant high school friend in the Twin Towers, I felt a twinge that only suggested the immensity of the loss that they have carried each day since 9/11 as they seek justice for the deaths of their loved ones. A uniformed New York Police Department officer, there in memory of his fallen colleagues, sits quietly in the back of the courtroom. He appears to be well known to the victims' families. One senses the gaping hole in him due to his loss of friends and colleagues on 9/11. His being a potential witness and his presence in the courtroom as opposed to the gallery were unsettling to me. Subject to exchanges between the defense and prosecution and ultimately allowed, his presence in the courtroom as opposed to the gallery, while an understandable desire by him given his pain, just seemed like one more needless complication for the already burdened 9/11 Military Commission.

And as one sits there thinking back to 9/11 and preparing to watch the 9/11 motion hearing, all of the intervening deaths and wounded on all sides in Iraq under false pretenses, in Afghanistan, in countries around the world in which drone strikes have taken place, in terrorist attacks, and the killing of Osama bin Laden, flow to one in a kaleidoscopic-accelerated series of memories that further weighs one down.

The defendants were dressed in white robes, four of five wearing camouflage vests. They entered surrounded by uniformed guards and in chains. They were unshackled and took their seats at the end of each of their defendant's tables. All had long hair and beards and had their heads

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7. In the Alfred P. Murrah Federal Building terrorist attack of April 19, 1995, 168 people died. *History and Mission*, OKLA. CITY NAT'L MEM'L AND MUSEUM, *available at* http://www.oklahomacitynationalmemorial.org/secondary.php?section=1&catid=193 (last visited June 5, 2013). In the Lockerbie Bombing of Pan Am Flight 103 of December 21, 1988, 270 people died. Lockerbie Bombing—Timeline, THEGUARDIAN (May 20, 2012, 11:23 EDT), *available at* http://www.guardian.co.uk/uk/2012/may/20/time-line-lockerbie-bombing-megrahi.

covered. The vast state-of-the-art courtroom, designed with the assistance of William and Mary Law School, was full of Americans of many shapes and sizes, male and female, in uniforms and in suits—probably around one hundred in all. At the front is the judge's bench with the emblems of the military services behind it.

It is hard to explain the cultural/psychic chasm that one feels between these defendants and everyone else in the room, including their lawyers. The mind's eye conjures up the imagined setting of the military commissions in the U.S.-Dakota Wars in the early 1860s, in which 323 Native-Americans were convicted for alleged war crimes, with 303 sentenced to death and twenty others provided lesser punishments.[8] Ultimately, thirty-eight Native-Americans were executed on order of President Lincoln,[9] and 265 were pardoned.[10] The cultural/psychic chasm is reminiscent of the chasm between those Native-Americans' views of what they had done, those of the settler population in Minnesota, those of the military commissions, and President Lincoln's ultimate view of the death sentences—seven of every eight being pardoned. These defendants are *in* these proceedings devised by Americans, but they are not *of* these proceedings in which they each risk the death penalty. Each perceives the other as the barbarian.

And, after the hearings close and the defendants are returned to their detention center, the observer returns to one's tent, goes out to dinner, and engages in amusements under the stars with wonderful people who are other observers and/or escorts in whose company it is a pleasure to be. On occasion, in a restaurant or on the street, the guard one saw earlier in the day is seen in more informal clothes enjoying himself—no longer in uniform. One even sees the judge at the commissary, more informal in a polo shirt. One is fortunate to dine with the prosecution on one night and the defense team for Khalid Sheikh Mohammed on another night. One is proud of the hard work of these lawyers—both in and out of uniform on both the prosecution and the defense—as they zealously work with what Congress and two Presidents have given them to convict and punish on one side and to seek acquittal (or at least to avoid the death penalty) on the other side.

And, to one's surprise, one learns at the dinner that the learned counsel for Khalid Sheikh Mohammed used to teach at the University of Toledo College of Law in the 1970s. As if to reinforce the impression left by the "US" in the coral, one finds that the links between the protagonists

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8. Paul Finkelman, *"I Could Not Afford To Hang Men for Votes." Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons*, 39 WM. MITCHELL L. REV. 405, 426 (2013).
9. *Id.* at 413 n.33.
10. *Id.* at 409.

of the 9/11 Military Commission at Guantanamo Bay and life back in Toledo are really quite strong.

One recognizes various protagonists in the case from having seen them when one watched the feed at Fort Meade, Maryland, back in October 2012. Remembering Fort Meade adds another layer to the complexity of the experience, as one is led to contrast the experience of the 9/11 Military Commission from the point of view of the feed in a theater at Fort Meade with the experience as an observer in the courtroom at Guantanamo Bay. The Fort Meade/Guantanamo Bay comparison is further complicated by the dualities that erupted on their own at Fort Meade. During a break in the 9/11 Military Commission feed at Fort Meade, I walked to the building next door and watched the ongoing court-martial of Bradley Manning for his leaks of classified material to WikiLeaks. Khalid Sheikh Mohammed in a military commission in the theater; Bradley Manning in a court-martial in the building next door—same War on Terror. During a break in the Bradley Manning court-martial, I had a chance to speak with a plaintiff in *Hedges v. Obama*, a case concerning the National Defense Authorization Act, who happened to be following the Bradley Manning case that day. When I asked a question of the military commission personnel at Fort Meade about when jeopardy attaches in the military commission, I found that I was speaking to the military judge for the Ehren Watada court-martial for refusing a troop movement to Iraq. That military judge declared a mistrial after the empaneling of the jury and the conclusion of the government's evidence, which led a federal court to decide that Watada could not be retried for a significant part of the preferred charges on the grounds of double jeopardy.[11] Military commission and court-martial contrasted again—same War on Terror.

In sum, with some difficulty given the pleasure one can have on Guantanamo Bay, one holds in one's head these dueling images from both a tropical paradise and tropical hell as a way of holding on to the expansive idea that makes Guantanamo Bay more than just a place. Individual dualities, like edges of a facet of a diamond, emerge from the experience at different points. Then, these dualities melt away into the enormity of the experience as other dualities surge to the forefront.

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11. Watada v. Head, 2008 U.S. Dist. LEXIS 88489, 2008 WL 4681577 (W.D. Wash. Oct. 21, 2008) (petition for writ of habeas corpus granted in part, with the government barred from retrying petitioner in court-martial on three of five violations due to double jeopardy, and denied in part, with the claim of petitioner for dismissal of other two violations denied without prejudice). The Justice Department dropped an appeal of that decision in the Ninth Circuit. Hal Bernton, *Justice Department Drops Appeal in Watada Case*, SEATTLE TIMES (May 6, 2009, 10:34 PM), http://seattletimes.com/html/localnews/2009184970_webwatada.html. Watada was discharged on October 2, 2009. Scott Fontaine, *Watada Discharged*, NEWS TRIB. (Oct. 2, 2009, 1:29 PM) http://blog.thenewstribune.com/military/2009/10/02/watada-discharged/.

On my last day at Guantanamo Bay, while purchasing some souvenirs for my children, I smoked a cigarette with a Bahamanian woman near the commissary. She was another duality—in this mostly-American presence on Cuba, one finds that all the people working in the stores are Jamaican and that many of the construction workers or staff for the food services are Filipino. In a globalizing world, one might expect that kind of globalized workforce at Guantanamo Bay, but it surprised me.

While standing there with my cigarette, I looked over to a hill where I saw for the first time a church with a cross on the steeple set against the background of the sky. As an Episcopalian, I felt myself brought back to the work of the National Religious Campaign Against Torture and the stain glass window in honor of a Marine emblazoned with "Keep Our Honor Clean" at my former church in Toledo. One wonders what the moral and spiritual dimension of the experience at Guantanamo is and why one has been plucked from obscurity and so fortunate to be allowed to observe.

One seeks to take ownership of this Guantanamo Bay in all its complexity as an ordinary American citizen—not succumbing to the tropical paradise one is permitted to visit and enjoy and not shying away from ownership of the tropical hell that is out of bounds and has been put there. For me, one manner of accomplishing this ownership was to purchase two t-shirts at the gift shop. The first I purchased soon after my arrival there—a "Deadhead" Guantanamo Bay t-shirt—which speaks to all the good times there. The second was the JTF GTMO Detainee Operations t-shirt, the most popular sales item at the store, according to the Jamaican clerk. In trying to take ownership of all that is Guantanamo, I wanted to purchase that t-shirt to own all of Guantanamo, including the part that was out of bounds. No doubt this idea will seem absurd, but I could not bring myself to purchase this second shirt; I was troubled by something. I discussed this dilemma with several of the observers. As I wrestled with my conscience, the idea occurred to me to reframe the purchase as for pedagogical purposes, as opposed to for personal use, permitting me to acquire the t-shirt with the purchase card of my university. That psychic sleight of hand allowed me to own that t-shirt in my professional capacity and then, through a reimbursement to the university for the price of the t-shirt, allowed me to make the transition to it being owned in my private capacity. That psychic sleight of hand may appear absurd to the reader, but it was required both physically and psychically by me in order to permit myself to take ownership of the full complexity of Guantanamo and get past what was blocking me. Those two t-shirts (Annex B), representing the tropical paradise/tropical hell duality, capture the cascade of other

complicated contrasts.[12] I have sought to express myself in this Section in my role of ordinary citizen bearing witness.

Annex B – The Duality of Guantanamo Bay in Two T-Shirts

III. THE 9/11 MILITARY COMMISSION

A. The Structure and Personalities of the 9/11 Military Commission

The military commissions are administered by the Department of Defense through five organizations: the Office of the Convening Authority (which plays a variety of roles in the process); the Office of the Chief Prosecutor; the Office of the Chief Defense Counsel; the Military

12. Upon my return to Toledo, Dr. Trudy Bond further suggested that even the "Deadhead" t-shirt that I associated with the good times contains in itself alone a further duality. Dr. Bond drew my attention to the skeletons used in the Guantanamo art of Sami al-Haj, a cameraman for Al-Jazeera seized by Pakistani soldiers on December 15, 2001, and held in Afghanistan and later at Guantanamo Bay. His pictures depict Guantanamo detainees as skeletons. *See* Andy Worthington, *Sami al-Haj: The Banned Torture Pictures of a Journalist in Guantánamo*, ANDY WORTHINGTON (April 13, 2008), *available at* http://www.andyworthington.co.uk/2008/04/13/sami-al-haj-the-banned-torture-pictures-of-a-journalist-in-guantanamo/.

Commissions Trial Judiciary; and, once an appeal is made, the United States Court of Military Commission Review.[13]

The defendants before the 9/11 Military Commission are Khalid Sheikh Mohammed, Walid Muhammad Salih bin Roshayed bin Attash, Ramzi bin al-Shibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al-Hawsawi. The charges against these defendants cover eight categories: conspiracy; attacking civilians; attacking civilian objects; intentionally causing serious bodily injury; murder in violation of the law of war (2976 times); destruction of property in violation of the law of war; hijacking an aircraft; and terrorism.

The Chief Prosecutor is Brigadier General Mark Martins.[14] He is seconded by a team of both uniformed and non-uniformed lawyers who appear to be assigned to this case from the Department of Justice, the Department of Defense, and possibly other government agencies, such as the CIA and other intelligence entities.

The learned defense counsel for each of the above defendants are David Nevin, Cheryl Bormann, James Harrington, James Connell III, and Navy Commander Walter Ruiz, respectively. From conversations with some of the non-uniformed counsel, I came to understand that they were contacted informally due to their death penalty experience by the Office of the Chief Defense Counsel to see if they would be amenable to serve as counsel in the cases. In addition to the learned counsel, there are other counsel, both uniformed and civilian, that form part of the trial teams of the defense. The uniformed counsel are detailed to a defense team—meaning that defending a given defendant is their mission for a period of time as a JAG lawyer—while the learned counsel are assigned and appear to be there for the duration of the case.

The military judge is retired Colonel James L. Pohl, the only military judge currently sitting as a military judge in the two ongoing military commissions (9/11 and Cole bombing Military Commissions).[15] He serves for renewable one-year terms.[16]

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13. *Organization Overview*, OFFICE OF MILITARY COMM'NS, http://www.mc.mil/ABOUTUS/OrganizationOverview.aspx (last visited Apr. 15, 2013).
14. Peter Finn, *Brig. Gen. Mark Martins, Lead Prosecutor in 9/11 Case, in Fight of his Career*, WASH. POST (May 4, 2012), http://articles.washingtonpost.com/2012-05- 04/world/35457357_1_military-commissions-second-class-justice-mark-martins.
15. *See* Wells Bennett, *Reminder: Hearings Resume Tomorrow in the 9/11 Case*, LAWFARE (Feb. 10, 2013, 9:59 PM), http://www.lawfareblog.com/2013/02/reminder-hearings-resume-tomorrow-in-the-911-case/; Wells Bennett, *What To Make of Judge Pohl's Ruling? Letter Filings in Al-Nashiri v. MacDonald*, LAWFARE (Jan. 25, 2013, 3:50 PM), http://www.lawfareblog.com/2013/01/what-to-make-of-judge-pohls-ruling-letter-filings-in-al-nashiri-v-macdonald/.
16. Colonel Pohl is the Chief Judge and he has detailed himself to both cases. Interview with Wendy A. Kelly, Chief, Operations Dep't, Office of Military Comm'ns (June 5-6, 2013). There are other military judges assigned on an as-needed basis to the Office of Military Commissions, but he has chosen to handle both cases himself. *Id.* Because he already retired from the Army, he is on a

The hearings are held in a specially designed courtroom.[17] At the front is a judge's bench, space for court officials such as the court security officer, and a witness stand. To the judge's left, along the wall, is an area currently empty where the military jury will sit once empaneled. To the left of the judge in front of the jury box are six prosecution tables. In the center front is a lectern at which counsel presents to the court. To the right of the judge are six defense tables with one defendant and their counsel at each of the first five and an additional table where various defense participants sit.[18] Along the wall, not far from the defendants, are uniformed military security. In the back of the room are a half-dozen seats for visitors permitted to be in the courtroom, such as the New York City police officer in full uniform, whose presence in the courtroom became an issue early in the proceedings. Next to those seats is an entrance to the courtroom that opens into a space which leads to the gallery where media, observers, and family sit. This gallery is separated from the courtroom by clear soundproof glass, through which one can see into the courtroom. Above the glass are several monitors through which the feed of the hearing is played on a forty-second delay. The forty-second delay permits the blocking of sound and pictures to the gallery in the event classified material is being discussed.[19]

The night before the start of the week of hearings and at the end of each day of hearings, or at a minimum at the end of the week of hearings, a press briefing occurs in which the prosecution, defense counsel, and family

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retired recall basis which has to be revalidated by the Judge Advocate General (JAG) of the Army. *Id.* Basically, the Army JAG Corps has an authorized end strength each fiscal year. *Id.* In addition to the number/rank authorized for active duty and reserve JAGs, the TJAG (Top JAG officer for the service) gets a few "retired recall" billets he can fill if he chooses to do so. *Id.* That is why Colonel Pohl is renewed each year—the TJAG has to manage the retired recall billets, and if he needs the one used for Colonel Pohl one year for another purpose, he could elect not to continue him on active duty. *Id.*

17. For a picture of the courtroom (Courtroom II), see *Courtroom II*, MILITARY COMM'NS, http://www.mc.mil/FACILITIESSERVICES/Facilities/Courtrooms/CourtroomII.aspx (last visited Apr. 17, 2013). The courtroom was designed with the assistance of William and Mary Law School. *See* Shanita Simmons, *Technology To Help Deliver State-of-the Art Judicial Proceedings*, JOINT TASK FORCE GUANTANAMO (Oct. 31, 2007), http://www.jtfgtmo.southcom.mil/storyarchive/2007/October/103107-1-courtroom21.html. For more on the physical layout of the Expeditionary Legal Complex, see *Facilities*, MILITARY COMM'NS, http://www.mc.mil/FACILITIESSERVICES/Facilities.aspx (last visited Apr. 17, 2003).

18. Originally, there were to be six defendants, including Mohammad al-Qahtani, but he was declared unable to stand trial by the Convening Authority. Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST (Jan. 14, 2009), http://articles.washingtonpost.com/2009-01-14/politics/36830647_1_interrogation-harsh-techniques-qahtani (quoting then-Convening Authority Susan J. Crawford) ("'We tortured [Mohammed al-] Qahtani,' . . . . 'His treatment met the legal definition of torture. And that's why I did not refer the case' for prosecution.").

19. This forty-second delay contrasts with the twenty-second delay in the Bradley Manning case because it was felt that a little more time was needed for the interpreter to begin interpreting what was said by those not speaking English so as to determine whether there was a risk of classified material being released.

members of victims are made available to the media for questioning. In addition to these press briefings, interviews of protagonists are organized on an ad hoc basis with the assistance of the public affairs officers.

B. The Military Commission Act of 2009

The 9/11 Military Commission is conducted pursuant to the Military Commission Act of 2009. Military commissions in some form have a long history in the United States. The Military Commission Act of 2009 is the third iteration of military commissions put in place in the War on Terror. The first military commissions, put in place pursuant to the Presidential Military Order, were struck down in 2006 in the *Hamdan I* decision.[20] As a result of that decision, the Military Commissions Act of 2006 was passed by Congress and signed by then-President Bush.[21] After the Obama administration came to power in 2009, a review of the Military Commission Act of 2006 and its procedures was completed, culminating in the current version under the Military Commissions Act of 2009. In the domestic sphere, these military commissions are to be contrasted with courts-martial under the Uniform Code of Military Justice and criminal cases in Article III courts. The quality and fairness of these military commissions as compared to courts-martial and Article III courts are hailed[22] or considered uncertain.[23] In the international sphere, the quality and fairness as compared to some international criminal tribunals are also a subject of comparison.[24]

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20. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 634-35 (2006).

21. Press Release, Office of the Press Sec'y, President Bush Signs Military Commissions Act of 2006 (October 17, 2006), http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061017-1.html. In his signing statement, President Bush said:

> The bill I'm about to sign also provides a way to deliver justice to the terrorists we have captured. In the months after 9/11, I authorized a system of military commissions to try foreign terrorists accused of war crimes. These commissions were similar to those used for trying enemy combatants in the Revolutionary War and the Civil War and World War II. Yet the legality of the system I established was challenged in the court, and the Supreme Court ruled that the military commissions needed to be explicitly authorized by the United States Congress.
>
> And so I asked Congress for that authority, and they have provided it. With the Military Commission Act, the legislative and executive branches have agreed on a system that meets our national security needs. These military commissions will provide a fair trial, in which the accused are presumed innocent, have access to an attorney, and can hear all the evidence against them. These military commissions are lawful, they are fair, and they are necessary.

Id.

22. *Comparison of Rules and Procedures in Tribunals that Try Individuals for Alleged War Crimes*, MILITARY. COMM'NS, http://www.mc.mil/ABOUTUS/LegalSystemComparison.aspx (last visited Apr. 17, 2013).

23. JENNIFER K. ELSEA, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT 5 (2013), *available at* http://www.fas.org/sgp/crs/natsec/R40932.pdf. Elsea writes:

C. Substance of the Motions

During the second[25] set of motions hearings in the 9/11 Military Commission, held from January 28-31, 2013, a number of motions were addressed that can be summarized by topic and disposition as follows:[26]

- Motion for indefinite delay: rendered moot
- Motion to reconsider definition of "unauthorized disclosure" in protective order: approved
- Motion to reconsider "need to know" provision in protective order: taken under advisement
- Motion to amend language of protective order: taken under advisement
- Motion to strike testimonial notice requirement in protective order: taken under advisement

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> The Supreme Court has not settled the question regarding the extent to which constitutional guarantees apply to aliens detained at Guantanamo, making any difference in rights due to location of the trials difficult to predict. Some view the unpredictability of the Supreme Court's acceptance of the military commission procedures as a factor in favor of using civilian trial courts.

Id.

24. For an examination of the quality and fairness of the Military Commission Act of 2006, see JENNIFER K. ELSEA, SELECTED PROCEDURAL SAFEGUARDS IN FEDERAL, MILITARY, AND INTERNATIONAL COURTS (2006), *available at* http://www.fas.org/sgp/crs/natsec/RL31262.pdf. The Military Commission Act of 2009 has been the subject of comparison with some international criminal tribunals also. *See Military Commissions and Due Process*, HERITAGE FOUND., http://www.heritage.org/research/projects/enemy-detention/military-commissions (last visited Apr. 17, 2103); Edward White, Office of the Chief Prosecutor, Litigating Detainee Cases, Presentation at the Southern Illinois University Law Journal Symposium: Guantanamo Bay: What Next? (Feb. 22, 2013) (on file with author).

25. This Article will discuss the earlier set of motion hearings that I observed remotely at Fort Meade, Maryland, in October 2012 to the extent relevant for discussion of the January 2013 hearings. In these earlier hearings, other motions argued included, inter alia, motions with regard to defining a protective order for classified and sensitive material (protective order later submitted to counsel) and a motion to have the Constitution presumptively apply in these proceedings (motion later denied). For a presentation of the October motion hearings, see Mark Martins, Chief Prosecutor, Office of the Chief Prosecutor, Remarks at Guantanamo Bay (Oct. 19, 2012), *available at* http://www.lawfareblog.com/wp-content/uploads/2012/10/Chief-Prosecutor-Statement-19-Oct-12.pdf. For the defense view of those hearings, see Wells Bennett, *October 19 Commission Session #9: Statement by Defense Attorneys*, LAWFARE (Oct. 21, 2012 11:30 AM), http://www.lawfareblog.com/2012/10/october-19-commission-session-9-statement-by-defense-attorneys/.

26. For a more lengthy presentation of the matters at the January hearings described above, see Mark Martins, Chief Prosecutor, Office of the Chief Prosecutor, Remarks at Guantanamo Bay (Jan. 31, 2013), *available at* http://www.lawfareblog.com/wp-content/uploads/2013/01/31-Jan-2013-Statement-of-the-Chief-Prosecutor.pdf. Further hearings were held on these matters in the week of February 11-15, 2013. For a presentation of what was to occur in the second week, see Mark Martins, Chief Prosecutor, Office of the Chief Prosecutor, Remarks at Guantanamo Bay (Feb. 10, 2013), available at http://www.lawfareblog.com/wp-content/uploads/2013/02/Chief-Prosecutor-Statement-10-Feb-13.pdf. Lawfareblog.com provides a summary of each day of the motions hearings in their archive.

- Motion to declare Rule for Military Commission 703 unconstitutional: taken under advisement
- Motion to compel defense examination of the accused's conditions of confinement including past ICRC reports: taken under advisement
- Motion to release of redacted version of classified pleadings: granted
- Mr. Aziz Ali's motion to request one-time audiovisual communication through the ICRC: taken under advisement
- Mr. Aziz Ali's motion to compel production of Larry Fox, Robin Maher, and a third witness: denied as to Larry Fox and granted as to Robin Maher
- Motion for extension of time for a reply with respect to Article 5 of the Third Geneva Convention: granted
- Motion to compel a witness to support a defense motion to dismiss due to unlawful command influence and defective referral: granted
- Motion to compel the production of SOP (Standard Operation Procedure) on force feeding: rendered moot
- Motion for emergency relief in the form of abatement: oral argument set for 2/11/2013
- Sua sponte decision of the court that the accused be present on 2/11/2013

D. Observing and Getting In

My approach to observing these hearings was to compare this experience with the experience of observing a trial in any federal or state courthouse in the United States. When I went to the Fort Meade, Maryland, remote feed, I was pleasantly surprised to see that the procedures for viewing were simple—identification and search at the entrance to the base and removal of cellphones from the theater, pretty similar to what would happen at any courthouse. Any member of the public could watch the hearing, and there was no need to be designated an observer by the Department of Defense. I was disappointed that the 250-person theater was nearly empty. With all of the significance of this military commission, it seemed a shame that ordinary citizens who have lived under the War on Terror all these years, staff of members of Congress, classes from nearby law schools or colleges, and other persons were not flocking there to watch along with the few of us.

At Guantanamo Bay, the process of actually being able to observe the hearings is more complicated. I had met Major Derek Poteet of Khalid Sheikh Mohammed's defense team in July 2012 and watched a panel at the American Bar Association Annual Meeting in August 2012 at which

Brigadier General Mark Martins, Chief Prosecutor, and others discussed the military commissions. I expressed my great skepticism about the fairness of these tribunals, which was a result of my work since 2004 on torture and my analysis of the military commissions that had been put in place (placing detainees in a hermetically-sealed legal box decoupled from any other law) over the three iterations of the Presidential Military Order, the Military Commission Act of 2006, and the Military Commission Act of 2009.[27] In making my criticism, I made it clear that my objections were not with the lawyers or judges who were conducting the military commissions, but rather with the system that Congress and two Presidents had put in place. Brigadier General Martins suggested I come down and observe the 9/11 Military Commission. After thinking over this kind invitation, I decided to take him up on it and wrote to the Office of Military Commissions. Shortly thereafter, I was designated an observer.

As an observer, I was contacted about upcoming hearings and asked whether I would wish to view the hearings remotely or go down to Guantanamo Bay on a military or commercial flight. Some observers refuse the military flight out of a concern about neutrality. There was no other way that I was going to be able to go down to Guantanamo, so I asked for a military flight. Travel orders for my mission were sent to me in due course, and I made my way to Andrews Air Force Base. At Andrews Air Force Base, one checks in at a military flight counter, meets the escorts, and takes the flight. Three hours later, one lands at Guantanamo Bay and is escorted over to the living quarters where one stays for the week. One wears an observer badge that states that one is to be escorted at all times, and one carries separate identification at all times. One has a certain amount of latitude to wander around on one's own with certain areas clearly identified as out of bounds to visit or photograph. Due to the need for a vehicle to get most places and the vehicles being controlled by the escorts, one tends to move around with the escorts.

It is possible to run afoul of protocols and when one does, one feels the military authority come down. On an occasion, two other observers and I were going to take pictures in front of the Camp Justice sign near our living quarters. As we made our way there, a jeep with two soldiers pulled up to us and asked where our escort was. They said there had been a briefing that morning about problems that had occurred and we were not authorized to do what we were doing without an escort. A person from the

27. Benjamin G. Davis, *All the Laws but One: Parsing the Military Commissions Bill*, JURIST (Sept. 25, 2006), http://jurist.org/forum/2006/09/all-laws-but-one-parsing-military.php; Benjamin G. Davis, *'Clarifying' the Geneva Conventions: A Ploy to Limit US Culpability*, JURIST (Nov. 30, 2007), http://jurist.org/forum/2007/11/clarifying-geneva-conventions-ploy-to.php; Benjamin G. Davis, *Guantanamo 'Court' Besmirches Nuremberg*, JURIST (June 5, 2008), http://jurist.org/forum/2008/06/guantanamo-court-besmirches-nuremberg.php.

public affairs office came over to take down our names and one could imagine this incident going into a file. Fortunately, among us were people who had been to Guantanamo Bay before, and they told the public affairs office investigator we were observers and that they should speak to the escorts for observers. Once the soldiers heard we were observers, they terminated their investigation, and we were left alone.

As for observing the hearings, the entrance to the courtroom has several checkpoints manned by uniform military, and one goes through a metal detector. One is checked in and assigned a specific seat in the gallery that remains their seat for the entire week. There are no doubt several layers of security about which I am unaware. For example, on court days, the various checkpoints on the roads are manned by armed military.

One is in a high-security military space. But, and this fact cannot be overemphasized, every single person in uniform with whom I had contact, as an escort or otherwise, was courteous. One cannot help but feel proud of their service and proud of them as representing the best in us.

In sum, observing at Guantanamo involves several layers of complications as compared to watching the remote feed at Fort Meade, Maryland. The remote feed at Fort Meade is as easily accessible to the public as it would be for an ordinary proceeding in state or federal court.

E. Lawyering and Judging

Whether watching the remote feed in October or sitting in the gallery watching the hearings in January, the lawyering by the experienced counsel was top-notch. The interactions between the lawyers and the judge were generally respectful, yet always to the point. I had reviewed some of the orders that the judge had made over the course of the case. I regretted that he did not write more fulsome analyses with his decisions on the various motions—he appears to be sparse in presenting his positions in writing.

Over the two sets of hearings, it was clear that concerns about how to deal with classified or protected information were paramount with the defense team. Any mishandling of such information could subject any counsel or the judge to potential prosecution, though one suspects that the persons with the most to fear are the defense counsels.[28] Much of the motion hearings in October had been about addressing the creation of a defense security officer position, which would be an interface for the defense to be able to know how to properly treat classified or protected material. Much of the hearing in January was spent addressing the draft

28. The case of attorney Lynne Stewart, who was sentenced to a ten year sentence, clearly haunts these proceedings. *See generally* United States v. Stewart, 686 F.3d 156 (2d Cir. 2012) (attorney convicted of smuggling messages to and from her client, in violation of Special Administrative Measures to which she was subject).

order the judge had prepared in the interim to clarify various procedures as to how to handle such material.

On several occasions, the lawyers and the military judge would hesitate in the manner of presenting their case and speak by analogy in open court. These appear to be the times when the lawyers and the judges were speaking about classified or protected material and, in order to not close the hearing, resorted to the use of analogy or euphemism to argue the point. The sensation for the observer is much the same as when one recognizes there is an "inside joke" and tries to ascertain what the joke is from the demeanor of those in the know.

F. Things Fall Apart (ListeningGate)

Soon after the start of the first day of the hearings, matters from outside of the courtroom intruded into the courtroom in ways that turned my perception of what was going on upside down. As the hearings started, Cheryl Bormann, defense counsel for Walid bin Attash, spoke at length about her not being allowed to meet with her client before court. Her concerns raised the issue of access to clients and the ability of defense attorneys to freely communicate with their clients. It became clear there were what appeared to be some misunderstandings or difficulties with the Joint Task Force Guantanamo structure that oversaw the detention of the defendants. These difficulties were matters outside the court that had bled into the court proceeding.

Later that day, when David Nevin for Khalid Sheikh Mohammed started to address a motion concerning the CIA black sites, the security light (like the light when a hockey goal is scored) by the judge suddenly went on, the feed to the gallery went silent, and the screens went blank. One could not hear what was going on in the courtroom at that moment, but it was clear that something was amiss. When the feed came back on, the judge made it clear that neither he nor the court security officer had ordered the feed to be cut. This statement opened the way to ask who was listening in beyond those watching the feed at Fort Meade or the court reporters. In addition, it opened the way to ask questions about the setup included in the courtroom and the power given to someone to shut down the feed in the courtroom without any input or instruction from the military judge.[29] The technology in the courtroom further became an issue, as defense counsel wondered when they muted the microphone at their desk whether, in fact, the microphone was muted. The obvious concern for the defense was that

29. Bobby Cuza, *CIA "Black Sites" Discussion Muted at Gitmo Hearing*, NY1.COM, http://www.ny1.com/content/176069/cia--black-sites--discussion-muted-at-gitmo-hearing (last updated Jan. 28, 2013, 10:27 PM).

the conversations with their clients at the respective desks would be monitored—either through muted microphones in fact not being muted or through powerful microphones in the room picking up any discussions in the room. A strangely surreal moment occurred when the counsel for the defendants and counsel for the prosecution each huddled separately in different parts of the room away from the microphones—both seemingly worried about what the microphones were picking up and who was listening to them. Further concerns of the defense counsel about the freedom to communicate with their clients arose with respect to a client meeting room (Echo 2) where microphones were present and counsel-client discussions could be overheard and had been overheard. A further series of concerns arose about the bins of defendants at the detention center being searched by persons under control of the JTF-Guantanamo Bay Detainee Operations staff, including legal bins that contained privileged communications between the lawyers and their clients.

G. Emergence of the Idea of the Nested Military Commission

For an ordinary citizen, watching lawyers complain about exterior forces not permitting them to meet with their clients, others listening in on or searching through the attorney-client communications, and what can be termed ListeningGate as to who controls the technology switches in the courtroom are deeply troubling. Put bluntly, all was not as it seemed as off-screen and out-of-court actions were influencing what could happen in the court. The military judge in this non-Article III proceeding appeared diminished in his authority by this revelation of his lack of control over his courtroom. He was also clearly angry with this turn of events, which tarnished the process that he was working so carefully to construct.

It occurred to me that my focus on the procedures and substantive law of the military commissions was possibly too narrow. The moving parts experienced in that courtroom went beyond the rules of the Military Commissions Act of 2009, implicating the detainee operations and other governmental agencies. It occurred to me that I should think more holistically about the military commissions to better understand their meaning. Somewhat like Russian dolls, understanding the 9/11 Military Commission requires one to understand the surrounding Rendition, Detention, and Interrogation protocols, including both interrogation and the conditions of confinement for these detainees. These protocols are better understood if one has an understanding of the broader federal executive control pursuant to executive, legislative, and judicial decisions. As I stepped back, I tried to make a table of the intertwined forces at work that made up the legal nest for military commissions (Table 1).

At the highest level of generalization, the executive branch, in 2001, sought to extract these individuals from the protections of the Geneva Conventions. As has been documented at some length by the Senate Armed Services Committee, the manner in which these persons were to be interrogated was almost simultaneously put in place, with the effort starting in late 2001 to reverse engineer the techniques developed at the SERE training programs.[30] In addition to the interrogation of these individuals, however, are the rules that form the conditions of their confinement. Wherever they were rendered to be interrogated, they were also confined. While, intellectually, the interrogation rules and the confinement rules can be separated (as revealed in memos by Stephen Bradbury from early 2005 and 2006),[31] from the point of view of the detainee, they are two related parts of the experience of how they are being handled under the authority of the executive branch. In addition, from the detainee's perspective, the people playing the roles of rendering them, interrogating them, and confining them are indistinguishable. For the executive branch, distributing the responsibility among both the military and intelligence community, both active duty and retired, and both Americans and foreigners provide a means for potentially shielding any one person from full responsibility for what happens to a detainee and helps to blur the chains of command of authority making accountability for anyone's action problematic. The President's military order fits into this structure by providing a path to prosecute these detainees through military commissions that would be sufficiently flexible so as to not be hindered by the Rendition, Interrogation, and Detention protocols developed outside of the Geneva Conventions.[32]

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30. *See generally* DETAINEE TREATMENT INQUIRY, supra note 7.

31. For interrogation rules, see Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to John A. Rizzo, Senior Deputy Gen. Counsel, Central Intelligence Agency (May 10, 2005) [hereinafter Torture Memo 3], *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/090416_Torture_Memo3.pdf, Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to John A. Rizzo, Senior Deputy Gen. Counsel, Central Intelligence Agency (May 10, 2005) [hereinafter Torture Memo 4], *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/090416_Torture_Memo4.pdf, and Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to John A. Rizzo, Senior Deputy Gen. Counsel, Central Intelligence Agency (May 10, 2005) [hereinafter Torture Memo 2], *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/090416_Torture_Memo2.pdf.

For conditions of confinement, see Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to John A. Rizzo, Acting Gen. Counsel, Central Intelligence Agency (Aug. 31, 2006) *available at* http://www.justice.gov/olc/docs/memo-rizzo2006.pdf.

32. *See* Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 37 Weekly Comp. Pres. Doc. 1665, 1667 (Nov. 13, 2001); Hamdan v. Rumsfeld, 548 U.S. 557, 613 (2006) (citations omitted) ("The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of

The second axis of distributing responsibility was through the oversight mechanisms of Congress (Armed Services, Intelligence, and Judiciary Committee oversight). Congressional acquiescence in the actions of the executive branch permitted the level of treatment of detainees sought by that branch and their preparation for trial by military commission in a procedure that was shaped to ensure that the evidence would not be a problem. But, with the advent of the Abu Ghraib scandal in 2004, complete acquiescence was untenable, and the Detainee Treatment Act of 2005 was passed as a constraint on executive treatment.[33]

The habeas cases brought before the judiciary form a third axis over this process through which countervailing forces of civil society sought to constrain the executive branch most successfully through the *Hamdan I* decision in 2006. With *Hamdan I*, at least Common Article 3 of the Geneva Conventions was made to apply, seriously constraining executive authority to render, interrogate, and confine detainees. With the process of the Presidential Military Order rejected and the problem of the quality of the evidence derived from the prior techniques present, the Military Commission Act of 2006 became the second iteration mechanism to formally extract these detainees from the protection of all laws and hermetically seal them into a military commission process specially developed for their prosecution. At the same time, as a further consequence of *Hamdan I*, the high-value detainees were moved from CIA black sites to Guantanamo Bay, where once again detention and interrogation operations work in tandem. What might be prohibited as an interrogation technique can be reformulated as a condition of confinement and carried out under that heading. The separate impact of the conditions of confinement and interrogation may be hard to discern clearly, but together they form a means of control over the detainee.

With *Boumediene*, which stands for the proposition that the Constitution operates at Guantanamo at a minimum for purposes of habeas,[34] the judiciary thrust the Constitution into the reasons for which the detainees are held at Guantanamo Bay and the manner in which they are held. With the legacy of the treatment of the detainees present,

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nations,' including, *inter alia*, the four Geneva Conventions signed in 1949. The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws."). The President's military order of November 13, 2001, together with the executive branch's extraction of these detainees from the protections of the Geneva Conventions and the interrogation techniques authorized, *see* DETAINEE TREATMENT INQUIRY, *supra* note 7, at xii-xxix, are properly viewed as a holistic strategy by the executive.

33. The resistance of the uniformed services and the role of key senators such as John McCain in achieving the passage of this Act are to be noted. *See* Charles Babington & Shailagh Murray, *Senate Supports Interrogation Limits*, WASH. POST (Oct. 6, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/10/05/AR2005100502062.html.

34. Boumediene v. Bush, 553 U.S. 723, 771 (2008).

notwithstanding any efforts to clean up and make more humane the treatment, a new administration found itself constrained by a congressional unwillingness to countenance domestic courts being used for the prosecution of these detainees and a defective Military Commission Act of 2006. The result of this correlation of forces was the Military Commissions Act of 2009.[35] Even with that Act, the military commission process was altered as *Hamdan II* and *Al-Bahlul v. United States* made their way through the Court of Military Commission Review to the D.C. Circuit, with the effect that conspiracy and material support for terrorism charges were not viewed as prosecutable war crimes under the international laws of war.[36] The government filed a petition to rehear *Al-Bahlul* en banc, which was granted.[37] If unsuccessful, a writ of certiorari to the Supreme Court appears certain, in an effort to further channel/modify the background structure that surrounds the military commissions.

Table 1 attempts to give one a sense of this dynamic process across the executive, legislative, and judiciary in which one finds the 9/11 Military Commission nested.

35. Press Release, Office of the Press Sec'y, Statement of President Barack Obama on Military Commissions (May 15, 2009), *available at* http://www.whitehouse.gov/the-press-office/statement-president-barack-obama-military-commissions. President Obama announced the introduction of legislative reforms that culminated in the Military Commission Act of 2009 later that year.

36. *See* Hamdan v. United States, 696 F.3d 1238, 1250 (D.C. Cir. 2012); Al-Bahlul v. United States, No. 11-1324, 2013 WL 297726, at *1 (D.C. Cir. 2013).

37. Wells Bennett & Benjamin Wittes, *Breaking News: D.C. Circuit Grants En Banc Rehearing in Al-Bahlul*, LAWFARE (Apr. 23, 2013, 11:54 AM).

Table 1. Timeline for the Legal Nest for Military Commissions

	2001-2004	2004-2005	2005-2008	2009 to Present
Confinement	?	?	Bradbury memo	?
Interrogation	Yoo-Bybee Memos (To Rizzo)	Levin memo (To Rizzo)	Bradbury memos (To Rizzo) Army Field Manual	Army Field Manual
Executive	PMO 2001 Appt. Auth.	Oversight Appt. Auth.	Oversight Conv. Auth. (1)	Oversight Conv. Auth. (2)
Congress	Armed Ser., Intel, and Jud. Committees Oversight	Armed Ser., Intel, and Jud. Committees Oversight	DTA of 2005 MCA of 2006 and Oversight	MCA of 2009 and Oversight NDAAs
Judiciary	Habeas	Habeas	Hamdan I (2006), Boumediene (2008)	Hamdan II (2012) Al-Bahlul (2013)

H. Another Way To Think About the Nested 9/11 Military Commission—The Moving Parts of Detainee Control

At the level of the 9/11 Military Commission, the incidents with detainee access and technology control suggest there are really three "offscreen" processes under distributed responsibility operating in the current Military Commissions Act of 2009 space. First, there is the Joint Task Force-Guantanamo Bay Detainee Operations, which oversees the conditions of confinement and access of the lawyers to their clients.[38] Second, there are the intelligence agencies that seek to interrogate the detainees while they are formally detained under the authority of the JTF-

38. *Mission*, JOINT TASK FORCE GUANTANAMO, http://www.jtfgtmo.southcom.mil/xWEBSITE/fact_sheets/jtf_mission.pdf (last updated Nov. 1, 2011) ("We conduct intelligence collection, analysis and dissemination for the safety and security of detainees and JTF Guantanamo personnel working in facilities as well as in support of ongoing overseas contingency operations. We also provide support to law enforcement, war crimes investigations and the Office of Military Commissions.").

Gitmo. Third, depending on the evidence involved, there is the relevant original classification authority that seeks to protect the secrets. How these different actors interact affects the ability of the defense lawyers to represent their clients meaningfully without finding themselves faced with the kinds of absurd incidents described above. The problem, however, is also one for the prosecution team because it is ostensibly representing the government (colloquially termed Big G), which is in turn made up of these moving parts that may or may not be acting in concert with each other, let alone in concert with the prosecution that is trying to successfully convict these defendants. Whether defense or prosecution, no matter how wonderful and zealous they are as lawyers, their power to constrain these other actors impinging on the process of the military commissions appears to have been demonstrated to be limited. The power derived from the authority of the military judge serving in a non-Article III proceeding also appears to be limited in the face of these other forces. The interaction of these three forces on the adjudication is presented in Table II.

Table II. Moving Parts in this Commission for Detainee Control

Confine or Detention	**Ask or Interrogation**	**Classify or Original Classification Authority**	**Adjudicate**
JTF-Gitmo	CIA, FBI, Other Agencies	CIA and other Intelligence Agencies	Convening Authority and Military Commission

I. The Weakened Authority of the Military Judge: The Moving Parts of the Constitution

The military commission judge is a non-Article III judge who derives his authority from Articles I and II of the Constitution. Yet, as he seeks to move the military commission forward, the problem of the operability and applicability of the Constitution to the military commission blurs the authority on which he can base his decisionmaking. In the United States, the Constitution is always operative, but may or may not be applicable in a given legal setting (e.g., constitutional vs. statutory issue). At Guantanamo, for these foreign detainees, the extent to which the Constitution is operative *and* applicable is unclear.

One view of the operability of the Constitution at Guantanamo is that the military commission is a non-Article III court created under Article I

legislative power, administered under Article II executive power, and subject to ultimate review by the Article III courts under judicial power. Moreover, all of the lawyers and the judge have sworn an oath to uphold the Constitution, and as officers of the court, they will comply with that oath. Yet, none of these aspects of the operability of the Constitution at Guantanamo provide guidance as to constitutional constraints or protections for the detainees. The only certain constraint that is known to be applicable at Guantanamo to these detainees is habeas corpus—a result of *Boumediene*.[39] The motion by the defense to have the Constitution apply presumptively was rejected by the military judge, so it is unknown whether and to what extent the First, Third, Fourth, Fifth, Sixth, or Eighth Amendments and the relevant jurisprudence under those provisions are operative and applicable in these proceedings (Table III).

Table III. Is the Constitution Operative and Its Jurisprudence Applicable to the 9/11 Military Commission?

Constitution	Applicable	Inapplicable	
Operative at Gitmo (Arts I, II, or III and Oaths Trust)	Habeas – Boumediene	? 1st, 3rd, 4th, 5th, 6th, 8th Amendments?	We do not know for 3 of 4 boxes.
Inoperative at Gitmo	? 1st, 3rd, 4th, 5th, 6th, 8th Amendments?	? 1st, 3rd, 4th, 5th, 6th, 8th Amendments?	We do not know for 3 of 4 boxes.

The implication of this uncertainty about the applicability of provisions of the Constitution leads to further complications in a process with minimal precedent. As a means of fleshing out the provisions of the Military Commissions Act of 2009 and the meaning of the rules of the Manual for Military Commissions, counsel frequently cite, or contrast experience with regard to, courts-martial under the Uniform Code of Military Justice and the Manual for Courts Martial, as well as criminal cases in U.S. courts, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence. These sources with abundant precedent may help to inform and persuade the judge as to the manner that the same matter would be addressed in these other tribunals and, therefore, how that matter might be treated consistently in a military commission. However, the Constitution is completely operative in courts-martial and Article III courts, but not clearly in this military commission as described above. At each

39. Boumediene v. Bush, 553 U.S. 723, 771 (2008).

juncture that a persuasive rule from the courts-martial or Article III court is presented to help guide the judge, the judge evaluates that rule without having the underpinning of the certainty of the constitutional applicability to the military commission. So, a space is open where the judge may be shown that in courts-martial and Article III courts, the logical approach would be a certain one, but because of the uncertainty as to the operability or applicability of such a settled constitutional rule to the military commission, the military commission would track off on another path.[40] Said new path for the military commission, subject to review by the Court of Military Commissions Review, and only then to review by an Article III court, is fraught with risk of improper drift. This improper drift risk may have been demonstrated in *Hamdan II* and *Al-Bahlul* in the D.C. Circuit with the vacating of conspiracy and material support for terrorism convictions achieved through the military commission process.[41] In particular, the essential hesitancy of the *Hamdan II* court about the constitutional operability and applicability in military commission proceedings led it to avoid framing their concern in constitutional terms (ex post facto law). Instead, the court resolved to make its determination by distinguishing between the war crimes found in the American Laws of War and the more limited set of war crimes found in the International Laws of War.

The indeterminacy of the operability and applicability of the Constitution directly in the military commission, combined with the diversity of potential interplay between statutory structures, creates a space of significant instability as to statutory interpretation, appropriate legal traditions, and constitutional protections (summarized in Table IV).

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40. For example, co-conspirators being tried in the same case should be avoided, pursuant to *Bruton v. United States*, 391 U.S. 123 (1968). Also, it must be determined when jeopardy attaches in a military commission (at the empaneling of the jury and first evidence or not?).

41. We await the en banc decision of the D.C. Circuit and a potential Supreme Court decision. *See* Bennett & Wittes, *supra* note 38.

Table IV. Current Moving Parts in the Military Commission: Statutory Interpretation, Legal Traditions, Constitutional Protections

Military Commissions	Courts-Martial	Article III Courts
MCA of 2009	Uniform Code of Military Justice	U.S. Courts
Manual for Military Commissions	Manual for Courts Martial	Federal Rules of Criminal Procedure
		Federal Rules of Evidence

This constitutional and doctrinal instability places a great burden on the lawyers and, particularly, the military commission judge to design a process that navigates this ambivalence in a manner that will not be subject to reversal on appeal.

Yet, a further instability in this process is derived from the detailing of lawyers and the one-year renewable tenure of the military judge. In the course of the hearing, defendants both rejected and added counsel. As to uniformed counsel, I noted that there were persons who had been detailed to work with a given defendant and who were rotated out to other duty after a period of time in these long running matters. This rotation out of uniformed lawyers and replacement creates an obvious problem of continuity and confidence for the defense in developing and presenting its case. Added to that the cultural/psychic chasm described above between these defendants and all of the Americans in the case, including their lawyers, one can see that the process of building and regaining trust risks repeating itself unnecessarily to the detriment of the rights of the defense. The same difficulty may arise on the prosecution side, but the fundamental differences of culture are not as apparent on that side, somewhat attenuating this disruption.

Turning to the military judge, no matter his personal qualities, his authority is diminished by the confluence of several factors. The first factor is his uneasy status as an Article I creature of statute in a death penalty case that merely borrows authority inherent in the longer traditions in the Article III and courts-martial arena. Military commissions have a history in the United States as courts of necessity, but as courts of necessity, their record is both discontinuous and subject to disagreement as to the quality of the process provided. In addition, these particular military commissions at Guantanamo are in place far from the battlefield or an occupied territory

and have even less credibility on the axis of necessity than other military commissions throughout history. In a word, they are military commissions of choice, as evidenced by the number of terrorism cases that have been prosecuted in the Article III courts or in courts-martial. The choice to have these military commissions comes as a result of the interaction of the forces in the executive, legislative, and judicial branches, creating a situation of detainees who were subject to torture and whom we want to prosecute for a national history-altering attack. The necessity derives to a great extent from the manner in which we have gone about treating these detainees and domestic political allergy to their presence on U.S. territory, rather than any exigencies of the battlefield or occupation. Put another way, the necessity is more self-created than in other traditional settings for military commissions. The confluence of the borrowed authority from the Article III-court and court-martial traditions, as well as the diminished necessity to even proceed down this path of military commissions, weaken the structural authority of the judge, no matter his personal qualities.

In addition to these structural concerns, his authority is further weakened by his appointment being for a renewable one-year term. In contrast to the life tenure of an Article III judge and its impact on the expressiveness of such a judge's action in cases in his courtroom, the military commission judge's short, renewable tenure sends a message that his presence is dependent on forces over which he has no control. Whatever his personal qualities of independence, this structural dependence on renewal each year is, to put it bluntly, problematic. Even if every decision he makes is made out of perfect independence and impartiality of spirit, he is met with a conundrum. Even if he continually makes decisions that are favorable to the defense, if he is continually renewed on one-year contracts, it raises the question as to whether the relative latitude to the defense masks a fundamental inequality of the process. If he continually makes decisions that are favorable to the prosecution and is continually renewed on one-year contracts, it raises the question as to whether he is being renewed precisely because of his prosecution-friendly approach to the case. On the other hand, if he is not renewed, the immediate natural suspicion is that he has displeased those with the power to renew—throwing into question the neutrality of the entire superstructure and process under which he works. Moreover, that suspicion taints any subsequent replacement military judge who would be viewed with suspicion as to his neutrality. Obviously, a longer tenure before renewal would help attenuate this actual and apparent structural dependence. But, as structured now, and again no matter the qualities of the military judge in place and his efforts, this suspicion haunts his every act.

What would tend to enhance his authority, in addition to his personal qualities and experience as a judge, is his status as a *military* judge.[42] The respect and support for the military of the United States by Americans is a halo effect earned by each participant in the military justice system. This respect and support are palpable and lend immediate, almost reflexive, unquestioning credibility to any action undertaken by someone in uniform or who has demonstrated longstanding affiliation to the uniform. This halo effect is partly derived from the legal traditions of the uniformed services certainly, but is really broader than a question of legal traditions and forms part of the fabric of our form of patriotism. He also has his authority enhanced because he wears the robes of a judge over his uniform, again benefiting from the societal deference to judges that is a hallmark of our polity.

The military judge operates with these structural issues that enhance or weaken his authority in these military commissions. These structural authority issues provide a further source of uncertain stability for these processes.

J. Unresolved Questions

Together with the concerns addressed above, a few remaining unresolved questions shape my view of the 9/11 Military Commission. First, the institutional interests tug-of-war between the Department of Justice, the Convening Authority, and the Chief Prosecutor on what to retain as charges in light of the *Hamdan II* and *Al-Bahlul* decisions bring into relief the complexity of the prosecutorial decision-making process in this high-profile case. Put another way, the Chief Prosecutor's autonomy to run his show appears constrained by both the Convening Authority's willingness to overrule his choices on such fundamental questions for its own reasons and, above the Convening Authority, the civilian authority. At the time of the writing, the Department of Justice has been granted rehearing en banc of the *Al-Bahlul* case in the D.C. Circuit.[43] In the event of an unfavorable decision on the request for en banc review or an unfavorable decision after en banc review, a request to grant certiorari to the Supreme Court appears inevitable. While it is noted that each part of this superstructure plays its assigned role and acts to preserve its interests, the lack of coherence between the three levels on this fundamental point

42. It is beyond the scope of this Article, but I have wondered about the autonomy of the judicial role as military judge vs. Article III judge in the sense of the willingness of a military judge to assert or express independent authority, as compared to an Article III judge, as demonstrated in the manner of judging. *See* Benjamin G. Davis, *No Third Class Processes for Foreigners*, 103 N.W. U. L. REV. COLLOQUY 88 (2008).

43. *See* Bennett & Wittes, *supra* note 38.

raises a question as to whether the criteria for determining whether to withdraw charges that may be articulated or come to be expected from our prosecutorial traditions are operating normally in this setting. At a minimum, it is unsettling to have this much incoherence through the second guessing of the Chief Prosecutor.

A second unresolved question, given all of the moving parts described above, is the nature of the classified or protected information that deforms the open aspect of the military commission proceedings. One understands the need to clarify the manner in which classified and protected information is used and the importance of getting a proper protective order that allows this process to conform to the Classified Information and Procedures Act. Otherwise, national security information risks being divulged to the detriment of the United States and all involved with such a leak running a very serious risk of criminal prosecution. A nagging question, though, is whether the process and protective orders put in place pursuant to such concerns are protecting legitimate government action or are more accurately serving to hide from view illegitimate and illegal government action. Part of this concern may be a question of whether the shape and structure of the Classified Information and Procedures Act is set up in a manner that can even contemplate the idea of some government action being illegitimate and illegal. The worry is that, when all is said done, the underlying reality being protected is of the dubious kind that was protected in *United States v. Reynolds*, through which the state secrets privilege was developed in the modern era.[44]

Obviously, this second unresolved question is concerned with the torture of these detainees, but its importance has been heightened by the completion, on December 13, 2012, of a still classified Senate Intelligence Committee Report on the use of enhanced interrogation techniques. In the cover letter announcing the 6000-page report that reviewed the CIA program in which these high-value detainees were held for years, the principal conclusion was that the enhanced interrogation techniques program was both ineffective and counterproductive.[45] This classified report was announced almost at the same time as the comprehensive and extensive draft protective order of the military judge. While one can understand the importance of protecting sources and methods, the conclusions of the Senate Intelligence Committee report make one wonder why sources and methods that were ineffective and counterproductive merit a similar level of protection to those that are effective and productive. This

44. 345 U.S. 1 (1953); *See generally* Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOKLYN L. REV. 201 (2009).

45. *See* Press Release, Sen. Dianne Feinstein, Feinstein Statement on CIA Detention, Interrogation Report (Dec. 13, 2012), *available at* http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=46c0b685-a392-4400-a9a3-5e058d29e635.

question is further made highly pertinent by the fact that the effect of such protection of information is to quash the public's knowledge of what was done in the one place in which witnesses are under oath, while leaving the public subject to the one-sided statements of the protagonists of the ineffective and counterproductive process in fora such as C-SPAN or think tanks. Simply put, it does not make sense to hide these materials from the public, yet it is not certain that the manner in which the Classified Information and Procedures Act is made to work captures this essential absurdity.

While there are no doubt other issues, a remaining nagging issue that, for the avoidance of doubt, I emphasize separately because of its unresolved nature are the questions of who is listening in and what are they listening into in the military commission courtroom and counsel meeting rooms. The events in the courtroom were focused on the fears of the defense, but it seems to me that the question of listening in also affects the prosecution on several levels. Obviously, the prosecution's case is undermined if the fairness of the process is undermined, so there is a clear interest to make sure that judicial norms, and not just judicial forms, are respected. But beyond that, to the extent that the prosecution's own deliberations are subject to listening in by those who are not part of the prosecution (we might call these other parts of the Big G Government), there is a chilling effect on the manner in which the prosecution proceeds with its case. Moreover, in a regime of third party listening in, the military judge is also subject to such a risk because the direction of his decision ahead of his actual decision may be of immense importance to those impacted by the military commission other than even the defendants.

K. Summary

Based on the experiences of observing the remote feed of October 2012 at Fort Meade, Maryland, and the 9/11 Military Commission motion hearings in late January 2013 at Guantanamo Bay, I have tried to reframe the image of the 9/11 Military Commission as a stand-alone process that is nested in a series of operational, structural, constitutional, and legal environments. Hopefully, this reframing may assist in better understanding the true dimensions of this process. Rather than hermetically sealing these defendants in a construct, one hopefully now sees a fuller picture of how this military commission fits into the American legal construct to assist the ordinary citizen in better evaluating the legitimacy of what is being done.

This evaluation of legitimacy, it should be noted, can be done in terms of internal law (the Constitution on down in our system). Such an approach with regard to foreigners now held at Guantanamo Bay is too narrow, however. The protagonists in our system have demonstrated our state

interest in these foreigners. The United States has availed itself of its sovereign power and interests to work with other countries at the international level to shape the rendition, interrogation, and confinement environment in which these persons have been held for years in black sites and otherwise. This military commission is being held at Guantanamo Bay—itself a creature of treaty law. We are reminded that the War on Terror is a transnational enterprise where extraterritorial effects of domestic law and international law form aspects of the legal environment. Thus, some sense of the international law vision of this military commission helps the ordinary citizen comprehend these military commissions. I will attempt to provide that vision in the next Section.

L. *Dedoublement Analytique* or Second Visioning the 9/11 Military Commission

In seeking to articulate that international law vision, however, one needs to avoid the inadvertent echo chamber of refracting that international analysis through the United States Constitution. We have already described the manner in which all parts of the federal government have interpreted their respective constitutional powers in the manner in which these foreigners have been treated and are being charged. Implicit in that dynamic is the interpretation by these authorities of their manner of compliance with the international law obligations of the United States. This form of international law analysis is more appropriately designated for what it is—United States foreign relations law. It is the manner in which the United States seeks to vindicate its international legal obligations. This United States foreign relations law methodology may be in harmony with the approach of other nations and may in fact reflect current international law, but such methodology is not international law. Rather, it is a form of domestic law subject to the powerful mechanisms of interpretation of the American state. The international law vision sought in this alternative analysis of what has been described here is one that steps away from an Americentric vision of international law and attempts to operate purely on the international plane. It is through that attempted internationalization of the legal analysis, coupled with the vision of the military commission as reframed by the discussion in the proceeding Section and in the context of the special nature of Guantanamo Bay, that I hope to provide further assistance to the reflection of the ordinary citizen. I do this fully certain that the ordinary citizen, if so desired, is fully capable of understanding both the concerns of the internal law approach and the concerns of international law to arrive at a conviction about the military commission process.

As confirmed in the *Hamdan I* decision,[46] Common Article 3 of the Geneva Conventions applies to these defendants. Common Article 3 states, in relevant part:

> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . .
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment *pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples*.[47]

As noted in the previous Section, comparisons of the Military Commissions Act of 2009 with the procedures available in other types of international criminal tribunals, other types of military commissions in American history, or what occurs in courts-martial or Article III courts have been done.[48]

From the point of view of international law, the debate is about how to characterize this death penalty military commission. Using language from Common Article 3, the question raised can be bifurcated in the following manner: Is the 9/11 Military Commission "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" (e.g., due process) or is it more a show trial in secret (*Tribunal d'exception* or Star Chamber)?

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46. A discussion could devolve at this point as to whether the *Hamdan I* reference to Common Article 3 should be informed more by contrasting language of Additional Protocol I (particularly Article 75 Fundamental Guarantees) for an International Armed Conflict or Additional Protocol II (particularly Article 6 Penal Prosecutions, but also possibly Articles 4 and 5) in a non-international armed conflict. I hope to make such an analysis in a future article in due course, for the formulations may raise interesting permutations though one senses the direction of the analysis would be similar. *Cf.* Michael W. Lewis, *How Clear and Inviolable is the Line Between AP I and AP II?*, OPINIO JURIS (Feb. 17, 2013, 10:30 AM CDT), http://opiniojuris.org/2013/02/17/michael-lewis-guest-post-how-clear-and-inviolable-is-the-line-between-ap-i-and-ap-ii/.

47. Convention (III) Relative to the Treatment of Prisoners of War art. 3, August 12, 1949, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Third Geneva Convention] (emphasis added) *available at* http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E160550475C4B133C12563CD0051AA66.

48. *See supra* notes 23-25.

In entering upon that discussion, it is useful to think of the 9/11 Military Commission under this criteria from a domestic law vision as well as an international law vision, as this helps sharpen one's appreciation of the difference in approach and bring to light the quality of one's technique of analysis with the assistance of the *dedoublement analytique*, or second visioning, approach.

For example, turning to the question above under a *dedoublement analytique* approach, the domestic law vision would place emphasis on the organs of domestic law that have put in place the Military Commission Act of 2009. On the other hand, the international law vision proposed here would insert into the evaluation of the acts of the domestic law organs a principle that is present in the Vienna Convention on the Law of Treaties and essentially absent from the legal doctrinal landscape of the United States and, by extension, the domestic law vision. These two points are highlighted immediately below through a presentation of the heart of the domestic law vision and a presentation of the principle I would suggest should be at the heart of the international law vision.

Domestic Law Vision: Congress, the President, and the judiciary have put the military commission in place through the Military Commission Act of 2009, "so it is a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[49]

International Law Vision: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[50] When presented in this manner, what is implicitly almost a presumption (whether irrebuttable or not) of regularity of the domestic law vision is put under sharper scrutiny in the international law vision.

Drawing on the analysis in Parts II and Parts III above refracted through Article 27 of the Vienna Convention on the Law of Treaties and in light of what I saw observing the 9/11 Military Commission at the remote feed at Fort Meade in October 2012 and particularly at Guantanamo Bay in late January 2013, I find myself deeply disturbed by the dynamic version of the military commission. Unlike my earlier static criticism, the more holistic approach of viewing them as nested military commissions is driving my hesitations.

At the outset, the holistic dynamic vision makes me view the lawyers and judge in this setting with great admiration. My views are shaped in part by my experience watching very difficult high-stakes cases (some implicating the risk of death to an arbitrator or his/her family) involving state parties in international commercial arbitration, where a need for

49. Third Geneva Convention, *supra* note 48, at art. 3(1)(d).

50. Vienna Convention on the Law of Treaties art. 27, May 22, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

explaining one's rationales for what might seem in other settings to be fairly simple matters can be one of the qualities of the best advocates and arbitrators in the world. As to the advocates, whether military or civilian or prosecution or defense, the quality of the lawyering is exceptional. As for the judge, while I am concerned about the extent to which he explains the rationale for his analysis in key orders, his demeanor in court and his preparation are top-notch. I am certain that in no manner could I ever hope to be as remarkable as these persons.

Put succinctly, my concern is that the lawyers and the judges are good people trying to do the best in a bad spot. The bad spot is the 9/11 nested Military Commission which is operating with so many—for want of a better term—moving parts as to lead me to worry that I am not observing process. Rather, I worry that what I am observing is more akin to very sophisticated theater in which the actors are lucid, but only somewhat in control of the variables that affect their parts.

This view is informed by a deeply disturbing, nagging doubt. The remarkable military lawyers who are operating this military commission provide a legitimacy by their essential respect for honor and duty in the execution of their tasks. Yet, these lawyers have their missions, while others in the military have their missions, as do others outside of the military chain of command. My sense is that the lawyers in the military commission are not in control of all of the significant variables that impact them in their role as lawyer or judge in the military commission. My nagging doubt is whether these lawyers in this carefully crafted military commission are being asked to clean up the CIA, presidential, and congressional oversight mess stemming from torture carried out through a remote process that was purposefully kept out of sight and, to that extent, out of mind. I fully expect that these lawyers will act with honor and duty in undertaking their tasks—that is not the issue for me. The issue for me is much deeper in terms of whether we as a polity should ask the military to play this kind of cleanup role on a crafted stage with many moving parts and, in particular, have these lawyers lend their prestige and loyalty to a process that is so prone to the risk of process drift for reasons elaborated in Part III of this Article.

I am certain that these lawyers will endeavor to make adjustments in the process to meet their respective images of what is sufficient to achieve the standard required by Common Article 3. Put succinctly, they are mission driven and will do what they can to make the process work. I am just not convinced, based on what I have seen, that the process is capable of being good enough, no matter how remarkable the lawyers. I find this analysis a terrible thing to write, as it reflects so poorly on us as ordinary citizens that we have allowed this nested military commission and its context.

Another way of putting this concern is drawn from Justice Robert Jackson, who spoke in 1945 of the need to ensure that judicial norms are respected if one is using judicial forms.[51] When I compare what I saw with what one would expect in either a domestic or international tribunal that was regularly constituted, I found the military commission wanting, but ironically, through no fault of the protagonists in the room. Part of what happens in the tribunal is what happens outside the tribunal that comes into the manner in which the tribunal operates. From what I saw, the multiple moving parts make me think that the military commission may be anchored in federal power, but it stands precariously in terms of compliance with affording all the judicial guarantees recognized as indispensable by civilized persons.

Even if one is willing to stipulate that the defense counsel are to be designated as opposed to be chosen by the defendants, the manner in which the relationship between defense counsel and the defendants is being deformed by forces external to their wills is deeply troubling. Put succinctly, the interventions on attorney-client privileged communications (whether in the bins or in taped conversations) by parties other than the judge were shocking. The complexities of having access to clients were also profoundly disturbing hurdles—peculiar to the determination to have these hearings in this manner in Guantanamo Bay—that are really quite unnecessary.

The structural ambiguities on the law applicable and legal traditions applicable seem to make the process more one of creation than one of performance of judicial process. The more pejorative view would be to view the lawyers as making it up as they go along, but that view masks the more fundamental problem of the lack of control of so many moving parts requiring the flexibility and innovation by these lawyers that, ultimately, defeats one's sense of confidence in what one observes.

The image that comes to my head, in imagining some standard marked in international law as a line, is that the nested military commission, viewed in the holistic manner that seems necessary given all the moving parts, falls into a dark space below the line for a minimum standard. It is not a show trial of the Stalinist version, but, even worse for a democratically-put-in-place process, it has show-trial tendencies in what is to be an image of a

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51. Robert H. Jackson, Associate Justice, Supreme Court of the United States, Address to the American Society of International Law: The Rule of Law Among Nations (April 13, 1945), *available at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-rule-of-law-among-nations/. Justice Jackson states:

> The ultimate principle is that you must put no man on trial under the forms judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are merely organized to convict.

Id.

minimally fair trial. It is not all the way to the old Wild West adage, "We'll give you a fair trial and then hang you." But, the overall impact of all the moving parts is to use the judicial forms in a manner that appears less than sufficiently fair-minded.

I find these things terrible to write, but they flow from what I have observed. Can they be cured? The legacy of what has gone before impregnates what is there now, and what is there now continues to have many moving parts that destabilize and will likely continue to destabilize the quality of justice rendered. I am not even sure whether the traditional legal structures have the wherewithal within the United States to address this case either, given the powerful effect of the 9/11 disaster on all Americans. I do think that having the judge have life-tenure and having more stabilized processes through which the adjudication takes place are guarantors of regularity that we should aspire to have in this case that cries out for legitimacy of process. Of course, that logic would suggest an Article III court, as initially envisaged by the Obama administration. It is a tragedy that the Obama administration did not stick to that vision and that congressional opposition has so far blocked such a more meaningful process for the prosecution of these heinous crimes.

My sadness with my review of this process is increased both by the torture of these defendants that occurred and by the delay that has been caused to the families of the victims in having a judicial process assess guilt or innocence for the 9/11 crime with celerity and without dithering. I watched almost Jobian patience by these families, even as their views differ as to the outcome they sought for the case. The depth of their loss makes me want them to have had better and to have better process.

Turning to the media, they serve as proxies for the American public and the rest of the world. With the whole world watching, it seems that we should really assess whether this nested military commission is the appropriate manner to proceed for this case. Is this truly the best we can do? Moreover, is this even good enough?

Turning to the observers for non-governmental organizations or as ordinary citizens, we attempt to bear witness in our own ways about what we have seen. In a sense, we are asserting a right to observe true process in a nested military commission as part of our sense of entitlement to know the truth about what is done by those to whom we delegate our spark of sovereignty in our constitutional structure.

To the extent no one cares and thinks this nested military commission is good enough, as an ordinary American one has to come to terms with whether one is concerned by what appears to be a long period of subversion of a peremptory norm against torture and a warping of judicial process by one's state. The protagonists in the nested military commissions remain

good people in their roles, but they appear to be trapped in a bad spot that may make their efforts ultimately without valence.

M. Guantanamo Bay: What Next?

A student's meditation:

> "Professor Davis,
>
> Thank you for sharing this with me. I'm fascinated by the trial but also intrigued by the dialogue on Gitmo as a place, as an idea. Its [sic] hard to predict how history will treat this endeavor, and frankly I feel torn about it. While such crimes can't go unpunished and the families deserve justice, I worry that holding out quasi-due process and secretive proceedings as 'justice' makes us no better than those we condemn. My grandparents used to tell me about the KGB in Ukraine. Secret proceedings, show trials, and indefinite detention were standard practice. I think the very existence of such things creates opposition. Yet, I would have a hard time saying this to someone who lost a friend or loved one in the attacks. They deserve solace... I hope that in the future we find a way to achieve this in a less compromising way. Notwithstanding the base, Cuba looks beautiful. One of my good friends is Cuban; born here but his family fled from the Castro regime years ago. Its [sic] interesting to hear him talk about it, because they seem to despise Castro but still respect him. Hard to understand, but it relates back to everything else. The trip seems like an amazing experience and I'm thankful for your efforts in keeping this dialogue going. Have a great weekend.
>
> Tyler [Mamone]"

In Part II, I described Guantanamo Bay as not just a place, but as an idea full of so many dualities that it may seem appropriate to refer to it more in terms of infinitalities. In Part III, I have so far presented and analyzed the 9/11 Military Commission based on my observations, and moving to an international level analyzing the 9/11 Military Commission under a *dedoublement analytique* or second vision approach, have articulated my ordinary citizen's view on what I had observed. In this last Section, taking the liberty that is permitted by the symposium title, I suggest what I would hope would be the next step.

In making these suggestions, I have little illusion about the relentless resistance of many forces in and out of the federal government to the suggestions. Yet, my view is that resistance is fundamentally flawed, requiring one to be just as relentless in insisting upon reasonable suggestions that would provide a path forward with regard to Guantanamo.

At the heart of Guantanamo Bay is the problem of the breaching of the peremptory norm against torture by the United States. The torture pervades every aspect of Guantanamo Bay. My suggestions track along four axes: Adjudication, Torture, Indefinite Detention, and Accountability. The experience of having been at Guantanamo and observed the military commissions has led me to believe that the issue of the military commissions is nested in several other issues that lead ineluctably to the need to think more holistically when one thinks about Guantanamo. To make suggestions with regard to the military commissions is to address adjudication, but leaves out the questions about the other detainees held there that are not likely to be tried in military commissions. Thus, "solving Guantanamo" requires one to look past adjudication at the regime of detention for those other detainees. The detention regime and the interrogation regime are intertwined. The manner in which detainees have and will be treated in Guantanamo remains a further aspect to address, leading to the question of torture. Torture of detainees at Guantanamo or brought to Guantanamo leads to the issue of accountability for that torture. Accountability for torture leads to the related question of the use of torture to gather evidence to convince Americans of the need for armed conflict—bringing us to the War in Iraq and accountability for taking us to war on false pretenses. In my view, rather than isolating these topics as we appear wont to do, addressing these four concepts is the manner in which one can address Guantanamo Bay in the War on Terror and in the future.

1. Adjudication

Based on the analysis above, I have serious reservations about the 9/11 Military Commission and the military commissions in general. My conclusion is that these cases should be done in a setting that will have domestic and international credibility rather than in a system that is questionable, regardless of the great qualities of the judge and lawyers. In this regard, the restrictions that Congress has placed on detainees being transferred from Guantanamo Bay to federal court in the mainland should be repealed. My personal preference is that the cases be tried in the Southern District of New York or in front of Wall Street on Governor's Island. Alternatively, as a second option, I would suggest that a Southern District of New York Article III court be empaneled and sit at Guantanamo with a proviso that all the rules and practices which are applicable in the Southern District of New York apply with full force at Guantanamo. Military commissions should be returned to their role as adjudicator mechanisms of necessity, not adjudicator mechanisms of choice.

2. Torture

It is foreseeable that the prosecution will attempt to frame the 9/11 Military Commission process in a manner to make the rendition, detention, and interrogation of the defendants of as little relevance to the charges as possible. Similarly, it is foreseeable that the defense counsel will try to make the torture a central part of the trial and, at a minimum, part of any penalty phase if the case should reach that point. What is absent from those calculations of the prosecution and the defense is a vision of the torture as anything more than as something that intersects with the trial that is of little or no relevance or only of use as a means to acquit or reduce the penalty for these detainees. Yet, from the most recent reports, we understand that the torture regime put in place was massive, operating across fifty-four countries and the work of both high-level civilians and generals. We are aware that low-level soldiers have been court-martialed and are serving time for their roles in the torture, but no civilian or military person at a high-level has been indicted or prosecuted for putting in place this regime. On each occasion, the Department of Justice, the intelligence agencies, such as the CIA, the Department of Defense, and Congress have been unwilling to reach up the chain of command to the high-level persons who are the only ones capable of putting in place such a sophisticated program operating in fifty-four countries. For Guantanamo to be fixed, the dimensions of the torture regime must be fixed. That need for accountability at the highest levels is the reason for my suggestion that we now need to have an independent counsel appointed who will look into and organize the prosecution of the high-level civilians and generals who put in place this regime. It is patently obvious that the federal government is incapable of self-policing and, in the absence of such prosecutions, will retain this whole tragic and illegal affair as a precedent for the future. Without the prosecution as a containment mechanism serving as a reminder to future administrations, we are lost.

3. Detainees and Indefinite Detention

The limits on transferring Guantanamo detainees to the mainland should be repealed. Those who can be prosecuted should be prosecuted. For those who we detain with no intention of prosecuting because they were tortured, we should not put in place an indefinite detention regime without trial. Indefinitely detaining people without trial, whether as a means to hide our own illicit activities or otherwise, is inimical to international law (human rights and international humanitarian law) and too much of a rehabilitation of the perverse spirit enshrined in *Korematsu v. United*

States.[52] Of course, detention should continue to the end of the armed conflict (analogizing from the rules applicable in international armed conflict), and a period of winding down of the detention regime would form part of such a process. However, the end of the armed conflict appears to have a date certain, with the end of the Afghanistan armed conflict being currently scheduled for 2014.[53] The paucity of detainees concerned (166 at this count)[54] should lead to a short period of winding down. If there are new detainees picked up in places other than Afghanistan and who are not prosecutable, it would seem that they could be held for as little time as is feasibly consistent with the winding down of those individual sub-armed conflicts. But, our approach should be to minimize detention. I recognize that the risk of people returning to the battlefield is increased. Yet, the risk of others being inspired to join the battlefield because their family or friends are being held indefinitely would seem just as likely a motivation. Indefinite detention without trial is frowned upon in domestic and international law, and we should act consistent with that hesitance. In sum, the current Guantanamo Bay detainees should be returned to the United States and released back to their home countries beginning, at the latest, in 2015.

4. Accountability

There is little doubt that the War in Iraq was started under false pretenses by former-President Bush and the highest levels of the American government with the aid of tortured evidence. Accountability for that war of choice, not necessity, that, as a matter of international law, looks very much like aggressive war is imperative for rehabilitating the American standing in the world and for honoring the sacrifice of our soldiers sent into battle, wounded, and killed based on false pretenses. Accountability for the torture for these people would serve a similar end of vindicating the rule of law through a domestic prosecution. For reasons discussed above, due to

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52. 323 U.S. 214 (1944).

53. Address Before a Joint Session of Congress on the State of the Union, 2013 DAILY COMP. PRES. DOC. 90, at 8 (Feb. 12, 2013). In his 2013 State of the Union address, President Obama stated:

> Tonight we stand united in saluting the troops and civilians who sacrifice every day to protect us. Because of them, we can say with confidence that America will complete its mission in Afghanistan and achieve our objective of defeating the core of Al Qaida. Already, we have brought home 33,000 of our brave service men and women. This spring, our forces will move into a support role, while Afghan security forces take the lead. Tonight I can announce that over the next year, another 34,000 American troops will come home from Afghanistan. This drawdown will continue, and by the end of next year, our war in Afghanistan will be over.

Id.

54. *The Guantanamo Docket—The Detainees*, N.Y. TIMES, *available at* http://projects.nytimes.com/guantanamo/detainees/held (last visited on June 6, 2013).

our institutional inability to currently address these types of crimes, their prosecutions should be conducted by an independent counsel.

With these four paths of adjudication, torture accountability, avoidance of indefinite detention, and accountability for the War in Iraq, we have a chance to clean up the Guantanamo Bay mess in a manner that is consistent with our ideals.

IV. CONCLUSION

In this Article, I have attempted to lay out a vision of what should happen at Guantanamo Bay, Cuba, in the future. As I come to this conclusion, I am reminded of the experience of listening to the U.S. national anthem played at Guantanamo on several of the days I was there. The whole base would stop, and we would stand at attention as the American flag was raised on what I believe was the Expeditionary Legal Complex building. At the same time, as an American, I was stirred by the sound of the Star-Spangled Banner. Through that lens of duality, I imagined how that same anthem must sound to the detainees held on the other side, some tortured and some having known of those who committed suicide.[55] I thought of having wanted to take a photo of that moving ceremony of the raising of the American flag, but was not able to because of the security concerns of photographing some of the buildings. Experiencing both of those reactions were complexities inherent to being at Guantanamo.

One was permitted to take a picture of the American flag on the ferry that takes one to and from the airport (Annex C). On the way home, I was able to snap a photo that captures that flag unfurled against a beautiful blue sky, with the moon glowing at the middle. Just like that ferry flying the American flag, the American flag flying on the Expeditionary Legal Complex reminds us that Guantanamo is a place that is a quintessentially American place. And, as I hope I have demonstrated, more than just a place, Guantanamo is an idea—an American idea. As an ordinary citizen, one feels called upon to make sure that what is done at Guantanamo comports with one's understanding of the American idea.

That American idea is the spirit that called me to seek to be an observer and calls me to share that observer experience through this Article. In that observer experience, I am moved by the sacrifice of all the young men and women in uniform there, of the sacrifice of the lawyers and judge working to create a process that meets the standards of the American idea,

55. It should be noted that I was told that Zero Dark Thirty had not been allowed out at Guantanamo Bay. I wondered to what extent this was self-censorship in the presence on the island of detainees who had been subject to the kind of torture shown at the beginning of that movie.

and of the terrible loss of the families of victims. But, consistent with that same American idea, I am also moved by those being detained, by those who have been tortured, and by those who have committed suicide or died there. All of that was seen or unseen at Guantanamo.

I hope those who have put in place the military commission have operated out of a sense of duty and patriotism similar to that called out in me. I am less certain of that spirit for those who put in place the torture of choice, War in Iraq of choice, and indefinite detention of choice because these things seem so antithetical to the American idea. But, what is going on at Guantanamo is not a disagreement about what is patriotic. What is at issue is something deeper, the nature of the American idea. Out of panic and fear, in our long history we have known periods of great darkness. While recognizing those dark periods, one can also recognize the periods in which, after painful struggle, we have brought ourselves back from that abyss.

By torture of choice, by military commissions of choice, by a War in Iraq of choice, and by envisaging indefinite detention of choice, we have gone down a path into the dark parts of our American idea. For the reasons presented in this Article, I believe now is another time in which we must do what is needed to take the steps to come back from that abyss.

Rather than continuing to demean the American idea, as we think of what next, I hope that we renew ideas, with these suggestions from an ordinary citizen observer, of ways to keep our honor.

Annex C – American Flag on the Guantanamo Bay Ferry with the Moon in the Background