Commissions Impossible:

How Can Future Military Commissions Avoid the Failures of Guantanamo?

By Aaron Shepard*

* LL.M., University of Amsterdam; J.D., Columbia Law School; M.A. Military Operational Art and Science, USAF Air Command and Staff College; B.A. Government Studies, William & Mary. The author is a lieutenant commander in the Navy Reserve Judge Advocate General's Corps. The author is also employed as a civilian attorney by the Military Commissions Defense Organization, a mixed civilian-military unit within the Department of Defense charged with representing detainees at Guantanamo. The author specifically represents Mr. Nazir Bin Lep and Mr. Ali Hamza al Bahlul. No confidential or classified information was used or disclosed in this paper. The views expressed in this paper are those of the author and do not reflect the official policy or position of the US government or the Department of Defense. The author specifically wishes to thank Mr. Brian Bouffard for his tremendous insights and edits on this paper, as well as all of the impressive attorneys and staff at the MCDO for their inspirational work in defending the rule of law.

Forward

"Justice must be done. But I caution this: while you feel that rage, don't be consumed by it. After 9/11, we were enraged in the United States. While we sought justice, and got justice, we also made mistakes."[1]
-President Joseph R. Biden, 18 October 2023

It's been over two decades since 9/11, yet our country still keenly feels the mistakes made in that attack's aftermath. This paper spends significant time discussing those mistakes, in particular the decision to torture and indefinitely detain alleged terrorists in the United States' "Global War on Terror." But the purpose of this paper isn't solely to critique those mistakes. Instead, it seeks to understand the impact of them, and offer ways to avoid such consequences in the aftermath of future terrorist attacks.

While writing this paper in September of 2023, there was no way to know that another such attack would be mere weeks away. Yet on October 7th, Israel experienced its own version of 9/11, after a Hamas operation left nearly 1,200 dead and hundreds more captive.[2] While there are certainly differences between 10/7 and 9/11,[3] in important ways, they bear striking similarities: both inflicted a devastating emotional toll on their respective populaces, came from known enemies who were thought not to possess the means or the will to carry off such strikes, and featured warning signs that were tragically missed.[4] Most relevantly for this paper, though, is the similar reactions the attacks have inspired, with the initial shock and fear transitioning to righteousness, passion, and – as President Biden notes – rage.

This rage has been felt not just in Israel, but in the Palestinian territories and around the world. And while the passion – on both sides – may feel righteous, the test will be whether it consumes the participants and leads to the same or similar mistakes as outlined below. This paper should therefore serve as a stark warning to those who would abandon their principles to satiate their fear, their passion, and their rage. In the long arc of history, such a course benefits no one, only perpetuating a malignant cycle of violence and discord which resonates in perpetuity.

Finally, this paper does not shy away from describing the ills committed in response to 9/11, but it should not be seen as a complete indictment of the United States. To the contrary, virtually none of the United States' current geopolitical adversaries would have given the detainees in Guantanamo even the cursory legal process they have received.[5] But the deviations from fundamental judicial processes – which all Americans should demand – have unfortunately had

[1] Julian Borger, *Biden Tells Israel Not to 'Repeat Mistakes' Made by US After 9/11*, THE GUARDIAN (Oct. 18, 2023), https://perma.cc/TZ2H-4F63.
[2] *Israel Revises Hamas Attack Death Toll to 'Around 1,200'*, REUTERS (Nov. 10, 2023).
[3] *See, e.g.*, Raphael Cohen, *Why the Oct. 7 Attack Wasn't Israel's 9/11*, THE RAND BLOG (Nov. 13, 2023), https://perma.cc/264Z-4NV8.
[4] Ronen Bergman & Adam Goldman, *Israel Knew Hamas's Attack Plan More Than a Year Ago*, N.Y. TIMES (Nov. 30, 2023).
[5] *See, e.g., Alexei Navalny: Russia's Jailed Vociferous Putin Critic*, BBC (Aug. 4, 2023), https://perma.cc/48BJ-NNQC.

profound effects on U.S. interests at home and abroad, rippling out to touch society in countless ways with pernicious consequences. We can – and must – do better.

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Introduction

"The complete disregard for the foundational concepts upon which the Constitution was founded is an affront to American values and concept of justice…

[The abuse was] closer to torture performed by the most abusive regimes in modern history…it is a stain on the moral fiber of America…[and] should be a source of shame for the U.S. Government."[6]

These are not the words of an impassioned human rights advocate. Or a dedicated attorney representing their client. Instead, they are from a handwritten letter signed by seven senior U.S. military officers who served as jurors in a 2021 sentencing hearing for a Pakistani detainee named Majid Khan. Khan had pleaded guilty almost a decade earlier in 2012, admitting to being a relatively low-level al-Qaeda operative and taking responsibility for his actions. But in sentencing Khan for his crimes, the jury was required to assess not just his actions but their own country's as well. Specifically, the actions of the U.S. government in pursuing the "Global War on Terror," including the choice to use military commissions to prosecute detained suspects.

The story of Majid Khan is in many ways atypical of Guantanamo. He is a rare example of a "high-value detainee" who has been released from American custody. And, unlike the vast majority of the hundreds of men who have been held at Guantanamo, Khan was formally charged, and thus had a high-profile venue in which to present his case and subsequently be judged. Khan's story also provides a rare insight into Guantanamo's core structural problems, and the military commissions in particular, with physical torture followed by the deprivation of rights, the denial of due process, and the various and repeated failures of the legal system the United States set up to handle those apprehended in the Global War on Terror.

[6] *The Handwritten Document*, N.Y. TIMES (Oct. 31, 2020). While the military commissions use the term panel members instead of jurors, both terms will be used interchangeably throughout this paper.

Yet Majid Khan's story is one of many. This paper tries to capture some of those stories, and reflects upon the narrative they tell about the military commissions as a whole. It looks at the commissions from their conceptualization and intended goals, to their creation and evolution, and finally to their outcomes – or lack thereof. The picture painted is one of a flawed system whose cracks almost immediately began to show and yet, instead of being addressed, were ignored in the misbegotten hope that things would eventually fall into place. Unfortunately, this has not been the case, to the detriment of all of the stakeholders involved: the victims and their families; the American public; foreign intelligence and military partners; and the men subjected to this fundamentally defective process.

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The decision to use military commissions was made early on in the George W. Bush Administration,[7] but twenty years after 9/11, the alleged perpetrators of the attack are still untried, as is the alleged mastermind of the USS *Cole* bombing. Moreover, at an estimated cost of over $500 million per year,[8] the U.S. is spending a lot of money for a system of justice that is neither systematic nor just. In fact, in the more than two decades of prisoners being held in Guantanamo, only *one* contested trial has resulted in an upheld conviction:[9] a 2008 case where the accused refused the assistance of his attorneys at trial, and is now still pending various appeals a decade-and-a-half after the conviction.[10] Compare these results to the nearly 700 individuals convicted by federal civilian courts in that timeframe,[11] or the countless defendants convicted in foreign jurisdictions, and it becomes objectively clear that the Guantanamo

[7] *Factsheet: Military Commissions*, CTR. FOR CONST. RTS. (Oct. 17, 2007), https://perma.cc/Y4YQ-KK4B.
[8] Carol Rosenberg, *The Cost of Running Guantánamo Bay: $13 Million Per Prisoner*, N.Y. TIMES (Sept. 16, 2019).
[9] *The Guantanamo Trials*, HUM. RTS. WATCH (Aug. 9, 2018), https://perma.cc/7LZM-JWWT.
[10] *See generally* Al Bahlul v. United States, 967 F.3d 858 (D.C. Cir. 2020).
[11] *The Guantanamo Trials*, *supra* note 9.

commissions have been a failure. How else to describe courts which have not had a full trial in more than 15 years?

But what if America has a need for military commissions in the future? This seems at least plausible given the plethora of armed and hybrid conflicts in which the United States might become involved and where it may be difficult to prosecute the criminal actors in civilian courts. Consequently, the military and legal communities must be prepared to implement a commissions system that is a significant improvement from the Guantanamo commissions. This paper endeavors to examine the roots of Guantanamo's failures, and suggest potential solutions to remedy them.

It begins with an introduction to the concept of military commissions, including a brief overview of their historic utilization and import, followed by background on Guantanamo Bay and an examination of the current commissions' framework. It then goes over some of the initial difficulties the Guantanamo commissions faced, and subsequently examines both broader structural issues and examples of particularly problematic cases. Finally, the conclusion proposes concrete solutions based upon fixes that are both implementable and politically feasible.

Of course, the best ideas on paper are doomed to failure if policymakers make the same mistakes as those made after 9/11. More critically, Americans must look skeptically at those seeking to abrogate fundamental American values and question whether the perceived near-term benefits of taking supposedly pragmatic, amoral approaches are worth the long-term consequences. The collective experience at Guantanamo has quite soundly demonstrated the opposite, and future leaders would do well to take heed before repeating such folly.

SECTION I
Might Makes Wrong: The Lead-up to the Guantanamo Commissions

"This nation was founded by men of many nations and backgrounds. It was founded on the principle that all men are created equal, and that the rights of every man are diminished when the rights of one man are threatened."[12]

In the hunt for those who perpetrated the attacks on 9/11, as well as others associated with al Qaeda and affiliated terrorist organizations, U.S. intelligence, defense, and law enforcement communities faced a significant problem: what to do with individuals captured in the "War on Terror" once they were removed from the battlefield. Typically, individuals arrested and accused of crimes related to terrorism faced trial in federal civilian court.[13] Alternatively, in most wars, combatants are held until the end of the conflict and then repatriated according to long-standing procedures.[14]

But terror is not an enemy. It is more of an abstract concept, like "poverty" or "drugs." And when does the war in the "War on Terror" end? What does victory look like? And where would those captured in this "War" be returned to if related conflicts were still ongoing? Terrorist suspects had also never been arrested *en masse* as they were after 9/11, and evidentiary issues (e.g., unavailable witnesses, evidence left behind in the midst of a firefight) resulting from their battlefield apprehension, as well as ongoing national security requirements, made for additional complications when considering traditional jurisprudential approaches.[15]

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[12] John F. Kennedy, U.S. President, Televised Address to the Nation on Civil Rights (June 11, 1963) *in* Historic Speeches, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, https://perma.cc/P349-DUK2.
[13] *See, e.g.*, Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, N.Y. TIMES (Jan. 9, 1998).
[14] *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 109-19, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.
[15] Sarah Almukhtar, Carol Rosenberg, Charlie Savage, Andrew Fischer, Rachel Shorey, Andrei Scheinkman, Alan McLean, Jeremy Ashkenas, Archie Tse, Jacob Harris, Derek Willis, Jeremy Bowers, & Margot Williams, *The Guantanamo Docket*, N.Y. TIMES (Sept. 22, 2023) [hereinafter *The Guantanamo Docket*].

Adding a further wrinkle, as part of the "War on Terror," federal courts approved holding suspects indefinitely without trial as law of war detainees, side-stepping the need to try them at all.[16] The Guantanamo military commissions, therefore, tried to walk a middle road: having trials conducted in accordance with legal principles of due process and fairness, while simultaneously recognizing the military and intelligence concerns and exigencies that may make civilian courts impracticable. But the results have been mixed.

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This section starts with a summary of the role commissions have played in American legal history. It then briefly goes into the background of Guantanamo Bay, focusing on developments leading up to 9/11. Finally, it brings those two pieces together, discussing why Guantanamo was selected to host the detainees and military commissions, as well as providing an outline of the framework under which the commissions operate.

A. A Brief History of U.S. Military Commissions

The Guantanamo military commissions were first authorized in 2001 by President Bush,[17] but military commissions have a lengthy history in American jurisprudence. Dating back to the Revolutionary War, military courts have been assembled in situations where civilian courts were either inaccessible or inappropriate to address the circumstances of the alleged crimes. Notable examples include the British trying and executing Captain Nathan Hale in 1776 for spying and the Americans doing likewise in 1780 to Major John André.[18]

The need for military commissions resurfaced in a number of conflicts in which the United States would later engage, especially during the Civil War, when shifting lines of battle

[16] *The Periodic Review Board*, PERIODIC REV. SECRETARIAT, U.S. DEP'T OF DEF., https://perma.cc/SD7M-5VPJ.
[17] Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57831 (Nov. 13, 2001).
[18] Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., 41, 42 (Mar. 2002).

and mercurial local populations made commissions particularly attractive. Judicial decisions during this time also provided key precedents, establishing critical rights for the accused. One particularly important case was *Ex parte Milligan,* in which the Supreme Court observed that the President "is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws."[19] The Court also reminded the Executive Branch that "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times."[20] In other words, even during military exigencies, the Constitution places limits on executive power and prohibits military commissions from defying established legal norms and requirements.

Another major development occurred nearly a century later in *Ex parte Quirin,* which was a 1942 Supreme Court case involving German would-be saboteurs who landed in New York and Florida with the goal of destroying U.S. military assets.[21] Because the defendants acted behind enemy lines in civilian clothing – much like Major André – they were found to be unlawful enemy combatants and thus triable by military commissions.[22] But critically, the Court in *Quirin* conducted a Constitutional analysis, albeit finding that exceptions within the Constitution justified the commission's jurisdiction in that instance.[23]

The takeaway from this brief survey is that military commissions have long filled a unique role in American jurisprudence, allowing the trial of alleged violators of the law of war who cannot be tried within either traditional military justice systems – presently the Uniform Code of Military Justice (UCMJ) – or within civilian jurisdictions.[24] This makes commissions especially

[19] *Ex parte Milligan,* 71 U.S. 2, 121 (1866).
[20] *Id.* at 120. This quote notably excludes women from such protections, and further excluded enslaved African men from "all classes of men." *Id.*
[21] *Ex parte Quirin,* 317 U.S. 1, 21 (1942).
[22] *Id.* at 31, 46.
[23] *Id.* at 40.
[24] Lacey, *supra* note 18, at 47.

appealing for fluid conflicts against non-state actors when domestic criminal courts are neither readily available nor secure, and also when conflicts are asymmetric with frequent law of war violations – a scenario very much like the one the United States found itself in following 9/11.

B. The Tale of Guantanamo Bay, Cuba

Given its notoriety during the "War on Terror," Guantanamo Bay has become a fraught symbol, though exactly what it symbolizes usually depends upon the viewer. But it has always had a unique status. The United States fought a major battle there in 1898 during the Spanish-American War, and a subsequent lease with newly independent Cuba in 1903 allowed the United States to build and operate a naval base on the site.[25]

But the lease – signed by President Theodore Roosevelt, who had fought in Cuba during the war – was written to be perpetual, with mutual consent required to cancel the pact.[26] As a result, despite the worsening of U.S.-Cuban relations following the Cuban Revolution and the ascension of the Castro regime in 1959, the United States has remained in Guantanamo, maintaining a substantial presence in a Communist country with whom the United States has – at best – a severely strained relationship.[27]

Fast-forwarding to the present, Guantanamo is currently host to approximately 6,000 U.S. military personnel, civilian employees, contractors, and their families, all living in a roughly 45 square mile area completely fenced off from the local Cuban community.[28] The U.S. presence includes a Marine force which guards said fence,[29] as well as about 1,500 military personnel who run the detention center housing the remaining detainees. There are on-base schools, restaurants,

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[25] *History*, NAVAL STATION GUANTANAMO BAY, COMMANDER, NAVY REGION SE., https://perma.cc/JPP5-N25B.
[26] Lily Rothman, *Why the United States Controls Guantanamo Bay*, TIME (Jan. 22, 2015), https://perma.cc/LQN9-VVWV.
[27] *1959-2023 U.S. Cuba Relations*, COUNCIL ON FOREIGN RELATIONS, https://perma.cc/8ZKM-MCFA.
[28] Carol Rosenberg, *Guantánamo Bay: Beyond the Prison*, N.Y. TIMES (Nov. 26, 2021).
[29] *Id*. Despite claims to the contrary by Colonel Nathan Jessup, USMC, the fence is more than 300 yards from where the Marines typically eat breakfast.

recreation facilities, and outdoor movie theatres; in other words, nothing that would differentiate it from any other small U.S. town playing host to a military base. Of course, that ignores what makes Guantanamo unique: its location in a foreign country, over that country's opposition,[30] with the United States exercising essentially complete administrative and operational control over the base.

C. The Establishment of the Guantanamo Military Commissions

Precisely because of its unique status, Guantanamo was selected to house enemy combatants in the "War on Terror," and they began taking their first shackled steps on the Caribbean island in January 2002.[31] These men – of whom there have been nearly 800 in the subsequent decades[32] – represented an assortment of backgrounds and nationalities, with similarly disparate connections to al-Qaeda, the Taliban, and other terrorist organizations the United States faced. While many were detained on the mere suspicion of involvement with those groups, others had cases with some evidentiary support, and the U.S. government's goal was to eventually bring those cases before military commissions.

The commissions were first authorized via an executive order from President Bush, in which he made the critical claim that it was "not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[33] But even with this pronouncement, the precedents set in *Milligan* and *Quirin* still required at least a cursory application of the Constitution, which meant that those accused before military commissions had at least some

[30] Dan Lamothe and Thomas Gibbons-Neff, *Cuba Wants Back the 'Illegally Occupied' Base at Guantanamo. The U.S. Isn't Budging*, WASHINGTON POST (Mar. 21, 2016).
[31] *The Guantanamo Docket*, *supra* note 15.
[32] *Id.*
[33] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 57833 (Nov. 16, 2001).

Constitutionally-based rights. Furthermore, certain legal rights were accorded to all individuals detained under President Bush's order, regardless of whether they eventually went before a commission. Perhaps most importantly, they had the presumed right to file writs of *habeas corpus* challenging the government's basis for detaining them.

However, those precedents, and indeed any U.S. jurisprudential authority, required access to U.S. courts. This was possible in *Milligan* and *Quirin* because those commissions were held within the United States. But what if the commissions were held elsewhere? This was the conundrum for Bush administration officials, who sought to "find the legal equivalent of outer space" to detain and eventually try apprehended terrorism suspects with limited or no judicial oversight.[34]

After considering overseas military bases and other foreign locations – usually discarded after assessing the political fallout with the host nations[35] – Guantanamo seemed like the perfect solution. It was in a foreign country and therefore arguably not under the umbrella of critical Constitutional safeguards, provided that the detainee was not an American citizen. Cuba's proximity to the United States would allow easy access for law enforcement, military, and intelligence officials, especially given the existing Navy infrastructure. Additionally, the relationship with the host country was non-existent, removing any need to consider political blowback. While it was not literally outer space, it might as well have been.

However, the initial rounds of military commissions did not go according to plan. First, the entire charging and procedural structure was invalidated in the Supreme Court case of

[34] Michael Isikoff, *The Gitmo Fallout*, NEWSWEEK (July 16, 2006, 8:00 pm), https://perma.cc/G5BX-JF6Q; Pauline Canham, *Guantanamo Bay: 'The legal equivalent of outer space'*, AL JAZEERA (Jan. 4, 2022), https://perma.cc/37EC-UZAE.
[35] *Id.*; *see also* Adam Liptak, *C.I.A. Black Sites Are State Secrets, the Supreme Court Rules*, N.Y. TIMES (Mar. 3, 2022).

Hamdan v. Rumsfeld because the commissions were carried out pursuant to the President's executive authority and not through a direct act of Congress.[36] Specifically, the President's existing authority to establish military commissions had come from Article 36 of the UCMJ, which required newly established commissions to justify any deviations from the rules which govern courts-martial.[37] And there were significant deviations in the first iteration of the commissions, including: the utilization of classified evidence unavailable to the accused; liberal standards for hearsay; and the admissibility of coerced statements. However, no justifications for those deviations had been explicitly provided, leading to the Court's decision.

In response, Congress passed the 2006 Military Commissions Act (2006 M.C.A.),[38] which solved the President's lack of authority by statutorily codifying many of the provisions used to establish the commissions. But the 2006 M.C.A. still contained a number of the problematic provisions listed above. Even more troubling, it purported to bar Guantanamo detainees from filing writs of *habeas corpus*.[39]

Once again, the Supreme Court stepped in, holding in the case of *Boumediene v. Bush* that the denial of *habeas corpus* was unlawful, brushing aside any notion that Guantanamo exists in "legal outer space."[40] The Court observed that, regardless of the current Cuban regime, "the United States continued to maintain the same plenary control [over Guantanamo] it had enjoyed since 1898."[41] In rejecting the notion that the government could act outside the law, the Court highlighted that "[e]ven when the United States acts outside its borders, its powers are not absolute and unlimited but are subject to such restrictions as are expressed in the Constitution."[42]

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[36] Hamdan v. Rumsfeld, 548 U.S. 557, 613-14 (2006).
[37] *See* 10 U.S.C. § 836.
[38] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2009).
[39] *Id.* at Sec. 7.
[40] Boumediene v. Bush, 553 U.S. 723, 732 (2008).
[41] *Id.* at 765.
[42] *Id.* (citing Murphy v. Ramsey, 114 U.S. 15, 44 (1885) (internal citations omitted)).

In response to another rebuke, Congress passed the 2009 Military Commissions Act (2009 M.C.A.), which, albeit with several subsequent amendments, remains the governing legislation for the commissions.[43] The Act states that the purpose of military commissions is "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission."[44] In simpler terms, an "unprivileged enemy belligerent" is defined as a person who either engaged in or supported hostilities against the United States or its coalition partners, or someone who was a member of al Qaeda at the time of their offense. Subsequent sections of the 2009 M.C.A. specifically eliminated a number of trial rights fundamental to U.S. and military courts, including the right to a speedy trial[45] and warnings against self-incrimination (in particular UCMJ Article 31(b) rights, akin to *Miranda* warnings),[46] while including prosecution-friendly evidentiary rules allowing the admission of evidence which would be inadmissible in other forums.[47] However, the 2009 M.C.A. does include elements giving accused some key rights, including the right to counsel,[48] the exclusion of "statements obtain[ed] by torture or cruel, inhuman, or degrading treatment,"[49] and the ability to present evidence and cross-examine witnesses.[50]

The 2009 M.C.A. is a broad document, which mandates that the Secretary of Defense also promulgate rules by which military commissions should be governed. The first of these is the Manual for Military Commissions (M.M.C.), the most recent version of which was published in

[43] Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574 (2009).
[44] 10 U.S.C. § 948b(a).
[45] 10 U.S.C. § 948b(d)(1)(A).
[46] 10 U.S.C. § 948b(d)(1)(B).
[47] 10 U.S.C. § 949a(b)(3).
[48] 10 U.S.C. § 948k(c); 10 U.S.C. § 949c(b).
[49] 10 U.S.C. § 948r(a).
[50] 10 U.S.C. § 949a(b)(2).

2019.[51] This issuance contains four components: a preamble, the Rules for Military Commissions (R.M.C.), the Military Commissions Rules of Evidence (M.C.R.E.), and a listing of crimes triable by military commissions. Its organization is roughly similar to the Manual for Courts-Martial (M.C.M.), which governs trials under the UCMJ.

Another important implementing document is the Regulation for Trial by Military Commission (R.T.M.C.), which was issued in 2011 and has had a number of subsequent updates.[52] Whereas the M.M.C. largely contains rules which apply to courtroom processes and procedures, the R.T.M.C. gives highly detailed instructions on how to carry out the logistical and administrative aspects of the commissions.

All told, the current rules and regulations for military commissions are fairly specific, and lay out a structure that attempts to balance military and intelligence necessities with the rights due to any individual whom the government seeks to deprive of their life or liberty. Of course, it took almost a decade after 9/11 to formulate this legal approach, a delay that deprived all stakeholders – the accused, the victims and their family members, and the general public – of justice during the meantime. And unfortunately, as the subsequent section shows, the current commissions' approach to seeking, obtaining, and imposing justice leaves much to be desired.

[51] U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS (2019), https://perma.cc/RP48-53TC [hereinafter M.M.C].
[52] U.S. DEP'T OF DEF., REGULATION FOR TRIAL BY MILITARY COMMISSION (2011), https://perma.cc/PC24-DFPG [hereinafter R.T.M.C.].

SECTION II
Can We Handle the Truth: An Assessment of Guantanamo's Performance

"Courts try cases, but cases also try courts."[53]

Any approach to suggesting improvements to the Guantanamo commissions must start with an assessment of its current status. Simply put, the Guantanamo commissions have failed. The United States has spent billions of dollars on Guantanamo, and yet the most notable commissions – for 9/11 and the *Cole* bombing – remain nowhere close to trial. And while a few minor cases have reached a verdict, most have been overturned on appeal. As noted previously, only one contested trial – of Ali Hamza al-Bahlul – has resulted in a valid conviction, and his case remains on appeal in light of numerous errors, including that two of the three charges of which he was convicted were subsequently vacated. Expanding the aperture to include convictions following guilty pleas does not improve things much either, as only four pleas have survived their appeals.[54] When compared with the hundreds upon hundreds of terrorism convictions in federal court – achieved at far less cost to the American taxpayer – one can come to no other conclusion than that the Guantanamo commissions are fatally flawed.

These are not cherry-picked factoids to support an anti-commissions narrative. On the contrary, there is widespread agreement within the military and legal community that Guantanamo has been a failure. One individual who has expressed this opinion is Theodore Olson, the Solicitor General during the Bush Administration whose wife was onboard American Airlines Flight 77 – the plane that was crashed into the Pentagon. Olson, as one of the highest-ranking officials in the Justice Department, was instrumental in crafting the initial iterations of

[53] TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 45 (2013) (quoting Supreme Court Justice Robert Jackson's April 13, 1945 speech to the American Society of International Law).
[54] *See The Guantanamo Docket*, *supra* note 15.

Guantanamo policy. Yet he has recently recognized that "the commissions were doomed from the start,"[55] citing both the use of coercion-derived evidence as well as the novel legal structure which deviated significantly from traditional practice. This has resulted in myriad interlocutory – or midtrial – appeals, which have dramatically slowed even the few commissions which have made any progress. While Olson would seemingly have every reason, both personal and professional, to want the commissions to continue and death sentences imposed upon the defendants, he now believes that resolving cases as quickly as possible is in everyone's interest. His conclusion about the commissions is that:

> It didn't work. The established legal system of the U.S. would have been capable of rendering a verdict in these difficult cases, but we didn't trust America's tried-and-true courts. In the 20 years since this ordeal began, no trial has even begun. There have been years of argument in pretrial hearings, which have produced no legal justice for the victims of 9/11. Instead of helping Americans learn more about who carried the attacks out and why, they have produced seemingly endless litigation largely concerned with the treatment of detainees by government agents and the government's attempts to suppress certain information.[56]

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This section first acknowledges several preconditions that, independent of the actual commissions, set the entire enterprise up for failure. Second, it looks at systemic issues across multiple commissions. Finally, it returns to the cases themselves, and examines the pitfalls which befell the various trials. All told, this tripartite endeavor paints a holistic picture of the errors that have plagued the Guantanamo commissions.

[55] Theodore Olson, *The U.S. Must Resolve the Cases of the Guantanamo Detainees*, WALL ST. J. (Feb. 2, 2023), https://perma.cc/3FY8-CP78.
[56] *Id.*

A. Headwinds at Launch: External Problems Facing the Commissions

While this paper spends much time criticizing both the design and performance of the commissions, a fair analysis must also consider the complications they assumed upon conception. Some of these problems were likely unavoidable, inherent in any military commission assigned to prosecute individuals from far-flung battlefields. But others were born from government decisions and have cast a long-lasting and irrevocable shadow over the entire process.

The most prominent example of this is torture. As stated by now-retired Marine Corps Brigadier General John Baker, a former Chief Defense Counsel, torture is the "original sin" of Guantanamo.[57] The U.S. decision to torture detainees through "Enhanced Interrogation Techniques" (EITs) – the legally palatable euphemism coined to describe what any rational individual would call torture – has brought moral condemnation at home and abroad, endangered American service members and national interests, and, relevantly for this paper, made trials immeasurably more difficult. Sadly, it constitutes "the single most significant barrier to fulfilling victims' rights to justice and accountability…[and] was a betrayal of the rights of victims."[58]

With that being said, this paper does not relitigate the torture issue.[59] But it is worth reiterating that torture is not only illegal,[60] it is also ineffective, often producing faulty information because the subject simply – and predictably – lies by saying whatever they think

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[57] *Closing Guantanamo: Ending 20 Years of Injustice: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2021) (statement of John G. Baker, Brigadier General, United States Marine Corps, Chief Defense Counsel, Military Commissions Defense Organization, Department of Defense).

[58] U.N. Hum. Rts. Special Proc., Technical Visit to the United States and Guantanamo Detention Facility by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (June 14, 2023), https://perma.cc/P76A-LNZG; *see also* Carol Rosenberg, *Conditions at Guantanamo Are Cruel and Inhuman, U.N. Investigation Finds*, N.Y. TIMES (June 14, 2023) .

[59] To the extent the reader seeks more information, *see* S. SELECT COMM. ON INTEL., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288 (2014) (providing extensive details on the activities the U.S. government engaged in).

[60] 18 U.S.C. § 2340A.

the interrogator wants to hear.[61] Flawed intelligence of this nature has had drastic consequences, including supporting incorrect conclusions that helped justify the 2003 invasion of Iraq.[62] Of course, the essential immorality of torture also runs contrary to the most bedrock principles of America's character and dedication to the rule of law. This is true whether the torture was done with the honest intention to gather intelligence or, as was often the case, for purposes as condemnable as giving torturers extra practice at their craft.[63]

Beyond torture, the reality is that apprehending individuals in a combat zone and flying them halfway across the world for trial is naturally going to lead to difficulties even for the most well-designed justice system. Compounding this problem was that the apprehensions often took place through allied or proxy forces, with detainees only ending up in U.S. custody after a series of transfers.[64] Cash bounties paid to unvetted and unaccountable foreign intermediaries increased the error rate, further slowing the process.[65]

Conversely, even when U.S. forces apprehended suspects, in many circumstances, the area of detention was either a war zone or other dangerous or inhospitable location, meaning the priority was on rapidly securing the suspect as opposed to gathering, documenting, and properly securing on-scene evidence. And when (or if) the criminal investigations actually began, they often had to be conducted through foreign law enforcement and intelligence officials, many of

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[61] Rebecca Gordon, *The CIA Waterboarded the Wrong Man 83 Times in 1 Month*, THE NATION (Apr. 25, 2016), https://perma.cc/8B2J-9MSC.
[62] *See* David Abramowitz, *Op-Ed: Torture, false information and the Iraq war*, L.A. TIMES (June 11, 2015), https://perma.cc/3WRV-YZFQ.
[63] *See* Spencer Ackerman, *Report of the CIA Inspector General Regarding Allegations of Torture Made by Ammar al-Baluchi*, FOREVER WARS (Mar. 13, 2022), https://perma.cc/WAY9-L64T.
[64] *See Guantanamo Inmates Say They Were 'Sold'*, ASSOCIATED PRESS (May 31, 2005), https://perma.cc/9M46-7L5B [hereinafter *Guantanamo Inmates*]; *see also* Mark Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data*, 41 SETON HALL L. REV. 1211 (2011).
[65] *See Guantanamo Inmates*, *supra*, note 64.

whom had their own goals that were separate from, or entirely contrary to, U.S. interests.[66] As a result, potential evidence was limited, and when it was obtained, its dubious validity would be subject to scrutiny decades later.

None of this is meant to exculpate the decision makers behind the Guantanamo commissions. As the next section discusses, they have pursued a variety of ill-conceived paths – both legal and strategic – that have inevitably led the commissions into their current, unproductive morass. But any fair analysis of these commissions must identify root causes of failure outside the structural trial issues, both to help avoid such preconditions in the future as well as isolate which legal issues can truly be fixed for future commissions.

B. Stormy Seas: Structural Causes of Failure

While the government lawyers involved in the Guantanamo commissions may not be responsible for the decision to engage in torture, they are accountable for the decision to use the fruits of torture in the prosecution of detainees. For instance, prosecutors in the case of Abd al-Rahim al-Nashiri – the alleged U.S.S. *Cole* bomber, whose trial is discussed further below – attempted to use statements he made while subject to torture in a pretrial hearing.[67] This was despite the prohibition under the 2009 M.C.A. that "[n]o statement obtained by the use of torture or by cruel, inhuman, or degrading treatment…whether or not under color of law, shall be admissible in a military commission."[68]

The prosecutors' argument was that the statements were not being used in the commission itself, but instead in pretrial motions before the military judge.[69] This notion would be looked at

[66] For a detailed description of such investigations, see ALI SOUFAN, THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL-QAEDA (W.W. Norton & Company, 2011).
[67] *See* Scott Roehm, *In U.S. v. Al-Nashiri the Government Is Rewarding Torture and Incentivizing Torturers*, LAWFARE (Aug. 10, 2022), https://perma.cc/B25M-B2XA.
[68] 18 U.S.C. § 948r(a).
[69] *See* Roehm, *supra* note 67.

askance by any litigator, let alone one practicing before the Guantanamo bar, given the common refrain that cases are won and lost in the motions phase. These pretrial arguments set the stage for the trial to come, and therefore any use of torture-derived evidence is as critical prior to the actual trial as it is during it. While there is certainly evidence that goes before a judge that cannot be used in front of a jury, to use torture-derived evidence at all completely ignores the justification for banning torture and its resulting information in the first place.

Eventually, the Biden Administration rejected prosecutors' legal assertions,[70] leading to the resignation of the strategy's proponent, then-Chief Prosecutor of the Military Commissions, Army Brigadier General Mark Martins.[71] Yet, other prosecutors continued to pursue similar tactics in the *Cole* case. Pivoting from Nashiri's statements, government lawyers next argued for the use of torture-derived evidence from *others* against Nashiri. Specifically, they tried to use statements from a former detainee, Ahmed Al-Darbi, which were the product of Al-Darbi's torture.[72] But the commission judge rejected this attempt, which was followed by the resignation of another key prosecutor.[73]

These individual developments primarily affected the *Cole* case, but they are discussed here to provide context for many of the follies within the commissions, both visible and invisible, caused by overly aggressive government tactics. This has included, among other infractions: a supposedly neutral government decision maker having to resign because of

[70] *See* Carol Rosenberg, *Biden Administration Rejects Use of Testimony Obtained From Torture in Guantanamo Trial*, N.Y. TIMES (Feb. 1, 2022).
[71] *See* Sacha Pfeiffer, *Chief Guantanamo Prosecutor Announces Surprise Retirement Before 9/11 Trial Starts*, NAT'L PUB. RADIO (July 10, 2021), https://perma.cc/S8AQ-CUPQ.
[72] *See* Roehm, *supra* note 67.
[73] *See* Carol Rosenberg, *Prosecutor Who Sought to Use Evidence Derived From Torture Leaves Cole Case*, N.Y. TIMES (Sept. 14, 2022).

significant conflicts;[74] judicial sanctions for failing to properly turn over evidence;[75] and prosecutors denying the existence of evidence that the government knew of or should easily have been able to discover.[76] This latter category continues to evolve, with recent disclosures of interrogation videos that prosecutors have long denied existed.[77]

Most of these matters were eventually addressed and (at least somewhat) remedied by competent judicial authorities, but the American criminal justice system requires the prosecution to avoid these errors in the first place. And without a baseline moral compass, for every prosecutorial ethical lapse discovered, many more likely go unnoticed, resulting in irremediable prejudice within the subsequent trial. American law relies upon – and indeed demands – a prosecutorial mindset that prioritizes fairness, transparency, and justice above all else.

While these may be the purported goals of the Guantanamo commissions,[78] time and time again history has shown that critical actors within the system have instead prioritized prosecutorial and personal aims over the delivery of legitimate justice. To the extent that such illegitimate goals have been uncovered and remedied – with significant prejudice and delay for the detainees, victims, and the American taxpayer – countless more will remain under the surface, in violation of the mandate the American legal system places upon prosecutors, that:

> [The Prosecution] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done…[W]hile he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain

[74] *See* M.E. Bultemeier, *9/11 Case: Military Commission Convening Authority to Be Called as a Witness as to His Own Bias*, JUST SECURITY (Dec. 2, 2019), https://perma.cc/J4PK-TQVJ.
[75] *See* AE 047K at 13, United States v. Majid Shoukat Khan (Mil. Comm'n 13 July 2020); *see also* Michel Paradis, *Military Commission Judge Penalizes Prosecution's Discovery Practices in United States v. Khan*, CAAFLOG (July 15, 2020), https://perma.cc/3L64-PD5S.
[76] *See* Steve Vladeck, *Al-Nashiri III: A No Good, Very Bad Day for U.S. Military Commissions*, JUST SECURITY (Apr. 16, 2019), https://perma.cc/XM7S-W8VS.
[77] *See* Carol Rosenberg, *Prosecutors Disclose Discovery of Secret Guantanamo Prison Videos*, N.Y. TIMES (June 21, 2023).
[78] *Guantanamo* Bay, U.S. DEP'T OF DEF., OFF. OF MIL. COMM'NS (June 15, 2023) https://perma.cc/GEP8-ZH6Y.

> from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[79]

Another case-spanning issue has been the rotation of military personnel. The involvement of uniformed military personnel is an inherent characteristic of military commissions, and so in and of themselves, these rotations are not a problem. By statute, a uniformed military judge[80] and jury[81] are required, and at least one (albeit, typically more) military judge advocate must be detailed as a defense attorney.[82] The only group for which rotation has not caused a problem – so far – is the jury, or members panel. In fact, as the words of Majid Khan's panel from the epigraph of this paper illustrate, military officers take their oaths to the Constitution seriously. So while an individual member or two may be conflicted based upon experiences during deployments or otherwise, there have been no major issues with the makeup of the very few panels created so far. As a caveat, the sample size for this assessment is fairly low given the dearth of cases that have actually made their way to trial, when a jury first becomes necessary.

There have been more issues with military defense lawyers, although at least in practice, they have remained relatively minor. The largest concern is that the attorneys – typically mid-grade officers in the midst of their careers – are rotated every few years to new military assignments. These changes are necessary to increase their likelihood of promotion, an issue which itself is problematic given the potential negative effects of being assigned to defend accused terrorists.[83]

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[79] Berger v. United States¸ 295 U.S. 78, 88 (1935).
[80] 10 U.S.C. § 948j(b).
[81] 10 U.S.C. § 948i(a).
[82] 10 U.S.C. § 948k (stating that military attorneys typically, but need not be, assigned as prosecutors).
[83] *See* Carol Rosenberg, *Military Lawyer Denied Promotion While Defending Qaeda Suspect*, N.Y. TIMES (Aug. 22, 2019).

The otherwise normal rotation of active duty attorneys has been contested in some cases,[84] but no major developments have occurred. However, in principle, there are at least two potential legal hurdles. First, once an attorney-client relationship is established, it is difficult to sever, although the relevant laws differ according to the attorney's licensing jurisdiction. Second, commissions are complex factually and legally, and mastering the relevant issues is both difficult and time-intensive. Therefore, rotating attorneys can cause serious setbacks to the case. As a practical matter, the remaining defendants all have civilian lead attorneys, including expert learned counsel in the capital cases. This ameliorates some, but certainly not all, of the concerns surrounding judge advocate movement.

Without a doubt though, the biggest issue with uniformed personnel has been the ephemeral employment of military judges. Consider the commissions' highest profile case of *United States v. Khalid Shaikh Mohammad et al.* – the joint trial of the five (perhaps now four) alleged 9/11 plotters.[85] In March 2020, the judge presiding over the case was Air Force Colonel Shane Cohen, who had only come on board nine months earlier in June 2019.[86] He took over for Marine Colonel Keith Parrella, who also served a mere nine months before the Marine Corps transferred him elsewhere. Upon taking over in 2019, Judge Cohen inherited a nearly decade-old case that, by then, had over 23,000 pages of transcripts and approximately 500 legal motions.[87]

Despite the massive catch-up he had to do, he promised quick results, including a potential trial by January 2021.[88] Yet in late March 2020, Judge Cohen abruptly decided to retire, leaving

[84] *See* AE 204A at 1, United States v. Abd al Hadi al-Iraqi, (Mil. Comm'n 30 Dec. 2021).
[85] United States v. Khalid Shaikh Mohammad et al., 28 F. Supp. 3d 1305 (USCMCR 2017)
[86] Carol Rosenberg, *New Judge in the 9/11 Trial at Guantánamo Inherits a Complex History*, N.Y. TIMES (June 20, 2019).
[87] *Id.*
[88] Carol Rosenberg, *Military Judge in 9/11 Trial at Guantánamo Is Retiring*, N.Y. TIMES (Mar. 25, 2020).

America's largest criminal trial – whose transcripts had grown to over 33,000 pages – in the hands of a temporary caretaker, Guantanamo's chief judge, Army Colonel Douglas Watkins.[89]

In September 2020, the case was assigned to Marine Colonel Stephen Keane.[90] But he recused himself only weeks later as a result of a personal conflict that – apparently – he only belatedly discovered.[91] After the case reverted again to Judge Watkins, Air Force Lieutenant Colonel Matthew McCall was assigned, taking his place as the fourth military judge to preside in an approximately six-month period.[92]

But in a display of confounding decision-making unique to Guantanamo, Judge McCall was objected to by *the prosecution* because he had only been an Air Force judge for one year, whereas the R.T.M.C requires that military commissions judges have been assigned as military judges for at least two years before their appointment to the Guantanamo bench.[93] It is worth recalling that the prosecution represents the U.S. government – the exact same government that decided to appoint Judge McCall in the first place. In other words, the government was objecting to its own decision.

The issue was resolved by waiting for a year while Judge McCall gained experience in the Air Force; after that delay, he was sufficiently qualified, and was reappointed to the commission's bench in August 2021.[94] Despite having been officially on the case for only two years, his present tenure has now exceeded the combined terms of the four men who proceeded

[89] *Id.*
[90] Carol Rosenberg, *Military Names New Judge for Guantánamo Bay 9/11 Trial*, N.Y. TIMES (Sept. 17, 2020).
[91] Carol Rosenberg, *New 9/11 Trial Judge Steps Down, Citing Conflicts*, N.Y. TIMES (Oct. 2, 2020).
[92] Carol Rosenberg, *Military Names Air Force Judge for Guantánamo Bay 9/11 Trial. But There's a Snag*, N.Y. TIMES (Oct. 16, 2020).
[93] *Id.*
[94] Carol Rosenberg, *Military Assigns Judge to 9/11 Case Who Lacked Enough Experience Last Year*, N.Y. TIMES (Aug. 20, 2021).

him. But, predictably, he has also announced he is retiring, and a new jurist will need to be selected to take on a case that recently held its first hearings in eighteen months.[95]

Judicial turmoil is not limited to the 9/11 case. As discussed below, judicial misadventures have marred virtually every commission in Guantanamo, including several instances of outright judicial misconduct.[96] Some of these have been related to retirements, others to transfers, but all have been due to the transient nature of military judges.

Another cross-commission complication is the capital nature of the two major cases – the ones for 9/11 and the *Cole* bombing. In lay terms, if the defendants are found guilty in these cases, the government can seek the death penalty. This paper does not go into the arguments for or against the death penalty, or its applicability to the defendants in these cases. Instead, the problem with the commissions imposing the death penalty is that it "differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability."[97] As a result, when pursuing death sentences is permitted, additional requirements and resources must be allocated to the case. Most important is the assignment of a "learned counsel" to an accused, providing him with an attorney experienced in death penalty litigation. This is codified in the 2009 M.C.A.,[98] with implementing guidelines in the R.M.C.[99] and R.T.M.C.[100]

To state the obvious, this is clearly a good thing, as no one has an interest in any cases, especially capital ones, being litigated in an incompetent or inexperienced manner. But the pragmatic reality is that there are relatively few attorneys who are "learned in applicable law

[95] Carol Rosenberg, *9/11 Judge Announces Retirement After Nearly 2-Year Delay in Hearings*, N.Y. TIMES, (Sept. 19, 2023).
[96] *See* Carol Rosenberg, *Court Rejects 2 Years of Judge's Decisions in Cole Tribunal*, N.Y. TIMES (Apr. 16, 2019).
[97] Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).
[98] Military Commissions Act, H.R. 2647, 111th Cong. (2009).
[99] M.M.C., *supra* note 51, at 506(b) (2019).
[100] R.T.M.C., *supra* note 52, at 9-1(6).

relating to capital cases,"[101] have the desire to litigate in Guantanamo, and have the requisite background to obtain the necessary security clearances.

Furthermore, because of the experience required, many of the attorneys who are qualified as learned counsel are older, resulting in the potential for medical or other complications which could force them off the case. This occurred in the 9/11 commission when the learned counsel for Ramzi bin al-Shibh had to step down, with a forced delay in proceedings until his replacement could officially be hired.[102] And even beyond medical issues, any problem affecting a learned counsel can cause delays, such as when they resign[103] or are forced to withdraw.[104]

Just as when military judges leave, the departure of a learned counsel requires not only a new one to be hired, but for time to be allocated for that attorney to be brought up to speed on the tens of thousands of relevant pages of law, evidence, and background material, not to mention establishing a relationship with their new client. In the meantime, the remainder of the case is stalled, an especially thorny result in the 9/11 commission, where each of the co-defendants has his own learned counsel – meaning an issue with one attorney can stop the entire trial.

A final global issue for the commissions is global in nature, and has to do with the decision to host them onboard Naval Station Guantanamo Bay. As noted previously, this was a calculated decision, largely done for detention purposes to abrogate detainees' and accuseds' legal rights. But despite the perceived benefits of confining and trying the detainees in Guantanamo, there have been significant downstream consequences of that decision.

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[101] M.M.C., *supra* note 51, at 506(b) (2019).
[102] Carol Rosenberg, *Judge Excuses 9/11 Defense Lawyer and Postpones Torture Testimony*, N.Y. TIMES (Feb. 19, 2020).
[103] Carol Rosenberg, *Amid Murky Investigation, Key Defender Asks to Quit 9/11 Case*, N.Y. TIMES (Mar. 10, 2022).
[104] John Ryan, *Lawyer Limelight – Guantanamo: Richard Kammen and the USS Cole Case*, LAWDRAGON (Apr. 1, 2018), https://perma.cc/ZV5Y-JJR8.

One is that, per Congressional legislation, no detainee may be transferred from Guantanamo to the United States, regardless of the justification.[105] This prevents the closure of the facility and could also be disastrous in the case of a medical emergency. These effects were particularly concerning during the coronavirus pandemic, when an outbreak on the base would have quickly overwhelmed the military medical facilities,[106] a prospect which became more dire when the detainees were initially delayed from receiving vaccinations.[107] And the pandemic aside, the small base clinic is not ideally equipped to handle an aging detainee population, many of whom have serious injuries from the battlefield, their capture, or their torture.[108]

Furthermore, a significant portion of the half a billion dollars per year spent on Guantanamo is directly related to the cost of transporting legal and logistical resources and personnel between the United States and Cuba, along with all of the associated infrastructure necessary to support such remote operations. While these costs may have been acceptable initially, it seems nobody projected that the trials would last several decades – and counting. As a result, the situation remains largely intractable, with no solution beyond commissions participants continuing to rack up frequent flyer miles traveling between D.C. and Cuba.

C. <u>These are the (Ill-Fated) Voyages: Specific Case Studies</u>

This paper examines four particular cases which illustrate many of the flaws previously mentioned, as well as unique areas of error that create a mosaic of dysfunction that has defined the Guantanamo commissions. The first case is that of Majid Khan, who pleaded guilty in 2012,

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[105] Dan Roberts, *Senate passes legislation barring transfer of Guantanamo prisoners to US*, THE GUARDIAN (Nov. 10, 2015, 1:14 PM), https://perma.cc/25DK-AGAY.
[106] Carol Rosenberg, *Senators Seek Answers on Coronavirus Protections at Guantánamo Bay*, N.Y. TIMES (May 28, 2020).
[107] Carol Rosenberg, *Pentagon Halts Plan to Vaccinate the 40 Prisoners at Guantánamo Bay*, N.Y. TIMES, (Jan. 30, 2021).
[108] Carol Rosenberg, *Red Cross Expresses Alarm Over Detainee Health at Guantánamo Bay*, N.Y. TIMES, (Apr. 21, 2023).

was sentenced in 2021, and was finally transferred to Belize in 2023. The second is the 9/11 commission – involving at first five, but for now four – co-defendants, led by the alleged mastermind, Khalid Shaikh Mohammad. The third is that of Abd al-Rahim Al-Nashiri, the alleged *Cole* bomber. The fourth and final case is one involving two Indonesian attacks – in Bali in October 2002, and in Jakarta in August 2003 – with three codefendants, two of whom have now been severed into a separate commission which resulted in guilty pleas in January 2024.[109] The 9/11, *Cole*, and Indonesian cases are the only remaining contested trials and, barring a major development, will likely be the last fully-fledged commissions conducted at Guantanamo.[110]

1. United States v. Majid Shoukat Khan[111]

Majid Khan was a Pakistani citizen who went to high school in Owings Mills, Maryland, a suburb outside of Baltimore.[112] Following graduation in 1999, he returned to Pakistan and, through family connections, became involved with terrorist groups planning a variety of attacks.[113] While some of these plots involved attacks in the United States, Khan's direct role was in transferring money to other foreign groups, as well as wearing a suicide vest in a failed attempt to assassinate Pakistani President Pervez Musharaf.[114]

Khan was arrested in Pakistan in 2003 and transferred to U.S. custody as a "high-value detainee."[115] He was then rotated through global black sites and subjected to torture under EITs

[109] Carol Rosenberg, *Bali Bombing Conspirators Get 5 More Years at Guantánamo Bay*, N.Y. TIMES (Jan. 26, 2024).
[110] There is one other commission still pending at Guantanamo, that of *United States v. Abd al Hadi al Iraqi*. *See* Carol Rosenberg, *Iraqi at Guantánamo Bay to Plead Guilty in Afghan War Crimes Case*, N.Y. TIMES (June 10, 2022). The defendant in that case – who goes by the name Nashwan al-Tamir – is an alleged al Qaeda commander, and following his guilty plea in 2022, is currently awaiting sentencing. *Id.*
[111] *The Guantanamo Docket*, *supra* note 15 (discussing Majid Khan).
[112] *Id.*
[113] Eric Rich, *Terrorism Suspect Alleges 'Mental* Torture', WASH. POST (May 16, 2007), https://perma.cc/L9NE-6VK8.
[114] *Id.*
[115] *The Guantanamo Docket*, *supra* note 15 (discussing Majid Khan).

before being sent to Guantanamo in 2006.[116] In 2012, Khan pleaded guilty, but his sentencing was continually delayed until 2021 to allow for potential cooperation with the government on other commissions.[117] To date, it is unclear what the extent of that cooperation was – or if it ever occurred at all.

At his sentencing hearing, Khan gave a statement discussing his involvement with al Qaeda and how he was recruited as a wayward 21-year-old man following the death of his mother.[118] He admitted culpability for his actions, apologized to the victims of the attacks he facilitated, and spoke about how he had changed as a person in the subsequent two decades.[119] He said he looked forward to reuniting with his wife and daughter, the latter of whom he had never met.[120]

Khan also gave specific details about his alleged treatment, which had never been disclosed in such a public forum.[121] He described garden hoses being forced into his rectum and turned on, as well as feeding tubes being sharpened and covered in hot sauce before insertion.[122] He alleged that he had additional rectal feedings containing a puree of "hummus, pasta with sauce, nuts, and raisins."[123] He recalled being beaten repeatedly, and threatened with bats, sticks, hammers, and belts.[124] Being put in frigid cells; forcibly submerged in ice water; shackled into painful positions for hours at a time; slammed into walls; deprived of sleep, food, and water;

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[116] Carol Rosenberg, *U.S. Military Jury Condemns Terrorist's Torture and Urges Clemency*, N.Y. TIMES (Oct. 31, 2021).
[117] *Id.*
[118] Majid Khan's Unsworn Statement, CTR. FOR CONST. RTS. (July 14, 2023), https://perma.cc/NTS3-LWVY.
[119] *Id.*
[120] *Id.*
[121] Scott Roehm, *A Torture Survivor Speaks at the Guantanamo Military Commissions*, JUST SEC. (Nov. 4, 2021), https://perma.cc/4WVF-8YBL.
[122] *Majid Khan's Unsworn Statement*, CTR. FOR CONST. RTS. 25, 27 (July 14, 2023).
[123] *Id.* at 27.
[124] *Id.* at 9-11.

denied medical attention; and having his eyebrows and eyelashes torn off by duct tape.[125] Being sexually assaulted and humiliated.[126] He described being told that his family would be physically assaulted and raped.[127] He discussed being covered in insects that bit him until he bled.[128] Being forced to stand in his urine and feces.[129] Being water-boarded.[130] This all despite him having already told the interrogators everything he knew.[131] When Khan asked for a lawyer during his abuse, he says was told "[A]re you kidding, a lawyer? You are in no man's land. No one even knows where you are."[132]

Khan was eventually sentenced to 26 years in prison, barely above the 25-year minimum the jury was allowed to give. But because of the pretrial agreement he had signed – which the panel was unaware of – Khan was guaranteed to be released by 2024 at the latest. So after serving his sentence – and following a strange, 11-month interim period during which the sentence was completed but his transfer out of Guantanamo had not been finalized – he was eventually moved to Belize, where he now lives with his family.[133]

One issue which came up in the years prior to sentencing was the prosecution's repeated gamesmanship around providing discovery, which is the legal term for the relevant and material evidence in the possession of the government which must be turned over to the defense. In particular, the prosecution team in Khan's case at first refused to turn over information that went to the bias of the former Convening Authority. The Convening Authority is the purportedly

[125] *Id.* at 11-16.
[126] *Id.* at 16.
[127] *See id.* at 11.
[128] *Id.* at 18-19.
[129] *Id.* at 19.
[130] *Id.* at 17.
[131] *See id.* at 22.
[132] *See id.* at 16-17.
[133] Carol Rosenberg, *Freed Former C.I.A. Prisoner Has Big Dreams for a New Life in Belize*, N.Y. TIMES (Feb. 9, 2023).

neutral individual who decides whether charges move forward to a trial. Yet in May 2019, a Convening Authority was appointed[134] who had a close personal relationship with the Chief Prosecutor and had professionally assisted with multiple military commissions prosecutions.[135] Validating the concern over these significant – and seemingly obvious – biases and conflicts, a new Convening Authority was appointed in April 2020.[136]

Despite the clear relevancy of the information about the Convening Authority, the prosecution still delayed turning it over even after it was ordered to do so by the judge.[137] This stalling resulted in a stern admonishment, with the judge stating that the prosecution's "interpretation of what the defense needs is very often too limited in scope to meet the spirit of [the rules]."[138] He reminded the prosecution that its:

> [S]overeign obligation in maintaining this prosecution is to ensure not a particular outcome, but rather that justice shall be done. Gamesmanship, second-guessing, and replacing the statutory language with the Government's unique interpretation of the discovery rules is unacceptable and will not be tolerated by this Commission.[139]

The judge held that the "Government [has] not acted within the spirit or letter of Article 46, 10 U.S.C. §949j, R.M.C. 701, or accepted standard practice in the military, [and] it has created needless litigation and potentially delayed the resolution of this Commission."[140] As a result, the judge ordered an entire year of sentencing credit be awarded to Khan, giving the defense a far greater boon from prosecutorial misconduct than from any of the evidence eventually provided.

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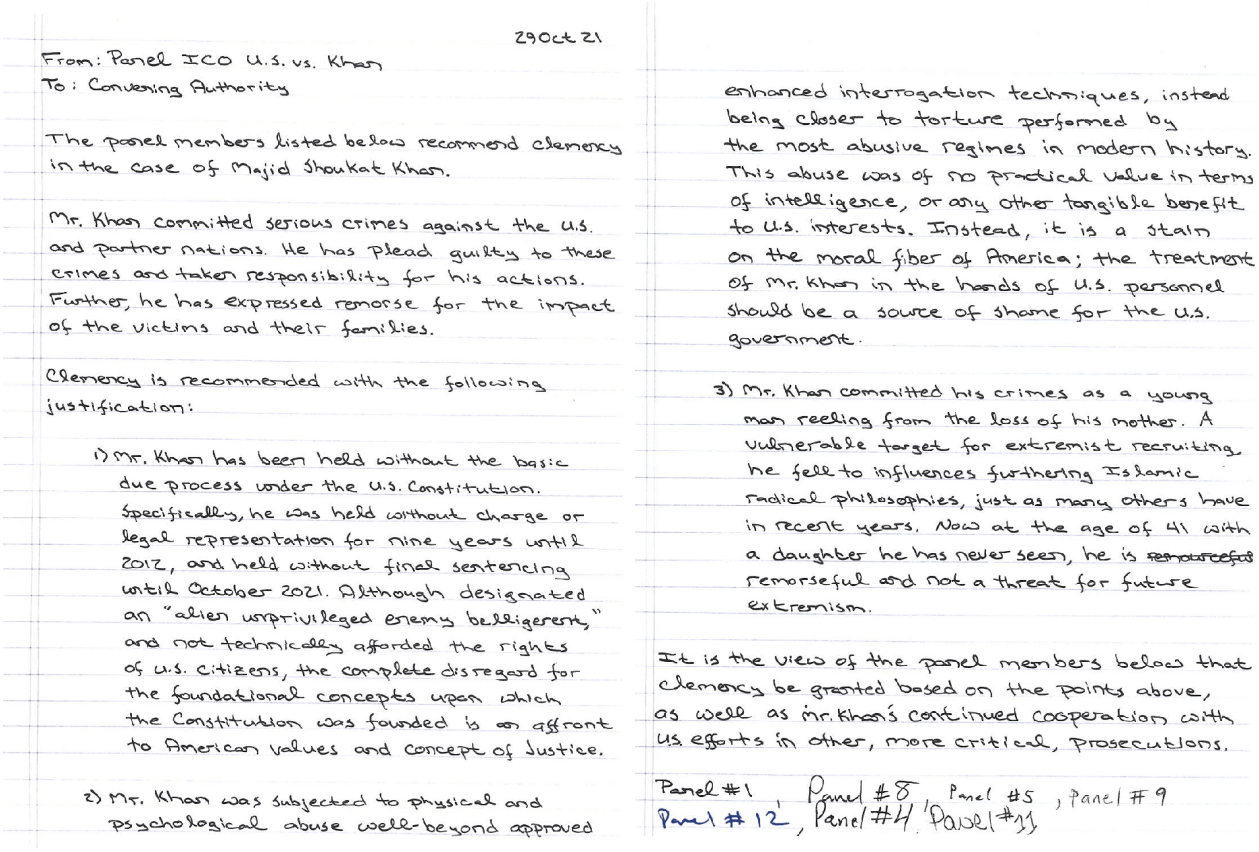
[134] Carol Rosenberg, *Former Navy Judge Named to Oversee Guantánamo Military Court*, N.Y. TIMES (May 28, 2019).
[135] Bultemeier, *supra* note 74.
[136] Press Release, U.S. Dep't of Def., SECDEF Appoints New Convening Authority for Military Commissions (Apr. 21, 2020), https://perma.cc/9FP3-CGJ2.
[137] AE 047K at 12, United States v. Majid Shoukat Khan (Mil. Comm'n 13 July 2020).
[138] *Id.*
[139] *Id.*
[140] *Id.*

Even beyond the prosecutorial obfuscation, the decade-long wait for sentencing, and the graphic details provided by Khan in his unsworn statement, the most notable aspect of this commission was the hand-written clemency statement signed by seven of the eight officers on the jury. Penned by the foreman, an experienced Navy Captain, and permitted by R.M.C. 1105(a)(4), the letter itself provides a remarkably concise, damning indictment upon the entire detention and commissions process:[141]



29Oct 21

From: Panel ICO U.S. vs. Khan
To: Convening Authority

The panel members listed below recommend clemency in the case of Majid Shoukat Khan.

Mr. Khan committed serious crimes against the U.S. and partner nations. He has plead guilty to these crimes and taken responsibility for his actions. Further, he has expressed remorse for the impact of the victims and their families.

Clemency is recommended with the following justification:

1) Mr. Khan has been held without the basic due process under the U.S. Constitution. Specifically, he was held without charge or legal representation for nine years until 2012, and held without final sentencing until October 2021. Although designated an "alien unprivileged enemy belligerent," and not technically afforded the rights of U.S. citizens, the complete disregard for the foundational concepts upon which the Constitution was founded is an affront to American values and concept of justice.

2) Mr. Khan was subjected to physical and psychological abuse well-beyond approved enhanced interrogation techniques, instead being closer to torture performed by the most abusive regimes in modern history. This abuse was of no practical value in terms of intelligence, or any other tangible benefit to U.S. interests. Instead, it is a stain on the moral fiber of America; the treatment of Mr. Khan in the hands of U.S. personnel should be a source of shame for the U.S. government.

3) Mr. Khan committed his crimes as a young man reeling from the loss of his mother. A vulnerable target for extremist recruiting, he fell to influences furthering Islamic radical philosophies, just as many others have in recent years. Now at the age of 41 with a daughter he has never seen, he is ~~remorseful~~ remorseful and not a threat for future extremism.

It is the view of the panel members below that clemency be granted based on the points above, as well as Mr. Khan's continued cooperation with US efforts in other, more critical, prosecutions.

Panel #1, Panel #8, Panel #5, Panel #9
Panel #12, Panel #4, Panel #11

Clemency letters are rare in the first place, especially from a panel of members that acknowledged the significant criminality of Khan's misdeeds.[142] But this letter took it a step further, condemning not only the government's shameful behavior with regard to torture – which

[141] *The Handwritten Document*, N.Y. TIMES (Oct. 31, 2021).
[142] Carol Rosenberg, *Foreman Says Military Jury Was Disgusted by C.I.A. Torture*, N.Y. TIMES (Nov. 6, 2021).

was of no "tangible benefit to U.S. interests" – but also the "complete disregard for foundational concepts" in the entire legal process.

As a result, the prosecution and defense were provided an insight into the thinking of potential future panels, with both legal and political ramifications for upcoming proceedings. For instance: if seven of the eight jurors in Khan's case were willing to recommend clemency, and award essentially the minimum sentence, what would future juries do with other defendants? How would they view the issue of torture given that all of the remaining defendants are "high-value detainees" subject to the most brutal EITs? What weight might they give to evidence that is admitted before them that could have been tainted by torture? And with death sentences requiring unanimous agreement from a panel of at least twelve members,[143] would it even be possible to convince all of them to put aside the mitigating factors and decide to execute a defendant?

Many in the government apparently do not think so. While this surely could have been predicted before the *Khan* commission, the result of that case made it abundantly clear. As succinctly put by former George W. Bush administration attorney Charles Stimson, in even the 9/11 case, "the likelihood of [a jury] coming to a unanimous verdict with respect to the death penalty is close to zero."[144]

2. United States v. Khalid Shaikh Mohammad et al.[145]

[143] *See* M.M.C., *supra* note 51, at II-135, II-139 (citing R.M.C. 1004(a)(2) and R.M.C. 1006(e)(4)(a)).
[144] Carol Rosenberg, *The 9/11 Trial: Why Are Plea Bargain Talks Underway?*, N.Y. TIMES (Mar. 20, 2022).
[145] *The Guantanamo Docket*, *supra* note 15 (discussing the Khalid Shaikh Mohammed, Walid Bin Attash, Ramzi bin al-Shibh, Abd Al-Aziz Ali, and Mustafa Ahmed al-Hawsawi, the five defendants in the case); *see also* United States v. Khalid Shaikh Mohammad et al., 28 F. Supp. 3d 1305 (USCMCR 2017).

The defendants in this case – Khalid Shaikh Mohammed (KSM), Walid Bin Attash, Ramzi bin al-Shibh,[146] Abd Al-Aziz Ali (a.k.a. Ammar al-Baluchi), and Mustafa Ahmed al-Hawsawi – are collectively on trial for their various alleged roles in the attacks on 9/11, with KSM being the alleged (and at times, admitted)[147] mastermind. The attacks on that day were catastrophic, with the nearly 3,000 dead representing the largest loss of life from a foreign attack on American soil.[148] Furthermore, the sequence of events following 9/11, including U.S. invasions of Iraq and Afghanistan, as well as the general military and intelligence shift to the "War on Terror," has had significant consequences for virtually every aspect of American society. It therefore goes without saying that the military commissions, conceived in the months and years following 9/11, were envisioned with the prosecution of this case as their capstone.

Yet, after a false start in 2008 under the 2006 M.C.A., with a restart in 2011, the case is still nowhere close to trial, without even a set preliminary start date. One major reason for this is the prosecution's failure to turn over all of the initial evidence until 2019,[149] a problem that demonstrates a lack of either competence or will to muster the proper resources on behalf of the government. Another major issue in the case has come from the aforementioned departures of several judges and learned counsel. These difficulties have compounded upon each other, especially in a case with multiple co-defendants, as each new accession must catch up on the tens of thousands of pages of litigation spanning well over a decade of work. Furthermore, while learned counsel will always have significant death penalty experience, many are unfamiliar with the military justice system, and likely would not have dealt with a case as complex and nuanced

[146] As discussed below, bin al-Shibh has recently been severed from this commission, with pending litigation to determine whether he will be eventually re-joined, tried separately, or not tried at all. For the purposes of this article, he will generally be discussed jointly with the other four men given that the majority of the litigation has included all five.
[147] Adam Liptak, *Qaeda [sic] prisoner tells U.S. he planned 9/11 attacks*, N.Y. TIMES (Mar. 15, 2007).
[148] *Events of the Day*, NAT'L SEPT. 11 MEMORIAL & MUSEUM (May 25, 2023), https://perma.cc/2HK3-PDU4.
[149] Gary Brown, *Another Decade of Military Commissions*, AM. BAR ASS'N (Jan. 9, 2023).

as the 9/11 trial. And with death penalty cases extremely rare within the military justice system, few judges will have presided over even one capital trial.[150]

Personnel departures have been problematic in other roles as well. As discussed in the section on the *Khan* case, one Convening Authority was appointed in 2019, only to be replaced less than a year later after issues related to potential bias and partiality were raised.[151] And his immediate predecessor was dismissed even more abruptly after the Trump administration disagreed with his decision to engage in plea discussions.[152] Of course, any plea at the commissions, and with this case in particular, will be politically fraught, and current negotiations appear stalled without administration approval.[153]

The political nature of what *should* be a purely legal decision is likely inseparable from any military commission, but the structure and history of the Guantanamo commissions make it additionally inextricable. And while President Biden's administration has made significant progress on some elements of Guantanamo,[154] the actual trials are not much further along than when he took office.

Torture has also played a significant legal role in the 9/11 case, as it has or will in every other commission. Because torture has significant long-term effects on its victims, the very ability for some of the aging defendants to medically stand trial is now in question.[155] In fact, in September 2023, one of the defendants – Ramzi bin al-Shibh – was found "too psychologically

[150] *Facts and Figures*, DEATH PENALTY INFO. CTR. (May 25, 2023), https://perma.cc/B4DL-9N8V.
[151] United States v. Khalid Shaikh Mohammad, 398 F.Supp.3d 1233 (USCMCR 2019), *remanded from* 866 F.3d 473 (D.C. Cir. 2017).
[152] Charlie Savage, *Fired Pentagon Official Was Exploring Plea Deals for 9/11 Suspects at Guantánamo*, N.Y. TIMES (Feb. 10, 2018).
[153] Sacha Pfeiffer, *A year after plea talks began, the 9/11 case is still in limbo, frustrating families*, NAT'L PUB. RADIO (Mar. 11, 2023), https://perma.cc/7DGB-JVTJ.
[154] Carol Rosenberg, *Pentagon's Repatriation of Algerian Leaves 30 Prisoners at Guantánamo*, N.Y. TIMES (Apr. 20, 2023).
[155] Carol Rosenberg, *Man Accused in 9/11 Plot Is Not Fit to Face Trial, Board Says*, N.Y. TIMES (Aug. 25, 2023); Carol Rosenberg, *Hearings in Sept. 11 Case Could Resume Despite Unresolved Issues*, N.Y. TIMES (May 25, 2023).

damaged to help defend himself,"[156] and had his legal case separated from the other four men. It's unclear at this point what that means for his future and whether he will ever be held accountable for his alleged involvement in 9/11.

For the remaining defendants, torture has had a significant impact on the so-called "clean team" statements that the government intends to use as evidence in its case-in-chief. To summarize this issue, after the torture and brutal interrogation of the detainees, they were transferred to Guantanamo Bay in 2006.[157] Recognizing that statements elicited directly from torture would almost certainly be inadmissible in court, the government decided to reinterview the detainees using "clean teams" of law enforcement agents whom the government claims were uninvolved with the torture – and hence untainted by information gained therefrom.[158] But these subsequent interrogations have significant problems which cast doubt upon the veracity of the statements obtained.[159]

First, the interrogation teams may not have been so clean, as there is substantial evidence – much of which remains classified – that the FBI and law enforcement "clean teams" cooperated with and received information from the CIA interrogations, irrevocably tainting any work product.[160] Second, even beyond the questionable circumstances of how the statements were taken, research into the science of trauma – which torture assuredly creates – puts into doubt the veracity of any answers given post-interrogation, even long after the cessation of

[156] Carol Rosenberg, *9/11 Defendant Not Fit for Death-Penalty Trial, Judge Rules*, N.Y. TIMES (Sept. 21, 2023).
[157] *The Guantanamo Docket*, *supra* note 15.
[158] Josh White et. al, *FBI 'Clean Team' re-interrogated 9/11 suspects*, NBC NEWS (Feb. 11, 2008), https://perma.cc/VPL3-K5RW.
[159] John Ryan, *CIA Abuse Rendered Future Statements Unreliable, Expert Testifies*, LAWDRAGON (June 16, 2023), https://perma.cc/SYG4-RJ97; Carol Rosenberg, *The 9/11 Trial: Why Is It Taking So Long?*, N.Y. TIMES (Apr. 17, 2020).
[160] John Ryan, *Lawyers in Sept. 11 Case Claim CIA-FBI Collusion Taints All Interrogations*, LAWDRAGON (July 24, 2018), https://perma.cc/73PA-QQAM.

torture.[161] While the science is complex, it boils down to "[e]xposure to misinformation is known to lead to distortions in human memory, especially during a personally relevant, highly stressful event."[162]

This has several practical effects on the validity of the "clean team" statements. First, after having been tortured for years when they did not give the answers interrogators wanted, detainees would likely have felt similarly about the "clean team," assuming that any resistance or hesitance to cooperate would be met with physical abuse and coercion, as had been amply demonstrated to them. Second, to avoid further torture, torture subjects often simply "cooperate" by giving the answer the torturer seems to desire. To the extent these false answers had already been given once, detainees were incentivized to give the same false answers to the "clean team" in order to avoid being perceived as – and then punished for – deception. Third, as noted above, the science of memory indicates that being exposed to false information (i.e., what the interrogator wanted the detainee to say) during torture could essentially re-write actual memory, making an individual truly believe what they were coerced into saying. This not only undermines what they said to the "clean team," but also their ability to assist their defense attorneys in preparation for trial years later. Fourth and finally, the similarities between the torture and the "clean" interrogations – they were often in the exact same rooms, with similar appearing U.S. personnel – affect all of the aforementioned issues, continually refreshing the effects of torture.

The criticality of the "clean team" evidence cannot be understated. These were often the first recorded statements by the defendants and form the basis for many of the charges across various commissions. While assessing their evidentiary import to each accused is beyond the

[161] *See* Declaration of Charles A. Morgan ¶ 15-16, *United States v. Khalid Shaikh Mohammad et al.* (MC Trial Judiciary 2022) (No. AE425NN(AAA)).
[162] *Id.* at ¶ 20.

scope of this paper, it is fair to say that without these statements, the prosecution's cases become far weaker. This is why it was such a major development when the statements were preliminarily suppressed in the 9/11 trial,[163] and litigation continues regarding whether they will ever be admitted as evidence.[164] More recently, it was why the decision by the military judge in the *Nashiri* commission to suppress the statements in that trial was also groundbreaking.[165] The likely appeals from that decision – and how other judges interpret it – will have a significant, and perhaps dispositive, impact on prosecutors' ability to prove their cases beyond a reasonable doubt. And the sole reason such critical evidence may be lost is that policy makers and agents of the U.S. government decided to disregard American values and brutally torture detainees.

Other issues have plagued the 9/11 commission, including ones that are almost too strange to believe. For instance, in 2014, the FBI coerced defense personnel to become informants on their own team, an episode that remains clouded in secrecy.[166] On another occasion, a court interpreter lied about the fact that he had participated in torture sessions, and ended up being recognized in court by bin al-Shibh.[167] One can safely assume that there have been many more oddities that remain classified.

Regardless, despite the lack of progress, there had been hope for a resolution moving forward, as the Biden administration was considering whether to approve a plea deal in the case which would spare the accused from potential execution.[168] The negotiated issues included

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[163] John Ryan, *Suppression of 'Clean Team' Statements a Turning Point in Sept. 11 Case*, LAWDRAGON (Aug. 22, 2018), https://perma.cc/RZQ4-G58X.
[164] Carol Rosenberg, *Psychologist Who Waterboarded for C.I.A. to Testify at Guantánamo*, N.Y. TIMES (Jan. 20, 2020); Carol Rosenberg, *Ex-C.I.A. Psychologist Re-enacts Interrogation Techniques for Guantánamo Court*, N.Y. TIMES (Apr. 13, 2023).
[165] United States v. Al-Nashiri, 62 F. Supp. 3d 1305 (USCMCR 2014).
[166] Matt Apuzzo, *Covert Inquiry by F.B.I. Rattles 9/11 Tribunals*, N.Y. TIMES (Apr. 18, 2014).
[167] Carol Rosenberg, *The Strange Case of the C.I.A. Interpreter and the 9/11 Trial*, N.Y. TIMES (Aug. 14, 2019).
[168] Scott McFarlane, *Pentagon considering plea deals for defendants in 9/11 attacks*, CBS NEWS (Aug. 17, 2023), https://perma.cc/QC3G-5GVD; Carol Rosenberg, *Sept. 11 Case Awaits Biden Administration's Reply on Plea Deal*, N.Y. TIMES (Oct. 23, 2022).

where the men would serve their sentences, whether they could be guaranteed avoidance of solitary confinement, and what type of medical and psychological care they would receive as they aged.[169] These types of conditions caused significant – and predictable – political fallout,[170] and eventually the administration declined to make any policy-based concessions.[171] Of course, this may change, and while a resolution now would not make up for the decades of delay – and billions of dollars in expenditures – it would end one of the most ignominious chapters in American legal history.

3. United States v. Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri[172]

Abd al-Rahim Al-Nashiri was charged with being the alleged mastermind of the October 2000 attack on the U.S.S. *Cole*, which killed 17 American sailors, as well as for alleged involvement with the attack on the tanker MV *Limburg* and the attempted attack on the U.S.S. *The Sullivans*. He was arrested in Dubai in 2002, and immediately entered in the EIT and torture protocol.[173] This occurred at several sites around the world, including an initial stint at Guantanamo followed by transfers elsewhere before his return to Cuba.[174] His particular torture included, among other unique experiences, waterboarding, forced nudity, and mock execution.[175] He also claims to have been subjected to threats with a pistol and power drill, being told his mother would be raped in front of him, and sodomy with a "stiff boar brush" in his buttocks and

[169] *Id.*
[170] Jamie Joseph, *GOP anger grows over Biden admin's potential plea deal for suspected 9/11 architects*, FOX NEWS (Aug. 29, 2023), https://perma.cc/W8ZK-SWB4.
[171] Jeff Mason & Dan Whitcomb, *Biden rejects conditions of plea deal for Sept. 11 attacks defendants*, REUTERS (Sept. 7, 2023), https://perma.cc/K53Q-S4Q4.
[172] *The Guantanamo Docket*, *supra* note 15 (discussing Abd al-Rahim al-Nashiri).
[173] *See id.*
[174] *See id.*
[175] *Id.*

genitals before it was forced into his mouth.[176] Most of these occurred even after the architect of the EIT program deemed Nashiri compliant and cooperative.[177]

While he was arraigned in 2011, Nashiri remains far from trial. Yet, despite the lack of forward progress, his case has hardly been uneventful. From the get-go, there were significant issues with jurisdiction, specifically whether Nashiri could even be tried at a military commission given that the *Cole* bombing occurred before 9/11 and the putative start of the "War on Terror." However, the D.C. Circuit punted on answering that question, raising the specter that a future appellate court could find the proceeding – which has now lasted over a dozen years – moot, ruling that Nashiri's entire trial was invalid.[178]

Of course, to get to a future appellate court, an actual trial needs to be held, and the government continues to find innovative ways to prevent that outcome. For instance, after hidden microphones were discovered in defense meeting rooms in 2013, the government promised that, although they had the capability to do so, they were not listening in on confidential attorney-client meetings.[179] And yet in 2017, Nashiri's lawyers discovered new government listening devices in a room they used to meet with their client.[180]

While the government again claimed that the devices were not active, the defense attorneys were skeptical, and wanted to discuss the issue with Nashiri. However, the judge – Air Force Colonel Vance Spath – barred them from doing so because the details of the circumstances were, at the time, classified.[181] As a result, and after consulting relevant ethics advisors and the

[176] AE 467CCC at 7-18, United States v. Abd Al-Rahim Hussayn Muhammad Al-Nashiri (Mil. Comm'n Aug. 18, 2023).
[177] *Id.*
[178] *In re* Al-Nashiri, 835 F.3d 110 (D.C. Cir. 2016).
[179] Peter Finn, *At Guantanamo, microphones hidden in attorney-client meeting rooms*, WASH. POST (Feb. 12, 2013), https://perma.cc/R4DZ-AKCF.
[180] Charlie Savage, *Guantánamo Lawyers Challenge Government's Explanation for Hidden Microphone*, N.Y. TIMES (Mar. 12, 2018).
[181] *See id.*

Chief Defense Counsel, Nashiri's civilian attorneys – including the only learned counsel – felt they had no choice but to resign, and did so in October 2017.[182]

This left only Nashiri's military counsel, a Navy lieutenant and judge advocate who had never tried a death penalty case.[183] As a result, per R.M.C. 506(b), he was unqualified to be learned counsel, and thus the case could not progress unless a replacement for the prior learned counsel was brought on board. But Judge Spath disagreed, continuing hearings on issues he felt did not require learned counsel.[184] The junior Navy judge advocate refused to acquiesce, merely answering every question asked by the judge with "the Defense takes no position other than to object to these proceedings continuing without learned counsel."[185]

Beyond preceding unilaterally, Judge Spath also engaged with the Chief Defense Counsel, General Baker, ordering the General to reinstate the civilian counsel who had resigned. This was based upon Judge Spath's view that General Baker lacked the proper authority to have released them from their duties.[186] General Baker disagreed, and after a summary hearing in November 2017, Colonel Spath found General Baker guilty of contempt, and sentenced him to 21 days in confinement in his "containerized housing unit" – essentially a trailer turned into a single-room studio. The Convening Authority quickly disapproved the sentence,[187] and in June 2018, a federal judge ruled that the contempt conviction was unlawful,[188] leaving the commission with

[182] *Id.*
[183] Dave Philipps, *Many Say He's the Least Qualified Lawyer Ever to Lead a Guantánamo Case. He Agrees.*, N.Y. TIMES (Feb. 5, 2018).
[184] Steve Vladeck, *What the Heck is Happening in Al-Nashiri?: The Ten-Layer Dip at the Heart of the Latest Guantánamo Mess*, JUST SEC. (May 11, 2018), https://perma.cc/GF56-EVGT.
[185] *Id.*
[186] Lindsey Offutt, *Guantanamo: Military General Sentenced to 21 Days Confinement in 2000 USS Cole Case*, JURIST (Nov. 2, 2017), https://perma.cc/7R7P-N8ET.
[187] Josh Gerstein, *Pentagon Official Releases Marine General Confined in Guantanamo Dispute*, POLITICO (Nov. 3, 2017), https://perma.cc/63JE-MPFC.
[188] Baker v. Spath, No. 17-cv-02311-RCL, 2018 U.S. Dist. LEXIS 101622 (D.D.C. June 18, 2018).

nothing to show for what could, in the light most favorable to the process, be fairly labeled a circus.

Unfortunately, the show had only just started with Judge Spath. To understand what happened next, one must start in November 2015, about a year after Judge Spath began presiding over Nashiri's commission.[189] Coming close to retirement at that point, Judge Spath decided to apply for a job as an immigration judge with the Department of Justice's (DOJ) Executive Office for Immigration Review. After a lengthy interview process, during which he highlighted his position as a judge in the commissions, Spath eventually received an offer – signed by Attorney General Jeff Sessions – to begin employment with the DOJ in March 2017.[190]

Notably, one of the key prosecutors in the *Nashiri* case was a civilian DOJ attorney, and therefore he – and, more importantly, the DOJ in its entirety – was a party to the case.[191] This presented a challenge for Judge Spath: how "to treat the Justice Department with neutral disinterest in his courtroom while communicating significant personal interest in his job application?"[192] Of course, as the D.C. Circuit rightly pointed out, this "is precisely why judges are forbidden from even trying" to seek employment with the DOJ when the Department is litigating before them.[193]

Regardless, Judge Spath pressed on with his quest for employment with the DOJ, continually delaying his start date while he waited for retirement confirmation from the Air Force.[194] The negotiations percolated throughout the spring, summer, and fall of 2017, during which time the aforementioned issues with Nashiri's representation and General Baker began to

[189] *In re* Al-Nashiri, 921 F.3d 224, 227 (D.C. Cir. 2019).
[190] *Id.* at 228.
[191] *Id.* at 236 (citing Rule for Military Commission 501(b)).
[192] *Id.*
[193] *Id.* at 237 (citing Scott v. United States, 559 A.2d 745, 750 (D.C. 1989)).
[194] *In re Al-Nashiri*, 921 F.3d at 228.

boil over. Judge Spath also became frustrated with the process, stating on 16 February 2018 that, "[o]ver the last five months . . . [my] frustration with the defense [has] been apparent; [w]e need action from somebody other than me" and "it might be time for me to retire, frankly. That decision I'll be making over the next week or two."[195] As a result, Judge Spath decided to indefinitely abate the commission, pausing the entire case until a new judge was brought on board.

Unbeknownst to the defense, however, a day before making that statement, on 15 February, Judge Spath had received another offer to start with the DOJ on 8 July.[196] He kept this hidden from the parties before him, although members of the government obviously knew of his employment prospects, and that knowledge is imputed to the prosecution given that the government is their client. In other words, the prosecution would have known about his prospective DOJ job had they simply asked their colleagues in the Department. Regardless, Judge Spath continued to delay proceedings until a new judge, Air Force Colonel Shelly Schools, was eventually appointed in August 2018.[197]

But the defense had heard reports earlier in the summer of 2018 that Judge Spath was going to work as an immigration judge, and requested the prosecution provide any evidence to that end. Incredibly, the prosecution refused, stating that any reports of Judge Spath seeking employment with the DOJ were "unsubstantiated and baseless," even though an inquiry by the case's DOJ prosecutor with his superiors would have revealed that such reports were actually true.[198] The truth squirmed its way to the light less than a week later, however, when pictures of

[195] *Id.* at 231.
[196] *Id.*
[197] *Id.*
[198] *Id.*

now-DOJ Immigration Judge Vance Spath, U.S. Air Force, Retired, were published by the Associated Press.[199]

Judge Spath was not the only Air Force colonel interested in working for the DOJ. In January 2019, the government disclosed that Judge Schools also intended to retire, and had similarly applied for and accepted a position as an immigration judge.[200] Her subsequent departure left the *Nashiri* case without a judge but with a variety of pending appeals that had escalated through the Court for Military Commission Review (CMCR) and on to the federal U.S. Circuit Court of Appeals for the District of Columbia.

In its eventual ruling, the Circuit Court did not hold back in its criticism of the commissions process. Judge David Tatel, writing for a unanimous panel, started by reiterating that "[u]nbiased, impartial adjudicators are the cornerstone of any system of justice worthy of the label."[201] He also noted that even the appearance of judicial bias is problematic and must be avoided at all cost.[202] This is reflected in the R.M.C., which mandates that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned."[203] Judge Tatel wrote that "it is beyond question that judges may not adjudicate cases involving their prospective employers."[204] And in concluding that the DOJ was both a party before the commission as well as Judge Spath's prospective employer, the Court found that his disqualification had been required.

But that was not the end of their condemnation of his actions. First, the court observed that then-Colonel Spath highlighted his role presiding over the commission in his application to the

[199] *Id.* at 231-32.
[200] *Id.* at 233.
[201] *Id.* at 233-34.
[202] *Id.* at 234.
[203] M.M.C., *supra* note 51, at 902(a).
[204] *In re* Al-Nashiri, 921 F.3d at 235.

DOJ;[205] given the government-friendly rulings he gave, especially toward the end of his tenure, this certainly raised the appearance of impropriety, as Judge Spath had an incentive to impress his potential future employer. Second, at no point did Judge Spath disclose his job application to the defense, and he made legal decisions – including the one to abate the proceedings – on a timeline that was clearly driven by his future employment. As Judge Tatel wrote, "given this lack of candor, a reasonable observer might wonder whether the judge had done something worth concealing."[206]

Judge Spath was not the only commissions participant on the sharp end of the Court's quill. "The Justice Department knew that Spath had applied for an immigration judge job and that he continued to preside over Al-Nashiri's case while awaiting his start date."[207] And yet, they did nothing to intervene or notify the defense.

"The prosecution, upon receiving the defense's request for discovery into Spath's employment negotiations, refused to investigate the matter and instead accused Al-Nashiri's team of peddling 'unsubstantiated assertions.'"[208] In other words, the prosecution could have easily found out whether the assertions were substantiated. And yet, they did nothing to bring clarity to the matter, instead falsely claiming the defense was making everything up.

The new judge, Colonel Schools, whom both the government and the CMCR argued should decide on the issue of whether Judge Spath should have recused himself, "was herself engaged in apparently undisclosed employment negotiations with the Justice Department during the pendency of this very case."[209] And yet, she did not immediately recuse herself either.

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[205] *Id.* at 237.
[206] *Id.*
[207] *Id.* at 239.
[208] *Id.*
[209] *Id.*

The court concluded its opinion by stating:

> Although a principle so basic to our system of laws should go without saying, we nonetheless feel compelled to restate it plainly here: criminal justice is a shared responsibility. Yet in this case, save for Al-Nashiri's defense counsel, all elements of the military commission system—from the prosecution team to the Justice Department to the CMCR to the judge himself—failed to live up to that responsibility.[210]

As a result of these failures, the court vacated all of Judge Spath's decisions dating back to November 2015, when he had first applied for a position as an immigration judge. Consequently, approximately three and a half years of decisions were overturned, a waste of time, money, and effort that deprived all stakeholders of deserved finality. While Judge Spath bore the most responsibility for this, other government actors contributed their fair share. And in the years since the Circuit Court's ruling in 2019, the case has made little progress, having to review many of the same issues decided under Judge Spath's tenure. The episode also revealed that other judges and court staff had applied for jobs with the DOJ while presiding over other commissions, resulting in additional appeals and litigation.[211]

While the issues surrounding the "clean team" statements were discussed above, it is worth briefly mentioning them here as well given the critical ruling by the now-departed military judge in Nashiri's commission.[212] Therein, the judge discussed in detail the various brutalities inflicted upon Nashiri and others, and noted that the entire point of the EITs was to condition the detainees into fearful obedience, with "the threat of a return to the EIT phase…dangl[ing] over the heads of detainees such as the Accused like a proverbial sword of Damocles."[213] He

[210] *Id.* at 239-40.
[211] *See* Angela Mauroni, *Guantanamo Detainee Loses Bid to Dismiss Charges and Disqualify Judge over Conflicts of Interest*, JURIST (Apr. 12, 2021, 1:48 PM), https://perma.cc/7XRK-FY4W.
[212] AE 467CCC at 50, United States v. Abd Al-Rahim Hussayn Muhammad Al-Nashiri (Mil. Comm'n Aug. 18, 2023).
[213] *Id.*

reiterated that "[i]f a captive faces a choice between compliance and extreme pain or suffering, then that's not a real choice."[214] And Nashiri:

> [H]ad no reason to doubt that he might, without notice, suddenly be shipped back to a dungeon like the ones he had experienced before…or [that the torturers] lurked nearby with a pistol, a drill, or a broomstick in hand in the event he chose to remain silent or to offer versions of events that differed from what he told his prior interrogators.[215]

The judge concluded:

> Any resistance the Accused might have been inclined to put up when asked to incriminate himself was intentionally and literally beaten out of him years before. For years, the Accused was coerced and psychologically conditioned to cooperate with questioners—dozens, if not hundreds of times. To refuse to cooperate was to face the prospect once again of experiencing drowning, the fear of summary execution, days of sleeplessness while shackled naked in a cell, confinement to small boxes, forced rectal feeding, or other physical and mental abuse. Through all that, the Accused implicated himself again and again. The Commission finds that the limited changes in the Accused's circumstances from September 2006 until February 2007 were not meaningful enough to erase the effects of what came before.[216]

The judge therefore decided to suppress the "clean team" statements because he recognized that Nashiri "had only the Hobson's choice of refusing to talk and risking the consequences or continuing to comply and implicating himself for the 201st time. The Commission finds this to be no choice at all."[217] While the judge recognized the prejudice to the prosecution by suppressing the evidence, "permitting admission of [the] evidence would greatly undermine the actual and apparent fairness of the criminal proceeding against the Accused in this case and infect the trial with unfairness sufficient to make any resulting conviction a denial of whatever process is due."[218] The government of course immediately appealed the decision, but for now, the ruling stands.

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[214] *Id.* at 26 (citing the testimony of Government Expert Dr. Welner).
[215] *Id.* at 38-39.
[216] *Id.* at 43.
[217] *Id.* at 44.
[218] *Id.* at 45.

The keen reader will notice that none of the aforementioned problems in this case have *anything* to do with the attacks on the *Cole*, *Limburg*, or *The Sullivans*. And they leave plenty of questions unanswered, including the core one: can a crime committed prior to the "War on Terror" even be tried by military commissions set up to prosecute said "War?" If the answer is no, then the entire *Nashiri* case has served as little more than an exercise in futility, with years of litigation coming to the conclusion that the commission should never have been initiated in the first place.

4. United States v. Encep Nurjaman et al.[219]

This case may be the least familiar to readers, and rightfully so, as none of the defendants are even accused of involvement with, or attacks upon, the United States. Instead, the three men – Encep Nurjaman (a.k.a. Hambali), who is Indonesian, and Mohammed Farik Bin Amin and Mohammed Nazir Bin Lep, who are Malaysian – were accused of facilitating attacks in Indonesia: in Bali in 2002 and in Jakarta in 2003.[220] But because they were turned over to the U.S. after their arrests – as opposed to being given to Indonesia or Malaysia authorities – their cases ended up in Guantanamo.[221]

While the men waited decades for any actual legal process, the Indonesian trials for others – including most of the masterminds of and operatives in the attacks – have long since finished,

[219] *The Guantanamo Docket*, *supra* note 15 (discussing Encep Nurjaman, Mohammed Farik Bin Amin, Mohammed Nazir Bin Lep). In August 2023, Bin Amin was severed from the case. AE 0060.003 (GOV), United States v. Encep Nurjaman et al. (Mil. Comm'n Aug. 30, 2023). In October, Bin Lep was also severed, and joined to Bin Amin. AE 0067.003 (GOV), United States v. Encep Nurjaman et al. (Mil. Comm'n Oct. 4, 2023); AE 0068.001 (GOV), United States v. Mohammed Farik Bin Amin and Mohammed Nazir Bin Lep. (Mil. Comm'n Oct. 4, 2023). As with the discussion regarding the 9/11 case, *supra* Section II(C)(2), the cases will be discussed together given the lengthy shared history.

[220] *The Guantanamo Docket*, *supra* note 15 (discussing Encep Nurjaman, Mohammed Farik Bin Amin, Mohammed Nazir Bin Lep).

[221] *Id.*

with the primary defendants having been executed or imprisoned.[222] Almost all of the remaining participants have been killed in police raids or tried and released, including an Indonesian named Umar Patek who admitted to making the explosives used in Bali.[223] In nearly every report or discussion regarding the perpetrators of the bombings, the names of the three Guantanamo detainees are completely – and conspicuously – absent.[224]

After extensive negotiations, Mr. Bin Amin and Mr. Bin Lep pleaded guilty in January 2024, admitting to being part of a conspiracy related to the 2002 Bali attacks; the allegations related to Jakarta were dismissed.[225] The focus of their admitted crimes centered on money transfers which occurred after the attacks, with no evidence that either man knew of or participated in the actual events. Regardless, they were each sentenced to twenty-three years, which will be reduced to six per their pre-trial agreements, with a further deduction of approximately a year due to government discovery violations.[226] This is in addition to the two-plus decades the men have already served, double the time of the actual bombmaker, Patek. And of course, all three were brutally tortured for years at various black sites.[227]

The treatment of these men at the black sites was also unique in that, unlike most of the detainees, they were not native English or Arabic speakers. And because there were initially no Malay or Indonesian translators on hand at the torture sites, the men – at least Bin Lep – did not

[222] Tom Allard & Ben Doherty, *Bali Bombers Executed*, SYDNEY MORNING HERALD (Nov. 9, 2008, 11:07 am), https://perma.cc/4E7X-WM5T.
[223] Trisnadi & Niniek Karmini, *Paroled Indonesia Bombmaker Apologizes for 2002 Bali Attack*, AP NEWS, (Dec. 13, 2022, 7:43 AM), https://perma.cc/SZ2W-45BZ.
[224] *See, e.g.*, Andrew Probyn, *Australian Intelligence's Secret Hand in Bringing Down the Bali Bombers*, ABC NEWS (June 3, 2023, 2:49 PM), https://perma.cc/2UEG-9A28.
[225] Carol Rosenberg, *Malaysian Prisoners Plead Guilty to Conspiring in 2002 Bali Bombing*. N.Y. TIMES (Jan. 16, 2024).
[226] Carol Rosenberg, *Bali Bombing Conspirators Get 5 More Years at Guantánamo Bay*, N.Y. TIMES (Jan. 26, 2024).
[227] *The Guantanamo Docket*, *supra* note 15; AE 0045.001 (LEP) at 3, United States v. Encep Nurjaman et al. (Mil. Comm'n Jan. 19, 2023).

understand the questions they were being asked.[228] But instead of recognizing that there was a language barrier, the torturers simply assumed that the men were resisting interrogation, and, as a result, increased the amount of torture applied in a vain attempt to gain compliance.[229]

In 2006, the three men were transferred to Guantanamo and languished there for over a decade without charges or movement on their case.[230] Finally, in 2017, charges were officially "sworn" – the rough equivalent of a civilian indictment – against the three by the prosecution and forwarded to the Convening Authority for a determination as to whether they should be referred for trial.[231] However, the Convening Authority declined to take action and, as 2017 turned into 2018, the men remained without defense teams or the resources to interview witnesses or review evidence.[232]

In the spring of 2019, skeleton teams of defense attorneys and staff were authorized by the government, and the prosecution began to provide a limited amount of evidence.[233] However, it turned out that the Convening Authority had no interest in initiating an actual trial, and instead provided the limited evidence solely for a series of classified proceedings that the government intended to carry out in the fall of 2019.[234]

These proceedings would have been the men's first opportunity to defend themselves after over a decade and a half in custody. But they would also have been represented by lawyers who had never met them, had never had a chance to investigate the case or speak with witnesses, and

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[228] S. SELECT COMM. ON INTEL., *supra* note 59, at 109.
[229] *Id.*
[230] AE 0002.012 (LEP) at 3, United States v. Encep Nurjaman et al. (Mil. Comm'n Jun. 4, 2021); AE 0002.012 (LEP) at 3, United States v. Encep Nurjaman et al. (Mil. Comm'n Jun. 4, 2021).
[231] Carol Rosenberg, *Pentagon Official Approves Guantánamo Trial of 3 Men for Indonesia Bombings*. N.Y. TIMES (Jan. 21, 2021); AE 0014.005 (LEP) at 12, United States v. Encep Nurjaman et al. (Mil. Comm'n Mar. 19, 2021).
[232] *See* AE 0014.005 (LEP) at 22-27, United States v. Encep Nurjaman et al. (Mil. Comm'n Mar. 19, 2021).
[233] *See id.* at 22-27.
[234] *See* Carol Rosenberg, *Something Classified Was Scheduled at Guantánamo. A Judge Stopped It.* N.Y. TIMES (Sept. 26, 2019).

who had all been on the defense teams for less than a year.[235] Needless to say, when pitted against a prosecution team with a two-decade head start, in addition to unlimited access to foreign and domestic law enforcement resources, any hearings would have been little more than a farce.

As a result, in September 2019, Bin Lep filed a petition for a writ of *habeas corpus* in D.C. District Court, requesting an injunction and temporary restraining order against the proposed hearings.[236] In quickly granting that request, Judge John Bates observed that Bin Lep would "suffer irreparable harm" if the proceedings were to go forward because of the "denial of basic procedural rights."[237] Judge Bates issued the temporary restraining order, and the proposed hearings were eventually canceled.[238]

After losing in district court, the government cut off any further funding for the defense, preventing the teams from taking critical investigative steps or interviewing key witnesses.[239] Unsatisfied with the prospect of another few decades of detention without trial, Bin Lep filed another *habeas* petition in October 2020, seeking relief on a variety of bases largely focused on the deprivation of due process and the right to a speedy trial.[240]

While Judge Bates initially expressed some interest in exploring these issues, the government apparently had none, and the Convening Authority suddenly referred charges on 21 January 2021 – the day after President Biden was sworn in. Within days, the government moved for Judge Bates to dismiss the *habeas* petition, citing the principle of abstention, whereby a

[235] AE 0014.005 (LEP) at 22-24, United States v. Encep Nurjaman et al. (Mil. Comm'n Mar. 19, 2021).
[236] Lep v. Trump, No. 19-2799 (JDB), 2019 U.S. Dist. LEXIS 189842 (D.D.C. Sep. 23, 2019).
[237] *Id.* at *21.
[238] AE 0002.012 (LEP) at 3, United States v. Encep Nurjaman et al. (Mil. Comm'n Jun. 4, 2021).
[239] AE 0014.005 (LEP) at 12, United States v. Encep Nurjaman et al. (Mil. Comm'n Mar. 19, 2021).
[240] Mohammed Nazir Bin Lep v. Trump, No. 20-3344 (JDB), 2020 U.S. Dist. LEXIS 234044, at *7 (D.D.C. Dec. 14, 2020).

federal judge should immediately defer to a military judge on ostensibly similar issues.[241] Bin Lep responded that the timing of this referral – by a President Trump-appointed Convening Authority – was awfully suspicious, coming right as the Biden administration was taking office with the publicly-stated goal of closing Guantanamo.[242] Simply put, it appeared that the referral was made to short-circuit the federal *habeas* proceeding and avoid the possibility that the new administration might disagree with a referral decision. Unfortunately for Bin Lep, Judge Bates agreed to abstain on most of the substantive issues before him.[243]

Meanwhile, the military commission faltered, starting with the very first step of arraignment, typically a perfunctory hearing that is quickly scheduled and completed. First, immediately upon referral, the government requested an indefinite delay, citing the coronavirus pandemic.[244] This request ignored that, only two months earlier, the government had safely conducted a complex deposition in Guantanamo,[245] meaning that an arraignment should not have been dangerous or challenging. This buttressed the argument that the entire referral was a sham simply undertaken to avoid losing in federal court.

While Bin Lep objected to any additional delay,[246] the military judge agreed with the prosecution and Bin Lep's co-defendants, and in February 2021, the case was continued until the end of the summer.[247] What the judge did not disclose, however, was that he was planning a permanent move to Europe during that time, necessitating his removal from the case.[248] By

[241] *Id.*
[242] Carol Rosenberg, *Biden Reviving Effort to Empty Guantánamo Prison*, N.Y. TIMES (Feb. 12, 2021).
[243] Mohammed Nazir Bin Lep v. Biden, No. 20-3344 (JDB), 2022 U.S. Dist. LEXIS 7012 (D.D.C. Jan. 13, 2022).
[244] AE 0002.006 (GOV) at 1, United States v. Encep Nurjaman et al. (Mil. Comm'n Jan. 31, 2021).
[245] Carol Rosenberg, *Military Judge in U.S. Held Court by Video Link to Guantánamo Bay*, N.Y. TIMES (Nov. 18, 2020).
[246] AE 0002.005 (LEP) at 1-2, United States v. Encep Nurjaman et al. (Mil. Comm'n Jan. 31, 2021).
[247] AE 0002.007 (TJ) at 6-7, United States v. Encep Nurjaman et al. (Mil. Comm'n Feb. 2, 2021); AE 0002.008 (TJ), United States v. Encep Nurjaman et al. (Mil. Comm'n Apr. 16, 2021)
[248] AE 0002.022 (LEP) at 5-8, *United States v. Encep Nurjaman et al.* (Mil. Comm'n Jul. 6, 2021).

immediately granting the government's request for a continuance, he was able to avoid a lengthy and physically unpleasant trip to Guantanamo, during which he, and the rest of the participants, would have been required to isolate and quarantine for several weeks. Notably, this judge has subsequently returned to Guantanamo post-pandemic, and is now the Chief Judge of the Military Commissions.[249]

But the first time the defense teams heard about the judicial replacement was after it happened, in a May 2021 notice appointing a new military judge.[250] When asked for further details, the Convening Authority, the trial judge, and the Chief Judge all refused to provide them.[251] This continued the trend of troubling judicial ethics issues in the commissions, specifically judges failing to reveal potential biases and conflicts, including those as seemingly benign as wanting to avoid an inconvenient trip while planning a career transition.

Once again, Judge Bates intervened, ordering the government to provide specific details.[252] This led to the revelation of the prior military judge's undisclosed plans, the uncovering of which resulted in additional ongoing litigation before the commission and the D.C. Circuit. Regardless, only four months after the referral of charges, the commission was on to its second judge, who eventually scheduled arraignment for August 30, 2021 – over eighteen years after the three men were first arrested.

However, this ostensibly simple arraignment did not go as planned.[253] As noted, such hearings are typically completed in a matter of minutes. The judge advises the defendants of their rights, especially the right to counsel, and offers to have the charges read aloud. Then the

[249] Carol Rosenberg (@carolrosenberg), X (July 27, 2023, 3:56 pm), https://perma.cc/C2GU-ZBM9.
[250] AE 0001.003 (TJ) at 1, United States v. Encep Nurjaman et al. (Mil. Comm'n May 6, 2021).
[251] AE 002.022 (LEP) at 41, United States v. Encep Nurjaman et al. (Mil. Comm'n July 16, 2021).
[252] *Id.* at Attach. D.
[253] John Ryan, *Lawyers Allege "Defective" Arraignment at Start of Latest Guantanamo Case*, LAWDRAGON (Aug. 31, 2021), https://perma.cc/2U9V-CZQ8.

defendants are asked how they plead, with the default response being a request to defer entry of pleas until a later session. This was what the three men expected and hoped for going into the arraignment.

But in an echo of their black site interrogations, the arraignment foundered because of the lack of capable interpreters – this time in the courtroom itself. Courtroom interpreters are present to translate the entirety of the hearing verbatim into the accused's native language so that he may understand what is being said. A competent interpreter would have been the only way for the men – none of whom speak fluent English – to comprehend the proceedings.

The deficiencies of the interpreters came to light immediately. First, there was only one interpreter per language: a Malaysian one for Bin Lep and Bin Amin, and an Indonesian one for Hambali. But standard practice, to ensure accuracy and avoid fatigue, is for there to be at least two interpreters for each language.[254] Second, the Malaysian interpreter proved to be utterly unqualified: instead of the required verbatim translation,[255] she instead gave brief summations, missing large portions of the proceeding, misstating facts, and occasionally just skipping parts that she was unable to keep up with.[256] Furthermore, the translations she did make were extremely poor, resulting in both Bin Amin and Bin Lep signaling within the first minute that they could not comprehend what the interpreter was saying.[257] Unfortunately, despite repeated pleas from defense attorneys that their clients were not understanding, the military judge chose simply to press on.[258]

[254] R.M.T.C., *supra* note 52, at 7-3.b.6.
[255] *See id.* at 7-3.b.4.
[256] AE 0002.037 (LEP) at 4-6, United States v. Encep Nurjaman et al. (Mil. Comm'n Sep. 14, 2021).
[257] *Id.* at 4.
[258] *Id.* at 7-8.

Eventually, Bin Lep and Bin Amin gave up on trying to understand the Malaysian interpreter and switched their audio feeds to the Indonesian one; as a result, they were forced to listen to a language of which they had only a limited understanding. But while the Indonesian interpreter was professionally competent, she was personally compromised, having made recent statements such as "the government is wasting money on these terrorists; they should have been killed a long time ago."[259] Over the repeated objections of the three defense teams, and with notable silence from the prosecutor, the military judge again pressed on, refusing to even question the second interpreter on her statements.[260] Instead, he found her technically proficient and decided that her apparent bias – and her desire that the defendants had simply been summarily executed while in custody instead of tried – were not worth examining.[261]

Additionally, the defendants recognized an interpreter who was sitting at the prosecution table.[262] This was strange in and of itself, as the prosecution has no client they need to speak with, and if they were confident in the courtroom interpreters – as they insisted they were – they should have had no need for an additional interpreter at all, let alone one sitting with their trial team. But he was not just any interpreter. The defendants recognized him as a former defense interpreter for all three at prior hearings before any of the defendants had legal counsel.[263] This interpreter had therefore been the conduit of confidential communications between the detainees and their representatives[264] – communications that the prosecution was not entitled to have. Despite being previously aware of this conflict, the prosecution still chose to use this individual, indeed having him sit conspicuously, in full view of the defendants, right next to the lead

[259] *Id.* at 6.
[260] *Id.*
[261] *Id.*
[262] *Id.* at 7.
[263] *Id.*
[264] *Id.*

prosecutor.[265] The defense objected, but the judge again did nothing.[266] Shortly after the arraignment concluded, the prosecution interpreter was fired from his position.

Overall, it took a day and a half to finish a process that typically is done within minutes. But does an arraignment under such conditions, where the accused are unable to reliably understand what actually occurred, constitute a valid judicial process? Could any American legal system possibly tolerate such fundamental error?

For Bin Lep, subsequent developments were even more troubling.[267] In an attempt to shore up the courtroom interpreter roster, the government took the remarkable step of simply hiring away Bin Lep's defense team linguist. [268] In other words, they took an individual who had spent years trusted within the attorney-client relationship, offered them increased compensation and benefits, and then hired them to work in the very courtroom where Bin Lep would be tried. Government and prosecution members then took nearly a week to notify Bin Lep's defense team of their new hire, a period in which that linguist continued to be involved in critical privileged discussions.[269] While one can blame the linguist for this shocking breach of rules and ethics, the reality is that the government employed dozens of individuals who, in the words of Judge Tatel, "failed to live up" to their responsibilities.[270] And Bin Lep's former translator – along with both of the interpreters at the arraignment and the defense-turned-prosecution interpreter who was fired by the government – remained on the official list of courtroom interpreters for commission hearings,[271] of which there have been only three in the two and a half years since the

[265] *Id.*
[266] *Id.*
[267] *See* Carol Rosenberg, *Guantánamo Prosecutor Seeks 2025 Trial in Bali Bombing Case*, N.Y. TIMES, *(*Apr. 24, 2023)**.**
[268] AE 0035.002 (LEP) at 8, United States v. Encep Nurjaman et al. (Mil. Comm'n Apr. 25, 2022).
[269] AE 0053.001 (LEP) at 5-6, United States v. Encep Nurjaman et al. (Mil. Comm'n May 10, 2023).
[270] *Id.* at 11-15.
[271] AE 0035.002 (LEP) at 2-5, United States v. Encep Nurjaman et al. (Mil. Comm'n Apr. 25, 2022).

arraignment. Naturally, while the case has been short on hearings, it has been fruitful in judges, with a newly appointed Air Force lieutenant colonel taking over as the fourth officer in the role since the case was referred in 2021.[272]

Beyond the procedural hurdles identified above, the other major roadblock in this case so far has been the delayed provision of discovery by the prosecution.[273] While the government has ostensibly been preparing its case for decades, it may still be many more years before it is able to turn over all of the relevant evidence to Hambali's team. This problem is compounded by the secrecy of much of that evidence, which remains classified for reasons known only to the stakeholder agencies. But in a twisted element of these commissions – and reminiscent of the problem Nashiri's attorneys had to deal with – much of the critical, classified evidence cannot be shown to or discussed with the clients, who for obvious reasons do not have security clearances. As a result, Guantanamo defendants are being prosecuted with evidence unknown to them and with defense attorneys unable to assist their clients in analyzing and assessing the case against them. This will certainly have a negative impact on Hambali's ability to defend himself, assuming the government ever allows the commission to get to a trial in the first place.

[272] Carol Rosenberg (@carolrosenberg), X (July 28, 2023, 4:34 PM), https://perma.cc/9A6G-6UJA.
[273] AE 0053.001 (LEP) at 6-7, United States v. Encep Nurjaman et al. (Mil. Comm'n May 10, 2023); AE 0054.001 (NUR) at 1-2, United States v. Encep Nurjaman et al. (Mil. Comm'n May 11, 2023).

SECTION III
All (Should Be) Fair in Law and War: Solutions for Future Commissions

"[T]his question isn't about our enemies; it's about us. It's about who we were, who we are and who we aspire to be."[274]

The previous sections have explored the origins of the commissions, and how those defective beginnings led to the deeply flawed system that has failed to bring about desired results for any of its participants. This section will now outline recommendations for structural improvements for future commissions. But what this section does not do is perhaps as important as what it does. For starters, it makes no attempt at arguing for military commissions versus civilian trials. That debate will be largely political, and the on-the-ground diplomatic and military realities of a relevant future conflict will dictate the path of post-conflict litigation far more than any current academic exposition could.

These recommendations are also not a holistic refining of the Rules for Military Commissions or the Military Commissions Rules of Evidence. While there are certainly myriad rules that could be improved, such an analysis would devolve into tedium that would seem byzantine to non-Guantanamo practitioners. Therefore, the presented recommendations should also not be taken as a wish list from a current defense attorney – albeit one who is a former federal and military prosecutor.

Instead, they are simply straightforward, achievable solutions that would ameliorate many of the ills which have plagued the Guantanamo commissions. And they should be familiar to

[274] Bill Theobald, *Former POW McCain Backs Release of CIA Torture Report*, USA TODAY (Dec. 9, 2014), https://perma.cc/U86D-4Z6K (quoting Senator John McCain's speech on the Senate floor in response to the release of the Senate Select Committee on Intelligence report on CIA torture).

readers from the preceding pages, as they are crafted as solutions to the specific problems discussed.

Finally, there are likely many ideas that have been missed, or that other practitioners believe would be particularly valuable. This is to be expected, and emphasizes the need for future commission designers to seek guidance from a broad spectrum of the legal community. While the concepts below are a non-exhaustive list, they should hopefully address most, but not all, of the troublesome waters into which America has waded in Guantanamo.

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The recommendations below are broken down into five categories. The first recommends ceasing capital referrals; in lay terms, no longer pursuing death sentences in commissions cases. The second recommends making trial judges civilians, as opposed to uniformed military lawyers, as well as directly routing appeals to the federal Circuit Court instead of the Court for Military Commission Review. The third recommends creating a more independent, powerful Convening Authority, thereby removing some of the political pressures on the appointed individual. The fourth recommends several steps to level the playing field for the defense, which will in turn make prosecutions timelier and convictions better able to withstand appellate review. The fifth and final recommends a number of miscellaneous procedural improvements which should also hopefully encourage a more expeditious and just completion of cases.

A. End Capital Referrals

Not seeking the death penalty in commissions may cause some political heartburn, but it makes sense from both pragmatic and legal standpoints. The reality is that many of the original architects of the Guantanamo commissions – including the senior Bush administration officials

quoted above – have agreed that the death penalty is unrealistic at Guantanamo. This is true even for the 9/11 case, which deals with arguably the worst criminal act in American history.

Capital cases in the commissions have proven extraordinarily difficult for a number of reasons. First, they require significant resources, including learned counsel with ample experience in death penalty trials. Such experience does not come overnight, and qualified attorneys necessarily tend to be older and therefore more likely to experience a health or personal event that requires their withdrawal. In complex cases, such a withdrawal can add a delay of years to the case.

Second, many commissions are likely to involve multiple defendants allegedly engaged in joint criminal conduct, as is the case with two of the four remaining cases in Guantanamo. This means that the odds of a complication involving a learned counsel are multiplied by the number of defendants, compounding the delay across the entire case. And in an especially large commission like 9/11, years could go by without significant action while multiple new learned counsel are brought up to speed.

Third, there are virtually no experts in capital litigation within the military branches' JAG Corps, as the military has only four men on death row – the last one put there in 2009 – and has not executed anyone since 1961.[275] The military rarely even seeks the death penalty, averaging approximately one death penalty case per year across all of the services during the last four decades.[276] This means that any capital commissions case would likely be the first one for all uniformed participants – including the prosecutors, defense attorneys, and judges. This could of

[275] Jonathan Lehrfield, *US Could Carry out its First Military Execution in Over 60 Years*, MIL. TIMES (Mar. 28, 2023), https://perma.cc/GM5U-UFZ7.
[276] *See* Brown, *supra* note 149.

course be supplemented by civilian expertise, but when the majority of the attorneys involved are judge advocates, this dearth of experience matters.

Fourth, because death penalty cases are so high-profile, they receive additional scrutiny at the appellate level. This means that even once the initial trial is complete, any execution could be delayed by years or decades. Consider the case of Ali Hamza al Bahlul, whose *non-capital* conviction in 2008 is still being appealed 15 years later; this is likely the minimum period one could expect if a death sentence were adjudged.[277] While this level of judicial review is legally necessary and appropriate, it delays finality for victims and their families, and preserves the possibility that entirely new trials could be ordered if significant errors are discovered. Realistically, it also means that many defendants may pass away before having their sentences carried out.

Fifth, given the international nature of commissions, evidence will often be located overseas, including in the hands of allies who may not want to cooperate in a capital case. This is likely to become increasingly true as countries continue to abolish the death penalty, which as of 2022, nearly three-quarters of the world's nations have done.[278] This issue has already impacted U.S. criminal cases, albeit in civilian courts, with allies refusing to provide evidence unless assurances were made that the death penalty would not be imposed or carried out.[279] Having this issue come up mid-commission, perhaps involving a critical piece of evidence or a necessary witness, would be incredibly disruptive to the judicial process.

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[277] *See* Bahlul v. United States, 77 F.4th 918 (D.C. Cir. 2023) (Al Bahlul's most recent appeal).
[278] Hanna Duggal & Marium Ali, *Map: Which Countries Still have the Death Penalty?*, AL JAZEERA (May 16, 2023), https://perma.cc/YW42-ZX4P; *Amnesty International Global Death Penalty Report: Death Sentences and Executions 2022*, AMNESTY INT'L (May 16, 2023), https://perma.cc/T9RF-XB3P.
[279] *See* Charlie Savage, *Barr Disavows Death Penalty for Two ISIS 'Beatles' if Britain Shares Evidence*, N.Y. TIMES (Aug. 19, 2020).

In retrospect, it is perhaps easy to conclude that the death penalty "doomed [the] commissions to collapse under their own weight."[280] But it is also fair to consider the severity of the crimes being tried at Guantanamo; if ever cases were to be capital, these were them. Still, the inherent difficulties commissions already face likely become pragmatically insurmountable once the death penalty becomes involved, and future commissions would do well to avoid that fate. Besides, in pursuing a system of justice that by definition limits the rights of defendants, it seems prudent to likewise limit the potential punishment. And if, for whatever reason, pursuing the death penalty becomes politically or morally necessary in a specific case, the decision can be made to bring that trial before a civilian Article III federal court.

B. Civilianize the Judiciary

The death penalty, without ever having been imposed, has affected the Guantanamo commissions in numerous collateral ways, many of which are invisible to the public. On the other hand, perhaps the most public flaws with the commissions have revolved around the judiciary. Whether it is the endless revolving door of judges in the 9/11 commission, the concealment of bias in the Indonesian case, the conflict of interest from multiple judges applying for jobs with the DOJ, or the smorgasbord of error committed by Judge Spath in the *Cole* trial, it seems reasonable to say that the Guantanamo commissions have not been the judiciary's finest hour.

In fairness, a large portion of the problem cannot be blamed on any individual judge. Military assignments are by nature temporary, and while courts-martial may fit neatly within a two-to-three-year window, complex war crimes trials clearly do not. Likewise, although

[280] Olson, *supra* note 55.

assignment to the judiciary is a desirable posting, officers cannot be blamed for wanting to further their careers or pursue opportunities that better align with their long-term interests.

Regardless of where the blame lies, the stark reality is that the current system of having uniformed personnel preside over the commissions has not worked. While some might suggest simply allowing military judges to stay on cases after they have rotated to a new job within their branch of service, this would raise a whole host of novel issues, including bias and logistical problems. Furthermore, it would not obviate the matter of retirements, which would increasingly come into play as judges encroached upon mandatory retirement ages.

Therefore, a reasonable alternative is to civilianize the judiciary, using either existing federal judges or newly appointed attorneys with a high degree of autonomy and protection from political backlash. This would put in place lawyers with significant judicial and/or criminal litigation experience, ideally in capital cases. Another possibility could be to utilize retired military or federal judges whose sole responsibility would be their specific commission, thereby increasing speed and efficiency in resolving pretrial matters.

Relatedly, the judicial process could also be improved by disbanding the CMCR, which functions as an intermediary appellate court between the commissions and the D.C. Circuit. It is not a permanent body,[281] and its *ad hoc* establishment and general existence significantly slows down the appellate process on critical interlocutory issues. Appeals from federal trials in District Court go immediately to Circuit Courts; why treat commission trial courts any differently?

C. Empower the Convening Authority

The Convening Authority concept is unique to military jurisprudence, with no equivalent in traditional civilian courts. Not only is the Convening Authority responsible for deciding

[281] *See* 10 U.S.C. § 950f.

whether cases go forward, but they also have the power to decide on plea agreements, clemency, and how the case should be finalized.[282] Furthermore, within the Guantanamo military commissions structure, the Convening Authority also typically heads up the Office of Military Commissions (OMC), an entity that decides all resource allocation and logistical needs for the entire legal process.[283]

As a result, the Convening Authority has tremendous sway over the commission, from how it starts, to how it functionally runs, to how it concludes. A biased or improperly influenced Convening Authority can heavily affect a case, seeding prejudice in ways that may be indiscernible from rationally-based decisions. Someone with a pre-conceived agenda or goal for how a case should play out can likely rationalize every decision they make to meet that end, as opposed to making decisions according to accepted legal and ethical principles.

While finding candidates committed to the latter virtues is possible, the political realities and external pressures on the Convening Authority must be acknowledged. After all, military commissions defendants are likely to be highly unpopular with the American public, and both congressional and executive officials may speak or act out against any action taken which advances an accused's interests. This is not mere speculation, as a Convening Authority and his legal advisor were allegedly fired for even considering actions that could benefit defendants.[284]

Therefore, unless America is solely interested in the pretense of justice for appearances' sake, steps must be taken to insulate the Convening Authority from unlawful influence. This should of course be done by avoiding prior mistakes, and selecting an independent-minded, non-

[282] *Organization Overview*, OMC, https://perma.cc/44XN-LQN9 (June 25, 2023).
[283] *Id.*
[284] *See* Carol Rosenberg, *Did Mattis Fire A Guantanamo War Court Overseer For Getting Soft On The 9/11 And USS Cole Cases?*, TASK & PURPOSE (Mar. 23, 2018), https://perma.cc/5ADP-XT24.

conflicted Convening Authority in the first place. But this individual must also be provided a buffer against political headwinds.

One potential model for this solution is to give the Convening Authority a period of tenure – perhaps five or ten years – during which they could only be removed due to misconduct. This would have myriad benefits for all participants, including political actors. For the latter group, it would immunize them to an extent against unpopular decisions by the Convening Authority, such as granting clemency or agreeing to a lenient deal with a particular accused. In other words, the independence of the Convening Authority would act as political insulation justifying inaction by Department of Defense (DOD) officials, who might otherwise feel pressured to replace the Convening Authority with someone more malleable.

For the litigants, it would give them a stronger partner with whom to negotiate, knowing that whatever agreements or understandings they have will last through fickle political news cycles. For defense teams in particular, it would (at least somewhat) ameliorate concerns about undue influence from external actors.

Finally, for the Convening Authorities themselves, it would give them both job security and independence, allowing decisions to be made purely on what the applicable laws and regulations require. It would also allow them to make difficult resourcing, litigation, and strategy decisions without worrying about how their DOD superiors might react. Finally, if the Convening Authority position were also Senate-confirmed, it would further legitimize their standing, and avoid ongoing legal challenges to the underlying structure of such a critical appointment.[285]

[285] *See* Robert Loeb, *D.C. Circuit Hears Oral Argument in Bahlul v. United States*, LAWFARE (Mar. 24, 2023).

D. Equalize Defense Resources

The provision of resources to criminal defendants – to be used, by definition, to oppose the very government providing them those resources – is a controversial topic, and the end result of the debate has been the chronic underfunding of civilian public defense offices across the country.[286] This has delayed cases, prolonged pretrial detention, and created a caste system whereby defendants with means are subject to a fundamentally different criminal justice system than those without.[287] To point out the obvious: unless one has the same viewpoint as the Indonesian commission interpreter ("the government is wasting money on these terrorists; they should have been killed a long time ago"),[288] the reality is that an effective – and therefore lawful – defense team requires the necessary resources to represent their clients. This is the only way a fair trial can be conducted, which itself is the only means by which finality and justice can be achieved for everyone involved.

While an independent Convening Authority would hopefully go a long way in ensuring the appropriate funding for the defense, future commissions planners would do well to statutorily require certain thresholds be met. Among these would be the requirement for a civilian lead counsel across all cases, and not just for learned counsel in capital ones. This would guarantee that an experienced defense attorney – oftentimes with decades more experience as a trial lawyer than even senior judge advocates – would be detailed to the case and hopefully remain there while uniformed personnel rotated in and out. This would also ensure continuity for clients, preserving long-term relationships which facilitate not only defense strategy, but also the trust

[286] *See* KATE TAYLOR, JUST. POL'Y INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 11 (2011).
[287] *See id.* at 8.
[288] AE 0002.037 (LEP) at 6, United States v. Encep Nurjaman et al. (Mil. Comm'n Sep. 14, 2021).

that is difficult to build between foreign combatants and their attorneys who happen to be citizens of the country prosecuting them.

Likewise, it would make sense to create opportunities for uniformed personnel – both from the defense and the prosecution – to remain within the commissions system if needed and desired. This would entail negotiations with the military branches and could have negative impacts on the officers' long-term career progression. But it would add a further element of stability which would hopefully address some of the pitfalls and errors which can occur with frequent transitions.

Another area where codified defense improvements are necessary is in the pretrial investigative stage. Theoretically, the rules give defendants equal access to witnesses and evidence;[289] the reality Guantanamo defendants face, however, is far different. Consider that the United States has been investigating these cases for two decades and has at its disposal the resources of every intelligence, military, and diplomatic agency. Any evidence any government entity has the prosecution can ask for, and to the extent a foreign government is needed to either obtain evidence or cajole a witness into cooperation, the State Department is merely a phone call away.

On the other hand, most defense teams are limited to a handful of investigators and analysts – if they are lucky. Many teams have numerous unfilled vacancies, while others – including the teams for Hambali, Bin Amin, and Bin Lep – have had at most a single investigator.[290] Yet, after starting the case in 2021, the prosecution initially expected those teams to be ready for trial by 2023.[291] This, despite the fact that the defense teams in that case are

[289] M.M.C., *supra* note 51, at R.M.C. 701(j); 10 U.S.C. § 949j(a).
[290] AE 0024.020 (LEP) at 2-4, United States v. Encep Nurjaman et al. (Mil. Comm'n Jan. 28, 2022).
[291] AE 0024.024 (GOV) at 2, United States v. Encep Nurjaman et al. (Mil. Comm'n Feb. 9, 2022).

prohibited from even going to certain countries, and despite the prosecution intentionally precluding the defense from speaking to critical witnesses.

To close this massive deficit in access and preparation, defense teams should be obligated specific intelligence liaisons to comb through the necessary evidence and facilitate witness communication. This would avoid the need to rely on an adversarial party – the prosecution – to enable every step of the pretrial investigatory process, which has become especially burdensome in light of the many ethical lapses which have occurred in the two decades of commissions practice. Additional requirements should include the defense having access to the sources and origins of any evidence the government intends to introduce in its case-in-chief; to the extent such sources are classified, defense teams are already cleared at the Top Secret level, and can be granted the need to know by the relevant stakeholder. Understandably, government officials may not want to divulge such information, but the result in that circumstance should be that the prosecution is foreclosed from utilizing that information at trial.

A similar change in the admittance of classified information, as prescribed by M.C.R.E. 505, should be considered as well, although a discourse on the appropriate litigation of classified information could take up another paper in its entirety. However, the over-classification of virtually every aspect of Guantanamo has significantly hampered both the defense and the public,[292] and delayed the imposition of the transparent justice that the Office of Military Commissions is purportedly dedicated to.[293] It is understandable that information which, if publicly released, could harm U.S. national security interests should be classified. But with defendants who have been confined for decades pre-trial, the question must be asked how much

[292] Carol Rosenberg, *At Guantánamo's Court Like No Other, Progress Is Frustrated by State Secrets*, N.Y. TIMES (May 30, 2023).
[293] Tyler Pager & Paige Leskin, *Military Restrictions Hinder Gitmo Coverage, Media Say*, USA TODAY (Mar. 13, 2015), https://perma.cc/E5Y3-7VS9.

of the information that is classified is done so to protect national security as opposed to simply hide embarrassing or shameful facts about government conduct. Giving properly-cleared defense counsel equal access to such classified information would at least start to balance the playing field, while simultaneously ensuring that protected information remains appropriately cordoned off.

In truth, none of these steps fully balances anything. Although civilian defendants face a similar burden in not having an equivalent to a police force or law enforcement agency, the difference in the commissions is that civilian prosecutors do not start with a two-decade head start, and the Constitutional requirement of a speedy trial – discussed more below – applies in every other American jurisdiction. Civilian defense attorneys do not face the same resulting loss of exculpatory and mitigating evidence which naturally occurs over the intervening time period.

Finally, future commissions must contemplate an improved scheme for client access to counsel. Naturally, Guantanamo detainees are limited in that they are housed in Guantanamo – not quite "outer space," but nearly as desolate from an access perspective. Even now in 2023, scheduling visits to the detainees is a difficult process, with no guarantee that meetings will be available during the trip. And once attorneys and staff take the government flights down to Guantanamo, go through the elaborate check-in and clearance routines, and get a meeting, the sessions themselves are limited, and not without the specter of government interference.

OMC has recently created a means for remote video meetings between defense teams and their clients, but these sessions are even more limited. This entire issue could be greatly improved therefore if defendants were given what seemingly every American prison is able to provide: a telephone to call their lawyer. The lines would have to be secure and could only be used for meetings with defense teams. But this seems eminently feasible both technologically

and practically, and could save significant time and resources that are otherwise spent on frequent island excursions on the taxpayers' dime.

One final note on both classification and client access to counsel involves the strange predicament currently facing high-value detainees. For obvious reasons, these men do not have security clearances and cannot be shown classified information. But because the government decided to classify the EIT and torture program – even though such information has been published through the Senate Select Committee on Intelligence Report and is commonplace within the public domain – the clients have been involuntarily exposed to classified information.[294] As a result, they are unable to communicate in any unclassified manner, even with their attorneys. In other words, because the government decided to torture them, and then classify the manner in which they were tortured, they have been forever barred from having any unclassified communications on even unrelated matters for fear of a release of classified information. Of course, they also would not know which elements of their torture were classified, as that information could not be told to them even if defense attorneys were aware of it. There may not be a solution to this quandary other than simply not repeating this schema, but it is an example of the tremendous difficulties defense teams face.

Perhaps some would assess the past few pages as a defense attorney's screed containing an impractical wish list of unpalatable government compromises. While a point-by-point rebuttal of the relative tenability of each of these proposals could be written, a larger point is perhaps more important to make: that the validity and legitimacy of any commissions will be judged by the fairness and justice they provide all parties – not just the victims and the public, but the defendants as well. If true fairness and equity before the court are not ensured, then the system

[294] *See CIA Torture Report Fast Facts*, CNN (Sept. 14, 2023), https://perma.cc/8JNL-UT3W.

will appear as mere victor's justice and no more than a sham that gives the pretense of due process while summarily arriving at a preordained result. Giving defendants the resources and ability to mount legitimate defenses benefits not just them, but every other party, who can then rest assured that any convictions produced were both legitimate and fairly won, able to withstand any amount of legal and political scrutiny.

E. Improve Procedural Frameworks

This section provides a variety of relatively specific improvements for trial practices and procedures. Of course, the major ones have been covered above, particularly in the streamlining of the classification processes, as well as the provision of appropriate resources to the defense. But more can be done.

As a start, a major encumbrance upon the commissions is the fact that there has been only one courtroom. This means that only one case could proceed at a time, in addition to the fact that multiple days are taken up by travel for every session. Another courtroom has now been built, and may be able to fully hear cases moving forward, but its functionality has yet to be tested.[295]

Future commissions cannot take such a penny-wise, pound-foolish approach. Certainly, building multiple facilities would cost additional money upfront, but when the alternative is years of delay and additional expense, a higher initial investment would be worth the cost. Alternatively, cases could be tried in existing military facilities, but this would likely require the commissions be located domestically. A further possibility is a statutory provision for remote hearings, where the judge and most participants could be in the United States while the detainees are elsewhere. This would require the time zones to roughly match up – not a problem for Cuba

[295] Carol Rosenberg, *Pentagon Building New Secret Courtroom at Guantánamo Bay*, N.Y. TIMES (Dec. 29, 2021).

– but would introduce a host of potential legal and technological issues. Still, the approach has had some initial success in Guantanamo[296] and could be expanded upon.

Another major improvement would entail timing requirements, encouraging the government to make earlier charging decisions and to differentiate between alleged criminals, who will be tried at commissions, and those individuals who are simply "law of war" detainees, to be held indefinitely – although the lawfulness and justification behind that classification is questionable. Currently, the government can effectively make whatever decisions it wants on charging, holding detainees indefinitely until trials become convenient – if they ever do. This is a direct result of the lack of speedy trial requirements at Guantanamo, something which the Constitution requires for Americans and domestic courts, but as of yet, not at overseas commissions. And in Guantanamo, delay is incentivized: every day of delay is a day the defendants are locked up behind bars, which is the government's explicit end goal for many of the cases in which they are seeking life sentences.

The Indonesian case is a perfect example of the downstream problems these perverse incentives create for the entire process. The three defendants were all captured in 2003 and interrogated – through torture – for three years.[297] They were then moved to Guantanamo in 2006, and interviewed by law enforcement teams in 2007 and 2008. This latter step was clearly taken with a trial in mind – why else would "clean teams" be used other than to obtain admissible information for trial? And trials appeared to be taking shape by early 2010, when Hambali, Bin Amin, and Bin Lep all had their cases slated for prosecution.[298]

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[296] Carol Rosenberg, *War Court Proceedings Stream to Guantánamo From a Secret Chamber in Virginia*, N.Y. TIMES (Apr. 28, 2023).
[297] AE 0002.012 (LEP) at 3, United States v. Encep Nurjaman et al. (Mil. Comm'n Jun. 4, 2021).
[298] Letter from Vanessa R. Brinkmann, U.S. Dep't of Just. Couns., Initial Request Staff, to Charles Savage (June 17, 2013) (on FOIA request for Guantanamo Bay detainee dispositions).

Yet the years came and went, and as discussed above, no action was taken until 2017. Over six years later, with only four hearings held, a trial at least for Hambali does not appear much closer. In the intervening time, witnesses have died, evidence has been lost, and the ability of the men to mount a legally sufficient defense continued to deteriorate.[299] The government, on the other hand, has been reviewing the case the entire time, with multiple interviews and investigations completed well before the commission was officially referred in 2021.[300]

Understandably, commissions cases will typically have some required period of military detention or intelligence gathering. But delay after that time must be justified, and for Hambali, Bin Amin, and Bin Lep, what could that justification possibly have been? The Indonesians had long since completed the investigation and then tried, sentenced, and – for some – executed the actual conspirators.[301] Lesser participants were released years ago.[302] No new evidence has been adduced for over a decade.[303] The reality is that the sole reason for the delay is simply the convenience of the government, and not wanting to initiate a case where there was zero pressure to do so. After all, the government is seeking life sentences, which it pragmatically already had with the three men held in indefinite detention. Of course, the second there was some pressure – in this instance, via a *habeas* petition filed by Bin Lep in federal court – the government *did* initiate trial proceedings, but has since done everything in its power to continue to delay them.[304]

So how can this be fixed? Naturally, the detainees can always file *habeas* petitions earlier in the process, although this is complex and requires access to counsel. An additional mechanism could be to add a series of escalating inferences to potential jury instructions, allowing members

[299] Lep v. Trump, 2020 U.S. Dist. LEXIS 234044 at *14.
[300] AE 0002.012 (LEP) at 3, United States v. Encep Nurjaman et al. (Mil. Comm'n Jun. 4, 2021).
[301] Allard & Doherty, *supra* note 222.
[302] *See* AE 0045.001 (LEP) at 2, United States v. Encep Nurjaman et al. (Mil. Comm'n Jan. 19, 2023).
[303] *See id.* at 5-6.
[304] *Id.* at 4-7; AE 0053.001 (LEP) at 6-7, United States v. Encep Nurjaman et al. (Mil. Comm'n May 10, 2023).

to weigh any deficit in evidence caused by unilateral government delay in favor of the defense. In other words, if a witness who was initially available dies or becomes unwilling to testify, and there is some reason to believe he would have had exculpatory evidence, the judge can instruct the members that they can assume that such evidence would have been introduced by the defense, allowing it to essentially become a fact in the case.

The severity of these instructions could also increase based on a threshold scale, with delays of 5, 10, 15, or 20 years perhaps increasing the degree of sanction on the government. Naturally, some case-by-case analysis would be required, with exceptions to speedy trial requirements available if the government demonstrates some sort of necessity. But for defendants such as Hambali, Bin Amin, and Bin Lep, with the government having had decades of access – and yet denying the defense the ability to obtain the same evidence – the appropriate instruction would be harsh indeed.

The response by government advocates may be that these men could have been held indefinitely as law of war detainees, and therefore any delay in their trial is incidental or moot because their detention would have existed contemporaneously regardless.[305] A first reply to this would be that the government should care about achieving just trials, and offer no excuses for perpetuating injustice. But another important rejoinder involves the resolution of the indefinite length of detention for law of war detainees in the "War on Terror."

In most wars, there is an identifiable end to the conflict, or at least a ceasefire under which captured adversaries can be repatriated in an appropriate manner. But what is the equivalent in a fight against terrorism? What if the adversary – originally al-Qaeda – evolves, as was the case with ISIS and U.S. interventions in Iraq and Syria? Do detainees in the original

[305] AE 0053.002 (GOV) at 8, United States v. Encep Nurjaman et al. (Mil. Comm'n May 25, 2023).

conflict remain subject to detention even if their specific conflict is concluded, or their organizational ties have been vitiated?

Courts have struggled with these questions, with much deference paid to executive branch determinations of when, where, and how a conflict should be interpreted.[306] But to the extent the United States has now held some individuals without charges for over two decades, something more appears necessary. Conversely, if indefinite detention without trial is truly to be allowed, it should not be done behind closed doors or within dense legal briefs, but publicly in Congress, voted upon with the opportunity for a debate upon the merits. Detaining individuals without charges for substantial portions – or the duration – of their lives may be a policy position legislators desire, but if so, they should clearly affirm it through the legislative process.

Relatedly, there should be some definable, public metric to determine whether detainees are charged. This would provide some clarity to both the public and the detainees, who could understand whether they should tailor their legal strategy to a commission or the Periodic Review Board (PRB) – a quasi-parole hearing for law of war detainees. While an analysis and proposed reformation of the PRB is outside the scope of this paper,[307] it seems reasonable for the government to make it clear which track a detainee is in as soon as possible. While new evidence could of course come into play later on, greater transparency on this issue would seemingly benefit all parties.

Another recommendation involves an improvement in pre-commission interrogations of detainees. Pretrial processes are going to be difficult to regulate, as detainees will likely be

[306] *See* Nina Totenberg, *Justice Breyer Says It's 'Past Time' To Confront Guantanamo's 'Difficult Questions'*, NAT'L PUB. RADIO (June 10, 2019), https://perma.cc/94H8-GVPU; INT'L CRISIS GRP., OVERKILL; REFORMING THE LEGAL BASIS FOR THE U.S. WAR ON TERROR [Insert Pincite] (2021), https://perma.cc/LR5G-T2LE.
[307] *See* Benjamin Farley, *Who Broke Periodic Review at Guantanamo Bay?*, LAWFARE (Oct. 15, 2018), https://perma.cc/HZ3V-TSVA.

apprehended in a variety of fashions, with similarly varying intelligence and military requirements prior to any commission. Standardizing such processes to closely match accepted American law enforcement practice would be ideal, especially since the resulting detainee interviews could form a key element in the case against them. Mirandizing detainees may be a non-starter for some in law enforcement – although it should not be[308] – but at least videotaping all interviews should be a baseline practice. Much of the critical litigation in all of the contested commissions so far has been about the admissibility of the "clean team" statements, and video of those interactions would certainly have been helpful in answering some of the questions posed.

Finally, a greater priority needs to be placed on resolving cases, including offering plea deals and resettlement opportunities that satisfy both security and human rights requirements. While there are likely practitioners who will disagree with some characterizations within this paper, one element that an overwhelming majority of those involved with the Guantanamo commissions can agree upon is that the fact that they've dragged on for two decades has benefited no one. Detainees have been robbed of their chance to restart their lives. Victims and their families have been robbed of closure and justice. The government is unable hold individuals accountable for serious crimes. And American taxpayers have seen billions of dollars spent on endless litigation which could be better used elsewhere.

It did not need to be this way. The government could – and next time, should – prioritize envisioning end goals for every detainee, and constantly work on progress toward said goals. Unfortunately, it is currently not incentivized to do so, as the PRB process offers detainees no actual guarantee of a return home, and the *habeas* route is time-consuming and equally uncertain.

[308] Even the law enforcement agents involved in the "clean team" statements have noted how unusual the decision not to advise the detainees of their rights was. *See* AE 467CCC at 20, United States v. Abd Al-Rahim Hussayn Muhammad Al-Nashiri (Mil. Comm'n Aug. 18, 2023).

The current status quo is simply that the government, if it elects not to refer cases, can impose de facto life sentences upon law of war detainees with very few repercussions.

To be charitable to government actors, this may not be their intent, and, for some detainees, it may even be tenable given their individual circumstances. But the reality is that U.S. domestic and foreign policy interests have been ill-served by the indefinite detention of individuals at Guantanamo, especially in the opaque way in which the process has unfolded. The military commissions mantra is "Fairness. Transparency. Justice." It should pay more than lip service to those notions.

Conclusion

"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[309]

Now is a particularly interesting moment in commissions' history, and hopefully for all involved, an inflection point that will lead to the beginning of the end of these ill-fated trials. For instance, the past few years have seen changes in the leadership of each pillar of the military commissions system. As discussed above, after over a decade of involvement with the commissions, the former Chief Prosecutor, General Martins, suddenly resigned, reportedly because of disagreements with the Biden administration over the use of the torture-derived evidence as discussed in the section on the *Cole* case.[310] The new Chief Prosecutor is Navy Rear Admiral Aaron Rugh, whose most high-profile role to date has been as the judge in the court-martial involving Navy SEAL Eddie Gallagher.[311] During that trial, then-Judge (and Captain) Rugh recused the lead Navy prosecutor for the latter's involvement in attempted electronic surveillance of defense attorneys[312] – something eerily reminiscent of government actions at Guantanamo.

There has also been a shift in presidential administrations. Former President Trump campaigned on filling up Guantanamo and lauded the torture of prisoners.[313] President Biden on the other hand has, along with members of his administration, repeatedly pledged to close the

[309] United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).
[310] Carol Rosenberg, *Chief Guantánamo Prosecutor Retiring Before Sept. 11 Trial Begins*, N.Y. TIMES (July 9, 2021).
[311] Sasha Ingber, *Judge Removes Lead Prosecutor In Navy SEAL War-Crime Case*, NAT'L PUB. RADIO (June 4, 2019), https://perma.cc/NXX4-TKNB.
[312] *Id.*
[313] *See* David Welna, *Trump Has Vowed To Fill Guantanamo with 'Some Bad Dudes' – But Who?*, NPR (Nov. 14, 2016), https://perma.cc/T9HL-4UC7; Dan Merica, *Trump on Waterboarding: 'We Have to Fight Fire with Fire,'* CNN (Jan. 26, 2017), https://perma.cc/26EV-YFJH; *see also* Adam Serwer, *Can Trump Bring Back Torture?*, THE ATLANTIC (26 Jan., 2017).

detention center.[314] Unfortunately, despite some progress on repatriation,[315] 30 men remain in Guantanamo, and the major cases are at an effective standstill. How long this will continue to be the case remains to be seen.

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The Guantanamo commissions have failed. That was the premise this paper started with, and hopefully has demonstrated through a recantation of the misbegotten legal tales from the past two decades. But what this paper has not done is concisely pinpoint the primary cause of that failure. Surely, ethical lapses have played a paramount role, as have ill-constructed legal processes designed for ephemeral convenience over real justice. And the inherited and collateral issues that the commissions have dealt with – primarily torture, but also military rotations, political cross-fire, and the perils of attempting any trial over the course of multiple decades – are ones which no system of justice would envy.

But at their core, the failures of the Guantanamo commissions can be explained by a foundational departure from America's long-standing belief in equality under the law and providing fair trials to even those who are most scorned and despised for alleged misdeeds. This tradition predates the republic, with John Adams imperiling his livelihood and prospects by defending British soldiers involved with the Boston Massacre.[316] Legal luminaries throughout American history have recognized this, including Justice Robert Jackson – quoted at the beginning of Section II – who realized that any trials of the Nazis after World War II would need to be conducted righteously to withstand the long and withering gaze of history.[317] If fair trials

[314] Carol Rosenberg, *Biden Still Wants to Close Guantánamo Prison*, N.Y. TIMES (June 27, 2020); Jess Bravin, *Biden Administration Quietly Steps Up Effort to Close Guantanamo*, WALL ST. J. (Sept. 17, 2022), https://perma.cc/5P88-NMKL.
[315] Rosenberg, *supra* note 154.
[316] *John Adams and the Boston Massacre Trial of 1770*, Collections, LIBR. OF CONG.
[317] TAYLOR, *supra* note 53, at 168 (quoting Justice Jackson's opening statement at the Nuremberg Trials).

were given to the Nazis – who arguably sit at the head of the table in the historic pantheon of evil – why should America attempt to do otherwise in future commissions?[318] Recalling the words of President Kennedy from Section I, when the rights of even evil-doers are trodden upon, everyone loses something of the collective spirit that makes them uniquely American.

This is not simply a jeremiad from the defense bar, as even former Guantanamo prosecutors have recognized the futility of continuing business as usual on the island.[319] Nor is it a liberal fantasy as perhaps some might assume. To the contrary, even conservatives such as former Senator John McCain have discussed the need to frame America's behavior not just in the context of those who are on trial, but about "who we are and who we aspire to be."[320]

America must aspire to be a nation that values law, and fairness, and justice over all other goals, with the trust that in the long run, such priorities will be reflected in the greatness of America. In the (likely apocryphal) words of Alexis de Tocqueville: "America is great because America is good. If America ever stops being good, it will stop being great."[321] America must continue to be good, regardless of the temptation to trespass into short-lived recesses of ill-conceived pragmatism and near-sightedness, or a political arc that sometimes threatens to bend toward evil. America must "never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well."[322]

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[318] Alka Pradhan & Scott Roehm, *Nuremberg Prosecutor says Guantanamo Military Commissions Don't Measure Up*, JUST SEC. (Aug. 24, 2021), https://perma.cc/5YBD-N44X.
[319] Omar Ashmawy, Opinion, *I was a prosecutor at Guantánamo. Close the prison now.*, WASH. POST (June 30, 2021), https://perma.cc/8G43-E9VD.
[320] Theobald, *supra* note 274 (quoting Senator John McCain).
[321] David Mikkelson, *Did Alexis de Tocqueville Say 'America Is Great Because She Is Good'?*, SNOPES (Dec. 5, 2019), https://perma.cc/SX6Q-6684.
[322] TAYLOR, *supra* note 53, at 168 (quoting Justice Jackson's opening statement at the Nuremberg Trials).

For two decades, Guantanamo has prevented and twisted justice for both the victims and the accused, weakened America's standing in the world, and debased the fundamental principles of the nation. If justice delayed is justice denied, what is clear after twenty years is that justice cannot and will not be achieved at Guantanamo. History will not reflect kindly upon those who fail to see that reality and learn from it.