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Zombie Courts: Lessons Learned from a Guantanamo Bay Military Commissions System That Refuses to Die

Michael J. Lebowitz

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ZOMBIE COURTS: LESSONS LEARNED FROM A GUANTANAMO BAY MILITARY COMMISSIONS SYSTEM THAT REFUSES TO DIE

LIEUTENANT COLONEL MICHAEL J. LEBOWITZ*

INTRODUCTION	2
I. ORIGINS OF MILITARY COMMISSIONS	5
II. LESSONS LEARNED FROM THE GUANTANAMO BAY SYSTEM	7
A. THE ESTABLISHMENT OF JOINT TASK FORCE GUANTANAMO.....	7
B. THE ROLE OF THE CONVENING AUTHORITY	10
1. The Lack of Established Charging Standards.....	11
2. The Lack of a Proper Grand Jury or Preliminary Hearing Officer.....	15
C. EXPERIENCE AND LONGEVITY OF COURT OFFICERS	18
1. Military Judges	18
2. Attorneys	24
1. Learned Counsel	29
D. INEFFICIENCIES OF A HYBRID SYSTEM.....	31
1. Lack of Established Policies and Guidelines.....	31
2. Graymail Turned on its Head	34

* LTC Lebowitz, a member of the U.S. Army Reserves, is an adjunct professor in the National Security Law Department of The Judge Advocate General's Legal Center & School (TJAGLCS). He previously served as the Chief of National Security Law for U.S. Army Cyber Command, and spent approximately nine years as a trial counsel and special trial counsel at the Guantanamo Bay Military Commissions. In his civilian capacity, he is an attorney with the Department of Justice's National Security Division, and has experience as a Special Assistant United States Attorney in the Eastern District of Virginia. The views expressed in this publication are those of the author and do not necessarily reflect the official policy or position of the Department of Defense or the U.S. government.

3. Capital Punishment.....	38
4. Lack of Urgency	42
E. LOGISTICAL INADEQUACIES	45
1. Travel.....	45
3. Costs	48
4. Filing System.....	49
III. PRIMER FOR CLOSING GUANTANAMO BAY.....	52
IV. CONCLUSION	56

INTRODUCTION

It was May 5, 2012, in a brightly-lit Guantanamo Bay courtroom.¹ The five men accused of plotting and implementing the attacks of September 11, 2001, were finally being arraigned.² It had been nearly a decade since the first of the five men was captured.³ This initial hearing ultimately dragged on for thirteen hours; arraignments typically last no more than a few minutes.⁴ It was well on its way to setting a record for the longest arraignment in American history.⁵

The arraignment in what is colloquially referred to as the 9/11 case—officially titled *United States v. Khalid Sheikh Mohammad*—is indicative of the inherent problems in tasking the military with prosecuting foreign actors for war crimes at Guantanamo Bay.⁶ The

1. See Unofficial/Unauthenticated Transcript of the KSM, et al. (2) Arraignment and Motions Hearing at 1, *United States v. Mohammad*, 803 R.M.C. 1, 1 (2012) (No. 12-02) [hereinafter KSM Transcript].

2. *Id.*

3. See REP. OF THE S. SELECT COMM. ON INTEL. COMM. STUDY OF THE CIA'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at 318 (2014) [hereinafter STUDY OF THE CIA'S DETENTION AND INTERROGATION PROGRAM] (describing the capture of the men who would eventually be charged via military commission for the 9/11 attacks, beginning with 9/11 conspirator Ramzi Binalshibh's capture on September 11, 2002).

4. See KSM Transcript, *supra* note 1, at 1, 239 (detailing how the arraignment began at 9:23 AM and concluded at 10:28 PM, with the longest break being about an hour for lunch. The arraignment transcript takes up about 239 pages).

5. *Id.* at 1 (concluding after an extensive search, that there was no apparent evidence of any other arraignment that took this long).

6. See Charlie Savage, *At a Hearing, 9/11 Detainees Show Defiance*, N.Y. TIMES (May 5, 2012), <https://www.nytimes.com/2012/05/06/us/9-11-defendants-face-arraignment-in-military-court.html> (highlighting challenges at the hearing like

system has morphed into a zombie-like institution that refuses to die, and nobody has been able to permanently put it out of its misery. The military commissions process is slow, inefficient, expensive, and at times out of control.⁷ For example, one would be hard-pressed to find a federal judge who would tolerate an arraignment that falls so far afield of its intended purpose—formal advisement of the charges, entering a plea, and detention.⁸ Yet within seconds of the 9/11 arraignment, defense counsel continuously lodged objections in what proved to be an auspicious beginning to the proceedings.⁹ The

the defense attorney requesting that women on the prosecution team dress more modestly so the defendants would not have to avert their eyes, problems with translators and prison privacy, and breaks for prayers).

7. See Sacha Pfeiffer, *Guantánamo Has Cost Billions; Whistleblower Alleges ‘Gross’ Waste*, NPR (Sept. 11, 2019, 5:00 AM), <https://www.npr.org/2019/09/11/759523615/guant-namo-court-and-prison-have-cost-billions-whistleblower-alleges-gross-waste> (detailing the cost of running the U.S. military court and prison at Guantanamo Bay, the apparent mismanagement, and protracted trials and appeals).

8. FED. R. CRIM. PRO. 10(a)(1)–(3); see also *Pennywell v. Rushen*, 705 F.2d 355, 357 (9th Cir. 1983) (observing that when faced with uncooperative or obstreperous defendant, a California court’s only power is to enter plea of not guilty); *Ruckle v. Warden, Md. Penitentiary*, 355 F.2d 336, 338 (entering a not guilty plea for a defendant who refuses to plead when arraigned); *Crossley v. State*, 420 So. 2d 1376, 1378 (Miss. 1982) (holding a defendant who stands mute in response to charges at arraignment will have plea of not guilty entered by the court, and trial is not precluded on ground that defendant has not personally entered a plea at arraignment).

9. See KSM Transcript, *supra* note 1, at 2–3 (Within seconds, the following colloquy occurred:

MJ [COL POHL]: . . . There is a process in place to follow the trial guide. Motions will be addressed at the time of arraignment. Clear?

DC [CDR RUIZ]: I understand that, Your Honor. I will cite to a Supreme Court case to address the issues at this time.

MJ [COL POHL]: What you can do is this: First, you can listen to me. Second of all, when you make your motion, when we get to that point, which will be today, if you want to go back and say I should have done it earlier, we can do it at that time. But I’m not taking motions out of order, clear?

DC [CDR RUIZ]: I’m not asking – I would like to cite a Supreme Court case –

MJ [COL POHL]: You can cite the Supreme Court case when I give you the opportunity to be heard on the motion.

DC [CDR RUIZ]: You Honor, we believe it is appropriate before the court is convened to address the issue. It is the heart of our motion.

MJ [COL POHL]: I will say it one more time, and that is the last time I’m going to say it. You will be able to make motions at the appropriate time. Now is not the appropriate time. Clear?

military judge failed to control the courtroom, and¹⁰ the military prosecutors overlooked the objections without effective interjection.¹¹ As of 2021, the case has continued to slog through the Guantanamo Bay system without resolution or even a firm trial date.¹²

This Article explains why the military commissions system has proven to be so ineffective. While this Article takes stock of the big picture issues that have hindered the military commissions, it also focuses on the numerous smaller deficiencies embedded into the system that have caused the biggest problems—a death by a thousand cuts.

With the withdrawal of U.S. forces from Afghanistan, this Article is intended to serve as a timely assessment of the military commissions system at Guantanamo Bay.¹³ Section I begins with a brief history of military commissions and how those initial, common law military courts differ from the modern, statutorily designed

DC [CDR RUIZ]: I understand your position, Your Honor. We object.).

10. See, e.g., *Chaotic Start to Opening of 9/11 Trial*, AL JAZEERA (May 6, 2012), <https://www.aljazeera.com/news/2012/5/6/chaotic-start-to-opening-of-9-11> (defendants refused to listen to a translation of the judges questions, prayed alongside their defense tables, and one shouted to the judge “You are going to kill us and say that we are committing suicide”); Peter Finn, *9/11 Detainees Seek to Disrupt Opening of Arraignment at Guantanamo*, WASH. POST (May 5, 2012), https://www.washingtonpost.com/world/national-security/911-detainees-seek-to-disrupt-opening-of-arraignment-at-guantanamo-bay/2012/05/05/gIQAnGzh3T_story.html (defendants refused to speak publicly throughout the hearing, but disrupted the proceedings with prayer, outbursts at the judge, and leafing through the Economist).

11. *Chaotic Start to Opening of 9/11 Trial*, *supra* note 10 (describing how it was not until more than seven hours into the hearing that prosecutors began reading the charges against the defendants).

12. See, e.g., Sacha Pfeiffer, *Trial of Sept. 11 Defendants at Guantánamo Delayed until August 2021*, NPR (Sept. 30, 2020, 12:36 PM), <https://www.npr.org/2020/09/30/918454831/trial-of-sept-11-defendants-at-guantanamo-delayed-until-august-2021> (noting how a new military court judge cancelled all hearings in the case, delaying the start of the trial until at least August 2021).

13. See, e.g., Rebecca Kheel, *Biden’s Move on Afghanistan Raises Guantanamo Questions*, THE HILL (Apr. 25, 2021, 7:30 AM), <https://thehill.com/policy/defense/550047-bidens-move-on-afghanistan-raises-guantanamo-questions?rl=1> (questioning the effect that President Biden’s decision to fully withdraw from Afghanistan will have on the future of the Guantanamo Bay detention center).

system.¹⁴ Section II examines the inherent problems and contradictions that are deeply rooted in the modern military commission system.¹⁵ The analysis of these problems is based on a thorough review of the military commissions' rules, guidelines, and policies—or lack thereof in many instances—combined with specific examples from the record, detailing how those ingrained problems have directly manifested into delay and ineffectiveness. Section III proposes a possible course of action that would significantly reduce the number of detainees held at Guantanamo Bay that would still hold unlawful enemy combatants accountable for their actions, while also recognizing the inherent failures of the system.¹⁶ Section IV provides a brief conclusion.¹⁷

I. ORIGINS OF MILITARY COMMISSIONS

Military commissions have historically been messy affairs operating on the periphery of the legal system.¹⁸ Judge Advocate General Enoch Crowder summarized military commissions at a Congressional hearing in 1916: “A military commission is our common law war court. It has no statutory existence, though it is recognized by statute law.”¹⁹ In other words, military commissions are intended to be creatures of military commanders, who retain ambiguous authorities over alleged unlawful combatants with little more than a few winks and nods from lawmakers.²⁰

Historically, military commanders have held the authority to decide between life and death of any individual captured on the battlefield, including combatants and non-combatants, spies, and

14. See discussion *infra* Part I.

15. See discussion *infra* Part II.

16. See discussion *infra* Part III.

17. See discussion *infra* Part IV.

18. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006) (citing W. WINTHROP, *MILITARY LAW AND PRECEDENTS*, 831 (rev. 2d ed. 1920) (noting that prior to 2006 the military commission—a tribunal neither mentioned in the Constitution nor created by statute—was born of military necessity).

19. *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952) (citing S.Rep.No.130, 64th Cong., 1st Sess. 40).

20. See Major Michael O. Lacey, *Military Commissions: A Historical Survey*, *ARMY LAW*, 41, 41 (Mar. 2002) (discussing the speculation around the origin of military commissions and the unique war power given to commanders).

pirates.²¹ Military commissions have taken many forms and borne many names.²² For example, a Spanish commander, known as the Duke of Alba, established the Council of Troubles in 1547, a veritable military commission for hanging suspected rebels.²³ The following century during the Thirty Years War (1618–1648), King and Field Commander Gustavus Adolphus of Sweden empaneled military officers to hear potential crimes that occurred on the battlefield and make recommendations on resolving the issues.²⁴ English language references to what are now recognized as military commissions have evolved over time. The British used the terms “courts-martial” and “military commission” interchangeably.²⁵ As such, it is not surprising that military commissions during the American Revolution were actually called courts-martials.²⁶ Early American military commissions equally used other names such as “court martial” and “Board of General Officers.”²⁷ Military

21. *Id.* (explaining how military commanders have held the authority of life and death over those captured on the battlefield, and the power to classify them as unlawful combatants, spies, or pirates).

22. *Madsen*, 342 U.S. at 347 (noting that military commissions also have been known as Council of War, Military Tribunal, Military Government Court, Provisional Court, Provost Court, Court of Conciliation, Arbitrator, Superior Court, and Appellate Court).

23. Lacey, *supra* note 20, at 41 n. 8 (providing examples of military commanders that used their unique war powers to establish military commissions, often with brutal results).

24. *Id.* at 41–42 (introducing Gustavus Adolphus as the father of modern warfare, who introduced new technological and training techniques).

25. *Id.* (providing the evolving history of military commissions and the use of military commissions in America).

26. *Id.* (explaining how in 1776, the British used a military commission—called court martial—to prosecute Captain Nathan Hale for spying on behalf of the Americans).

27. For example, General George Washington convened a “Board of General Officers” on June 8, 1778 to prosecute Thomas Shanks, a former soldier accused of spying for the British. See *General Orders*, 3 June 1778, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-15-02-0319> (last visited July 28, 2021) (citing George Washington, *May–June 1778*, in 15 REVOLUTIONARY WAR SERIES 305 (Edward G. Lengel, ed., 2006)) [hereinafter *General Orders*] (recording the conviction of Thomas Shanks as a spy by a board of General Officers, who were convened by the Commander in Chief); see also Detlev F. Vagts, *Military Commissions: A Concise History*, 101 AM. J. INT’L L. 35, 48 (2007) (noting that the panel used to try British major John Andre for his role in attempting to make contact with Benedict Arnold was in fact termed a

commissions came into more regular, wartime use during the Civil War through the end of World War II.²⁸

In 2001, Military Order No. 1 revived military commissions to provide a legal framework for military prosecutions of foreign nationals associated with al Qaeda.²⁹ That initial framework was struck down by the Supreme Court in *Hamdan v. Rumsfeld*.³⁰ Instead of letting the post-9/11 military commissions die, Congress authorized the continuation of the commissions in 2006 and again in 2009.³¹ Because military commissions had historically been common law courts without statutory recognition, this authorization by statute was unprecedented and provided for a hybrid system between military justice and federal practice.³²

II. LESSONS LEARNED FROM THE GUANTANAMO BAY SYSTEM

A. THE ESTABLISHMENT OF JOINT TASK FORCE GUANTANAMO

On January 11, 2002, an Air Force C-141 Starlifter cargo plane transported twenty detainees from Afghanistan to Guantanamo Bay.³³ These detainees, clad in orange jumpsuits as they were escorted off of the plane by U.S. Marines, were deemed the “worst of the worst.”³⁴ Joint Task Force Guantanamo (JTF-GTMO) was

“board of general officers,” though it has been treated as a military commission).

28. See Vagts, *supra* note 27, at 37–41 (following World War II, military commissions did not occur until after the 9/11 attacks).

29. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57, 834–57,835 (Nov. 16, 2001) [hereinafter Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism].

30. See *Hamden v. Rumsfeld*, 548 U.S. 557, 632–35 (2006) (holding that Hamden’s case did not “demonstrate an example where the military commission ‘can be regularly constituted’ by the standards of our military justice system only if some practical need explains deviations from court-martial practice”).

31. See 10 U.S.C. § 948(d) (2009); 10 U.S.C § 948(d) (2006).

32. *Id.*

33. See Carol Rosenberg, *They Were Guantánamo’s First Detainees. Here’s Where They Are Now*, N.Y. TIMES (Mar. 27, 2021), <https://www.nytimes.com/2021/03/27/us/politics/guantanamo-first-prisoners.html> (detailing the arrival of the first inmates to Guantanamo Bay on January 11, 2002).

34. *Id.* (describing how 760 more detainees would ultimately arrive at

officially in business.

The U.S. Southern Command (SOUTHCOM) established JTF-GTMO to detain enemy combatants captured after the 9/11 attacks.³⁵ JTF-GTMO had the added mission of collecting intelligence in furtherance of Afghanistan military operations, also known as Operation Enduring Freedom.³⁶ From a strategic communications viewpoint, the first public images of JTF-GTMO operations were particularly auspicious.³⁷ The enduring images of the arriving detainees handcuffed and at times kneeling on the ground, dressed in orange jumpsuits and black-out goggles has frustrated the military. The government failed to control its message about Guantanamo Bay and counterterrorism detention policy. The reputation of Guantanamo Bay operations was never able to gain its footing after publication of those first, disturbing images.³⁸

Guantanamo Bay, with only 40 remaining as of mid-2021).

35. See Todd Jason Hanks, *Millionaire Protectors—Adjusting the New Rules for the Federal Government Overseas Private Security Contractor Procurement System*, 44 PUB. CONT. L.J. 649, 671 (2015) (putting the U.S. Southern Command, or SOUTHCOM, and the creation of the Joint Task Force Guantanamo in the context of Operation Enduring Freedom), citing Jamison D. Braun, JTF-GTMO: A 10-YEAR RELOOK i., 3–5 (May 4, 2012) (research paper, Naval War College) (on file with Defense Technical Information Center), <https://apps.dtic.mil/sti/citations/ADA563766>.

36. *Id.* (explaining that JTF-GTMO's purpose was to detain enemy combatants captured after 9/11 attacks and collect intelligence in furtherance of OEF).

37. Adam R. Pearlman, *GQ: The Guantanamo Quagmire*, STAN. L. & POL'Y REV. 101, 117–18 (2016) (describing how the government failed to craft and control its message about Guantanamo Bay and counterterrorism detention policy in light of the enduring images “depicting the orange-jump suited detainees with black-out goggles arriving at or kneeling in cases on a U.S. naval base in Cuba”).

38. *Id.* (describing how the early images of detainees in chain-linked cells at Camp X-ray endured more than a decade later even though the facility closed after only ninety-two days); see also Carol Rosenberg, *Photos Echo Years Later*, MIAMI HERALD (Jan. 10, 2008), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1928720.html>; Katharine Q. Seelye, *A Nation Challenged: The Prisoners; First ‘Unlawful Combatants’ Seized in Afghanistan Arrive at U.S. Base in Cuba*, N.Y. TIMES (Jan. 12, 2002), <http://www.nytimes.com/2002/01/12/world/nation-challenged-prisoners-first-unlawful-combatants-seized-afghanistan-arrive.html> (describing the conditions in which the prisoners were brought to Guantanamo, including being taken to individual wire cages); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-31, GUANTÁNAMO BAY DETAINEES: FACILITIES AND FACTORS FOR CONSIDERATION IF DETAINEES WERE BROUGHT TO THE UNITED STATES 11–24 (2012) [hereinafter

From the beginning, JTF-GTMO suffered from conflicting directives and shortfalls in the operational art functions of command and control, sustainment, protection, and intelligence.³⁹ At its peak, JTF-GTMO's command staff typically involved approximately 300 positions, the majority of which were sourced through whole-unit rotations of Army Reserve and National Guard units.⁴⁰ The remaining command positions were sourced by individual augmentees from the active-duty components.⁴¹ The constant churn of rotating personnel is particularly salient because the JTF-GTMO guard force essentially must re-learn numerous nuanced procedures on an annual or bi-annual basis. JTF-GTMO operates the detention camps and is responsible for the custody of all detainees and any sentenced prisoners.⁴² Despite the fact that JTF-GTMO was created in early 2002, it does not retain the institutional knowledge of a jail or Bureau of Prisons facility in the United States that is vital to maintaining consistency.⁴³ The result has been countless legal challenges to military commission cases, ranging from conditions of confinement to the use of female guards.⁴⁴ In many instances, those

GAO REPORT] (detailing the history of detention facilities and standards of confinement at Guantanamo Bay, including the chain-link enclosures on concrete slabs at Camp X-Ray).

39. See Braun, *supra* note 35, at 1–2 (describing JTF-GTMO as “a classic study of an ill-defined organizational structure among competing stakeholders on all four levels of warfare: National-Strategic, Theater-Strategic, Operational, and Tactical”).

40. *Id.* at 4–5 (explaining the composition of JTF-GTMO command staff).

41. *Id.* (describing how the majority and the remaining positions of the JTF-GTMO are sourced).

42. Paul H. Hennessy, *Prosecution by Military Commission versus Federal Criminal Court: A Comparative Analysis*, 75 FED. PROBATION 27, 31 (June 2011) (explaining that those convicted by a military commission remain in the custody of JTF-GTMO, which operates the detention camps).

43. *At Guantanamo, Prisoners Watch Parade of US Military Guards Go By*, FRANCE24 (Nov. 8, 2018, 2:51 AM), <https://www.france24.com/en/20181108-guantanamo-prisoners-watch-parade-us-military-guards-go> [hereinafter *Prisoners Watch Parade of US Military Guards Go By*] (describing how the institutional knowledge of Guantanamo has suffered due to brief deployments and constant changes).

44. See, e.g., Dru Brenner-Beck, *Eighteen Years of Detention at Guantánamo Bay: Compliance with International Law or the Specter of Tyranny?*, 35 AM. U. INT'L L. REV. 671, 733–747 (2020) (illustrating the challenges before these military commissions, including the legal challenges based on conditions of

legal challenges are rehashed on a rotational basis consistent with the changes in JTF-GTMO personnel.⁴⁵ In the future, any semi-permanent detention operations should develop a system to retain its institutional knowledge.⁴⁶ This might include employing experienced leadership teams to oversee such operation for the duration of the endeavor. In turn, a stable, experienced leadership team can ensure a more seamless transition for rotating personnel.

B. THE ROLE OF THE CONVENING AUTHORITY

The fundamental purpose of military law “is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”⁴⁷ Front and center of this mission statement is the convening authority.⁴⁸

confinement as cruel and inhumane treatment, and other violations of international humanitarian law and human rights standards).

45. See, e.g., *United States v. Al-Nashiri*, 374 F. Supp. 3d 1190, 1196–99 (2018) (providing a detailed factual accounting of several reoccurring complaints, including issues surrounding detainee mail). The AE 018 series of filings in the 9/11 case also provides a history of complaints on a near-rotational basis involving JTF-GTMO personnel’s handling of detainee mail. See Defense Mot. for Gov’t to Show Cause for its Viol. of AE 018U at 5–7, 11, 20, *United States v. Mohammad*, AE018U (Mil. Comm’ns Trial Judiciary Guantánamo Bay) June 14, 2017 [hereinafter Def. Mot. AE018U].

46. Ron Ashkenas, *How to Preserve Institutional Knowledge*, HARV. BUS. REV. (Mar. 5, 2013), <https://hbr.org/2013/03/how-to-preserve-institutional> (explaining how institutional knowledge disappears and the impact of that loss on organizations).

47. See *Manual for Courts-Martial United States*, JOINT SERV. COMM. ON MIL. JUST. pt. I, ¶ 3 (2019) [hereinafter *MCM*], [http://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final%20\(20190108\).pdf?ver=2019-01-11-115724-610](http://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final%20(20190108).pdf?ver=2019-01-11-115724-610) (citing the preamble which includes a discussion of the nature and purpose of military law: “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”); see also Rachel E. VanLandingham, *Military Due Process: Less Military & More Process*, 94 TUL. L. REV. 1, 14 (2019) (stating that the *raison d’être* of the military justice system is, and always has been, disciplinary in nature).

48. According to 10 U.S.C. § 822, a convening authority in the courts-martial context is typically a military commander who convenes, or assembles, a court

1. *The Lack of Established Charging Standards*

The Guantanamo Bay Military Commissions were conceived on November 13, 2001, in response to the 9/11 attacks.⁴⁹ At its onset, the specific intent of military commissions was to facilitate the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”⁵⁰ The first finding, in what became known as Military Order No. 1 was that:

International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.⁵¹

Military Order No. 1 specifically referenced the “terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania.”⁵² Thus, there is little to no doubt that Congress intended to subject those directly involved in the 9/11 attacks to trial by military commission.

But in May 2008, when faced with a living, breathing 9/11 hijacker detained at Guantanamo Bay, a civilian convening authority

martial. *See generally* Christopher W. Behan, *Don’t Tug on Superman’s Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 191–192 (2003) (discussing the role of military commanders in the administration of military justice).

49. Michael J. Nardotti, Jr., *Military Commissions*, ARMY L. 1, 5 (Mar. 2002) (describing Military Order No. 1 and stating the authorities vested in the President, as Commander in Chief of the Armed Forces of the United States, by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107–40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code).

50. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 16, 2001) [hereinafter Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism]. Pursuant to that order, the Secretary published Military Commission Order (MCO) No. 1 on March 21, 2002, and revised it on August 31, 2005.

51. *Id.*

52. *Id.*

refused to prosecute him.⁵³ The convening authority never explained why it declined to prosecute Mohamed al Qahtanai—a would-be hijacker who was turned away at the Orlando airport just weeks before the 9/11 attacks.⁵⁴ Military prosecutors never learned about the convening authority's rationale until a 2009 interview with a member of the authority conducted by the *Washington Post*.⁵⁵ The prosecutors found out about the rationale the same way virtually everyone else did, which was indicative of the military commission system's lack of defined and consistent charging standards.⁵⁶ Well over a decade since that decision, the hijacker languished at

53. Charge Sheet at 1, *United States v. Khalid Sheikh Mohammed*, (2008), https://ccrjustice.org/sites/default/files/assets/2008-05-12%20Dismissal%20of%209_11%20Charges.pdf [hereinafter Charge Sheet]; *Organization Overview*, OFF. MIL. COMM'NS <https://www.mc.mil/ABOUTUS/OrganizationOverview.aspx#:~:text=The%20Office%20of%20the%20Convening%20Authority%20is%20responsible%20for%20the,and%20review%20records%20of%20trial> (last visited July 19, 2021) (describing the five organizations within the Department of Defense that administer military commissions and that the Convening Authority is empowered to convene military commissions, refer charges to trial, negotiate pre-trial agreements, and review records of trial. The Convening Authority also provides an accused an opportunity for clemency before taking action on the findings and sentence of all military commission cases.).

54. *Id.*

55. See Bob Woodward, *Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials*, WASH. POST (Jan. 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html> (discussing the interview with Susan Crawford, the convening authority of military commissions named in 2007, and her conclusion that the military tortured a Saudi national who allegedly planned to participate in the 9/11 attacks).

56. See Morris Davis, *Eroding the Foundations of International Humanitarian Law: the United States Post-9/11*, 46 CASE W. RES. J. INT'L L. 499, 509 (2014) (describing that the former Chief Prosecutor for military commissions stated, “[i]n the spring of 2008, Ms. Crawford dismissed the charges against Mohammed al-Qahtani. In January of 2009, you can see on January 14th in this article by Bob Woodward in the Washington Post, Ms. Crawford said she made the decision to dismiss charges because, quote, ‘We tortured [al-] Qahtani. His treatment met the legal definition of torture. And that’s why I did not refer the case’”); see also William Glaberson, *Case Against 9/11 Detainee is Dismissed*, N.Y. TIMES (May 14, 2008), <http://www.nytimes.com/2008/05/14/washington/14gitmo.html> (noting in 2008 that the dismissal of charges against al Qahtani came without explanation); Woodward, *supra* note 55.

Guantanamo Bay without even a hint of an effort to revive his prosecution.⁵⁷ The military commission system failed in its most fundamental mission of facilitating the trial of al Qaeda members involved in the terrorist attacks on September 11, 2001.⁵⁸

The story of Mohammed al-Qahtani is one of good old-fashioned investigative work, combined with poor and potentially unlawful conduct by the military.⁵⁹ But it was the mistreatment he endured at Guantanamo Bay that caused the convening authority to refuse to refer the case for prosecution.⁶⁰ In the 2009 interview with Bob Woodward of the *Washington Post*, Convening Authority, Susan Crawford, said the following:

We tortured Qahtani. His treatment met the legal definition of torture. And that's why I did not refer the case [for prosecution] The techniques they used were all authorized, but the manner in which they applied them was overly aggressive and too persistent You think of torture, you think of some horrendous physical act done to an individual. This was not any one particular act; this was just a combination of things that had a medical impact on him, that hurt his health. It was abusive and uncalled for. And coercive. Clearly coercive. It was that medical impact that pushed me over the edge [to call it torture].⁶¹

Crawford's refusal to refer Qahtani's case for prosecution on the basis that Qahtani was subject to coercive treatment and torture is notable. First, it was within her authority to refuse such a prosecution.⁶² But during the same timeframe, Crawford did allow

57. See *Al Qahtani*, OFF. MIL. COMM'NS, <https://www.mc.mil/CASES.aspx> (last visited July 19, 2021) (showing that charges against Al Qahtani were dismissed on Jan. 28, 2013).

58. See, e.g., *9/11 Commission Report*, 9/11 COMM'N 11, 248, 525 (2004), <https://www.9-11commission.gov/report/911Report.pdf> (identifying Al-Qahtani as likely the 20th hijacker).

59. *Id.*; see also Peter Jan Honigsberg, *The Consequences Today of the United States' Brutal Post-9/11 Interrogation Techniques*, 31 NOTRE DAME J.L. ETHICS & PUB. POL'Y 29, 43–45 (2017) (describing how it was after al Qahtani arrived in Guantanamo Bay that law enforcement made the connection between him and the hijackers, while also discussing the abuse he suffered by military interrogators).

60. Woodward, *supra* note 55.

61. *Id.* (adding that Crawford's tenure as Convening Authority ended in January 2010).

62. See *id.* (stating that Crawford has ultimate decision-making power over all cases coming before the military commissions).

cases involving five of Qahtani's alleged co-conspirators in the 9/11 plot to move forward for prosecution.⁶³ This included Khalid Sheikh Mohammad, who was subject to extensive use of what the CIA referred to as "enhanced interrogation techniques (EITs)," which included waterboarding.⁶⁴ The other 9/11 co-conspirators endured EITs as well.⁶⁵ Regardless, Crawford never provided public explanation for her apparent contradiction.⁶⁶ She never explained why Qahtani's treatment rendered his case not fit for prosecution while others who endured arguably harsher treatment were referred for prosecution with little public consternation.⁶⁷

The Qahtani decision is indicative of the arbitrary and inconsistent nature of the Guantanamo Bay military commissions.⁶⁸ In the federal system, the Department of Justice typically had written standards and policies for ensuring consistent charging and sentencing across the judicial districts.⁶⁹ But the military commissions have no such standards, at least publicly.⁷⁰ As such, the system allows for inconsistency among the cases.⁷¹ Moreover, the lack of transparency in the convening authority process creates confusion.⁷² As discussed, the convening authority did not officially announce her detailed rationale for prohibiting Qahtani's case to move forward, and the public first learned about her rationale nearly a year later when Crawford discussed the matter during a media interview.⁷³ This

63. Charge Sheet, *supra* note 53, at 1.

64. See STUDY OF THE CIA'S DETENTION AND INTERROGATION PROGRAM, *supra* note 3, at xi, xii.

65. *Id.* at 75–79.

66. Woodward, *supra* note 55.

67. See *id.* (describing that Crawford claimed she does not know whether five other detainees were tortured).

68. See *id.*

69. See, e.g., OFF. OF THE ATT'Y GEN., INTERIM GUIDANCE ON PROSECUTORIAL DISCRETION, CHARGING, AND SENTENCING (Jan. 29, 2021), <https://www.justice.gov/ag/page/file/1362411/download> (reinstating the guidance articulated in *Department Policy on Charging and Sentencing* (May 19, 2010)).

70. See Office of Military Commissions, *How Military Commissions Work*, available at <https://www.mc.mil/aboutus.aspx> (showing that there is no standard for military commissions).

71. See Woodward, *supra* note 55.

72. See Woodward, *supra* note 55 (after four years the prosecution was unprepared to bring cases to trial).

73. *Id.*

failure to provide an official assessment of her determination led to a lack of institutional guardrails that could have served to inform prosecutors of their charging mandates.⁷⁴ For example, if mistreatment and/or torture were a red line that could not be crossed, then the convening authority should have made a policy decision based on an established set of institutional standards.⁷⁵ Instead, the convening authority inexplicably refused to prosecute one alleged 9/11 conspirator based on mistreatment, but approved the prosecution of other conspirators despite torture and mistreatment in their cases.⁷⁶

2. *The Lack of a Proper Grand Jury or Preliminary Hearing Officer*

Considering Crawford's strange and contradictory decision, why are civilians even tasked with the role of convening authority in the first place?⁷⁷ As one author put it in describing courts martial:

"Although the system has evolved considerably over the years to its current state of statutory codification in the Uniform Code of Military Justice (UCMJ), one thing has remained constant: courts-martial in the United States military are, and always have been, ad hoc tribunals created and appointed by the order of a commander, called a convening authority, for the express purpose of considering a set of

74. See Major Dana M. Hollywood, *Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Material Support for Terrorism*, 36 HASTINGS INT'L & COMP. L. REV. 1, 4–5 (2013) (suggesting that the paucity of convictions can be attributed primarily to the lack of an existing legal precedent, among various other factors).

75. See Jonathan Hafetz, *Detention Without End?: Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing*, 61 UCLA L. REV. 326, 354–55 (2014) (proposing avenues for restructuring the detention review process so that it aligns more closely with the realities of detention in an armed conflict with terrorist organizations, including more formalized incentives for cooperation).

76. See Woodward, *supra* note 55.

77. Cf. MCM, *supra* note 47 (describing how the official purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States). To date, all military commission convening authorities have been civilians. David Glazier, *Destined for an Epic Fail: The Problematic Guantanamo Military Commissions*, 75 OHIO ST. L.J. 903, 925 (2014).

charges that the commander has referred to the court.”⁷⁸

In 2001, Congress initially intended the military commissions to continue the tradition of command prerogative in the context of exigent, battlefield scenarios with respect to enemies brought to Guantanamo Bay.⁷⁹ Apart from perhaps the President as Commander-in-Chief, civilians do not have command authority.⁸⁰ Yet, in the military commissions system, a civilian essentially serves in the roles of commander and grand jury.⁸¹ On one hand, the military commissions convening authority wields very little power as he or she has no command authority.⁸² On the other hand, the convening authority holds immense power to grant or refuse charges against an alleged war criminal.⁸³ In light of the post-9/11 statutory construct of military commissions, the reliance on a civilian convening authority for charging decisions fails to hue the system closer to standards ingrained within Article III U.S. criminal courts.⁸⁴

78. Behan, *supra* note 48, at 191.

79. See *In re Al-Nashiri*, 835 F.3d 110, 114–15 (D.C. Cir. 2016) (“[a]fter the passage of the AUMF in September 2001, the President began detaining enemy combatants and trying them by military commission at Guantanamo. The Supreme Court considered the legality of the commissions established by the President in *Hamdan v. Rumsfeld* . . . and held that they exceeded certain limits Congress had previously imposed on the President’s authority. Specifically, the Court concluded that the President’s commissions did not comply with procedural protections set out in the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions”) (citation omitted).

80. See, e.g., *United States v. Apel*, 571 U.S. 359, 367–68 (2014) (noting that when the Department of Defense establishes a base, military commanders assign a military unit to the base, and the commanding officer of the unit becomes the commander of the base).

81. Because Congress did not incorporate the court-martial requirement for a formal pretrial investigation—the equivalent of a grand jury—into military commission rules, a criminal charge can be referred to trial by a military commission through the convening authority without the grand jury-equivalent step. See Scott L. Silliman, *Prosecuting Alleged Terrorists by Military Commission: A Prudent Option*, 42 CASE W. RES. J. INT’L L. 289, 294 (2009).

82. See *Regulation for Trial by Military Commissions*, DEP’T DEF. § 2-3, <https://www.mc.mil/Portals/0/2011%20Regulation.pdf> (last visited July 17, 2021) (detailing the responsibilities and functions of the convening authority).

83. *Id.*

84. See, e.g., Larkin Kittel, *Trying Terrorists: The Case for Expanding the Jurisdiction of Military Commissions to U.S. Citizens*, 44 GEO. J. INT’L L. 783, 816 (2013) (arguing that military commissions are governed by rules designed to

If this practice existed in the federal system, a U.S. Attorney would need permission from a singular individual to indict someone for a felony instead of obtaining a true bill from a grand jury.⁸⁵

Even in courts-martials involving felony-level offenses pursuant to the UCMJ, a convening authority is typically a military general officer who refers the charges for trial.⁸⁶ This trial is where the court-martial is “convened,” and a military judge and military panel (jurors) are assigned.⁸⁷ But before a court-martial gets to that point, the proposed charges are typically sent to a preliminary hearing, colloquially known as an Article 32 hearing.⁸⁸ In an Article 32 hearing, an impartial hearing officer determines whether: (1) the specification alleges an offense; (2) there is probable cause to believe that the accused committed the offense charged; (3) the convening authority has court-martial jurisdiction over the accused and over the offense; and (4) a case should be disposed in a particular manner.⁸⁹ The Guantanamo Bay military commissions appear to have skipped the preliminary hearing step.⁹⁰ Instead, the role of impartial preliminary hearing officer is combined with the convening authority’s job description, ultimately creating something of an

address legitimate challenges raised by the exigencies of war, adding that they provide somewhat relaxed evidentiary and procedural standards to account for exigent situations which serves to protect the integrity of Article III courts).

85. Lieutenant Colonel Kyle G. Phillips, *Military Justice and the Role of the Convening Authority*, PROCEEDINGS (May 2020), <https://www.usni.org/magazines/proceedings/2020/may/military-justice-and-role-convening-authority> (last visited Aug. 1, 2021). Without a formal pretrial investigation process, additional questions are raised. For example, is the military commission convening authority a veritable hybrid between a U.S. Attorney and a grand jury? If so, that raises even further questions since the convening authority is involved in defense matters as well, including funding for experts.

86. See 10 U.S.C. § 834 (2019).

87. *Id.*

88. See 10 U.S.C. § 832 (2019).

89. *Id.* at (a)(2).

90. See Daniel H. Benson & Calvin Lewis, *Repeal of the Military Commissions Act*, 19 S. CAL. REV. L. & SOC. JUST. 265, 281 (2010) (stating that the most significant difference between court-martial cases and military commissions is UCMJ Article 32, which requires a pretrial investigation of the charges, adding that Article 32 is specifically excluded from military commissions procedures).

outlier among U.S. criminal court systems.⁹¹

C. EXPERIENCE AND LONGEVITY OF COURT OFFICERS

1. *Military Judges*

If the Department of Defense continues prosecuting alleged foreign war criminals, the military commission system will churn through judges at an unsustainable pace.⁹² Between 2012 and 2021, the Chief Trial Judge of the Guantanamo Bay military commissions assigned the 9/11 case to an astounding six military judges at various points.⁹³ That number does not count the two other judges who presided over an aborted first iteration of the 9/11 military commission case between 2008 and 2010.⁹⁴ Capital cases are difficult and wrought with appellate concerns by any measure.⁹⁵ Churning through judges only creates more room for error and confusion.⁹⁶

The quixotic search for longevity on the 9/11 bench is mired in two primary issues: first, military judges do not have lifetime appointments; and second, a limited bench of judges opens the system to less experienced judges or those who may be close to retirement.⁹⁷ Notwithstanding the separate problem of cases taking

91. *Id.* at 283–84.

92. *See, e.g.,* Pfeiffer, *supra* note 7; Carol Rosenberg, *Military Names Air Force Judge for Guantanamo Bay 9/11 Trial. But There's a Snag*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/us/politics/guantanamo-bay-trial-sept11.html> (describing the cycling of judges in one case).

93. Rosenberg, *supra* note 92.

94. On November 17, 2008, Army Colonel Steven Henley replaced Marine Colonel Ralph Kohlmann as the military judge in the first, aborted effort to prosecute the 9/11 conspirators at Guantanamo Bay. *See* Email from Ralph H. Kohlmann, Colonel, U.S. Marine Corps Chief Judge, MCTJ (Nov. 17, 2008, 10:40) [hereinafter Email from Ralph H. Kohlmann] (available at [https://www.mc.mil/Portals/0/pdfs/KSM/KSM%20\(AE088\).pdf?ver=2011-11-22-082756-000](https://www.mc.mil/Portals/0/pdfs/KSM/KSM%20(AE088).pdf?ver=2011-11-22-082756-000)).

95. *See* Pfeiffer, *supra* note 7 (describing the difficulty in winning death penalty convictions because evidence is tainted by torture and that the appeals process can last ten to fifteen years).

96. *See id.* (explaining how judges are trying to break the “legal logjam” and trying to put order to a process they inherited).

97. *See* 10 U.S.C. § 826(c)(4) (2019) (military judges are appointed for “appropriate minimum periods”); Steve Vladeck, *It's Time to Admit That the*

over a decade or more to complete, if at all, a combination of these judicial issues has caused a vicious circle for the Guantanamo Bay capital cases.⁹⁸

In comparison, federal district court judges have lifetime appointments and are chosen at random as criminal case numbers are divided out.⁹⁹ These judges are presidentially nominated and Senate-confirmed.¹⁰⁰ As such, case participants are assured from the beginning that the presiding judge of their cases will be there for the long haul.¹⁰¹ On the rare occasion that a district court judge retires, or otherwise leaves the position, the bench is deep enough with senior district court judges and other retired judges available to return to work that the next judge can take over with little problems moving forward.¹⁰² The military commissions system is set up in an almost opposite manner, despite its initial focus on the vastly complex 9/11 case.¹⁰³ Military commission judges are nominated by the Judge Advocate Generals from each of the military components.¹⁰⁴ A Chief

Military Commissions Have Failed, LAWFARE INST. (April 16, 2019, 10:40 PM), <https://www.lawfareblog.com/its-time-admit-military-commissions-have-failed>.

98. See Pfeiffer, *supra* note 7.

99. See, generally, Colonel George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Court Judge and Brigadier General (Retired) Wayne E. Alley (U.S. Army, 1952–1954, 1959–1981*, 208 MIL. L. REV. 213, 293 (2011).

100. See generally *Courts: A Brief Overview*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/courts-brief-overview.openform&nav=menu1&page=/federal/courts.nsf/page/183>.

101. District court judges often remain in their positions long enough to handle post-trial matters such as motions for reduction in sentences and compassionate release. See Walter Pavlo, *Federal Judge Rulings Across Country Inconsistent on Compassionate Release*, FORBES (June 19, 2020), <https://www.forbes.com/sites/walterpavlo/2020/06/19/federal-judge-rulings-across-country-inconsistent-on-compassionate-release/?sh=3b6fde6c4c38> (describing how the judge who released an individual from prison was the same one who initially sentenced him).

102. See also, 28 U.S.C. § 294 (further deepening the bench by generally permitting retired judges to continue to perform judicial duties).

103. See Nardotti, *supra* note 49, at 5 (“it is 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”).

104. 10 U.S.C. § 948(j); *Regulation for Trial by Military Commissions*, *supra* note 82, § 6; MANUAL FOR MILITARY COMMISSIONS III-22 (2019) (R. 503(b)).

Trial Judge is selected from that pool of military judges, whose job is to detail judges to individual cases.¹⁰⁵ Notably, military judges are required to make the military commission case their top priority, and can only preside over other cases if those other matters do not conflict with their primary duty with the military commission.¹⁰⁶ In practice, this means that military commission judges are expected to serve as a judge on one case and not preside over several like judges in other systems.¹⁰⁷ Anecdotally, it appears likely that this professional limitation serves to discourage many qualified military judges from pursuing nominations to the military commissions.¹⁰⁸

The pool of military judges is further limited by the fact that judges must come from the active duty ranks, and not from the reserve components.¹⁰⁹ In addition, military commission judges must have Top Secret security clearances, which further shrinks the pool of judges.¹¹⁰ For the limited number of judges who are available, willing, and qualified to serve as military commission judges, they also are subject to the military's mandatory retirement age of sixty-two.¹¹¹ To the extent a military judge wishes to serve beyond that age, the judge must request a waiver.¹¹² Each of these factors has

105. *Id.*

106. *Id.*

107. *Id.*

108. See also, Warren Richey, *Guantanamo Judge Refuses to Step Aside*, CHRISTIAN SCI. MONITOR (July 17, 2012), <https://www.csmonitor.com/USA/2012/0717/Guantanamo-judge-refuses-to-step-aside>. The article states that one 9/11 judge would face a twenty percent pay reduction if returned to inactive retired status, but this reflects only base pay. Military personnel on active duty also receive a substantial tax-free monthly housing allowance; in the case of a Colonel (O-6) with at least one dependent assigned to the metropolitan Washington D.C. area-where the Office of Military Commissions is located-this amounts to an additional \$3,132.00 per month lost if Pohl reverts to inactive status.

109. 10 U.S.C. § 948(j); *Regulation for Trial by Military Commissions*, *supra* note 82, § 6; MANUAL FOR MILITARY COMMISSIONS, *supra* note 104.

110. *Id.*

111. Glazier, *supra* note 77, at 926 (raising this issue for concern in 2014 that the 9/11 judge at the time was a retired officer recalled to active duty to serve on the commissions for one year at a time and that he can be returned to retired status, at a significant pay cut, on fairly short notice).

112. See DEP'T DEF., DOD INSTRUCTION 1320.08, CONTINUATION OF COMMISSIONED OFFICERS ON ACTIVE DUTY AND ON THE RESERVE ACTIVE-STATUS LIST (Jul. 7, 2017)..

proven detrimental to the military commission cases as they contributed to delays and inconsistencies.¹¹³

Take the 9/11 case for example.¹¹⁴ In 2012, Judge James Pohl, a relatively experienced military judge, was detailed to the case despite being close to his mandatory retirement age.¹¹⁵ As the case dragged on, Judge Pohl ultimately chose to retire.¹¹⁶ What ensued was a revolving door of military judges presiding over the case.¹¹⁷ Judge Pohl's successor, Colonel Keith Parrella, opted to leave the position for another military assignment about eight months later.¹¹⁸ The Chief Trial Judge then detailed himself to the 9/11 case, before turning the case over to another military judge named W. Shane Cohen.¹¹⁹ Less than two years later, in 2020, Judge Cohen opted to

113. See Glazier, *supra* note 77, at 930 (describing limitations on military judges and the resulting hardships caused to military cases).

114. *Id.* at 926 (detailing the assignment of Judge James Pohl to the case of the 9/11 defendants, despite being close to his mandatory retirement age).

115. *Id.* Despite his experience in military legal matters, Judge Pohl's tenure was rife with slow decision-making and lack of courtroom control. For example, Judge Pohl presided over the 2012 arraignment that inexplicably lasted 13 hours. The 9/11 case record, *available at* <https://www.mc.mil>, reveals that he also failed to definitively decide matters in controversy and instead allowed the issues to fester for years at a time.

116. See Memorandum from Col. James L. Pohl for Col. Keith A. Parrella, USMC, on *United States v. Mohammad*, AE001A (Aug. 27, 2018) (on file with Military Comm'ns Trial Judiciary Guantanamo Bay) [hereinafter Parrella Memorandum] (explaining that in this filing, Judge Pohl wrote the following: "On 30 September 2018, the term of my current voluntary retiree recall will expire. I have made a personal decision not to request an additional voluntary retiree recall and thus I will leave active duty after 38 years").

117. See Carol Rosenberg, *Military Judge in Trial of Sept. 11 Suspects Will Step Aside*, N.Y. TIMES (May 2, 2019), at A19, <https://www.nytimes.com/2019/05/02/us/politics/9-11-judge-guantanamo.html> (stating: "The current judge, Col. Keith A. Parrella of the Marines, took over the case a little more than eight months ago. He said he was leaving for a job supervising Marine security forces at United States embassies around the world, a possibility he had flagged when he held his first hearing in the case last September. No replacement was named for him.").

118. *Id.*

119. See Memorandum from Col. Douglas K. Watkins for Col. W. Shane Cohen, USAF, on Military Judge Detailing Order, *United States v. Mohammad*, AE001C (June 3, 2019) (on file with Military Comm'ns Trial Judiciary Guantanamo Bay) [hereinafter Cohen Memorandum] (discussing case turnover to the new military judge, W. Shane Cohen during the 9/11 trial).

retire.¹²⁰ The Chief Trial Judge (a different one from the 2018 Chief Trial Judge) detailed himself to the case, before assigning Colonel S. F. Keane to preside over the case.¹²¹ Judge Keane lasted two weeks before recusing himself due to numerous potential conflicts of interest.¹²² Shortly after Judge Keane's recusal, the Chief Trial Judge detailed Lieutenant Colonel Matthew McCall to preside over the 9/11 case.¹²³ Judge McCall's appointment lasted about five hours before case prosecutors demanded his recusal.¹²⁴ Military commission regulations require that judges must have at least two years of experience as a military judge.¹²⁵ Judge McCall—the fourth judge at that point to preside over the 9/11 case in 2020 alone—was appointed to the case despite only having about one year's experience as a military judge.¹²⁶ A few months later, the Chief Trial

120. See Memorandum from Col. W. Shane Cohen Memorandum for Chief Trial Judge, Military Commissions, on Col. Cohen Retirement, *United States v. Mohammad*, AE001E (Mar. 17, 2020) (on file with Military Comm'ns Trial Judiciary Guantanamo Bay) [hereinafter Chief Trial Judge Memorandum] (discussing retirement of Judge Cohen during the 9/11 trial).

121. See Memorandum from Col. Douglas K. Watkins for Col. Stephen F. Keane, USMC, on Military Judge Detailing Order, *United States v. Mohammad*, AE001G (Sept. 17, 2020) (on file with Military Comm'ns Trial Judiciary Guantanamo Bay) [hereinafter Keane Memorandum] (discussing case turnover to additional military judge, S.F. Keane during the 9/11 trial).

122. See Order Recusing Col. Stephen F. Keane, *United States v. Mohammad*, AE001I, 1, 4–5 (2020) (detailing recusal of Judge Keane due to conflicts of interest).

123. Memorandum from Col. Douglas K. Watkins for Lt. Col. Matthew N. McCall, USAF, on Military Judge Detailing Order, *United States v. Mohammad*, AE001C (June 3, 2019) (on file with Military Comm'ns Trial Judiciary Guantanamo Bay) [hereinafter McCall Memorandum] (describing how the 9/11 trial case would be turned over to Chief Trial Judge, Matthew McCall, following Judge Keane's recusal).

124. See Gov't Notice of Position on the Qualifications of Lt. Col. Matthew N. McCall to Serve as a Military Commission Judge, *United States v. Mohammad*, AE001L, 1, 2 (Mil. Comm'ns Trial Judiciary Guantanamo Bay Oct. 16, 2020) [hereinafter McCall Qualifications Notice] (discussing how the prosecutors requested Judge McCall's recusal within five hours of his appointment to the 9/11 trial).

125. See *Regulation for Trial by Military Commissions*, *supra* note 82, § 6-3 (describing military commission regulations, which require military judges to have at least two years of experience as military judges).

126. Lt. Col. Matthew N. McCall Biography, MILITARY COMM'NS [hereinafter McCall Biography], [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE001K\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE001K).pdf) (last

Judge again assumed the bench in the 9/11 case, and the vicious circle of judges continued into 2021.¹²⁷

The turnover and controversies surrounding military commission judges was not limited to the 9/11 case. Issues with the second judge to preside over the capital case involving the U.S.S. Cole attack caused an appellate court to overturn years' worth of rulings made by that military judge.¹²⁸ The judge, Colonel Vance Spath, had not only applied for a job with the Department of Justice to serve as an immigration judge, but failed to disclose the fact that he was seeking employment with the same government agency involved in the prosecution (the U.S.S. Cole case was composed of military and Department of Justice prosecutors).¹²⁹ As such, more than three years of litigation in that case was forced to be revisited.¹³⁰

The military commissions judicial system has proven incapable of

visited Jul. 24, 2021) (noting how Judge McCall failed to meet the minimum requirements for years of experience upon his appointment as a 9/11 trial judge).

127. See Memorandum for the Record, on MJ Detailing Col. Watkins, *United States v. Mohammad*, AE001 (Dec. 14, 2020) (on file with Military Comm'ns Trial Judiciary Guantanamo Bay) [hereinafter Watkins Detail Memorandum] (discussing the Chief Trial Judge again assuming the bench in the 9/11 case, and the vicious cycle of judges continuing into 2021).

128. See *In re Al-Nashiri*, 921 F.3d at 240 (vacating orders issued by a judge accused of judicial bias).

129. *Id.*; Debra Cassens Weiss, *DC Circuit Says Guantanamo Judge Created 'Intolerable Cloud of Partiality' and Tosses His Rulings*, A.B.A.J. (Apr. 17, 2019, 9:04 AM), <https://www.abajournal.com/web/article/dc-circuit-says-guantanamo-judge-created-intolerable-cloud-of-partiality-and-tosses-his-rulings> (noting how the U.S. Court of Appeals for the District of Columbia Circuit said that the judge presiding over Abd al-Rahim Hussein Muhammad al-Nashiri's trial created "an intolerable cloud of partiality").

130. See *In re Al-Nashiri*, 921 F.3d at 227 (vacating orders issued by a judge accused of judicial bias). See also *In re al-Tamir*, 993 F.3d 906, 909 (D.C. Cir. 2021) (describing a similar situation in another military commission case in which the court stated the following: "Judge Waits arraigned al-Tamir on June 18, 2014, during a thirty-three-minute hearing in which the DOJ prosecutor was the first attorney to speak on the record. Less than two months later, prior to any other hearings or substantive orders, Waits applied to be an immigration judge in DOJ's Executive Office of Immigration Review. In his applications for positions in eleven different cities, he stated that he was the only Navy or Marine Corps judge detailed to a military commission and identified the Hadi commission by name. Those applications remained under consideration for the entire first year of proceedings, but Waits received no interviews or offers.").

handling the rigors of capital litigation.¹³¹ It is a system created for the military but designed for civilian judges. Accordingly, a more robust system for assigning judges is crucial in avoiding the numerous self-inflicted problems over the past decade, including the creation of a pool of qualified military judges from the reserve components.

2. Attorneys

Longevity concerns in military commissions are not limited to judges. The system is not conducive to fostering institutional knowledge of lawyers and support staff.¹³² Active duty military lawyers are typically encouraged—if not explicitly required—to switch jobs every few years.¹³³ Failure to progress can be detrimental to their careers.¹³⁴ As such, the military legal system sets itself up for failure because complex cases can go on for over a decade.

The lack of inherent longevity affects cases differently in terms of military prosecutors and defense counsel.¹³⁵ On the defense side, consider as an example the case of Army Major Jason Wright.¹³⁶ He

131. See Weiss, *supra* note 129 (reporting how in the case of Al-Nashiri, the D.C. Circuit, in its opinion, asserted that the judge whose orders were vacated shared blame with others in the military commissions process).

132. See generally DEP'T OF THE ARMY, PAMPHLET 600-3: COMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT, 1, 452 (2014), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN14707_DA%20Pam%20600_3_FINAL.pdf [hereinafter ARMY PAMPHLET 600-3] (describing how officer development for the Army should effectively balance breadth and depth of experience).

133. *Id.* at 452.

134. *Id.* at 24.

135. *Guantanamo Defense Lawyer Resigns, Says U.S. Case is 'Stacked'*, NPR (Aug. 31, 2014, 5:25 PM) <https://www.npr.org/2014/08/31/344576895/guantanamo-defense-lawyer-resigns-says-u-s-case-is-stacked> [hereinafter *Guantanamo Def. Att'y Resigns*] (describing how the frequent turnover of defense attorneys disadvantages defendants and breeds mistrust).

136. See Memorandum from Col. J.P. Colwell for Cpt. Jason D. Wright, JAG, USA, on Detailing as Detailed Defense Counsel, *United States v. Mohammad*, AE012A (Apr. 20, 2012) (on file with Military Comm'ns Trial Judiciary Guantanamo Bay) [hereinafter Wright Memorandum] (detailing Jason Wright defense counsel in the trial of Khalid Sheik Mohammed); see also *Guantanamo Def. Att'y Resigns*, *supra* note 135 (documenting the circumstances that led to

was an active duty military defense counsel for Khalid Sheikh Mohammad, the alleged mastermind of the 9/11 attacks.¹³⁷ In 2014, after receiving several deferrals, the Army instructed Wright to leave the defense team to complete an Army graduate course, which was required for his promotion from the rank of captain to major.¹³⁸ Ultimately, Wright left active duty military service despite what he claimed would be a disruption to his client's case.¹³⁹ The government, for its part, dismissed the bigger picture effects to attorney-client relationships by issuing a statement contending that Wright was easily replaced.¹⁴⁰

The U.S.S. Cole case was also bogged down with defense attorney issues, with the D.C. Circuit Court of Appeals even referring to it as a “drama.”¹⁴¹ At one point, the entire civilian defense team resigned in protest to unfounded claims of government intrusion into defense affairs.¹⁴² Although the defense claims had no factual merit and

Jason Wright's resignation from the Army).

137. See Wright Memorandum, *supra* note 136 (detailing Jason Wright as defense counsel for Khalid Sheik Mohammed); *Guantánamo Def. Att'y Resigns*, *supra* note 135 (documenting the events that led to Jason Wright's resignation from the Army).

138. See *Guantánamo Def. Att'y Resigns*, *supra* note 135 (describing how Jason Wright resigned from the Army after being instructed by the Army to leave Khalid Sheik Mohammed's defense team, on which he had served for three years); see also Gabriel Urza, *Why Khalid Sheikh Mohammed's Lawyer is Leaving the Defense Team — and the Army*, SLATE.COM (Aug. 26, 2014, 5:24 PM) <https://slate.com/news-and-politics/2014/08/khalid-sheikh-mohammed-s-guantanamo-defense-lawyer-jason-wright-is-departing-the-military-in-the-face-of-an-injustice.html> (explaining why Jason Wright planned to resign from the Army).

139. *Guantánamo Def. Att'y Resigns*, *supra* note 135. Wright stated the following to NPR regarding the issue: “Here you have government [defense] attorneys who tell a defendant, ‘I’m your attorney, I’m here to help you, and I’m going to be here ‘til the end.’ And half-way through this process, the U.S. government — the same government that tortures you, the same government that’s trying to kill you, the same government that provides the public defender — now gets to control when defense attorneys come and go.”

140. *Id.* An Army spokesperson stated that “[t]he Judge Advocate General denied the second deferral request because a suitable and competent military defense attorney replacement was available, Major Wright was not the lead or sole counsel, and it ensured Major Wright remained professionally competent and competitive for promotion.”

141. *In re Al-Nashiri*, 921 F.3d at 228.

142. See *id.* at 229 (noting that the defense lawyers discovered a hidden microphone in their meeting room at Guantanamo); see also *United States v. Al-*

appeared to be an obstructive tactic, the claims ultimately succeeded in significantly delaying the proceedings.¹⁴³ At one point, the military judge—who had little to no tangible recourse in stopping civilian defense attorneys from simply quitting—opted to conduct court proceedings in the capital case with a military defense attorney who was essentially brand new to the profession.¹⁴⁴ It took the U.S.S. Cole Court nearly a year to resolve the issue.¹⁴⁵ Even the court's resolution was flawed as the military judge was forced to rely on the Secretary of Defense to “indefinitely recall” to active duty one singular defense counsel in the Navy Reserves as the primary hope to move the case forward.¹⁴⁶ The judge went so far as to note that this one defense counsel “remains the only counsel on the case with significant experience litigating before the Commission and the only military counsel who has significant national security experience as well as capital experience.”¹⁴⁷ Not only does that episode highlight the military commission's deficiency in maintaining qualified counsel, but it also demonstrates how the system's deficiencies are

Nashiri, 374 F. Supp. 3d 1190, 1226 (USCMCR 2018) (holding that the government did not intrude on defense attorney-client work communications).

143. See Savage, *supra* note 6 (while announcing an abatement to the proceedings, a frustrated military judge stated that “I will tell you right now, the reason I’m not dismissing — I debated it for hours — I am not rewarding the defense for their clear misbehavior and misconduct. But I am abating these procedures — these proceedings indefinitely until a superior court orders me to resume”).

144. See Dave Philipps, *Many Say He’s the Least Qualified Lawyer Ever to Lead a Guantanamo Case. He Agrees.*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/2018/02/16/us/politics/guantanamo-cole.html> (describing how a former Navy SEAL with just six years’ legal experience became the sole defense attorney for an accused terrorist after the wholesale resignation of the accused terrorist’s expert legal team, which was prompted by the discovery of a secret recording device in their meeting room at Guantanamo).

145. See Military Judge Ruling on the Application for Withdrawal as Detailed Defense Counsel at 2, *United States v. Al-Nashiri*, AE339R (Mil. Comm’n’s Trial Judiciary Guantanamo Bay Feb. 6, 2019), *available at* <https://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20.pdf> [hereinafter Order Den. Capt. Mizer’s Appl.].

146. *Id.*

147. *Id.* The judge openly opined about the possibility of further delaying the case by cancelling pending court sessions so long as that defense counsel’s participation was foreclosed by the failure of the Department of Defense to definitively resolve his continuing military status.

ripe for exploitation for tactical gain.¹⁴⁸

Meanwhile, the government side faces similar issues in maintaining qualified, knowledgeable trial counsel. In the U.S.S. Cole case, the lead trial attorneys have consistently turned over since 2011.¹⁴⁹ This includes civilian Department of Justice Assistant United States Attorneys who were detailed to the case, as well as military lawyers.¹⁵⁰ However, in the 9/11 case, many but not all of

148. The disrespectful behavior of some defense counsel is not new to military commissions. The lead defense counsel in the U.S.S. Cole case, for example, displayed a stuffed kangaroo at counsel table, and also donned a kangaroo lapel pin on his jacket during court sessions as an open act of defiance against the military commission system. See Lawrence Douglas, *A Kangaroo in Obama's Court*, HARPER'S (Oct. 2013), <https://harpers.org/archive/2013/10/a-kangaroo-in-obamas-court>.

149. The first detailing memorandum in October 2011 listed a Department of Justice lawyer as Trial Counsel, and a Navy Commander as Assistant Trial Counsel, along with the Chief Prosecutor's name. See Trial Counsel Detailing Memorandum, *United States v. Al-Nashiri*, AE004 (Mil. Comm'ns Trial Judiciary Guantanamo Bay) Oct. 5, 2011, [https://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20\(AE004\).pdf](https://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20(AE004).pdf) [hereinafter October 2011 Detailing Memorandum]. By February 2014, the Department of Justice lawyer was no longer on the case. See Trial Counsel Detailing Memorandum, *United States v. Al-Nashiri*, AE218 (Mil. Comm'ns Trial Judiciary Guantanamo Bay) Feb. 11, 2014, [https://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20\(AE218\).pdf](https://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20(AE218).pdf) [hereinafter February 2014 Detailing Memorandum]. In July 2014, the original Navy Commander assigned to the case left and was replaced by a Department of Defense civilian and the Deputy Chief Prosecutor. See Trial Counsel Detailing Memorandum, *United States v. Al-Nashiri*, AE312 (Mil. Comm'ns Trial Judiciary Guantanamo Bay) July 30, 2014, [https://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20\(AE312\).pdf](https://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20(AE312).pdf) [hereinafter July 2014 Detailing Memorandum]. By January 2016, the lead prosecutor was listed as another Department of Defense civilian who was new to the case. See Trial Counsel Detailing Memorandum, *United States v. Al-Nashiri*, AE338B (Mil. Comm'ns Trial Judiciary Guantanamo Bay) Jan. 13, 2016, [https://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20\(AE338B\).pdf](https://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20(AE338B).pdf) [hereinafter January 2016 Detailing Memorandum]. By February 2021, the two lead prosecutors in the case were Department of Defense civilians. See Trial Counsel Detailing Memorandum, *United States v. Al-Nashiri*, AE338K (Mil. Comm'ns Trial Judiciary Guantanamo Bay) Feb. 1, 2021, [https://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20\(AE338K\).pdf](https://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20(AE338K).pdf) [hereinafter February 2021 Detailing Memorandum].

150. It should be noted that, like military judges, Department of Justice trial attorneys who are detailed to the military commission system are expected to devote their time to just that one particular case. From a practical standpoint, this

the primary prosecutors have remained on the case while military attorneys come and go.¹⁵¹ This phenomenon is notable because each of the longstanding 9/11 prosecutors are either detailed to the case from the Department of Justice or began the case as Department of Defense civilians.¹⁵² In other words, the 9/11 military commission is being effectively prosecuted by civilian federal trial attorneys.¹⁵³ A better solution could be to fully integrate the Department of Justice into these prosecutions such that the attorneys prosecuting the cases can remain at their districts or home offices.¹⁵⁴

The hybrid nature of military commissions does not favor the judges in terms of controlling the courtroom and enforcing the rules. For example, a judge detailed to a court-martial, a court of inquiry, the United States Court of Appeals for the Armed Forces, a military Court of Criminal Appeals, a provost court, or a military commission, has the statutory authority to punish people for contempt.¹⁵⁵ But that same statute specifically excludes judges presiding over Guantanamo Bay military commissions.¹⁵⁶ As a result, lawyers have proven emboldened to openly defy court orders and conduct themselves in ways that would never be tolerated in other court systems.¹⁵⁷

Ultimately, many of the attorney and judicial issues could be fixed

system appears to discourage experienced prosecutors from volunteering and makes it very difficult to attract the most qualified attorneys for more than a few years at a time. As such, it creates the problem of institutional knowledge filtering in and out of the process.

151. See Trial Counsel Detailing Memorandum, *United States v. Khalid Sheikh Mohammad*, AE003 (Mil. Comm'ns Trial Judiciary Guantanamo Bay) Apr. 4, 2012 [hereinafter April 2012 Detailing Memorandum], [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE003\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE003).pdf).

152. Benjamin G. Davis, *The 9/11 Military Commission Motion Hearings: An Ordinary Citizen Looks at Comparative Legitimacy*, 31 S. ILL. U. L. REV. 599, 609, 622 (2013).

153. *Id.*

154. *Infra* Part IV.

155. 10 U.S.C. § 848(a)–(b).

156. 10 U.S.C. § 848(c).

157. See *Baker v. Spath*, No. 17-CV-02311-RCL, 2018 WL 3029140, at *13 (D.D.C. June 18, 2018) (holding that the military judge in the U.S.S. Cole case acted unlawfully when he unilaterally convicted the Chief Defense Counsel of criminal contempt and sentenced him for that contempt).

or otherwise rendered moot if the cases did not take so long.¹⁵⁸ But is the root problem the slow pace of cases themselves, or is it the inexperience and lack of longevity that ultimately hinders the ability to prosecute military commission cases at Guantanamo Bay? Certainly, amending the statute to provide military judges with more teeth to control their courtrooms could help mitigate some of the extracurricular shenanigans that have occurred at Guantanamo Bay.¹⁵⁹ Regardless, the military commission system appears designed for civilian personnel and not those constrained by rigid military timelines. Until the system can reconcile its personnel issues, then complex military commission prosecutions will continue to face delay and confusion.

1. *Learned Counsel*

The military commissions system differs from capital courts-martial cases in that the military commissions accused has the right to be represented by at least one defense counsel who is learned in applicable law relating to capital cases, or “learned counsel.”¹⁶⁰ As such, the military commissions are more in line with federal court practice where capital defendants are entitled to at least one defense counsel experienced in and knowledgeable about the defense of death penalty cases.¹⁶¹ While certainly admirable, the military commissions “learned counsel” requirement further serves to civilianize what is intended to be a military justice endeavor.¹⁶²

158. *Infra* Part III, Part IV.

159. *Infra* Part III, Part IV.

160. *See* 10 U.S.C. § 948b

161. As required by 18 U.S.C. § 3005, at the outset of every capital case, courts should appoint two attorneys, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Under 18 U.S.C. § 3599(a)(1), if necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in a capital case.

162. *See* John Ryan, *Pretrial of the Century: The Sept. 11 Case at Guantanamo Bay*, LAWDRAGON (Sept. 21, 2016), <https://www.lawdragon.com/2016/09/21/pretrial-century-sept-11-case-guantanamo-bay/>. (noting that a key reform in the 2009 Military Commissions Act was that all defendants facing the death penalty receive government-paid “learned counsel” with experience in capital cases, in addition to military defense lawyers. The article also noted that the lead attorneys for all five defendants in the 9/11 case

Between 2008 and 2021, only one of the five alleged 9/11 conspirators had a “learned” military defense counsel—a Navy reservist who in civilian practice served as a federal public defender.¹⁶³ The rest of the learned counsel were civilians.¹⁶⁴ Moreover, in 2013, the sole “learned” military defense counsel hung up his uniform to represent his client as a civilian.¹⁶⁵ Since then, the 9/11 defense teams were all run by civilian lawyers, with a combination of civilian and uniformed Judge Advocates and support staff to assist.¹⁶⁶ According to a document obtained by NPR, it cost the government as much as \$500,000 per year for each civilian learned counsel who was not employed by the U.S. government.¹⁶⁷ By the end of 2013, all five of the learned counsel in the 9/11 case were in private practice.¹⁶⁸ The Chief Defense Counsel for military commissions remarked in 2016 that “it makes more sense to staff the case with civilian attorneys, when possible.”¹⁶⁹

are civilian attorneys who contract with the Department of Defense).

163. *Id.*; see also John Ryan, *Lawyer Limelight – Guantanamo: Walter Ruiz*, LAWDRAGON (Nov. 25, 2017), <https://www.lawdragon.com/2017/11/25/lawyer-limelight-guantanamo-walter-ruiz/>; *Mr. al Hawsawi’s Motion for Continuance to Preserve Continuity of Learned Counsel Representation, United States v. Mohammad et al* (Mil. Comm’ns Trial Judiciary Guantanamo Bay) (AE188(MAH)), available at [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE188\(MAH\)\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE188(MAH)).pdf).

164. Ryan, *supra* note 162; Ryan, *supra* note 163; *Mr. al Hawsawi’s Motion for Continuance to Preserve Continuity of Learned Counsel Representation*, *supra* note 174.

165. Ryan, *supra* note 162; Ryan, *supra* note 163; *Mr. al Hawsawi’s Motion for Continuance to Preserve Continuity of Learned Counsel Representation*, *supra* note 174.

166. Ryan, *supra* note 162 (exemplifying the increased use of civilian learned counsel); see also Ryan, *supra* note 163 (noting that CDR Walter Ruiz was the only uniform officer in the learned counsel role); *Mr. al Hawsawi’s Motion for Continuance to Preserve Continuity of Learned Counsel Representation*, *supra* note 174 (detailing CDR Walter Ruiz as Mr. al Hawsawi’s defense counsel).

167. Pfeiffer, *supra* note 7 (noting the military court and prison at Guantánamo Bay has cost more than \$6 billion to operate since opening and costs more than \$380 million a year to maintain despite housing only 40 prisoners).

168. Before transitioning to private practice, some of those learned defense attorneys had initially joined the case as civilian federal employees on the GS pay scale.

169. Ryan, *supra* note 163 (noting that CDR Walter Ruiz was the only uniform officer in the learned counsel role).

D. INEFFICIENCIES OF A HYBRID SYSTEM

The military commission system evolved from a legal response to the 9/11 attacks into a full-fledged creature of Congress.¹⁷⁰ By 2009, the system was ineffectively pieced together with elements of the federal courts and courts-martial, leaving little left for the historic role of military commissions in American battlefield jurisprudence.¹⁷¹ The system had become akin to a legal Frankenstein.¹⁷² The system strived to be a military entity with a civilian apparatus; two dynamics that do not mesh.¹⁷³ The result was an inefficient system that conflicted with its inherent mission.¹⁷⁴

1. *Lack of Established Policies and Guidelines*

The issue of inexperience and judicial control—or lack thereof in many of the proceedings—clearly contributed to the delays and maladies plaguing the military commission system.¹⁷⁵ But a lack of

170. See David D. Cole, *Military Commissions and the Paradigm of Prevention*, in GUANTANAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVES 2 (Oren Gross & Fionnuala Ni Aolain, eds., 2013) (describing how the Military Commissions Act of 2006 did little to improve the procedural errors involved with the post-9/11 commissions); Cf. Military Commissions Act of 2009, Pub. L. No. 111–84, § 1802, 123 Stat. 2190, 2574–2612 (2009).

171. See, e.g., 10 U.S.C. § 948b(c) (2014) (noting that procedures for military commissions are based on procedures for trial by general courts-martial); see also Joshua L. Dratel, *How I Learned to Stop Worrying and Love the Military Commissions*, 41 SETON HALL L. REV. 1339, 1339 (2011) (referring to the military commissions as an invented, hybrid, ad hoc apparatus where fundamental threshold issues that are never considered in traditional court systems – such as whether defense lawyers could participate in any manner consistent with ethical obligations – arose with regularity); *Hamdan v. Rumsfeld*, 548 U.S. 557, 647–52 (2006) (explaining several “structural and composition” deviations in military commissions as compared to “conventional courts-martial standards”).

172. Joshua L. Dratel, *Military Commission Mythology*, 41 U. TOL. L. REV. 783, 799 (2010) (noting the unrealistic expectations military commissions were created to meet).

173. See e.g., *id.* at 799 (describing the military commissions as a “shipwreck” that should remain a lesson learned for the U.S.).

174. See, e.g., *id.* at 784 (listing how bureaucratic processes bog down any potential efficiencies within military commissions).

175. MANUAL FOR MILITARY COMMISSIONS, *supra* note 104 (describing the qualifications required and authority given to military judges); see also Diane Marie Amann, *A Janus Look at International Criminal Justice*, 11 NW. U. J. INT’L

established policies and standards have further exacerbated the problems.¹⁷⁶ The Office of Military Commissions has never published a clear set of discovery guidelines and policy.¹⁷⁷ As such, prosecutors are forced to internally develop their own guidance or otherwise consult with a hodgepodge of ever-evolving military regulations and Department of Justice guidelines for support.¹⁷⁸

This lack of established standards has further eroded public confidence in the military commissions while also causing delay and dysfunction.¹⁷⁹ Unlike the Department of Justice, the military commissions do not have published guidance on attorney work product filter protocols.¹⁸⁰ Consequently, the military commissions

HUM. RTS. 5, 12 n.51 (2013) (observing how the military commissions at Guantanamo Bay compares less favorably to other forums with regard both to costs and time delays).

176. Cf. Dratel, *supra* note 172, at 799 (advocating for federal criminal courts to prosecute terrorism cases considering the military commissions' "inept implementation.").

177. In 2011, the author contributed to an effort to produce internal discovery guidelines for the prosecution section of the military commissions system. That unpublished document was based on established rules, regulations, and guidelines.

178. See, e.g., U.S. Dep't. of Just., Justice Manual § 9-5.000 (2020), <https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings> (permitting government attorneys to use their discretion in disclosure practices).

179. See Brett Barnett, *History Rhymes-A Comparative Analysis of the United States' Use of Military Commissions and the United Kingdom's Use of Diplock Courts*, 2014 U. ILL. L. REV. 1911, 1938 (2014) (noting that everything of substance and importance in the military commission case of *United States v. al Qosi* was decided behind closed doors; it was a derogation below even the basest standards of what constitutes a military commission or tribunal); see also, John M. Burman, *The Ethical Duties of Prosecutors of Detainees Who Appear Before Military Commissions*, 18 TEMP. POL. & CIV. RTS. L. REV. 69, 69 (2008) (commenting that given the unique nature of military commissions and standards and procedures used to hold and interrogate detainees, prosecutors before military commissions face difficult, and sometimes insurmountable, hurdles in the prosecution of detainees).

180. See, e.g., U.S. Dep't of Just., Justice Manual, *supra* note 178 § 9-13.400(D)(4-5) (evidencing the Department of Justice's detailed policies regarding attorney work product); see also *In re Grand Jury Subpoena*, JK-15-029, 828 F.3d 1083, 1087 (9th Cir. 2016) (noting that a "taint team," sometimes called a "filter team," consists of individuals from an investigating agency and the United States Attorney's Office, who are walled off from the "prosecution team. The taint team is responsible for reviewing seized documents for potentially privileged material, and thus insuring that the prosecution team is not provided with any

system has proven inept at seamlessly resolving issues surrounding privileged information.¹⁸¹ Furthermore, by placing the defense and prosecution teams on the same Department of Defense server, military commissions leadership opened themselves up to accusations of impropriety.¹⁸² In 2013, for example, litigation over unfounded allegations that government agents were intruding on defense attorneys' privileged work product bogged down both the 9/11 and U.S.S. Cole cases.¹⁸³ The next year, defense lawyers learned that the FBI was apparently attempting to turn a non-attorney member of one of the defense teams into an informant.¹⁸⁴ That episode caused a lengthy abatement in the case and was not fully resolved until January 2017.¹⁸⁵ Without established guidelines, the

privileged material).

181. See, e.g., Christopher W. Behan, *Military Commissions and the Comundrum of Classified Evidence: A Semi-Panglossian Solution*, 37 S. ILL. U. L.J. 643, 674, 678, 678 n.211. (2013) (noting how intelligence agencies continue to exploit detainees for privileged information).

182. See, e.g., Jane Sutton, *Vanishing Files Delay Guantanamo Hearings in 9/11 Case*, REUTERS (Apr. 17, 2013, 2:52 PM), <https://www.reuters.com/article/us-usa-guantanamo-delay/vanishing-files-delay-guantanamo-hearings-in-9-11-case-idUSBRE93G0YT20130417> (detailing the server failure as "near-catastrophic"); see also Arun Ruth, *Guantanamo Commissions Paralyzed by Data Breach*, FRONTLINE (April 13, 2013), <https://www.pbs.org/wgbh/frontline/article/guantanamo-commissions-paralyzed-by-data-breach> (reporting that the defense had access to the prosecution's files and that the prosecution had access to the defense's files); Ben Fox, *Guantanamo Lawyers Plead to Put 9/11 Case on Hold*, AP (Sept. 20, 2013), <https://apnews.com/article/81957ed5c84f489298ce98cd5b61f3c8> (detailing how the defense attorneys asked the judge to place the case on hold because of the data breach).

183. Ruth, *supra* note 182 (detailing the Department of Defense's server lack of network security).

184. Emergency Joint Defense Mot. to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused at 6–7, *United States v. Mohammad*, AE292 (Military Comm'ns Trial Judiciary Guantánamo Bay) [hereinafter Emergency Joint Defense Mot.], [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE292\(KSM%20et%20al\)\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE292(KSM%20et%20al)).pdf) [hereinafter Emergency Joint Defense Mot.]; see also Tom Ramstack, *Lawyers for 9/11 Suspects Seek Hearing into FBI Spying Allegations*, REUTERS (June 16, 2014, 6:20 AM) <https://www.reuters.com/article/us-usa-guantanamo-idUSKBN0ER10820140616>.

185. Military Judge Ruling Mr. al Baluchi's Motion to Compel Discovery of Information From Special Review Team at 3, *United States v. Mohammad*, AE 292YYYYY (Mil. Comm'ns Trial Judiciary Guantánamo Bay) Jan. 12 2017,

military judge was ill-equipped to promptly address these issues.¹⁸⁶ Military prosecutors were compelled to request a civilian filter team from the U.S. Attorney's Office for the District of Columbia.¹⁸⁷

2. *Graymail Turned on its Head*

Congress established the post-9/11 military commissions system at Guantanamo Bay, in part, to balance the need to protect national security information with the desire to prosecute foreign terrorists.¹⁸⁸ However, that premise has at times been turned on its head where military commission prosecutions have been held hostage by national security issues.¹⁸⁹ In essence, the old concept of “graymail”—long exorcised from federal courts—lives on at Guantanamo Bay.¹⁹⁰

[https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE292YYYYY\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE292YYYYY).pdf) [hereinafter Mr. al Baluchi's Mot. to Compel].

186. See, e.g., Military Judge Ruling Mr. al Baluchi's Mot. to Compel Discovery of in the Alternative to Abate and Dismiss at 4, *United States v. Mohammad*, AE 425T (KSM, AAA) (Mil. Comm'ns Trial Judiciary Guantanamo Bay) Jan. 19, 2017, [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE425T\(KSM%20AA A\)\(RULING\)\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE425T(KSM%20AA A)(RULING)).pdf) [hereinafter Mr. al Baluchi's Mot. to Compel Granted in Part] (recognizing information sought after is discoverable and relevant after original Motion to Compel was denied).

187. See Baker, 2018 WL 3029140, at *13.

188. Brenner-Beck, *supra* note 44, at 720 (exemplifying the numerous legal challenges arising out of JTF-GTMO).

189. For example, the 9/11 case in its AE013 series litigated about twenty-six filings just on the protective order alone between 2012 and 2017. The military judge most recently issued a supplement to the protective order in February 2017. See Suppl. to 3d Am. Protective Order #1 – To Protect Against Disclosure of Nat'l Security Info. at 3, *United States v. Mohammad*, AE 013BBBB (Mil. Comm'ns Trial Judiciary Guantanamo Bay) Feb. 21, 2017, [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE013BBBB\(Sup\)\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013BBBB(Sup)).pdf) [hereinafter Supplement to Third Amended Protective Order] (adding additional protections against disclosing classified information under the Protective Order).

190. Arjun Chandran, *The Classified Information Procedures Act in the Age of Terrorism: Remodeling CIPA in an Offense-Specific Manner*, 64 DUKE L.J. 1411, 1415 (2015) (describing graymail as occurring when a potential criminal defendant threatens to expose sensitive classified information if he is prosecuted, thus creating a “disclose or dismiss” dilemma whereby “[t]he Government . . . must choose between going forward with the prosecution, thereby compromising the classified material, or safeguarding the material but dropping the prosecution.” Graymail therefore creates an irreconcilable conflict between the government's dual obligations to safeguard national-security secrets and prosecute violators of federal law).

Prior to 1980, criminal defendants who threatened to expose classified information employed graymail tactics if they were going to be prosecuted.¹⁹¹ These tactics created a “disclose or dismiss” dilemma where the government was forced to “choose between going forward with the prosecution, thereby compromising the classified material, or safeguarding the material but dropping the prosecution.”¹⁹² In essence, graymail created an irreconcilable conflict between the government’s dual obligations to safeguard national security secrets and prosecute violators of federal law.¹⁹³

Congress sought to remedy this problem with the 1980 passage of the Classified Information Procedures Act (CIPA).¹⁹⁴ That statute became the foundation for classified criminal litigation and sets the balancing point between the government’s interest in preventing disclosure of classified information with a criminal defendant’s right to exculpatory material.¹⁹⁵ Military rules of evidence in both courts-martial and military commissions have largely adopted CIPA.¹⁹⁶ Despite CIPA and its military equivalent, the 9/11 and U.S.S. Cole cases have been mired in classified litigation issues for nearly over a decade.¹⁹⁷ The first protective order governing classified information in the 9/11 case was not granted until about eight months after an

191. *Id.* at 1415.

192. *Id.*; see also S. REP. NO. 96-823, at 3 (1980), as reprinted in 1980 U.S.C.C.A.N. 4294, 4297 (detailing the “disclose or dismiss” dilemma); 125 CONG. REC. H18092 (daily ed. July 11, 1979) (statement of Rep. Murphy) [hereinafter *House Hearings*]; *Graymail Legislation: S. 1482: Hearings Before the S. Comm. on the Judiciary*, 96th Cong., 2d Sess. 13 (1980) (statement of Philip B. Heymann, Assistant Attorney General, Criminal Justice Division) [hereinafter *Senate Hearings*]; *Prosecuting Law of War Violations: Reforming the Military Commissions Act of 2006: Hearing Before the H. Comm. on Armed Servs.*, 111 Cong. 5 (2009) (statement of Vice Admiral Bruce E. MacDonald, the Judge Advocate General, U.S. Navy) [hereinafter *Prosecution Hearing*].

193. *House Hearings*, *supra* note 192.

194. *Id.*; see also Classified Information Procedures Act (CIPA), Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app., §§ 1-16 (2020)) [hereinafter *Classified Information Procedures Act*].

195. Classified Information Procedures Act, 18 U.S.C. §§ 1-16, *supra* note 194.

196. See MIL. COMM’N R. EVID. 505; MIL. R. EVID. 505.

197. See Letter from the N.Y.C. Bar to Hon. Mitch McConnell, Majority Leader, S., and Hon. Nancy Pelosi, Speaker, H.R. (May 21, 2020) (requesting to change Guantanamo Bay military commissions to Article III courts because of the long case processing times and high expenses).

order was first requested.¹⁹⁸ Two weeks after the protective order was issued, defense counsel asked the military judge to reconsider.¹⁹⁹ Years of litigation followed.²⁰⁰ Eight years after a protective order was first requested, prosecutors still contended that defense counsel was attempting to graymail the government by attempting an end run around the prohibition on disclosing classified information to unauthorized persons.²⁰¹

This revitalized version of graymail not only caused significant delay, but it also threatened to completely shut down the proceedings.²⁰² In 2016, the government faced the dilemma between protecting classified material and continuing with the prosecution.²⁰³ Department of Defense officials had learned that defense teams accessed classified computer systems and downloaded gigabytes of data without authorization.²⁰⁴ If the government attempted to prosecute members of the defense teams, or otherwise put the defense teams' Top Secret security clearances under administrative scrutiny, the military commission cases would cease altogether.²⁰⁵

198. See *United States v. Mohammad*, No. 3:15-cr-358, 2017 WL 2568834, at *1 (N.D. Ohio June 13, 2017).

199. *Id.* at *1.

200. *Id.*

201. See, e.g., GOV'T RESP. TO MOT. TO COMPEL DISC. IN A FORM RELEASABLE TO MR. MOHAMMAD at 13–14, *United States v. Mohammad*, AE 783A (GOV) (Mil. Comm'ns Trial Judiciary Guantanamo Bay) Mar. 26, 2020, [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE783A\(Gov\)\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE783A(Gov)).pdf) [hereinafter GOV'T RESP. TO MOT.] (requesting the disclosure of classified information).

202. GOV'T MOT. BY SPECIAL TRIAL COUNSEL FOR ORDER REQUIRING DEFENSE REMEDIATION OF MATERIAL OBTAINED OUTSIDE OF THE DISC. PROCESS at 2, *United States v. Mohammad*, AE 460A (GOV STC), (Mil. Comm'ns Trial Judiciary Guantanamo Bay) Nov. 9, 2016, [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE460A\(Gov%20STC\)\)_Part1.pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE460A(Gov%20STC))_Part1.pdf) [hereinafter GOV'T MOT. BY SPECIAL TRIAL COUNSEL (DEF. REMEDIATION)] (noting that the Defense requested to dismiss *United States v. Mohammad* in light of the government's graymail actions).

203. *Id.* at 2 (stating the government's legal obligation to protect classified information).

204. *Id.* at 1 (requesting the Defense destroy classified information obtained outside the scope of discovery).

205. Military commissions personnel, including defense counsel, are required to possess TS/SCI clearances. If their access to classified information was suspended, the lawyers would be unable to defend their clients. To the extent "learned

Ultimately, the government adopted a course of action where a special trial counsel was appointed to ask the defense teams to destroy any material that they obtained without authorization. When they did not consent, the government asked the respective military commission judges to order the defense to do so.²⁰⁶ Although some defense teams admitted on the record to obtaining the information without authorization, they claimed that they were nonetheless entitled to it pursuant to the *Brady v. Maryland* standard requiring that the government must produce all evidence that might be material to guilt or punishment.²⁰⁷ That episode constituted a reverse-CIPA scenario—something that would be virtually unthinkable in federal court—where defense attorneys were tacitly permitted to make their own classified discovery determinations without government input and direct judicial oversight.²⁰⁸ With military judges reticent to get involved and openly fearing cessation of the proceedings, the military commissions found themselves victims of their own *raison d’etre*.²⁰⁹

counsel” faced criminal charges or a suspension of their security clearances, then the defendants would effectively be no longer represented and the cases would be halted. Here’s how the U.S.S. Cole judge described the prospect of pursuing criminal avenues:

“We all know what’s going to happen. Law enforcement is going to show up on their doorstep, seize their electronics and seize their computers and their phones and make life more uncomfortable for them.” Unofficial/Unauthenticated Transcript, Al Nashiri Motions Hearing at 8061, 8079, *United States v. Al-Nashiri*, 374 F. Supp. 3d 1190 (2018), [https://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(\(TRANS7Mar2017-AM1\).pdf](https://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20((TRANS7Mar2017-AM1).pdf) [hereinafter Al Nashiri Transcript].

206. GOV’T MOT. BY SPECIAL TRIAL COUNSEL (DEF. REMEDIATION), *supra* note 202, at 2.

207. Learned counsel for 9/11 defendant Khalid Sheikh Mohammad, for instance, discussed “all of the browsing and all of the downloading and everything that occurred.” Al Nashiri Transcript, *supra* note 205, at 8089.

208. GOV’T MOT. BY SPECIAL TRIAL COUNSEL (DEF. REMEDIATION), *supra* note 202, at 2.

209. AM. C.L. UNION, <https://www.aclu.org/other/911-family-members-challenge-legitimacy-guantanamo-military-commissions> (last visited Sept. 1, 2021) (describing military commissions as incapable “achieving the justice that 9/11 family members and all Americans deserve”).

3. Capital Punishment

Prosecuting complex war crimes cases at Guantanamo Bay creates numerous challenges in terms of cost, logistics, and hashing through the multitude of inefficiencies within the military commission system.²¹⁰ But with capital litigation thrown into the mix, the 9/11 and U.S.S. Cole cases have stagnated for at least a decade.²¹¹ Some have concluded that removing the death penalty from the equation is the only way to save those cases and the military commissions themselves.²¹² One former convening authority attempted to do just that. In 2019, then-Convening Authority Harvey Rishikof began preliminary settlement negotiations with the 9/11 and U.S.S. Cole defense teams.²¹³ The deal essentially would have been guilty pleas

210. See, e.g., David Kris, *Comparing the Criminal Justice and Military Detention Systems*, in NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS § 24:19 (2019) (describing significant advantages in how capital cases are handled in federal court as compared to a military commission).

211. See, e.g., Carol Rosenberg, *The 9/11 Trial: Why Is It Taking So Long?*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/us/politics/911-trial-guantanamo.html> (describing the complexities of prosecuting a capital case in Guantanamo Bay).

212. See *Connell v. U.S.S. Command*, No. 18-1813 (RDM), 2020 WL 6287467, at *1 (D.D.C. Oct. 27, 2020) (defense counsel for alleged 9/11 conspirator Ali Abdul Aziz Ali sought information from U.S. Southern Command pursuant to the Freedom of Information Act regarding efforts by former military commissions Convening Authority Harvey Rishikof to accept a plea from the alleged 9/11 conspirators); see also Stevie Moreno Haire, *No Way Out: The Current Military Commissions Mess at Guantanamo*, 50 SETON HALL L. REV. 855, 878 (2020) (noting that Rishikof had been considering plea agreements for the 9/11 case, was not referring all of the charges in another pending case, and had made a number of other judicial or quasi-judicial decisions with which his superiors in the Department of Defense disagreed); G. Alex Sinha, *The Cynical Success of the Guantánamo Bay Military Commissions*, 34 NOTRE DAME J.L., ETHICS & PUB. POL'Y 1, 34 (2020) (Rishikof's plea deal carried the potential to resolve the 9/11 case at long last, but would have required prosecutors to accept a penalty for the defendants less severe than death); Charlie Savage, *Fired Pentagon Official Was Exploring Plea Deals for 9/11 Suspects at Guantánamo*, N.Y. TIMES (Feb. 10, 2018), <https://www.nytimes.com/2018/02/10/us/politics/guantanamo-sept-11-rishikof.html> ("Pentagon official who oversaw military commission trials at Guantanamo Bay was exploring potential plea deals . . . that would foreclose the possibility of execution").

213. As convening authority, Rishikof did have the authority to remove capital punishment on his own accord, with or without a negotiated deal. *Regulation for Trial by Military Commissions*, *supra* note 82, § 2–3 (convening authority has the

in exchange for life in prison rather than capital punishment.²¹⁴ The rationale was that a quick and unceremonious conclusion to these cases “would’ve brought closure to the victims’ family members, which was our primary concern, and it would have potentially brought some closure to the wound that Guantanamo is to U.S. national security.”²¹⁵ Rishikof also took time and expense into his calculus, as well as the possibility that any capital conviction was doomed to be overturned anyway.²¹⁶ Regardless, it soon became apparent that Rishikof’s efforts were doomed to fail.²¹⁷ He was fired by the Secretary of Defense shortly after making these overtures.²¹⁸ Although Rishikof failed to remove capital punishment, his logic was sound.²¹⁹ Issues surrounding “learned counsel” would be moot, including for instances involving efforts to withdraw from respective cases and prospects for administrative or criminal accountability for malfeasance.²²⁰ The appellate trajectory would be less dramatic.²²¹

Moreover, capital punishment only serves to highlight the issue of torture and CIA detention.²²² Mistreatment is always relevant for mitigation purposes at sentencing.²²³ But in a capital case at Guantanamo Bay, it becomes exceptionally contested as prosecutors

power to remove capital punishment).

214. Pfeiffer, *supra* note 7 (noting that guilty pleas would eliminate resources waste).

215. Savage, *supra* note 212 (“Guilty pleas would offer a way out of a complex case that has been mired in years of pretrial hearings and is certain to face many more years of appeals if it ever gets to trial and results in convictions.”); Pfeiffer, *supra* note 7 (expressing the emotional need to close cases and bring closures to the families of the 9/11 victims).

216. Pfeiffer, *supra* note 7 (implying the increasing waste of resources if military commissions were to continue pursuing the death penalty).

217. See, e.g., Savage, *supra* note 212 (“[S]triking such a deal would mean giving up on winning death sentences against defendants accused of aiding the murder of nearly 3,000 people”).

218. Pfeiffer, *supra* note 7 (“[F]ormer head of the military court were fired because they were negotiating a controversial cost-saving proposal with defense lawyers”).

219. *Id.*

220. See, e.g., Ryan, *supra* note 162.

221. See *id.*

222. Brenner-Beck, *supra* note 44, at 745.

223. MANUAL FOR MILITARY COMMISSIONS, *supra* note 104, at II-130–II-131, II-133 (R. 1001).

attempt to convince a large panel of military officers that the crime so severely outweighs the torture that death is appropriate.²²⁴ In contrast, defense counsels will argue in graphic detail how the United States' mistreatment and torture of detainees effectively disqualifies capital punishment.²²⁵ No matter what, the government will find itself on trial just as much as the defendants.²²⁶

Furthermore, unlike federal courts where capital punishment may be imposed by a unanimous jury of twelve people, the 9/11 case is likely to require the unanimous verdict of a much larger jury (or "panel" as it is known in the military justice system).²²⁷ Military commissions are not limited to twelve panel members like the jurors in the federal criminal system.²²⁸ Instead, the military commissions require that all panel members who have been called be seated unless they are struck for some valid reason during the *voir dire* process.²²⁹ So, if twenty-one panel members are called, and none are struck, then all twenty-one people must vote for the death penalty to be imposed.²³⁰ As such, the defense prevails if it can convince just one of those twenty-one people that torture outweighs the crime.²³¹

This quirk in the military commissions system ultimately creates a math problem for the 9/11 case. Each of the five defendants are entitled to a peremptory challenge to remove a member from the panel.²³² The prosecution is only entitled to one peremptory

224. *Id.*; see also Rosenberg, *supra* note 211 (explaining how the "lawyers argue that the prisoners had been conditioned by the C.I.A. to tell the interrogators what they wanted to hear").

225. MANUAL FOR MILITARY COMMISSIONS, *supra* note 104, at II-130–II-131, II-133 (R. 1001); Rosenberg, *supra* note 211.

226. Rosenberg, *supra* note 211 (stating that the military judge's job is "balancing what the government contends are the national security secrets of the case against the right of the men to a fair trial"); see also Carol Rosenberg, *The Legacy of America's Post-9/11 Turn to Torture*, N.Y. TIMES (Sept. 12, 2021) (noting that defense lawyers have effectively managed to put the C.I.A. on trial in the 9/11 case).

227. See MANUAL FOR MILITARY COMMISSIONS, *supra* note 104, at II-135 (R. 1004).

228. *Id.*

229. *Id.* at II-107, II-108 (R. 912).

230. *Id.* at II-125 (R. 921).

231. *Id.* at II-135 (R. 1004).

232. *Id.* at II-107, II-110 (R. 912).

challenge.²³³ Therefore, if twelve panel members are seated and the five defense teams strike five people through their respective peremptory challenges, then there could never be a quorum.²³⁴ Consequently, the minimum number of panel members that can be seated is seventeen.²³⁵ To boost their odds of winning, the defense teams may decide not to move to strike any of the members.²³⁶ As a result, the 9/11 capital case is already at a disadvantage before it even begins.²³⁷

Since 1950, the military has not proven to be a reliable forum for pursuing capital punishment.²³⁸ Less than one-third of known capital courts-martials resulted in death sentences.²³⁹ In those cases where a servicemember was sentenced to death, capital punishment was overturned on appeal by a seven-to-two margin.²⁴⁰ Typically, those death sentences are replaced with life sentences instead.²⁴¹ Based on these facts, it seems vastly optimistic to believe that a capital verdict emanating from the untested military commission system will result in an execution. At some point, government officials need to take stock of the situation and decide whether continued pursuit of capital punishment in the 9/11 and U.S.S. Cole cases is worth the time,

233. *Id.* at II-110 (R. 912).

234. *Id.* at II-22, II-74, II-75 (R. 501, R. 805); *see also id.* at R.805(d) (“[w]hen the military commission has been reduced below a quorum, a mistrial may be appropriate”).

235. *Id.*

236. *See* Robert W.M. Best, *Peremptory Challenges in Military Criminal Justice Practice: It Is Time to Challenge Them Off*, 183 MIL. L. REV. 1, 4, 6, 49 (2005) (discussing that various judges in the military justice system believe the peremptory challenge should be eliminated).

237. *Id.* at 4 (explaining how by “being able to select the members *ab initio*, the convening authority has already shaped the composition of the panel, and very likely, the outcome of the trial”).

238. *See generally* Dwight H. Sullivan, *Killing Tim: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 2–3 (2006) (July 30, 2019), <https://www.armytimes.com/news/your-army/2019/07/30/what-death-row-executions-may-mean-for-these-four-soldiers-at-leavenworth> (discussing the high reversal rate of capital punishment sentencing in the military justice system).

239. *See Military Facts and Figures*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/military/facts-and-figures> (last visited Sept. 3, 2021) (assessing the current death penalty system adopted in January 1984).

240. *Id.* (analyzing data on military death penalty cases from 2009).

241. *Id.*

hassle, and uncertainty.²⁴² A legitimate argument can be made that the continued decision to pursue the death penalty is a matter of principle.²⁴³ However, using the state of military commissions as evidence, blind devotion to that principle is proving to be a detriment to the underlying goal of seeking justice for the victims and their families.²⁴⁴

4. *Lack of Urgency*

In 2009, the Military Commissions Act was revised from its 2006 iteration to better align the system more closely with various Supreme Court rulings and legal norms.²⁴⁵ At that time, about 240 detainees were held at Guantanamo Bay.²⁴⁶ Despite this size, [prosecutors?] only swore out a handful of new charges.²⁴⁷ In fact, between 2009 and 2021, only eight detainees were charged with war crimes, not counting the 9/11 and U.S.S. Cole cases that began in 2008 before being canceled in 2009 and revived in 2011.²⁴⁸ That

242. See Thomas Michael McDonnell, *The Death Penalty: An Obstacle to the War against Terrorism*, 37 Vand. J. Transnat'l L. 353, 357, 368–69 (2004) (explaining how the argument “generally advanced in favor of the death penalty” is rooted in the “retribution theory”).

243. See *id.* (depicting a clear debate on whether or not to use capital punishment for those responsible for the September 11th attacks).

244. See Valerie Lucznikowska, *Our Family Members Died on 9/11. We Want to See Guantanamo Bay Closed*, NATION (June 21, 2021), <https://www.thenation.com/article/world/close-guantanamo-bay-2> (arguing that keeping Guantanamo Bay open ensures that victim family members of September 11th never get justice because of ineffective legal precedents).

245. See Jennifer K. Elsea, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, CONG. RSCH. SERV. 1, 1–3 (2014) [hereinafter MCA OVERVIEW] (adding that the bill was somewhat aligned with the Obama Administration’s proposed goals).

246. See Arun Rath, *Trump Inherits Guantanamo’s Remaining Detainees*, NPR (Jan. 19, 2017), <https://www.npr.org/2017/01/19/510448989/trump-inherits-guantanamos-remaining-detainees> (discussing the problems associated with Guantanamo’s remaining detainees).

247. See *The Guantánamo Docket*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html#charged> (last updated Sept. 1, 2021) (analyzing the charges of the Guantanamo Bay’s detainees).

248. *Id.*; see Carol Rosenberg, *About the 9/11 War Crimes Trial*, MIAMI HERALD (Nov. 5, 2013), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1928877.html> (last updated Feb. 21,

“progress” amounted to less than one charge per year.²⁴⁹

Between 2009 and 2010, military prosecutors were effectively prohibited from charging most new cases.²⁵⁰ In early 2009, the newly-elected President Barack Obama issued an executive order designed to end Guantanamo Bay detention operations.²⁵¹ That order prompted a review of each detainee’s case.²⁵² The Guantanamo Review Task Force Final Report revealed in January 2010 that of the 240 Guantanamo Bay detainees, thirty-six were subject for prosecution.²⁵³ It would take another twenty-eight months before the court would hold the arraignment in the 9/11 case.²⁵⁴ Charges against the three alleged conspirators of the 2002 Marriott Hotel bombing in Bali did not emerge until 2021, nearly eleven years after the Guantanamo Task Force report was issued.²⁵⁵

As of late 2021, the prosecution never charged the remaining detainees approved by the task force for prosecution.²⁵⁶ Despite

2019) (assessing the capital murder charges against five detainees who are alleged conspirators in the September 11th attacks); *See USS Cole Bombing Fast Facts*, CNN (Apr. 1, 2021), <https://www.cnn.com/2013/09/18/world/meast/uss-cole-bombing-fast-facts/index.html>.

249. *The Guantánamo Docket*, *supra* note 247.

250. David J.R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash over Detainees and the Closure of Guantánamo*, 74 U. PITT. L. REV. 179, 192 (2012) (assessing the subsequent result of an Executive Order signed by President Obama on January 22, 2009).

251. *Id.*; *see also* GUANTANAMO REVIEW TASK FORCE, FINAL REPORT, at i (Jan. 22, 2010), <https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf>; Exec. Order No. 13,493, 74 Fed. Reg. 4901, 4901 (Jan. 27, 2009).

252. Frakt, *supra* note 250, at 192. (explaining how review of Guantanamo Bay was to be conducted by the Guantanamo Review Task Force); GUANTANAMO REVIEW TASK FORCE, *supra* note 251, at i.

253. Frakt, *supra* note 250, at 200 (adding that Obama’s Executive Order also suspended military commissions); GUANTANAMO REVIEW TASK FORCE, *supra* note 251, at ii.

254. *See* KSM Transcript, *supra* note 1, at 1.

255. *See* Arraignment Order at 1, *U.S. v. Nurjaman*, AE 0002.001 (Jan. 26, 2021).

256. In 2014, some prosecutions were likely mooted after Material Support for Terrorism offenses that occurred prior to the 2006 Military Commissions Act were deemed to be in violation of the *ex post facto* clause. *See Al Bahlul v. United States*, 767 F.3d 1, 30 (D.C. Cir. 2014). However, that decision does not explain

approval by the task force, military commission prosecutors did not attempt to refile charges against Mohamad al-Qahtani, who was believed to be the true 20th hijacker in the 9/11 attacks.²⁵⁷ Nor did prosecutors attempt to charge Saifullah Paracha, a lawful permanent resident of the United States whose son was convicted in federal court for his related role supporting al Qaeda.²⁵⁸

Detention pursuant to the Law of War is certainly permissible.²⁵⁹

other charging decisions, including the extensive gap in time for prosecuting the Bali Marriott Hotel bombing conspirators. Other detainees, for example, could have been charged with different offenses such as spying and accessory after the fact. *See, e.g.,* Thomas Joscelyn, "Make a Schwarma Sandwich" Out of His Interrogator, WASH. EXAMINER (Aug. 17, 2009), <https://www.washingtonexaminer.com/weekly-standard/make-a-schwarma-sandwich-out-of-his-interrogator> (describing how one detainee served as a body guard for Usama bin Laden and later accompanied a fellow al Qaeda operative on a reconnaissance mission at a flying club in the UAE).

257. According to one author, the Chief Prosecutor for military commissions apparently revised the list of detainees that he planned to prosecute in order to focus on those who have committed traditional law of war offenses, as opposed to terrorism offenses. David J.R. Frakt, *Applying International Fair Trial Standards to the Military Commissions of Guantanamo*, 37 S. ILL. U. L.J. 551, 590 (2013). However, that logic may not apply to al Qahtani who, as a part of the 9/11 conspiracy, could conceivably be charged with similar crimes as the others alleged conspirators in that case.

258. *See, e.g.,* Michael J. Lebowitz, *A Question of Allegiance: Choosing between Dueling Versions of Aiding the Enemy During War Crimes Prosecution*, 67 A.F. L. REV. 131, 146 (2011) (noting that if the detainee is a lawful permanent resident or holds himself out as a resident alien based on the stated belief that his "green card" is still valid, then the government could conceivably prosecute him under the military commission version of aiding the enemy).

259. The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." *Ex parte Quirin*, 317 U.S. 1, 11–12 (1942). The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. Yasmin Naqvi, *Doubtful prisoner-of-war status*, 84 INT'L REV. RED CROSS 571, 572 (2002). ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war'" (quoting decision of Nuremberg Military Tribunal, reprinted in 41 AM. J. INT'L L. 172, 229 (1947))); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 788 (2d ed. 1920) ("The time has long passed when 'no quarter' was the rule on the battlefield It is now recognized that 'Captivity is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.' . . . 'A prisoner of war is no convict; his imprisonment is a simple war measure'" (citations omitted)); *cf. In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946)

But Guantanamo Bay detainees are not arrested like their federal court counterparts.²⁶⁰ The detainees are not subject to initial appearance requirements, which typically serve as the beginning of the countdown toward indictment or speedy trial attachment, depending on the circumstances.²⁶¹ But sometimes there is a fine line between what is legally permissible and what is right.²⁶² The Bali bombing occurred in 2002 and the alleged conspirators were brought to Guantanamo Bay in 2006.²⁶³ Failing to bring charges against them until 2021 is emblematic of a deeper issue with the military commission system itself. To the extent military commissions are revived in the future, a greater sense of urgency in prosecuting cases is an important lesson.

E. LOGISTICAL INADEQUACIES

1. Travel

Prosecuting cases at Guantanamo Bay has proven to be something of a logistical nightmare.²⁶⁴ A *New York Times* editorial aptly referred to Guantanamo prosecutions as a “traveling circus.”²⁶⁵

(“The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released” (footnotes omitted)).

260. Spencer Ackerman, *Only Three of 116 Guantanamo Detainees Were Captured by US Forces*, GUARDIAN (Aug. 25, 2015), <https://www.theguardian.com/us-news/2015/aug/25/guantanamo-detainees-captured-pakistan-afghanistan> (stating that “only three of the 116 men still detained at Guantanamo Bay were apprehended by US forces”).

261. See FED. R. CRIM. P. 5.

262. *Id.*

263. Carol Rosenberg, *Pentagon Prosecutors Seek Trial of 3 Guantánamo Prisoners for Indonesia Bombings*, N.Y. TIMES (Apr. 10, 2019), <https://www.nytimes.com/2019/04/10/us/politics/pentagon-guantanamo-indonesia-bombings.html> (discussing the renewed interest of Pentagon prosecutors to charge the prisoners involved with the nightclub bombings in Bali).

264. Aisha I. Saad & Zoe A.Y. Weinberg, Opinion, *Remember Guantánamo?*, N.Y. TIMES (Mar. 16, 2018), at A27, <https://www.nytimes.com/2018/03/15/opinion/guantanamo-detainees.html> (arguing that the tent city of Guantanamo Bay is an “embarrassing chapter in American history”).

265. *Id.* (explaining how the complexity of getting to Guantanamo comprises a “traveling circus”).

Travelling to the isolated Navy outpost is a unique endeavor as well.²⁶⁶ The trek requires weekly flights to and from the United States because there is no mechanism for regular telephonic communications between detainees and their lawyers.²⁶⁷ In addition, although the military commission system does have mechanisms for facilitating video testimony, an established process for conducting regular attorney-client meetings and full-fledged hearings by video has not come to fruition.²⁶⁸ Accordingly, air travel is the only recourse.²⁶⁹

Court hearings are typically scheduled in weekly blocks.²⁷⁰ Just prior to those hearings, the entire military commission system essentially packs itself up and crams into a chartered airplane together.²⁷¹ This “traveling circus” includes the judge, defense counsel, prosecutors, support staff, interpreters, court staff, journalists, contractors, law enforcement, legal observers, witnesses, and victim family members who are invited to watch the

266. *Id.* (detailing the journalists travels to Guantanamo).

267. See Glazier, *supra* note 77, at 930 (“[g]iven the serious inconveniences involved with travel to and from Guantanamo, for example, defense attorneys realistically need the ability to communicate remotely with their clients between court sessions. But, JTF rules forbid telephonic communication, and the task force commander decreed in 2011 that attorney-client mail would be read, rather than merely inspected for contraband”); see also Mil. Judge Order on Joint Defense Mot. For Telephonic Access for Effective Assistance of Counsel at 9–10, *United States v. Mohammad*, AE 183L (Mil. Comm’ns Trial Judiciary Guantanamo Bay) (May 9, 2017) [hereinafter Order on Phoning Counsel].

268. Glazier, *supra* note at 77, at 940–41; Carol Rosenberg, *9/11 Prisoners May Get Video Chats to Bridge the Coronavirus Divide*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/02/us/politics/guantanamo-september-11-coronavirus.html> (explaining how video-conferencing has presently been used by the commissions).

269. Carol Rosenberg, *The Cost of Running Guantánamo Bay: \$13 Million Per Prisoner*, N.Y. TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/us/politics/guantanamo-bay-cost-prison.html> (noting that in 2018 there was a total of 52 commercial flights between Joint Base Andres, Washington D.C., and Guantanamo).

270. See Pfeiffer, *supra* note 7 (outlining the overall challenges of commuting to Guantanamo).

271. Pfeiffer, *supra* note 7; Blake Hulnick, *Out of Sight, Out of Mind in Guantanamo Bay*, 104 GEO. L.J. ONLINE 133, 134–35 (2015) (explaining how commissions schedule their hearings in weeklong increments).

proceedings.²⁷²

The cost for each flight is about \$185,000 roundtrip.²⁷³ On occasions where no court proceedings are taking place, the weekly charter flights still must take place due to the need to permit consistent, in-person attorney-client communications.²⁷⁴ Despite the fact that many flights only carry a small handful of passengers on a Boeing 737 when no court hearings are taking place, the \$185,000 cost remains the same.²⁷⁵

The travel costs can be significantly reduced if the Department of Defense can establish a secure mechanism for defense counsel to speak telephonically with their clients.²⁷⁶ Most jails and prisons housing state and federal inmates provide these resources.²⁷⁷ But at Guantanamo Bay, government officials fear that defendants will reveal information deemed classified over unsecured telephone lines.²⁷⁸ Still, defense personnel have access to top-secret facilities, and could conceivably make arrangements to speak to their clients on a limited basis via secure telephones.²⁷⁹ Such a move would save an

272. Pfeiffer, *supra* note 7 (discussing how the cost of travel to Guantanamo greatly outnumbers the actual number of people that are on the plane).

273. Pfeiffer, *supra* note 7 (describing one instance when a flight down to Guantanamo only had two passengers on the plane); Rosenberg, *supra* note 269.

274. Pfeiffer, *supra* note 7.

275. *Id.*

276. See Abigail Beckman, *Investigative Report Alleges 'Human Rights Abuses' At Colorado's Supermax Prison*, COLORADO PUBLIC RADIO (June 27, 2019), <https://www.cpr.org/2019/06/27/investigative-report-alleges-human-rights-abuses-at-colorados-supermax-prison> (describing the stark restrictions prisoners are subjected to for using phones, such as being limited to a singular phone call per month).

277. Even the most stringent special administrative measures (SAMS) at the Bureau of Prisons-run Supermax facility in Colorado allows inmates a limited number of phone calls with their lawyers, albeit under tight restrictions. *See id.*

278. *See id.*

279. See Cora Currier, *Gitmo Defense Lawyers Say Someone Has Been Accessing Their Emails*, PROPUBLICA (Apr. 11, 2013, 11:12 AM), <https://www.propublica.org/article/gitmo-defense-lawyers-say-somebody-has-been-accessing-their-emails> (describing the strict controls on attorney/detainee communication by commissions); See Courtney Kube & Robert Windrem, *Judge Says Guantanamo Case Must Go On Though Defense Lawyers Have Quit*, NBC NEWS (Nov. 2, 2017, 5:23 PM), <https://www.nbcnews.com/news/crime-courts/judge-says-guantanamo-case-must-go-though-defense-lawyers-have-n816841>.

inordinate amount of time and money and contribute to more efficient attorney-client relationships.²⁸⁰

3. *Costs*

It costs the U.S. government about \$13 million to house each detainee at Guantanamo Bay.²⁸¹ That number is a sharp contrast to the roughly \$78,000 per inmate cost at Colorado's Supermax facility.²⁸² Even Rudolph Hess, perhaps one of the highest-profile, long-term Nazi war crimes prisoners, cost an estimated \$1.5 million in today's dollars to be housed at Germany's Spandau Prison.²⁸³

The total cost for the entire endeavor—from paying the guards to operating the military commissions—is roughly \$540 million per year.²⁸⁴ The 9/11 case in particular is something of a costly logistical nightmare due to the sheer number of personnel necessary to conduct

280. See Letta Tayler, *Attorney-Client Privilege? Not at Gitmo*, HUM. RTS. WATCH (June 28, 2013), <https://www.hrw.org/news/2013/06/28/attorney-client-privilege-not-gitmo> (explaining how the rules controlling attorney-client communication need to be examined, but that there is a genuine concern for safety at Guantanamo); See Peter Finn, *At Guantanamo, Microphones Hidden in Attorney-Client Meeting Rooms*, WASH. POST (Feb. 12, 2013), https://www.washingtonpost.com/world/national-security/2013/02/12/812c7662-7552-11e2-95e4-6148e45d7adb_story.html (discussing how it is known that the government monitors attorney-client communication on Guantanamo with hidden microphones); Hope Metcalf & Judith Resnick, *Gideon at Guantanamo: Democratic and Despotic Detention*, 122 YALE L.J. 2504, 2538–40 (2013) (discussing how courts enter protective orders that lawyers often need to accede to which impose significant limitations on counsel); James A. Cohen, *Lawyering in a Vacuum*, 41 SETON HALL L. REV. 1427, 1443–44 (2011) (describing that Guantanamo Bay makes client-centered attorney-client communication very difficult for attorneys to accomplish because of time and cost of travel).

281. Rosenberg, *supra* note 269 (discussing the per-prisoner cost of running Guantánamo Bay).

282. *Id.* (contrasting the cost of operating Guantánamo Bay with the per-inmate cost at Colorado's supermax facility).

283. *Id.* (stating the cost of incarcerating Rudolph Hess, a notable Nazi war criminal).

284. *Id.* (describing how in one instance, the Navy shipped a portable M.R.I. machine to Guantánamo Bay to scan the brains and bodies of detainees awaiting death penalty trials, by order of a military judge, who granted a request by a defense team to do the tests and hire experts to look for damage done by torture. But because there was no on-site technologist to run it, an off-island contractor had to shuttle to the base to service).

a full-fledged trial.²⁸⁵ The Defense Logistics Agency entered into an \$11.6 million contract with a Las Vegas company to produce more than 150 prefabricated, single occupancy housing structures specifically for the trial.²⁸⁶ In addition, the government began plans to install a village of 375-square foot houses on an obsolete airfield near the court compound just for the 9/11 lawyers and support staff.²⁸⁷ In discussing a January 2021 trial date that came and went, one 9/11 military judge acknowledged that the trial “will face a host of administrative and logistical challenges.”²⁸⁸

4. Filing System

The Office of Military Commissions should consider entering into a contract to improve its electronic filing capability. The Guantanamo Bay military commission employs an inefficient filing system that is rife with confusion.²⁸⁹ For example, the Military Commissions Trial Judiciary Rules of Court requires the parties to file unclassified pleadings by email.²⁹⁰ But before filing the document, a party must first send an email to a clerk’s list server in order to ask for an Appellate Exhibit (AE) number.²⁹¹ The AE number in military practice effectively serves as a docket number in

285. See Pfeiffer, *supra* note 7 (explaining the exorbitant cost associated with the trial); Rosenberg, *supra* note 269.

286. Rosenberg, *supra* note 269 (stating the cost of the single occupancy housing structures prepared for trial).

287. *Id.* (discussing plans to build a professional village for housing governmental lawyers and staff).

288. Associated Press, *Trial in 9/11 Case at Guantanamo Gets Early 2021 Start Date*, ABC NEWS (Aug. 30, 2019, 4:37 PM), <https://abcnews.go.com/Politics/wireStory/trial-911-case-guantanamo-early-2021-start-date-65298516>. [hereinafter *Early 2021 Start Date*] (quoting a military judge’s apprehension regarding the trial).

289. *Dropped Charges, Overturned Convictions, and Delayed Trials in Guantánamo Military Commissions*, HUM. RTS. FIRST (Feb. 16, 2018), <https://www.humanrightsfirst.org/resource/dropped-charges-overturned-convictions-and-delayed-trials-guantanamo-military-commissions> [hereinafter *Gitmo Comm’ns Charges/Trials*] (describing the dysfunction of the Guantánamo military commissions system).

290. OFFICE OF MILITARY COMMISSIONS, MILITARY COMMISSIONS TRIAL JUDICIARY RULES OF COURT 18 (2016) (Rule 3.10.d.2.b.).

291. *Id.* at 17 (Rule 3.10.b.).

the federal system.²⁹² The email to the clerk list server must also include another list server for the Office of Court Administration.²⁹³ The email itself is required to list what type of filing the party is seeking to make (e.g. motion, reply, response), and provide a description of the filing.²⁹⁴ The party sending the email risks rejection if the email does not sufficiently meet the criteria.²⁹⁵

If approved, the Chief Clerk of military commissions then provides an AE number to the party.²⁹⁶ From there, the party has two days to file the proposed pleading using the assigned AE number.²⁹⁷ Upon filing the proposed pleading, the rules require very specific subject lines and formats; otherwise, the party risks rejection of the filing.²⁹⁸ And if, for whatever reason, the pleading is not filed within two days, then the Chief Clerk will recall the AE number and the party will be required to go through the process again.²⁹⁹ Once a party is granted an AE number and is ready to file a pleading, the party must specifically include the email addresses of all recipients.³⁰⁰ Due to the constantly changing landscape of military and civilian personnel shuffling through the system, it is likely that some individuals who legitimately should be served with a pleading will not receive it.³⁰¹ The result is that the parties must constantly update who the intended recipients will be. This email-based filing system also makes it difficult to know who exactly is receiving pleadings.³⁰²

The haphazard email filing system also exposes vastly more

292. *Id.* at 17 (Rule 3.10.b.3).

293. *Id.* at 17 (Rule 3.10.b).

294. *Id.*

295. *Id.* at 18 (Rule 3.10.d.1).

296. *Id.* at 17 (Rule 3.10.b.1).

297. *Id.* at 17 (Rule 3.10.b.2).

298. *Id.* at 12 (Rule 3.7a).

299. *Id.* at 12 (Rule 3.10.b.2).

300. *Id.* at 3 (Rule 2.3b).

301. *See id.* at 4 (Rule 2.4) (suggesting frequent personnel changes).

302. Oyin Falana & Ricky Zipp, "Mystery Motion" Clouds First Day of Latest Court Hearing For Accused 9/11 Mastermind, MEDILL NEWS SERV. (Dec. 5, 2017), <https://dc.medill.northwestern.edu/blog/2017/12/05/mystery-motion-clouds-first-day-latest-court-hearing-accused-9-11-mastermind/#sthash.UkLMd8IL.R1DbEEf.dpbs>.

people to potential classified information spills.³⁰³ For example, in 2017, defense counsel in the 9/11 case attempted to file a document that contained classified information.³⁰⁴ Instead of submitting that document onto a secure (albeit unclassified) electronic platform, the defense team emailed the classified document as part of the filing process.³⁰⁵ This meant that potentially hundreds of individuals—some who probably no longer were involved in the case—were inadvertently involved in the spill.³⁰⁶ The spill affected the court system and any device where the email was sent, including laptops, desktop computers, and mobile phones.³⁰⁷ The result was a significant remediation problem to scrub the classified data from each individual device that could be identified.³⁰⁸

The military commission email-based system for filing pleading stands in stark contrast to the electronic filing system used by federal courts.³⁰⁹ There, the parties use a system known as Case Management/Electronic Case Files (CM/ECF) to file and receive pleadings.³¹⁰ An attorney who is party to a case signs onto CM/ECF

303. See, e.g., John Ryan, *Classified Spills Cost Military Commission \$100K Per Year, Add to Lawyer Fatigue*, LAWDRAGON (Feb. 6, 2018), <https://www.lawdragon.com/news-features/2018-02-06-classified-spills-cost-military-commissions-100k-add-lawyer-fatigue>; see also Falana & Zipp, *supra* note 302.

304. Ryan, *supra* note 303; Falana & Zipp, *supra* note 302; see also Gov't Notice of Obj. to the Service of AE 532 Matters on the Special Trial Counsel at 1, *United States v. Mohammad*, AE 532D(GOV) Mil. Comm'ns Trial Judiciary Guantanamo Bay, Cuba (2017) [hereinafter Gov't Obj.] (describing how the AE 532 motion series dealt solely with a notice regarding a referral to the Department of Defense Consolidated Adjudications Facility (DoD CAF) by the Washington Headquarters Services security function, based on a classified information spill in one of the recent Defense filings).

305. Ryan, *supra* note 303.

306. Falana & Zipp, *supra* note 302.

307. Ryan, *supra* note 303.

308. *Id.*

309. Compare Electronic Filing (CM/ECF), U.S. CTS., <https://www.uscourts.gov/court-records/electronic-filing-cmecf>.

310. See *id.* (The federal judiciary states the following: Case Management/Electronic Case Files (CM/ECF) is the federal Judiciary's system that allows case documents, such as pleadings, motions, and petitions, to be filed with the court online. CM/ECF is most often used by attorneys in cases, U.S. Trustees, and bankruptcy trustees).

and files a notice of appearance.³¹¹ Depending on the settings entered, that attorney will then have the ability to file pleadings in that case, and be electronically notified whenever something is filed.³¹²

In CM/ECF, the filing process also is streamlined.³¹³ Parties simply log on and click through various tabs depending on the type of pleading they intend to file.³¹⁴ The system allows for modifications for pleadings that may be atypical.³¹⁵ Such pleadings can also be linked to other documents already in the system, which is important for filings such as responses, replies and supplements.³¹⁶ Once a pleading is filed, the system immediately establishes a docket number, which is the federal equivalent to the military's AE numbers.³¹⁷ The filings are then listed on PACER.³¹⁸

III. PRIMER FOR CLOSING GUANTANAMO BAY

In 2021, President Biden inherited about forty detainees at Guantanamo Bay.³¹⁹ This includes the five 9/11 defendants and the one U.S.S. Cole defendant who have been mired in decade-long

311. *FAQs: Case Management/Electronic Case Files (CM/ECF)*, [hereinafter *CM/ECF FAQs*] U.S. CTS., <https://www.uscourts.gov/court-records/electronic-filing-cmecf/faqs-case-management-electronic-case-files-cmecf>; *Appearance of Counsel*, U.S. CTS. (2009), <https://www.uscourts.gov/forms/attorney-forms/appearance-counsel>. Rule 49(d) of the Federal Rules of Criminal Procedure authorize individual courts by local rule to permit or require papers to be filed by electronic means. Most courts that offer electronic filing have issued an authorizing local rule; most have supplemented the local rule with a general order and/or procedures that set forth the relevant procedures governing electronic filing in that court. Individual court rules and procedures are generally available on their Web sites. *See* FED. R. CRIM. P. 49(d).

312. *CM/ECF FAQs*, *supra* note 311.

313. *Id.*

314. *Id.*

315. *Electronic Filing (CM/ECF)*, *supra* note 309.

316. *CM/ECF FAQs*, *supra* note 311.

317. *Id.*

318. According to the federal judiciary, the Public Access to Court Electronic Records (PACER) service provides electronic public access to federal court records. *See What is PACER?*, PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, U.S. CTS., <https://pacer.uscourts.gov>.

319. *The Guantánamo Docket*, *supra* note 259.

military commission proceedings.³²⁰ But apart from the ten total detainees who faced military commission charges in 2021, and the two military commission convicts, there are about twenty-seven detainees that continue to linger.³²¹ With the conclusion of Operation Enduring Freedom in Afghanistan, detention operations will likely need to wind down.³²² Common sense dictates that the best way to shutter the detention facility is to clear out these detainees or otherwise resolve as many criminal cases as possible. Like gravity, when the number of detainees dwindles to a certain threshold, cost analysis and math will do the rest in creating momentum for finally shutting down JTF-GTMO operations.³²³

The first step in achieving this metaphorical escape velocity is to remove capital punishment from the 9/11 and U.S.S. Cole cases. As former convening authority Harvey Rishikof deduced, eliminating the death penalty will likely lead to guilty pleas for up to six detainees.³²⁴ Removing the 9/11 and U.S.S. Cole cases from the equation would represent a monumental shift away from justifying further use for JTF-GTMO's existence.³²⁵

The second step requires leaders and policymakers to target the "low-hanging fruit," meaning, transfer all detainees who can be prosecuted in the United States. Of course, doing this requires either an act of Congress or some creative funding.³²⁶ Since 2010, Congress

320. *Id.*

321. *Id.*

322. See Rebecca Kheel, *Biden's move on Afghanistan raises Guantanamo questions*, THE HILL (Apr. 25, 2021, 7:30 AM), <https://thehill.com/policy/defense/550047-bidens-move-on-afghanistan-raises-guantanamo-questions> (discussing how the culmination of Operation Enduring Freedom impacts operations at Guantánamo Bay).

323. Rosenberg, *supra* note 269.

324. See Sinha, *supra* note 212, at 34 (discussing the likelihood of resolving cases in exchange for penalties less severe than death).

325. Charlie Savage, *Fired Pentagon Official Was Exploring Plea Deals for 9/11 Suspects at Guantánamo*, N.Y. TIMES (Feb. 10, 2018), <https://www.nytimes.com/2018/02/10/us/politics/guantanamo-sept-11-rishikof.html>; Dino Hazell et al., *In Step to Shut Guantanamo, Biden Transfers Moroccan Home*, AP (July 19, 2021), <https://apnews.com/article/guantanamo-detainee-transfer-biden-826566e2787963ad499ccdd016efb2da> (discussing the Biden administration's options for shutting down Guantánamo Bay).

326. Ken Gude, *Congress Must Adopt Changes to the Guantanamo Provisions*

has consistently barred the use of any Department of Defense funding to transfer Guantanamo Bay detainees to the United States.³²⁷ Absent Congressional support, the Department of Justice should expend its own funds to unilaterally transfer certain detainees to the United States for trial.³²⁸ Overall, approximately thirteen detainees could face federal charges for materially supporting al Qaeda, among other offenses.³²⁹ If such transfers could be funded and take place, combined with pleas in the 9/11 and U.S.S. Cole cases, the disposition of twenty-one out of forty detainees will have been resolved in some meaningful way.³³⁰

Notably, transferring the proposed thirteen detainees to the United States for trial has its own legal problems. Specifically, the eight-year statute of limitations has likely long expired in most of these cases.³³¹ But an argument can be made that the statute of limitations had tolled based, in part, on the statutory prohibition against bringing Guantanamo Bay detainees to the United States.³³² Moreover, as law

of the 2016 National Defense Authorization Act, CTR. FOR AM. PROGRESS (Nov. 3, 2015, 3:57 PM),

<https://www.americanprogress.org/issues/security/news/2015/11/03/124908/congress-must-adopt-changes-to-the-guantanamo-provisions-of-the-2016-national-defense-authorization-act> (discussing advocates' push to pressure Congress to lift transfer restrictions on Guantánamo detainees).

327. See David Herszenhorn, *Senate Passes Military Bill That Bans Transfers of Guantánamo Detainees*, N.Y. TIMES (Nov. 10, 2015), <https://www.nytimes.com/2015/11/11/us/politics/senate-passes-military-bill-that-bars-transfers-of-guantanamo-detainees.html> (discussing congressional measures to ban the transfer of Guantánamo Bay detainees).

328. Such a transfer would be relatively costly to the Department of Justice budget, but overall, the taxpayer savings to the government writ large would be immense.

329. *The Guantánamo Docket*, *supra* note 247. A potential first wave of test cases in this endeavor could involve Guantanamo Bay detainees Saifullah Paracha and Mohamad al Qahtani based on the quality and type of evidence against them.

330. *The Guantánamo Docket*, *supra* note 247. A similar funding scheme could be employed to transfer to the United States those former detainees who are convicted at Guantanamo Bay, including current convicts Ali al-Bahlul and Majid Khan.

331. See *id.* (listing detainees' date of arrival at Guantánamo Bay); CHARLES DOYLE, CONG. RSCH. SERV., R41333, TERRORIST MATERIAL SUPPORT: A SKETCH OF 18 U.S.C. §2339A AND §2339B 4, 7–8 (2016) (stating that an eight year statute of limitations period applies).

332. There have been several cases where the principle of equitable tolling was

of war detainees, another argument can be made that the statute of limitations clock did not even begin until the detainees' classification changed.³³³ Accordingly, federal prosecutors have a legal basis for pursuing cases against several Guantanamo Bay detainees.³³⁴

Under this scenario, prosecutors can seek either indictments or criminal complaints against certain detainees.³³⁵ If approved, judges will issue arrest warrants.³³⁶ From there, law enforcement will have the impetus to use Justice Department funding to travel to Guantanamo Bay, arrest detainees, and transfer them to the United States for their initial appearances in front of federal magistrate judges.³³⁷

This proposed course of action would eliminate about half of the Guantanamo Bay detainee population.³³⁸ The resulting momentum would certainly increase diplomatic avenues for resolving the cases of additional detainees.³³⁹ The end result would be the natural wind down and cessation of JTF-GTMO operations.

applied. *See, e.g., Young v. United States*, 535 U.S. 43, 50 (2002) (applying the principle of equitable tolling); *United States v. Grady*, 544 F.2d 598, 601 (2d Cir. 1976) (applying the principle of equitable tolling); *United States v. Friedman*, 649 F.2d 199 (3d Cir. 1981) (applying the principle of equitable tolling); *United States v. Midgley*, 142 F.3d 173 (3d Cir. 1998) (applying the principle of equitable tolling).

333. *See* CHARLES DOYLE, CONG. RSCH. SERV., RL31253, STATUTE OF LIMITATIONS IN FEDERAL CRIMINAL CASES: AN OVERVIEW 1, 2 (2017) (stating that crimes associated with terrorism may be prosecuted at any time under certain conditions).

334. *See id.*

335. Frakt, *supra* note 250, at 219–20.

336. MICHAEL JOHN GARCIA ET AL., CONG. RSCH. SERV., R40139, CLOSING THE GUANTANAMO DETENTION CENTER: LEGAL ISSUES 1, 22, 58 (2013).

337. Because Guantanamo Bay does not fall under the jurisdiction of a federal district, the arresting officers can take the former detainees to whatever federal district issued the arrest warrant. *See* FED. R. CRIM. P. 5(a)(1)(B) (explaining that a person making an arrest outside of the United States is required to bring the defendant before a magistrate judge).

338. *The Guantánamo Docket*, *supra* note 247.

339. *See* Melissa Quinn, *Biden Administration Announces First Transfer of Detainee out of Guantanamo Bay*, CBS NEWS (July 19, 2021, 8:46 AM), <https://www.cbsnews.com/news/biden-administration-abdul-latif-nasir-guantanamo-bay> (discussing the repatriation of a Guantánamo Bay detainee and accompanying diplomatic pressure to facilitate the repatriation of remaining eligible detainees).

The alternative to winding down JTF-GTMO operations is more of the same. As of late 2021, the Guantanamo Bay military commissions continued to lumber on without firm trial dates or clarity on its future.³⁴⁰ In fact, the same problems that plagued the Guantanamo Bay cases in 2009 continue to afflict the military commissions system more than a decade later. This includes recurring litigation coinciding with frequent rotations of the guard force, turnover among counsel and judicial officers, and overly complex logistics. Even in November 2021, prosecutors were still accusing defense teams of engaging in graymail.³⁴¹

Absent enacting wholesale changes to ongoing cases midstream in order to rectify the ingrained problems, the government should address existing Guantanamo Bay detainees through mitigation efforts such as removing the death penalty and otherwise reducing the detainee population down to the bare minimum. Without taking action to end JTF-GTMO operations, nothing within the military commission records indicate that the system will improve.

IV. CONCLUSION

Regardless of what ultimately happens with military commissions in the future, the lessons from this episode in American legal history should be understood at both the big picture and the granular level. While hosting the military commissions at Guantanamo Bay represents perhaps the primary impediment to swift, efficient, and fair justice, many of the systematic inefficiencies in conducting court proceedings are rooted in individual policies and procedures. The result is endless litigation and a failure to achieve the intended goals of the current legal solutions to our fight against al Qaeda and associated forces. In essence, the military commissions have devolved into a veritable zombie legal system where it lumbers on without direction or a clear mandate. The best solution is to put this iteration of military commissions out of its misery.

340. See Ken Dilanian, 20 years after 9/11, mastermind Khalid Sheikh Mohammed still awaits trial. What went wrong?, NBC NEWS (September 7, 2021).

341. See Carol Rosenberg, Accused 9/11 Mastermind Seeks Access to Secret Testimony, N.Y. TIMES (Nov. 17, 2021), <https://www.nytimes.com/2021/11/17/us/politics/khalid-shaikh-mohammed.html>.