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Guantanamo Military Commissions: Reflections from a Legal Observer – Part 1

By Dawinder Sidhu

Oxford Human Rights Hub Blog

There is perhaps no more controversial space in the world than the U.S. Naval Station at Guantanamo Bay, Cuba. For many, Guantanamo represents the very worst of the American prosecution of its post-9/11 conflict: executive overreach, detainee abuse and neglect, and modest judicial oversight.



Should the 9/11 defendants be tried in federal court?
Professor Sidhu explores this key question in a three-part post.

Part 1: September 12, 2013

In the purported balance between liberty and security, Guantanamo has come to symbolize the triumph of a rule of necessity over the rule of law. Guantanamo's problematic existence is compounded by its perpetual existence. At present, it indefinitely houses 166 detainees and is the venue for two ongoing military [commissions](#). In a three-part post, I will reflect on my experience as a legal observer of one of these commissions.

Before discussing the commissions, it may be useful to share impressions that may not have come to mind had I not visited Guantanamo, which—as a professor and volunteer advocate—I used to equate or associate with its detention facilities and courtrooms. Indeed, these defining features are the most salient in my academic and legal work in the national security context. It is thus tempting to forget that there is another, quite ordinary, side to the expansive military base, which is, in many respects, quite typical. To facilitate transitions from base-to-base or home-to-base for those assigned, Guantanamo is designed to look and feel familiar; it has, for example, a Starbucks, McDonalds, Subway, Pizza Hut, Wal-mart type commissary, gym, outdoor movie theatre, and three small beaches. To accommodate the resident staff and families, Guantanamo has single-family homes, apartments, and schools for children.

These 'common' features create an odd disconnect—at times a surreal juxtaposition—between Guantanamo's special significance, troubling characteristics and wartime amenities, on one hand, and the seemingly mundane landscape that could be Main Street in Anytown, USA, on the other.

As these aspects of the base are overlooked so too, sadly, are an important community: the victims' families. Along with legal observers, members of the media and the victims' families are invited to attend the military commissions at the base. During my visit, it was clear that, for them, the emotions of losing loved ones in the terrorist events are still very raw and fresh. While lawyers and advocates tend to focus on formal doctrine, technical rules, and applicable standards, this underlying human dimension cannot be forgotten; as such, I cannot comment on Guantanamo without acknowledging them.

With this important context established, I will address the commissions generally and the commissions I attended: the military proceedings against Abd al Rahim al-Nashiri, the alleged mastermind of the 2000 USS Cole bombings. During these proceedings, a number of pre-trial motions were cramped into just a few days. The hearings concerned, for example, whether and if so when Mr. al-Nashiri can—consistent with the Confrontation Clause—be excluded from portions of his trial for national security reasons; whether Mr. al-Nashiri could be charged with “terrorism” under the laws of war; whether there was any audio monitoring of privileged attorney-client communications during Mr. al-Nashiri's meetings with his defence team, as microphones were found in the smoke detectors in the client meeting rooms; and what may be done about the thousands of private defence emails that were made available to the prosecution in an apparent IT error.

It was evident to me that, as the lawyers on both sides argued the merits of these specific motions, in the process they were also offering meta-arguments on the validity of the commissions themselves. This is perhaps best exemplified by a defence motion objecting to the fact that they were no longer permitted to bring spiral notebooks with them to client meetings. This motion, while seemingly trivial, seemed to be a proxy for the defence's broader and more substantial point that the rules of the road were shifting and were being made on an ad hoc basis. The prosecution, of course, offered its own counter-narrative throughout the week: that military commissions are well-established institutions that have been activated, throughout American history, by presidents in times of war; and that these commissions are advantageous, if not necessary, as their special rules are tailored for wartime realities.

These themes emerged in the lawyers' presentations before the commission, and seemed to be the primary messages of their separate, informal meetings with the legal observers. My own observations of the proceedings and conversations with the legal teams support my initial view that Mr. al-Nashiri and the 9/11 defendants should be tried in federal court—a perspective that will be further explored in the following post.

Part 2: September 24, 2013

As noted in [Part I](#) of this three-part post, Guantanamo, a military base typically associated with its detention facilities and courtrooms to the exclusion of its other features, is a quite ordinary and expansive place. In the previous post, I also expressed the view, reaffirmed by my observations of [military commissions](#) and conversations with the prosecution and defence teams, that the alleged mastermind of the USS Cole bombing and the 9/11 defendants should be tried in federal court. My remaining comments will support this conclusion.

For starters, federal courts have more reliable, predictable, and well-established rules. In federal court, the two cases ([USS Cole](#) and [9/11](#)) would be randomly assigned to two separate judges, whereas at Guantanamo the two commissions are presided over by a single judge. In federal court, consistency of the rules therefore would be promoted by the ability of two judges to apply set rules to their cases; consistency in the commissions arises not necessarily because the rules are known in advance, but because one judge is applying, and arguably making up on the fly, rules for multiple cases. The United States should show the world that it can obtain convictions under ordinary rules, without the aid of the commissions' more flexible standards.

While the two cases are inherently complex, federal court proceedings present efficiencies in that judges, court staff, lawyers, and witnesses need not travel to Cuba for hearings held weeks and even months apart. In federal court, those hearings could be held more regularly, and would eliminate the need for any Guantanamo-specific [server issues](#) that led to the disclosure of defence emails to the prosecution.

Accordingly, even if it is true that [commissions](#) have been used in other wartime contexts, this does not mean, as a normative matter, that they should be used. The executive's discretion in selecting the commissions as the appropriate forum for these cases comes at the cost of efficiency, credibility, and technological problems that undermine the concept of fairness that lies at the heart of any legitimate legal system. Guantanamo has diminished, and continues to deplete, America's soft power and moral standing around the globe. The commissions' skewed rules and irregular system contribute to this situation. In short, federal courts would be the better form of justice.

Following the Supreme Court's opinion in [Hamdan v. Rumsfeld](#), Neal Katyal, the lead attorney for post-9/11 detainee Salim Hamdan, [said](#), 'if we're going to win the war on terror, ... we're going to win it through saying to the world that we actually have a better model than you because in your countries you settle these things through force and fiat, and here we settle them through law.' The United States cannot credibly make this statement or hold itself out to the world as an 'Empire of Liberty' if it continues to insist upon using a military model when a more procedurally sound civilian model is available.

In my next and final post in this series, I will address some of the key counterarguments to the use of federal courts to try these defendants.

Part 3: September 30, 2013

In my last post, I laid out reasons why Guantanamo detainees currently before [military commissions](#) should be tried in federal court. Of course, some counter arguments to this position must be addressed.

First, some may contend that federal prosecutors and judges lack the necessary expertise to appropriately handle terrorism cases. This is simply not true. As Jess Bravin's compelling book on post-9/11 national security litigation, [Terror Courts](#), notes, federal prosecution teams have secured convictions in civilian court against members of al-Qaeda prior to 9/11, and, armed with their familiarity of the subject matter and relevant players, were eager to take on the post-9/11 terrorism cases as well. In other words, [terrorists](#), including members of the al-Qaeda group responsible for 9/11, have been successfully prosecuted by federal attorneys in federal courts under traditional rules.

Second, the federal system is capable of detaining high-profile individuals. Federal prisons have held many dangerous men, including Timothy McVeigh and Dzhokhar Tsarnaev. Suspected 9/11 terrorists, such as Yaser Hamdi and Jose Padilla, already have [been held domestically](#). The seal, as it were, has been broken, without giving rise to any of the speculative, exaggerated harms.

Third, some claim that trying or holding detainees in the United States would give satisfaction or comfort to our enemy. To this it may be answered that Guantanamo itself likely serves a terrorist [recruitment function](#) far more powerful and harmful than

any amorphous psychological victory in transferring or trying the detainees stateside. To the extent there is discomfort in having these detainees in Manhattan, they could be tried elsewhere.

Moreover, it is not as though domestic detention facilities would be comfortable for the detainees. In fact, American prisons can be quite harsh for many reasons. Recently, the conditions in the California and New Mexico prison systems, for example, have been found to be [unconstitutional](#), even with the generous deference that is given to prison administrators. This reflects the unfortunate state of confinement for inmates in the American penal system.

Fifth, and finally, the failure to bring detainees from Guantanamo to the territorial United States for trial and detention is not a reflection of the merits of such a move, but is a product of a lack of political will to make it happen. Without public support, our leaders do not have the traditional popular predicate to proceed. But, even if this decision is not politically viable, the issue is of such domestic and international importance that our leaders should take decisive action nonetheless. Doing so would be a principled tribute to the rule of law, and a pragmatic response to the varied, compounding costs of the current approach.

At the end of the day, my concern about [military commissions](#) at Guantanamo is about process, not result. We, Americans, have a better system — the federal system — available to us that we should use without further delay. Posterity is poised to judge us harshly, yet we can pull ourselves back, at least somewhat, from the dark side of history if we take this better path forward.

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