

## Out of Sight, Out of Mind in Guantanamo Bay

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First-time visitors might be surprised to learn that the Guantanamo Bay Naval Base offers a full complement of recreational activities. One can rent a kayak, visit a bowling alley, or stop by the arts and crafts pavilion operated by contractors for the Department of Defense.<sup>1</sup>

And so it came to be that I found myself standing in the warm surf of a well-groomed Cuban–American beach, belongings perched on a lounge chair nearby. Behind me stood a series of shaded cabanas, a just-renovated restroom facility, and a posted sign admonishing visitors to please refrain from feeding the iguanas. To my right were beautiful rock formations protecting the cove from the strongest gusts of wind, and to my left loomed a picturesque rocky cliff with a sheer one-hundred-foot drop into the ocean. On top of that cliff, stark and unmistakable, stood one of the island’s famous military detention facilities. Encased in concentric rings of razor wire, it was flanked on all sides by spotlights and guard towers. The view from the top, for the undisclosed number of Saudis, Yemenis, and Pakistanis housed there for more than a decade, is no doubt breathtaking.

The beachside detention facility serves as a telling monument to all that is strange and inscrutable about the post-9/11 detainee operation at Guantanamo Bay. As a law student invited by the Department of Defense to travel to Cuba and observe the proceedings there, no significant title, connections, or security clearances were required of me before I found myself wading in Cuba’s Caribbean surf.<sup>2</sup> During the five days I spent there in March of 2015, I was shuttled around by junior enlisted men, invited to meetings with senior brass, and more or less looked after from

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1. See *Recreation*, CNIC: NAVAL STATION GUANTANAMO BAY, [https://www.cnic.navy.mil/regions/cnrse/installations/ns\\_guantanamo\\_bay/ffr/things\\_to\\_do/recreation.html](https://www.cnic.navy.mil/regions/cnrse/installations/ns_guantanamo_bay/ffr/things_to_do/recreation.html) (last visited Nov. 2, 2015).

2. See Office of Military Comm’ns, Observer Selection Criteria for Viewing of Military Commission Proceedings (July 1, 2014), <http://www.mc.mil/Portals/0/NGO%20OBSERVER%20SELECTION%20CRITERIA.pdf>.

sunup to sundown, as much for my own comfort and edification as for the security of the operation.

And yet, for all the Southern hospitality, my access to the reality of the place was noticeably circumscribed. Ask what lies behind a barricade, and an official will tell you he does not know. Ask if this or that detainee is housed on the island, and no one is sure how to find out. Ask your civilian ombudsman if you can see Camp X-Ray—a defunct holding facility widely documented in media, depicted by reporters, toured by visitors, and preserved in time as evidence in a pending civil lawsuit—and he will tell you he doubts if he can get you permission even to drive by it. Ask another base employee a few hours later, and for no particular reason she will gladly take you there, though surmising that the place has not been used since the Haitian refugee crisis of the early 1990s. You can drive to the top of a mountain overlooking the windward side of the base for a stunning view of the bay below—and clearly see a handful of other detention sites on the unpopulated side of the mountain. Photographs, like specific questions, are kindly prohibited.

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The real reason I traveled to Guantanamo, of course, was to watch the military commissions themselves. Although there are currently several matters pending before the commissions, my own visit was for hearings in the case against Abd Al-Rahim al-Nashiri, a Yemeni national accused of orchestrating the 2000 attack on the U.S.S. Cole that killed seventeen U.S. sailors.<sup>3</sup>

Much of the time, nothing is happening at the “Expeditionary Legal Complex” that houses the courthouse and its related infrastructure at Guantanamo. When court is in session, the commission schedules its hearings in weeklong increments. In a bizarre stroke of Pentagon planning, at the beginning of each week, on Sunday night, the entire cast of commission characters loads onto a charter plane at Andrews Air Force Base in Maryland for the flight south.<sup>4</sup> For now, it’s one of the few legal, direct

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3. See *The Guantanamo Docket: Abd al Rahim al Nashiri*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/10015-abd-al-rahim-al-nashiri> (last visited Nov. 15, 2015).

4. The journalist Carol Rosenberg provides frequent descriptions of this singular flight on Twitter and in her numerous reportorial dispatches. See, e.g., Carol Rosenberg,

flights to Cuba. This flight carries the prosecution lawyers, the defense team, the judge, a handful of non-government observers, the few victims' family members who still make the trek, and the *Miami Herald* journalist Carol Rosenberg. At the end of a hearing week on Saturday morning, everyone once again boards the plane and flies back to Maryland, leaving the legal complex to the sun and the lizards.

To see the precious few minutes that court is in session for a given commission, the observers, journalists, and victims' families are ushered through a comprehensive security checkpoint ("like at the airport, except these machines actually work," one roughly nineteen-year-old soldier told me) and seated in a soundproof glass room directly behind the courtroom.

The room offers a view of the court and its occupants, but relays sound and video on a forty-second delay. This means that although one can watch the silent drama directly, it is virtually incomprehensible other than as viewed on the delayed closed-circuit televisions. A complicated array of signs in the observation room forbid you from falling asleep, sketching the faces of some (but not other) people in the courtroom, eating food, or depicting the courtroom's precise setup through the use of diagrams.<sup>5</sup> Because the observation room, like the crude tents observers are quartered in during their visits, is kept at approximately sixty degrees, it appears to be the no-sleeping rule that is most frequently enforced.

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At present, the al-Nashiri commission, like the other two most active cases, is locked in years of pre-trial proceedings. No one has a credible estimate for when, if ever, an actual trial might commence. In part, this is because fundamental aspects of the case's ability to proceed are in litiga-

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*Charter Flight from Guantanamo Makes Emergency Landing in Miami*, MIAMI HERALD, Feb. 15, 2013, <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1947326.html>.

5. Despite the numerous prohibitions on reproducing features of the courtroom with one's sketchbook, the Military Commissions website provides surprisingly detailed descriptions and photographs of the courtroom. See *Courtroom II*, OFFICE OF MILITARY COMM'NS, <http://www.mc.mil/FACILITIESSERVICES/Facilities/Courtrooms/CourtroomII.aspx> (last visited Nov. 2, 2015).

tion—at the commission, at its custom-made military appellate body,<sup>6</sup> before a federal trial court, and before the D.C. Circuit, all at once.

When I visited, the military appellate body, called the Court of Military Commission Review (CMCR), found itself in strange circumstances. Though the CMCR is normally the court of first appeal for any one of hundreds of contestable rulings made by military commission judges, the D.C. Circuit had enjoined the CMCR from conducting further business until the D.C. Circuit could resolve a constitutional challenge to the CMCR's existence by al-Nashiri's defense team.<sup>7</sup> While that challenge proceeded through the D.C. Circuit, the numerous appeals from the military commission's rulings had nowhere to be heard. This strange development considerably narrowed the range of issues the commission could consider before others had to be resolved by the stymied military appellate court. Because the tribunal meets so infrequently, they were still working through that dwindling list.<sup>8</sup>

The wheels of commission justice shifted into yet a lower gear on the first day of my visit. Air Force Colonel Vance Spath, the trial judge in the al-Nashiri commission proceeding, ruled that a Pentagon order that he move to Guantanamo full time risked a serious violation of law.<sup>9</sup> The re-

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6. *U.S. Court of Military Commission Review*, OFFICE OF MILITARY COMM'NS, <http://www.mc.mil/Cases.aspx?caseType=cmcr> (last visited Nov. 2, 2015).

7. See Marty Lederman, *D.C. Circuit Stays (i.e., Postpones for at Least a Couple of Months) Thursday's Scheduled CMCR Hearing in al-Nashiri*, JUST SEC. (Nov. 12, 2014, 8:13 PM), <http://justsecurity.org/17362/d-c-circuit-postpones-tomorrows-cmcr-hearing-al-nashiri>. In their challenge, al-Nashiri's attorneys "argue[d] that it would be unconstitutional for the *military* judges on the CMCR panel—two of the three judges—to sit, raising two distinct Article II, constitutional arguments: one under the Appointments Clause, the other under the Commander-in-Chief Clause." *Id.*

8. In the months since my visit, the D.C. Circuit handed down its ruling. See *In Re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015). Although the court did not deny that it possessed jurisdiction to hear al-Nashiri's *mandamus* petition (itself potentially significant for future Guantanamo cases), it declined the substantive challenge until at least a post-conviction appeal. See Steve Vladeck, *The D.C. Circuit's Thoroughly Convincing Decision in al-Nashiri*, LAWFARE (June 23, 2015, 12:20 PM), <https://lawfareblog.com/dc-circuits-thoroughly-convincing-decision-al-nashiri>.

9. See Lacey Ann Johnson, *War Court Judge Orders Replacement for Overseer of Guantanamo Cases*, REUTERS, Mar. 2, 2015, <http://www.reuters.com/article/2015/03/02/us-usa-guantanamo-idUSKBN0LY25D20150302#8FoUkwc02juB2S4H.97>. Colonel Spath continues to hear cases elsewhere in the court martial military justice system, and the order may have been based in part on a desire to focus his attentions full time on the Guantanamo proceedings.

location order, it turns out, may constitute “unlawful influence” prohibited under the Military Commissions Act.

This development caused more than a little head scratching among the uninitiated. The logic works this way: Military justice, both in the classic court-martial setting and in the new military commissions, requires judicial independence. Interference with that independence by actors in the Pentagon chain of command is a crime in military law, and that prohibition was imported into the commissions’ rules.<sup>10</sup>

The commissions’ fourth “Convening Authority,” retired Marine Major General Vaughn Ary, was responsible for administering and resourcing the commissions. He had been on the job all of five months. During that time, he noticed that the commissions rarely met, and it could take years before even the fastest proceeding reached a trial.<sup>11</sup> To address that issue, he opined that it would better serve justice if all three military commissions’ judges relocated to Guantanamo on a full-time basis. On his recommendation, the Pentagon ordered the judges to move.

This did not sit well with the defense. Lawyers in all three cases immediately filed motions accusing the Pentagon of attempting to influence the proceedings by hurrying them along.<sup>12</sup> One of the commission’s judges stayed all proceedings<sup>13</sup> until the order was lifted a day or two later.<sup>14</sup> Another, Judge Spath from the al-Nashiri case, was unsatisfied and com-

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10. See Military Commissions Act of 2009 § 949b(a)(1)–(2), 10 U.S.C. § 949b(a)(1)–(2); Uniform Code of Military Justice § 837, 10 U.S.C. § 837 (2012); see also *United States v. Al-Nashiri*, No. 14-001, Order AE332U (Mil. Comm’n Guantanamo Bay, Cuba Mar. 4, 2014 [*sic*, 2015]) (order denying defense motion to dismiss for unlawful influence and denial of due process for failure to provide an independent judiciary), [http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20\(AE332U\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20(AE332U).pdf).

11. Ary’s findings were reportedly set forth in a memorandum noting, among other things, that all three commissions collectively met for “34 days in 2014, at a cost of \$78 million.” Ian Simpson, *Pentagon Official Who Sought to Move Judges to Guantanamo Quits*, REUTERS, Mar. 19, 2015, <http://www.reuters.com/article/2015/03/19/us-usa-guantanamo-idUSKBN0MF1ZE20150319>.

12. See, e.g., Defense Motion to Dismiss for Unlawful Influence and Denial of Due Process for Failure to Provide an Independent Judiciary, *United States v. Al-Nashiri*, No. 14-001 (CMCR Jan. 13, 2015), [http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20\(AE332\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20(AE332).pdf).

13. See Carol Rosenberg, *9/11 Judge ‘Pulls Plug’ on Trial over Pentagon Order*, MIAMI HERALD, Feb. 25, 2015, <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article11135684.html>.

14. Carol Rosenberg, *Pentagon Rescinds Order to Make Judges Move to Guantanamo*, MIAMI HERALD, Feb. 27, 2015, <http://www.thestate.com/news/nation-world/national/article13733069.html>.

pletely disqualified Ary, the Convening Authority, from involvement in his trial. Shortly thereafter, Ary resigned altogether.<sup>15</sup> In the meantime, to prove that his independence was unaffected by the abortive move-to-Cuba order, Spath also decided to cancel some of the motions on his docket, postponing everything further still. The appearance of justice, he decided, was best served by delay.<sup>16</sup>

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After that ruling was announced, I confided to one of the lawyers that I thought I had witnessed some serious intrigue in this fledgling military justice experiment.

“Actually, you’re lucky,” he said. “This is the only one of the three cases that’s really moving. If we get to trial, it could be years before the others.” Without an appeals court, a Convening Authority, or an evidentiary hearing on the calendar for the next couple of months, I wondered how this could be.

Easily, he explained. One of the other commissions is referred to loosely as the “9/11 Case.” Its marquee defendant is Khalid Shaikh Muhammad,<sup>17</sup> but he is being prosecuted alongside four other detainees for planning and helping to carry out the 9/11 attacks. Charged in 2012, these defendants maintain five separate defense teams and have yet to enter pleas. Pre-trial matters were proceeding slowly already, but in April of 2014, it came to the commission’s attention that the FBI had attempted to question a security officer on one of the defense teams, appearing unannounced at his door after he returned from church one Sunday.<sup>18</sup> The re-

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15. See Simpson, *supra* note 10.

16. See Wells Bennett, *3/2 Session #1: Unlawful Influence*, LAWFARE (Mar. 2, 2015, 11:36 AM), <http://www.lawfareblog.com/2015/03/32-session-1-unlawful-influence>.

17. See *The Guantanamo Docket: Khalid Shaikh Mohammed*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/10024-khalid-shaikh-mohammed> (last visited Nov. 2, 2015).

18. Matt Apuzzo, *Covert Inquiry by F.B.I. Rattles 9/11 Tribunals*, N.Y. TIMES, Apr. 18, 2014, <http://www.nytimes.com/2014/04/19/us/politics/covert-inquiry-by-fbi-rattles-9-11-tribunals.html>. Narratives have differed, with the defense describing the FBI’s action as an attempt to recruit a member of their team as an informant, *see id.*, and other sources describing the FBI’s action as an attempt to investigate a possible security breach. See Ben Fox, *Judge May End Impasse That Halted 9/11 Case at Guantanamo*, ASSOCIATED PRESS (Oct. 18, 2015, 7:33 PM), <http://bigstory.ap.org/article/8230d6a76f0d47d2b30f0d713e88b516/judge-may-end-impasse-halted-911-case-guantanamo>.

sulting firestorm more or less ground substantive progress to a halt for a year and a half. The prosecution refused to bifurcate the trial of the defendant with the allegedly tainted team member. The various defense teams insisted upon it.<sup>19</sup>

It did nothing to speed the proceedings when, in February 2015, some of the 9/11 defendants claimed to recognize one of their Guantanamo interpreters from his prior employment at the CIA.<sup>20</sup> This revelation likewise demanded a short recess.<sup>21</sup>

“At this point, if Abraham Lincoln rode into the courtroom on a unicorn, I’d probably just nod and move on to the next motion,” observed one defense lawyer, recounting all this.

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The on-base McDonald’s offers fare more or less on par with its civilian cousins. Other than that, most things in Guantanamo work differently. As a tourist, those differences make for interesting curiosities. As an experiment in alternative justice, they have turned out to be consequential and expensive.<sup>22</sup> I approached the opportunity to visit without strong preconceived notions of whether the commissions are an enormous mistake. I recognize that to some extent, they are the legacy of decisions made a dec-

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19. This issue has since mostly been resolved, with the 9/11 commissions judge, Colonel James Pohl, ruling “that there was no actual or potential conflict within the war crimes tribunal underway” in that proceeding. Sean Froelich, *Judge Quashes Spy Allegations in 9/11 Case*, MIL. TIMES (Oct. 26, 2015, 5:38 PM), <http://www.militarytimes.com/story/military/pentagon/2015/10/26/judge-quashes-spy-allegations-911-case/74640480>.

20. Associated Press, *Interpreter’s Alleged Link to CIA Halts Guantanamo Case*, N.Y. TIMES, Feb. 9, 2015, <http://www.nytimes.com/aponline/2015/02/09/world/americas/ap-cb-guantanamo-sept-11-trial.html>.

21. One recent estimate suggests that the 9/11 trials may not begin until 2020, or even later. See Jenifer Fenton, *Guantanamo 9/11 Cases Hit Yet Another Snag*, AL JAZEERA, Oct. 26, 2015, <http://america.aljazeera.com/articles/2015/10/26/guantanamo-911-cases-hit-yet-another-snag.html>.

22. One recent estimate pins the annual cost of the operation at \$454 million per year, or \$2.7 million per detainee per year. See, e.g., Max Fisher, *U.S. Could Save Millions by Paying Each Gitmo Prisoner \$2 Million Annual Salary to Do Nothing*, WASH. POST, July 21, 2013, <http://www.washingtonpost.com/blogs/worldviews/wp/2013/07/31/u-s-could-save-millions-by-paying-each-gitmo-prisoner-2-million-annual-salary-to-do-nothing>.

ade or more ago.<sup>23</sup> Still, I wanted to understand as much as I could about what to expect. To that end, I embarked on a listening tour of professors, activists, and other experts with backgrounds in the various issues involved.

To my initial amazement, the responses I got were nearly uniform. “I wish I could tell you more,” said one academic who had authored half a dozen law review articles about international criminal law and even Guantanamo itself, “but I just can’t follow what’s going on down there anymore.” Another friend who had briefly worked on detainee policy at the Pentagon wrote me that the Commissions are so “bogged down in procedural nonsense” that she had “stopped paying attention. Which is depressing.” The more answers like this I got, the more I realized that the number of outsiders truly informed about the proceedings down there is vanishingly small.<sup>24</sup>

Salvation, I hasten to add, will not come from a dozen people of widely divergent experience watching the court from behind soundproof glass for a few days. Permitting observer and (theoretical) journalistic access is a helpful gesture, to be sure. But on its own, it falls far short of helping the country grapple with the strange and mostly unprecedented situation there. It may be tempting to roll one’s eyes when people invoke lofty concepts like the “rule of law” being threatened at the drop of a hat. But the fact remains that there are actually 107 people imprisoned on that island right now.<sup>25</sup> All of them have been there since at least 2008, and many much longer. Ten of them are in some phase of the military justice system. Some have been cleared for release in the unlikely event that places like Yemen become safer, some might face trial in the distant future, and others’ prospects are even more uncertain. This, to put things in the most uncontroversial terms I can think of, is a very weird state of affairs.

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23. For a thorough and thoroughly readable history of the events contributing to the current state of affairs, see JESS BRAVIN, *THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY* (2013).

24. It is worth pointing out that I did indeed receive helpful guidance from several Georgetown professors, which I would hate to discount for rhetorical effect.

25. See *The Guantanamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo> (last visited Nov. 15, 2015). Note that this total remains fluid, as “five lower-level Yemeni detainees” were transferred as this article neared completion. See Charlie Savage, *5 Yemeni Guantánamo Inmates Are Sent to United Arab Emirates*, N.Y. TIMES, Nov. 15, 2015, <http://www.nytimes.com/2015/11/16/us/5-yemeni-guantanamo-inmates-are-sent-to-united-arab-emirates.html>.

The most recent incarnation of the legal system undergirding the commissions dates to 2009,<sup>26</sup> which means, as one lawyer there put it, that they are “laying the tracks in front of the train.” Precedent comes by sometimes-crude analogy to the Uniform Code of Military Justice, the Federal Rules of Evidence, international law, and ad hoc arguments about how to handle every new issue for the first time. Appeals are common and their resolutions, as discussed, are not always swiftly forthcoming.

To some degree, the tiny size of the legal universe permitted to contemplate these issues is unavoidable. After all, a key rationale for the entire commissions system is the outsized role of highly classified information, along with the long shadow that Enhanced Interrogations continue to cast over much of the evidence.<sup>27</sup> But other aspects are due to its physical and cultural remoteness. The detention operation confronts enormous, perpetual controversy and nearly constant existential legal challenges. Given all that, the relatively resigned ignorance of so many potential experts is telling.

The commissions’ dockets are posted online, but every filing undergoes a security review *followed by* a fifteen-day waiting period. This delay is, by all accounts, often inexplicably long.<sup>28</sup> Journalists are theoretically able to visit the proceedings under tightly controlled conditions, but save for the intrepid Carol Rosenberg, most seem uninterested in the canvas accommodations, lack of internet, equatorial climate, and three restaurants. A handful of observers and victims’ families are now able to watch a delayed and censored video feed from the proceedings at Fort Meade, in

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26. See Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (codified in scattered sections of 10 U.S.C.).

27. See, e.g., Marcellene Hearn, *3 Reasons the Guantánamo Military Commissions Need the Senate Torture Report*, ACLU SPEAK FREELY BLOG (Aug. 12, 2014, 4:25 PM), <https://www.aclu.org/blog/national-security/3-reasons-guantanamo-military-commissions-need-senate-torture-report>.

28. Marty Lederman, *Al-Nashiri Can Now Speak About His Treatment . . . Plus News About the Full SSCI Report*, JUST SEC. (Feb. 23, 2015, 8:01 AM), <http://justsecurity.org/20271/al-nashiri-speak-treatment> (noting that the sometimes inexplicable delays in posting files with no classified information has made it “virtually impossible for interested observers, here and abroad, to keep track of the motions practice in the commissions when the public docket is miles behind what is happening in the courts”). Readers attempting to access motions posted before the various reviews and delays have run receive only the cover sheet found here: <http://www.mc.mil/Portals/0/pdfs/alNashiri2/FileNotAvailable.pdf>.

Maryland, and one or two other bases, depending on the proceeding.<sup>29</sup> A very small stable of national security bloggers has made use of this option and delivered some of the only sophisticated analysis to emerge from the trials.<sup>30</sup> By and large, though, the military commissions are both figuratively and literally only visible from about 40,000 feet.

There is no obvious way to rectify this situation, save for more radical options like packing up the whole project and moving it to federal court.<sup>31</sup> A modest step, I thought, was to expand the closed circuit video feed from a handful of military bases to the broader internet. Given the forty-second delay and the panoply of officials more than capable of censoring anything inappropriate for wider consumption,<sup>32</sup> it's hard to imagine this idea carries much risk. From a security perspective, when the Pentagon invites groups of law students and non-government activists to watch, it seems like the cat is more or less out of the bag anyway.

Suffice it to say that my proposal met with a chilly reception at Guantanamo. Ordinary federal courts do not broadcast their proceedings, I was instantly reminded. Somehow, it seemed this question had come up before.<sup>33</sup>

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29. See *Viewing of Military Commission Proceedings*, OFFICE OF MILITARY COMM'NS, <http://www.mc.mil/FACILITIES/SERVICES/Facilities/CCTV/Sites.aspx> (last visited Nov. 2, 2015).

30. On many occasions, Brookings Fellow Wells Bennett's posts for the blog Lawfare are the only thorough (and contemporaneous) record of what occurred at a given commission hearing. He seems to base his reporting mostly on the Fort Meade video feed. See, e.g., Wells Bennett, *3/3 Session #3: To Reconsider*, LAWFARE (Mar. 3, 2015, 2:43 PM), <https://www.lawfareblog.com/33-session-3-reconsider>. Likewise, Georgetown Professor Marty Lederman's posts on the Just Security blog are a rare source of substantive legal commentary on the proceedings' finer details. See, e.g., Marty Lederman, *Perfidy, Ambush, Snipers, and the COLE Bombing (al Nashiri) Case*, JUST SEC. (Mar. 24, 2015, 12:05 PM), <https://www.justsecurity.org/21398/perfidy-ambush-snipers-cole-bombing-al-nashiri-case>.

31. This step is not without its advocates, among them the Guantanamo defense teams and the NGO Human Rights Watch. See, e.g., *US: Move New Guantanamo Cases to Federal Courts*, HUMAN RIGHTS WATCH (Mar. 10, 2008), <http://www.hrw.org/news/2008/03/10/us-move-new-guantanamo-cases-federal-courts>.

32. Indeed, the number of such officials "in the loop" has at times proved larger than even the judge knew, such as when an out-of-court "classification authority" activated the censorship function, revealing their ability to do so for the first time. See Apuzzo, *supra* note 18.

33. In fact, it had. In 2012, defense lawyers in the 9/11 case asked the judge to authorize televising the trials, while acknowledging that the Secretary of Defense ultimately holds the sole discretion to do so. See Jane Sutton, *Defense Wants 9/11 Trial Televised Globally from Guantanamo*, REUTERS, Oct. 19, 2012, <http://www.reuters.com/article>

That is only partly correct. The Supreme Court famously does not videotape its proceedings, and even brief membership on that body seems to change judicial minds on the subject.<sup>34</sup> In recent years, though, the Court has released its audio at the end of each week, and recordings have been available after a delay for the last half-century.<sup>35</sup> The Ninth Circuit has gone further still, uploading polished video of its arguments to YouTube on the same day they are heard. For more than a year, one can also listen to the live, streaming audio of every case the court hears.<sup>36</sup>

On top of that, added one official I asked, is that “the Commissions are supposed to be truth-seeking bodies.” Broadcasting their proceedings, he added somewhat ominously, risks turning them into “something else.”

This latter observation I found especially curious. One might imagine the incendiary effect of broadcasting the proceedings in a *To Kill a Mockingbird*-type trial, where the concern was protecting unpopular defendants from a pitchfork mob so that neutral justice might be done.

There is understandably no love lost between the American people and most of Guantanamo’s permanent residents. In this case, though, the incendiary issue may be the tribunal itself, and that hardly justifies shielding it from public view unnecessarily. Even if ordinary courts tend not to make their proceedings widely accessible, Guantanamo is most certainly not an ordinary court. Heavily guarded military bases in Virginia and Maryland are far less accessible than courthouses in Washington or New York. More importantly, every aspect of the Guantanamo experiment is novel and untested, demanding greater scrutiny than ordinary courts, not less. For the commissions’ detractors, a wider understanding of their daily, grinding eccentricities and dysfunction might hasten a public reaction. For their defenders, a richer and more adversarial academic and legal discus-

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/2012/10/20/us-usa-guantanamo-idUSBRE89I19620121020. Shortly thereafter, William Lietzau, then the Deputy Assistant Secretary of Defense for Detainee Policy, rejected the request on then-Secretary Panetta’s behalf. See Carol Rosenberg, *Guantanamo Trials Won’t Be Televised*, MIAMI HERALD, Nov. 26, 2012, <http://www.mcclatchydc.com/2012/11/26/175602/guantanamo-trials-wont-be-televised.html>.

34. See, e.g., *Kagan & Sotomayor Do 180s on Video*, BLOOMBERG (Mar. 11, 2013), <http://www.bloomberg.com/news/videos/b/51967f5a-cc71-4f10-8dee-94f79b949e53>.

35. Recordings began in 1955. See *Argument Audio*, SUPREME COURT OF THE U.S., [http://www.supremecourt.gov/oral\\_arguments/argument\\_audio.aspx](http://www.supremecourt.gov/oral_arguments/argument_audio.aspx) (last visited Nov. 2, 2015).

36. See *Audio and Video*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, <http://www.ca9.uscourts.gov/media> (last visited Nov. 2, 2015).

sion of the issues could only enhance the quality—and legitimacy—of the justice they mete out.

There is perhaps no more overused quotation than Justice Brandeis's line about sunlight being the best disinfectant.<sup>37</sup> But even the most powerful disinfectant is no time machine, and will not undo the events leading up to this intractably difficult state of affairs. What discourse there remains about Guantanamo often tends toward the intemperate, blaming current officials for the status quo when it was set in motion by events a decade and a half ago. This dynamic engenders a kind of bunker mentality, and it's noticeable in virtually everyone involved in the system. That is unfortunate, because the vast majority of people I spoke to are earnestly trying to accomplish what they view as a just result under undeniably difficult circumstances. Still, for better or worse, the military commissions system will be with us for the foreseeable future. Taking steps to expand access to what they do and facilitate a more nuanced discussion of how they do it is a modest but important way to face the facts, inherited or not.

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37. Nevertheless, see Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10, <http://perma.cc/CN3W-MZKG>.