

MILITARY COMMISSIONS UPDATE

BY MICHAEL PRICE

Curtains for Guantánamo

December 8 marked the last hearing at Guantánamo Bay in the case against five so-called “high-value detainees” accused of coordinating the 9/11 attacks, at least until after President-elect Barack Obama takes the oath of office on January 20. It remains uncertain, however, whether the new administration will act swiftly to close the Guantánamo prison camps and end the military commissions system. Although there is no shortage of logistical and diplomatic hurdles to repatriating the remaining detainees and emptying the now infamous detention facility, Mr. Obama can and should order an immediate halt to the commissions on Day One. I have never been more convinced of or committed to this goal than now, fresh off the flight from my first week at Guantánamo.

I made the trip to Guantánamo from Andrews Air Force Base with the defense attorneys from NACDL’s John Adams Project, a partnership with the American Civil Liberties Union that sponsors expert civilian capital trial counsel to assist the under-resourced military defense lawyers for several detainees. In addition to the inevitable cadre of journalists, non-governmental organization observers, and military personnel, the manifest included the family members of five 9/11 victims, selected by lottery and invited by the Department of Defense to attend the proceedings for the first time.

While it might be tempting to construe this effort at victim outreach as a step toward the full, fair, and open trials guaranteed by President Bush, the fact remains that the intensely secretive and constitutionally suspect commissions process continues to function as a barrier to any degree of finality or credible resolution to this painful chapter in American history. Moreover, the inability of defendants to confront their accus-

ers or to obtain meaningful access to the evidence against them ensures both a miscarriage of justice and the continued suppression of facts about the authorization and use of “enhanced” interrogation tactics that amount to nothing less than torture by American officials. Just a few days at the ironically named “Camp Justice” and an afternoon behind four inches of plexiglass in the courtroom gallery offered a striking snapshot of the extent to which these makeshift tribunals are mere theater.

From the moment I arrived on the tarmac at Guantánamo, I could not escape the feeling that I had joined a surreal tour of legal Wonderland. Upon entering the airport terminal, a sign sternly admonished all visitors to refrain from killing, eating or harassing any iguanas on the base, a rule strictly enforced to comply with the Endangered Species Act in a place that the Bush administration created to be a “Constitution-free zone.” The prosecution seems to have embraced this logic, asserting in the same breath that although the defendants do not enjoy any constitutional due process rights, the Health Information Privacy Act prohibits disclosing their medical records from the nearly four years they spent in secret CIA prisons.

After gathering our luggage, the unlikely group of prosecutors, defense attorneys, and victims’ family members filed onto a white school bus that drove a few hundred yards to a ferry terminal on the leeward side of the base. Aboard the ferry and chugging slowly across the 2.5 mile-wide bay, I struggled to reconcile the spectacular Cuban coastline with the fact that I had just arrived at the world’s most notorious prison camp. Brig. Gen. Thomas Hartmann stood across the deck, binoculars and birdwatching book in hand, apparently unmoved by the paradox. The former legal advisor to the Convening Authority, Gen. Hartmann had returned to Guantánamo as a witness, accused for the fourth time of exerting unlawful command influence

over the prosecution office and accelerating the timetable for cases deemed “sexy” enough to capture the imagination of the American public prior to the November presidential election.

We disembarked on the windward side of the base, just down the hill from Camp Justice, an “expeditionary” legal complex comprised of a purpose-built, maximum security courthouse encircled in concertina wire next to an abandoned airstrip lined with rows of canvas Air Force tents, affectionately known as Tent City. The \$6 million corrugated metal courthouse stands in the shadow of a World War II-era control tower that houses a separate courtroom for “low value detainees.” The secure facility boasts five external holding pens, a covered gangway into the courtroom, and an observation gallery separated from the courtroom by four inches of glass and a 40-second audio time delay. Seated just a few feet to the right of the military judge is an intelligence officer whose sole job is to cut the audio feed whenever anyone mentions something that might be classified, such as the detainees’ conditions of confinement or the illegal interrogation tech-

Continued on page 52



❖ Slowest — the districts with the highest percentage of pending white collar criminal matters:

- (1) Southern District of Mississippi has 61.97 percent pending
- (2) District of the Virgin Islands has 50.00 percent pending
- (3) Western District of Missouri has 45.04 percent pending

While these district-by-district comparisons may provide practitioners with an interesting, yet superficial, portal into the activities of USAOs across the country, anyone using this report to reach broad conclusions about prosecutorial trends should proceed with caution. As discussed above, not enough time has passed to draw meaningful conclusions about the data. In addition, as this excerpt from page xvi (pdf page 17) demonstrates, the authors of the report actually cast doubt on the accuracy of their own findings:

When we presented this information to EOUSA officials, they were surprised at the large number of pending mat-

ters, particularly the large number of cases in pending status for such long periods of time, and said they were unable to fully explain this data without reviewing individual district files. We therefore judgmentally selected a limited number of 50 pending matters from several different USAOs and requested that these USAOs notify us whether the matters were, in fact, pending. According to the USAOs' responses, 44 percent of the matters we tested were accurately reflected as awaiting a decision to prosecute as of September 30, 2007 — half of which were referred to USAOs between FYs 2003 and 2005. However, the remaining 56 percent of matters in our sample were not actually in pending status. Instead, the USAOs explained that many matters had been prosecuted and the defendants sentenced prior to September 30, 2007.

The report explains that the cause of this discrepancy may be a lack of coordination between the individual districts' LIONS databases and the national LIONS database. Nonetheless, before relying on the report's data, carefully consider this warning set out by the report's authors: "We believe that this analysis has revealed significant concerns over the accuracy and reliability of LIONS data."

Notes

1. Go to <http://www.usdoj.gov/oig/reports/EOUSA/a0903/final.pdf> to view the report in its entirety. ■

About the Author

Tiffany M. Joslyn is Research Counsel for NACDL's White Collar Crime Project.

Tiffany M. Joslyn

NACDL
1660 L Street, NW, 12th Floor
Washington, DC 20036
202-872-8600 x260
Fax 202-872-8690
E-MAIL tiffany@nacdl.org

MILITARY COMMISSIONS UPDATE

Continued from page 49

niques used to extract their confessions.

Camp Justice has the unmistakable air of a forward operating base, in stark contrast to the rest of the 45 square mile naval station, which might be mistaken for a Sarasota suburb. There is an elementary school, a high school, a Subway, and a Starbucks — there is even a golf course, go-cart track and SCUBA diving center. Even more telling, there is an abundance of empty townhouses and vacant apartments in the high-rise Bachelor Enlisted Quarters, which led me to wonder whether the "M*A*S*H"-style accommodations in Tent City were not just part of the stage. Did I mention that the drinking water is kept in a portable morgue?

It appears that one purpose of constructing Camp Justice — and indeed of selecting Guantánamo Bay as its venue — was to reinforce the fiction that these detainees are the "worst of the worst," incapable of being released, rehabilitated, or made to stand trial in a true court of law. The more Guantánamo resembles a battlefield, the easier it is to argue

that the Constitution should not apply, or so the theory goes. Yet the "worst of the worst" myth has been thoroughly debunked — as recently illustrated by the court-ordered release of five petitioners in the *Boumediene* case¹ — and the dramatic impression of Camp Justice as a vital front in the War on Terror strikes the familiar chord of exigency and fear that marked the Bush administration's case for war with Iraq, its defense of "extraordinary rendition" and secret CIA detention, and its authorization of "enhanced interrogation techniques" that can only be described as torture.

The reality is that the military commissions system amounts to little more than taxpayer-funded show trials. We deserve more than a show. The victims of 9/11 deserve more than a show. Recounting the words of one 9/11 family member, "If the government continues to prosecute Guantánamo detainees in a way that is at odds with American values of due process and transparency, any verdict will lack legitimacy, and we will be left wondering whether those responsible for the deaths of our loved ones have truly been brought to justice."² Justice demands that the incoming administration shun these tribunals

as a denigration of fundamental American values. It should reject any proposal that seeks to admit coerced confessions as well as uncorroborated and unreliable hearsay, and that precludes defendants from relying upon the Geneva Conventions.

It is time to pull the curtains on Guantánamo.

Notes

1. *Boumediene v. Bush*, No. 04-1166 (D.D.C. Nov. 25, 2008), available at http://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv1166-279.

2. Terry Kay Rockefeller, *Deficient Justice at Guantánamo*, WASH. POST, Dec. 18, 2008, at A24 (Letter to the Editor). ■

About the Author

Michael Price is NACDL's National Security Coordinator.

Michael Price

NACDL
1660 L Street, NW, 12th Floor
Washington, DC 20036
202-872-8600 x258
Fax 202-872-8690
E-MAIL michael@nacdl.org