

## How I Learned to Stop Worrying and Love the Military Commissions

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### I. INTRODUCTION

The Guantánamo Bay military commissions have generated controversy since their inception. 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 in an invented, hybrid, ad hoc apparatus that contained just enough process to provide a patina of fairness, but that was designed and operated to ensure convictions.

That reality can, of course, be discouraging to lawyers aiming to litigate on behalf of clients in ordinary circumstances. In the Guantánamo Bay military commissions, though, the problems were aggravated by several factors, including (a) the client's general distrust of the United States; (b) the treatment (more often maltreatment) of the client at the hands of the United States prior to commencement of the attorney-client relationship; (c) the client's lengthy isolation at Guantánamo Bay; (d) the lack of applicability of any particular body of law, whether U.S. federal, U.S. military, the laws of armed conflict (LOAC), including the Geneva Convention, international law, or international humanitarian law (IHL);<sup>1</sup> (f) the geographic and logistical remoteness of Guantánamo Bay; and (g) the continued politicization of even the most mundane aspect of detainee affairs and of the conduct of the military commissions.

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<sup>1</sup> See, e.g., Danielle Keats & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441, 1486 (2011) (“[T]he Department of Defense located many detainees in the War on Terror at Guantánamo Bay, which it viewed as a legal ‘no man’s land’ where neither American law nor any other country’s law was supposed to apply.”); Michael J.D. Sweeney, *Detention at Guantánamo Bay: A Linguistic Challenge to Law*, 30 HUM. RTS. 15, 15 (2003) (“[T]he Bush administration has refused to recognize the detainees under international law and has avoided the legal obligations.”).

Notwithstanding those challenges, it would be a mistake to consider the experienced criminal defense practitioner at a complete disadvantage when practicing in these military commissions. Indeed, as the first U.S. civilian attorney to visit a client detainee at Guantánamo Bay—David Hicks, in early January 2004—and as David’s civilian defense counsel in the first, second, and third iterations of the Guantánamo Bay military commissions, my thirty years as a criminal defense attorney practicing in the federal and state courts in the United States afforded me several important advantages in those proceedings.

As detailed below, those advantages can be categorized broadly as follows:

(a) the advantage of being the first private defense lawyer involved in the military commissions;<sup>2</sup>

(b) the advantage of experience litigating in a properly constituted, legitimate criminal court system (i.e., the U.S. federal system operating in Article III courts);<sup>3</sup>

(c) the advantage of being a criminal defense lawyer in the military commission system with the rights, albeit limited, attendant to the criminal process therein, rather than as a civil plaintiff’s lawyer in the habeas corpus context, which provided the detention authorities substantially more control over attorney-client relations and conduct;<sup>4</sup>

(d) the advantage of familiarity with the rules and procedures governing the use of classified information and evidence in the federal courts;<sup>5</sup>

(e) the advantage of experience litigating—including investigation, preparation, and trial—complex, document-intensive, multi-

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<sup>2</sup> See discussion *infra* Part II.

<sup>3</sup> See discussion *infra* Part III. Such courts are denominated “Article III” courts because their authority derives from Article III of the U.S. Constitution. U.S. CONST. art. III, §§ 1, 2. Judges in such courts are appointed by the President and confirmed by the Senate. *Id.* art. II, § 2. They possess lifetime tenure. *Id.* art. III, § 1. District court judges preside at the trial level. *District Courts*, U. S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts.aspx> (last visited Sept. 15, 2011). Circuit court of appeals judges are at the intermediate appellate level. *Courts of Appeals*, U. S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtsofAppeals.aspx> (last visited Sept. 15, 2011). The United States Supreme Court constitutes the ultimate legal authority, and its opinions are binding on all federal and state judicial systems. See BLACK’S LAW DICTIONARY 693 (3d ed. 1996). In addition, the criminal justice system under Article III courts is based on constitutional provisions, statutes, and rules, and not on the common law.

<sup>4</sup> See discussion *infra* Part IV.

<sup>5</sup> See discussion *infra* Part V.

defendant cases, which are exceedingly rare in the ordinary military court-martial system;<sup>6</sup>

(f) the advantage of adopting a client-oriented, rather than cause-oriented, approach that is second nature for criminal defense attorneys in the U.S.;<sup>7</sup> and

(g) the advantage of having a global audience paying extraordinary attention to the proceedings at the Guantánamo Bay military commissions, thereby providing an alternate and continuing source of pressure on the government.<sup>8</sup>

Each and all of these advantages provided civilian defense counsel at least some openings to perform their craft in a manner capable of leveling, at least partially (and to the greatest extent possible), the military commissions' playing field that was so deliberately tilted in favor of the prosecution.

## II. THE ADVANTAGES OF BEING FIRST

When I agreed to represent David Hicks in December 2003, the government was eager to facilitate my involvement and my ability to visit David at Guantánamo Bay. The rumor was that the government expected David to cooperate with the prosecution, to enter a plea of guilty, and to assist with other investigations and prosecutions. David would have made a perfect prosecution witness in some respects—an English-speaking native Westerner, an Australian who was not responsible for any violent conduct or terrorist activity—and thereby provided the nascent military commission system with some legitimacy.

That incentive for the government provided me with more leverage than I might have possessed otherwise. The initial hurdles were the terms of my formal entry as David's civilian counsel.<sup>9</sup> The military commission process, which at the time was essentially devoid of for-

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<sup>6</sup> See discussion *infra* Part VI.

<sup>7</sup> See discussion *infra* Part VII.

<sup>8</sup> See discussion *infra* Part VIII.

<sup>9</sup> David already had detailed—the military's term for having been assigned—military counsel (USMC), Major Michael D. Mori and an Australian Foreign Attorney Consultant (FAC), Steven Kenney, both of whom had already visited David once at Guantánamo Bay prior to my engagement as David's U.S. civilian defense lawyer. Joseph Margulies, Esq., one of the architects of the entire Guantánamo Bay habeas strategy, had represented David, who was a plaintiff in *Rasul v. Bush*, 542 U.S. 466 (2004). However, it was determined that Mr. Margulies could not represent David in the military commissions due to his multiple representation of detainees in *Rasul*. As a result, I was asked to be David's civilian defense counsel.

mal rules or procedures, did, however, have protocols for defense counsel's admission into the military commission system.<sup>10</sup>

A. *The Proposed Conditions for Civilian Defense Counsel Participation*

The principal document was called "Annex B," which set forth the terms and conditions of representation and required counsel's sworn agreement to abide by those terms and conditions.<sup>11</sup> In its initial form, however, Annex B was unacceptable.<sup>12</sup> In August 2003, the National Association of Criminal Defense Lawyers (NACDL) approved Ethics Opinion 03-04 issued by its Ethics Advisory Committee.<sup>13</sup> The opinion adopted the position that "it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation."<sup>14</sup>

The NACDL opinion added that "[d]efense counsel cannot contract away his or her client's rights, including the right to zealous advocacy, before a military commission, which is what the government seeks in Annex B, although it says it is not, in spite of the clear language of the MCI's."<sup>15</sup> The NACDL opinion did "not condemn criminal defense lawyers who undertake to represent persons accused before military commissions because some may feel an obligation to do so."<sup>16</sup> However, the opinion did impose upon such lawyers an obligation

to raise, with knowledge of the serious and unconscionable risks involved in violating Annex B, including possible indictment, every conceivable good faith argument concerning the jurisdiction of the military commission, the legality of denial of applica-

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<sup>10</sup> See Dep't of Def., Military Commission Instruction No. 5, Qualification of Civilian Def. Counsel, Annex B (2003) [hereinafter Annex B 2003], *available at* <http://www.defense.gov/news/Feb2006/d20060217MCI5.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> NACDL Ethics Advisory Comm., Op. 03-04, at 1 (2003) [hereinafter NACDL Opinion], *available at* <http://www.nacdl.org/search.aspx?term=nacdl%20ethics%20advisory%20committee%20opinion>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* A "MCI" was a Military Commission Instruction in the initial Guantánamo commissions system in 2004. MCI's were designed to provide guidance to practitioners in the commission system. See, e.g., Dep't of Def., Military Comm'n Instruction No. 1 (2003), *available at* <http://www.defense.gov/news/may2003/d20030430milcominstno1.pdf>.

<sup>16</sup> NACDL Opinion, *supra* note 12, at 1.

tion of the Uniform Code of Military Justice (UCMJ), international treaties, and due process of law, including resort to the civilian courts of the United States to determine whether the proceedings are constitutional.<sup>17</sup>

The NACDL opinion identified several provisions of Annex B and the Military Commission Instructions, which it incorporated, that were objectionable, including:

(1) the requirement that civilian defense counsel acknowledge and agree to monitoring of attorney-client communications;<sup>18</sup>

(2) the requirement that civilian defense counsel acknowledge and agree to be barred from certain proceedings, despite having the requisite security clearance;<sup>19</sup>

(3) the requirement that civilian defense counsel “ensure the commission proceedings are counsel’s primary duty and no matter in counsel’s private practice or personal life can interfere with the commission’s proceedings”;<sup>20</sup> and

(4) the requirement that “once proceedings have begun, [civilian defense] counsel will not leave the site of the proceedings without approval of the Appointing Authority or Presiding Officer.”<sup>21</sup>

In addition, Annex B also unreasonably limited the scope of the defense team and the ability of defense counsel to share information with appropriate consultants, experts, and witnesses.<sup>22</sup> As the NACDL opinion protested, the individual and cumulative effect of these provisions was that “full zealous representation likely will not and cannot be achieved because of severe and unreasonable limits on counsel imposed by the government, in violation of the UCMJ and treaties the United States has signed guaranteeing rights to the accused before these commissions.”<sup>23</sup> As a result, the NACDL opinion concluded that “[c]riminal defense lawyers are severely disadvantaged in their duties to represent their clients,” and that “[t]he loss of rights can only help insure unjust and unreliable convictions.”<sup>24</sup>

The NACDL opinion, however, constituted a powerful statement of an attorney’s duty in the military commissions, and a basis for refusing to sign Annex B as initially presented. That unwavering insti-

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<sup>17</sup> *Id.* (citation omitted).

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.* at 14.

<sup>20</sup> *Id.* at 15.

<sup>21</sup> *Id.*

<sup>22</sup> See Annex B 2003, *supra* 10, at II(C); NACDL Opinion, *supra* note 12, at 23.

<sup>23</sup> NACDL Opinion, *supra* note 12, at 1.

<sup>24</sup> *Id.* at 1–2.

tutional support for civilian defense counsel, coupled with the government's desire to get the commission process under way (and to facilitate David's anticipated cooperation), provided me with substantial leverage to resist those intolerable conditions.

In addition, the fact that no one else had yet agreed to those terms—as I was the first civilian defense counsel to visit Guantánamo, and therefore to confront Annex B in practice—provided me with a clean slate that enhanced that leverage. Insisting on adherence to the NACDL opinion, I informed military commission officials that I would not sign Annex B unless it was modified to meet the NACDL opinion's objections.

In response, commission officials obliged by eliminating or amending the offending sections. Consequently, the monitoring provision was removed entirely, and the other unpalatable terms were revised to reflect federal court standards (i.e., slavish devotion to the commissions at the expense of all other professional and personal engagements was no longer required, and the contours of the defense team were the same as those in federal court, as were the standards for adjournments of proceedings).<sup>25</sup> In addition, as in federal court, the amended Annex B permitted civilian defense counsel to object to any ex parte proceedings.<sup>26</sup>

After commission officials prepared that version of Annex B, and I executed it, I was officially David's civilian defense counsel in the military commissions. By April 2004, Annex B had been revised to reflect all of those changes.<sup>27</sup> As a result, all subsequent civilian defense lawyers in the commissions were spared the most onerous provisions of Annex B that the NACDL opinion had identified.

*B. The Flexibility of Operating in a System Prior to Promulgation of Rules*

Being involved in the military commissions and interacting with the Guantánamo Bay detention operation prior to any other civilian counsel provided flexibility in a system for which rules had not yet been formulated, much less implemented. The absence of rules allowed us to gain improvements in David's conditions at Guantánamo that were not possible once formal procedures were set in place,

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<sup>25</sup> Compare Dep't of Def., Military Commission Instruction No. 5, Qualification of Civilian Def. Counsel, Annex B (2004) [hereinafter Annex B 2004], available at <http://www.defense.gov/news/Feb2004/d20040206milcominstno5annB.pdf>, with Annex B 2003, *supra* note 10.

<sup>26</sup> Annex B 2004, *supra* note 25, at II.E.1.

<sup>27</sup> See Annex B 2004, *supra* note 25.

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which occurred once a regular stream of lawyers began visiting the base. We also enjoyed greater freedom of movement and less interference with materials we sought to review and leave with David. During that early period we were able, in many respects, to capitalize on the rules vacuum and correspondingly customize David's conditions for his benefit.

Part of our success in gaining improvements was attributable to the military officials directly in charge of lawyer access and legal issues, who were accessible and in most cases agreeable. Also, when Major General Jay Hood assumed command of the detention operation early in 2004,<sup>28</sup> he afforded us personal access to him and his staff to lodge complaints or raise issues. Military personnel, however, were regularly rotated from assignment at Guantánamo Bay. Successive military officers were progressively less interested in accommodating counsel or facilitating their relationships with their clients and more interested in creating bureaucratic obstacles that did not exist at the outset.

### III. EXPERIENCE LITIGATING IN A PROPERLY CONSTITUTED, LEGITIMATE CRIMINAL COURT SYSTEM

Anyone experienced in litigating in federal court would instantly note its contrast with the Guantánamo military commissions, especially back in 2004.<sup>29</sup> As a threshold matter, presence of military defense

<sup>28</sup> Eric Schmitt, *Pentagon Drops Post in Pakistan for Top General*, N.Y. TIMES, May 9, 2008, at A1.

<sup>29</sup> Two sets of hearings were conducted in 2004. At the first, in August 2004, four defendants, including David, were arraigned on the charges against them. *U.S. Prepares for Guantánamo Arraignments*, USA TODAY (Aug. 23, 2004), [http://www.usatoday.com/news/world/2004-08-23-gitmo-trial\\_x.htm](http://www.usatoday.com/news/world/2004-08-23-gitmo-trial_x.htm). At the second, in October 2004, certain pretrial motions were argued, and voir dire of the commission members commenced. See Dep't of Def., Challenges for Cause Decision No. 2004-001, at 1 (2004) [hereinafter Challenges for Cause Decision], available at <http://www.defense.gov/news/Oct2004/d20041021panel.pdf>; ANGUS MARTYN, PARLIAMENT OF AUSTL., PROGRESS OF THE UNITED STATES MILITARY COMMISSION TRIAL OF DAVID HICKS 1 (2005), available at <http://www.aph.gov.au/library/pubs/rn/2004-05/05rn33.pdf>. Illustrating the lack of administrative planning that regularly afflicted the commissions, two members of the panel that heard those motions were subsequently disqualified by the Appointing Authority on defense's motion based on their voir dire answers. *Id.* Also, on the second day of the October 2004 proceedings, a federal judge invalidated the commissions in part, and issued a restraining order enjoining the proceedings. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 173–74 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd and remanded*, 548 U.S. 557 (2006) (“[U]nless and until the rules for Military Commissions . . . are amended . . . petitioner may not be tried by Military Commission . . .”). The commission proceedings against David did not formally resume until months after the Supreme

counsel made importation of certain military justice conventions (e.g., scripted, formalistic pretrial conferences, extensive off-the-record contact between the parties and the “court”)<sup>30</sup> relatively painless. The military commissions’ lack of structure, however, and the chaos that ensued at every proceeding, was glaring in comparison with federal court practice.

For example, the first time a defendant asked to proceed pro se (and thus represent himself), which occurred during the first day of commission hearings, the proceedings came to a screeching and abrupt halt.<sup>31</sup> Similarly, the unprecedented composition of the commission—its members, predominantly non-lawyers,<sup>32</sup> were all equals, deciding all issues of fact and law—was completely unworkable. The four non-lawyers on David’s prospective commission—the fifth member was a retired military judge re-activated specifically for assignment to the commissions<sup>33</sup>—simply lacked the capacity to analyze or decide legal issues in any coherent, consistent, or competent fashion. Untrained in the law and with very limited exposure to court-martial proceedings, they could not grasp fundamental legal concepts such as jurisdiction (or more accurately, its limits), ex post facto, the dangers of hearsay, and / or the relevance of expert testimony, which they rejected altogether when offered by the defense.

Problems also arose with respect to the scope of voir dire, including whether certain portions should be classified,<sup>34</sup> as well as with the quality of translators, the confidentiality of defense counsel’s in-

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Court’s 2006 decision in *Hamdan* and the subsequent passage of the Military Commissions Act of 2006.

<sup>30</sup> The initial commission proceedings did not designate a “judge,” as all panel members acted as both judge and jury on all issues—factual, legal, and evidentiary. Bruce Zagaris, *Controversy Over U.S. Guantánamo Detentions Continues*, 20 INT’L ENFORCEMENT LAW REP. 12, 12 (2004). One panel member, however, was a retired military judge brought back to active duty for service in the military commissions, and he served as the “judge” for purposes of organizing the proceedings and communicating with counsel for both parties. Scott L. Silliman, *On Military Commissions*, 37 CASE W. RES. J. INT’L L. 529, 537 n.50 (2005).

<sup>31</sup> See Challenges for Cause Decision, *supra* note 29, at 1 n.1. See generally MARK P. DENBEAUX ET AL., *THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW* 185 (2009) (discussing how “ill prepared” the government was to deal with a pro se detainee).

<sup>32</sup> Toni Locy, *Guantánamo Hearings Start Today*, USA TODAY, Aug. 24, 2004, at 4A (noting that, from the panel members, only retired Army Colonel Peter Brownback had legal training).

<sup>33</sup> See Silliman, *supra* note 30, at 537 n.50.

<sup>34</sup> Ultimately, it was the general consensus of all involved that significant portions (if not all) of the voir dire that were conducted in classified session should have been held in open court, while other responses from prospective panel members made in open court perhaps should have been classified.



court communications with the client given the proximity of military court security, and the lack of availability of interpreters for such purposes.<sup>35</sup> Substantive and procedural defects continued to plague the military commissions, creating a stark distinction from the mundane and inexorable progress of a federal criminal case of even the greatest magnitude.

The nearly wholly uncharted proceedings that the commissions represented in 2004 (and for most purposes, through the middle of 2006, until passage of the Military Commissions Act of 2006 and the promulgation and implementation of a formal set of more comprehensive rules and procedures)<sup>36</sup> offered experienced federal court practitioners three distinct advantages: (1) each particular deviation from federal court practice could be cited as a material deficiency in the commission system, (2) the standards and practices employed in federal court could be cited as preferable in those many instances in which the military commission rules and orders had failed to provide *any* guidance, and (3) when appropriate, the lack of any military commission rules or standards served as an opportunity to craft innovative challenges or solutions that were based on and consistent with federal court practice.

Federal practice standards were, of course, particularly useful with respect to distinguishing the critical fundamentals of the commissions from those present in the federal system. Such standards included (a) the composition of the commission (non-lawyers endowed with the responsibility for making legal determinations), (b) the preference for hearsay over direct testimony, (c) the problems with the substantive offenses (notably regarding jurisdiction and the *ex post facto* doctrine), and (d) the diminution of the defendant's right to confront evidence.

In addition, federal practice standards also contrasted with the commission in the context of Sixth Amendment standards regarding attorney-client confidentiality and the scope of the attorney-client privilege and access, the sequence of pretrial events (e.g., bifurcating

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<sup>35</sup> For example, during the initial proceedings, private interpreters (hired by the defense teams) sitting in the audience immediately challenged the accuracy of translations by the court interpreters. Also, due to the small size of the courtroom, and the manner in which it had been reconfigured to accommodate the commissions, security personnel were situated so close to the defense table that it was very difficult to have even a whispered conversation with the defendant without the danger of it being overheard. For those defendants who did not speak English, adding a third person—the interpreter—to the conversation made confidentiality impossible.

<sup>36</sup> Pub. L. No 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

discovery motions from motions attacking the charging instrument from motions regarding evidentiary challenges), the range of resources made available by the courts for the defense of indigent defendants, and the handling of classified information.<sup>37</sup> Moreover, the initial military commissions' lack of rules and standards left so much uncovered that federal practice and military practice under the UCMJ served as the most likely and applicable analog.<sup>38</sup> When, however, the attempt to import the methodology of those established systems into the military commissions was opposed by the prosecution and/or rejected by the military commission itself, it merely illuminated the fatal flaws in the commissions system, including its resistance to fairness in adjudicating the detainees' cases.

Ultimately there were too many such instances to catalogue completely; they accumulated on a continuing basis and severely undercut the commissions' claim to any legitimacy. The repeated references to federal practice and its superiority to the military commissions substantively and procedurally (and in the context of orderly, predictable, reliable, and consistent proceedings and results) provided an invaluable template for challenging both the essence and operations of the commissions. Experienced civilian practitioners, equipped with the depth of experience and who could with the utmost confidence point to and explain examples from federal court practice, were able to expose the inadequacies of the military commissions on a regular basis.

#### IV. THE ADVANTAGES OF BEING A LAWYER IN THE MILITARY COMMISSIONS SYSTEM RATHER THAN IN HABEAS CORPUS PROCEEDINGS

Since military commission prosecutions commenced in *early* 2004, which was before any lawyers representing detainees in habeas corpus proceedings were permitted to visit their clients at Guantánamo Bay,<sup>39</sup> certain standards for military commission attorney access and conduct were already in place before the rules for habeas lawyers were formulated. That prior access became a distinct advantage for lawyers operating in the military commissions who were subject to dif-

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<sup>37</sup> See discussion *infra* Part V. Traditional military justice under the UCMJ, 10 U.S.C. §§ 801–941 (2006), also provided ample sources for comparison with the military commissions, with the latter proving inadequate in nearly every respect.

<sup>38</sup> *Id.*

<sup>39</sup> See Biography of Gitanjali Gutierrez, CTR. FOR CONST. RTS., <http://ccrjustice.org/about-us/staff-board/gutierrez-gitanjali> (last visited Sept. 16, 2011).

ferent rules, different treatment, and different recognition than the habeas lawyers.

The criminal nature of the military commissions provided a strong basis for insisting on the charged detainees' rights to counsel, the full protections afforded by the attorney-client privilege, and the protection of attorney work product. Also, because the military commissions' charges and the detailing of military defense counsel were referred<sup>40</sup> before any habeas lawyers were allowed to visit their clients at Guantánamo Bay, defense counsel in the commissions were able to operate under the auspices of a criminal prosecution before any of the more restrictive provisions applying to habeas lawyers were imposed.

Consequently, many of the restrictions under which habeas counsel were compelled to conduct their representation never applied to commissions' defense counsel. For example, during my representation of David (1) none of his statements to counsel were considered classified or embargoed in any way (other than initially with respect to the physical aspects of his confinement, but this restriction, too, vanished within a couple of months), (2) none of what he wrote was subject to any such restrictions, (3) there was no protective order with respect to communications or relations with the client (but rather only with respect to discovery provided by the prosecution), (4) none of the materials we provided or received from David were subject to any "privilege team" review, and (5) we were not subject to any formal limitations with respect to access to the client when we wished to visit. Conversely, the habeas attorneys suffered under all of those constraints.<sup>41</sup>

Even logistically there were benefits. Civilian lawyers (and of course their military co-counsel) in the military commissions were permitted to reside on the "windward" side of the base, situated on the eastern side of Guantánamo Bay. The windward side contained more resources and reduced travel time—including elimination of the ferry ride each morning and evening to the "leeward" side and back—to and from the detention camps, which were also located on the windward side. Nor were civilian defense lawyers in the commissions assigned personnel to accompany them everywhere. Rather, Guantánamo base officials deemed military defense counsel suitable

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<sup>40</sup> "Referral" is simply the technical term for the process by which military charges are instituted against a defendant.

<sup>41</sup> See, e.g., Josh White, *Rules for Lawyers of Detainees Are Called Onerous*, WASH. POST, Feb. 13, 2008, at A3 ("All mail from the lawyers to the detainees and from the detainees to their attorneys is screened by a Defense Department Privilege Team . . .").

escorts. Civilian defense lawyers in the commissions shared offices in the first commissions building with their military counterparts, which included access to telephones and the Internet. These working conditions enabled civilian defense lawyers in the commissions to use their time more productively and efficiently when not visiting clients at the detention camps.

The more favorable conditions under which civilian defense lawyers in the military commissions operated without *any* incident demonstrates that the disparate treatment of habeas counsel was purely arbitrary, unnecessary, and designed simply to impair the effectiveness of those attorneys and their relationships with their detainee clients. Unfortunately, as the revived commissions move forward, the Department of Defense (DoD), via its proposed protective order and directive to the military lawyers announcing DoD's position that it can monitor all electronic and telephonic communications to and from the Office of Military Defense Counsel-Defense (OMC-D),<sup>42</sup> is attempting to engraft the more restrictive treatment of lawyers in the civil habeas cases on to the defense attorneys in the military commissions. The purpose of such gratuitous rules, which are neither necessary for national security nor for case management in the commissions themselves, is transparent: to constrict and impair the defense function in the commissions.<sup>43</sup>

#### V. THE ADVANTAGES OF FAMILIARITY WITH CLASSIFIED EVIDENCE PROCEDURES AND RULES

The commissions initially lacked any formal or practical protocols for handling classified information and evidence. As a result, expertise in litigating under the Classified Information Procedures

<sup>42</sup> See Dep't of Def., Protective Order & Procedures for Counsel Access to Detainees Subject to Military Commission Prosecution at the U.S. Naval Station in Guantánamo Bay, Cuba (2011), *available at* <http://www.talkleft.com/legal/militcommprotorder.pdf>; Memorandum from Col. Jeffrey Colwell, Chief Mil. Def. Counsel, U.S. Dep't of Def., on Objections to Protective Order and Procedure for Counsel Access of Mar. 4, 2011 (Mar. 15, 2011), *available at* [http://media.miamiherald.com/smedia/2011/03/19/14/CDC\\_PO\\_objections\\_15\\_Mar\\_11.source.prod.affiliate.56.pdf](http://media.miamiherald.com/smedia/2011/03/19/14/CDC_PO_objections_15_Mar_11.source.prod.affiliate.56.pdf).

<sup>43</sup> It likely also represents the Obama administration seeking to mollify congressional critics who, in 2010, passed an amendment (that failed in the Senate) requiring DoD to investigate any lawyer who represented a Guantánamo Bay detainee and, *inter alia*, about whom there existed "reasonable suspicion" of having "interfered with the operations of the Department of Defense." Letter from Former Prosecutors and Judges to Senate Armed Servs. Comm. 1 (June 18, 2010), *available at* <http://www.constitutionproject.org/pdf/408.pdf>. See also H.R. REP. NO. 111-491, at 367 (2011).

Act (CIPA),<sup>44</sup> the statute that governs classified material and evidence in federal criminal prosecutions, was invaluable.

Knowledge not only of CIPA's procedural framework but also of the unblemished history of defense attorneys' compliance with the confidentiality of classified information provided a firm and principled basis for successfully resisting any restrictions on access or use of classified material that extended beyond what was permitted in the federal courts. In addition, CIPA provided a template for offering common sense and reliable solutions that was absent from the military commission rules. As a result, defense counsel were able to operate with confidence that—in the absence of commission rules on the subject—the manner in which we treated classified information and evidence was consistent with the law, conventional practice endorsed by the federal courts, and national security. Experience in litigating cases involving classified information and evidence also aided civilian defense counsel with respect to proposed protective orders. Federal cases implicating classified information always<sup>45</sup> include protective orders.<sup>46</sup> To the extent the military commissions attempted to impose conditions in protective orders that were more stringent on defense counsel and defense preparation, we were able to point to the protective orders in federal cases—as well as the perfect record of protecting such information in federal court—as examples of adequately protected classified information that did not unduly constrain defense preparation and investigation.

#### VI. THE ADVANTAGES OF EXPERIENCE IN INVESTIGATING, PREPARING, AND LITIGATING COMPLEX, DOCUMENT-INTENSIVE, MULTI-DEFENDANT CASES

Criminal prosecutions in the military justice system rarely involve more than one defendant, and among those, even rarer are complex, document-intensive cases—and by that term I mean a volume in the thousands, if not tens or hundreds of thousands, of pages. Yet such prosecutions are commonplace in the federal courts, and in a variety of cases, including white-collar crime, terrorism, computer fraud, and

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<sup>44</sup> 18 U.S.C. App. III, §§ 1–16 (2006).

<sup>45</sup> CIPA makes such protective orders mandatory upon government motion. *Id.* § 3. As a result, such motions are entered in every case involving classified information.

<sup>46</sup> See, e.g., *United States v. Moussaoui*, 591 F.3d 263, 267 (4th Cir. 2010); *Bismullah v. Gates*, 501 F.3d 178, 199 (D.C. Cir. 2007) (“At no time . . . may Petitioner’s Counsel make any public or private statements disclosing any classified information made available pursuant to this Protective Order.”).

identity theft.<sup>47</sup> In addition, organized crime and gang cases, as well as terrorism cases, routinely involve extensive forensic evidence and expert testimony.<sup>48</sup> Again, such cases are infrequent in the military justice system.

Such cases are different in kind and degree not only because of the amount of discovery. In addition, the scope of the necessary defense investigation (involving not simply an act or discrete series of acts, but a transnational conspiracy over considerable time designed to achieve multiple criminal objectives and to commit manifold diverse offenses in the process), the preparation time required for trial readiness, the use of broad inchoate offenses (e.g., conspiracy and “material support” for terrorism), and the intricate legal issues that arise in the context of complex offenses and fact patterns, distinguish such cases from the ordinary prosecution. These intricacies can also alter the dynamics among co-defendants and their counsel. Many lawyers, even in the federal courts, are unfamiliar with joint defense agreements, joint strategy sessions, and harmonization of co-defendants’ approaches to the case in a manner that denies the prosecution use of its traditional “divide and conquer” blueprint.

Multi-defendant cases present a minefield of opportunities for conflict among co-defendants and their tactical and strategic choices. While it is often challenging to reconcile contrasting interests among defendants—and their counsel’s theory of their defense—it is only in the rarest of instances that one defendant cannot achieve his strategic objective or engage in specific tactics without also fashioning it in a manner that avoids harming a co-defendant. Nor is this simply altruism; the benefits are reciprocal, as advance consideration of how a particular argument, exhibit, or cross-examination will affect a co-defendant’s case is the best insurance against the opposite happening to your client. Such consideration is contagious and encourages other counsel to preview parts of their case that might be harmful to other defendants.

The key is communication among counsel and with the defendants both individually and as a group. A defense that is not cohesive and involves counsel who, through either obliviousness, carelessness,

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<sup>47</sup> See, e.g., *United States v. White*, No. 06-377-1, 2007 U.S. Dist. LEXIS 60778, at \*18 n.6 (E.D. Pa. Aug. 17, 2007) (“This case involves ten defendants and twenty-two counts . . . and aggravated identity theft. The indictment describes seventy-five different transactions . . . . Discovery included thousands of documents . . .”).

<sup>48</sup> See, e.g., *United States v. Sabir*, No. S4 05 Cr. 673, 2007 U.S. Dist. LEXIS 34372 (S.D.N.Y. 2007) (involving expert testimony for charges pertaining to material support to a foreign terrorist organization).

or worse, disparage other defendants more often than not inures to the detriment of *all* defendants in a multi-defendant trial, including the attorneys who engage in such tactics. In fact, it is one of the chief ancillary advantages enjoyed by the prosecution in a multi-defendant case.

Yet regular and continued communication among counsel can diminish the negative effects in such cases. For example, legal issues advanced by one defendant can have a significantly better chance of success than if presented by another defendant (because either the factual context or some other aspect favors one defendant over another). Also, the timing in which issues are raised can also be critical and can benefit from joint discussion so that the benefits are maximized for all defendants. Language of argument or cross-examination can be structured so that it accomplishes its goal but minimizes or eliminates altogether the harm to another defendant. Cross-examination can also be divided not only to share ideas and to reduce each counsel's workload, but also to allocate to each counsel areas of cross-examination that most benefit their client (and, in turn, transfer to other counsel areas that are of use to them or which would benefit the client more if aired by a different defendant). As a cooperative venture, a whole defense in a multi-defendant case is far greater than the sum of its parts.

None of that is possible, however, if counsel fail or are unwilling to communicate. Experience in these types of cases—whether in securities or other white-collar cases, organized crime racketeering prosecutions, or large-scale drug cases—is sobering, as both exemplary and awful examples at each extreme provide the best lessons for future practice and sear into memory the consequences of a balkanized defense and the geometric advantages of striving to find strategic and tactical common ground.

Yet military counsel were almost all completely unexposed to such cases and to the culture of a joint defense. Also, while the first four commissions cases back in 2004 were charged as single-defendant cases,<sup>49</sup> it was clear that they would proceed in many respects as a multi-defendant case. The only judicial officer on each commission was the same, and the cases were heard in series over consecutive days.<sup>50</sup> Thus, whichever case went first would set the tone in many respects for the cases that followed. As a result, knowing

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<sup>49</sup> See Challenges for Cause Decision, *supra* note 29.

<sup>50</sup> See John Mintz, *Presiding Officer at Guantánamo Faces Questions*, WASH. POST, Sept. 16, 2004, at A3 (noting that the was Army Colonel Peter E. Brownback III presided over all four cases).

which issues might be important to the *next* defendant, even if not integral to the client's case, would influence how a particular issue might be presented in order not to minimize the importance of that other issue, which is vital to the co-defendant. Also, again, if a particular defendant's circumstances strengthened his chances on a certain issue, it would be prudent for counsel to recognize that *that* defendant's counsel should be afforded the opportunity to emphasize that issue.<sup>51</sup>

Obviously, these are not matters taught in law school—even in clinical programs, which correctly concentrate on developing individual lawyering skills. Nor are these matters recognized or cultivated in a system that handles almost exclusively single-defendant cases charged with individual offenses narrowly defined in time and scope. Such matters are second nature, though, to lawyers with extensive experience in federal court practice.<sup>52</sup>

#### VII. THE ADVANTAGES OF A CLIENT-ORIENTED, RATHER THAN CAUSE-ORIENTED, APPROACH

A criminal defense attorney's horizon is usually limited to one client's objectives in a particular case. That, after all, is the mandate: zealous, un-conflicted representation of the client—in the *singular*, and not the *plural*. Yet in the context of Guantánamo Bay, the “cause” could also serve as a distraction, as the inclination to view the detainees—their identities hidden for so long and their individuality denied as a consequence—as a unitary entity was powerful. Add to that dynamic the multiple representation of detainees in the habeas cases, and as a result, the obligation to the specific client could easily be obscured.

Also, the commentary regarding Guantánamo Bay, whether in the media, or from academics, politicians, or legal and human rights

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<sup>51</sup> A corresponding advantage in the military commissions was that it was unclear whether the military prosecutors' experience was broader than their military defense counterparts'. As a result, those prosecutors did not exploit the multi-defendant context nearly as often or effectively as civilian prosecutors. For example, the initial cases were charged individually even though the defendants were charged with what a civilian prosecutor would recognize as the same conspiracy and would consequently present in the same indictment charging multiple defendants.

<sup>52</sup> Conversely, the diverse nature of a federal practice afforded civilian defense counsel ample preparation for learning unfamiliar areas of law such as the Laws of Armed Conflict, the Geneva Convention, international humanitarian law, and the procedural and substantive elements of the UCMJ. Absorbing those doctrines simply replicated what occurs in the course of federal practice, which requires criminal defense counsel to master, over time and in considerable detail, securities law, tax law, construction law, banking law, and other areas of law that arise in particular cases.



organizations, invariably treated the detainees' circumstances en masse—as a unitary legal or human rights issue<sup>53</sup>—even though detainees often faced individual problems and possessed different interests and priorities. That grouping of the detainees, facilitated by the U.S. government's refusal to identify the detainees<sup>54</sup> (and its earlier tactical decision not to confine any U.S. citizens at Guantánamo Bay,<sup>55</sup> thereby effectively eliminating the U.S. public at large as an interested party), made it convenient, even seductive, to transfer that more abstract approach to the representation of individual detainees in their criminal military commissions prosecutions.

Again, though, the culture of criminal defense lawyering in the U.S. criminal justice system acted as a bulwark against that division of interest. While in civil litigation multiple representation is permitted, and is often efficient if the interests of the clients converge, the general rule is the opposite in the U.S. federal criminal justice system: one client per lawyer.<sup>56</sup> That limitation guards against viewing too broadly the attorney's role and duty, which is to the individual client only.<sup>57</sup> Having more than one client per lawyer was a persistent issue regarding representation in the military commissions as the detainees, and the commissions themselves, were the subject of an ongoing political debate that often transcended individual cases and the important issues at stake for each detainee defendant. Although it may have been tempting to treat the conditions at Guantánamo Bay and the structure of the military commissions as grounds for a “cause” on the detainees' behalf, in the context of a criminal prosecution, that would be as misguided as it would be contrary to ethical obligations. Treating the two as grounds for a cause would have jeo-

<sup>53</sup> See, e.g., E.A. Torriero, *Guantánamo Braces for Change*, CHI. TRIBUNE, July 12, 2004, at 1 (noting human rights groups' criticism).

<sup>54</sup> See *President Makes Recess Selections*, PITTSBURGH POST-GAZETTE (Pa.), Jan. 5, 2006, at A-8 (discussing media efforts to uncover the identities of the detainees).

<sup>55</sup> See, e.g., Joan Biskupic, *The Questions the Court Will Consider*, USA TODAY, Apr. 19, 2004, at 13A (noting that a U.S. citizen “was transferred to a military brig in the USA when officials realized” this fact).

<sup>56</sup> See, e.g., *United States v. Curcio*, 786 F.2d 52 (1986) (discussing dangers arising from multiple representation); Rory K. Little, *A Roundtable Discussion of the ABA's Standards for Criminal Litigation: The Role of Reporter for a Law Project*, 38 HASTINGS. CONST. L.Q. 747, 794 (2011) (noting that defense counsel should generally refrain from representing “two or more clients in criminal cases”).

<sup>57</sup> That principle is not incompatible with the points made *supra*, Part VII. The justification for coordination and cooperation among co-defendants and their counsel is to achieve the best results for the individual client. The preference for joint defense strategy and communication merely recognizes that a unified approach is most advantageous for *each* client.

pardized obtaining the best results for the individual client. Indeed, if, as David's lawyers, we would have considered as a priority the broader goal of invalidating the military commissions in their entirety, we would not have been able to capitalize on the opportunity for a disposition that resulted in David's return to Australia sixty days later and his freedom within six months thereafter. If David had not pleaded guilty, but instead waited for (another) defeat of the military commission system,<sup>58</sup> he would likely still be at Guantánamo Bay, "presumed" innocent but still awaiting trial in the fifth incarnation of a failed and illegitimate system.<sup>59</sup>

In the criminal justice system, justice most often must be achieved one defendant at a time, and deviating from that principle often precludes both aims: the client gets convicted, and the cause is not advanced, either. For Guantánamo Bay, too, the concept is the same: it now appears, given President Obama's unwillingness and/or inability to shutter the facility, that the detention operation will only be closed one detainee at a time, through individual cases in the military commissions and habeas petitions that gain a detainee's release.

#### VIII. THE ADVANTAGES OF A GLOBAL AUDIENCE

The attention paid to Guantánamo Bay detainees by non-governmental organizations (NGOs), international (and, over time, domestic) media, organized bar associations, and academics in the United States and abroad created an atmosphere conducive to pressuring the military commissions apparatus by appeals to those audiences. Because the purpose, structure, and operation of the military commissions were so transparently political, the commissions were naturally quite sensitive to political pressure. Thus, media, academic, and NGO criticism of the military commissions exerted an impact on the commissions far greater than would have been the case in the federal courts, which, although not entirely immune to influence from those quarters, are far more insulated from it.

The global audience also provided the lawyers available outlets for their message on a daily basis, as there was never a shortage of reporters, professors, and NGOs anxious for information about the

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<sup>58</sup> Although David's case was still relatively early in its pretrial phase when the Supreme Court decided *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006), the Court's rejection of the military commissions did not free David. All the ruling did was leave David in continued limbo pending Congress's attempt to gloss over the commissions' inadequacies via the Military Commission Act of 2006.

<sup>59</sup> In early 2011, there were "172 detainees remaining [in Guantánamo], 48 of whom are expected to be held indefinitely." Glenn Kessler, *Takes Factchecker Banner with GK Mug*, WASH. POST, May 22, 2011, at A6.

Guantánamo Bay detainees and their legal struggles in both the military commissions and habeas corpus process. Also, once the military commissions commenced and their deficiencies were apparent, stinging editorials from U.S. newspapers placed the commissions on the defensive.<sup>60</sup> That posture only aggravated the problem for the commissions, as cosmetic changes or reforms were recognized as such and further eroded the military commissions' credibility.

Experience in high-profile cases in the U.S. courts obviously provided defense lawyers excellent training for this aspect of the military commissions, although the scope and volume of the attention vastly exceeded all but the highest profile cases—and with respect to academic and NGO interest, it was unprecedented for criminal proceedings. While it is a myth that the media can be “controlled,” even by the most skilled lawyer, experience does provide guidance on how to maximize the advantages of media interest in a case for the client's benefit—steadfastly keeping in mind that the only objective is improving the client's chances and not aggrandizement of the attorney's media profile or reputation.

Criminal cases are rarely won by appealing to an audience outside the jury box or judge's bench, but with respect to the Guantánamo Bay military commissions, the global audience and its enduring fascination with all things Guantánamo created a fertile environment for successfully challenging the military commissions and revealing its many flaws.

#### IX. THE ADVANTAGE OF HAVING THE RIGHT CLIENT

An additional advantage was not the result of federal court experience as a defense lawyer. Rather, it was simply good fortune to have David as a client. The absence of a language barrier, the relative lack of any cultural barrier (Australian cultural mores are close enough to American, Vegimite<sup>61</sup> and “football” aside), and the ability to engage in regular contact with David's family all combined to make establishing the essentials of a productive attorney-client relationship—trust, confidence, and candor<sup>62</sup>—a relatively effortless process.

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<sup>60</sup> See, e.g., Editorial, *The President and the Courts*, N.Y. TIMES, Mar. 20, 2006, at A22.

<sup>61</sup> Vegimite is a popular Australian dark brown food paste made from yeast extract.

<sup>62</sup> While these three elements are all related, they are in fact different. Trust involves believing what the other person says and that person's bona fides (in this instance, counsel acting in the best interest of the client, and the client's agenda being transparent). Confidence, on the other hand, involves the client listening to the lawyer's advice and making prudent decisions based on the belief that such advice has merit. Candor, in which lawyer and client provide their honest assessment of the

For many other lawyers, particularly military lawyers without the aid of civilian counsel, the suspicion and distrust detainees harbored with respect to uniformed U.S. officers was difficult to overcome and created initial obstacles that we never encountered with David. Also, without doubt, some of the advantages described above, particularly the lack of any “competition” at the outset, enabled us to accomplish certain objectives for David that increased his confidence in our ability to achieve our more important goals in the commissions themselves.

Throughout the period of representation, David was an engaged and informed client, an avid student of both the system to which he was subjected and other subjects—English literature, science, and math, for example—that due to his lack of extensive formal education had not previously been accessible to him. He handled the challenging circumstances of his confinement and prosecution with great resilience, perseverance, and humor, without which probably none of the advantages discussed in this Essay would have mattered much at all.

The point of this Essay is not to suggest that for experienced federal practitioners these advantages make the military commissions a venue superior to federal courts, but instead that those who practice in the federal courts state a preference for federal court prosecutions of Guantánamo Bay detainees (and apprehended alleged terrorists generally) do not do so because of some inability to navigate the military commissions. Rather, it is based on the belief that the federal courts constitute a legitimate system in which justice is at least possible and the design of which is not merely to guarantee convictions.

Indeed, proponents of military commissions who see them as a barrel in which to prosecute alleged terrorist fish should be aware that the fundamental defects in the military commissions provide substantial opportunity for experienced civilian defense practitioners—which is perhaps why the government has thus far refused to fund the participation of civilian defense counsel in the commissions. As a Department of Justice (DoJ) lawyer reportedly declared during a high-level internal DoJ strategy session shortly after September 11, 2001, regarding affording Muslim detainees in federal civilian custody timely access to counsel, “Let’s not make it so they can get Johnny

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facts, the circumstances, and each other, stems from the foundation of both trust and confidence. All three are imperative for an effective attorney-client relationship.

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Cochran on the phone.”<sup>63</sup> While unfortunately Mr. Cochran is deceased, the spirit of vigorous, innovative, and intelligent defense lawyering lives on.

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<sup>63</sup> See STEVEN BRILL, *AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA* 147 (2003).