**Dispatch from GTMO**

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**Reflections on the Hearings**

Guantánamo Bay is a strange place. From September 14 to September 21, 2013, I traveled to naval base as an approved non-government observer (NGO) to witness the pretrial hearings for the five men accused of conspiring to commit the terrorist attacks that took place on September 11, 2001. The military commission, which convenes at Guantánamo Bay, oversees the hearing for the five men who face the death penalty if convicted.

When I first arrived on the base, I was pretty confused. I saw men and women in neon luau shirts everywhere. Some of them were landscapers, cutting shrubs and plants on the side of the road. Others worked sanitation, picking up garbage from road-side trash bins. Still, others were riding around, talking on walkie-talkies. In my gut, I felt like I had landed on some distant planet, somewhere far away from where the military commission was going to take place...somewhere far away from where something "legal" was bound to take place.

I wondered about the people in luau shirts. Later on, I learned that these men and women were contract workers from Jamaica, Haiti, Cuba and the Dominican Republic. They work on the naval base for two to three months at a time before returning to their home countries. I also learned that at one time, Guantánamo Bay hosted Haitian refugees, people displaced by the 2010 earthquake and various hurricanes. When I asked my escorts what happened to the Haitians (if they are still on the island), he could not answer my question.

With our escorts, we drove from the dock-area of the Windward Point through several streets. We passed the movie theater, the Jamaican grill, the bowling alley, the youth center and the "arts-n-crafts" building, which struck me as odd every time we passed it in our vehicle. The doors were never open. There were never any cars in the parking lot. There was barbed wire by the building. When I asked about the building, our escort told us: "very few people on the island like arts-n- crafts." Then why have the building?

Finally, we arrived at "Camp Justice," a set-up of tents for visitors and military personnel. The name of the camp seemed slightly audacious, perhaps even a little bit presumptuous, given everything that I had heard about the military commission from other observers. I wondered if perhaps all military bases have a "Camp Justice."

There were 13 NGO observers visiting Guantánamo Bay during the week I was there, myself included. Individuals represented various groups, including Amnesty International, Human Rights Watch, Judicial Watch, and the American Bar Association. Throughout the course of the week, I learned that each of us had a very different idea of "justice." One individual thought "justice" only came in the form of transferring the

hearing to a civilian court. Another thought that "justice" meant stopping the pre-trial hearings and just moving on to the trial. Calling the area "Camp Justice" is provocative, raising the question as to what true justice means and looks like.

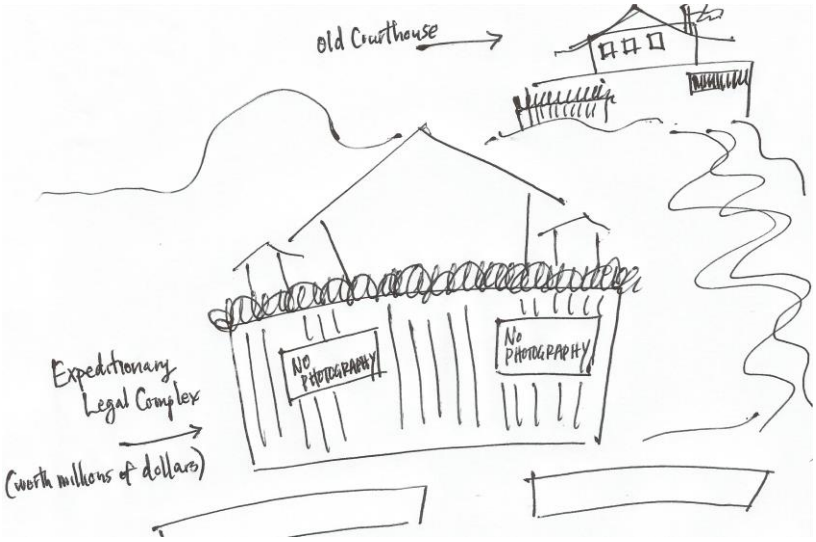
After we claimed our tents and unpacked our belongings, we reconvened at a table outside of the tents where our escorts explained basic rules and procedures and asked if we had any questions. "Where is the courthouse?" someone asked. Our escorts pointed to a building right behind us, inside a fence with barbed wire and big signs that read "NO PHOTOGRAPHY." I was shocked. The courthouse looked like a barn or a big warehouse. Next, our escort pointed to a building atop a close-by hill. "That's the 'old courthouse,' where low-value detainees are brought." I was stunned. Both buildings did not look anything like the courthouses that I have seen. They were not marked. There was no signage. Nothing about them looked official.

Our escorts explained to us that taking photographs of the courthouses was strictly prohibited. He told us that guards begin their "sweep" of the courthouse on hearing-days at "0 dark thirty" (Aha! The title of the movie now made sense) and that both courthouses cost millions of dollars to build. I didn't understand what that had to do with us taking pictures, but I listened to his instructions.

Later that day, we took an official tour of the new courthouse (where the high-value detainees have their hearings) and the complex. Even after the tour, I still could not believe it that it cost millions of dollars to construct each complex. Wendy Kelly, the Operations Chief of the military commission, showed us around.

When the detainees first arrive at the Expeditionary Legal Complex (as it was formally known), she explained, they are brought in through a small entrance in the back. They are unloaded from individual vehicles and brought to an area of the complex where six small sheds stand. One-by-one, they go through the same routine. First, they are brought into the first shed, where they are attached to a machine. The machine is supposed to detect whether the detainees have any contraband on their person, like metal or plastic pieces.

Then, each one is brought to his own unique "holding shed." Each shed is small and divided into two parts. The part furthest from the door is where the detainee is kept. There is a bed, a toilet, some personal belongings (a Koran and other religious items) and a camera mounted to the wall. The part nearest the door is for the detainee's attorney. There is a chair, a plastic container (with some water), and a flat-screen LCD mounted to the wall. The attorney is able to put anything he/she wants in the plastic container. Wendy Kelly explained to us that sometimes, during the breaks of the hearing, an attorney will conference with his/her client in the shed (rather than in the courtroom) and may choose to leave belongings in the shed. The set-up looked something like this:




There is also a marking on the floor pointing the way to Mecca, so that the detainees have an opportunity to pray in their shed should they choose.

Additionally, she told us that if a detainee preferred not to be present in the courtroom, he was able to return to his holding shed and watch the commission live, on his own LCD flat- screen television. At that time, I really did not understand that the detainees had the opportunity to "opt out" of the hearings (or of portions of the hearings). At the beginning of each day, they are asked whether they understand their right to be present and they are asked to make a decision about whether or not they will attend the hearing. This was also a subject of controversy during the week. Mr. Mohammed and Mr. bin al Shibh challenged this process, arguing that their decision not to show up in court should not negatively impact the proceedings, even though the language of the order seems to suggest otherwise. As a law student, this seemed strange. I wondered how it is that the detainees are able to meaningfully participate in their hearings "from the sidelines," – that is, if they are not in the courtroom and not consulting with their attorneys.

When we left the first shed, Colonel Kelly told us that each one was "virtually the same" and that we would move on to tour the inside of the courtroom. When we asked her which "shed" belonged to which detainee, she told us that that information was privileged and that she was not at liberty to tell us. I wondered what difference it made. Why couldn't we know who was where during the proceedings? I also wondered if each "shed" was, in fact, the same. This seemed like a ridiculous thing to keep secret.

The inside of the courtroom definitely looked more like a courtroom than the outside. There was a raised bench for the judge, an area for court stenographers, an area for the jury, prosecution and defense. Colonel Kelly explained to us that originally, six men were going to be put on trial for the 9/11 attacks but that one of them had been tortured so badly he was removed from the commission. There remained six defense tables, however, because apparently it would be too costly for the government to remove the last table.

Over the course of the week, that courtroom – or, rather, the viewing gallery looking into the courtroom – became our workstation. Together, the NGO observers, military personnel and victims' families listened to testimony about a whole host of technology problems plaguing Pentagon computer systems. These problems are affecting defense attorneys so much so that they say they can no longer defend their clients and ethically practice the law. I was shocked to hear that the focus of the week's hearings was to be about technology. *How could there be so many technological problems*, I wondered, *when we live in an age full of technology? Shouldn't the government be on top of this?*

Colonel Karen Mayberry, the Chief Defense Counsel for the Office of Military Commissions, related that the problem began when Defense Department technicians began the process of "replication," that is, when the Department tried to make both prosecution and defense files from the teams' main offices in Virginia available to them in their offices in Guantánamo Bay. The colonel testified that shortly after the Department's first attempt to replicate files, some defense teams could not access their computer drives while others could not locate files containing confidential information. According to David Nevin, the attorney for Khalid Sheikh Mohammed, when his team accessed files, they found that some documents had new modification dates and times, ones that did not coincide with a date or time in which his team had accessed and used the files. The defense also brought to light other problems, some of which are still ongoing. Among the problems: that defense documents mysteriously showed up on a different government agency's server, that defense teams have not been receiving emails on time, and that "phantom" defense team email addresses have been circulating.

At first, I don't know if I truly believed the defense teams' argument. The courtroom seemed to have a lot technology. I watched the defense teams bring up lots of different documents onto their computers. I also noted the quantity of paper files sitting on their desks. What difference does it make, I wondered, that they could not access their files electronically when they have a paper trail? Isn't it their responsibility to ensure that they are using a system that meets their needs? Don't technology failures happen all the time?

The more I watched the commission, however, the more I noticed something strange: the prosecution seemed to "run the show" – that is to say, the commission did not seem to allow for the typical adversarial system that one might see in a civilian court. The prosecution swore in witnesses. They were the ones who requested breaks. They provided defense teams with an electronic platform to conduct their work.

Over hours of testimony, the biggest problem, the defense teams said, had been a massive loss of data. Witness testimony revealed that in mid-April about 540,000 defense emails, which were not available on defense team servers, had been inadvertently passed to the prosecution. At one point during the week, Cheryl Bormann, attorney for Walid bin Attash, pointed out that 57 of her investigatory files were still missing. Testimony revealed that not only were files missing, but that the NSA had monitored internet searches by several members of the defense team before the files went missing; all of this, the defense said, has severely compromised the attorney-client privilege and the credibility of the military commission.

Because of these problems, Colonel Mayberry testified that in April, she ordered defense counsel to stop using government computers to store and send privileged documents. She said she was worried about defense teams using the system and upholding their duty of confidentiality. She also recognized that the compromised data system jeopardized attorney-client relationships, weakening the defendants' trust in their attorneys. As a result, defense teams have had to create their own mishmash system, relying on private email accounts, external hard drives, snail-mail and . . . Starbucks.

After court, many of the observers joked about the defense teams having to go to Starbucks to send emails and strategize about the hearings. The whole argument seemed pretty strange to me: on the one hand, it seemed like hyperbole – did the defense teams *really* have to go to Starbucks? Why couldn't they just work from home? On the other hand, it seemed really sad. The defense teams, who are working to ensure that their clients receive a fair trial, *had to work at a Starbucks*. The defense teams were at the mercy of a faulty government server and were trying as best they could to advocate effectively on behalf of their clients. The whole thing seemed outrageous.

It was true, the defense teams argued: due to the unpredictable government server and the outrageousness of the situation, defense teams have resorted to using a public Starbucks internet connection, which they believed (and continue to believe) is safer than the government's system. Strangely, Prosecutor Ed Ryan acknowledged that the defense teams' system has been a viable workaround to the problems they experienced with the government server, a problem that Colonel Mayberry repeatedly stated was "very, very bad."

These problems, and the defense teams' makeshift solution, shed light on the unique challenges of the military commission process. The lack of any real precedent, coupled with geographic complexities (including the difficulty of having to uproot a judge, prosecutors, defense teams, and analysts in the U.S. and replant them in Guantánamo) has caused real dangers to the legal process. The duty of confidentiality seems to have been lost, attorney-client privilege seems to be severely jeopardized, and a "true" adversarial system – the type found in civilian courts – seems to be nonexistent. And talk of torture and human rights abuses is constant. At one point during the week, we went to a hill that overlooked Camp X-Ray, one of the first camps used to house detainees post 9/11. Camp X-Ray was shut down, our escorts explained, after the new detention facilities were built. Throughout the week, I also thought about what the world must be saying and thinking about Guantánamo Bay. According to the International Covenant on Civil and Political Rights, unless some extreme circumstance exists, trials must be held in a civilian court. I wondered what "extreme circumstance" warrants the use of the military-commission process. Is it an issue of national security? Is it war?

I started thinking about the research I have been doing with the Center for Policy & Research. If "war" is the United States government's justification for convening a military commission, which war is the U.S. government relying on? The War in Afghanistan? The Global War on Terror? Over the course of the week, I started to see how all of our work at the Center (and the themes we explore) mesh together – how Guantánamo Bay, over-classification, national security, secrecy, the Global War on

Terror, NATO, etc. all in some relate to one another and tell a story about U.S. government policy in a post 9/11 world. At the end of the week, as the hearing came to a close and in light of all of my reflections, I recognized how important it is for defense teams to obtain a "system that works" sooner, rather than later. This is critically important, I realized, so that defense teams can do their jobs and so that this nation's conceptualization of fairness is not in any way cheapened and after it was discovered that guards were torturing inmates. It was definitely a strange sight to see: there were watch towers and what appeared to be open-air bunks. I wondered why Camp X-Ray just sits there – why it hasn't been torn down – and I think it may be because allegations of abuse and torture are still being investigated. We were instructed not to take any pictures or video footage.

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