

Commissionland

By Dwight Sullivan

Disclaimer: This essay is written by Dwight Sullivan in his personal capacity. His views are not those of, and should not be imputed to, the Department of Defense or any other agency or entity.

General Omar Bradley is credited with saying, “Amateurs talk strategy; professionals talk logistics.” The experience of attempting to litigate military commission cases revealed that it is logistically impossible to have a fair trial at Guantánamo Bay.

Guantánamo had insufficient courtroom space, housing, transportation, and telecommunications to support complex criminal litigation. It also offered defense counsel inadequate access to their clients. Finally, there was an enormous legal difficulty that prevented trials at Guantánamo from being fair—the inability to subpoena civilian witnesses to appear at commission proceedings held there.

- **Inadequate courtroom space:** From the inception of the commission experiment through 2007, there has been only one courtroom for the trial of military commissions at Guantánamo. It is a cramped room in a dilapidated structure that is both rat-infested and riddled with holes bored by woodpeckers eating insects from the building’s bug-ridden, rotting frame. Conspicuous signs warn against drinking the building’s water—which no one would be tempted to do, since the water that spews out of the building’s faucets is orange. The commission room itself prominently features several load-bearing pillars, resulting in obstructed-view seating reminiscent of Fenway Park. But the most significant problem has been the courtroom’s size. When the commission prosecution office wanted to hold a joint trial of three defendants in 2006, it couldn’t because the courtroom simply wasn’t big enough to accommodate more than one defendant and his

lawyers at a time. And with only one operating courtroom, the space limitations produce a chokepoint that has severely limited the number of cases that can be tried.

In 2006, to overcome these limitations, the Office of Military Commissions developed an elaborate plan to build a courthouse complex in Guantánamo at an estimated cost of \$126 million. In one of his first actions after becoming the Secretary of Defense, Secretary Gates wisely killed this proposal.<sup>1</sup> In the fall of 2007, construction got underway to spend \$15 million to erect a barebones prefabricated courthouse surrounded by a military commission tent city. Whether this field expedient approach will succeed in producing a viable courtroom venue has yet to be seen, though the history of the military commission process provides little reason for optimism.

- **Inadequate housing:** Housing space at Guantánamo is severely limited. These limitations affect the counsel litigating commission cases, the U.S. military personnel who support them, and the journalists and handful of nongovernmental organization observers who have been permitted to attend. Limitations on housing have directly interfered with the ability of military commission defense counsel to perform their duties. The U.S. military will not issue a country clearance to travel to Guantánamo Bay unless the individual has confirmed housing available. On several occasions, the Office of Military Commissions' Chief Defense Counsel was directed to limit the number of defense counsel traveling to Guantánamo, particularly when commission proceedings were scheduled, due to a housing shortage. If trials ever get underway, such restrictions will make it enormously difficult for counsel to prepare for upcoming hearings.

The number of observers allowed to attend trials at Guantánamo has also been severely limited. Such a respected organization as the National Institute of Military Justice had its request

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<sup>1</sup> See Testimony of Secretary of Defense Robert Gates, Senate Appropriations Committee, Feb. 27, 2007 (“By the time I received it, the request was, I think, for \$92 million, and I basically said, this is ridiculous. . . . I said, we’ll be handed our hat if we go up to the Hill for \$100 million for these courthouses.”).

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to send an observer rebuffed. Severe housing limitations at Guantánamo 's Leeward Combined Bachelor's Quarters (CBQ) likely contribute to the restrictions on how many members of the public are actually permitted to witness commission proceedings.

Once the new fifteen million dollar modular courthouse is erected, the plan calls for many of the U.S. service members who provide security for the commission facilities to be housed in tents pitched near the courthouse—which will be on the tarmac of an abandoned airfield immediately adjacent to the Bay and just a few feet above sea level. But pitching tents on an impervious surface in an area subject not only to hurricanes but frequent tropical downpours hardly seems the answer to Guantánamo's housing shortage.

- **Inadequate transportation:** Traveling to and from Guantánamo is difficult. While two commercial carriers fly to Guantánamo, Office of Military Commissions personnel are prohibited from using them due to safety concerns. So the only way for a commission counsel to travel to or from Guantánamo is aboard one of the limited number of U.S. military flights. Due to those flights' relative infrequency and points of origin far from Washington, D.C., in practice almost every trip to Guantánamo takes at least four days. Because commission defense counsel have thus far not been allowed to talk to their clients over the telephone, this means that any time an attorney needs to consult with the client about any matter—even if the conversation will take only thirty minutes—the attorney must devote at least ninety-six hours to accomplish that task. This has obvious negative effects on case preparation.

Particularly at times when many of the military personnel at Guantánamo are executing Permanent Change of Station orders, there may be absolutely no seats available on military flights to or from Guantánamo, making it impossible for counsel to see their clients some weeks.

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And, as I have personally experienced, it is hardly rare to have a trip to Guantánamo delayed due to cancellation of the military flight down or extended due to cancellation of the military flight back. It is completely understandable why that happens—one of my planned flights off the island was cancelled because the plane was diverted for Hurricane Katrina relief purposes. But while such transportation glitches are understandable, they reveal the incompatibility of Guantánamo with fair trial preparation.

The military commission proceedings themselves produce an even greater unnecessary strain on U.S. military aircraft assets. During the March 2007 hearing in *United States v. Hicks*, more than ninety individuals flew from the Washington, D.C., area to Guantánamo aboard at least three different military flights to participate in or observe the commission proceedings. The only trial participant who was in Guantánamo before the hearing was the defendant, David Hicks. Moving that one individual to the United States would be far more economically efficient than flying dozens of individuals back and forth from Maryland to Guantánamo for every military commission hearing.

Transportation difficulties also make it difficult or impossible to deal with the unexpected events that frequently arise during litigation. For example, in the military commission case of *United States v. Zahir*, the Presiding Officer realized the afternoon before a hearing that the commission did not have a translator who spoke the accused's language. If the trial were held anywhere in the United States, a Farsi translator could have been obtained by the next day. But not at Guantánamo.

In the *Hicks* case, transportation difficulties again impacted the proceedings. While a plea bargain was struck on Monday, March 26, 2007, the commission's members (the equivalent of the jury) couldn't be rounded up and flown to Guantánamo until Friday, March 30. And my

understanding is that when the members were flown to Guantánamo and back to the Washington, D.C., area, the Deputy Secretary of Defense's jet had to make a round trip to Guantánamo each time. Even worse than the inordinate expense of two trips by an executive jet to ferry the commission's ten members back and forth was the waste of one of my office's most precious assets: the time of the Office of Military Commissions' attorneys and paralegals who were there to litigate or observe the *Hicks* case, as well as the time of all the other trial participants and observers. All of the trial participants and observers were stuck on Guantánamo until flights out could be arranged on Sunday, April 1. Counsel's trips to Guantánamo were also constantly postponed during the summer and fall of 2007 because the Naval Air Station at Guantánamo had to cease air operations for two weeks to allow its runway to be repaved. But in typical Guantánamo "hurry up and wait" fashion, the repaving project was constantly pushed back due to difficulties acquiring all of the necessary raw materials to accomplish the mission. This resulted in rolling flight cancellations, as the Guantánamo unavailability window was intermittently pushed back.

- **Inadequate telecommunications:** Both telephone and computer services are extremely limited on Guantánamo. The limited number of telephone lines that reach the United States are generally of poor quality and usually feature a delay that makes it difficult to actually converse. Due to the poor sound quality, for all practical purposes it is impossible to have a conference call between Guantánamo and anyone in the United States. The computer network's bandwidth is extremely limited. Both latency and through-put speeds are very slow. The combination makes it practically impossible to download a large document from the Internet. And the overly aggressive JTF-GTMO Internet filters often prevent access to Web sites that are necessary to prepare for trial. Worse still, it is currently impossible for civilian defense counsel to use the JTF-GTMO computers at all. So those counsel, who generally serve as lead defense

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counsel in a commission case, have no access to the Internet or even the JTF-GTMO e-mail accounts that all of the military parties, including the judges, use. In practice, this is an even greater limitation than it might sound because almost all commission business is conducted electronically rather than on paper.

It is also virtually impossible to interface with the Office of Military Commissions computer network from Guantánamo Bay. Accessing office e-mail, for example, requires patching through a DSN dial-up connection that frequently drops calls. Files stored on the OMC network drive are, for all practical purposes, unavailable to counsel working at Guantánamo. And BlackBerry devices will not work at Guantánamo.

- **Inadequate access to the client:** The Joint Task Force Guantánamo imposes unnecessary limitations on the number of hours that a military attorney can meet with the client and what can be done during those limited meetings. Contrary to practice at most U.S. military detention facilities, where a military defense counsel can essentially meet with his or her client at any time and on any day when the counsel needs such access, JTF-GTMO strictly limits attorney visits to three hours in the morning and four hours in the afternoon Mondays through Fridays. Weekend and evening visits are not generally permitted.

JTF-GTMO also interferes with the attorney-client relationship by applying inappropriate restrictions on the information that defense counsel may share with their clients. In the case of *United States v. Khadr*, for example, JTF-GTMO officials have never allowed defense counsel to share any of the prosecution's evidence in the case with the defendant. It is simply impossible to prepare for a highly complex criminal trial without being able to review such materials with the client. The Military Commissions Act of 2006 expressly requires that the defendant be given an opportunity "to examine and respond to evidence admitted against him on the issue of guilt or

innocence and for sentencing.” 10 U.S.C. § 949a(b)(A). Yet JTF-GTMO’s operating procedures have made it impossible to do so. This not only prevents the defense team from preparing for trial, but it undermines the attorney-client relationship. It is hard enough for a U.S. military lawyer to win the trust of a foreign national who has been detained at Guantánamo Bay for five years. It becomes harder still when the defense counsel tells the detainee that the counsel has information about the detainee’s case, but the counsel can’t share it with the detainee.

JTF-GTMO has also refused to allow detainees to meet with mental health experts working with the defense counsel. The Military Commissions Act provides that “[t]he accused in a military commission under this chapter has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.” 10 U.S.C. § 949k(b). How can the defense ever carry that burden if it is not allowed to have a mental health expert examine the defendant? And JTF-GTMO severely limits the number of people who can be in a cell with a detainee at one time. Given the necessity of having a translator present when talking with many clients, this has often prevented some members of the defense team from participating in attorney-client meetings.

- **Operational concerns:** Military commission proceedings at Guantánamo are subject to interruption due to operational concerns. Because of security concerns, scheduled commission proceedings had to be canceled in June 2006 due to the suicides of three detainees at Guantánamo. The threat of disruption to commission proceedings would be particularly acute if there were to be another mass exodus of refugees from Cuba.

- **Legal limitation:** In addition to these practical matters, there is a fundamental legal limitation that arises from the commission system’s location in Guantánamo: compulsory process is not available to subpoena a civilian witness to attend a commission proceeding. As the discussion to Rule for Courts-Martial 703(e)(2)(A) explains, “A subpoena may not be used to

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compel a civilian to travel outside the United States and its territories.” *See also United States v. Wooten*, 34 M.J. 141, 146 (C.M.A. 1992). In light of the United States Court of Appeals for the District of Columbia Circuit’s recent reiteration that Guantánamo Bay is not U.S. territory,<sup>2</sup> it is apparent that neither the prosecution nor the defense will be able to subpoena witnesses to appear at a military commission. This problem is exacerbated because in the military commission system, the prosecution can present its case entirely through hearsay evidence. It is essential for the defense to have an ability to subpoena prosecution witnesses so that they can be confronted and cross-examined about their allegations. But holding the commission trials in Guantánamo extinguishes that ability.

#### Conclusion

In his testimony to this subcommittee on March 29, 2007, Secretary Gates said:

[B]ecause of things that happened earlier at Guantánamo, there is a taint about it. And it’s one of the reasons why I had recommended or pressed the issue of trying to get the trials moved to the United States, because I felt that no matter how transparent, no matter how open the trials, if they took place at Guantánamo in the international community, they would lack credibility.

That assessment is no doubt correct. But trials at Guantánamo don’t merely *appear* unfair; they *are* unfair.

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<sup>2</sup> *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007).