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ARTICLES

THE CYNICAL SUCCESSES OF THE GUANTÁNAMO BAY MILITARY COMMISSIONS

G. ALEX SINHA*

ABSTRACT

Since they were first authorized in the weeks after the 9/11 attacks, the Guantánamo Bay Military Commissions—special military tribunals for the trial of certain terror suspects—have generated eight minor convictions at a cost of over one billion dollars. Nearly half of the convictions have been vacated on appeal. The three ongoing contested cases, including the case against those accused of complicity in the 9/11 attacks, remain mired in pretrial proceedings. The biggest storylines emanating from the commissions do not concern convictions, but rather government surveillance of the defense teams and the compelled recusal of judges for the appearance of partiality toward the government. Focusing largely on the unique structural features of the commissions, such as the remote location of the commissions that helps explain their cost or the rules of evidence that are unusually favorable to the prosecution, scholars and other observers have consistently and understandably described the commissions as failures.

This Article argues that we have been looking at the commissions all wrong. First, the structural features of the commissions are not the primary drivers of their performance. The more fundamental problem is one of ethos: officials associated with the commissions consistently prioritize objectives other than dispatch, transparency, and public confidence. Second, that prevailing culture was injected into the commissions deliberately at their founding and remains broadly consonant with the governing norms of the broader War on Terror. The commissions have indeed failed the American people, but not because they were badly designed; rather, it is because they have done exactly what they were designed to do. These conclusions have significant implications for our understanding of the importance of the informal norms that overlay the

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structural features of any justice system, as well as lessons for the War on Terror specifically.

INTRODUCTION

Since their controversial beginnings, there has been no shortage of criticism of the Guantánamo Bay Military Commissions, special military tribunals convened in the wake of the 9/11 attacks to try certain foreign individuals charged with terrorism-related offenses. As described in more detail below, advocates, observers, and participants have critiqued many structural or formal features of the commissions, such as their purported constitutional problems,¹ the possibility that they violate U.S. treaty obligations,² their specific evidentiary rules,³ their reliance on non-Article III judges,⁴ their appellate

1. See Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 338 (2002) (citing a statement signed by hundreds of law professors expressing concern that the initial version of the commissions violated the separation of powers).

2. See *id.* at 338–39 (suggesting the original commissions may have violated the International Covenant on Civil and Political Rights and the Third Geneva Convention).

3. See George Lardner Jr., *On Left and Right, Concern Over Anti-Terrorism Moves*, WASH. POST (Nov. 16, 2001), https://www.washingtonpost.com/archive/politics/2001/11/16/on-left-and-right-concern-over-anti-terrorism-moves/6e6d0193-1ab4-4a4a-9c67-b52d1892c889/?utm_term=.2918526c0ceb (noting concerns about the commissions held by people across the political spectrum, specifically including criticisms expressed by the director of the Cato Institute's project on criminal justice about the commissions' standards for admitting evidence); Zachary Katznelson, *Guantánamo Plea Deal Tainted by Torture*, ACLU (Feb. 29, 2012, 12:42 PM), <https://www.aclu.org/blog/national-security/detention/guantanamo-plea-deal-tainted-torture> (describing a particular commission plea deal as "tainted by torture" because the defendant had allegedly been abused in U.S. custody and "[t]he military commissions system allows coerced evidence to be used"); see also Carol Rosenberg, *How Long After Torture Are Statements Admissible? Guantánamo Court Debates Question*, MIAMI HERALD (Aug. 4, 2017, 6:00 AM), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article165305107.html> (describing some of the more recent commission litigation over the admission of hearsay and statements obtained from a detainee who was tortured).

4. See Timothy H. Edgar, *Interested Persons Memorandum Regarding the "Military Commission Order No. 1,"* ACLU (Apr. 16, 2002), <https://www.aclu.org/other/interested-persons-memorandum-regarding-military-commission-order-no-1> (arguing that capital commissions cases should be tried in an Article III court); but see Peter Margulies, *Justice at War: Military Tribunals and Article III*, 49 U.C. DAVIS L. REV. 305 (2015) (generally defending the use of Article I military tribunals).

structure,⁵ their inefficiency,⁶ and more.⁷ Although the commissions have improved on some structural measures since they were first created, many of the criticisms persist. The cumulative heft of these widely-perceived deficiencies has led multiple observers and advocates to regard the commissions as failures.⁸

National security law scholar Steve Vladeck recently joined this chorus as a result of some particularly dramatic developments in the ongoing trial of Abd al-Rahim al-Nashiri, who stands accused of (among other crimes) masterminding the October 2000 bombing of the U.S.S. Cole.⁹ Specifically, in

5. See Steve Vladeck, *The Misbegotten Court of Military Commission Review*, LAWFARE (May 24, 2016, 12:00 PM), <https://www.lawfareblog.com/misbegotten-court-military-commission-review> (critiquing the appellate court at the commissions, which, like the trial-level system, was also created from scratch).

6. See, e.g., Robert Loeb & Helen Klein Murillo, *Advice from the D.C. Circuit—Nashiri and Khadr*, LAWFARE (May 23, 2016, 1:35 PM), <https://www.lawfareblog.com/advice-dc-circuit-nashiri-and-khadr> (“At nearly every turn, the hastily crafted military commission system shows that being novel and untested comes at a great cost in time, resources and ultimately credibility.”).

7. See *Military Commissions*, ACLU, <https://www.aclu.org/issues/national-security/military-commissions> (last visited July 29, 2019) (describing the commissions as “plagued by excessive secrecy”).

8. See David Glazier, *Destined for an Epic Fail: The Problematic Guantánamo Military Commissions*, 75 OHIO ST. L.J. 903, 905 (2014) (cataloging a series of the commissions’ “failings,” including “procedural shortcomings,” those concerning their “application of substantive law,” and their arguably counterproductive effects on broader U.S. counterterrorism efforts); John G. Baker, *Drinking from a Poisoned Chalice Post-9/11: Defending the Rule of Law in the Guantánamo Bay Military Commissions*, CHAMPION, July 2018, at 35 (in which the Chief Defense Counsel at the commissions claims that the work of defense counsel has “exposed the Guantánamo Bay Military Commissions as a failed experiment”); Laura Pitter & W. Paul Smith, *Another Blow for Justice in the Guantánamo Bay Military Commissions*, HUM. RTS. WATCH (June 29, 2017, 10:30 AM), <https://www.hrw.org/news/2017/06/29/another-blow-justice-guantanamo-bay-military-commissions#> (calling the commissions “a failed experiment in alternative justice”); *Guantánamo Bay Detention Camp*, ACLU, <https://www.aclu.org/issues/national-security/detention/guantanamo-bay-detention-camp> (last visited July 10, 2019) (describing both the military commissions and the detention center at Guantánamo as “catastrophic failures”); *Doubling Down on Failure at Guantánamo*, AMNESTY INT’L, <https://www.amnestyusa.org/doubling-down-on-failure-at-guantanamo> (last visited July 10, 2019) (“[T]he reality is that Guantanamo is so broken it can’t be fixed—it needs to be condemned and shut down. It is an affront to every American who ever recited the Pledge of Allegiance and it is . . . even by its own terms, a colossal failure.”); John Hutson, *Military Commissions Are a Failed Experiment, Try Terror Suspects in Civilian Courts*, POLICY.MIC (Mar. 30, 2012), <http://www.policymic.com/debates/6237/military-commissions-are-a-failed-experiment-try-terror-suspects-in-civilian-courts> [<http://perma.cc/43PH-3FJM>] (urging the trial of the 9/11 defendants in civilian court so that “we begin closing the chapter on the failed military commissions experiment”).

9. Steve Vladeck, *It’s Time to Admit That Military Commissions Have Failed*, LAWFARE (Apr. 16, 2019, 10:40 PM), <https://www.lawfareblog.com/its-time-admit-military-commissions-have-failed>. Vladeck has written extensively on national security issues generally and on the commissions specifically; his ongoing analysis of developments at the commissions has been extraordinarily valuable for observers.

April 2019, the D.C. Circuit held that the trial judge in al-Nashiri's case—Air Force Colonel Vance Spath—created the appearance of partiality by secretly negotiating for many months for a job as an immigration judge while presiding over al-Nashiri's pretrial proceedings.¹⁰ Spath's negotiations with his future employers in the Department of Justice (DOJ) occurred while the DOJ was deeply involved in prosecuting the defendant appearing before him. Seeking a job from one of the parties to a case, the D.C. Circuit held, warranted the vacatur of all of Judge Spath's rulings in the al-Nashiri case dating back to the point at which Judge Spath applied to work as an immigration judge.¹¹ With one appellate court's unanimous decision, the case lost hundreds of rulings dating back to late 2015.¹²

Even before this latest blow in a marquee prosecution, it would have been difficult to dispute that the commissions have failed to deliver what many observers had sought. Collectively, the commissions have proceeded at a glacial pace since they were first authorized in 2001; despite an estimated cost of over one billion dollars, they have generated only eight relatively minor convictions, nearly half of which have not survived appeal. Moreover, the system itself appears compromised. The commissions have endured a range of serious criticisms¹³ and are often seen as fatally flawed or tainted.¹⁴ Yet the biggest trials lie ahead. The completed prosecution of al-Nashiri will be significant, if it ever occurs, but most notable of all would be the trial of the defendants accused of complicity in the 9/11 attacks, including Khalid Shaikh Mohammed. Even the 9/11 case remains mired in pretrial proceedings, however—notwithstanding the fact that the defendants were arraigned in 2012.¹⁵ The trial date in that case is set for January 11, 2021,¹⁶ though some expect that date to give way to further delays.¹⁷ It remains conceivable if not

10. *See In re al-Nashiri*, 921 F.3d 224, 226 (D.C. Cir. 2019).

11. *Id.* at 241.

12. By one count, the D.C. Circuit's ruling reached approximately 460 of Judge Spath's written rulings, plus an unspecified number of oral rulings, and at least four published rulings of the commissions' appellate-level court, the United States Court of Military Commission Review. *See Steve Targaryen, First of His Name*, NSL PODCAST (Apr. 17, 2019), <https://www.nationalsecuritylawpodcast.com/episode-118-steve-targaryen-first-of-his-name>.

13. *See supra* notes 1–8.

14. *See Guantánamo Bay Detention Camp, supra* note 8 (describing the military commissions as “fundamentally broken”); Baker, *supra* note 8, at 34 (analogizing the commissions to a “poisoned chalice”).

15. Charlie Savage, *At a Hearing, 9/11 Detainees Show Defiance*, N.Y. TIMES (May 5, 2012), <https://www.nytimes.com/2012/05/06/us/9-11-defendants-face-arraignment-in-military-court.html?module=inline>.

16. *See* Carol Rosenberg, *Trial for Men Accused of Plotting 9/11 Attacks Is Set for 2021*, N.Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/30/us/politics/sept-11-trial-guantanamo-bay.html?action=click&module=Top%20Stories&pctype=Homepage>.

17. *See, e.g.,* Steve Vladeck (@steve_vladeck), TWITTER (Aug. 30, 2019, 11:30 AM), https://twitter.com/steve_vladeck/status/1167459624913690625 (responding to news of the 9/11 trial date with: “I’m not a betting man, but if I were, I’d put very good money on the ‘over’”). There

likely that the defendants will die in custody, of natural causes, before a final verdict is rendered.¹⁸

Reflecting upon that landscape, surely Vladeck and many others are right: we have seen enough to know that the commissions are fundamentally incapable of rendering trustworthy convictions in a timely and transparent manner, and the commissions will probably never yield meaningful justice in any broader or more amorphous sense either. Moreover, it is obviously tempting to evaluate the commissions against that sort of standard—perhaps the standard one might apply to traditional criminal prosecutions in federal court, given the salience of Article III courts as an alternative venue for prosecuting defendants accused of terrorism-related offenses.¹⁹

But this consensus approach to evaluating the commissions is mistaken. Indeed, the commissions have largely succeeded in institutionalizing the norms behind their creation and behind the War on Terror more broadly. Further, upending our understanding of the commissions to understand the ways in which they have “succeeded” is essential to recognizing the greater lessons they can teach us, both for the War on Terror and for the justice system in general. To sustain these conclusions, this Article defends two primary, related propositions.

First, the snags in military commission proceedings that have invited so much criticism reflect not just the commissions’ structural features—their use

is ample reason for skepticism about the trial date. See Carol Rosenberg, *Start of Sept. 11 Trial in Doubt After Defense Lawyer Asks to Quit Case*, N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/us/politics/911-trial-guantanamo.html> (reporting on the possibility of a delay arising because one defendant’s attorney, who “serves in the statutorily required role of ‘learned counsel,’” has requested to leave the case over health issues, and noting further that the defense teams had long sought—and been denied—funding to retain backup learned counsel to prevent precisely this sort of delay); Carol Rosenberg, *Military Judge in 9/11 Trial at Guantánamo Is Retiring*, N.Y. TIMES (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/us/politics/guantanamo-judge-sept-11-trial.html#click=https://t.co/c31CAk5mhr> (reporting that, in March of 2020, the judge who set the trial date abruptly announced his resignation from the case, threatening to delay proceedings even further).

18. See Carol Rosenberg, *Guantánamo Bay as Nursing Home: Military Envisions Hospice Care as Terrorism Suspects Age*, N.Y. TIMES (Apr. 27, 2019), <https://www.nytimes.com/2019/04/27/us/politics/guantanamo-bay-aging-terrorism-suspects-medical-care.html?module=inline> (reporting on the U.S. government’s efforts to plan for the long-term medical needs of an aging population of forty detainees at the Guantánamo Bay detention facility—which also houses defendants in ongoing military commission cases—and noting further that the commission trials have been “inching ahead at a glacial pace”).

19. See generally, Joshua L. Dratel, *How I Learned to Stop Worrying and Love the Military Commissions*, 41 SETON HALL L. REV. 1339 (2011) (extensively comparing the author’s experience litigating criminal cases in Article III courts with his experience representing a defendant at the military commissions). By one count, there have been over 660 terrorism convictions in Article III courts between the 9/11 attacks and the middle of 2019. See Tess Bridgeman, Joshua Geltzer & Luke Hartig, *Guantánamo is No Answer—But Here’s What Can Work*, JUST SECURITY (Aug. 31, 2018), <https://www.justsecurity.org/60540/guantanamo-answer-but-heres-work>.

of military rather than Article III judges, their peculiar appellate structure, their evidentiary and secrecy rules, their remote location and sporadic hearing schedule, and so forth. Rather, the deeper problem is the pervasive, questionable judgment by numerous key officials associated with commissions, including judges at the trial and appellate levels, employees of the DOJ (including prosecutors and officials within the FBI), employees of the Department of Defense (DOD) (such as the convening authority of the commissions, an appointed official), and unidentified intelligence agencies. Although the structural features of the commissions may facilitate problematic conduct by key officials, they do not alone explain such conduct. The simpler, more compelling explanation is that many officials associated with the commissions simply do not assess the commissions along the same axes as the public at large. In other words, the commissions suffer from a problem of culture or ethos, as revealed below by an examination of the circumstances surrounding the departure of Judge Spath.

The idea that a judicial system can be governed by informal norms—and not just by formal rules—is not controversial. Indeed, the very notion of the rule of law turns in substantial part on the norms governing a society as a whole.²⁰ In some systems, the informal norms may go further in explaining outcomes than the formal rules.²¹ Moreover, it is widely accepted that discrete judicial systems²² or their constituent parts (such as prosecutors' offices)²³ operate under a mix of formal rules and informal norms. Such norms can derive from any number of sources. For example, scholars have argued that norms

20. See Jeremy Waldron, *The Rule of Law*, STAN. ENCYCLOPEDIA PHIL. (June 22, 2016), <https://plato.stanford.edu/entries/rule-of-law> (“The Rule of Law comprises a number of principles of a formal and procedural character, addressing the way in which a community is governed. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society.”).

21. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 515 (2013) (exploring the subtle norms governing the leaking of classified information from within the U.S. federal government and observing that “the statutes on the books concerning leaks, and the political rhetoric associated with them, are so harsh, and yet the government’s actual treatment of the activity seems to have been so mild. There is a dramatic disconnect between the way our laws and our leaders purport to condemn leaking and the way they have condoned it—a rampant, pervasive culture of it—in practice.”).

22. See John F. Padgett, *Plea Bargaining and Prohibition in the Federal Courts, 1908–1934*, 24 LAW & SOC’Y REV. 413, 414–15 (1990) (arguing that, “judges appointed through bar association sponsorship may be harsher and more routinized in their sentencing than judges elected through sponsorship by political machines” and therefore that “[h]istorically, the local legal culture of the federal courts differed sharply from contemporaneous state and county criminal courts precisely on [norms of] professionalism” as manifested in the practice of accepting plea bargains from criminal defendants).

23. See generally Todd A. Berger, *The Ethical Limits of Discrediting the Truthful Witness: How Modern Ethics Rules Fail to Prevent Truthful Witnesses from Being Discredited Through Unethical Means*, 99 MARQ. L. REV. 283 (2015) (referring both to the culture of prosecutor’s offices and of criminal defense lawyering generally).

borrowed from a particular legal domain²⁴ or from broader, exogenous sociopolitical forces²⁵ can operate in the background to influence judicial decision-making. Whether the norms are good ones (morally, practically, or on any other metric) is a separate question, although this Article argues that the norms governing the military commissions are bad on multiple metrics.

The second proposition defended below is that, although the ethos of the commissions deviates sharply from the one we typically associate with fair trials, its presence at the commissions is neither surprising nor, strictly speaking, a failure of the commissions. Indeed, it was injected into the commissions deliberately from the outset. The commissions are in significant part designed to serve as a less favorable venue for their defendants than traditional civilian courts. The sentiment behind that feature is consistent with other elements of the War on Terror—including the closely-linked policies behind the United States’ treatment of detainees. As a result, the commissions are best understood as another prong in the broader War on Terror, not a separate, isolated experiment dedicated to seeking justice above all else. The traditional indicia of fairness and efficiency (or even the perceptions of fairness and efficiency) were never at the center of the military commissions project. The commissions very much bear the mark of their maker, and, this Article argues, have succeeded in achieving much of what they were designed to achieve.

These propositions have significant implications because they force us to overturn our traditional understanding of the commissions. In doing so, they reveal new lessons about the perils of creating a trial system from scratch, the genesis and ongoing significance of the norms that govern those systems, and the inability of the commissions to render reliable results. The first Section of this Article offers a brief description of the relevant history and structure of the commissions. Section II recounts the dramatic story of Judge Spath’s exit from the commissions and the litigation that followed to argue that commission proceedings evince a pervasive and problematic ethos. Section III explores the historical basis for concluding that, nevertheless, the commissions are achieving the goals that key officials long intended. Finally, Section IV teases out the implications of accepting this view of the commissions.

24. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 561 (1990) (“[Constitutional] norms operate indirectly, by serving as the unstated background context that informs our interpretation of statutes and other subconstitutional texts. In other words, contemporary constitutional law is a significant element of the legal culture that judges inevitably, if often subconsciously, absorb and rely upon when acting in their judicial capacity, including those instances in which they engage in statutory interpretation.”).

25. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1605–09 (2009) (arguing that, before the Civil Rights Era, American courts institutionalized bias against people of color by deploying “seemingly neutral strategies to disenfranchise peoples of color in lockstep with sociopolitical forces that sought to restore the South’s honor”).

I. BACKGROUND TO THE GUANTÁNAMO BAY MILITARY COMMISSIONS²⁶

Military commissions are a distinct form of tribunal, “neither mentioned in the Constitution nor created by statute,” that are “born of military necessity.”²⁷ The resort to military commissions is not without precedent in the United States. The United States has historically utilized such commissions in three situations: in place of civilian courts when martial law was in effect; “as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function”;²⁸ and “as an ‘incident to the conduct of war’ when there is need ‘to seize and subject to disciplinary measures those enemies who . . . have violated the law of war.’”²⁹ Perhaps most famous for the Supreme Court cases they generated, the United States utilized military commissions during the Civil War³⁰ and to prosecute Nazi saboteurs in 1942.³¹ Officials within the DOJ drew on parts of that history in recommending the creation of the present commissions after 9/11,³² which represent the third variety described above.³³

The Guantánamo Bay commissions have proceeded roughly in three phases. The initial phase began formally when the commissions first originated, via an executive order signed by President Bush on November 13, 2001.³⁴ Bush created the commissions explicitly as an emergency response to the attacks on 9/11.³⁵ Per his executive order, the commissions were designed to try non-U.S. citizens³⁶ whom the President deemed to have a particular connection to

26. Others have written in significant detail about the history of military commissions in the United States and the structure of the current commissions at Guantánamo Bay. *See generally*, Glazier, *supra* note 8; JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL41163, THE MILITARY COMMISSIONS ACT OF 2009 (MCA 2009): OVERVIEW AND LEGAL ISSUES (2014); STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 1161–97 (Wolters Kluwer, 6th ed. 2016). This Section provides the basic history necessary to support the argumentation that follows.

27. *Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006).

28. *Id.* at 595–96 (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 314 (1946)) (identifying these as two of the three categories encompassing the historical use of military commissions in the United States).

29. *Id.* at 596 (quoting *Ex parte Quirin*, 317 U.S. 1 (1942)) (identifying this as the third category encompassing the historical use of military commissions in the United States).

30. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

31. *See Ex parte Quirin*, 317 U.S. 1 (1942).

32. *See generally* Legality of the Use of Military Comm’ns to Try Terrorists, 25 Op. O.L.C. 238 (2001).

33. *See Hamdan*, 548 U.S. at 597 (noting and approving of the government’s use of previous law-of-war commissions as precedent for the commissions at Guantánamo Bay).

34. *See* Press Release, President George W. Bush, President Issues Military Order (Nov. 13, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html>; *see also* Barton Gellman & Jo Becker, *A Different Understanding with the President*, WASH. POST (June 24, 2007) http://voices.washingtonpost.com/cheney/chapters/chapter_1 (describing the genesis of the executive order).

35. *See* Press Release, *supra*, note 34, § 1(a)–(b), (g).

36. *See id.* § 2(a).

international terrorism.³⁷ Although reasonably short, the order laid out some of the formal features of the commissions that have been the subject of criticism by observers. For example, it announced Bush’s “finding”:

Given the danger to the safety of the United States and the nature of international terrorism . . . it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.³⁸

The order designated the commissions a “military function,”³⁹ and therefore control over the defendants and proceedings—including the creation of governing regulations—fell to the Secretary of Defense.⁴⁰ The order nevertheless specified that detainees should be treated humanely,⁴¹ and that the commissions would provide for a “full and fair trial, with the military commission sitting as the triers of both fact and law.”⁴² In addition to providing several additional stipulations concerning items such as conviction and sentencing,⁴³ the order offered several important parameters. First, it noted that defendants could be “tried . . . for any and all offenses triable by military commission.”⁴⁴ It also explicitly stated that life imprisonment and death were among the sentences available,⁴⁵ and it decreed that individuals subject to the order could not “seek any remedy or maintain any proceeding, directly or indirectly . . . in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.”⁴⁶

Under this order, the United States initiated commission proceedings against four defendants in 2004.⁴⁷ One of those defendants, Salim Ahmed Hamdan, challenged the lawfulness of the commissions via a habeas petition.⁴⁸ That challenge ultimately reached the Supreme Court, which sided with

37. *See id.* § 2(a)(1). The order allowed the President to determine which qualifying individuals it would be in the interest of the United States to try by military commission and to exempt qualifying individuals who did not meet that test. *See id.* § 2(a)(2).

38. *Id.* § 1(f).

39. *Id.* § 4(b).

40. *Id.* §§ 2(b)–(c), 3–4. The DOD first issued procedures for commission trials on March 21, 2002. *See* Memorandum from Timothy H. Edgar, ACLU Legislative Counsel, regarding the “Military Commission Order No. 1” (April 16, 2002), <https://www.aclu.org/other/interested-persons-memorandum-regarding-military-commission-order-no-1>.

41. *See* Press Release, *supra* note 34, § 3(b).

42. *Id.* § 4(c)(2).

43. *See generally id.* § 4.

44. *Id.* § 4(a).

45. *Id.*

46. *Id.* § 7(b)(2).

47. *DYCUS ET AL.*, *supra* note 26, at 1175.

48. *See id.* at 1175–76 (summarizing the *Hamdan* decision and its implications for the commissions).

Hamdan in late June of 2006.⁴⁹ As noted above, the commissions had been created by executive order, without explicit congressional authorization, which left them vulnerable to challenge on statutory grounds. The Court indeed found that the commissions violated both the Uniform Code of Military Justice (UCMJ) (a federal statute) and the Geneva Conventions (which indisputably constitute part of the law of war, compliance with which is a predicate for the exercise of non-court-martial jurisdiction under the UCMJ⁵⁰).⁵¹ In so holding,

49. See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); see also DYCUS ET AL., *supra* note 26, at 1175 (providing some background to *Hamdan*).

50. See *Hamdan*, 548 U.S. at 628 (“For, regardless of the nature of the rights conferred on Hamdan, [the Geneva Conventions] are, as the Government does not dispute, part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 [of the UCMJ] is granted.”) (citations omitted).

51. Specifically, the Court held that commissions violated Articles 21 and 36 of the UCMJ and Common Article 3 of the Geneva Conventions. See *Hamdan*, 548 U.S. at 612–13 (“These simply are not the circumstances in which, by any stretch of the historical evidence or this Court’s precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.”); *id.* at 624 (“Under the circumstances, then, the rules applicable in courts-martial must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Article 36(b).”); *id.* at 625 (“The procedures adopted to try Hamdan also violate the Geneva Conventions.”).

Under Article 21 of the UCMJ, military commissions could be used to try defendants for violations of the laws of war; but Hamdan was charged, *inter alia*, with standalone conspiracy, which was not at the time a war crime. See *id.* at 612 (“Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war and which military efficiency demands be tried expeditiously, but with an *agreement* the inception of which long predated the attacks of September 11, 2001, and the AUMF. That may well be a crime, but it is not an offense that ‘by the law of war may be tried by military commissio[n].’”) (alteration in original) (footnote omitted) (quoting 10 U.S.C. § 821 (2018)); see also DYCUS ET AL., *supra* note 26, at 1175 (offering a brief summary of the *Hamdan* ruling as concerns Article 21 of the UCMJ).

Article 36 of the UCMJ required that the rules governing trials held at military commissions be “the same as those applied to courts-martial unless such uniformity proves impracticable.” *Hamdan*, 548 U.S. at 620. The first phase of the commissions indisputably deviated in myriad ways from court-martial proceedings. According to the Court, the President had not made an official determination that operating the commissions in accordance with court-martial rules was impractical. Moreover, the Court found that the record did not independently support the conclusion that conforming the commissions to courts-martial was impractical. Therefore, the rules governing the commissions were illegal. *Id.* at 620–24.

As for the Geneva Conventions, the fullest restrictions of the laws of war apply to “international armed conflicts,” and more limited restrictions apply in “non-international armed conflicts.” See Glazier, *supra* note 8, at 906 (“All Guantánamo charges fail to distinguish between the robust set of international armed conflict rules and the lesser set of non-international conflict regulations even while the government generally holds itself accountable only for complying with the latter.”). The United States’ position was that the conflict with al Qaeda fell into neither of these categories and therefore that the Geneva Conventions were inapplicable. See *Hamdan*, 548 U.S. at 628, 630 (“The conflict with al Qaeda is not, according to the Government, [an international armed conflict] to which the full protections afforded detainees under the 1949 Geneva Conventions apply”

the Supreme Court ensured that the original model of the Guantánamo Bay Military Commissions could not continue, and so ended their first phase.⁵²

President Bush publicly characterized the *Hamdan* ruling as an endorsement of his view that it was appropriate to try defendants accused of terrorism offenses before military commissions with the qualification that the commissions should be authorized specifically by Congress.⁵³ Within three months, he sent legislation to Congress that would revive the commissions.⁵⁴ In remarks announcing that legislation, given in early September of 2006, he identified the changes to the commissions that he sought to establish through legislation:

First, I'm asking Congress to list the specific, recognizable offenses that would be considered crimes under the War Crimes Act -- so our personnel can know clearly what is prohibited in the handling of

and "the Government [further] asserts, that Common Article 3 [governing non-international armed conflicts] does not apply to Hamdan [either].").

The D.C. Circuit had accepted that view below. *Hamdan v. Rumsfeld*, 415 F.3d 33, 41–42 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006). But the Supreme Court disagreed and held that the United States and al Qaeda are engaged in a non-international armed conflict. *Hamdan*, 548 U.S. at 630. As a result, the restrictions of Common Article 3 apply. *Id.* at 631. One of those restrictions requires that individuals detained in such a conflict are entitled to have "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. The Court held that Hamdan's commission was not a "regularly constituted court" because the government had demonstrated no practical need to deviate to the extent that it had from typical court-martial practices. *Hamdan*, 548 U.S. at 632–33.

52. The *Hamdan* Court also expressed concern about the evidentiary rules governing the first phase of the commissions, which bears on the analysis below. *See Hamdan*, 548 U.S. at 614–15 ("Another striking feature of the rules governing Hamdan's commission is that they permit the admission of *any* evidence that, in the opinion of the presiding officer, 'would have probative value to a reasonable person.' Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn. Moreover, the accused and his civilian counsel may be denied access to evidence in the form of 'protected information' (which includes classified information as well as 'information protected by law or rule from unauthorized disclosure' and 'information concerning other national security interests'), so long as the presiding officer concludes that the evidence is 'probative' under § 6(D)(1) and that its admission without the accused's knowledge would not 'result in the denial of a full and fair trial.' Finally, a presiding officer's determination that evidence 'would [not] have probative value to a reasonable person' may be overridden by a majority of the other commission members.") (alteration in original) (footnote omitted) (citations omitted).

53. *See* Press Release, President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html> ("The Supreme Court [in *Hamdan*] determined that military commissions are an appropriate venue for trying terrorists, but ruled that military commissions needed to be explicitly authorized by the United States Congress.").

54. *See id.* ("So today, I'm sending Congress legislation to specifically authorize the creation of military commissions to try terrorists for war crimes."). *Hamdan* was decided on June 29, 2006. *See Hamdan*, 548 U.S. at 557.

terrorist enemies. Second, I'm asking that Congress make explicit that by following the standards of the Detainee Treatment Act our personnel are fulfilling America's obligations under Common Article Three of the Geneva Conventions. Third, I'm asking that Congress make it clear that captured terrorists cannot use the Geneva Conventions as a basis to sue our personnel in courts -- in U.S. courts.⁵⁵

The first two of these changes were plainly designed to blunt the concerns expressed by the *Hamdan* Court.

Approximately one month later, in October of 2006, President Bush signed the legislation in question, the Military Commissions Act (MCA) of 2006.⁵⁶ Bush then reconstituted the commissions in February of 2007 when he issued Executive Order 13425.⁵⁷ Thus began the second phase of the military commissions. Fundamentally, the MCA of 2006 provided statutory authority for the commissions to "try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission."⁵⁸ The MCA of 2006 also established an appellate structure for the commissions—first by directing the Secretary of Defense to create the Court of Military Commission Review (CMCR), an Article I appellate court utilizing panels of at minimum three military judges,⁵⁹ and second by stipulating that appeals from the CMCR would go to the D.C. Circuit,⁶⁰ with the Supreme Court empowered to review final judgments of the D.C. Circuit by writ of certiorari.⁶¹

Additionally, the MCA of 2006 provided several procedural and evidentiary rules for the commissions, such as permitting the admission of certain hearsay evidence⁶² and evidence obtained through coercion.⁶³ The statute also identified twenty-eight triable offenses.⁶⁴ Those offenses included traditional violations of the law of war (such as attacking civilians or inflicting torture), but also offenses that did not meet that criterion (such as conspiracy and providing material support for terrorism).⁶⁵

55. See Press Release, *supra* note 53.

56. See Press Release, President George W. Bush, President Bush Signs Military Commissions Act of 2006 (Oct. 17, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061017-1.html>.

57. See ELSEA, *supra* note 26.

58. Military Commissions Act of 2006, Pub. L. No. 109-366, § 948b(a), 120 Stat. 2600, 2602 (2006).

59. See 10 U.S.C. § 950f (2018).

60. See *id.* § 950d; see also *DYCUS ET AL.*, *supra* note 26, at 1176 (describing the relevant commission structure).

61. See 10 U.S.C. § 950g(d).

62. See *id.* § 949a(b)(3)(D).

63. See *id.* §§ 949a(b)(3)(B), 948r.

64. See *id.* § 950v.

65. See § 950v(2), (17), (25), (28); see also *DYCUS ET AL.*, *supra* note 26, at 1177 ("Some of the offenses defined by the MCA, such as perfidy and attacking protected targets, are clearly

Under the MCA of 2006, the commissions fully prosecuted three defendants.⁶⁶ Additionally, by the time President Obama took office in January of 2009, “charges were pending against 13 defendants and had been sworn in an additional nine cases.”⁶⁷ Because of statements made during his presidential campaign, many expected Obama to shut down the commissions altogether.⁶⁸ Instead, however, on May 15, 2009, Obama paused ongoing proceedings to “reform the military commission process,”⁶⁹ thus ending the second phase of the commissions. Obama sought several specific rule changes:

The rule changes will ensure that: First, statements that have been obtained from detainees using cruel, inhuman and degrading interrogation methods will no longer be admitted as evidence at trial. Second, the use of hearsay will be limited, so that the burden will no longer be on the party who objects to hearsay to disprove its reliability. Third, the accused will have greater latitude in selecting their counsel. Fourth, basic protections will be provided for those who refuse to testify. And fifth, military commission judges may establish the jurisdiction of their own courts.⁷⁰

Obama argued that these changes would “begin to restore the Commissions as a legitimate forum for prosecution, while bringing them in line with the rule of law.”⁷¹

recognized as international war crimes. . . . Others, such as inchoate conspiracy and ‘providing material support to terrorism,’ are not nearly as well established as international offenses, as four Justices emphasized with respect to conspiracy in *Hamdan*.”) In fact, offenses in the latter category “have formed the basis for *most* of the post-MCA military commission prosecutions.” *Id.*

66. See Glazier, *supra* note 8, at 911; see also Press Release, President Barack Obama, Statement of President Barack Obama on Military Commissions (May 15, 2009), <https://obamawhitehouse.archives.gov/the-press-office/statement-president-barack-obama-military-commissions> (asserting, as of May 15, 2009, “the system of Military Commissions at Guantánamo Bay had only succeeded in prosecuting three suspected terrorists in more than seven years”). For a brief discussion of some of these specific commission proceedings, see Glazier, *supra* note 8, at 911–12.

67. *The Guantanamo Trials*, HUM. RTS. WATCH, <https://www.hrw.org/guantanamo-trials> (last updated Aug. 9, 2018).

68. See *id.* Relatedly, in January of 2009, President Obama also issued an executive order directing the closure of the detention facility at Guantánamo Bay, although that result never materialized. See ELSEA, *supra* note 26. At one point, President Obama and Attorney General Eric Holder decided to move the trial of the 9/11 defendants from the military commissions to an Article III court in New York, but they rescinded that decision two years later due to political opposition. See Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES (Apr. 4, 2011), <https://www.nytimes.com/2011/04/05/us/05gitmo.html> (detailing the decision made in 2011 to backtrack and continue with trying the 9/11 defendants before a military commission).

69. Press Release, *supra* note 66 (“Today, the Department of Defense will be seeking additional continuances in several pending military commission proceedings. We will seek more time to allow us time to reform the military commission process.”).

70. *Id.*

71. *Id.*

Several months later, in October of 2009, President Obama signed those revisions into law with the MCA of 2009, which was part of the National Defense Authorization Act (NDAA) of 2010.⁷² The MCA of 2009 modified the language defining commission jurisdiction, providing for the trial by commission of any “alien unprivileged enemy belligerent.”⁷³ Among other changes, it also strengthened some of the rights of commission defendants, such as by imposing new limits on hearsay evidence⁷⁴ and evidence derived from coercion,⁷⁵ improving access of defendants to evidence and witnesses,⁷⁶ and, for the first time, requiring that defendants facing the death penalty be appointed experienced capital defense attorneys.⁷⁷ Additionally, under the MCA of 2009, the CMCR became the United States Court of Military Commission Review (USCMCR), and gained broader scope of appellate review over trial proceedings.⁷⁸ The D.C. Circuit also gained a broader scope of appellate review, now comprising all “matters of law, including the sufficiency of the evidence to support the verdict.”⁷⁹ With some minor changes, the regime set in place by the MCA of 2009 continues to govern today.⁸⁰

The current military commissions at Guantánamo Bay thus operate under the auspices of the DOD, per a statutory framework largely instituted under the Bush administration in 2006 and modified in nontrivial ways under the Obama administration in 2009. They are managed primarily by the Office of the

72. See Press Release, President Barack Obama, Remarks by the President at the Signing of the National Defense Authorization Act for Fiscal Year 2010 (Oct. 28, 2009), <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/remarks-president-signing-national-defense-authorization-act-fiscal-year-2010> (announcing the signing of the NDAA); Warren Richey, *Obama Endorses Military Commissions for Guantánamo Detainees*, CHRISTIAN SCI. MONITOR (Oct. 29, 2009), <https://www.csmonitor.com/USA/Justice/2009/1029/p02s01-usju.html> (noting that the signing of the NDAA included the signing of the MCA of 2009); see also ELSEA, *supra* note 26 (describing the MCA of 2009 as part of the NDAA of 2010).

73. See 10 U.S.C. § 948c (2018).

74. See *id.* § 949a(b)(3)(D).

75. See *id.* § 948r.

76. See *id.* § 949j.

77. See *id.* § 949a(b)(2)(C)(ii); see generally *President Obama Signs Military Commissions Changes into Law*, ACLU (Oct. 28, 2009), <https://www.aclu.org/press-releases/president-obama-signs-military-commissions-changes-law>. For a detailed comparison of the provisions of the MCA of 2006 and the provisions of MCA of 2009, see ELSEA, *supra* note 26, at 36–38.

78. Steve Vladeck, *A Guide to Appellate and Collateral Review Under the Military Commissions Acts*, LAWFARE (Apr. 4, 2013, 2:42 PM), <https://www.lawfareblog.com/guide-appellate-and-collateral-review-under-military-commissions-acts>.

79. *Id.* (quoting National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84 § 950(d), 123 Stat. 2190, 2604 (2009)).

80. See *U.S. Court of Military Commission Review (USCMCR) History*, OFF. MIL. COMMISSIONS, <https://www.mc.mil/ABOUTUS/USCMCRHistory.aspx> (last visited May 18, 2020) (noting that the MCA of 2009 was amended in 2011 and 2013). For a list of some of these changes, see CHANGES TO MILITARY COMMISSIONS ACT OF 2009 FROM 2010 TO 2013, <https://www.mc.mil/Portals/0/pdfs/Changes%20to%20Military%20Commission%20Act%20from%202010%20to%202013.pdf> (last visited July 14, 2019).

Convening Authority, which is housed within the DOD and “is empowered to convene military commissions, refer charges to trial, negotiate pre-trial agreements, and review records of trial.”⁸¹ The convening authority reports to the Secretary of Defense and his or her deputy.⁸² The commission structure also includes an Office of the Chief Prosecutor and a Military Commissions Defense Organization (MCDO). The prosecution teams include staff from the U.S. Armed Forces, the DOD, and the DOJ. The defense teams feature a combination of military and civilian attorneys, including “learned” capital defense counsel in capital cases.

The Secretary of Defense appoints a chief judge of the Military Commissions Trial Judiciary, and that judge then details a trial judge (drawn from the military judges who oversee court-martial proceedings) to each case that the convening authority refers for trial.⁸³ The Secretary of Defense may directly appoint judges from the Courts of Criminal Appeals for the different branches of the military to the USCMCR.⁸⁴ Under the MCA of 2009, the President may also appoint civilian judges to the USCMCR with the advice and consent of the Senate.⁸⁵ Since June of 2015, all judges nominated to the USCMCR have been approved by the Senate.⁸⁶ As of May of 2020, the USCMCR comprised nine judges.⁸⁷

Appeals from the judgments of the USCMCR flow to the D.C. Circuit, but, in 2008, the D.C. Circuit held that it “lacked jurisdiction under the MCA to entertain a military commission defendant’s direct appeal from anything other than a ‘final judgment’ reviewed by the [US]CMCR.”⁸⁸ In 2015, the D.C.

81. *Organization Overview*, OFF. MIL. COMMISSIONS, <https://www.mc.mil/ABOUTUS/OrganizationOverview.aspx> (last visited May 18, 2020).

82. *See Office of Military Commissions Organizational Chart (High Level)*, OFF. MIL. COMMISSIONS, <https://www.mc.mil/ABOUTUS/OrganizationOverview/OrganizationalChart.aspx> (last visited May 18, 2020); *see also* Daniel Uria, *Pentagon: Two Top Guantanamo Bay Officials Fired*, UPI (Feb. 26, 2018, 12:08 AM), https://www.upi.com/Top_News/US/2018/02/06/Pentagon-Two-top-Guantanamo-Bay-officials-fired/5441517891086/ (describing the firing of a convening authority and the appointment of an acting successor, both by the Secretary of Defense).

83. *See How Military Commissions Work*, OFF. MIL. COMMISSIONS, <https://www.mc.mil/ABOUTUS.aspx> (last visited May 18, 2020).

84. *See U.S. Court of Military Commission Review (CMCR) History*, OFFICE OF MILITARY COMMISSIONS, <https://www.mc.mil/ABOUTUS/USCMCRHistory.aspx> (last visited July 14, 2019).

85. *See id.*

86. *See* Steve Vladeck, *The D.C. Circuit’s Passive-Aggressive Approach to Military Commission Mandamus*, LAWFARE (July 31, 2017, 10:30 AM), <https://www.lawfareblog.com/dc-circuits-passive-aggressive-approach-military-commission-mandamus>; *see generally* Khadr v. United States, 529 F.3d 1112 (D.C. Cir. 2008) (providing the holding in question).

87. *Judges U.S. Court of Military Commission Review*, OFFICE OF MILITARY COMMISSIONS, <https://www.mc.mil/ABOUTUS/USCMCRJudges.aspx> (last visited May 18, 2020).

88. Steve Vladeck, *The D.C. Circuit’s Mandamus Jurisdiction and the Legitimacy of the Military Commissions*, LAWFARE (Dec. 7, 2014, 11:10 AM), <https://www.lawfareblog.com/dc-circuits-mandamus-jurisdiction-and-legitimacy-military-commissions>. Parties may then petition for

Circuit held that it does, however, possess jurisdiction to issue writs of mandamus directed to the USCMCR.⁸⁹ The D.C. Circuit's standard for a successful petition for a writ of mandamus requires the petitioner to demonstrate clear error by the court below.⁹⁰ This pair of rulings has effectively constricted the range of issues from the commissions that reaches Article III courts: rather than a typical range of interlocutory appeals, petitioners from decisions of the USCMCR can raise only collateral challenges to clearly erroneous rulings—a standard that may be particularly difficult to meet because so many questions arising from the commissions are novel and assessed as a matter of first impression.⁹¹

As of May of 2020, six cases were designated “active” on the commission docket,⁹² but in essence there are three contested cases ongoing:⁹³ the 9/11 case, the case against al-Nashiri, and a case against Abd al Hadi al Iraqi.⁹⁴ All three remain in pretrial proceedings.⁹⁵ Hearings for each case typically occur for no more than one week per month; most of the relevant participants (including the judges, the prosecutors, and the defense attorneys) travel to Guantánamo Bay on military flights from Andrews Air Force Base on the weekend before the hearings and return the following weekend.⁹⁶ The remote location of the commissions is one reason for the delays and cost inefficiencies that have characterized the proceedings thus far.

a writ of certiorari to the Supreme Court. *See* Glazier, *supra* note 8, at 907 (describing the Supreme Court's denial of a petition for a writ of certiorari for a convicted commission defendant).

89. *See* Vladeck, *supra* note 86; *see generally* *In re al-Nashiri*, 791 F.3d 71, 75 (D.C. Cir. 2015) (providing the holding).

90. *See* Vladeck, *supra* note 86; *see also* *In re al-Nashiri*, 791 F.3d at 86.

91. *See* Vladeck, *supra* note 86 (discussing the D.C. Circuit's approach to granting mandamus relief, which has at times disadvantaged petitioners raising questions of first impression).

92. *See* Cases, OFF. MIL. COMMISSIONS, <https://www.mc.mil/CASES.aspx> (refine search by “Charges Pending/Active”).

93. *See* Vladeck, *supra* note 9 (offering some background).

94. Two of the six cases relate to ongoing proceedings for guilty pleas that have already been accepted, and two separate cases are tied to the 9/11 attacks. *See* Cases, *supra* note 92 (refine search by “Charges Pending/Active”). The case against al Hadi is the only one of these three that is not capital. *See* Carol Rosenberg, *War Crimes Trial of an Alleged al-Qaida Commander at Guantánamo Bay*, MIAMI HERALD (Nov. 11, 2016, 4:00 PM), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article114204098.html> (“Hadi is charged in what is currently the only contested non-capital case at Guantánamo.”).

95. *See id.*

96. *See* Alex Sinha, *Government Attempt to Speed up Guantánamo Trials (Rightfully) Backfires*, ACLU (March 2, 2015, 4:15 PM), <https://www.aclu.org/blog/speakeasy/government-attempt-speed-guantanamo-trials-rightfully-backfires> (noting that the judges do not reside in Guantánamo Bay); Carol Rosenberg, *The Cost of Running Guantánamo Bay: \$13 Million Per Prisoner*, N.Y. TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/us/politics/guantanamo-bay-cost-prison.html#click=https://t.co/CGa9XnAlTy> (“Judges, lawyers, journalists and support workers are flown in and out [of Guantánamo] on weekly shuttles.”).

According to Vladeck, in the roughly eighteen years since the start of their first phase, the commissions have generated a total of eight convictions.⁹⁷ Six of those convictions were the result of plea bargains, and half of those six were later vacated on appeal.⁹⁸ In fact, applying its “plain error” mandamus standard, the D.C. Circuit discarded two of the three charges in the solitary commission conviction that *has* survived a post-conviction appeal.⁹⁹ The precise financial costs of obtaining this handful of convictions is difficult to ascertain. Per the Department of Defense, from 2007 to 2013, the commissions cost \$600 million.¹⁰⁰ Estimates place the total cost for the life of the commissions in excess of one billion dollars.¹⁰¹ The cost-per-conviction ratio for the commissions is therefore exceptionally high, providing another basis for concern among observers.

II. JUDGE SPATH’S DEPARTURE FROM THE *AL-NASHIRI* CASE

The performance of the commissions to date plainly justifies objections from observers about efficiency and effectiveness. It is undeniable that the commissions have not brought terrorism suspects to justice in impressive numbers or with impressive speed, and the commissions’ performance unsurprisingly fails the standard that many observers apply.¹⁰² In that

97. See Vladeck, *supra* note 9.

98. See *id.*

99. See *id.*

100. See Zak Newman, *\$600 Million and Counting: GTMO’s Military Commissions*, ACLU (Oct. 24, 2013, 6:42 PM), <https://www.aclu.org/blog/national-security/detention/600-million-and-counting-gtmos-military-commissions>.

101. See DYCUS ET AL., *supra* note 26, at 1195. It is difficult to separate the cost of maintaining the detention facility from the cost of maintaining the court system, and the virtues of doing so are somewhat limited because the two are linked in operation, even though many of the detainees are not defendants in commission cases. In 2019, the New York Times estimated the cumulative cost of maintaining both the prison and court system from its inception at over seven billion dollars. See Rosenberg, *supra* note 96 (“A Defense Department report in 2013 calculated the annual cost of operating Guantánamo Bay’s prison and court system at \$454.1 million, or nearly \$90 million less than last year. At the time, there were 166 prisoners at Guantánamo, making the per-prisoner cost \$2.7 million. The 2013 report put the total cost of building and operating the prison since 2002 at \$5.2 billion through 2014, a figure that now appears to have risen to past \$7 billion.”).

102. See, e.g., Baker, *supra* note 8, at 35 (noting that, as head of the MCDO, John Baker is “frequently asked why these trials are taking so long” and that “[f]or many, delay is the biggest concern”). Of course, as noted above, there *have* been some convictions at the commissions, and one might point to the handling of those cases as limited evidence of the effectiveness of the commissions at fulfilling their ostensible purpose. For example, in 2016, sitting *en banc* and applying a “plain error” standard, the D.C. Circuit upheld the commission’s conspiracy conviction of Ali Hamza al Bahlul (after the D.C. Circuit’s panel had previously vacated the conviction). See Helen Klein Murillo & Alex Loomis, *A Summary of the al Bahlul Decision*, LAWFARE (Oct. 21, 2016, 9:39 AM), <https://www.lawfareblog.com/summary-al-bahlul-decision>; *Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016). Peter Margulies has argued that the *Bahlul* decision in fact reinforced the legitimacy of the commissions. See Peter Margulies, *The D.C. Circuit’s En Banc Decision in Bahlul: Sui Generis or Guidance for Future Military Commissions?*, LAWFARE (Oct.

connection, it is especially notable that the commissions have endured revisions to address some of their structural issues, such as being bolstered by congressional authorization and undergoing upgrades to the evidentiary rules that began as very unfavorable to the defendants.¹⁰³ Indeed, Chief Prosecutor of the Military Commissions, Brigadier General Mark Martins, has claimed that a careful comparison of the third phase of the commissions with civilian courts reveals that “procedural differences in protections [for the defendants] are . . . slight.”¹⁰⁴ If anything, the arc of the commissions arguably bends toward conformity with court-martial proceedings.¹⁰⁵

In theory, these changes should “improve” the performance of the commissions by blunting the concerns of critics and by diminishing the dimensions of the commissions that are subject to novel legal challenges (thereby potentially accelerating proceedings). But it is far from clear that the performance of the commissions has improved in any meaningful way even as their formal features have become more similar to those of fair or regular trials. The salient explanation is that the formal features of the commissions are not, in fact, the primary impediment to swift, secure and (reasonably) numerous convictions. An evaluation of the circumstances surrounding the departure of Judge Spath from the commissions trial of al-Nashiri helps reveal that that a deeper problem with the commissions is their prevailing ethos.

A. al-Nashiri’s Trial-Level Proceedings

Abd al-Rahim al-Nashiri was detained in 2002¹⁰⁶ and held for years in CIA custody, where he was tortured as part of the CIA’s “Enhanced

21, 2016, 3:51 PM), <https://www.lawfareblog.com/dc-circuits-en-banc-decision-bahlul-sui-generis-or-guidance-future-military-commissions> (“The en banc D.C. Circuit’s affirmation of the military commission conviction of Ali Hamza al Bahlul for conspiracy . . . solidifies the legitimacy of commissions in U.S. counterterrorism law and policy.”). Steve Vladeck took a very different view. See Steve Vladeck, *Al Bahlul and the Long Shadow of Illegitimacy*, LAWFARE (Oct. 22, 2016, 9:59 AM), <https://www.lawfareblog.com/al-bahlul-and-long-shadow-illegitimacy> (describing the judges’ opinions in *Bahlul* as “surprisingly sloppy” and describing as “mind-boggling” Margulies’s assertion that the *Bahlul* ruling “solidifies the legitimacy of the commissions”) (quoting Vladeck, *supra*). Controversy aside, it is consistent with the view defended here that a handful of convictions have survived appeal, especially (but by no means only) because a number have not. See, e.g., *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012), *overruled by* *al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014).

103. See *supra* note 52 (describing some of the original evidentiary rules).

104. Benjamin Wittes, *Mark Martins Address to the New York City Bar*, LAWFARE (Jan. 10, 2012, 6:30 PM) (quoting Brigadier General Mark Martins), <https://www.lawfareblog.com/mark-martins-address-new-york-city-bar>.

105. See Vladeck, *supra* note 78 (arguing that “the purpose of the 2009 MCA was to align appellate review of the commissions with that available in courts-martial”).

106. *USS Cole Bombing Fast Facts*, CNN, <https://www.cnn.com/2013/09/18/world/meast/uss-cole-bombing-fast-facts/index.html> (last updated Mar. 27, 2019, 8:12 PM).

Interrogation Program.”¹⁰⁷ He was transferred to Guantánamo in 2006,¹⁰⁸ and his case was referred for trial before a military commission in 2008.¹⁰⁹ He stands accused of orchestrating the bombing of the U.S.S. Cole in October of 2000 as it was docked in a harbor in Yemen, killing 17 and wounding 39 more.¹¹⁰ He has also been accused of attempting an attack on the U.S.S. The Sullivans (also in 2000) and of coordinating an attack on a French oil tanker in 2002.¹¹¹ The government withdrew its charges against him in 2009¹¹² and reinstated charges in 2011.¹¹³ As noted above, this second pass at trying al-Nashiri remains in the pre-trial phase as of February of 2020.

Air Force Colonel Vance Spath joined the al-Nashiri case in the summer of 2014, presiding until the summer of 2018, when he departed to become an immigration judge.¹¹⁴ He was therefore not the first judge to preside over al-Nashiri’s commission proceedings. Unbeknownst to al-Nashiri and his defense team, however, Judge Spath began the process of applying to become an immigration judge in November of 2015, approximately a year and a half after he began overseeing al-Nashiri’s case.¹¹⁵ Judge Spath in fact received an offer to become an immigration judge in March of 2017, but extended negotiations about a mutually acceptable start date continued into early 2018—again, all without the knowledge of al-Nashiri and his defense team. Thus, for a substantial majority of the time during which he was the judge in that case, Judge Spath was either secretly pursuing employment within the DOJ or

107. See Charlie Savage, *C.I.A. Torture Left Scars on Guantánamo Prisoner’s Psyche for Years*, N.Y. TIMES (Mar. 17, 2017), <https://www.nytimes.com/2017/03/17/us/politics/guantanamo-bay-abd-al-rahim-al-nashiri.html> (“It has long been known that the C.I.A. subjected Mr. Nashiri to some of the most extreme torture of any prisoner taken into the agency’s custody after the terrorist attacks of Sept. 11, 2001. That included prolonged sleep deprivation and the suffocation technique called waterboarding, both of which the Justice Department deemed lawful. It also included a mock execution by an interrogator who racked the slide of a pistol as if preparing to fire it and then revved a power drill next to his head, which went beyond the approved program.”).

108. See *USS Cole Bombing Fast Facts*, *supra* note 106.

109. See *id.*

110. See *id.* Because this bombing predated the 9/11 attacks, and therefore arguably predated a state of war with al Qaeda, at one point al-Nashiri sought a writ of mandamus “to dissolve the military commission convened to try him.” *In re al-Nashiri*, 835 F.3d 110, 113 (D.C. Cir. 2016). The D.C. Circuit held that whether the charged crime occurred outside the context of hostilities is not “clear and indisputable,” and therefore that al-Nashiri was not entitled to the writ. *Id.* at 136–37.

111. See *USS Cole Bombing Fast Facts*, *supra* note 106.

112. See *Withdrawal of Charges in the Case of United States v. Abd al-Rahim al-Nashiri*, ACLU (Feb. 5, 2009), <https://www.aclu.org/legal-document/withdrawal-charges-case-united-states-v-abd-al-rahim-al-nashiri>; *In re al-Nashiri*, 921 F.3d 224, 227 (D.C. Cir. 2019).

113. See Tim Ryan, *Feds Get Tough Audience at DC Circuit in Cole Bombing Case*, COURTHOUSE NEWS SERV. (Jan. 22, 2019), <https://www.courthousenews.com/feds-get-tough-audience-at-dc-circuit-in-cole-bombing-case>; *In re al-Nashiri*, 921 F.3d at 227.

114. Judge Spath’s replacement, Judge Shelly Schools, took the reins on August 6, 2018. *In re al-Nashiri*, 921 F.3d at 231.

115. See *In re al-Nashiri*, 921 F.3d at 227.

secretly hired by the DOJ,¹¹⁶ even as the DOJ continued to play a significant role in prosecuting al-Nashiri.¹¹⁷

In fact, Judge Spath attempted to bolster his candidacy for an immigration judgeship by highlighting his position presiding over the al-Nashiri case, and even utilized one of his written rulings from the case as a writing sample.¹¹⁸ Further, during the time in which his application was pending with DOJ, Judge Spath made a number of significant rulings in favor of the prosecution—rulings that, whatever their merits, look questionable at minimum in light of his position as a job applicant before the prevailing party. Moreover, in the months leading up to his departure, Judge Spath repeatedly and pointedly criticized the defense team for its responses to those rulings.¹¹⁹

The story of those months is remarkable on its own, but it is truly extraordinary when viewed in light of the fact that Judge Spath was simultaneously seeking employment in the DOJ. In August of 2017, counsel for al-Nashiri discovered a hidden microphone in the location they had been using to meet with their client.¹²⁰ The government responded by noting that the existence of such microphones was classified—meaning, among other things, that it could not be disclosed to al-Nashiri—and that there were some “legacy microphones” in meeting areas that were no longer in use.¹²¹ Judge Spath denied the defense team discovery over the microphones, denied them a hearing on the issue (because the prosecution team assured him that none of them had personally listened in on meetings between al-Nashiri and his counsel), and

116. For more detail on the timeline of Judge Spath’s negotiations, see Carol Rosenberg, *War Court Judge Pursued Immigration Job for Years While Presiding Over USS Cole Case*, MCLATCHY D.C. (Nov. 20, 2018, 5:00 AM), <https://www.mcclatchydc.com/latest-news/article221557485.html>.

117. The size and complexity of the DOJ was not enough to save Judge Spath from a conflict because “the Attorney General himself is directly involved in selecting and supervising immigration judges.” *In re al-Nashiri*, 921 F.3d at 235. Moreover, although the D.C. Circuit concluded that the DOJ’s role in prosecuting al-Nashiri was smaller than the DOD’s, DOJ involvement nevertheless remained significant:

First, the Justice Department, presumably with the approval of the Attorney General, detailed one of its lawyers to prosecute Al-Nashiri. . . . And Commission transcripts reveal that this Justice Department lawyer’s participation was far from perfunctory; indeed, he appears to have been the prosecution team’s second-in-command for at least part of the time.

Id. at 236 (citation omitted). “Second, aside from the particulars of Al-Nashiri’s case, the Attorney General plays an important institutional role in military commissions more generally,” including appearing “by name twice in the Military Commissions Act.” *Id.* Thus, “the Attorney General was a participant in Al-Nashiri’s case from start to finish: he has consulted on commission trial procedures, he has loaned out one of his lawyers, and he will play a role in defending any conviction on appeal.” *Id.*

118. See *id.* at 227; Ryan, *supra* note 113.

119. See *infra* notes 276–278 and accompanying text.

120. See Baker, *supra* note 8, at 39.

121. See *id.* at 39–40.

denied them specific permission to disclose to their client that their meetings might have been compromised.¹²²

Unable to describe the situation to al-Nashiri or to investigate further, one of al-Nashiri's attorneys then brought the situation to an expert on legal ethics, who advised the attorney that that it was not possible to continue representing al-Nashiri in a manner consistent with his ethical obligations "to act diligently and competently, to maintain confidentiality, and [to] adhere to the duties of loyalty and communication."¹²³ The expert, Professor Ellen Yaroshefsky, advised al-Nashiri's counsel that withdrawal was required.¹²⁴ The three civilian members of al-Nashiri's four-attorney defense team—Rick Kammen (al-Nashiri's experienced capital defense attorney), Rosa Eliades, and Mary Spears¹²⁵—approached the Chief Defense Counsel (CDC), a Brigadier General in the U.S. Marine Corps named John Baker,¹²⁶ to seek permission to withdraw from the case.¹²⁷ Baker ultimately authorized their withdrawal, and the trio left the team in October of 2017.¹²⁸

The sole remaining attorney on al-Nashiri's team at the time, Lieutenant Alaric Piette, "[did] not qualify as learned counsel in capital cases and [was] not qualified to serve as the sole counsel in capital cases under the Military Commissions Act of 2009."¹²⁹ Judge Spath nevertheless repeatedly denied Piette's motions to abate proceedings, finding that al-Nashiri was not entitled to an experienced capital defense attorney "at every aspect of every proceeding, . . . especially when it doesn't relate to capital matters."¹³⁰ Pre-trial proceedings thus continued for several months with Piette operating as the only defense attorney for al-Nashiri (against four members of the prosecution team, including the chief prosecutor for the commissions, an attorney from the

122. *See id.*

123. *In re al-Nashiri*, 921 F.3d at 229 (alteration in original) (quoting Ellen Yaroshefsky).

124. *See id.*

125. Carol Rosenberg, *Now We Know Why Defense Attorneys Quit the USS Cole Case. They Found a Microphone.*, MCCLATCHY D.C. (Mar. 7, 2018, 1:05 PM), <https://www.mcclatchydc.com/article203916094.html> (identifying the members of al-Nashiri's defense team).

126. Baker, *supra* note 8, at 35, 40 (noting in a speech in 2018 that, "[f]or three years now, [Brigadier General John G. Baker] ha[s] been privileged to head the Military Commissions Defense Organization" and describing his role).

127. *See id.* at 40; *see also* Rosenberg, *supra* note 125 (describing the departure of al-Nashiri's civilian defense counsel); *In re al-Nashiri*, 921 F.3d at 228 (briefly describing the role of each attorney). The CDC supervises the defense teams as head of the MCDO, but it does not actually represent any of the defendants. *See* Baker, *supra* note 8, at 35.

128. *In re al-Nashiri*, 921 at 229 ("Baker, citing 'all the information [he knew] about this matter—both classified and unclassified,' found 'good cause' to terminate the representations on October 11, 2017.") (alteration in original).

129. Baker v. Spath, No. 17-CV-02311-RCL, 2018 WL 3029140 at *1 (D. D.C. June 18, 2018).

130. *In re al-Nashiri*, 921 F.3d at 230 (quoting Commission Transcript 10084 (Nov. 3, 2017)).

DOJ, and two judge advocates).¹³¹ Judge Spath made a number of rulings on pre-trial matters during that time while Piette abstained from substantive participation in the proceedings on the grounds that al-Nashiri remained entitled to learned counsel.¹³²

At the same time, Judge Spath refused to accept Baker's decision to excuse the civilian contingent of al-Nashiri's defense team, ordering Baker to rescind his consent to the attorneys' departure.¹³³ When Baker refused (claiming that Judge Spath's order was unlawful), Judge Spath held Baker in contempt, sentencing him to twenty-one-days confinement and fining him \$1,000.¹³⁴ In June of 2018, Baker had his conviction vacated, prevailing on a habeas petition filed in federal court on the grounds that military commission judges like Judge Spath lack unilateral contempt power.¹³⁵

Judge Spath also declared Baker's excusal "null and void,"¹³⁶ insisting that only *he* could excuse the attorneys and finding "no good cause" do so.¹³⁷ In mid-October of 2017, he thus ordered Kammen, Eliades, and Spears to appear at the next scheduled hearing for the case.¹³⁸ They did not comply.¹³⁹ Judge Spath again attempted to order Eliades and Spears to appear in December of 2017.¹⁴⁰ When the two refused and explained their rationale for doing so via letter, Judge Spath twice directed the government to compel their appearance with subpoenas.¹⁴¹ Eliades and Spears moved to quash the subpoenas, and on February 12, 2018, Judge Spath denied those motions from the bench.¹⁴² When Eliades and Spears still refused to appear the next day, Judge Spath "directed the government to draft writs of attachment for their arrest so that . . . he would have 'options available . . . when we get here tomorrow.'"¹⁴³ Judge Spath did not conclusively address the issue over the next two days as he continued "trying to figure out what to do";¹⁴⁴ but, on February 16, he "indefinitely" abated the

131. *See id.*

132. *Id.*

133. Baker, *supra* note 8, at 40.

134. Carol Rosenberg, *Gitmo Judge Sends Marine General Lawyer to 21 Days Confinement for Disobeying Orders*, MIAMI HERALD (Nov. 1, 2017, 9:50 AM), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article182031196.html>.

135. *See Baker v. Spath*, No. 17-CV-02311-RCL, 2018 WL 3029140 at *1 (D. D.C. June 18, 2018).

136. Rosenberg, *supra* note 134 (quoting Judge Spath).

137. *In re al-Nashiri*, 921 at 229 (quoting Judge Spath).

138. *See id.* at 230.

139. *See id.* Kammen brought his own suit over the government's efforts to compel his appearance. *See JP Schnapper-Casteras, On Guantanamo*, SCHNAPPER-CASTERAS PLLC (Sept. 12, 2019), <https://schnappercasteras.com/2019/09/12/on-guantanamo>.

140. *See In re al-Nashiri*, 921 F.3d at 230.

141. *Id.*

142. *Id.*

143. *Id.* at 231 (quoting Commission Transcript 11914–15 (Feb. 14, 2018)).

144. *Id.* (quoting Commission Transcript 11919 (Feb. 14, 2018)).

proceedings in al-Nashiri's case.¹⁴⁵ Speaking from the bench, Judge Spath referenced his "frustration with the defense" over the previous five months, noted the need for "action from somebody other than [him]" ("a superior court"), and mused that "[i]t might be time for [him] to retire, frankly."¹⁴⁶ He neglected to mention that, the night before, he had received an offer to start as an immigration judge in July of 2018.¹⁴⁷

B. The Recent Contributions of the USCMCR

This dramatic standoff with the defense team took place throughout the second half of Judge Spath's application and negotiation process for a position within the DOJ.¹⁴⁸ Judge Spath put in his retirement paperwork with the military during the abatement while the government was appealing to the USCMCR to restart proceedings.¹⁴⁹ Thus, al-Nashiri learned that Judge Spath was retiring during early 2018, though he remained unaware that Judge Spath was moving on to work for the DOJ.¹⁵⁰ Finally, in the summer of 2018, al-Nashiri's defense team received "credible reports" that Judge Spath had pursued employment as an immigration judge.¹⁵¹ The team sought discovery on the subject, which the prosecution opposed on the grounds that the defense concerns were mere "unsubstantiated assertions."¹⁵² Within a week, the Associated Press published a photograph of Judge Spath standing beside Attorney General Jeff Sessions as the latter welcomed a new class of immigration judges.¹⁵³

With the trial court in abatement, al-Nashiri looked to the USCMCR, filing a motion to compel discovery on the issue of Judge Spath's job application and seeking to vacate Judge Spath's rulings.¹⁵⁴ On September 28, the USCMCR denied that motion; it found that al-Nashiri had not yet developed the factual record around the issue at the trial level (though al-Nashiri's hands were tied in that respect by Judge Spath's ongoing abatement), and also found that al-Nashiri "had failed to 'show[] that a "reasonable and informed observer would question

145. *Id.* (quoting Commission Transcript 12376 (Feb. 16, 2018)).

146. *Id.* at 231 (quoting Commission Transcript 12364, 12374 (Feb. 16, 2018)); *see also* Rosenberg, *supra* note 116 (describing these events).

147. *In re al-Nashiri*, 921 F.3d at 231.

148. *See id.*

149. *Id.*

150. *Id.*

151. *Id.* (quoting Petition for a Writ of Mandamus and Prohibition 23, *In re al-Nashiri*, No. 18-1279 (Oct. 4, 2018)).

152. *Id.* at 231 (quoting Corrected Attachments to Petitioner's Petition for a Writ of Mandamus and Prohibition at Attachment B, at 1, *In re al-Nashiri*, No. 18-1279 (D.C. Cir. Nov. 4, 2018)).

153. *Id.*; *see also* Britain Eakin, *Terror Rulings Vacated Over Risk of Bias from Military Judge*, COURTHOUSE NEWS SERV. (Apr. 16, 2019), <https://www.courthousenews.com/terror-rulings-vacated-over-risk-of-bias-from-military-judge> (showing the photograph).

154. *In re al-Nashiri*, 921 F.3d at 232.

[Spath's] impartiality."¹⁵⁵ A month later, on October 11, the USCMCR ruled on the government's appeal from Judge Spath's February abatement.¹⁵⁶ The panel sided with Judge Spath on the departure of al-Nashiri's civilian counsel, ordering the pre-trial proceedings to resume and the civilian attorneys to return to continue representing al-Nashiri.¹⁵⁷ The panel also agreed in substance with Judge Spath on the limitations of al-Nashiri's right to learned counsel, emphasizing that the right is not absolute and exists only "to the 'greatest extent practicable.'"¹⁵⁸ As he had already petitioned the D.C. Circuit for a writ of mandamus, al-Nashiri then asked both the USCMCR and the D.C. Circuit for a stay until that petition was resolved.¹⁵⁹ The USCMCR denied the motion on November 2, stating that al-Nashiri should make his motion to disqualify Judge Spath to the new trial judge at the commissions.¹⁶⁰

The USCMCR's role in this incident extends beyond consistently denying al-Nashiri's motions, however.¹⁶¹ One of the USCMCR's judges who had also served as an Air Force judge—Colonel Mark Allred—wrote a recommendation for Judge Spath's application to the DOJ in November of 2015.¹⁶² When asked about the propriety of recommending Judge Spath under the circumstances, Judge Allred defended his decision.¹⁶³ He noted it was common for military judges to seek recommendation letters to become administrative law judges, which was "kind of their dream job," and said he had written dozens of such recommendations for lawyers and judges.¹⁶⁴ He was not aware of a policy requiring Air Force judges to disclose such job applications, and, though he conceded the possibility of conflicts, said such assessments should be made on "a case-by-case basis."¹⁶⁵ (Additionally, Judge Spath received a reference from

155. *Id.* (quoting Order 2, United States v. Al-Nashiri, No. 18-002 (CMCR Sept. 28, 2018)).

156. *Id.*

157. *Id.*

158. *Id.* (quoting United States v. al-Nashiri, No. 18-002, slip op. at 21, 34 (CMCR Oct. 11, 2018)).

159. *Id.*

160. *Id.*

161. Vladeck has heavily criticized the USCMCR on a number of different grounds. *See, e.g.,* Steve Vladeck, *Why Aren't the Military Commissions Working? Look No Further Than al-Nashiri*, LAWFARE (May 21, 2018, 10:18 AM), <https://www.lawfareblog.com/why-arent-military-commissions-working-look-no-further-al-nashiri> ("I've written before about the 'misbegotten' CMCR—a court that has spent its entire history slowing down the military commissions and embracing pro-government arguments that couldn't even get a single vote from the D.C. Circuit under 'plain error' review.") [hereinafter Vladeck, *Look No Further*]; *see also* Vladeck, *supra* note 5 (identifying both structural and substantive failings of the court).

162. Rosenberg, *supra* note 116. Judge Allred was appointed to the USCMCR in 2014 and left in 2016. *See* Judge Allred's official resumé at COLONEL MARK L. ALLRED, <https://www.mc.mil/Portals/0/pdfs/CMCRJudges/Judge%20Allred%20Bio.pdf>.

163. Rosenberg, *supra* note 116.

164. *Id.* (quoting Judge Allred).

165. *Id.* The article also quotes Allred as saying, "I don't see it as a specious argument [to assess conflicts on a case-by-case basis], nor am I particularly alarmed by it." *Id.*

the staff director of the trial judiciary and Judge Spath's former attorney-advisor on the al-Nashiri matter, retired Army Colonel Fred Taylor.)¹⁶⁶

More generally, its handling of the Judge Spath conflict is not the only occasion on which the USCMCR has fared poorly before the D.C. Circuit.¹⁶⁷ It is not even the first time the circuit issued a writ of mandamus to the USCMCR over the conduct of a commission judge.¹⁶⁸ In 2017, the D.C. Circuit recused the Deputy Chief Judge of the USCMCR, Scott Silliman, from Khalid Shaikh Mohammed's case.¹⁶⁹ Before becoming a judge, Judge Silliman made public statements expressing the view that Mohammed was complicit in the 9/11 attacks—thus taking a position on his guilt and warranting a recusal under the Rules of Practice for the USCMCR.¹⁷⁰ In issuing that writ, the D.C. Circuit also vacated a USCMCR ruling in Mohammed's case made by a panel that included Judge Silliman.¹⁷¹ Additionally, even when the circuit has declined to issue a writ, it has more than once suggested that the USCMCR got things wrong.¹⁷²

C. The D.C. Circuit's Vacatur of Judge Spath's Rulings

Following this chain of adverse decisions before the USCMCR throughout late 2018, al-Nashiri then secured the intervention of the D.C. Circuit, which held an oral argument on al-Nashiri's motion for a writ of mandamus before Judges Rogers, Tatel, and Griffith on January 22, 2019.¹⁷³ During oral

166. *Id.*

167. For some more background on the performance of the USCMCR, see Vladeck, *Look No Further*, *supra* note 161; Vladeck, *supra* note 5.

168. See Vladeck, *Look No Further*, *supra* note 161.

169. See *In re Mohammad*, 866 F.3d 473, 477 (D.C. Cir. 2017).

170. *Id.* at 475–76.

171. *Id.* at 477.

172. See Vladeck, *Look No Further*, *supra* note 161 (explaining that “in two . . . cases, [the D.C. Circuit] dropped strong hints that the CMCR got matters wrong even while holding that the plaintiff couldn't meet the exceptionally high bar for mandamus relief”). As noted above, Vladeck has also offered pointed criticism of the performance of the USCMCR. For example, though he primarily blames Congress for the design of the court, Vladeck has argued the USCMCR has failed the most salient goals it might have been designed to achieve and that “all [the USCMCR] has really accomplished in these cases is to (1) slow them down; while (2) answering the questions presented in ways that have had little bearing (other than proving deeply vulnerable) on subsequent appeal.” Vladeck, *supra* note 5; see also Robert Chesney, *Undue Delay at the CMCR re the Viability of Material Support and Conspiracy Charges and the Ability to Raise Constitutional Arguments in Commission Proceedings*, LAWFARE (Jan. 4, 2011, 11:16 AM), <https://www.lawfareblog.com/undue-delay-cmcr-re-viability-material-support-and-conspiracy-charges-and-ability-raise> (criticizing “undue delay” at the USCMCR in 2011). Indeed, as Vladeck has pointed out, the complexity of creating a trial court from scratch is compounded by an order of magnitude when the government simultaneously creates a corresponding appellate court from scratch as well. See Vladeck, *supra* note 5 (observing that “Congress created a hitherto-unprecedented system in which a military commission conviction would first be appealed to a brand-new Article I military appeals court, then to an Article III civilian Court of Appeals.”).

173. Oral Argument, *In re al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019) (No. 18-1279), <https://www.courtlistener.com/audio/61108/abd-al-rahim-hussein-al-nashir/>.

argument, al-Nashiri asked the court to vacate the pretrial proceedings in the case. He argued that Judge Spath had violated four canons of judicial ethics—any one of which alone would justify granting his preferred form of relief, but which collectively “shocked the conscience.” First, al-Nashiri claimed that Judge Spath had knowingly concealed facts calling his impartiality into question. Second, Judge Spath had sought to position himself for an appointment from the Attorney General (AG) at the same time that the AG and the DOJ had a substantial interest in the case before him. Third, Judge Spath had traded on his status as a judge in this case—an important, capital case—for his own personal gain. Fourth, and worst of all from al-Nashiri’s perspective, Judge Spath had allowed his personal financial interests to influence his handling and scheduling of the case.¹⁷⁴ Notably, al-Nashiri pointed out that the first two of these issues were before the USCMCR but the latter two were not.¹⁷⁵ Additionally, al-Nashiri argued that Judge Spath’s conduct revealed not just the appearance of bias but *actual* bias.¹⁷⁶

The government’s position was that the D.C. Circuit should send the matter back to the new trial judge assigned to al-Nashiri’s case.¹⁷⁷ Specifically, the government wanted the trial judge to develop the record surrounding Judge Spath’s conduct while he was seeking an appointment as an immigration judge, including securing Judge Spath’s testimony.¹⁷⁸ At the time of the argument, it was unclear which judge would handle the matter if it were remanded below; however, as Judge Tatel pointed out, there was a reasonable possibility that the presiding judge would be Judge Shelly Schools—the judge initially designated as Judge Spath’s replacement, who had *also* successfully applied to become an immigration judge.¹⁷⁹ Judge Tatel in particular was unimpressed with the suggestion that the matter might end up before Judge Schools.¹⁸⁰ Moreover, as Judge Tatel noted, Judge Spath’s state of mind at various points in the pursuit of his new position would not have been relevant to the objective test that the D.C. Circuit applies in evaluating the appearance of bias introduced by judicial conduct.¹⁸¹

On April 16, 2019, the D.C. Circuit issued a unanimous and forceful ruling that all orders issued by Judge Spath in the al-Nashiri matter, dating back to November of 2015 (when he applied to become an immigration judge), must be

174. *Id.* at 2:17.

175. *Id.* at 2:35.

176. *See id.* at 7:30.

177. *See id.* at 26:35.

178. *See id.* at 25:50.

179. *See In re al-Nashiri*, 921 F.3d at 233.

180. *See* Oral Argument at 27:12, *In re al-Nashiri*, 921 F.3d 224 (No. 18-1279), <https://www.courtlistener.com/audio/61108/abd-al-rahim-hussein-al-nashir>.

181. *See id.* at 59:40.

vacated.¹⁸² The court noted that the circumstances “easily satisfied”¹⁸³ the exacting standard for issuing the “‘drastic’ remedy” of a writ of mandamus.¹⁸⁴ The panel stated that “it is beyond question that judges may not adjudicate cases involving their prospective employers.”¹⁸⁵ In the court’s view, the job application alone would have warranted Judge Spath’s disqualification,¹⁸⁶ but Judge Spath further compromised the appearance of neutrality by trading on his role in the al-Nashiri case explicitly (“making his performance as presiding judge a key point in his argument for employment”) and by failing to disclose his application at any point to al-Nashiri.¹⁸⁷ (Notably, the D.C. Circuit’s decision was based in significant part on information about Judge Spath’s application to the DOJ obtained not from Judge Spath himself, but rather by New York Times reporter Carol Rosenberg via a request under the Freedom of Information Act (FOIA).)¹⁸⁸

D. The Underlying Cultural Problems at the Commissions

Crucially, the D.C. Circuit also noticed that the situation before it had not arisen from a discrete, erroneous judgment by Judge Spath; the facts of the case revealed that something deeper had gone awry with the commissions. The panel therefore issued a stinging, broader critique:

Although a principle so basic to our system of laws should go without saying, we nonetheless feel compelled to restate it plainly here: criminal justice is a shared responsibility. Yet in this case, save for Al-Nashiri’s defense counsel, all elements of the military

182. See *In re al-Nashiri*, 921 F.3d at 240; see also *supra* note 12 (noting that the D.C. Circuit ruling implicated 460 of Judge Spath’s written rulings, an unspecified number of oral rulings, and at least four published USCMCR rulings); *In re al-Nashiri*, 921 F.3d at 238 (noting that the government represented to the court that Spath had made “many oral rulings from the bench” and “issued approximately 460 written orders” during the time in question) (quoting Brief of the United States in Opposition 8, *In re al-Nashiri*, No. 18-1279 (D.C. Cir. Nov. 16, 2018)).

183. *In re al-Nashiri*, 921 F.3d at 238.

184. *Id.* at 237 (quoting *Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005)).

185. *Id.* at 235. See also *id.* at 235–36. The government had contested the significance of the DOJ’s involvement in the commissions, given the primary role reserved for the DOD. The court was not persuaded by that argument, noting that, despite the size and complexity of DOJ, “it is enough to decide this case to know that the Attorney General himself is directly involved in selecting and supervising immigration judges.” *Id.* at 235. That is because, according to the court, “the Attorney General was a participant in Al-Nashiri’s case from start to finish: he has consulted on commission trial procedures, he has loaned out one of his lawyers [to the prosecution team], and he will play a role in defending any conviction on appeal.” *Id.* at 236.

186. See *id.* at 237.

187. *Id.*

188. See *id.* at 227; see also Lauren Harper, *Reporter Carol Rosenberg’s FOIA Request Changes Course of al-Nashiri Trial*, UNREDACTED (Apr. 19, 2019), <https://unredacted.com/2019/04/19/reporter-carol-rosenbergs-foia-request-changes-course-of-al-nashiri-trial-frinforms-4-19-2019/> (identifying Carol Rosenberg as the one who filed the FOIA request that turned up Judge Spath’s application to become an immigration judge).

commission system—from the prosecution team to the Justice Department to the [US]CMCR to the judge himself—failed to live up to that responsibility.¹⁸⁹

By questioning the decision-making of Judge Spath, the USCMCR, the prosecution team, and the DOJ more broadly, the panel in essence condemned the culture of the commissions.¹⁹⁰ The situation before the court arose over many months and as a result of countless, distinct choices by important officials. Yet decisions of the sort that invited the D.C. Circuit’s criticism—alarming decisions reflecting the norms that officials at the commissions have adopted—are not uncommon at the commissions. While the structural features of the commissions have undergone changes since 2001, key officials with power over the commissions have consistently prioritized factors other than the transparent, speedy, and fair trial of commission defendants.

Consider just a sample, all drawn from the third phase of the commissions. In 2011, Joint Task Force Guantánamo, which maintains custody of Guantánamo detainees, “seized, copied, and translated all written material in all detainees’ possession,” including “documents very clearly marked as attorney-client privileged.”¹⁹¹ These seizures occurred following consultation with the Joint Task Force’s attorneys.¹⁹² In early 2013, lawyers for the 9/11 defendants discovered that some unidentified intelligence agency had the power to “shut down live courtroom proceedings without the knowledge or assent of the judge and that the same agency had the ability to listen to courtroom conversations, including between defense counsel and their clients, through the microphones placed on defense tables.”¹⁹³ Around the same time, a defense attorney found that the smoke detectors affixed to the ceilings of all of the attorney-client meeting rooms designated for use by commission defendants were in fact disguised recording devices.¹⁹⁴ And, in 2014, the FBI successfully infiltrated the defense team of a commission defendant, persuading a defense

189. *In re al-Nashiri*, 921 F.3d at 239–40.

190. Marc Falkoff has suggested to me that the ethos of the commissions might reflect a complex amalgam of multiple constituent cultures, including at minimum a military culture and a legal (or lawyers’) culture. This is a plausible suggestion, though of course courts martial are likely to feature a fusion of both military and legal cultures as well. In what follows, I argue that the source of the ethos of the commissions can be traced at least in part to the political environment in which they were created—namely, the very first days of the War on Terror—and the contemporaneous attitudes of the key political actors behind their creation. Additional qualitative research may well reveal more detail.

191. Baker, *supra* note 8, at 38.

192. *See id.*

193. *Id.* at 38–39 (footnote omitted); *see also* Amy Davidson Sorkin, *A Red Light at Guantánamo*, NEW YORKER (Jan. 29, 2013), <https://www.newyorker.com/news/daily-comment/a-red-light-at-guantnamo> (describing the judge himself as “confused and angry” when, for the first time, some unseen person from a remote location triggered a flashing light in the courtroom and the accompanying “censor” function that prevents secret information disclosed in the courtroom from reaching those who are publicly observing the proceedings).

194. Baker, *supra* note 8, at 39.

security official on the team (who had unfettered access to the defendant's legal files) to sign an agreement to become a confidential FBI informant against the MCDO.¹⁹⁵

In yet another incident, during a hearing in 2015, a defendant in the 9/11 case claimed to recognize “the court interpreter sitting at his defense table from one of the ‘black sites’ where he was interrogated and tortured.”¹⁹⁶ Years later, reporting confirmed that the defendant was telling the truth: the interpreter had served as a CIA linguist, and had lied about his role when interviewed by defense attorneys upon being assigned to the 9/11 commission case.¹⁹⁷ Defense attorneys have sought to secure the testimony of the linguist, in part because he is an eyewitness to the circumstances of the defendant's detention at the hands of the CIA.¹⁹⁸ According to the *New York Times*:

The prosecutors have been so determined to stop the testimony—or at least restrict it to a secret session—that they put the judge on notice last month: If he opted for open-court testimony, even if delivered in a way that masked the interpreter's identity and distorted his voice, the government would invoke a national security privilege and refuse to let him testify at all.¹⁹⁹

Questions about transparency, speed, and fairness at the commissions continue to arise even in the months and years immediately preceding publication of this Article. In 2017, Chief Prosecutor Mark Martins imposed a “media blackout” by stopping a long-standing practice of holding news conferences.²⁰⁰ In 2019, Lieutenant Alaric Piette—the last attorney standing on al-Nashiri's defense team after the standoff with Judge Spath detailed above—was passed over for promotion in a move that appears retaliatory for his fierce advocacy of an unpopular client.²⁰¹ Around the same time, another commission judge who successfully applied to become an immigration judge testified before the commissions that the D.C. Circuit ruling in the Spath matter surprised him

195. See Spencer Ackerman, *Guantánamo Hearings Halted Amid Accusations of FBI Spying on Legal Team*, *GUARDIAN* (Apr. 14, 2014, 2:07 PM), <https://www.theguardian.com/world/2014/apr/14/guantanamo-bay-hearing-halted-fbi-spying>; Baker, *supra* note 8, at 39.

196. Baker, *supra* note 8, at 39.

197. See Carol Rosenberg, *The Strange Case of the C.I.A. Interpreter and the 9/11 Trial*, *N.Y. TIMES* (Aug. 14, 2019), <https://www.nytimes.com/2019/08/14/us/gitmo-trial-cia-interpreter.html?smid=nytcore-ios-share>.

198. See *id.*

199. *Id.*

200. Carol Rosenberg, *Pentagon's War Crimes Prosecutor Begins a Media Blackout at Guantánamo*, *MIAMI HERALD* (Nov. 1, 2017, 8:17 AM), <https://amp.miamiherald.com/news/nation-world/world/americas/guantanamo/article182020876.html?twitterimpression=true>.

201. See Carol Rosenberg, *Military Lawyer Denied Promotion While Defending Qaeda Suspect*, *N.Y. TIMES* (Aug. 22, 2019), <https://www.nytimes.com/2019/08/22/us/politics/navy-lawyer-promotion-guantanamo.html#click=https://t.co/CbVqeV7q6o>.

and a number of other judges,²⁰² and that it “did not occur to him” that applying to a job at DOJ while presiding over a prosecution undertaken in significant part by the DOJ created “even the appearance of a conflict of interest.”²⁰³

Perhaps even more striking, interrogators extracted inadmissible confessions from some 9/11 defendants by torturing them while they were held in CIA custody between 2002 and 2006.²⁰⁴ Once the defendants arrived at Guantánamo, the Bush administration assembled “clean teams” of FBI agents to question them in an effort to obtain new, admissible confessions.²⁰⁵ According to prosecutors, the FBI teams operated “independently of what happened during the period when the defendants were tortured.”²⁰⁶ But in the summer of 2019, defendants argued that they have obtained evidence that the CIA and FBI coordinated during both phases of the defendants’ questioning—and thus that “[t]he clean teams were a fiction from the very beginning” because the two agencies have been operating jointly as “one big team” throughout.²⁰⁷

Against that background, the Spath incident reveals a continuity of culture. Of all of the parties involved, Judge Spath’s decisions are perhaps the most striking. As the trial judge in one of the commissions’ major prosecutions, he refused to disclose the existence of a pending job application with the DOJ. With his application under consideration for months at one of the prosecuting departments, Judge Spath shrugged off defense concerns about the presence of hidden microphones in client meeting spaces, repeatedly blocking efforts by defense attorneys to explore the matter or even disclose it to their client. In doing so, Judge Spath forced the attorneys into a manifest ethical conflict. Yet when defense counsel consequently sought to withdraw, Judge Spath aggressively pursued sanctions both against them and against their supervisor. It is noteworthy that frustration with the defense team specifically characterized Judge Spath’s final months with the commissions even as the D.C. Circuit singled out the defense team as the only relevant commission entity to handle its responsibilities properly in this entire episode.

But let us not forget the USCMCR, which, already standing on a poor record before the D.C. Circuit and featuring an alumnus judge who wrote a recommendation for the trial judge’s secret job application, blocked al-Nashiri’s request for discovery concerning a clear violation of the rules of judicial conduct. The USCMCR also denied that Judge Spath’s comportment

202. See Carol Rosenberg (@carolrosenberg), TWITTER (Aug. 24, 2019, 11:24 AM), <https://twitter.com/carolrosenberg/status/1165283845970833409>.

203. Carol Rosenberg (@carolrosenberg), TWITTER (Aug. 24, 2019, 11:20 AM) (quoting Judge Waits), <https://twitter.com/carolrosenberg/status/1165282691476054016>.

204. See Carol Rosenberg, *Lawyers Press Case That 9/11 Confessions Given to F.B.I. Are Tainted*, N.Y. TIMES (July 29, 2019), <https://www.nytimes.com/2019/07/29/us/politics/september-11-confessions-guantanamo.html#click=https://t.co/lGnRlbczFd>.

205. *Id.*

206. *Id.*

207. *Id.* (quoting Cheryl Bormann).

introduced the appearance of bias, only to be slapped down by yet another writ of mandamus issued unanimously by a three-judge panel of the D.C. Circuit.

The prosecutors, meanwhile, persistently opposed discovery both on the hidden microphones and on Judge Spath's job application. When the matter of Judge Spath's conduct came before the D.C. Circuit, the prosecutors asked an incredulous panel to send the matter back down to Judge Spath's replacement to develop the record on Judge Spath's actual motivation. Prosecutors made that request knowing that the information they sought to develop was irrelevant to the objective legal test the circuit was bound to apply, that Judge Spath's replacement had also applied successfully to become an immigration judge, and that the matter would almost certainly end up before the D.C. Circuit once again in a matter of months anyway. And notwithstanding the forcefulness with which the D.C. Circuit vacated most of Judge Spath's rulings, prosecutors promptly asked Judge Spath's replacement to reinstate those very rulings.²⁰⁸

Then there is the DOJ, which—operating across two administrations and two Attorneys General of different political parties—entertained and ultimately approved the application of Judge Spath. Never mind that Judge Spath was presiding over a case that required careful handling as one of the most important capital cases in the country. The DOJ hired Judge Spath as an immigration judge *when his application for the position was a glaring violation of the governing rules of judicial conduct.*

None of these incidents make any sense if we presume that the officials who caused them were motivated by the same goals as most observers. Each of the underlying decisions, especially when understood within its broader historical context, would tend to slow the proceedings, generate results plainly vulnerable to appellate or collateral attack, suggest that the government was attempting to hide illicit tampering with the defense teams, or otherwise diminish the public's confidence in the proceedings. Given how many agencies' interests are affected by the commissions, perhaps one or two anomalous incidents could be excused as reflecting bad judgment, crossed wires, or even the misplaced priorities of isolated officials. But the pattern at the commissions is unmistakable, for all of these decisions cut in the same direction: against the defendants.

Time and again, officials with power over the commissions have acted in a manner that plainly undermines the fairness—or, at the very least, the appearance of fairness—of the proceedings as concerns the putative rights of the defendants. And that pattern holds true even after the implementation of structural reforms in 2009 that, on paper, make the commissions somewhat fairer to defendants than initially was the case. Moreover, in none of the instances detailed above were the questionable decisions compelled by structural features like the practical difficulties of litigating in a remote location or specific rules that strictly prohibited alternative outcomes. Features of that

208. Carol Rosenberg, *Judge Rules Prosecutors Misrepresented Evidence from C.I.A. Sites*, N.Y. TIMES (Nov. 8, 2019), <https://www.nytimes.com/2019/11/08/us/politics/gitmo-uss-cole-trial.html#click=https://t.co/vqmX6i4E4T>.

sort have likely facilitated the choices of officials to relegate traditional norms to the background of the military commissions; but if officials had prioritized conventional prosecutorial norms of seeking justice, each of these incidents could have been avoided.

So, how could all of this happen? How could so many high-placed officials, in diverse roles, consistently undermine the purported objectives of the commission proceedings—even as the commissions were operating under their “best” (though still flawed) structural configuration? Two salient possibilities present themselves. One is that the commissions are riddled with incompetence, overrun by officials who, try as they might, simply cannot stop themselves or their subordinates from making bad decisions. A second is that a substantial number of relevant officials simply do not agree that the objectives of the commissions are to be fair to the defendants, efficient, and accepted as legitimate by the public. At minimum, a critical mass of agents with power over the commissions are willing to subordinate those prototypical objectives to “nontraditional” ones when the two conflict.

Of these two possibilities, the latter is far more plausible. Generalized incompetence should cut both ways, but the valence of all these decisions points in favor of the prosecution. Moreover, by most accounts, the commission judges and prosecutors are experienced, intelligent, and capable people. The most generous interpretation of their conduct—the one most consistent with a presumption of competence—is that they have accepted (whether knowingly or not) a different set of governing norms for the enterprise before them. Put another way, the commissions suffer from a problem of culture.

Consider once more Judge Spath, who is in fact an experienced litigator and judge. There is no reason to think he was unfamiliar with the norms that govern typical prosecution proceedings—and even with respect to the commissions, he had previously purported to accept some of the typical objectives, like ensuring public confidence in the trials. In fact, Judge Spath objected forcefully when, in February of 2015, the convening authority expressed disappointment at the pace of commission proceedings and attempted to implement a rule change that would have required the commissions judges to live at Guantánamo Bay—generally considered an undesirable location, and certainly one that would separate the judges from their families—until the trials concluded. At the time, Judge Spath stated that, although he would not allow such a rule to affect his decisions in the case, he could understand how a reasonable observer might wonder whether pressure to wrap up the trials and leave the base would factor into his rulings.²⁰⁹ Judge Spath went so far as to call the convening authority to testify over the rule change and ultimately barred him from managing the case, thus forcing the appointment of a new convening authority.²¹⁰ Whatever his motives at the time, Judge Spath clearly

209. See Carol Rosenberg (@carolrosenberg), TWITTER (Mar. 2, 2015, 11:00 AM), <https://twitter.com/carolrosenberg/status/572426270589382656>.

210. Sinha, *supra* note 96; see also Rosenberg, *supra* note 209 (noting Judge Spath’s concern that, under the new rule, the “public would easily wonder if decisions were made in the

demonstrated the ability to discern how the proposed change might affect the public's perceptions of the fairness of the military commissions. Yet, nearly a year later, he submitted his application to the DOJ, predictably creating a much larger cloud of partiality over his rulings than the proposed rule change he had previously opposed.

It may not be possible to identify with certainty the specific norms that shifted Judge Spath's views about the appearance of partiality. But it is not difficult to posit plausible norms that various government officials might have adopted that explain the choices documented above. For certain law enforcement or intelligence agencies, for example, the commissions appear to serve as an auxiliary source of intelligence. For some judges or prosecutors, ultimately securing a conviction may constitute the specific priority.²¹¹ In any case the next Section will explore why alternative norms like these might have taken hold of actors at the commissions.

To be clear, none of this is meant to impugn the motives of every single official with power over the commissions. There are striking examples of officials with central roles in the administration of the commissions who resisted the dominant ethos sketched out above (and described in more detail in the following Section). Unfortunately, what makes these examples striking—for example, the decision by Susan Crawford, who served as convening authority of the commissions from 2007 to 2010, to decline to prosecute 9/11's so-called "20th hijacker" Mohammed al-Qahtani²¹² on the grounds (as she later explained) that he had been tortured in United States' custody²¹³—is precisely that they stand out against the bleak record of the commissions.

interests of speed rather than a just, fair outcome.”). I attended this set of hearings at Guantánamo Bay and was in fact struck quite favorably by Judge Spath's measured demeanor and apparent interest in preventing a loss of public confidence in the commissions.

211. Prosecutors in civilian courts have certainly been accused of prioritizing convictions over justice as well. See Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 16 (2009) (“The pressure to bring and win cases has infiltrated the very culture of the prosecutor's office. Prosecutors may have once believed their role to be like that of a judge—to evaluate and determine when it is fair to bring criminal charges or pursue a conviction. Now the primary purpose of the prosecutor is to seek as many convictions as possible.”); see generally, e.g., Alanah Odoms Hebert, *Prosecutors Must Be Held Accountable for Misconduct*, NOLA.COM (Aug. 3, 2018, 12:57 PM), https://www.nola.com/opinions/article_bd8404d8-a247-566c-9fef-c144f03c5e7b.html; John Terzano, *Prosecutors Must Seek Justice, Not Merely Convictions*, HUFFINGTON POST: THE BLOG (Apr. 18, 2010), https://www.huffpost.com/entry/prosecutors-must-seek-jus_b_464291. But the pressure in the commission cases is especially significant because the charged crimes have dozens if not thousands of victims, the crimes hold an especially significant place in the public consciousness, and family members of the victims have flown down to watch the hearings for years as the commissions have dragged on. See *infra* note 249 (describing one attorney's view that the military commissions were designed to generate convictions).

212. William Glaberson, *Case Against 9/11 Detainee Is Dismissed*, N.Y. TIMES (May 14, 2008), <https://www.nytimes.com/2008/05/14/washington/14gitmo.html>.

213. See Bob Woodward, *Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials*, WASH. POST (Jan. 14, 2009), <http://www.washingtonpost.com/wp->

In fact, some of the most notable instances of officials resisting the prevailing ethos required self-sacrifice or triggered adverse consequences. In 2007, Colonel Morris Davis famously resigned from his position at the Chief Prosecutor of the commissions after officials with a history of either licensing the use of torture or the use of evidence obtained through torture were placed above him in the chain of command.²¹⁴ As Davis put it, “When I learned that two men who sanctioned torture were above me in the chain of command, I concluded that I could not ensure fair trials for the detainees at Guantanamo.”²¹⁵

In another incident, in 2018, Secretary of Defense Jim Mattis fired Convening Authority Harvey Rishikof—without notice and without explanation, but seemingly because he was exploring the possibility of accepting guilty pleas from the 9/11 defendants.²¹⁶ Rishikof’s legal advisor was removed at the same time.²¹⁷ Pleas carried the potential to resolve the case at long last, but would have required prosecutors to accept a penalty for the defendants less severe than death.²¹⁸ The Administration’s subsequent justification for the removals cited the pair’s temperamental deficiencies, though many (including Rishikof and his advisor) remained suspicious that this was a pretext.²¹⁹ Notably, removing Rishikof in an attempt to influence the case would have constituted unlawful command influence.²²⁰

It is therefore undeniable that officials have passed through the commissions without being compromised by the problematic norms that others have apparently endorsed, and surely some remain there today. But that is consistent with the idea that a pervasive cultural problem at the commissions—more so than their structural features—explains their current state.²²¹ If

[dyn/content/article/2009/01/13/AR2009011303372.html?hpid=topnews](https://www.nytimes.com/dyn/content/article/2009/01/13/AR2009011303372.html?hpid=topnews) (reporting part of an interview with Susan Crawford that took place several months after she made the decision not to prosecute al-Qahtani).

214. See Morris Davis, Opinion, *Here’s Why I Resigned as the Chief Prosecutor at Guantanamo*, L.A. TIMES (Oct. 4, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-davis-why-i-resigned-as-chief-prosecutor-for-military-commissions-guantanamo-20171004-story.html>.

215. *Id.*

216. Charlie Savage, *Fired Pentagon Official Was Exploring Plea Deals for 9/11 Suspects at Guantánamo*, N.Y. TIMES (Feb. 10, 2018), <https://www.nytimes.com/2018/02/10/us/politics/guantanamo-sept-11-rishikof.html>.

217. *Id.*

218. *Id.*

219. Charlie Savage, *Mattis Says Guantánamo Lawyers Were Fired Over Temperament, Not Legal Work*, N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/us/politics/guantanamo-officials-fired-mattis.html>.

220. *Id.*

221. There is almost certainly some relationship between the structural features of the commissions and the governing norms. For more on this possibility, see *infra* Section IV. But there are at least cognizable, neutral principles that may justify peculiar structural features of the commissions. For example, Chief Prosecutor of the commissions, Mark Martins, stated in conversation with my group of observers from a February 2015 visit to the commissions that special rules on the admission of evidence are necessary to prosecute defendants for crimes committed in

anything, the instant analysis highlights the power of governing norms because it reveals their influence even in a system where their acceptance is not universal.²²²

As the next two Sections explore, although some elements of the commissions' culture are comprehensible, they are not acceptable in any trial system, and especially not in this one. Moreover, there is good reason to think that the die was cast for the culture of the commissions by the context in which they were born and the specific manner in which they were created. The unfortunate truth is that the commissions were designed around some of the fundamental norms of the broader War on Terror, and the commissions have succeeded in internalizing those norms.

III. HAVE THE COMMISSIONS FAILED?

One could accept that the prevailing norms of the commissions are the fundamental drivers of their performance, as argued in the previous Section, and still regard the commissions as a failure.²²³ And accepting that we should focus on the ethos of the commissions more than their structural features in no way implies that the commissions have been more effective on the traditional metrics of trial systems than observers have typically concluded. However, whether the commissions have failed ultimately depends on what they were actually designed to do. It is thus worth reconsidering the nature of our standards for assessing the commissions. From where have we collectively derived the idea that the commissions are *supposed* to provide fair trials?

One source, of course, is the government itself. For example, in the initial executive order that authorized the commissions, President Bush described them as offering “full and fair trial[s].”²²⁴ At various points tied to the structural revisions implemented in 2006 and 2009, Presidents Bush and Obama both

war zones abroad, where it is much more difficult to obtain evidence and to maintain a proper chain of custody over it. He has made similar remarks in public. *See* Wittes, *supra* note 104 (noting that, in the third phase of the commissions, “[t]he exception to the hearsay rule requiring consideration of operational and intelligence factors . . . preserves confrontation rights but properly balances the realities of armed conflict and our national security”) (quoting Brigadier General Mark Martins). It remains at least theoretically possible to accept such reasoning and the rules it implies without accepting the propriety of a culture that deemphasizes traditional objectives. Moreover, though it remains important to recognize structural problems in any justice system, it is difficult to evaluate those features in the abstract, and it is not necessarily fruitful to attempt to do so given that the implications of such features are tied in part to the norms that dictate how the officials in the system approach their duties.

222. *See infra* Section IV.

223. In other words, one might accept the first proposition laid out in the introduction of this Article and reject the second.

224. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,835 (Nov. 16, 2001).

described the commissions as fair or legitimate trial venues as well.²²⁵ But that is to be expected. Even if only as lip service, it would be essential for the government to describe the commissions as a system of fair trials to generate any support (domestic or international) for the project at all. Otherwise the executive branch could just as well detain these suspects indefinitely without charges, which is something it has done with other captives in the War on Terror.²²⁶ For the same reason, it is natural simply to presume without assurance that, controlling for the special circumstances (such as the distant locations of some of the crimes and the lack of control the United States maintains over the crime scenes), the trials are intended in substance to mimic traditional courts to the extent possible. One might genuinely wonder what purpose the commissions would serve otherwise, given the costs and logistical challenges of creating and maintaining them.

But it is too credulous to accept those thin representations without a closer look, especially when nearly two decades of history demonstrate a pervasive cultural problem within the commissions. Revisiting the origins of the commissions and various statements of previous Presidents in fact reveals a different story. First, it is widely known (if not widely remembered) that the executive order signed by President Bush on November 13, 2001 to create the commissions was prepared almost exclusively by hardliners in the War on Terror: Vice President Dick Cheney, his Legal Counsel, and a like-minded lawyer at the DOJ.²²⁷ Its contents triggered the strenuous opposition of Attorney

225. See Press Release, *supra* note 53 (“We put forward a bill that ensures these commissions are established in a way that protects our national security, and ensures a full and fair trial for those accused.”); Press Release, *supra* note 56

(“These military commissions will provide a fair trial, in which the accused are presumed innocent, have access to an attorney, and can hear all the evidence against them. These military commissions are lawful, they are fair, and they are necessary.”); Press Release, *supra* note 66 (proposing revisions to the commissions that would thereafter become law and noting that “[t]hese reforms will begin to restore the Commissions as a legitimate forum for prosecution, while bringing them in line with the rule of law”).

226. See Charlie Savage & Carol Rosenberg, *Justice Breyer Raises Specter of Perpetual Detention Without Trial at Guantánamo*, N.Y. TIMES (June 10, 2019), <https://www.nytimes.com/2019/06/10/us/politics/justice-breyer-guantanamo.html?searchResultPosition=1> (reporting that the “Supreme Court on Monday refused to hear a lawsuit by a Yemeni man who has been held in wartime detention for more than 17 years at the military’s Guantánamo Bay prison, prompting Justice Stephen G. Breyer to warn that the American legal system is on autopilot toward permitting life imprisonment without trial.”).

227. See BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 162–68 (2008). The key figures behind the order were David Addington, who was Legal Counsel to Vice President Cheney at the time, and John Yoo, who then served as Deputy Assistant Attorney General at the Office of Legal Counsel at the DOJ. *Id.* Cheney is known for his aggressive posture on policy related to the War on Terror. See, e.g., *id.* at 130 (reporting that, on the day of the 9/11 attacks, Cheney asked Addington, “What extraordinary powers would the president need in the coming war?”). Addington has a similar reputation. See Jane Mayer, *The Hidden Power*, NEW YORKER (June 26, 2006), <https://www.newyorker.com/magazine/2006/07/03/the-hidden-power> (describing David Addington as having played “a central role in shaping the Administration’s legal strategy for the

General John Ashcroft.²²⁸ In presenting it for Bush's signature, Cheney deliberately and anomalously excluded the key officials from signing off, including Secretary of State Colin Powell, National Security Advisor Condoleezza Rice, the White House Counsel's Office, the White House communications team, and President Bush's own Chief of Staff.²²⁹ Thus there was very limited opportunity for the order to reflect any views that conflicted with Cheney's.

The day after President Bush signed the order, Vice President Cheney gave a speech to the U.S. Chamber of Commerce.²³⁰ At the end of the speech, he fielded several questions, the last of which concerned the military commissions described in the new executive order. Asked how the commissions would differ from an international tribunal, Cheney gave a revealing answer. After explaining the precedent for the use of military commissions generally, he articulated the basis for these commissions specifically:

The basic proposition here is that somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans, men, women, and children, is not a lawful combatant. They don't deserve to be treated as a prisoner of war. *They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process. . . . [T]hey will have a fair trial, but it'll be under the procedures of a military tribunal and rules and regulations to be established in connection with that. We think it's the appropriate way to go. We think it[] guarantees that we'll have*

war on terror," which controversially asserted "that the President, as Commander-in-Chief, has the authority to disregard virtually all previously known legal boundaries, if national security demands it" and has been applied to set aside legal restrictions on "torture, secret detention, and warrantless surveillance"). Yoo is often referred to as one of the authors of the "torture memos" relied upon by the Bush Administration to deploy its "enhanced interrogation techniques" against detainees in the war on terror. *See, e.g.,* Rebecca Morin, 'Torture Memo' Author Nominated for Trump Administration Post, POLITICO (June 5, 2017, 10:05 PM), <https://www.politico.com/story/2017/06/05/trump-nominee-torture-bradbury-239167> (identifying Yoo as one of "three principal authors" behind the memos); *see also* Jon Schwarz, John Yoo Thinks Presidents Can Legally Torture Children. Even He Has "Grave Concerns" About Donald Trump, INTERCEPT (Feb. 6, 2017, 1:47 PM), <https://theintercept.com/2017/02/06/john-yoo-thinks-presidents-can-legally-torture-children-even-he-has-grave-concerns-about-donald-trump> (recounting a debate in which, when asked if there is any law that would prevent the President from torturing a person, including by "crushing the testicles of the person's child," John Yoo replied, "I think it depends on why the President thinks he needs to do that").

228. GELLMAN, *supra* note 227, at 164–66.

229. *Id.* at 162–68.

230. *See* Press Release, Vice President Dick Cheney, Vice President Addresses U.S. Chamber of Commerce (Nov. 14, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011114-6.html>.

*the kind of treatment of these individuals that we believe they deserve.*²³¹

Cheney's response appears to describe the 9/11 defendants, but his view—the view that gave birth to the military commissions—was that any defendant tried before the commissions should fundamentally be treated worse throughout the trial process than other defendants precisely in virtue of the charges they faced. As noted above, those charges would ultimately vary substantially in gravity, though they would all reflect the U.S. government's view (at times controversial) of what constituted a violation of the laws of war.

The notion of determining the trial rights of a defendant based only on a function of the accusations against him and his citizenship lends itself to a number of substantive criticisms, not least because of its cart-before-horse logic or its tension (explored more below) with the possibility of holding what Cheney simultaneously described as a “fair trial.” But more relevant for present purposes is that the idea here—that commission defendants are intrinsically deserving of worse treatment than defendants in other courts—constituted a major part of the government's message concerning the commissions from the moment they were authorized, even if it was not presented as an official statement of their purpose. Indeed, President Bush did not make public remarks upon signing the order, so Cheney's statements took on even greater significance.²³²

Later messaging from the highest levels of the government continued to downplay the importance or reliability of the commissions at best, and even endorse Cheney's comments at worst. As noted above, when the Supreme Court issued its ruling in *Hamdan*, President Bush sought to address the Court's concerns by seeking congressional authority for the commissions via the MCA of 2006. Upon signing the initial MCA into law, Bush gave public remarks. But those remarks did not focus on the military commissions; in fact, the name of the bill notwithstanding, Bush did not even mention the military commissions until the second half of his statement.²³³ He focused instead on the bill's implications for the CIA's “Enhanced Interrogation Program,” preservation of which was apparently the primary motivator behind the bill. According to Bush, “When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? This bill meets that test.”²³⁴ In other words, Bush principally sought a bill that would

231. *Id.* (emphasis added).

232. See GELLMAN, *supra* note 227, at 168 (reporting that President Bush signed the executive order and then promptly departed for his ranch in Crawford, Texas, leaving various high-level staff to learn about the order from CNN).

233. Press Release, *supra* note 56.

234. *Id.*

protect the CIA program, not a bill that would revive the military commissions.²³⁵

Only after touting the successes of the CIA program—advancing claims that would later be debunked by the Senate Select Committee on Intelligence report on the subject²³⁶—did President Bush note that the legislation “also provides a way to deliver justice to the terrorists we have captured.”²³⁷ Per Bush, the commissions authorized by the MCA would “provide a fair trial, in which the accused are presumed innocent, have access to an attorney, and can hear all the evidence against them.”²³⁸ In short, Bush noted, “[t]hese military commissions are lawful, they are fair, and they are necessary.”²³⁹ Despite this sprinkling of shibboleths, the statement clearly conveys the sentiment that the commissions are an afterthought, secondary in importance to the CIA’s authority to detain and interrogate suspects in the War on Terror.

Further, though President Obama later sought to improve the commissions, his statements and actions did little to convey his confidence that the commissions could be trusted to carry out their important work. In fact, Obama actively reinforced Cheney’s foundational principle. Initially, Obama effectively gave the commissions a vote of no-confidence while campaigning for president, expressing skepticism about them and raising the possibility of closing them altogether.²⁴⁰ His related plan to try the 9/11 defendants in the

235. Ultimately, detainees who were tortured as part of the CIA program (including al-Nashiri) would find themselves defendants before the commissions, creating pressure to reform the commission rules that previously permitted coerced testimony.

236. Compare Press Release, *supra* note 56 (“By allowing the CIA program to go forward, this bill is preserving a tool that has saved American lives. The CIA program helped us gain vital intelligence from Khalid Sheikh Mohammed and Ramzi Binalshibh, two of the men believed to have helped plan and facilitate the 9/11 attacks. The CIA program helped break up a cell of 17 southeastern Asian terrorist operatives who were being groomed for attacks inside the United States. The CIA program helped us uncover key operatives in al Qaeda’s biological weapons program, including a cell developing anthrax to be used in terrorist attacks.”) with S. REP. NO. 113-288, at x–xi (2014) (“The CIA’s use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees. . . . [and t]he CIA’s justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness.”).

237. Press Release, *supra* note 56.

238. *Id.*

239. *Id.*

240. See Connie Bruck, *Why Obama Has Failed To Close Guantánamo*, NEW YORKER (July 25, 2016), <https://www.newyorker.com/magazine/2016/08/01/why-obama-has-failed-to-close-guantanamo> (noting that “[b]oth Hillary Clinton, Obama’s main opponent in the Democratic primaries, and McCain, the Republican nominee and a former prisoner of war in North Vietnam, endorsed [closing the prison facilities at Guantánamo]. But Obama spoke about the issue with particular passion.”); Morris Davis, *Obama and Change at Guantánamo: Believe It When You See It*, HUFFPOST (June 27, 2010, 5:12 AM), https://www.huffpost.com/entry/obama-and-change-at-guant_b_553113 (describing candidate Obama as promising to “close the detention facility at Guantánamo” and “reject the Military Commissions Act”) (quoting BARACKOBAMA.COM (2008)). Some observers primarily blame President Obama for the failure to close the detention facility at Guantánamo. See Spencer Ackerman, ‘No One But Himself to Blame’: How Obama’s Guantánamo

Southern District of New York faced political backlash and never came to fruition,²⁴¹ but it sent the same signal. Moreover, recall that Obama ended the second phase of the commissions by pausing proceedings in 2009 to study a better way forward.²⁴² At the time, he proposed key structural changes that would later become law and he argued that “[t]hese reforms *will begin to restore* the Commissions as a legitimate forum for prosecution,”²⁴³ therefore implying that the commissions would remain illegitimate even upon entering their third and current phase. And when Obama signed the MCA of 2009 into law, he focused on other elements of the bill and did not mention the commissions at all.²⁴⁴

Indeed, even as President Obama sought to distinguish his views in the War on Terror from Vice President Cheney’s, he still remained committed to the underlying idea that the defendants at the military commissions were entitled to less favorable treatment than other defendants. During a March 2009 interview that Obama gave to 60 Minutes, he stated this position clearly:

The whole premise of Guantánamo, promoted by Vice President Cheney, was that somehow the American system of justice was not up to the task of dealing with these terrorists. I fundamentally disagree with that. *Now, do these folks deserve Miranda rights? Do they deserve to be treated like a shoplifter down the block? Of course not.*²⁴⁵

To the extent that Congress was instrumental in pushing the commissions into their second and third phases, the views of individual congressmen and congresswomen, as expressed at the time, might seem to hold promise to undermine this narrative. But unlike the Bush and Obama Administrations, which tended to take relatively uniform positions expressed by figures at the top of the administrative hierarchy, the picture in Congress was mixed at best. Moreover, congressional viewpoints on the commissions remained relatively muted and, collectively, did more to reinforce the story emanating from the executive branch than to contradict it.

For example, there was limited floor debate about the true significance of revising the military commissions in the lead-up to the passage of the MCA of 2009, the start of the commissions’ third phase. There was, however, some debate at the committee level, where various members of Congress expressed views of the commissions and related matters. In one such hearing in the House

Plans Fell Through, GUARDIAN (Feb. 24, 2016, 7:00 AM), https://amp.theguardian.com/us-news/2016/feb/24/obama-guantanamo-bay-closure-republicans?__twitter_impression=true (articulating that view).

241. Scott Shane & Benjamin Weiser, *U.S. Drops Plan for a 9/11 Trial in New York City*, N.Y. TIMES (Jan. 29, 2010), <https://www.nytimes.com/2010/01/30/nyregion/30trial.html>.

242. See *supra* note 69 and accompanying text.

243. Press Release, *supra* note 66 (emphasis added).

244. See Press Release, *supra* note 72 (omitting any reference to the military commissions).

245. CBS, *President Obama, Part One* at 18:53, YOUTUBE (Mar. 22, 2009), <https://www.youtube.com/watch?v=RVwq4-MEiA4> (emphasis added).

that took place in July of 2009, Republican Lamar Smith expressed his concern that U.S. policy might have shifted in favor of Mirandizing terror suspects, notwithstanding President Obama's statement to 60 Minutes (which Smith quoted).²⁴⁶ By contrast, some Democrats—such as Hank Johnson²⁴⁷ and Adam Schiff²⁴⁸—saw the commissions as beyond repair from the standpoint of providing justice.²⁴⁹ Witnesses called by the Democrats forcefully supported that view.²⁵⁰ At another committee hearing in the House, Republicans Randy Forbes²⁵¹ and Roscoe Bartlett²⁵² questioned why the United States should bother to try these defendants at all when the Obama Administration's stated position was to detain these defendants throughout the War on Terror (to prevent them from rejoining hostilities) regardless of the verdict. But the representatives did not clearly state their positions on what the MCA of 2009 could, would, or should achieve with respect to the aims of the commissions themselves.²⁵³

In the Senate, Carl Levin—the Chairman of the Senate Armed Service Committee, which took the lead in drafting the Senate legislation that became

246. *Legal Issues Surrounding the Military Commissions System: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 5 (2009) [hereinafter *Legal Issues*] (statement of Sen. Lamar Smith). At a different hearing, Democratic Representative Patrick Murphy also asked whether military personnel were Mirandizing detainees encountered on the battlefield. *See Reforming the Military Commissions Act of 2006 and Detainee Policy: Hearing Before the H. Comm. on Armed Servs.*, 111th Cong. 14 (2009) [hereinafter *Reforming*] (statement of Rep. Patrick Murphy).

247. *See Legal Issues*, *supra* note 246, at 9 (statement of Rep. Hank Johnson).

248. *See id.* at 11 (statement of Rep. Adam Schiff). Schiff went so far as to propose legislation that would result in the trial of commission defendants by traditional courts-martial proceedings instead. *See id.* at 12.

249. Other witnesses who testified at the hearing took the same view. *See, e.g., id.* at 20 (statement of Darrel J. Vandeveld, Lieutenant Colonel and Former Prosecutor of Guantánamo Bay Military Commissions) (offering a statement as a former commission prosecutor, that “[t]he military commissions cannot be fixed, because their very creation—and the only reason to prefer military commissions over federal criminal courts for the Guantanamo detainees—can now be clearly seen as an artifice, a contrivance, to try to obtain prosecutions based on evidence that would not be admissible in any civilian or military prosecution anywhere in our nation.”).

250. *See id.* at 12 (statement of Rep. Adam Schiff).

251. *See Reforming*, *supra* note 246, at 20 (statement of Rep. Randy Forbes).

252. *See id.* at 41 (statement of Rep. Roscoe Bartlett). Bartlett seemed to prefer an international tribunal to the military commissions. *See id.* (“Why don’t we move these prisoners to an international arena and avoid all of the national stigma that we are going to get from these proceedings, no matter what we do and how careful we are?”).

253. *See generally id.* (where many House Representatives focused on President Obama's commitment to closing the detention facility at Guantánamo, and especially the risks of transferring detainees to the United States or releasing detainees altogether, more so than on whether the MCA of 2009 would improve the commissions in a way that rendered them fairer or more effective trial venues); *see also Legal Issues*, *supra* note 246, at 5 (statement of Rep. Lamar Smith) (generally omitting statements about the speaker's perceived relationship of the MCA of 2006 and the MCA of 2009).

the MCA of 2009²⁵⁴—expressed the view that the MCA of 2009 was necessary but not sufficient to restore the American public’s confidence in the commissions.²⁵⁵ Specifically, Senator Levin observed that deficiencies in the MCA of 2006 had “placed a cloud over military commissions and . . . led some to conclude that the use of military commissions can never be fair, credible, or consistent with our basic principles of justice.”²⁵⁶ But he expressed confidence that the commissions could be brought up to the Supreme Court’s standards (set out in *Hamdan*) and thereafter “play a legitimate role in prosecuting violations of the law of war.”²⁵⁷

But Senator Levin’s view is an outlier in the Congressional record, and others adopted a markedly different perspective. For example, Senator Joseph Lieberman emphasized his commitment to some version of Cheney’s principle:

I think [attempting to try some of these defendants in Article III courts] puts us in a very odd position. We’re giving these terrorists greater protections in our Federal courts than we’ve given war criminals at any other time throughout our history, even though in my opinion they are at least as brutal and inhumane, probably more brutal and inhumane, than any war criminals we’ve apprehended over the course of the many wars we’ve been involved in.

Yes, it may also be an act of murder to have killed people who were in the Twin Towers on September 11, but it was an act of war and the people who did that don’t deserve the same constitutional protections in our Federal courts as people who may be accused of murder in New York City. I say, New York City because the attack was there.²⁵⁸

And Senator Mel Martinez agreed with Senator Lieberman:

I think that it’s fascinating for us to discuss a person like Khalid Sheikh Mohammed, who didn’t wear a uniform and in fact inflicted great harm upon civilians, not only here but in other parts of the world. He considers himself to be a part of a movement, of a political

254. See *Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Hearing Before the S. Comm. on Armed Servs.*, 111th Cong. 12 (2009) (statement of David Kris, Assistant Attorney General) (noting “how much the administration appreciates the [Senate Armed Services] committee’s leadership, and the very thoughtful bill it has drafted”).

255. See *id.* at 4 (statement of Sen. Carl Levin, Chairman, S. Comm. on Armed Servs.) (noting that “even if we’re able to enact new legislation that successfully addresses the shortcomings in existing law, we still have a long way to go to restore public confidence in military commissions and the justice that they produce. However, we will not be able to restore confidence in military commissions at all unless we first substitute new procedures and language to address the problems with the existing statute.”).

256. *Id.* at 2.

257. *Id.*

258. *Id.* at 39 (statement of Sen. Joe Lieberman).

movement, that we would then consider a person like that to have a preference for trying him as a criminal under Title 18 in an Article III court *and according him an additional set of legal rights as opposed to in a military tribunal.*

....

... I truly believe that these are not criminals, that these are people engaged in a very profound battle against this country as part of a non-state actor for some of them, but they nonetheless do not really belong [sic] treated as criminals, but as people that are involved in something much deeper and greater than that.²⁵⁹

Thus, as one would expect, Congress hardly spoke with one voice on the matter. But even as they debated inaugurating the commissions into their third and present phase, a number of members of Congress had already rejected the commissions categorically, and others had adopted some version of the view that the commission defendants were entitled to worse treatment as a matter of principle than other defendants.

Moreover, subsequent reporting has also revealed the private views of key administrative officials that bear on our understanding of the commissions and their initial purpose. For example, although President Bush authorized the commissions in 2001, no prosecutions began until 2004.²⁶⁰ By late 2003, Bush reportedly had become frustrated by the delays,²⁶¹ but other high-ranking White House officials had not. Vice President Cheney was apparently “not in any hurry to see a trial”;²⁶² and Secretary of Defense Donald Rumsfeld, whose DOD held the detainees and was obliged to fill in the gaps of Bush’s executive order to operationalize the commissions, “wanted no part of Gitmo [(Guantánamo)] at all.”²⁶³ The prevailing view among some of these officials was that “[t]he detainees were locked up and disabled,” and there was no need to rush to trial in the absence of a law requiring a speedy resolution of their situations.²⁶⁴ Indeed, even after being ordered by Bush to initiate commission prosecutions in late 2003, “Cheney and Rumsfeld would slow-roll the tribunals for many months to come.”²⁶⁵

Rarely will a single overarching motivation lie behind any initiative that requires the endorsement and cooperation of so many people. The federal government is no monolith, especially when considered across a span of years and multiple administrations. It is plainly the case that some officials associated with the commissions (and not just members of the defense teams) would like them, above all, to produce trial results that are accepted by the public, as the

259. *See id.* at 39–40 (statement of Sen. Mel Martinez) (emphasis added).

260. *See supra* note 47 and accompanying text.

261. *See GELLMAN, supra* note 227, at 338–40.

262. *Id.* at 339–40.

263. *Id.* (quoting a participant in a key December 2003 Situation Room meeting).

264. *Id.*

265. *Id.* at 340.

examples listed above demonstrate.²⁶⁶ For those officials, perhaps it is correct to say that the commissions have failed, at least thus far.

But the genesis of the commissions presents a surprisingly clear account of their purpose—and that purpose is most assuredly not to seek justice in a manner analogous to other conventional courts, whether civilian or military. The driving force behind the executive order that created the commissions—Vice President Cheney—made his aims plain and seemed unconcerned that the system itself was not being put to use in its early years. The presidential statements that followed evinced equivocation about the commissions' value and doubt about their legitimacy, as well as a commitment to the underlying view that commission defendants are morally unworthy. Key members of Congress reiterated that latter view as well. At minimum, it is far from clear that the officials most responsible for the commissions would be dismayed by their current state. Perhaps the public can be forgiven for failing to read between the lines of these statements and silences, but the implications for those associated with the commissions are manifest.

This backstory makes sense. Even without recourse to the record surrounding the commissions, the context for their creation alone should caution against a credulous interpretation of their purpose when undertaking a serious review of their performance. Like so much of the counter-terrorism policy that remains in effect today, the commissions rose from the ashes of the World Trade Center. They were born in the chaotic weeks immediately after the 9/11 attacks and designed by officials who prioritized detention, interrogation, and other “aggressive” action against other would-be attackers. And they were built to try perhaps the single most unsympathetic class of defendants in the country.

Accepting the proposition that Vice President Cheney's foundational principle successfully permeated the commissions is both plausible and the single most powerful assumption one can make to explain the state of the commissions today.²⁶⁷ If any key officials—judges, prosecutors, authorities within relevant intelligence agencies, whoever—accept that view, those officials can justify a wide range of interference with the defendants, whether for self-serving purposes or otherwise.²⁶⁸ That, in turn, would yield results of

266. See *supra* notes 211–19 and accompanying text.

267. See Koh, *supra* note 1, at 340–42 (suggesting that the initial order authorizing the military commissions was an expression of vengeance that undermined four important values: holding perpetrators of terrorist attacks accountable, “telling the world the truth” about their crimes, illustrating that their actions “violate all norms of civilized society,” and demonstrating our own respect for human rights) (emphasis omitted).

268. Though it would require speculation, one might attribute a number of the problematic incidents described above to pure careerism—the subordination of proper prosecutorial norms to the personal career advancement of officials involved in the commissions. Although careerism may undermine proceedings in other venues as well, the argument advanced here is that the cultural resistance to its manifestation (as well as the resistance to manifestations of other forms of misconduct) is weaker in a setting where the rights of the defendants are seen as inherently and by definition less important. It is for this reason that I have not endeavored with more specificity to illuminate the competing cultures of Article III courts or courts-martial, a significant undertaking

the sort that the commissions have produced thus far, even if such a view were accepted by only a handful of people. If some officials believe the defendants do not fundamentally deserve attorney representation, it is no longer perplexing that hacking the attorney-client relationships of the defendants seems more the norm than the exception—especially if officials also believe that the defendants may possess valuable intelligence. Similarly, if the defendants are thought to be fortunate to face a judge at all, it is no longer surprising that some prosecutors may feel a reflexive impulse to oppose reasonable requests from the defendants or that some judges lose their sensitivity to the appearance of pro-prosecution bias. The consistently poor record of the commissions before the D.C. Circuit generally, and the shock expressed by the D.C. Circuit about what occurred in the matter of Judge Spath specifically, are also both explicable by reference to a difference in norms between the military commissions system and the Article III system.

This is not to allege some sort of elaborate conspiracy theory—for example, that Vice President Cheney and others around him manipulated the commissions into playing out in practice in a specific, preordained fashion. Rather, the performance of the commissions to date is very much explicable—best explained, I contend—if we accept that numerous agents with power over the proceedings internalized the notion that the defendants are entitled to worse treatment than defendants in other venues. In the alternative, one would have to accept that it is sheer coincidence that *that was the precise view of the commissions that the administration expressed when creating them and that was the same view that key officials, including the subsequent President, continued to express even years later.*

Moreover, it is not difficult to identify alternative plausible functions that the commissions might serve for the administration, even if they were initially created for the purpose of treating defendants as second-class. From the start, the commissions provided cover for the administration to pursue aggressive action on other fronts of the War on Terror, offering allies and other foreign governments at least a head-fake away from indefinite detention while taking

of its own that has independent merit but is not essential here. After all, the founding norm of the commissions is just that *they should be less favorable than those other venues.* One might be inclined nevertheless to press the objection further by noting that this Article does not set a baseline for rates of misconduct in competing venues, complicating efforts to ascertain the extent to which the commissions are *more* compromised than alternatives. That is true enough; it is likely impossible to set such a baseline, no matter how helpful it would be, and I have not attempted to set one here. But I maintain that the performance of the commissions speaks for itself in this regard. The numerous troubling incidents described above—of necessity, a mere sampling—stand in stark contrast to the small number of cases that have passed through the system. See *Cases, supra* note 92 (listing a total of forty cases over the life of the commissions, some of them arguably duplicative). These incidents, which would constitute notable irregularities in other venues, have quite simply come to characterize the proceedings at Guantánamo. That conclusion should be evident even if it is impossible to calculate the precise extent to which the commissions underperform alternative venues.

accused terrorists “off the board.”²⁶⁹ And the commissions most assuredly serve an expressive and retributive function, consistent with other elements of the War on Terror, conveying a low regard for foreign terror suspects. With respect to the last of these, at minimum, the commissions have most certainly succeeded.²⁷⁰

This seemingly jaundiced view of the commissions is precisely the view warranted by the evidence,²⁷¹ yet there seems to be broad reluctance among scholars and advocates to engage with the possibility that the commissions are not fundamentally about seeking justice in a traditional sense.²⁷² Writing about

269. See *supra* notes 261–64 and accompanying text. Perhaps others would argue that the commissions were designed to facilitate convictions, even if not rapidly, by stacking the deck against the defendants. See, e.g., Dratel, *supra* note 19, at 1358 (articulating a preference for prosecution of suspected terrorists in Article III courts because, unlike the commissions, those courts “constitute a legitimate system in which justice is at least possible and the design of which is not merely to guarantee convictions”). Dratel also responds directly to “proponents of military commissions who see them as a barrel in which to prosecute alleged terrorist fish.” *Id.* To the extent ensuring convictions was the aim, it is difficult to say the commissions have succeeded; but with the major cases still in pre-trial proceedings, it is arguably too early to make an assessment on that front.

270. As noted above, this is not to deny that some officials may prioritize the traditional trial function of the commissions, and, to the extent that occurs, it is laudable. But, in light of their origins, it is unrealistic to think that treating the defendants fairly or operating efficiently was ever the overarching priority—or, at minimum, would ever be internalized as the overarching priority by those tasked with operating the commissions.

271. Emily Berman has suggested to me another possible framing for the proposition defended in this Section—namely, that the commissions were “designed to fail.” This is an interesting possibility; it is certainly closer to the truth than the notion that the commissions were designed to operate fairly, openly, and reasonably quickly, but it is also substantively different from my own view. The difference is this: designing the commissions to treat the defendants poorly is an affirmative goal that is consistent with multiple outcomes because it permits officials to subvert the process at any number of levels and for the purpose of advancing any number of secondary objectives (such as intelligence-gathering, personal career advancement, or something else entirely). One possible outcome that results from such a design would be that the defendants are forced to languish as they maneuver their way slowly through a byzantine process that invites numerous appeals. Another possible outcome is the generation of quick convictions on charges that would be difficult to bring in another venue. (That both of these are viable outcomes explains why it is no objection to my view that there have been only a handful of convictions.) Although it was very much foreseeable, *ex ante*, that the first of these possibilities was more likely to obtain, that was not a given—and, in fact, the second possibility could well have materialized if the governing norms identified in this Article had come to reach even deeper into the proceedings than they ultimately have thus far (such as by compromising the defense teams as well). By contrast, I interpret the prospect of designing the commissions to fail as specifically planning for the first of these two possibilities: creating a complex and novel system specifically because it would be ponderous.

272. This is especially interesting given the broad skepticism the commissions faced when they were first established. See, e.g., Lardner, *supra* note 3 (reporting that such skepticism came from sources on different ends of the political spectrum); see also Koh, *supra* note 1, at 344 (arguing that the military commissions as initially constituted would simply be unable to provide “credible justice”).

the USCMCR specifically, Vladeck has expressed some awareness of this possibility, though he appears to have framed it tongue in cheek. After describing the USCMCR as a failure, he noted that “the CMCR could only be considered a ‘success’ if Congress’s goal was either (1) to create a structurally flawed, woefully inefficient, and substantively inaccurate mechanism to slow down military commission cases; or (2) to provide interesting fodder for federal courts professors.”²⁷³ Vladeck almost certainly intended this as a joke, given that nobody would seriously believe that Congress wants to “provide interesting fodder for federal courts professors.”²⁷⁴ But, it turns out, the first option he identifies is not so far from the truth. Although it may be unfair to say that Congress as a whole deliberately designed the USCMCR to be a flawed and inefficient body that would serve to impede the commissions, there is ample reason to conclude that the USCMCR’s performance upholds the ideals of the commissions’ originators.

IV. THE LESSONS OF THE COMMISSIONS

Accepting these two propositions—that the performance of the commissions follows largely from their governing norms and that the nontraditional governing norms of the commissions are in fact very much consistent with the views of the commissions’ creators—reveals a number of important lessons that are easy to miss if we focus primarily on the structural deficiencies of the commissions system.

First, the structural features of a trial system alone are not enough to secure efficient, fair outcomes that invite the confidence of observers. Structural features (like particular procedural rules) may be easier to identify and critique, but improving the rules at the commissions alone has not correlated with better results. That remains true even if the revisions have been undertaken primarily by legislators who intend for the commissions to bring about just results. The original norms persist, notwithstanding structural changes.

Shared commitment to the rules of the system (or at least to avoiding penalties assessed for violating the rules) is a predicate for broad compliance with the rules. That has obviously been lacking at the commissions; some of the instances detailed above clearly involve violations of commission rules, such as Judge Spath’s violations of the rules governing judicial conduct. But even perfect compliance with the rules of a system does not necessarily bring about just results or inspire the confidence of the public. When the D.C. Circuit vacated most of Judge Spath’s opinions in the al-Nashiri matter, it also chided the DOJ, the prosecution team and the USCMCR; but it did not indicate that any of those entities had violated a specific rule or statute. Instead it suggested that these elements of the commissions had fallen short of a broader obligation

273. Vladeck, *supra* note 5. As noted above, Vladeck primarily blames Congress for the poor performance of the USCMCR, attributing it to poor design. *See supra* note 172. Though that is a relatively narrow point, it suggests a significant disagreement between us about whether to blame structural or cultural issues for the performance of the commissions.

274. Vladeck, *supra* note 5.

to shoulder their respective share of the collective responsibility of criminal justice.²⁷⁵ They neglected to take seriously a manifest violation of the rules by the trial-level judge; and although their neglect did not entail a formal violation of the rules binding each of them, respectively, the appearance of bias arose nevertheless, as did the basis for the D.C. Circuit's criticism.

A second lesson here is that the preference many observers express for the use of Article III courts to try the commission defendants can be explained not simply by reference to the structural features of those courts. Thus, when Chief Prosecutor Mark Martins argues that, formally speaking, the commissions are not that different from other courts, he seems to be missing the point. Or, put another way, if the formal features of the commissions are so similar to the courts against which critics routinely compare them, then something else must explain the disparate results generated by the different systems. Article III courts, with all of their imperfections, operate under superior norms—as evidenced most recently by the D.C. Circuit's surprise at the comportment of multiple elements of the commissions system. It is of course plausible that there is a link between the rules of a system and the governing norms and that the structural features of Article III courts help explain their superior ethos. Nevertheless, at this point, the gap between Article III courts and the Guantánamo Bay Military Commissions is wider at the level of norms than it is at the level of formal structure.

Third, norms are extremely powerful.²⁷⁶ The orientation that a judge (or other official in the criminal justice system) has toward his responsibilities is extremely important for guiding his or her decisions even within the bounds of the rules. Improper animus of any sort can have far-reaching implications for outcomes in trial proceedings, even without documented misconduct. Consider the deep divide between Judge Spath and the D.C. Circuit on the conduct of al-Nashiri's defense team. Several months into his standoff with the defense, and less than a month before abating proceedings indefinitely to contemplate his retirement, Judge Spath accused “the defense community [of] making strategic and tactical decisions to delay.”²⁷⁷ Recall further that, in abating proceedings a few weeks later, Judge Spath also acknowledged that his “frustration with the defense [had] been apparent” for months.²⁷⁸ That frustration was almost certainly genuine. It no doubt played a role in his decision to confine CDC John Baker, as well as to seek writs of attachment to arrest defense attorneys Rosa Eliades and Mary Spears. Yet, the conduct of the defense team that so frustrated

275. See *In re al-Nashiri*, 921 F.3d 224, 239–40 (D.C. Cir. 2019).

276. See generally Pozen, *supra* note 21 (arguing that the U.S. government's approach to preventing leaks of classified information relies more heavily on informal norms than on the formal legal regime put in place to provide for the protection of such information).

277. *In re al-Nashiri*, 921 F.3d at 230 (alteration in original) (quoting Commission Transcript 11072 (Jan. 19, 2018)).

278. *Id.* at 231 (quoting Commission Transcript 12364 (Feb. 16, 2018)).

Judge Spath invited the praise of the D.C. Circuit.²⁷⁹ There is thus a gaping chasm between Judge Spath’s stance and the stance of the circuit on the conduct and role of the defense team; their views are quite literally on opposite ends of a spectrum. Moreover, there is little basis for meaningful disagreement over the facts in this scenario. The difference is entirely one of norms.

Fourth, the norm that a particular class of defendants is less deserving of rights than other defendants (or relatedly, that the rights enjoyed by a defendant are a matter of the State’s generosity) is particularly pernicious and corrosive. It does not have to be universally shared—and it has not been universally shared at the commissions—to lay the foundation for irregularities.²⁸⁰ Rights recognized by the grace of the State are flimsy and vulnerable to being treated as courtesies rather than entitlements.²⁸¹ It is difficult to muster sympathy for defendants accused of the 9/11 attacks, but that is precisely why (at least for those who seek reliable convictions and exonerations) the protections of the defendants’ rights must be sturdy and nonnegotiable.²⁸² It is not a matter of sympathy. This lesson has applications in the criminal justice system more broadly as well. For all of the foregoing discussion of the superior norms governing Article III courts, there are longstanding and compelling critiques of biases ingrained within those courts that may parallel, and will certainly predate, those from the commissions.²⁸³

Fifth, and relatedly, creating a trial system from scratch is a perilous exercise, not only because it is time-consuming and requires generating procedures and rules that may interact in unforeseen ways or generate novel

279. *Id.* at 239–40 (“Yet in this case, save for Al-Nashiri’s defense counsel, all elements of the military commission system . . . failed to live up to [the shared] responsibility [of criminal justice].”).

280. To be clear, I am not in a position to attribute acceptance of this specific norm to any commission official, including Judge Spath. But, it clearly characterized Vice President Cheney’s view, and there is significant evidence that it has taken hold at the commissions.

281. *See, e.g., supra* note 130 and accompanying text; *In re al-Nashiri*, 921 F.3d at 230 (citing Judge Spath’s ruling that al-Nashiri was not entitled to capital defense counsel “at every aspect of every proceeding, . . . especially when it doesn’t relate to capital matters.”) (quoting Commission Transcript 10084 (Nov. 3, 2017)).

282. Moreover, a number of the detainees in the War on Terror have been held in error. *See* Wesley Bruer, *Mistaken Identity Keeps Detainee at Guantanamo Bay*, CNN (Dec. 2, 2015, 2:35 PM), <https://www.cnn.com/2015/12/02/politics/guantanamo-bay-mistaken-identity/index.html> (reporting on a Guantánamo detainee held for over thirteen years because of mistaken identity); *see also* Carol Rosenberg, *Victims of Mistaken Identity Among the 10 Sent from Guantánamo to Oman*, MIAMI HERALD (Jan. 17, 2017, 4:38 PM), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article127055319.html> (reporting on the transfer of ten prisoners from Guantánamo Bay to Oman, including “several men cleared for release for years who were mistakenly profiled as captives of consequence,” one of whom the government had gone so far as to charge with a crime).

283. *See, e.g., Cho, supra* note 25, at 1605–09 (arguing that, before the Civil Rights Era, American courts institutionalized bias against people of color and “promoted unreconstructed whiteness” through “seemingly neutral strategies to disenfranchise peoples of color in lockstep with sociopolitical forces that sought to restore the South’s honor.”).

legal issues that are ripe for challenge on constitutional or statutory grounds; the system's creators must also take significant care to shape the system's ethos. That is particularly delicate in a context where a viable system already exists, and the creation of a new system expressly or impliedly suggests a perceived problem with using the extant one. Of course, in the case of the military commissions at Guantánamo Bay, the perception that Article III courts are more protective of the defendants was used as a foil, in part, to justify the commissions; the comparatively weaker defendants' rights at the commissions were a feature, not a bug. But even if that were not the case, there would remain a risk that creating a separate system for a particular class of defendants by itself connotes inequality—even under circumstances where there is a defensible rationale for a separate system (such as, for those who accept it, the reasoning offered by Mark Martins to the effect that the remote location of the crime scenes requires the modification of certain evidentiary rules²⁸⁴).

A version of this phenomenon has been famously observed in the context of public education. In *Brown v. Board of Education*, the Supreme Court reflected on the effects of segregated schools:

“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. . . .”

. . . .

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal.²⁸⁵

Although the commissions are meant to try aliens, they are not, *per se*, designed to try defendants of a specific race.²⁸⁶ But the commissions *are* designed to try a class of defendants that are widely seen as particularly dangerous or morally bad—hence the overwhelming votes in both chambers of Congress to ban the transfer of detainees from Guantánamo to United States' soil, even for purposes of trial.²⁸⁷ The creation of a separate trial system for such a category of

284. See *supra* note 221.

285. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (footnotes omitted) (quoting a finding made by the court in *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951)).

286. The commissions have overwhelmingly, but not exclusively, tried defendants of Middle Eastern descent. For example, Australian national David Hicks passed through the commission system during its second phase. See *U.S. Acknowledges Conviction of David Hicks, Guantanamo Detainee, Should Not Stand*, PROPUBLICA (Jan. 28, 2015, 12:36 PM), <https://www.propublica.org/article/u.s.-acknowledges-conviction-of-david-hicks-guantanamo-detainee-not-valid> (describing the circumstances surrounding Hicks's guilty plea before a military commission).

287. See David M. Herszenhorn, *Senate Passes Military Bill that Bans Transfers of Guantánamo Detainees*, N.Y. TIMES (Nov. 10, 2015), <https://www.nytimes.com/2015/11/11/us/politics/senate-passes-military-bill-that-bars-transfers-of-guantanamo-detainees.html>; see also *House Committee Blocks Effort to Allow Transfer of Gitmo*

defendant plausibly fuels the views of officials involved in the commissions that their system is specially designed for the worst defendants, in turn supporting an ethos of disregard for the rights of those defendants.²⁸⁸

Sixth, once we have identified a system that manifests a problematic ethos, it becomes important to monitor the implications of that fact for other adjacent systems. For one, although the commissions are best regarded as simply another prong in the War on Terror (rather than a distinct and disparate project), they constitute a more tightly controlled and observable environment than many other fronts in the War on Terror. If the norms at the commissions can produce the results we have witnessed to date, it becomes less surprising that other fronts involving profiling of travelers, targeted killings abroad, and detention of suspects have also led to serious abuses.²⁸⁹ This way of looking at the commissions helps to explain the difficulty of preventing abuses in those other contexts.

Additionally, to the extent many military judges may regard administrative law judgeships as “dream” positions, the commissions may well establish a small but notable pipeline channeling judges into such positions.²⁹⁰ At least three commission judges have sought to become immigration judges.²⁹¹ Moreover, as of May of 2020, Judge Spath remains listed as an active immigration judge posted in Arlington, Virginia, even though he violated judicial rules of conduct to secure the position.²⁹² To maintain public confidence in the government’s roster of immigration judges, it will remain important that the prevailing norms of the military commissions do not accompany commission alumni who make such transitions.

Seventh and finally, these propositions give us a better understanding of the reasons for which the commissions will simply never be able to generate confidence-inspiring trial results. As Vladeck and others have argued, the

Detainees, CONST. PROJECT (May 8, 2014), <https://constitutionproject.org/documents/house-committee-blocks-effort-to-allow-transfer-of-gitmo-detainees>.

288. A concern about this possibility arose in the House of Representatives during the debate over the MCA of 2009. *See Reforming*, *supra* note 246, at 9–10 (statement of Rep. Howard “Buck” McKeon) (“[Representative Buck] McKeon[:] Are you concerned at all that dividing up into two systems and the preference that going to one or the other [sic] might buttress the view that military commissions are second-class type courts? [Assistant Attorney General David] Kris[:] It is a very good point.”).

289. This logic obviously operates in both directions. Systemic abuses on the other fronts of the War on Terror has predictive value for setting our expectations for the performance of the commissions.

290. *See supra* note 164 and accompanying text.

291. In addition to Judge Spath and Judge Schools, Judge J.K. Waits (the first judge in the Hadi case) also applied to become an immigration judge. *See* Carol Rosenberg (@carolrosenberg), TWITTER (May 13, 2019, 8:04 PM), [https://twitter.com/search?lang=en&q=Waits%20\(from%3Acarolrosenberg\)%20until%3A2019-05-16%20since%3A2019-05-01&src=typed_query](https://twitter.com/search?lang=en&q=Waits%20(from%3Acarolrosenberg)%20until%3A2019-05-16%20since%3A2019-05-01&src=typed_query).

292. *See EOIR Immigration Court Listing*, JUSTICE.GOV, <https://www.justice.gov/eoir/eoir-immigration-court-listing> (last visited May 19, 2020).

commissions are indeed bound to fail at producing sound convictions (or appropriate exonerations). I have argued that that is not what the commissions were designed to do; but to the extent some observers hold out hope, or that the commissions persist in part because the government insists they are essential for such a purpose, that purpose will never be fulfilled. And the reason is not that they were badly designed structurally, although they certainly were. It is that they were created at least in substantial part to relegate their defendants to a second tier, and too many officials associated with the commissions treat the defendants in a manner consistent with that idea. Based on nearly two decades of history, there is simply no reason for optimism that change is forthcoming on that front. The commissions are also geographically associated with the detention facility at Guantánamo Bay, the site of now-infamous mistreatment of detainees. There is thus a very real risk that, even if it were possible to excise and replace the problematic culture of the commissions, much of the public would forever link the commissions with the mistreatment of its defendants.

The impulse to assess the commissions against a higher standard, and thus to view the commissions as failures, is perfectly understandable. Many observers would like to think more of their government than the arguments above might suggest. Many would also like nothing more than to see justice done—to see defendants brought before a judge, with counsel on both sides of the podium and evidence marshaled, and trustworthy convictions or exonerations to follow. Family members of the victims of the charged crimes have routinely traveled to Guantánamo Bay for years now to observe the proceedings, as have advocates, students, and scholars. Many continue to look on in disappointment—albeit with a diminishing sense of surprise—at the accumulating costs, the persistent delays, the successful challenges, and the various other dramatic irregularities that have characterized the proceedings since they began.

But the two propositions defended here force us to confront perhaps the most tragic element of the commissions. It is not that they are a misconceived but good faith effort to secure justice in an important set of cases. They are, instead, a fundamentally unserious enterprise nominally oriented around the most serious of tasks. By allowing its disapproval of a particular class of defendants to permeate the commissions, the government violated its fair-trial assurances from the outset. I have argued above that those assurances were mere pretext; if that is correct, it makes the situation worse. The commissions system was destined to disappoint the legitimate expectations of the public—expectations set by the government itself. The very birth of the system and the cynical successes it has achieved all traded on the public's trust. Even now, the primary, substantive excuse for continuing the commissions hangs on the mirage of fair trials materializing at some point on the horizon, the misguided idea that the commissions may eventually work out their structural kinks and return reliable results. In short, it is the success of the commissions that renders them a betrayal rather than merely an expensive mistake.

CONCLUSION

This Article ultimately urges a comprehensive reckoning with the military commissions system created in the wake of the 9/11 attacks rather than a piecemeal critique of its various formal features. It is tempting to think that the performance of the commissions has been poor, and thus to conclude that they have failed. But natural though it may be, that approach requires ignoring evidence about how and why the system came about, as well as why the commissions have appeared ineffective. Moreover, ignoring the cynicism behind the commissions cuts off the only source of value the system has to offer: its capacity to be instructive. This Article endeavors to ensure that, whatever happens to the commissions themselves, we do not lose their lessons for the future.

