This Pentagon-approved sketch by court artist Janet Hamlin from June 2014 shows the perspective from the viewing gallery at the Camp Justice courtroom. The five defendants, from front to back – Khalid Sheikh Mohammed, Walid bin Attash, Ramzi bin al Shibh, Ammar al Baluchi, Mustafa al Hawsawi – sit on the left side of the courtroom with their defense teams, while prosecutors sit on the right. (AP Photo/ Janet Hamlin, Pool)

Pretrial of the Century:

The Sept. 11 Case at Guantanamo Bay

An inside look at the government's epic attempt to prosecute the five accused 9/11 plotters in an untested military system at Guantanamo Bay – and defense lawyers' efforts to prevent the government from executing the men they say are torture victims. A special report based on a year of reporting from Guantanamo Bay covering the military commissions, a system created by the Bush administration and amended under President Obama, to try detainees captured in the ongoing war on terror.

I. Torture v. the Sept. 11 Attacks

The main reason Ed Ryan took the podium on May 31 was to convince the judge, Army Col. James Pohl, to allow the government to preserve the testimony of aging or infirm family members of the victims of the Sept. 11 terrorist attacks – those who may not make it to trial as witnesses. Since the May 2012 arraignment, the pretrial phase has crawled forward, leaving any trial at least a few years away; jury selection could last months, the trial itself more than a year. Already, two witnesses the government planned to call have died.

Prosecutors wanted to take the pretrial depositions in open court during the scheduled October 2016 session at Guantanamo Bay, in the presence of the five defendants. Defense attorneys objected, claiming that taking the public testimony would prejudice the defendants – all of whom face the death penalty – before the trial even begins.

During arguments, it became clear that Ryan had another motive: He wanted to refocus attention to Sept. 11, 2001, when orchestrated terrorist attacks killed nearly 3,000 people in New York, the Pentagon and a Pennsylvania field. And he wanted to let anyone watching know that prosecutors were a little sick and tired of what has become a frequent refrain of all five defense teams – that the past torture of their clients should undermine, at every possible turn, the government's efforts to bring these men to justice. All five defendants spent multiple years at CIA black sites and were subjected to what the Bush Administration gently termed "enhanced interrogation techniques" before they arrived at Guantanamo Bay in September 2006.

"Since the proceedings began in 2012, the word torture has been used over 500 times in this courtroom," Ryan told the judge. "By comparison, the phrase September 11, or 11 September, or 9/11, about 200 times."

No one from the defense side of the room challenged these numbers. Torture has hovered over the case since the beginning and will remain through its final days, whenever that may be. The December 2014 release of the executive summary of the Senate Select Committee on Intelligence report on CIA interrogation practices, commonly referred to as the "Senate Torture Report," declassified a significant amount of information about abusive practices inflicted on terrorism suspects. Army Brig. Gen. Mark Martins, who is Ryan's boss and the chief prosecutor of the military commissions, said publicly after the report's release that it should positively impact the case by allowing for greater transparency of the proceedings.

It also provided a flood of vivid torture references in court by defense attorneys. Waterboarding, slapping, confinement inside a coffin-like box, wall-slamming, rectal hydration, rectal feeding, sleep deprivation, exposure to cold temperatures, prolonged isolation, being deprived of sunlight for years at a time, being hung from chains in diapers without use of a toilet – all of these receive mention in court.

The case's docket has close to 4,500 filings. The government's count of motions that deal with substantive legal issues totals about 220; these have generated thousands of pleadings as the five defense teams and the prosecution have litigated each motion back and forth. In many of these documents, the defense teams have challenged the legitimacy of the military commissions system, the current conditions of their clients' confinement at the top-secret Camp 7 detention facility on Guantanamo Bay and the government's moral authority to execute the defendants. Defense attorneys see evidence of past torture as not only relevant to many of these arguments but also as

the key weapon in their arsenal. They also believe the government is prosecuting their clients in this new and untested forum instead of a federal court or court-martial in order to hide Bush-era abuses.

In fact, defense lawyers often contend that the government remains in violation of the Convention Against Torture by failing to provide any mental or physical rehabilitation for the past abuse. Walter Ruiz, the lead attorney for defendant Mustafa al Hawsawi, who is accused of providing money to the hijackers, considered it a positive step this October when his client underwent surgery for rectal damage that the attorney links to "sodomy" disguised as medical treatment during the black-site years.

Ruiz explained to reporters that his client "has to choose between eating and defecating," due to the pain and blood associated with bowel movements, and that having a bowel movement required al Hawsawi "to reinsert parts of his anus back into his anal cavity."

These and other details may surprise or alarm those who haven't read the Senate report, but in the context of the 9/11 proceedings they have become somewhat mundane.

Ryan reminded the judge during his argument that "We even got to watch movies" about torture, referring to Feb. 19, 2016, one of the case's more unsettling and surreal days. James Connell, the lead defense attorney for Ammar al Baluchi, screened torture scenes from "Zero Dark Thirty" featuring a character based on his client. Connell wants more information about the CIA's treatment of his client, which he claims was given to filmmakers but not defense lawyers. Their backs to the viewing gallery, the five defendants watched Hollywood's rendition of their torture in silence.

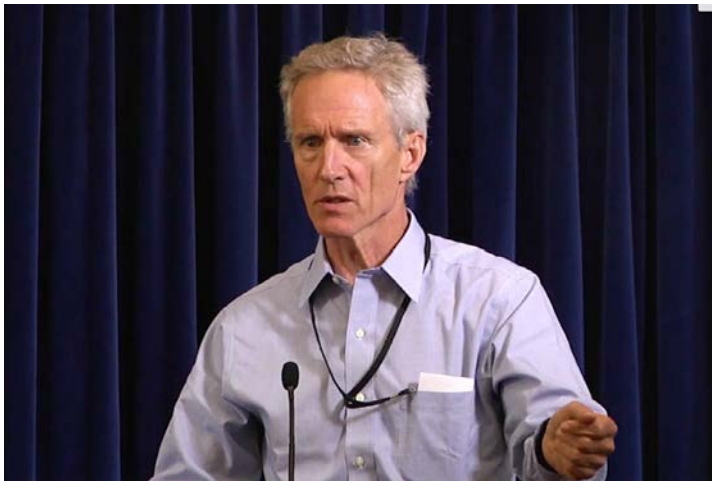
Prosecutors, too, have some powerful facts at their disposal, as Ryan's oral arguments made clear that Tuesday morning.

This court system, established by the Military Commissions Act of 2009, is based on rules and procedures from the Uniform Code of Military Justice (UCMJ) as well as regular federal courts. Both prosecution and defense teams benefit from a mix of military and civilian lawyers and staff. From the civilian side, Ryan is a longtime award-winning federal prosecutor with stints in North Carolina and Southern Florida. Very friendly in casual conversation outside court, Ryan can be an imposing presence during arguments, with his tall frame and booming voice.

Ryan explained to the judge that the 10 prospective witnesses would all be "victim-impact witnesses" – those not called at the guilt-or-innocence phase of the trial but during the sentencing phase, if there is a conviction. He asked that their testimony be taken in October and preserved for later use.

"Our submission to you is that the testimony of people saying, 'My child meant the world to me,' or 'My husband meant the world to me,' and 'Their loss has devastated me,' that won't be anywhere near a point of jeopardizing a fair trial," Ryan argued.

The prosecutor added that one witness would have "a dual role" as both a victim-impact witness and as a fact witness to the attacks. Lee Hanson, age 83, lost his son Peter, daughter-in-law Sue, and granddaughter Christine – "the youngest victim of 9/11," Ryan said – when United Airlines flight 175 crashed into the South Tower.



David Nevin, lead defense attorney for Khalid Sheikh Mohammed. Image by Joint Task Force-Guantanamo.

Ryan explained that Peter had placed a harrowing call to his dad during the hijacking.

"Stabbings of flight attendants, flying erratically, people screaming, hijackers claiming they had a bomb," Ryan recounted. "That phone call ended with Mr. Peter Hanson saying to his father, 'Oh, God, 'Oh, God,' – and the plane crashed into the South Tower."

Ryan's delivery was a punch in the gut. There was audible discomfort in the viewing gallery, which seats the media, NGO observers and victim family members chosen by lottery to attend the proceedings. Sobs could be heard as a curtain was drawn to give the family members privacy.

Defense attorneys later acknowledged the power of Ryan's presentation, and his skills as an advocate, but not everybody in court was pleased.

Later that afternoon, after Ryan finished his plea for public depositions, Khalid Sheikh Mohammed surprised the courtroom by telling Pohl that although he had been "neutral" in the argument, he now wanted to speak. The accused plot mastermind, Mohammed is the best known of the defendants and sits at the front table, closest to Pohl. According to the charges, Mohammed first began hatching the plot – referred to by the defendants as the "Planes Operation" – with Osama bin Laden in 1996 and then guided it to its conclusion five years later.

The judge admonished Mohammed to pipe down and threatened to remove him from the court – but not before the defendant uttered something about a "nuclear bomb," according to the court's Arabic-to-English translator. After Mohammed settled a bit, Pohl told David Nevin, his lead attorney, to talk to his client.

It wasn't exactly clear what Mohammed was trying to say. Those in the viewing gallery watch the proceedings in real-time through a wall of glass, while the audio and video feed arrives on a 40-second delay allowing the judge and his security officer to prevent the spill of classified information. The disjointing experience is made worse in these situations: Pohl and Mohammed spoke over not only one another but also trampled the simultaneous translator. The transcript for that day records that Mohammed said: "He needs to know that this is a nuclear bomb in the world."

In addition to a live Arabic translation for the court record, which is provided by a translator not present in the courtroom, the defendants each have interpreters that sit at their tables to provide additional assistance. But Mohammed hadn't had his team interpreter in about a year; for reasons that were still not exactly clear but extremely frustrating to Nevin, this person had lost his security clearance. Nevin had unsuccessfully sought to postpone the proceedings until the interpreter was restored. (Prosecutors often point out that Mohammed seems to speak pretty good English. He earned a mechanical engineering degree from North Carolina A&T University in 1986.)

Nevin explained to Pohl that the lack of a team interpreter contributed to Mohammed not fully understanding what was happening in court when Ryan was talking about the Sept. 11 attacks. Nevin said that Mohammed also was bothered by the fact that both Nevin and Cheryl Bormann, the lead attorney for co-defendant Walid bin Attash, who sits directly behind Mohammed, had objected to a few of Ryan's statements on the grounds the prosecutor had mischaracterized the defense's opposition to the depositions, but Pohl overruled them.

"Well, that's the way the system works," Pohl said.

Later that evening, Nevin, a prominent criminal defense attorney and name partner at Boise, Idaho-based Nevin Benjamin McKay & Bartlett, stopped by the media center at Camp Justice to explain to reporters his view of what happened. The nuclear bomb statement may have been a reference to U.S. aggression in the world, he said, such as the use of atomic weapons against Japan in World War II.

More generally, his client was bothered that Ryan seemed to be giving a closing argument in the case, and Pohl seemed to be helping him out by overruling the defense objections. Nevin described Ryan's argument as "compelling and effective."

The following day, when victim family members met with the media, there was great satisfaction among those who spoke on the record: Finally, they said, the proceedings had returned their focus to the 9/11 attacks.

"About damned time," said Kenneth Fairben, who attended with his wife Diane. The Fairbens lost their son, Keith, a 24-year-old paramedic who died while helping victims in the South Tower. They have set up the Keith Fairben Memorial Scholarship Fund to pay for medical and paramedic training courses for applicants in Nassau County, N.Y. – one of a countless number of charitable efforts launched by victim family members.

Fairben said that most of his and his wife's friends are now becoming grandparents for the first time. But Keith was their only child.

"That's something we will never have," Fairben told reporters.

Several weeks later, Pohl issued a written ruling that the government could depose two witnesses, but the process would take place outside of court, in the Washington, D.C., area, during December, and result in sealed testimony to be used at a possible sentencing phase. After a government motion to reconsider, Pohl issued another order allowing two additional witnesses for D.C.-area depositions, for a total of four, including Hanson. Pohl added that

any testimony by Hanson on the merits of the case – not the sentencing – would have to take place in Guantanamo Bay before the accused, unless the defendants waived their right to be present. The government later withdrew its request to depose all of the approved witnesses, except for Hanson.

Of course, it's hard to tell when a sentencing, or even the trial itself, might take place. Chief prosecutor Martins regularly declines to estimate when the trial might start. Defense teams have estimated that a trial is several years away, with Ruiz last Fall having provided the most dire prediction by saying it might be 10 years out.

The most recent proceedings prior to this publication, held from Oct. 11 to 14, were the 18th pretrial session, occurring shortly after the 15th anniversary of the Sept. 11 attacks and before a presidential contest between two candidates who had different views of what to do about Guantanamo Bay. Former Secretary of State Hillary Clinton supported President Obama's efforts to close the detention facility, while President-Elect Donald Trump has said he would expand the detention operations. Congress has blocked the transfer of detainees to U.S. soil.

But even closure of the detention operations at Guantanamo Bay would not itself terminate the military commissions system. Moving the case to federal court, where the Obama administration had wanted it to take place before abandoning the plan under political pressure, would be a separate decision. The 2009 MCA limits the military commissions' jurisdiction to "alien unprivileged enemy combatants" – foreign terrorists and war criminals – but doesn't say they have to be prosecuted at Guantanamo Bay.

"Military commissions, like courts-martial, can be convened wherever you can securely hold a trial," Martins told Lawdragon after the February pretrial session, before the plane ride back to Joint Base Andrews. "That can be many places."

II. Case Focuses on Defense Access to CIA Interrogation Evidence

Though Ryan may have scored a moral victory of sorts at May's end, past torture of the defendants remains the dominant theme in the pretrial phase. Martins wasn't even in court to hear Ryan argue; he was back in Washington, D.C., partly to participate in oral arguments before the military commissions appellate panel in a separate death penalty case against Abd al Rahim al Nashiri, who is accused of masterminding the USS Cole bombing in October 2000. (The third active military commission in pretrial hearings is against Abd al Hadi al Iraqi, who faces a life sentence for alleged war crimes as an al Qaeda commander.)

The other reason Martins stayed in D.C. was to push forward the discovery process related to the CIA's Rendition, Detention and Interrogation (RDI) program as the government seeks to determine what information about the defendants' treatment at black sites should be given to the defense. Before the hearings, Martins talked by phone to reporters at Guantanamo Bay to explain his absence. At that point, the case's "center of gravity" was in D.C., not at Guantanamo's Camp Justice, given the looming discovery deadline of Sept. 30 for CIA black-site evidence – a date proposed by prosecutors and agreed to by the judge earlier in the year.

Martins became the chief prosecutor in September 2011 after commanding a Rule of Law task force in Afghanistan. He graduated first in his class from West Point in 1983 and became a Rhodes Scholar. Through the Army's Funded Legal Education Program, he attended Harvard Law School and graduated in 1990. The school awarded him its highest honor, the Medal of Freedom, in 2011, for his distinguished career as a lawyer and soldier.

The commission's work is largely done away from Guantanamo. While prosecutors trudge through discovery, defense teams travel around the world to prepare their cases. Both sides file lots of pleadings related to pending motions, and Pohl rules on matters that have been fully briefed and argued. That last part is the domain of Guantanamo trips – with oral arguments there reserved for motions that have been fully briefed. They take place every other month or so, parceled into one or two weeks at a time.

Martins has published academic articles and taught at the Army Judge Advocate General's School. He can come across as professorial when explaining aspects of the military commissions system to the media; that is similar to his reserved style in court. He typically meets with reporters before each court session and holds a formal press conference at the end. During the two-week trips, he'll also hold a press briefing on the middle weekend. He and his staff are happy to find a pleading or citation relevant to a reporter's inquiry. They also provide DVDs of all the commission pleadings and transcripts. (Defense teams are also generous with their time to the traveling reporters.)

Army Brig. Gen. Mark Martins meets with reporters at the Camp Justice media center. Photo by John Ryan.

Martins is patient responding to repetitive questions, the most common being: Why is this case taking so long?

Cordial as he is, the general can sound a bit irked – you can sense his blood pressure rise – when he's asked to respond to defense allegations that the government is skirting its discovery obligations with the CIA black-site material.

In July, the court spent half a day sifting through defense claims that the government improperly destroyed evidence from a CIA black site.

"Allegations that can be wild and extreme should not be confused with serious allegations," Martins said at the press conference concluding those hearings.

His mantra? That his team is working on discovery "24 hours a day, seven days a week, 365 days of the year, including holidays." He also underscores that prosecutors will not use any evidence from coercive CIA interrogations. He is more than well versed in his topic. Before he was deployed to Afghanistan, Martins co-led President Obama's Detention Policy Task Force and helped draft the 2009 Military Commissions Act, which reformed the Bush Administration's 2006 MCA. Among the reforms in the Obama version was a clear bar against the use of evidence obtained through cruel, inhuman and degrading treatment.

Martins also typically adds that the government has already turned over in its case in chief to the defense some 300,000-plus pages of unclassified evidence and thousands more pages of classified material, and that the CIA black-site evidence is small by comparison.

The government has nevertheless acknowledged that black-site evidence is relevant to various defense efforts. One is mitigation – the defense will continue to argue that past torture should bar the government from executing their clients. The more the defense teams learn about this past treatment, presumably the stronger their mitigation arguments will become. The evidence will also assist defense motions to have the case dismissed for outrageous government conduct. Beyond that, the defense teams will challenge the admissibility of their clients' statements made after they arrived at Guantanamo Bay from the black sites. Defense attorneys say that these interrogation sessions are not "clean" – even if they did not employ the earlier brutal methods – and are instead tainted by the past torture, and should thus be suppressed by Pohl.

How much the defense will learn about this past treatment is the critical legal question in pretrial litigation over discovery. The only public portion of the Senate torture report is the 500-page executive summary, which itself has redactions. The still-classified report is 6,700 pages, and it was based on about six-million pages of underlying documents. Defense lawyers have said that a massive "document dump" of all that material is at least theoretically possible because they and other members of their teams have top security clearances allowing them to view this information. Under the *Brady v. Maryland* principles, they add, the defense is entitled to all information that is favorable to the defendants.

Under *Brady,* discovery always begins with a presumed good faith effort by the government to provide information to the defense. However, the government can invoke a "national security privilege" that allows it to withhold certain information that, if released, could jeopardize national security. In such situations, prosecutors can propose substitutions or summaries of the underlying information in a process that requires cooperation with the "original classification authority" – the authority or agency that first classified the information – whether it's the CIA or another agency that has a stake or concern in the material's distribution. It's then up to the judge to determine if the proposed substitutions and summaries are fair by giving the defense "substantially the same ability" to make its arguments as if it had the original classified material.

This process by the military commissions system mimics the procedures used in federal court cases under the Classified Information Procedures Act, or CIPA.

Pentagon-approved sketch by court artist Janet Hamlin from June 16, 2014.

Martins has described the process as "interactive" between the judge and the government. Earlier this year, Pohl adopted the government's plan to provide, by the proposed Sept. 30 deadline, ten categories of CIA black-site information, including a chronology of where the defendants were held; details of how they were treated; summaries of interrogations; the identifications of interrogators, guards and medical staff at the black sites; and official documents on the use of the enhanced techniques, among other areas.

Some evidence – including classified photos of the detainees at the black sites – has already gone to the defense teams. But most material is either with, or on its way to, Pohl, along with the prosecution's proposed summaries and substitutions. (Martins told reporters before the October session that his team met the Sept. 30 deadline.)

The commissions system incorporates CIPA procedures and also a standard from *U.S. v. Yunis*, a D.C. Circuit decision from 1989, which held that, in situations in which the national security privilege is invoked, the defense is not entitled to the evidence based "on a mere showing of theoretical relevance." According to commission rules, the judge has to determine that the information is "noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing."

What makes a certain piece of evidence "cumulative," or redundant or repetitive, and therefore not discoverable, is a disputed area between defense attorneys and prosecutors. Also disputed is who gets to make the initial cumulative determinations – the judge or the prosecutors.

The Defendants

1) Near the front (right) of the court is the accused plot mastermind, **Khalid Sheikh Mohammed**, who allegedly first met with Osama bin Laden in Afghanistan in 1996 to discuss the "Planes Operation." He then directed the training and financing activities of the hijackers and the other four defendants, according to the charges.

2) **Walid bin Attash,** who sits behind Mohammed, allegedly ran a training camp in Logar, Afghanistan, to help find "trainees" for the operation, researched flight timetables to plan for coordinated attacks and conducted early "casing" missions to test security and surveillance of airports and flights.

3) In the middle, **Ramzi bin al Shibh** allegedly planned to become a hijacker but later became Mohammed's "main assistant" in the Planes Operation after being denied a visa, and assisted with financing the operation.

4) **Ammar al Baluchi**, a nephew of Mohammed, allegedly ordered flight simulation software, transferred money to the hijackers and assisted with their travel. A year before the attacks, he allegedly wired $70,000 from Dubai to hijacker Mohammed Atta – designated as the "emir" of the operation – and another hijacker in Florida.

5) **Mustafa al Hawsawi**, who sits near the back of the court (left), also allegedly assisted the hijackers with travel to the U.S. and funding.

During February proceedings, Pohl referred to cumulative as the "word of the day" as defense attorneys argued for access to correspondence and memos between the White House, the Department of Justice and the CIA on the controversial Bush-era rendition and interrogation program.

Connell presented an elaborate slide illustrating the *Yunis* and *Brady* requirements when arguing to Pohl why the defense was entitled to "distribution channels" of torture memos between various arms of the government.

Another key reform in the 2009 MCA was that all defendants facing the death penalty receive government-paid "learned counsel" with experience in capital cases, in addition to military defense lawyers. The lead attorneys for all five defendants are civil-

James Connell, lead defense attorney for Ammar al Baluchi, with military defense lawyer Lt. Col. Sterling Thomas of the Air Force. Photo by John Ryan.

ian attorneys who contract with the Department of Defense.

Connell was a federal public defender before going into private practice, where among other cases he handled the appeal of John Allen Muhammad, the so-called "D.C. Sniper" who was executed in 2009. Connell is big on slides and often will make the most in-depth presentation on a legal topic in defense of his client, who is a nephew of Khalid Sheikh Mohammed and accused of providing money to the hijackers. (After finishing his argument, he was pleased that Nevin also wanted to refer to his *Yunis* and *Brady* slides. "It's my proudest moment, your Honor," Connell remarked before ceding the podium.)

His point to Pohl was that the defense needed to know not just the content of the memos, which could arguably be cumulative, but also who had received them. "Noncumulative is who got it," Connell argued.

Pohl came at the discussion from a different angle, asking if the government's conduct is more outrageous simply because more people know about it.

"Absolutely," Bormann responded. The Chicago-based defender generally eschews Connell-style formal presentations in favor of exasperated critiques of the fledgling commissions system compared to the tried-and-true of federal courts.

"This is by far the most restrictive discovery regime of my career," Bormann said.

Previously, Bormann had been best-known for running Illinois' Capital Trial Assistance Unit, a state agency that assisted defense lawyers on death penalty cases. In that role, she was part of a coalition of lawyers and activists that convinced the state to abolish the death penalty in 2011, a victory that made her job at the time, in a sense, cumulative. She told the New York Times in 2011 that maybe she would go to "another state" to fight the death penalty, not yet knowing she would soon be fighting its application at Guantanamo Bay.

Bin Attash, her client, is accused of running an al Qaeda training camp attended by two of the hijackers, and he also allegedly conducted some of the initial tests of the operation by bringing razor knives on planes. He lost his right leg fighting the Northern Alliance in Afghanistan and wears a prosthetic.

Bormann asked Pohl to think back to the paper trails of Nazi officials that were revealed during Nuremberg trials after World War II.

"The number of people that know about illegal conduct, or what I would characterize as war crimes, and cover them up, and the further those fingers stretch into various components of the United States Government, I would say that makes it more outrageous," Bormann argued.

The defense teams told Pohl that it is he – not the prosecution – who must decide what is cumulative, given the judicial role in determining what versions of classified information the defense gets after the government has invoked its national security privilege.

But Martins disagreed. He argued that prosecutors always get a "first cut" in discovery and make the initial cumulative decisions.

"We categorically reject this notion that we have to present every duplicate we have to you so you

can sort out which is cumulative and which is not," Martins told Pohl.

The cumulative debate is relevant not only to how many copies of memos are produced but also to the level of detail that defense teams receive about interrogation techniques – details they later hope to present to the panel of military officers who will be charged with deciding the defendants' guilt or innocence, and then their sentences if there are convictions.

In the February session, Nevin told Pohl that maybe it would be "the 403rd blow that was delivered against Mr. Mohammed" that would make a difference to the panel members, "only one of whom has to say execution is not right here." That level of detail "may feel cumulative" if the panel has already learned that some abuse took place, Nevin argued, but "one more event may be important to one of these jurors who will have Mr. Mohammed's life in his hands, if we get to that point."

In the arena of discovery about past torture, the *Yunis* cumulative arguments did not exactly fall into the category of riveting courtroom drama. That excitement was reserved for arguments about the government's alleged destruction of CIA black-site evidence.

Three defense teams want both Pohl, who is alleged to have improperly colluded in this effort, and the prosecution team removed from the case; a fourth, led by Connell, wants the prosecution removed but to question Pohl about his possible involvement; and a fifth, led by Ruiz, wants the judge and prosecutors to remain on the case. Ruiz also sees improper evidence destruction but wants to pursue different remedies later in the litigation.

In July, the issue was somewhat narrow: If Pohl should hear the motion for his recusal or farm it out to another judge – the recusal before the recusal, if you will. But the arguments got nasty, with the prosecution and defense each calling the other "despicable."

The courtroom translators who provide the English-to-Arabic translation for the defendants regularly tell attorneys to "slow down," with Connell being the most common offender. It does not happen with Nevin, who is deliberate, meticulous and sometimes slow-moving in his style. He also has an admitted anti-authority streak and does not shy away from expressing outrage in court. One source in an ABA Journal profile of Nevin described the veteran defense attorney as "a velvet shiv."

Timeline of Events

Sept. 11, 2001
Terrorists using four hijacked planes kill 2,977 people in New York, the Pentagon and a Pennsylvania field.

2002–2003
The five defendants are arrested in several locations in Pakistan.

September 2006
The five defendants are transferred to Guantanamo Bay after being held for multiple years at CIA black sites, where they were subjected to "enhanced interrogation techniques."

June 2008
The defendants are arraigned at Guantanamo Bay under the Bush-era Military Commissions Act of 2006.

January 2009
Upon taking office, President Obama halts the military commissions for the Sept. 11 defendants and other detainees facing charges.

October–November 2009
Obama signs the 2009 Military Commissions Act, with reforms to the system. Nevertheless, Attorney General Eric Holder announces that the five 9/11 defendants will be prosecuted in lower Manhattan federal court.

April 2011
Facing congressional prohibitions on transferring detainees to the U.S. and other political pressure, Holder announces that the Sept. 11 case will be returned to the military commissions system at Guantanamo Bay.

May 2012
The five defendants are arraigned again at Guantanamo Bay, this time under the Obama-era Military Commissions Act of 2009.

December 2014
The U.S. Senate Select Committee on Intelligence released the findings and executive summary of "Study of the CIA's Detention and Interrogation Program," which though redacted contains details of past abusive treatment of the five defendants and other captives in CIA custody.

October 2016
The Sept. 11 military commission holds its 18th pretrial session in the case, shortly after the 15th anniversary of the attacks. A trial date is not yet set. The last pretrial session of 2016 is scheduled for Dec. 5-9.

Nevin outlined what he saw as a troubling sequence of events: Earlier in the case, Pohl had issued a "do not destroy" order related to evidence at overseas detention facilities. In good faith, defense teams had relied on the order. But then, in June 2014, Pohl issued a secret "destruction order" after an ex parte, or unilateral, presentation by the government, without giving defense teams a chance to challenge it. In fact, defense teams did not learn about the destruction order until 20 months after it was issued. Nevin said that he deduced from the events that Pohl had not first seen the original evidence to assess the adequacy of any substitutions proposed by the government before he made his ruling.

"We have lost the ability to put our hands on some of the most important evidence in this case," Nevin contended.

Prosecutor Robert Swann shot back that Nevin was "not Sherlock Holmes." The government has conceded that the failure to provide the June 2014 order to the defense teams in a timely manner was "regrettable." Swann blamed it on miscommunication between the prosecution and Pohl as to whether the judge or prosecutors were responsible for distributing the document.

Otherwise, Swann argued, the government followed the CIPA-like procedures that allow prosecutors to seek to provide substitutions or summaries for classified evidence. In this situation, the substitutions were photographic evidence provided to the defense. He said that both the defense and prosecution are allowed to make ex parte presentations to the judge – nothing fishy about that, contrary to what Nevin said.

Swann, a civilian Department of Defense lawyer and former Army judge advocate colonel, worked on the 9/11 case during the Bush years, as did Ryan. (The defendants were initially charged under the 2006 Military Commissions Act before the Obama Administration temporarily halted, and then reformed, the commissions system.) Swann also served as chief prosecutor of the military commissions from 2004 to 2005, the first version of the system that Bush created by executive order in 2001. That version was in 2006 determined to be unconstitutional by the Supreme Court in *Hamdan v. Rumsfeld*, a decision that prompted the passage of the original Military Commissions Act later that year.

Swann can be surly and occasionally funny in his jabs at the defense. Like Ryan, he is more prone to display hints of anger and frustration in court than Martins. On this day, he was clearly angry that Nevin had insulted the integrity of the judge.

"They can't manufacture a recusal by distorting the truth," Swann told Pohl. "Their needless comments, their sarcasm, their pompous condemnation are all undignified and lack civility."

Written pleadings filed on this dispute in the weeks before the July session had also turned unusually bitter. The government accused Nevin's team of "shrill antics" and filing a "hatchet-job of a motion" unfairly attacking Pohl after 35 years of honorable service. Mohammed's team responded that prosecutors were predictably relying on "jingoistic histrionics" and had an "overarching priority of covering up the wide-ranging governmental conspiracy in criminal wrongdoing."

After oral arguments, Pohl ruled from the bench that he would not recuse himself from deciding whether he and the prosecution team should be removed from the case. He is expected to hear arguments on that issue during an upcoming session.

Since that hot July day, the government and Pohl have made progress on their "interactive" process of deciding what classified information on the CIA interrogation program will be produced to the defense. In August, Pohl ruled that the government's "proposed substitutions and summaries" were adequate for the first two categories of discoverable information – the chronologies of where the defendants were held from their capture to their arrival at Guantanamo Bay, and the descriptions of how the defendants were transported between the various locations. The remaining eight categories apparently remain a work in progress.

Pohl – also the chief judge of the commissions system – does not appear to be merely rubber-stamping the government's proposed versions of the evidence. In July, he informed the defense teams in court that he had been reviewing the prosecution's proposals and had sent "virtually all of it" back for additions. Defense attorneys were somewhat heartened by this disclosure.

What happens if Pohl wants "additions" – more detailed evidence – about past abusive treatment that the prosecution can't get the original classification authority, the CIA, to provide? Conceivably, the judge would have to abate the proceedings until the government complies with his order to provide additional evidence. What appears to be the more likely scenario is that the defense will receive the Pohl-approved substitutions and summaries, determine them to be insufficient, and then file motions contending the government needs to provide additional discovery.

The judge told defense attorneys back in February – when he signed off on the government's proposed 10-category framework – that he would not stop them from filing additional discovery motions, including in areas that may fall outside the 10 categories.

"I'm going to remind you of that somewhere down the line," Bormann told him.

III. Why is This Case Taking So Long?

The oral arguments over CIA interrogation evidence are a relatively new development in the case, starting in earnest this February and continuing into the Spring and Summer. Connell often serves as the defense-side explainer-in-chief for the media and traveling NGO representatives, and even sometimes for the parties in court, given his savant-like knowledge of the ligation. He said the focus on interrogation discovery marked a "new phase" in the case.

Martins generally avoids such labels but acknowledged the obvious importance of moving forward with the process. "Once discovery is done, we'll be able to seriously set trial milestones, leading to a selection of a jury panel of officers," he said in an interview following the February session.

The case already has taken a long time to get to this point. Not surprisingly, there is some finger-pointing between the defense and prosecution about which is more responsible for the pace of litigation. Many people who have not been following the goings-on at Guantanamo Bay are surprised to hear that 15 years after the attacks the government is still trying to prosecute alleged 9/11 conspirators.

In fairness, though, the longest delays in putting the accused through a trial have little to do with the present case, which is the second attempt at a military commission for the five defendants. The first attempt took place during the Bush era.

The Bush administration's decision to prioritize intelligence-gathering from suspects over prosecuting them delayed any trial from the outset: The defendants, all captured in 2002 or 2003, were not charged in the Bush-era military commissions until June 2008. The first commission, brought under the 2006 Military Commissions Act, seemed like it would move quickly. The five defendants sought martyrdom and rejected their defense attorneys at the arraignment. (The 2006 MCA only provided defendants with military defense lawyers, but the American Civil Liberties Union and the National Association of Criminal Defense Lawyers launched the John Adams Project to hire civilian lawyers to assist in the defense.)

In a December 2008 hearing at Guantanamo Bay, the five defendants said they wanted to plead guilty. However, the judge on that first commission, Army Col. Stephen Henley, determined that al Hawsawi and Ramzi bin al Shibh and could not make decisions about their own cases, due to questions about their mental competency. Mohammed, bin Attash and al Baluchi told Henley that they would wait until those issues were resolved before entering pleas. (Henley also asked the prosecution and defense lawyers to brief whether he could accept guilty pleas for capital offenses and, if so, whether the death penalty could be imposed, given that the 2006 MCA required a conviction "by the concurrence of all" the panel members before a death sentence.)

The defendants never got the chance to enter their pleas. Obama took office the following month and immediately suspended the military commissions system, which included the 9/11 case and several other cases involving accused terrorists and war criminals held at Guantanamo Bay. Eventually, Obama decided that he would develop a new-and-improved military commissions system that was more credible in his eyes, with bans on evidence from cruel treatment and enhanced defense rights to counsel.

"Military commissions have a long tradition in the United States," Obama said on May 15, 2009. "They are appropriate for trying enemies who violate the laws of war, provided that they are properly structured and administered."

However, even with the passage of the 2009 Military Commissions Act later that year, the Obama administration decided to hold the Sept. 11 case in lower Manhattan federal court, a short walk from the site of the attacks on the World Trade Center towers. This further delayed a trial, as Attorney General Eric Holder's plan fell apart under intense political pressure. In April 2011, Holder announced that the case would be sent back to Guantanamo Bay, and the government's prosecution would start afresh under the new commissions system.

Under the system, commission prosecutors draft charges and send them to the Convening Authority, who in addition to an overall management role decides whether to refer charges for trial. Ret. Navy Vice Adm. Bruce MacDonald, then the convening authority, referred death penalty charges in April

2012, and the defendants were arraigned in court at Guantanamo Bay about a month later, on May 5, 2012.

That widely covered 12-hour session marathoned through defendant prayer breaks; defense teams' voir dire of Pohl to probe for potential judicial bias; and a defense-side request to have the entire charge sheet read, which took about 2-1/2 hours. Defense attorneys also lodged numerous objections to the fairness of the proceedings that previewed written motions in the months and years to follow.

In fact, defense teams began filing motions the month before the arraignment. One motion attacked the government's proposed "presumptive classification" guidelines that would make any defendant statement classified unless cleared by an original classification authority, which defense attorneys claimed was both unprecedented and unworkable. The government later abandoned this position as Pohl fashioned his protective order for how the parties are to handle classified information in the case. But that order – now in its third amended form – has remained a subject of litigation. Three of the defense teams did not sign the order's "memorandum of understanding" regarding the handling of classified information until late 2015, and they did so with written reservations preserving their objections for appeal.

Another pre-arraignment motion sought to have the case dismissed for "defective referral." The motion alleged that the convening authority did not give the defense teams enough time and resources to meet with their clients and assemble information to make mitigation arguments against the referral of death penalty charges. Defense teams did not present their final arguments on the motion – armed with supplemental information from the Senate Torture Report – until Oct. 30, 2015. Pohl denied the motion to dismiss on Dec. 29, 2015.

Cheryl Bormann, lead defense attorney for Walid bin Attash. Image by Joint Task Force-Guantanamo.

The presumptive classification and defective referral motions were the earliest from the defense teams. By the time the Mohammed team filed its motion alleging improper destruction of CIA black-site evidence, in May of this year, the number of defense pleadings and supplements were so far into the thousands they were hard to track. In their response pleading to the destruction allegations, prosecutors accused the defense of "a scorched-earth litigation strategy."

"Their goal is not acquittal in this case; their goal, and their entire defense strategy, is that the case never, ever be tried," prosecutors wrote. "They seek to advance this goal by attacking and litigating every possible thing imaginable."

Some litigation does seem far afield from the case's core issues, at least at first glance. This has bothered observers, including traveling victim family members, who have generally been impressed by Pohl but wondered if he is being a bit indulgent. The record for appellate review will be enormous. Any case with a guilty verdict goes to the U.S. Court of Military Commission Review. Either side can then appeal to the U.S. Court of Appeals for the D.C. Circuit, and then to the U.S. Supreme Court.

Significant parts of the past year were consumed by witness testimony and oral arguments on a defense motion to ban female guards of Joint Task Force-Guantanamo from touching the defendants on their way to legal meetings and court. Pohl issued a temporary ban in December 2014 and defense lawyers wanted him to make it permanent, claiming that the touching by female guards violated their clients' religious beliefs and reminded them of sexual humiliations from past torture. Pohl eventually sided with the government and lifted the ban this year.

A few victim family members compared the defense teams' painstaking witness examinations and presentations on the topic to, well, torture. Robert Regg, a retired New York City firefighter severely injured when the twin towers collapsed, said at the February session's concluding press conference that he felt "emotionally waterboarded" by the defense efforts. (He overall praised his experience of attending the hearings.) Prosecutor Swann said during his closing argument that the defense was engaged in "a lame effort" to "drown out the realities of Sept. 11."

From the defense perspective, however, the female-guards issue cut to the core of the case by directly relating to the past torture of the defendants, as well as to the current conditions of confinement that negatively effect their ability to participate in their defense.

"Mr. Swann's trivialization of the tenets of one of the great religions of the earth is almost breathtaking," Nevin told Pohl in his closing argument on the female-guards issue.

The female-guard motion is one of several in which the specter of "unlawful influence" has been raised, as senior Department of Defense officials – including Secretary of Defense Ashton Carter – publicly criticized Pohl's temporary female-guard ban. Defense lawyers saw a clear example of Pohl's superiors in the military attempting to influence the case. (Pohl left his ban in place a little longer as punishment for what he termed "entirely inappropriate" comments.) Unlawful command influence is a common legal concept in U.S. military law; it has been referred to as "the mortal enemy of military justice" by the military's appellate court, the U.S. Court of Appeals for the Armed Forces. The Uniform Code of Military Justice bars anyone subject to the code from attempting to influence a court-martial.

The 2009 MCA similarly bars "unlawful influence," but defense lawyers say such behavior has been rampant in the 9/11 case. Defense lawyers first filed a motion to dismiss for unlawful influence shortly after the 2012 arraignment, and updated it numerous times during its pendency, incorporating allegedly prejudicial comments against the defendants from President Obama and other officials. Mohammed's military defense lawyer, Marine Maj. Derek Poteet, argued during oral arguments in December 2015 that too many "plainly inappropriate and reckless" comments have piled up – the bell cannot be "un-rung." Poteet told Pohl that this case will be looked to for decades for "what is acceptable in military justice."

Ruiz, whose arguments can be colorful, compared the 9/11 case to a well of toxic waste that has been poisoned by repeated interference from a host of government officials and agencies.

"We should not drink from that well," he argued.

Pohl rejected the unlawful influence motion to dismiss in April. He nevertheless agreed that some public statements could "taint the panel" of military officers that will eventually decide the case at trial. As a result, he will allow "expanded voir dire" and "liberal challenges" during the panel-selection process – which is what prosecutor Swann had proposed in his arguments.

More generally, defense attorneys say they have an ethical and sacred obligation to litigate as aggressively as possible on behalf of any defendant facing the death penalty. They also see the system as fundamentally unfair and confusing, often noting that it's even unsettled whether the Constitution applies to the proceedings. Two months after the arraignment, defense attorneys filed a motion asking Pohl to find that the Constitution "is presumed" to apply to the commission. The judge ruled in January 2013 that the issue was "not yet ripe for decision," agreeing with the government's position.

David Glazier, a former Naval officer turned academic who is critical of the system, describes the system as "court-martial lite" and says it abounds with opportunities for legal challenges.

"In federal courts and courts-martial, the procedures are well settled; judges and attorneys know how to conduct those trials expeditiously," Glazier, a professor at Loyola Law School in Los Angeles, said in an interview. "In the commissions, in contrast, literally every aspect is untested; judges are having to make almost everything up as they go, with attendant challenges by one side or the other to almost everything that they do."

Critics of the commissions system also take issue with the admissibility of hearsay evidence – which is allowed with greater latitude in the commissions than in regular federal courts or courts-martial – and are skeptical that statements by the defendants and other witnesses taken without *Miranda* warnings are truly free of coercion.

On these issues, Martins echoes his commander-in-chief by praising the federal courts as the best option in most situations but not appropriate for certain cases involving terrorists captured overseas. In these situations, Martins says, commissions can fill "a narrow but important role."

"The *Miranda* and confrontation requirements in federal court are appropriate rules in domestic trials of alleged domestic criminals and terrorists," Martins says. "But such rules are not only unprecedented in situations of genuine hostilities; they are not wise in such situations."

Beyond these constitutional issues are a quagmire of more practical constraints. Defense attorneys, for example, feel burdened by their inability to talk on the phone with their clients, a restriction that requires

in-person client meetings at Guantanamo Bay. The teams have to balance these meetings and oral arguments with investigative trips to various regions of the world to prepare their clients' defense. They also oppose the prosecution's motion to prevent the defense teams from distributing client statements – what the government views as potentially constituting "propaganda" – to third parties. Defense lawyers say this will significantly inhibit their ability to work with nongovernmental agencies and experts that might be able to assist their clients.

More than anything, the defense teams contend that many delays – and much of the litigation – have stemmed from government intrusions into the functioning of the defense teams. They have made regular complaints that the Joint Task Force guard force has improperly seized privileged attorney-client materials. Early in 2013, the defense teams also learned that the attorney-client meeting rooms had listening devices disguised as smoke detectors. (The listening devices were removed, and prosecutors said they never eavesdropped on conversations.)

Attorneys and Pohl alike were troubled by an infamous episode, from a January 2013 hearing, that highlighted the murky layers of intelligence that may continue in the courtroom and legal proceedings. In the "red light incident," the courtroom's security light went off as Nevin was discussing a motion to preserve evidence in overseas detention facilities. But Pohl and his security officer had not pressed the censor button, which cuts the audio and video feed to the viewing gallery, leaving many to assume the CIA did it remotely. (Pohl later said an "OCA" had cut the feed and that such outside control would not be permitted in the future.)

The most problematic event for the proceedings was an FBI criminal investigation into the team led by Buffalo, N.Y.-based attorney James Harrington, who represents Ramzi bin al Shibh, also alleged to have funneled money to the hijackers. According to the charges, bin al Shibh also wanted to be a hijacker but later became Mohammed's "main assistant" for the plot after he was denied numerous visa requests for travel to the U.S.

The FBI investigation into bin al Shibh's team looked into information that defense members provided to their client and relayed from him to an outside party. Harrington learned in April 2014 that federal agents had turned one member of his team into an informant. The unlikely twist also caught Martins off guard. He assigned a Justice Department special trial counsel, which grew to a full "Special Review Team," to handle the inquiry. Prosecutors were "walled off" from the proceedings and not permitted in court whenever the Special Review Team attempted to hash out with Pohl and the defense lawyers what was going on with the probe.

The investigation effectively stalled any real progress in the case for over a year – from about April 2014 to October 2015 – when the Special Review Team finally convinced Pohl that the investigation into Harrington's team had been closed, without any charges being filed. One especially bizarre hearing during that phase came in February 2015, when bin al Shibh and three of his co-defendants recognized the interpreter at his table as someone who worked at a CIA black site. The hearing was cancelled as it began. A defense motion to compel the government to produce the former interpreter for a deposition remained pending as of this publication.

Marine Brig. Gen. John Baker became the chief defense counsel in July 2015. In this role atop the Military Commissions Defense Organization, Baker does not represent any of the defendants but rather supervises and consults with the teams and helps get them resources from the convening authority. That dynamic itself is a problem, he says, in that the authority responsible for referring charges also makes decisions about how defense teams are staffed and what experts they can hire.

But Baker sees the intrusions into the defense function as the biggest problem in the case.

"Everybody talks about how this is perhaps the most important criminal trial in United States history," Baker said in an interview at his Guantanamo Bay office in June. "You would think that if we are going to put our system of law on display internationally, we would want to demonstrate how fair we are. And we certainly aren't."

The two-week session in October 2015 proved to be productive by moving past – at least for a time – the potential conflict-of-interest issue resulting from the FBI investigation, which had been the biggest roadblock in the case. But even that set of hearings began with an "only in Gitmo" series of events and delays when bin Attash told Pohl that he might want to represent himself.

Though allowed for by the 2009 MCA, going *pro se* is almost never a good idea. The challenge is heightened in a death penalty commission at Guantanamo Bay. Defendants do not have access to crucial clas-

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David Glazier: A Discussion on the History of the Military Commissions

Those who knew Prof. David Glazier during his college days at Amherst assumed he would go to law school, and they were right – eventually. He first spent two decades with the U.S. Navy, seeing a significant part of the world and gaining an impressive array of experiences, including those that would later inform his law studies at the University of Virginia and his scholarship afterward. Glazier teaches international criminal law, law and the use of force, and the law of war at Loyola Law School in Los Angeles. He has authored six law journal articles and one book chapter on the military commissions.

Lawdragon: When President Bush first implemented commissions by executive order in 2001, where did this idea come from? What's the lineage?

DG: Military commission proponents always say that these tribunals date back to the Revolution, but the reality is that they were first created by the Army's commanding general, Winfield Scott, who trained as a lawyer before joining the Army, during the Mexican War. The Articles of War (forerunner of the Uniform Code of Military Justice) in effect at the time only provided for the punishment of military-specific offenses, such as desertion, disobedience of a lawful order, cowardice in the face of the enemy, etc. Congress assumed that the Army would only be used defensively within the United States, and so they had mandated that soldiers accused of common crimes be turned over to local civil authorities for prosecution. But no invading army will ever allow its soldiers to be tried by local enemy civilian courts, and this left no way to punish U.S. soldiers for depredations they committed against Mexican nationals, including even murder and rape.

LD: So it was for his own men.

DG: Yes, Scott used what he called "martial law" authority to create a new "common law" tribunal – the military commission, for the initial purpose of trying Americans, not foreigners. Scott's commission followed existing court-martial procedure, but substituted a set of common-law crimes listed in military orders in place of the statutory set of offenses included in the Articles of War. It is thus worth noting that military commissions were never intended to be limited to trying foreigners, nor were they intended

Photo provided by Loyola Law School, Los Angeles.

to be a downward departure from the due-process standards provided by courts-martial. They differed only in terms of subject-matter jurisdiction. Military commissions were used extensively during the Civil War, and the Philippine Insurrections, continuing this practice of rigorous adherence to court-martial practice; they received the same post-trial review and a number of convictions were overturned on "technicalities" for failing to apply fine points of military justice procedures or rules of evidence.

LD: What are the more contemporary precedents? I know you have written about the case of the eight Germans who attempted sabotage on U.S. soil in 1942.

DG: The eight Nazi saboteurs who landed in New York and Florida were quickly captured by the FBI with the assistance provided by one of the group leaders who turned himself in. Although the Justice Department initially intended a federal trial, it quickly discovered that there was no adequate crime available on the books to charge them with; prosecutors were literally looking at having to resort to offenses like immigration violations for entering the country without passports, and being unregistered agents of a foreign government in order to qualify for a sentence of even just a couple of years in prison.

Attorney General Francis Biddle thus proposed to President Roosevelt that he use a military commis-

sion based on a common-law application of the law of war which could impose death sentences. Unfortunately, Biddle also proposed that they depart from the historical practice of faithful adherence to court-martial procedure, and essentially allowed the commission to make up its own rules as it went along, and admit any evidence which the commission panel deemed "of probative value to a reasonable man." Given that the FBI had conducted a thorough investigation and had an impressive collection of damning evidence, including voluntary confessions by each of the eight men that would have been fully admissible in federal court, Biddle's legal shortcuts were wholly unnecessary.

LD: What is the significance of *Ex Parte Quirin* – the 1942 U.S. Supreme Court case that upheld the jurisdiction of the U.S. military tribunal over the saboteurs – when looking at the support it may provide for, or limitations it places on, the use of military commissions?

DG: Although FDR's order establishing the military commission purported to foreclose judicial review, lead defense attorney Kenneth Royall – a former Felix Frankfurter protégé at Harvard – had the wherewithal to approach several Supreme Court justices and argue the importance of reviewing the constitutionality of using a military commission when ordinary civilian courts were open. Although the Court was in summer recess, and Royall had not even filed a habeas petition in a district court yet, the justices nevertheless agreed to convene a special July term while the military commission proceedings were still ongoing.

The decision, styled *Ex Parte Quirin*, ultimately upheld the commission on the basis that the eight Nazis were enemy belligerents in wartime who were charged with an actual violation of the law of war, in a theater of war. At least one defendant was a U.S. citizen; the Court held that his affiliation with the enemy was no bar to trial.

The *Quirin* decision was relied upon by key Bush advisers when they proposed the post-9/11 commission resurrection (the last prior commissions took place in the immediate post-WW II years), but they really failed to read it carefully or apply it in good faith. Bush's order borrowed most of FDR's language essentially verbatim, even including the bar on judicial review, despite the fact that the Court had unanimously rejected that part of Roosevelt's approach just by meeting to hear the case. And in taking ordinary U.S. crimes such as "conspiracy" and "providing material support to terrorism" and attempting to charge them as war crimes, they ignored *Quirin*'s explicit holding that the charges must include a recognized violation of the international law of war in order for the commission to have valid jurisdiction.

Read the full Q&A at www.lawdragon.com/2016/05/01/lawyer-limelight-guantanamo-david-glazier.

Current Commissions

Of the detainees remaining at Guantanamo Bay (a total of 60 as of Nov. 8, 2016), seven individuals across three different cases are facing charges before military commissions:

The 9/11 Case

Khalid Sheikh Mohammed, Walid bin Attash, Ramzi bin al Shibh, Ammar al Baluchi and Mustafa al Hawsawi face the death penalty for their alleged roles in planning and financing the Sept. 11 terrorist attacks.

The USS Cole Case

Abd al Rahim al Nashiri faces the dealth penalty for allegedly orchestrating the bombing of the USS Cole in 2000.

The case against Abd al Hadi al Iraqi

Hadi faces a life sentence for his alleged role as a senior al Qaeda operative in Afghanistan and Pakistan. (His lawyers claim the detainee's name is Nashwan al Tamir.)

Convictions

Two detainees (Majid Khan and Ahmad al Darbi) have pled guilty in military commissions and are awaiting sentencing, and one detainee (Ali Hamza al Bahlul) was convicted in 2008 and received a life sentence, though the conviction was vacated on appeal. The government appealed before the full U.S. Court of Appeals for the D.C. Circuit, which upheld the conspiracy conviction.

sified information or to a law library, and they cannot pick up a phone to talk about legal issues with whomever the judge appoints as standby counsel.

Bin Attash complained to Pohl that his lawyers did not adequately explain to him what the self-representation process would entail. But Bormann said you couldn't exactly blame her.

"This is like no other court," Bormann explained. "So I can't possibly advise Mr. bin Attash of his rights because I, frankly, don't know what they are."

Pohl concluded that he would need to draft a very strongly worded admonishment for bin Attash about the perils of self-representation, which the judge would use for a colloquy with the defendant and any other who might later consider going go *pro se*. The next day, after Pohl had distributed his proposed "trial conduct order," the government expressed satisfaction with the document, offering just a few minor proposed revisions.

Another of the defense counsel, Connell, saw a problem. He told Pohl that he had previously been briefed by the government on a top-secret program, referred to as an Alternative Compensatory Control Measure (ACCM), that he believed would be relevant to a detainee's ability to represent himself.

Connell had a classified filing in his hand that he wanted to submit to the court on the topic, but Pohl had not been "read into" the program, nor had the other defense teams.

"Your Honor, could I double-wrap the document and submit it to the trial judiciary to be kept in a safe?" Connell asked.

Pohl didn't want it: "We will get to it when we get to it, but I don't want to take custody of a document I'm not authorized to read."

The judge and other defense teams were briefed, or "read into," the ACCM that week, which led to additional revisions of the bin Attash admonishment. (The Miami Herald later reported that the program appeared to involve extensive surveillance within the Camp 7 detention facility. "You must assume anything you say in Camp 7 is not confidential and will be disclosed to the U.S. Government," Pohl edited into the admonishment.)

Naturally, because this is Guantanamo, the ACCM read-ins created yet another sub-issue: Putting aside the oddity of a defense counsel but not the judge having been read in, what members of the defense teams can be read into the program?

On Oct. 22, after the additional read-ins, Ruiz told the judge that the government was refusing to read-in certain members of his team, even though they had the full security clearances and signed the "memorandums of understanding" to the judge's protective order. Martins told Pohl that not every defense team member gets read into this particular ACCM, that it was based on a "need to know" standard.

Ruiz was flabbergasted at what he saw as another government intrusion.

"That gives the government a direct reach into the defense and into defense strategy as to who has and who needs to see this information," he argued. Litigation over who can get read into ACCMs is pending as of this publication.

Defense teams have also made numerous complaints over the past year that some team members have not yet received the required top-secret and special access program (SAP) clearances to review all case information and meet with their clients. As a result, these lawyers and support staff can only perform limited duties on the case.

"The length of time that it takes to get a security clearance is unacceptable," Baker said. "I have talked to everybody that I know about this, but it is like talking to a wall."

Ruiz has wrapped up many of the perceived interferences and other complicating factors into a somewhat global "motion to dismiss because national security considerations make a fair trial impossible." He first filed the motion last year and has updated it since, including recently with the allegations over the allegedly improper destruction of CIA black-site evidence.

As it turned out, bin Attash decided not to represent himself. Instead, he has made repeated efforts to fire his lawyers and have new ones appointed. Pohl has met privately with the defendant and his team and determined that bin Attash has not met the standard of "good cause" to sever the attorney-client relationship.

After one such order, at the start of the two-week session in February, Bormann surprised the courtroom by approaching the podium to say that she herself wanted to withdraw from the case.

"The trust has been completely eroded," Bormann said of her relationship with bin Attash. She cited his past torture and the litany of government intrusions, all of which had irreparably damaged the attorney-client relationship.

Bormann added that her team had failed to get bin Attash a phone call with family members, even after his mother died.

Pohl interrupted her, saying she was getting into another "global attack on the system."

"I understand that, but understand me here," Bormann said. "We are talking about little pebbles, each little pebble being added into a glass of water so eventually there is no more water left."

Pohl denied her request, but the issue lingers. In the July session, bin Attash reacted angrily to the presence of Bormann and her co-counsel, Michael Schwartz, and had to be removed from court one day. The solution agreed to by the lawyers, Pohl and the government was that bin Attash's lawyers would sit at the back of the court whenever the defendant was present.

Few observers believe that Bormann actually wanted to leave the case, or that Pohl would seriously entertain the request that day. Instead, her plea was widely seen as an expression of sympathy for her client – an apology of sorts for the system – and another opportunity to assert that government interferences were preventing effective assistance of counsel, as defense teams have also argued in written motions. Many of the defense lawyers have grappled with the same fundamental question of whether to participate in a system they see as illegitimate and unfair, or to leave, which would be a principled stand but likely put their clients in worse positions.

The other four defense teams currently have more cordial working relationships with their clients, but establishing and maintaining trust has been a challenge for all of them. That is the common motivation underlying many of the motions brought by defense lawyers, and why those sympathetic to their often unpopular work view them as bringing greater legitimacy to the system.

Occasionally, in their own way, prosecutors faintly echo this sentiment, as Ryan did when he stood up to register the government's objection to Bormann leaving the case – and to reject any notion that this was a situation of ineffective assistance by defense counsel.

"For four years, no one in this courtroom – no one – can say she has not been a very zealous and competent counsel on behalf of Mr. bin Attash," Ryan said.

IV. The Scene

The defendants refused to enter pleas or answer Pohl's questions at their chaotic May 2012 arraignment. It was not clear if they would participate in their defense or if they would adopt their approach from the Bush-era commission, when they welcomed their martyrdom. In one *pro se* filing from that case, the defendants said that they accepted the charges as "badges of honor." But the biggest difference from the 2008 commission has been their decision to work with their lawyers and see this case through; even bin Attash, in his current disgruntled state, continues to meet with some members of his team.

Not a whole lot is known about the conditions of the Camp 7 facility that houses the 15 high-value detainees, all formerly held by the CIA, including the five 9/11 defendants. As of this writing, the U.S. is holding a total of 60 individuals on Guantanamo Bay as law-of-war detainees. Joint Task Force-Guantanamo, or JTF-GTMO, which runs the detention facility, has conducted media tours of Camps 5 and 6 (Camp 5 was recently consolidated into Camp 6 with the reduced detainee population), but Camp 7 is off limits. Defense attorneys and the International Committee of the Red Cross (ICRC) can visit Camp 7.

Court testimony has established that each detainee at Camp 7 has a personal recreation yard on the back end of his cell, and that detainees can talk to each other in raised voices. They also get time in a common rec area and a media room.

But it's clear the defendants enjoy coming to court, which gives them an opportunity to socialize. Pohl requires the defendants to attend the first day of each session, at which point they are advised of their right to skip subsequent days. Al Hawsawi, with his discomfort in transport and sitting from the rectal injury, is the most likely to stay at Camp 7.

Members of the guard force typically begin bringing the defendants in, one at a time, shortly before 8:30 a.m., entering on the left side of the courtroom when facing the bench. Guards walk on either side of the defendants, holding their shoulders and wrists, and walk them to their chairs on the outer left side of the defendant tables. At their seats, the defendants are not shackled to the floor, though the court has that capability. Mohammed, at the front, followed by bin Attash and then bin al Shibh, generally prefer to wear paramilitary-style camouflage jackets or vests (their right to do so was litigated). Al Baluchi, at the fourth table from Pohl, and al Hawsawi at the back closest to the viewing gallery, wear loose-fitting tunics or robes.

As the official court time of 9:00 a.m. approaches, the large courtroom has the feel of a friendly office

The courtroom where high-value detainees are tried. Photo by Joint Task Force-Guantanamo.

get-together, particularly on the crowded defense side of the room, as staff and defendants greet one another and chat amiably among themselves and their clients. The exception these days is bin Attash. But even on July 21, when he was removed from court, the defendant seemed to be having a pleasant conversation with Mohammed before his attorneys approached the table.

The defendants talk to each other regularly during the proceedings. Pohl allows this, though attorneys acknowledge it can be distracting.

"Mr. Mohammed, I don't mind you discussing with your co-accused," Pohl said during one of the October sessions as Connell was trying to give oral arguments. "But please keep your voice down."

"Thank you," the judge added. Pohl always sets the lunch break based on the scheduled prayer time.

The courtroom was built to accommodate six defendants, as the government also initially sought charges against Mohammed al Qahtani, a Saudi national who was suspected of being the 20th hijacker. But Susan Crawford, the convening authority in 2008, was convinced that he was tortured and so refused to refer charges for trial. Al Qahtani remains in detention at Guantanamo Bay. The extra table and chairs at the back of the court, behind the al Hawsawi team, come in handy for overflow defense staff and, more recently, for bin Attash's lawyers. That's also where chief defense counsel Baker has sat to observe proceedings.

Reflecting the hybrid nature of the commissions system, both sides of the room have a mix of men and women in military uniform and civilian business attire. Female civilian members of the defense teams will wear head coverings if their clients are in court. Bormann wears a black abaya (a full-body cloak) at all times, except on the rare days when none of the defendants is in attendance. Gary Sowards,

a longtime death penalty lawyer from California who assists on the Mohammed team, stands out by going tie-less. Harrington, the elder statesmen of the crew, might show up to court in a bowtie, then later appear at the post-hearing press conference in sandals and shorts.

Those who work on the commissions have ample opportunity to run into each other outside court. Pohl, his staff, the prosecution and defense teams, victim family members, NGOs and the media all take the same three-hour chartered flight out of Joint Base Andrews, in Maryland, to Guantanamo Bay Naval Base. The judge and the victim family members sit in first class; the media sit in the far back; the other groups are in between. Everybody except the judge takes the same 20-minute ferry ride from the Leeward side of the base, which houses the air terminal, to the Windward side, which provides access to the main parts of the base and Camp Justice, where the court proceedings are held. (Pohl takes a fast boat.)

Large numbers of the prosecution and defense teams – including the bosses, Generals Martins and Baker – sleep in trailers on Camp Justice, while media and NGOs stay in nearby tents on the complex. Other lawyers and staff and victim family members stay in townhouse or hotel-style lodging elsewhere on the base.

Camp Justice itself has become the subject of litigation over concerns that the area, a former airstrip, has too many cancer-causing agents. Baker temporarily halted his staff from sleeping in the FEMA-like trailers when elevated formaldehyde levels were disclosed, then rescinded the order once he was convinced that base staff had improved the airflow within the trailers.

The bin Attash team has litigated, so far unsuccessfully, to halt the proceedings until the Navy completes a full health assessment of Camp Justice.

"I'm not comfortable being in this room and I'm not comfortable bringing a team of typically 12 to 15 people and asking them to be here on behalf of my role as a defense attorney and on behalf of Mr. bin Attash," Schwartz told Pohl on June 1.

Anyone getting sleepy during Schwartz's long presentation likely became wide awake when he said that an initial health report found a potential high frequency in soil samples of a type of benzopyrene that he referred to as "a highly carcinogenic, nasty material that causes scrotal cancer."

The naval base itself has existed since 1903 and has all the comforts of a small town: cafeterias, fast food, a Walmart-like store called the NEX (Navy Exchange), a bowling alley, an athletic complex, two movie theaters and a handful of bars and restaurants, not to mention a nice marina and opportunities for snorkeling and fishing. JTF-GTMO is a relatively recent tenant, leasing its space from the Navy. With about 4,000 service members and civilians on the base who are not part of the task force or the court, it is occasionally possible for temporary guests to blend into plain sight. Court participants and observers can avoid each other outside of the court complex, though it takes some effort and planning.

One could walk into the base's Irish bar, O'Kelly's, on any given evening and see a series of tables – one with defense team members, another with prosecutors, then NGOs, victim family members and one with the media. Given the intensity of the case's subject matter, the environment can feel a little claustrophobic – and that's for a one- or two-week hearing. A number of people who work on commission cases are concerned that a long trial could feel overwhelming for some participants. They point out that a small town can be a clever backdrop for courtroom drama in novels and movies, but even fictional small town trials don't wrestle with the worst-ever attack on U.S. soil and details of torture during the day, then send their participants to the same bars and restaurants at night.

The different components of the traveling court system also meet with each other intentionally on the island. The prosecution meets separately with the media, NGOs and victim family members, and defense teams will do the same. Defense lawyers say they get the full range of emotions and comments from victim family members, from "we understand and appreciate what you're doing" to palpable anger.

At the end of the hearings, all groups take the same chartered flight for the return to Andrews, though some defense attorneys will stay on to meet with their clients. On one return flight this past year, defender Ruiz and prosecutor Ryan could be seen standing opposite each other in the aisle, several feel apart. Ruiz had to move forward; Ryan had to head back to the toilets. Who was going to move? Who finds a partially empty row to slide into to let the other pass? Ryan has a height advantage, but Ruiz is younger and a serious athlete. Both intimated that they weren't moving. Then they chuckled and slid by each other, each patting the other on the shoulder.

Welcome to the reality of a traveling court system.

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The Chief Prosecutor: Army Brig. Gen. Mark Martins

Army Brigadier General Mark Martins knew that being the top prosecutor of the controversial military commissions was not for the thin-skinned when the assignment came his way in 2011, while he was serving in Afghanistan. Among his many past assignments, he had co-led a task force on detention policies and helped draft the 2009 Military Commissions Act, which replaced earlier legislation from the Bush administration.

Lawdragon: While here, you begin your press statements with a story of a victim family member, and you also meet with them during the week. Can you talk about the relationship with them – does that affect your approach to the case in any way?

Brig. Gen. Mark Martins: For prosecutors, reaching out to victims and family members of the fallen is a labor we undertake with our hearts and not purely out of legal obligation. But it is also a formal duty, and very much part of the representation of the United States. Victim and Witness Assistance is formalized in statutes and rules, and we thus have an obligation to seek out those who have been traumatized, victimized, and wounded, and to figure out the best ways to give them information about the case.

If you have wounded individuals who were at the scene, they also can be, in some cases, actual fact witnesses as well. Securing witness testimony, as with all evidence, is a prosecutor's responsibility. We also must implement Victim-Witness legislation that is intended by Congress to ensure that the victims of crime are not forgotten by what is a necessarily analytical, fact-based, and empirical process that might otherwise come across as bureaucratic and heartless to the very people we're sworn to protect. It's impossible not to feel compassion for these victim family members who come to Guantanamo to observe, so it comes naturally to me and to all of us on our team to reach out to them whenever we can.

LD: Can you talk a little bit about the lead-up to this job – you were involved in a task force related to Guantanamo policies, is that right?

BGMM: Sure. In January 2009, the President established three interagency task forces in regard to Guantanamo and detention policy more generally. I was appointed to be the day-to-day Department of Defense representative for Secretary [Robert] Gates and for [the then-General Counsel of the DOD] Jeh Johnson, on one of the three task forces, specifically the one assigned to develop and make recommendations on detention policy.

Photo by Joint Task Force-Guantanamo.

Those of us on the Detention Policy Task Force worked closely with the Guantanamo Review Task Force, which examined the files of the approximately 250 or so then-remaining detainees, and with the Interrogation Policy Task Force, which focused, as its name suggests, upon interrogation policy.

The Detention Policy Task Force had a forward-looking focus. We asked, "What are the best policies, from arrest or capture, to detention under various legal authorities by our forces or those of allies, following through to trial or other disposition? Then, where and how do we detain the person ultimately if he's been tried and sentenced?" In other words, we examined the life cycle of the detention of an individual who comes into our custody because he was involved with international terrorism and hostilities.

LD: How long did that last?

BGMM: For me it was an intensive 10-month period. And I knew from early on that I would be on the Task Force for less than a year because only months after reporting to the Department of Justice building where all of the Task Forces were required by

Executive Order to convene, I was promoted, and then essentially drafted, to go to Afghanistan to command a new task force there.

I went to Afghanistan, in part, to help implement the detention policy that we had developed and recommended. At this point, though, I thought that my involvement in traditional judge advocate legal work was likely done. My two years in command in Afghanistan drew upon legal training, but the assignment was operational. Then toward the end of the two years – in mid-2011 – Jeh Johnson called to inform me that the term of the previous chief prosecutor was coming to an end.

LD: What were you doing in Afghanistan at the time?

BGMM: I had been interim commander of Joint Task Force 435, the United States organization responsible for law of war detention. Then, I commanded a new unit established by Secretary Gates in September of 2010 called the Rule of Law Field Force. It later became the NATO Rule of Law Field Support Mission when some 50 NATO and ISAF [*International Security Assistance Force*] countries voted at a North Atlantic Council meeting to make it a NATO-wide mission as well.

Given how potentially divisive and controversial western military involvement in rule of law development can be, it was no small thing for such diverse nations to agree that putting military capabilities in support of Afghan-led law enforcement, judicial, corrections, and civil dispute resolution support was a wise move. In the end, these nations, led by Afghanistan itself, agreed that military logistics and security over the near term were essential to transitioning rule-of-law functions to Afghan control as soon as possible and to denying Afghanistan as a safe haven for the Taliban and the likes of al Qaeda.

The command benefited from formal Afghan government approval, as well as from unanimous NATO and ISAF endorsement. We worked in 14 provinces and some 60 districts where there had been a vacuum in government law enforcement and dispute resolution. We found that if we could help the Afghans populate local government ranks with a few police investigators, prosecutors, judges, and trained corrections personnel – not perfection, but just a decent presence in positions of authority – then the Taliban would poll in the low single digits.

It was a tremendous mission and a great honor to lead it. We were taking Afghan prosecutors, Afghan defense counsel, and Afghan judges and others, giving them modest training, security, and support, and getting them set up. They were prepared to work and to sacrifice for their country.

LD: What was your thinking when you got the call from Jeh Johnson about being chief prosecutor?

BGMM: When Jeh Johnson called me up, although it was unexpected, I had to acknowledge that my training and previous assignments made me eligible. I had been a prosecutor. I had been in armed conflict. I understood the law of war crimes, having taught the discipline at the Judge Advocate General's school in the 1990s. And then it was true that I had done the detention policy work. It wasn't one of those pre-assignment situations in which I could say, "This isn't a good fit." To be clear, a military assignment is not something I would ever actually resist, as the needs of country always come first, but this was an instance in which my past service and qualifications had led Mr. Johnson to call on me.

Every duty assignment in a military uniform of the United States is a privilege. Though I did not foresee the job, it has enabled me to serve alongside some of the most talented and determined public servants I have ever known. It often works out that way. I have never had an assignment I've regretted.

LD: You could have built your team a couple of different ways. You decided to keep on people who have been with the case for a while. Why?

BGMM: We are fortunate as a country that experienced and talented prosecutors with federal court as well as court-martial experience have committed to staying on. Different leaders assume leadership differently. My approach over the previous three decades had not been to dive into a diverse organization with a complex mission and immediately start making dramatic changes. Over time, a pattern of carefully weighed decisions and efforts to lead by example make their imprint. Even as we are standing on the shoulders of all who came before us, we have done many things together to build a team over the past four years that is as capable and as cohesive as ever.

In addition to prosecuting trial counsel, we have paralegal specialists, analysts, and others who also are making critical contributions, and their families are making sacrifices. The bottom line is that we have a great blend of skills and experience and dynamism.

Read the full Q&A at www.lawdragon.com/2016/03/24/lawyer-limelight-guantanamo-brig-gen-mark-martins.

V. Harrington and His Client's Vibrations

No one who travelled to Guantanamo Bay for the two-week session in October 2015 – the first to be held in several months – was especially confident that the case would finally move forward. Bin Attash's surprise inquiry about self-representation was a distraction from the real issue that the session eventually settled into: the status of the FBI's criminal investigation into the bin al Shibh defense team, led by Harrington, which apparently focused on how his team handled information going to and from the defendant.

Remaining "walled off," Martins' team was not in court when a representative from the Justice Department's "Special Review Team" told Pohl that the investigation into Harrington's team was closed, without any charges being filed. The case could move forward after nearly a year-and-a-half of delays, according to the Justice Department team.

"If we have indeed established, as we believe we have, that there is no investigation and not even a security-access issue, there cannot be a conflict," attorney Fernando Campoamor-Sanchez said.

Harrington and other defense lawyers had their doubts that the matter was so simple. Harrington pointed out to the judge that the government's document attesting to the closed investigation contained the worrisome caveat "at this time."

Each defense team has a "defense security officer" – or DSO – a security specialist that advises the team on how to properly handle case information. In April 2014, the FBI met with the Harrington team's DSO and entered into a confidential relationship with him. The DSO, an employee of SRA International – which contracts with the commissions – told Harrington of the meeting a few days later after consulting with his SRA supervisors. Harrington fired him, and the defense teams filed a joint emergency motion to abate the proceedings until they figured out what on earth was going on.

"Where counsel's duty of loyalty is potentially divided because counsel himself is under investigation, courts have not hesitated to critically examine the nature of the investigation and its impact upon the attorney-client relationship," the defense teams wrote in their motion.

Defendants are entitled to conflict-free counsel, which is potentially compromised if an attorney being investigated could be suspected of pulling his or her punches to curry favor with the government. The motion noted that the FBI asked Harrington's DSO about all of the defense teams. Lawyers said that the investigation would have "a chilling effect" on the functioning of the teams.

Camp Justice houses the legal complex where detainees are tried. Photo by John Ryan.

Later in 2014, Pohl ruled that a potential conflict did not exist for four of the defendants, but he held out bin al Shibh as a possible exception, given that the FBI had directed the bulk of its investigative efforts at his legal team. The FBI had also interviewed a linguist for the Mohammed team, but Pohl found that this could not have affected "trial strategy or intensity of effort" because the defense team did not know about the meeting until after that investigation was closed. Bin al Shibh's situation required "further examination," Pohl ruled. (He had earlier even decided to sever bin al Shibh from the case, citing both the conflict issue and pending litigation concerning the defendant's mental capacity, but prosecutors convinced Pohl to hold off until the issues were resolved.)

By the time the October 2015 session rolled around, both Harrington and Connell argued that they should receive more detailed discovery about the investigation – even if it was closed – before Pohl ruled on whether a conflict or a potential conflict existed.

The judge sided with Campoamor-Sanchez, however: With the investigation closed, he could make a finding of no-conflict on the spot and the case could move forward. But Pohl ordered the Special Review Team to provide additional discovery on the past investigation, and he added that any of the affected teams, not limited to Harrington's, could file new

conflict motions in the future. (The judge also ruled during that session that bin al Shibh was competent to stand trial.)

Reuters broke the story of one aspect of the investigation with an article explaining how a member from Harrington's team relayed a message from bin al Shibh to his nephew in Yemen. Investigators were apparently concerned that the message to bin al Shibh's nephew was "coded" but later determined it to be harmless.

Nevin referred to the article in court during the October session, telling Pohl it was especially disturbing because defense lawyers have to meet with defendant family members in order to do their jobs.

"It was found that Mr. Harrington wasn't doing anything wrong, but I don't know what the basis for that finding was," Nevin said. "I don't know how close Mr. Harrington was to a line. I don't know what it would have taken for him to have been judged to have been on the other side of that line."

Over the past year, Harrington and his team's lead military defense lawyer, Army Maj. Alaina Wichner, have been receiving discovery on the investigation into their team, per Pohl's order. Harrington has not been shy in telling both Pohl and the media that what they are learning about the FBI's infiltration into his team is alarming, and that the issue is far from over.

In a meeting with reporters during the Spring session, Harrington and Wichner explained that the Reuters story covered one facet of the investigation. They added that investigators had also infiltrated their team to probe any improprieties with information going in the other direction – to bin al Shibh. In total, five members of the team – all long since fired – gave privileged information to investigators.

Harrington said that there is a lot of "gray area" in the area of national security when it comes to deciding what information the client can see. None of the information given to bin al Shibh was classified, but apparently several team members were concerned enough to cooperate with the FBI.

The investigation was obviously traumatic for the team and a major distraction to actual case preparation. Harrington said he credits Wichner with keeping what was left of the team together and also rebuilding with new additions to create an environment of trust. (As on other teams, some members continued to wait for security clearances that are required to meet with the client and see all case information.)

Wichner has encouraged members of the team to express any concerns they have about security issues or the handling of information.

Baker, the chief defense counsel, said the FBI investigation lingers over not just the bin al Shibh team but his entire office.

"The people that work for me, their security clearance for many of them is their livelihood, and the idea that if they don't follow the rules they can be justifiably held accountable is something that makes us extra cautious in what we are doing," Baker said. "That very justifiable anxiety is made much worse by the fact that we have still never received the official guidance about what is classified and what is not that we are entitled to under the regulations."

No one wants to get fired, or go to jail and be disbarred, which is what happened to defense attorney Lynne Stewart after passing on information from Sheikh Omar Abdel-Rahman, her convicted terrorist client, to third parties.

References to the "chilling effect" will occasionally find their way into the proceedings. During witness testimony over the female guards, in December, Nevin probed the then-commander of the detention center, Army Col. David Heath, about instances in which female guards are given different roles than their male counterparts. Heath acknowledged that it's true that female guards cannot watch a detainee shower. Heath then told Nevin that, similarly, a female guard would not be allowed to see the defense attorney unclothed.

"It makes me a little uncomfortable that you imagine me as a detainee," Nevin responded.

Despite the gravity of the case, almost every court session has some exchange that leads to laughter in the viewing gallery – and that was one of them. But Nevin wasn't smiling.

Harrington has quipped a few times that FBI agents must have been excited about the possibility of nabbing a veteran defense attorney, particularly one representing a 9/11 defendant. But it's unlikely many people who work for the traveling court system would enjoy seeing Harrington go, not least of all Pohl, who seems to get a kick out of the affable and proudly Irish-American partner of Harrington & Mahoney. Harrington has been practicing since 1969, after graduating from the law school at the State University of New York at Buffalo.

Inside the detention zone, which is a short drive from Camp Justice. Photo by John Ryan.

Harrington has generally left the long and technical, or long and impassioned, arguments to the other lead attorneys, and is more likely to take his turn at the podium offering a relatively brief complementary argument. During the female-guard litigation, Harrington compared his client's religious beliefs to his own Irish-Catholic parents banning the family from eating meat. Pohl corrected him: You mean just on Fridays, right?

"Yes, we did eat meat on other days," Harrington said. "Every other day I should say. Overcooked."

"We are Irish," Pohl observed.

"That's the only way to eat it, Judge," Harrington said.

Then he made his point: We cannot fully understand all fixed religious beliefs in the world. He said that his mother found it "heartbreaking" when he merely inquired why he couldn't eat meat on Fridays, and she struggled with the issue when the Church lifted the Friday ban.

"It doesn't matter whether we agree with the reasons behind it," Harrington argued. "It's a religious belief, and we are not here to make that kind of a judgment."

Bin al Shibh also seems to want Harrington to stick around, given that the attorney is relentlessly litigating his concerns over his treatment at Camp 7. Though he often stays in the background, Harrington has played a starring role in two of the more exciting court days this past year: on Feb. 24, when his client testified in court about alleged mental torture at the Camp 7 facility; and on June 2, when fellow Camp 7 detainee Hassan Guleed (who is not charged before the commission) testified to support bin al Shibh's claims.

Those days highlighted another of the case's long-pending litigation series, that involving bin al Shibh's claims that the JTF guard force is subjecting him to noises and vibrations as a continuation of the torture from the CIA black sites. Harrington's team filed the first motion complaining about the alleged mistreatment in April 2013.

James Harrington, lead defense lawyer for Ramzi bin al Shibh. Photo by John Ryan.

Prosecutors have suggested that the defendant is hallucinating, lying or hearing normal construction and maintenance noise in the detention facility. Pohl ordered the government and the guard force to stop the disruptive noises and vibrations if they were in fact happening. But Harrington has begun several court days over the past year telling Pohl the abuse is continuing, that his client is suffering badly and that he is often in a distracted state for court proceedings. A pending motion now seeks to hold the government in contempt for allegedly violating Pohl's order.

Most observers seemed to side with the government on this one, and assume that bin al Shibh may be suffering from the aftereffects of the black sites; his claims sound a little wacky. But Harrington has tried to chip away at the assumptions, alluding not only to the past torture at the black sites but also to all the unknowns about what might go on at Camp 7.

In October, after Connell alerted everyone about the top-secret ACCM involving Camp 7 surveillance, Harrington told Pohl this program could be related to his client's suffering. Maybe the guard force didn't even know about the sounds and vibrations, Harrington said.

How could that be? Pohl wondered.

"They may be very sophisticated," Harrington said. "They may be very low level. They may be just enough to set him off, just the same kind of things that happened to him years ago."

He added: "It's a very, very sophisticated program, and it's something that the ordinary person, such as a guard outside the cell with a steel door or something like that, may well not know anything about."

On Feb. 24, bin al Shibh walked to the witness stand, flanked though untouched by guards. Pohl ordered that he would remain free of shackles on his short walk to the witness box on the judge's left side. Harrington later said that it was the first time his client has walked freely – with so many unshackled steps – since his capture on the one-year anniversary of the Sept. 11 attacks, in Pakistan in 2002.

Bin al Shibh spoke calmly in accented but clear English during quick-moving direct examination by his lead defender. Harrington used the Senate Torture Report as the basis for a brief exchange about bin al Shibh's past treatment, which included noises and vibrations at the black sites, before moving into how the treatment has continued at Guantanamo. (Bin al Shibh testified that the Senate report did not document all that was done to him.)

At 10:08 a.m. the courtroom's red security light began flashing. The video monitor switched to a "Please Stand By" message and all observers were ushered out of the viewing gallery for about a minute before open proceedings resumed. The last audio to reach the gallery before the interruption involved bin al Shibh starting to compare structural characteristics of the black sites with Camp 7. The testimony once resumed went smoothly, without the censor button being pushed.

"Make all my life terrible, make it upside down," bin al Shibh testified of the alleged noises and vibrations. "You cannot concentrate, you cannot read, you cannot sleep, you cannot pray, you cannot do any of this because of living with this condition day and night, 24 hours a day."

Bin al Shibh said that the noises take different forms – from banging on the walls of his cell to buzzing – while the vibrations feel like "sitting in a car with the engine on." He said it's common for the guard force to wake him swiftly after he appears to fall asleep, and that guards are often proudly defiant of Pohl's order. He also said that the treatment can get worse when he complains.

Harrington focused a series of questions on how the disturbances affect bin al Shibh's ability to participate in his defense. The defendant testified that disruptions occur as he tries to work on his case and that they get worse in the days before and during legal meetings and commission sessions. He said he has cancelled legal meetings and decided not to go to court as a result of his sleep deprivation and anxiety.

Among those not buying his claims was Clay Trivett, a counterterrorism prosecutor with the Justice Department's national security division. Of the prosecutors who do most of the arguing in court – including also Gen. Martins, Ryan and Swann – Trivett is the most boyish of the lot. But he brings a deep reservoir of experience, having been first assigned to the military commissions in 2003. He is also a Reserve JAG Lieutenant Commander in the U.S. Navy.

Under cross-examination, bin al Shibh rejected Trivett's suggestions that the sounds may not be happening or perhaps are natural sounds from pipes. The prosecutor also raised the idea that bin al Shibh was lying to harass the guard force and to continue his jihad against the United States; the witness acknowledged that he views himself as an enemy of the U.S. He also acknowledged making abusive statements, such as calling female guards "sluts," and breaking security cameras.

In what seemed a non-sequitur, Trivett asked bin al Shibh if he remembers his dreams when he sleeps. The witness answered "sometimes."

"Do you dream about the people killed on Sept. 11th?" Trivett asked.

Pohl sustained Harrington's objection before bin al Shibh could answer.

Trivett elicited detailed testimony from bin al Shibh about the workings of the detention facility. In the defendant's view, the facility is a giant machine that allows guards to send noises and vibrations to almost any area, including cells, attorney meeting rooms, recreation areas and the media room.

This might sound farfetched to some. At the hearing's concluding press conference, however, Harrington said that he can feel trace effects or sensations of what his client is experiencing at the Camp Echo complex, where he meets with his client. Of course, by then, anybody directing vibrations to the room would presumably stop to make it seem like bin al Shibh was imagining the whole thing, so Harrington was possibly just feeling mild aftershocks.

The 9/11 commission, like other long cases, progresses like a movie being filmed out of sequence, with scenes seldom occurring in a logical order to the casual observer. A motion might come up in one set of hearings and finish up with oral arguments in the next session, or maybe two sessions later, particularly if witnesses are required, which requires logistical preparations. And so the dispute over the alleged vibrations simmered from the end of February until the Spring session. That week in court was among the most highly anticipated of the past year due to the planned testimony of fellow Camp 7 detainee Abu Zubaydah, who was expected to support bin al Shibh's claims.

The Palestinian is one of the better-known detainees due to his repeated mention in the Senate's Torture Report. The report described Zubaydah as "the CIA's first detainee" to go through the enhanced interrogation program. For Zubaydah, that reportedly included 83 rounds of waterboarding and a long list of other abuses, including being confined inside a coffin.

The guard force transported Zubaydah and the other corroborating witness, Hassan Guleed, to Camp Justice on June 2, with Guleed scheduled to testify first. But there was a problem with getting Zubaydah to the stand: Unlike Guleed, he is one of the detainees who has been considered for prosecution and was represented by counsel. Zubaydah waited just outside the door of the courtroom (unseen by observers in the gallery) as his lawyer, Navy Cmdr. Patrick Flor, told Pohl that he would object to any line of questioning that could incriminate his client. This created an impasse given that Pohl had decided that the prosecution could probe Zubaydah for bias, including questions about his terrorist ties.

Harrington and Flor agreed that the testimony could not move forward. Flor left the court to update Zubaydah before he was transported back to Camp 7. After the session ended, Flor told reporters that his client was disappointed but that he looked forward to testifying at some point.

Still, Guleed, a 43-year-old Somali who testified in English, had held the gallery's attention during lively direct examination by Harrington and cross by prosecutor Ryan. He testified that he has been subjected to offensive "smells" as well as to noises and vibrations.

"We have mental torture in Camp 7," Guleed said.

The witness said that he decided to testify to help his "brother" (the two men are not related) and because his complaints to the guards – which he stopped making years ago – had not helped.

Guleed also testified that a second 9/11 defendant – "Brother Mohammed" – also has experienced disruptions. He said that he and Mohammed are separated from each other by a cell but are able to communicate when both are in their individual recreation areas behind their cells. He described a situation when he and Mohammed both heard a banging noise – like

a "hammer on a roof." (In one prior session, when Harrington updated Pohl about the continuing abuse of his client, Nevin stood up to add that his client, Mohammed, had also recently reported to him a similar experience.)

Ryan suggested that Guleed told multiple lies on the stand out of a continued devotion to al Qaeda, an affiliation the witness denied.

"Is America your enemy?" Ryan asked.

"No," Guleed responded. He testified that he sees Americans as his friends because they provide him with his food at Camp 7.

Both Harrington and Guleed complained that Ryan was cutting the witness off during his cross examination, and Pohl told Ryan to slow down. Ryan told Guleed he would not cut him off.

"You did already, eh?" the witness said, sounding almost Canadian.

Evidence on the vibrations continued later in the session, when a former Camp 7 commander, who was not identified by name, testified by video that both he and his predecessor had inspected areas of the facility and found no evidence to corroborate bin al Shibh's claims. He said that roof repairs, air conditioner maintenance, installation of insulation and other activities could create loud noises. He said the guard force always notifies the detainees of such repairs in advance.

But the public did not learn all that the former commander had to say. That's because, on occasion, witness testimony is bifurcated, with some being given in open court and the rest in closed session when classified information may be involved. The commander repeatedly refused to answer certain questions about Camp 7 during Harrington's cross-examination, explaining that he'd rather address those inquiries in the closed portion.

The witness did testify in open court that he never asked to see the schematics of Camp 7 or inquire what company built the facility. He also testified he did not have any special training in mechanical or electrical engineering, plumbing or construction, and that when conducting his inspections he was looking for something that would have appeared unusual to him. He did not, for example, inspect the wiring that went into the defendant's cells.

"I did not look inside the walls," the former commander told Harrington.

"We'll ask about the walls in a little bit," the attorney said, pointing to the closed session scheduled for that afternoon.

Zubaydah may yet testify at a future session. Harrington made a request to the current convening authority, Paul Oostburg-Sanz, to grant Zubaydah a limited "testimonial immunity," so that prosecutors could not use what he says in court against him. Oostburg-Sanz denied the request, but the defense has asked Pohl to reconsider. Even if Pohl sides with the convening authority, Zubaydah could choose to testify after conferring with his attorneys.

VI. Case Moves Forward on Island Time

Pohl has a standing rule that all defense teams are presumed to have automatically joined each other's motions, unless they move to unjoin. One reason why the litigation can proceed slowly through a single issue is that all defense teams may want to question a witness or give oral arguments on a motion, perhaps to make a point specific to their client or that the other teams may not have focused on. But the rule nevertheless makes sense, as the teams have similar positions on many issues and unjoining happens only on occasion.

Apparently, this rule can create confusion if a third-party files a motion. That happened earlier this year when a consortium of news organizations challenged the government's redaction of parts of the transcript for the Oct. 30, 2015 hearing, when a Camp 7 guard testified in the female-guard dispute. The entire hearing was held in open court. Lawdragon and other media representatives were in the viewing gallery, and Miami Herald reporter Carol Rosenberg live tweeted the hearing from the media center, which receives the court feed.

After the hearing, the government nevertheless decided to redact from the published transcript information related to guard staff and operations that it deemed sensitive and did not want on the web. The media consortium claimed the censorship is unconstitutional.

Dave Schulz, a longtime media lawyer at Levine Sullivan Koch & Schulz, travelled from New York earlier this year, for the oral arguments on Feb. 22. Without the necessary security clearances, Schulz could not be in court except to make his arguments; he had to watch defense and prosecution arguments from the gallery. With the 40-second security delay, Schulz

also was able to watch the last several seconds of his own presentation on the video feed after he took his seat with the rest of the observers behind the glass.

A side issue was how automatic joinder might work when a third-party files a motion that at least some defense teams support. Three defense teams had filed joinders to the media motion. Nevin told Pohl that he was joining the defense teams who joined the motion, but had not necessarily thought of himself as joining Shulz's motion. Pohl understood, using his catchphrase: "I got it."

"You are joining the joinders," the judge said

"Unless I unjoin," Nevin confirmed.

Gen. Martins wasn't exactly upset about this, but he arose to say that the approach didn't seem to follow the rules of the court because the automatic joinder rule applied to joining motions, which have "content," not to joining a mere notice of joinder.

Pohl said that he would be lenient in this instance, as it appeared that a few teams thought they had "automatically joined the joinder."

"But in the future going forward, if it's a third-party motion, I need affirmative joinders of the motion, not joinders of the joinder," Pohl said.

Though Martins was satisfied, Bormann then stood up. She pointed out that the joinder to the media motion filed by Connell's team wasn't simply a "pro forma motion," it had "subsequent legal argument" by adopting Shulz's arguments and adding supplemental points. That is why her team thought they had already – and automatically – joined that particular joinder, which was really more of a motion in its own right.

"We are spending way too much time on this issue," Pohl concluded, perhaps stating the obvious. (The judge later sided with the government on the transcript redactions, concluding in an October order that such retroactive actions are allowed to protect classified information.)

The parties also can spend a significant amount of time simply talking about which pleadings they are referring to in court, as there are thousands of them. Each motion is assigned a number with the letters AE, for "appellate exhibit," so the hundredth motion is AE100. Then each subsequent pleading within the series is given a letter, so AE100A is followed by AE100B and, when the series moves past Z, the next in line is AE100AA. Lawyers sound the letters out in court using the military phonetic, so AE100BB will be talked about as "100 Bravo Bravo" or "100 Double Bravo."

The pleadings in the AE292 series – dealing with the potential conflict of interest from the FBI investigation into the bin al Shibh defense team – proved particularly confusing to sort through. Naturally, it was up to Connell to try to straighten out for the commission which motions were pending.

"Separately pending is 292 Quadruple Yankee, which is our request to unseal the long series of classified and unclassified but all under-seal pleadings by the Special Review Team," Connell explained at one point on Oct. 25. "Connected to that, a sort of footnote to 292 Quadruple Yankee, is that the Special Review Team has filed 292 Quintuple Delta, which was although styled as a notice, is really a motion to approve redactions without, in our opinion, complying with the requirements of M.C.R.E. [Military Commissions Rules of Evidence] 506."

Another view inside the detention zone. Photo by John Ryan.

Connell added that 292 Quintuple Delta "could be seen as an unauthorized supplement to 292 Quadruple Yankee, or it can be seen as its own issue."

He told the judge that he needed to resolve those issues before moving on "to the question of resolving 292 Romeo Romeo, the government's motion to reconsider, and 292 Sierra Sierra, the defense motion to reconsider."

Connell continued, "Now, 292 Sierra Sierra, the defense motion to reconsider, contains within it essentially two components. One of those is the ruling in 292 Quebec Quebec regarding AE 292 Lima…"

And on it went.

Despite the joinders, if there is one defense team that tries to distance itself a little bit more from the others, it's the al Hawsawi team, which sits in the far back, often without the client present. Ruiz is not necessarily likely to unjoin other motions – he often takes the lead with impassioned omnibus attacks on the system, such as with the defective referral or unlawful influence motions – but he also contends that the case doesn't have a whole lot to do with his client. Ruiz first filed a motion for severance back in May 2014 and has supplemented his position in pleadings since.

"The prosecution's case against Mr. al Hawsawi, as well as his criminal culpability, if any, is disproportionate when compared to his co-accused," the motion states, referring to al Hawsawi's alleged role in providing money to the hijackers. His lawyers argue that he had little contact with the other defendants, and that a joint prosecution severely prejudices him because the panel that decides the case with be likely to transfer guilt from the others.

Prosecutors counter that the defense motion mischaracterizes al Hawsawi's role in the plot.

"Mr. Hawsawi ran many necessary errands, and he ran them with willingness and knowledge that an operation to take American lives was underway," the government wrote in its response brief.

To be sure, the media often lumps "the five 9/11 defendants" together when covering the case by not always detailing the allegations specific to each accused. Much of the general public probably knows that Mohammed, or KSM, as he's broadly referred to, is the alleged mastermind of the 9/11 attacks; beyond that, they all are conjoined as the accused plotters.

Ruiz believes that the government intentionally groups the defendants together, even when defense teams advance different arguments. That was evident in July in defense motions over the alleged evidence destruction of CIA black-site evidence, when Ruiz declined to join parts of the motion that sought to remove both the judge and the prosecution from the case.

Ruiz told Pohl that he was bothered that trial counsel Swann had criticized the "entire left side of the room with the same broad brush." Ruiz argued that a military judge like Pohl could "cut through the weeds" to see the distinctions, but a jury may not have that ability if the prosecution kept stepping "away from individualized determinations based on legal positions and relative roles in the case."

Pohl asked Ruiz if he was supplementing his motion for severance, then caught himself: He didn't want to encourage another pleading.

"Yes, we have information that we can add," Ruiz said. "And you don't have to encourage me, judge, on this issue, I think you know that."

Pohl acknowledged that al Hawsawi deserved "an answer" on the pending motion at some point.

For the first half of the case, Ruiz was a Naval Commander and wore his uniform in court. With his extensive experience as a state and federal public defender before his most recent stint in the Navy, Ruiz for a time actually wore two hats on the 9/11 case as both the learned counsel and the military counsel for al Hawsawi. He is now a reservist and in civilian clothes. He has two military lawyers at his table, Marine Lt. Col. Sean Gleason and Army Lt. Col. Jennifer Williams, and another civilian lawyer, Suzanne Lachelier.

As the case has dragged on, Ruiz is not the only attorney to step out of uniform. The second civilian attorney for bin Attash, Schwartz, has been with Bormann since the 2012 arraignment. He was an Air Force Major through the fall of 2015 before becoming a civilian to stay on the case, as he was scheduled to rotate to another assignment. Schwartz showed up to the February 2016 hearings in civilian clothes for the first time, and also with a beard. It was a bit of a cruel move when bin Attash later decided he wanted to fire both Bormann *and* Schwartz. The government supported Schwartz's removal from the case because, as additional civilian counsel, Schwartz was not "statutorily required" to be present as learned counsel Bormann was. But Pohl included Schwartz is in his order that bin Attash did not have "good cause" to fire his lawyers.

Army Maj. Wichner, for bin al Shibh, also will be returning to civilian life this year in order to stay on the case with Harrington. Chief defense counsel Baker says the rotation of military personnel is also an ongoing issue for the military paralegals, analysts and investigators who play crucial roles on the teams, and who have to choose between staying with the case and remaining competitive for promotion. He believes that the teams are vastly underresourced and is seeking additional civilian and military staff, recently securing funding for additional paralegals from the convening authority.

But Baker says it makes more sense to staff the case with civilian attorneys, when possible. The biggest

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The Chief Defense Counsel: Marine Brig. Gen. John Baker

If you go to Guantanamo Bay to observe the military tribunal against the five Sept. 11 defendants, you won't see the Chief Defense Counsel arguing any of the motions at the podium or sitting at the defendant tables during the proceedings. Instead, you'll find Marine Brig. Gen. John Baker at the back of the courtroom, directly in front of the glass separating the highly secure court from its viewing gallery. In his supervisory role, Baker does not represent any of the detainees. Rather, he provides advice to the defense teams and helps them get the resources they need from the military commissions Convening Authority, which is responsible for overall management of the commissions system as well as referring charges for trial.

Baker was a supply and logistics officer in the Marines before attending law school at the University of Pittsburgh through the Marine Corps Law Education Program. Since graduating in 1997, he has served as a defense attorney, prosecutor and judge. He says he found his true calling – managing defense lawyers – as the Regional Defense Counsel for the Eastern Region of the Marine Corps, a position he held from 2008 to 2010 before serving three years as Chief Defense Counsel of the Marines Corps. In that top job, he oversaw the establishment of the Marine Corps Defense Services Organization, which reformed how defense lawyers were supervised and assigned to cases.

Lawdragon: Can you discuss why you changed the name of the defense office, and how that plays into what your role is here?

Brig. Gen. John Baker: When I took over, this office was referred to as the Office of the Chief Defense Counsel. The reason why I changed the title to the Military Commissions Defense Organization is that the focus of this office shouldn't be on me. We are an organization that is comprised of defense teams, and when someone thinks about what we do, it is not the Chief Defense Counsel that is doing the litigation. The litigation is done by the defense teams.

What I do is provide them with oversight and supervision, and advocate on their behalf for resources. What I don't do is tell them how to litigate their cases. That is a big difference between my role and General

Photo by the U.S Marine Corps.

Martins' role. General Martins decides what the government is doing with its litigation strategy and has an active role in court. The Chief Defense Counsel absolutely does not decide the litigation strategy for any particular case and cannot represent individual clients. The defense teams talk to me about their cases, but what they do with my advice is up to them.

LD: What did you think when you were promoted and assigned to this position? Did you know what you were getting into?

BGJB: I knew about the position and was excited about the possibility when being considered for it. But what I thought the commissions were, and what the commissions are, is like night and day. I just didn't appreciate the depth and breadth of the legal work that is involved in the commissions. I had no idea how much work is involved. I didn't know the amount of resources that were put into it. I had no idea how often they came down here. I had no idea how many motions they filed. I had no idea how much discovery would be involved.

I also did not have an appreciation for how committed to the mission people here are. The quality of lawyers that are assigned to this, the paralegals and all the staff – everybody here is really, really impressive. I guess the other thing I didn't appreciate was how under-resourced the defense teams are, even

though we have what may seem like a lot of people. I feel like we have made some progress, but we need more resources to get the job done.

LD: How do you get resources for the case?

BGJB: When I was Chief Defense Counsel of the Marine Corps, I had my own budget. Here I don't have my own budget. I have to ask permission from the Convening Authority of the military commissions to spend any amount of money on the defense teams. When I was the Chief Defense Counsel for the Marines, I felt like I had enough people and other resources. Here I don't feel like I have enough resources, so that is what I have been working with the Convening Authority to provide – to get the assets that the teams need to do their job. I don't know how Gen. Martins is resourced, but I can't just go to the FBI or Department of Justice or elsewhere to get what we need. I have to go to the Convening Authority.

LD: Even if the defense teams get new members, it can take a while for them to get their security clearances.

BGJB: That is right. That is a huge issue. The length of time that it takes to get a security clearance is unacceptable. I have talked to everybody that I know about this, but it is like talking to a wall. Everybody I talk to says, "Hey, great, we hear you. We wish it was better." Nobody can do anything about it. I am still waiting to find the person that can speed the process up. Everybody acknowledges that it is a problem, but nobody offers a solution, and that dramatically impacts the defense teams' ability to adequately and zealously defend their clients.

LD: You don't have an attorney-client relationship with the defendants, but you do speak with them. For example, you've spoken a lot with Walid bin Attash, who has been unsuccessful in getting his attorneys fired and replaced.

BGJB: While I don't have an attorney-client relationship with any of them, their communications with me are privileged. I will meet with any detainee that requests to meet, as long their lawyers approve. I won't meet with a detainee where his counsel says no. That has never arisen. There are a couple reasons why they want to talk to me. One is because they have an issue they feel needs to be resolved. Mr. bin Attash and his issues with his lawyers is a perfect example. I have met with him probably ten times to explain the rules, my role in the process, to let him know and give him my word that we are going to work through this issue.

The other time I will go talk to them is that sometimes they want to tell me in front of their lawyers or their paralegals that they think these people are doing a good job, which is interesting.

LD: Why did you decide to go to law school?

BGJB: I was a supply and logistics officer and sat on the administrative separation boards in Quantico, Va., which are held if a service member engages in minor misconduct and the command wants to process them out of the service. It is essentially the way you can get fired without going to court. I sat on these boards every other week for six months.

I remember watching a Marine Judge Advocate defending a Marine and thinking to myself that I could do a better job. Not because he was doing a really bad job, but it felt like it was an opportunity to help the Marines. Once I was involved in that process it made me decide that I wanted to be involved in the military justice process. My oldest brother also is lawyer.

LD: So you knew you wanted to end up on the defense side?

BGJB: It's interesting. What drew me to want to go to law school was watching a Marine defend a Marine, thinking that was cool. But as I came out of law school I wanted to prosecute. My first assignment was as a legal assistance attorney, then as a defense counsel, and then I became a prosecutor. I really liked that, and later I also really liked being a judge. It is almost like whatever job I have been in, I have enjoyed.

But when I became Regional Defense Counsel for the Marine Corps on the East Coast, is when I really felt like I had found my calling – leading defense counsel. I went from the regional role to being the Chief Defense Counsel of the Marine Corps. I really like leading litigators.

LD: Some lawyers in the Sept. 11 case believe that trial is several years away. How long do you expect to stay in this role?

BGJB: I think it is a three-year assignment, but I don't know. Nobody said to me when I came in, "You are here for X amount of days." I want to stay in this position as long as I am effective. So, if that means five years, it means five years. If it means one year, it means one year.

Read the full Q&A at www.lawdragon.com/2016/07/06/lawyer-limelight-guantanamo-brig-gen-john-baker.

Joint Task Force-Guantanamo provides tours of the detention area, where this photo was taken, but Camp 7 is off limits. Photo by John Ryan.

change observers of the case may see is the addition of a second learned counsel for each 9/11 defendant. If the government is going to move forward with the trial of the century, he says, it had better put its money where its mouth is.

"The legal standard on capital cases is very clear," Baker explained. "Counsel are essentially required to investigate and litigate two simultaneous cases: one to determine the guilt of the client and one for mitigation if the client is found guilty. If we really want to try these cases, there needs to be a second learned counsel on each team."

Not surprisingly, the arrival of the 15th anniversary of the Sept. 11 attacks renewed discussions of whether the case would be better off in federal court, even if the steps to get there (transferring detainees) are presently barred by Congress. The most commonly expressed critique of the commissions system is that it's unnecessary given that federal courts have successfully processed hundreds of terrorist cases, typically ending in conviction.

Only one detainee case, that of Ahmed Khalfan Ghailani, was moved to federal court from Guantanamo Bay before Congress banned transfers of detainees to U.S. soil. In 2010, Ghailani was found guilty in New York federal court for his role in the 1998 bombing of the U.S. Embassy in Dar es Salaam and received a life sentence – another success, perhaps, for the civilian side. But supporters of the military option also cite the case as a dangerous near-failure, given that Ghailani was convicted of just a single conspiracy count and acquitted of hundreds of murder and terrorism charges. U.S. District Judge Lewis Kaplan excluded a key witness from testifying after learning he had been through the CIA's coercive interrogations. Of course, a military judge at Guantanamo Bay might have to make a similar call under the 2009 MCA's provisions.

The convictions by military commissions include three during the Bush era (one by guilty plea) and five under Obama (all by guilty plea). They generally have resulted in short sentences, with all but three of the convicted detainees long since transferred out of Guantanamo Bay to their home countries. In addition, the D.C. Circuit has overturned convictions on charges of providing material support for terrorism and conspiracy – charges used in federal court cases all the time – because they were not recognized war crimes at the time the defendants engaged in the conduct.

Walter Ruiz, lead defense attorney for Mustafa al Hawsawi. Photo by John Ryan

However, the government successfully challenged a D.C. Circuit panel's invalidation of the conspiracy charge against Ali al Bahlul, who received a life sentence and remains at Guantanamo, in an appeal to the full circuit. In October, the circuit upheld al Bahlul's conspiracy conviction in a 6-3 ruling; the issue is likely headed to the U.S. Supreme Court.

For a military tribunal, the Sept. 11 case is on much firmer ground because the allegations include established war crimes, such as attacking civilians, attacking civilian objects, murder and destruction of property in violation of the law of war, terrorism and hijacking.

And, of course, by this point so much has transpired in the case that starting over in a new jurisdiction is difficult to imagine – even if imagining this commission's conclusion is equally difficult. The case has finally built some semblance of momentum. Pohl always sets the hearing docket based on the motions that have been fully briefed. During the Spring and Summer sessions, the judge and the lawyers were pleasantly surprised that they made it through everything available for argument.

"As I've said on many occasions, I'm more optimistic than realistic," Pohl told the court on June 2. "But actually this week we got a lot of things done, much more than I anticipated, and we've kind of exhausted what's on the docket."

He called an early recess for the day.

Critics of the military commissions often invoke the victim family members, who must wait for justice. In the area of war crimes and international justice, the long wait for justice is a recurring theme for victims and their families, particularly in new court systems that attempt to account for mass atrocities. In one of just many examples from the past few decades, earlier this year the International Criminal Tribunal for the Former Yugoslavia, based in The Hague, finally convicted Serb wartime leader Radovan Karadzic for genocide, war crimes and crimes against humanity tied to events that unfolded in the early-to-mid 1990s. In the eyes of some observers, like former Attorney General Eric Holder, who claimed nearly three years ago that the five defendants would be on death row if they had been prosecuted in federal court, the difference is that the wait for 9/11 justice is self-inflicted, not mandated by an existing court's inability or unwillingness to handle a case.

At the press conference concluding the most recent session in July, Harrington said that the fastest way to move the case along would be "to take the death penalty off the table."

"The government ought to seriously consider that at this point," the attorney said.

But family members who have travelled to Guantanamo Bay don't often criticize the government for the pace of the case, resenting instead certain defense tactics. It's hard to generalize on these topics, as some family members said they would have preferred a federal court trial. But most who have spoken on the record are deeply appreciative of the effort put forth by Martins and his team and say they are willing to wait as long as it takes for the Guantanamo military tribunal to finish. Where critics see a farcical system stacked against the defendants, these observers see a system willing to bend over backwards for the defendants, to cross every "t" and dot every "i" to prove that Americans do things right.

When he took the job of chief prosecutor, Martins requested the assignment to be his last in the military to avoid any consideration for a promotion. He was scheduled to retire back in 2014 before receiving a three-year extension. He believes in continuity, and the long view.

"We're going to do this for however long it takes," Martins told Lawdragon earlier this year. "Another benefit of meeting with family members is that many of them take a long view, too. They inspire us."