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Carnival of Justice: Military Commissions & Guantanamo Bay

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Every trip to Guantanamo Bay, Cuba (GTMO) brings with it a strange cocktail of emotions. The excitement of prosecuting before a historic military tribunal, the nervous energy when delivering an oral argument before the judge, and the dread of reading the inevitably negative headlines the following day are all part of the experience. But it seems that the commissions' proceedings are merely a sideshow in this carnival-like atmosphere. As famously described by the Saudi national Ghassan Sharbi at his arraignment in 2006, the second iteration of the military commissions were simply the "same circus, different clown."

Make no mistake, this is not the same "circus" described by critics of the military commissions. That is a term leveled at the process — a process which is by any legal standards quite fair. Rather, in this sense, the carnival spirit can be seen in the trips to and from Guantanamo Bay, and the subsequent news reports about Court sessions, which seldom reflect what actually occurs.

In order to save resources, travel to GTMO for the commissions' hearings is consolidated into one flight. While the group waits together at the terminal, walking to find a seat for a government prosecutor feels similar to what a tight-rope walker must feel — everyone waits for the fall. Not-so-subtle glances and mouth-covered comments are what greet those of us that would dare defend anything GTMO-related, including the prosecution of suspected terrorists. This, in contrast to the hug-fest shared between the defense, media personnel, and non-governmental organizations, can be quite disheartening. Admittedly, the distance we feel as prosecutors is largely self-imposed. Prohibited from making statements to the press, we must quietly look on as defense counsel hold interviews and solidify their victory in the court of public opinion. With megaphone in hand, the ringmaster controls the crowd.

After the boarding announcement, the prosecution, defense, paralegals, and observers from numerous media outlets and NGOs push into the same charter flight, not unlike packing clowns into funny cars. Never have such disparate interests and personalities collided in such a small space. Nonetheless, the co-mingling is typically polite and professional, but with underlying tension.

Flying into GTMO for the first time is like entering a parallel universe. Informed only by reports that it is “the gulag of our times” (Amnesty International), it is surprising to discover a tropical paradise. If it were not a naval base, GTMO would certainly be prime beachfront resort property with its impossibly blue waters, surrounding mountains stretching into Cuba, and clear skies except for the occasional late afternoon Caribbean rain. Tucked away in this landscape, the base itself is only 40 square miles, and the detention facility takes up a small fraction of that.

The ideal surroundings are not enough to remove the dour skepticism of our observers. On each trip there are approximately 30 press and NGO representatives who attend the commission hearings and report on everything they see. These include reporters from *The New York Times*, Associated Press, Reuters, *Miami Herald*, *Toronto Star*, and representatives from Amnesty International, the ACLU, Human Rights Watch, and Human Rights First. While some of the reporting is accurate and unbiased, for the majority I must assume they are blinded by the bright lights under the big top.

An example of, shall I say, unfocused reporting is evident in a recent session held in May. Mr. al-Bahlul was to be arraigned for various offenses, which included conspiring with al-Qa’ida. This hearing was special because it was the debut of the multi-million dollar, state-of-the-art court complex designed to eventually try the detainees accused of plotting and executing the attacks of September 11, 2001. The new facility experienced several technical problems, including malfunctioning audio equipment, a brief power outage, and a humorous incident when the Judge left the bench to find the nearest working microphone — which happened to be at the same table as Mr. al-Bahlul himself.

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While all of this is interesting, of greater importance were statements made by al-Bahlul. Reaffirming his commitment to ‘Usama bin Ladin, he denounced the tribunal and threatened to boycott the proceedings – his second such protest. For his grand finale, al-Bahlul vowed to continue his resistance in the name of jihad against the United States. But the headlines read: “Comedy of Errors As New War Court Complex Debuts.” (*Miami Herald*) Not unsurprisingly, most articles contained little to no coverage of the remarkable statements made by the accused.

The courtroom battles aren’t adequately captured by the onlookers either. Most of the hearings to date have been oral arguments on pre-trial motions, hashing out which legal principles will be applied, whether charges should be dropped or amended, and the type of evidence that will be admitted at trial. The give and take between the prosecution and defense is heated and contentious at times, but guided by questions or instructions from the military judge. At the end of the day, justice is being done at each of these hearings. The defense has an unfettered opportunity to zealously represent their client, and the military judge makes independent and unbiased rulings on the legal issues argued by each party. In fact, in one case, the judge raised a jurisdictional challenge on his own and dismissed a case because the government had not shown that the accused was properly before the court. No other unlawful combatant in the history of the world has ever been afforded this degree of due process.

Overcoming the general ill-feelings toward the commissions requires a good sense of humor. That is why on Wednesday nights the prosecutors, and sometimes the defense, can be found at the GTMO officers’ club for Karaoke Night. After a long day of preparing motions and oral argument for a Thursday hearing, a colleague from the Department of Justice (“Rob”) and I decided to take a break and relax at the officers’ club. Rob had done a great deal of research for his arguments and one of the reoccurring themes was that, contrary to assertions made in defense motions, the US Constitution does not extend to aliens detained at GTMO. On the way to the club, Rob looked at me and said, “You know, the only song I sing at karaoke is ‘Lucille’ by Kenny Rogers, but my wife never lets me sing karaoke.” I asked, “Are you going to sing tonight?” Without missing a beat he replied, “Of course. After all of the research I have done I can be sure of two things at GTMO — the Constitution and my wife’s rules do not apply.” The only cruel and inhumane act at GTMO that night was Rob’s rendition of “Lucille.”

The in-court showmanship by the defense outshines even the songs at Karaoke Night. Light on their feet and quick with a sound bite, I often wonder why defense counsel bother facing the military judge during oral argument. Most of their statements seem pre-packaged for a press release and more appropriately aimed at the gallery in the rear. In the past, the defense has claimed that the government “buried evidence,” “manipulated documents,” and “tampered with witnesses.” With such exaggerated statements, the gallery must expect the prosecutors to stand up and say, “For my next trick I will dazzle you with a bit of ‘bribing the jury’ followed by a never-before-seen performance of ‘witness intimidation!’” But don’t expect any oohs and aahs from this audience.

To be fair, defense counsel have a difficult job representing their clients at GTMO, and must have every opportunity to adequately prepare for trial. The tremendous amount of discretion granted to them by the rules and by the judges is testament to the due process provided at military commissions. That is why attacks leveled against the integrity of the prosecution are particularly egregious and unnecessary given the other valid legal arguments at the disposal of the defense.

But these unwarranted criticisms, much like the imperfect reports, are unlikely to correct themselves. To its own discredit the government has remained largely silent, allowing public perception to be shaped by the opposing point of view. As a result, the legacy of the military commissions has already been written. Unlike the military tribunals at Nuremburg following World War II, history will not be kind to these trials. This should surprise no one. The effective public relations campaign by the defense coupled with an overly receptive audience in the press and NGOs will likely prevail. This only shows that common sense, along with the Constitution and Rob’s wife’s rules, does not apply at the circus we call Guantanamo Bay.

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