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Lessons from Gitmo

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**Review: International Environmental Law:
The Practitioner's Guide to the Laws of the
Planet, Roger R. Martella, Jr. and J. Brett
Grosko (Eds.) American Bar Association,
Section of Environment, Energy and Resources
(2014)**

ANASTASIA TELESITSKY*

When John Donne penned his metaphor “no man is an island” in 1624,¹ he could not have anticipated how connected we have become in the 21st century. Today, contemporary human communities spanning the globe experience simultaneously both the positive externalities of globalization, in the form of the democratizing internet revolution, along with the negative externalities of globalization, in the form of the extraction of conflict minerals to build our electronics and electronic waste. As individual citizens, we are part of an increasingly complex web of seemingly small and discrete policy decisions with larger and sometimes tragic transboundary consequences. An increasing number of governments and institutions recognize that individual political and economic decisions have resulted in globally cumulative environmental consequences that necessitate collective action in order to avoid or mitigate long-term harm to global well-being.

It is within this context of increasing connectivity that the American Bar Association's Section of Environmental Energy and Resource's recent publication *International Environmental Law: The Practitioner's Guide to the Law of the Planet (IEL: The Practitioner's Guide)* should be read.² If increased connectivity has been the source of some of our current global environmental challenges such as the spread of invasive species, the ability to connect across great distances can also be a source for devising long-term solutions to addressing chronic transboundary issues such as ocean acidification. As a collaborative project, the *IEL Practitioner's Guide* demonstrates this positive power of connectivity with fifty-eight contributors located in twenty-six countries including both the Global North

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1. JOHN DONNE, *Meditation 17*, in DEVOTIONS UPON EMERGENT OCCASIONS (Cosimo Classics 2007) (1624).

2. INTERNATIONAL ENVIRONMENTAL LAW: THE PRACTITIONER'S GUIDE TO THE LAWS OF THE PLANET (Roger Martella & J. Brett Grosko eds., 2014) [hereinafter IEL: THE PRACTITIONER'S GUIDE].

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and the Global South, as well as contributors from an array of professional backgrounds including intergovernmental organizations, governmental agencies, private firms, and the academy.

IEL: The Practitioner's Guide offers a practical and accessible handbook of fifty concise chapters covering the role of international environmental law in the larger field of law, key international environmental legal developments, and comparative national environmental laws. The book should become part of the reference library for any general practice firm because international environmental law can no longer be regarded as an arcane subject matter of interest to a clique of diplomatic experts. As the book's general editors, Roger Martella and J. Brett Grosko, observe, the rapid globalization of markets "have thrust international environmental law issues from strictly a foreign arena onto the front doorstep of attorneys practicing environmental law from regional cities to small manufacturing towns."³

Today to be a responsible practitioner of environmental law, one must also have a working knowledge of both international environmental law and comparative law. As Robert Percival and Tseming Yang observe in their contributions to the volume, domestic environmental law does not exist in a vacuum because of the emergence of "global environmental law."⁴ More and more regularly, international or regional environmental law informs the content of domestic environmental law; or, one domestic environmental regime will borrow standards from another domestic environmental regime. For example, in the United States some environmental statutes directly incorporate international treaty requirements.⁵ The Registration, Evaluation, Authorization, and Restriction of Chemicals (REACH) Legislation of the European Union to regulate chemical production now impacts the substance of chemical production legislation outside of Europe.⁶ Increasingly, transnational laws covering the conduct of private individuals are influencing laws, such as the influence of multi-stakeholder Extractive Industries Transparency Initiative on the development of the U.S. Dodd-Frank Act on financial reform.⁷

Just as practitioners must be aware of the variety of sources of law that will govern their clients' actions both at home and abroad, so too must practitioners representing globally mobile clients be prepared to respond to litigation across a variety of jurisdictions even where the underlying activities originate in another jurisdiction. Charles di Leva offers a valuable chapter for practitioners, reminding counsel that litigation can arise over failure

3. *Id.* at xlix.

4. Robert Percival, *The Globalization of Environmental Law*, in *IEL: THE PRACTITIONER'S GUIDE*, *supra* note 2, at 3-11; Tseming Yang, *The Relationship between Domestic and International Environmental Law*, in *IEL: THE PRACTITIONER'S GUIDE*, *supra* note 2, at 13-21.

5. *See, e.g.*, Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1412(a) (requiring application of standards under the London Convention on Dumping); Clean Air Act, 42 U.S.C. § 7671(6) (requiring the term "consumption" to be "construed in a manner consistent with the Montreal Protocol").

6. *See, e.g.*, [Order No. 7, Measures for Environmental Management of New Chemical Substances 2010] (promulgated by the Ministry Env't Prot., Jan. 19, 2010, effective Oct. 15, 2010), *available at* http://www.rsjtechnical.com/images/Documents/China_New_Chemical_Substances_Jan10.pdf (China); Act on the Registration and Evaluation of Chemicals, Act No. 11789, Apr. 20, 2013 (S. Kor.).

7. Corporate members of the Extractive Industry Transparency Initiative are expected to disclose company payments to governments associated with resource extraction. EITI INT'L SECRETARIAT, *THE EITI STANDARD 28* (Sam Bartlett & Dyeke Rogan eds., 2015), *available at* https://eiti.org/files/English_EITI_STANDARD.pdf; Dodd-Frank Wall Street Financial Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), s. 1504 (amending Securities Exchange Act of 1934, 15 U.S.C. § 78m).

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to comply with standards not just of a nation, but also of an international financial institution, depending on how a project has been financed.⁸

For a practitioner with multinational clients, or a client who relies upon an international supply chain, the remainder of the book offers a valuable reference guide. Expert authors describe the international regime in eleven different areas including: (1) air and climate change; (2) water; (3) handling, treatment, transportation, and disposal of hazardous materials; (4) waste and site remediation; (5) response to emergencies; (6) natural resource management and protection; (7) management and recovery of natural resource damages; (8) protection of species; (9) environmental review and decision making; (10) transboundary pollution; and, (11) civil and criminal enforcement and penalties. These eleven different areas of law are then used to structure chapters that cover a selection of nations that include the top fifteen nations in terms of gross domestic product. Additional chapters provide insight into the governance of the European Union, North America, Central America, South America, Southeast Asia, and the Arctic.

This book makes a valuable contribution in providing concise descriptions of existing environmental legal regimes. For a private practitioner, it offers a quick checklist of what laws might govern a particular transaction in specific jurisdictions, and citations to these laws. For a government legislative or administrative practitioner seeking to reform existing laws, the volume offers a cornucopia of approaches that might be adopted to protect the environment. For a member of the judiciary, the volume offers an easy to explore source of reference for comparative law.

While the book is highly informative, the only suggestion for possible future editions would be to structure the book more tightly around the eleven thematic areas. The text would be strengthened if, rather than having separate chapters covering each nation's environmental law, the selected nations' approaches to a thematic area were, instead, contained within those thematic areas' respective chapters. This structure would make it easier for an audience to compare and contrast the variety of approaches taken by the States. Given that fifty-eight authors were operating in twenty-six countries to produce this excellent volume, this suggestion would have required an even greater degree of coordination, which would be difficult to achieve with the busy schedules of authors seeking to complete this project in only eighteen months.

Perhaps, a second edition to this handbook could seek to create a larger conversation among the authors who are contributing their expertise on national, regional, and international environmental frameworks. For example, as South American authors learn about African approaches and North American authors learn about Asian approaches, perhaps new ideas will be transplanted, or previously overlooked points of legal convergence will be identified. Even though practitioners of environmental law may have unique political and cultural considerations depending on where they practice, every State can benefit from an open-minded exchange of ideas. As Justice Joseph Story, one of the founders of the U.S. legal system once remarked about the United States: "There is no country on earth, which has more to gain than ours by the thorough study of foreign jurispru-

8. Charles di Leva, *How to Approach an International Environmental Law Question*, in IEL: THE PRACTITIONER'S GUIDE, *supra* note 2, at 23-32.

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dence. . . . Let us not vainly imagine, that we have unlocked and exhausted all the stores of juridical wisdom and policy.”⁹

IEL: The Practitioner’s Guide provides a crucial lesson about the role of international environmental law in a world where even our fundamental concepts of time and space are rapidly evolving. John Donne reminds us that we are “a part of the main.”¹⁰ This is true for law also. As individual citizens identified in part by our nationalities, we belong to a legal system that extends beyond our own national laws—a global environmental legal system. To negotiate this emerging legal system will require new skills and knowledge on the part of practitioners; *IEL: The Practitioner’s Guide* provides an excellent introduction to the content of global environmental law.

9. Joseph Story, Progress of Jurisprudence, Address at the Suffolk Bar on their Anniversary (Sept. 4, 1821), in *THE MISCELLANEOUS WRITINGS, LITERARY, CRITICAL, JURIDICAL AND POLITICAL OF JOSEPH STORY* 405, 434-35 (James Munroe & Co. ed., 1835).

10. Donne, *supra* note 1.

Lessons from Gitmo

MEGHAN J. RYAN*

I recently returned from a trip to Guantanamo Bay Naval Base (GTMO, or Gitmo). I spent a week at Camp Justice—the site of the military commissions proceedings for the alleged terrorists and war criminals who have been held on the base since the “War on Terror” began after 9/11. I was representing the American Bar Association and observing military commission proceedings in the case of high-value detainee Abd al Hadi al-Iraqi, who was allegedly “one of Osama bin Laden’s closest advisors.”¹ He has been charged with “Denying Quarter, Attacking Protected Property, Using Treachery or Perfidy, and Attempted Use of Treachery or Perfidy in a series of attacks in Afghanistan and Pakistan between about 2003 and 2004, and Conspiracy to commit law of war offenses.”² I was tasked with observing the proceedings to ascertain whether they comply with human rights principles and relevant rules of law. During the course of this weeklong adventure, I learned a number of lessons.

1. “Hurry up and wait” may be an appropriate military motto.

My Gitmo adventure began as I waited for my flight from Andrews Air Force Base in Washington, D.C. We had been asked to arrive at Andrews by 0600 on Sunday, but after a series of flight delays, we didn’t end up departing Andrews until around 1330. It’s about a three-hour flight to Guantanamo Bay from D.C., so we arrived in Cuba at around 1630

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1. Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1450 (2008); Mark Mazzetti, *Rules Lay Out C.I.A.’s Tactics in Questioning*, N.Y. TIMES, July 21, 2007, at A1.

2. Abd al Hadi al-Iraqi, OFFICE OF MIL. COMM’NS, <http://www.mc.mil/Cases.aspx?caseType=ome&status=1&id=47> (last visited Sept. 3, 2015); see also Charge Sheet: Abd al Hadi al-Iraqi, OFFICE OF MIL. COMM’NS (Feb. 3, 2014), <http://www.mc.mil/Portals/0/pdfs/allIraqi/ChargingDocumentAbdalHadialIraqiFeb2014.pdf>; Charge Sheet: Abd al Hadi al-Iraqi, OFFICE OF MIL. COMM’NS (Feb. 3, 2014), <http://www.mc.mil/Portals/0/pdfs/allIraqi/Hadi%20Al%20Iraqi%20Referred%20Charge%20Sheet.pdf> (referred charges).

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or 1700.³ Throughout the day, I became thoroughly familiar with an unofficial military motto: “Hurry up and wait.”

“Hurry up and wait” may also be the theme for many of the detainees at Guantanamo. I traveled to Gitmo to view proceedings related to the case against Abd al Hadi al-Iraqi. Mr. Hadi al-Iraqi has been held at Guantanamo since April of 2007.⁴ (Prior to that, he was in CIA custody.⁵) He is suspected of engaging in many violations of the laws of war. After years of detention, in 2013 he was charged with denying quarter (ordering that there will be no survivors), attacking protected property (attacking a medical helicopter, which is protected under the laws of war), using treachery or perfidy (inviting confidence that a person was protected under the laws of war as civilian but using the person to conduct hostilities), and attempted use of treachery or perfidy.⁶ He was subsequently also charged with conspiracy.⁷ Currently, the proceedings related to Mr. Hadi al-Iraqi’s case are pre-trial in nature. The litigants have been dealing with issues such as whether Mr. Hadi al-Iraqi’s alleged religious desire that female guards not touch him must be respected, whether the government’s conspiracy allegations are too broad under applicable law, and whether the court possesses personal jurisdiction over him.⁸ The case is not expected to proceed to trial anytime soon.

Other Gitmo detainees are in similar states of limbo. Guantanamo has been holding hundreds upon hundreds of War-on-Terror detainees since early 2002.⁹ Today, nearly a hundred still remain.¹⁰ Many of these detainees have been held without charges ever

3. Cuba is in the same time zone as Washington, D.C.

4. See Press Release, U.S. Dep’t of Def., Defense Department Takes Custody of a High-Value Detainee, No. 494-07 (Apr. 27, 2007), <http://archive.defense.gov/releases/release.aspx?releaseid=10792>.

5. See Karen DeYoung, *CIA Received Recent Detainee From Turkey, Al-Qaeda Says*, WASH. POST, May 25, 2007, www.washingtonpost.com/wp-dyn/content/article/2007/05/24/AR2007052402417.html; Dafna Linzer, *CIA Held Al-Qaeda Suspect Secretly*, WASH. POST, Apr. 28, 2007, at A1.

6. See Charge Sheet: Abd al Hadi al-Iraqi, OFFICE OF MIL. COMM’NS (June 7, 2013), <http://www.mc.mil/Portals/0/pdfs/allIraqi/ChargingDocumentsAbdalHadialIraqi2013.pdf>. The initial charges were ultimately dropped, and the charges on which the government is proceeding are dated February 3, 2014. See Dismissal of Sworn Charges Dated June 7, 2013, OFFICE OF MIL. COMM’NS (June 2, 2014), <http://www.mc.mil/Portals/0/pdfs/allIraqi/Hadi%20Charges%207%20Jun%2013%20-%20Dismissed.pdf>; Charge Sheet: Abd Al Hadi al-Iraqi, OFFICE OF MIL. COMM’NS (Feb. 3, 2014), <http://www.mc.mil/Portals/0/pdfs/allIraqi/ChargingDocumentAbdalHadialIraqiFeb2014.pdf>.

7. See Charge Sheet: Abd Al Hadi al-Iraqi, OFFICE OF MIL. COMM’NS (Feb. 3, 2014), <http://www.mc.mil/Portals/0/pdfs/allIraqi/ChargingDocumentAbdalHadialIraqiFeb2014.pdf>; Charge Sheet: Abd Al Hadi al-Iraqi, OFFICE OF MIL. COMM’NS (Aug. 28, 2013), <http://www.mc.mil/Portals/0/pdfs/allIraqi/ChargingDocumentAbdalHadialIraqiAug2013.pdf>.

8. See Mark Martins, Chief Prosecutor, Remarks at Guantanamo Bay (Jan. 25, 2015), <http://www.mc.mil/Portals/0/pdfs/VWAP/allIraqi%20Statements/3%20-%20January%2025,%202015%20-%20Statement%20of%20the%20Chief%20Prosecutor.pdf>. Mr. Hadi al-Iraqi’s “Emergency Defense Motion For Appropriate Relief To Cease Physical Contact with Female Guards” was denied on February 24, 2015. See Ruling, United States v. Abd al Hadi al-Iraqi (Feb. 24, 2015), [http://www.mc.mil/Portals/0/pdfs/allIraqi/Al%20Iraqi%20\(AE021DD\).pdf](http://www.mc.mil/Portals/0/pdfs/allIraqi/Al%20Iraqi%20(AE021DD).pdf); see also Emergency Defense Motion for Appropriate Relief to Cease Physical Contact with Female Guards, United States v. Abd al Hadi al-Iraqi (Oct. 16, 2014), [http://www.mc.mil/Portals/0/pdfs/alIraqi/al%20Iraqi%20\(AE021\).pdf](http://www.mc.mil/Portals/0/pdfs/alIraqi/al%20Iraqi%20(AE021).pdf).

9. Alyssa Fetini, *A Brief History of Gitmo*, TIME, Nov. 12, 2008, <http://content.time.com/time/nation/article/0,8599,1858364,00.html>.

10. See Charlie Savage, *9 Guantánamo Prisoners from Yemen are Sent to Saudi Arabia*, N.Y. TIMES, Apr. 16, 2016, http://www.nytimes.com/2016/04/17/us/politics/9-guantanamo-prisoners-from-yemen-are-sent-to-saudi-arabia.html?_r=0; Kevin Liptak, *Obama Administration in “Final Stages” of Planning Gitmo Closing*,

being filed against them, and, throughout this long period of detentions,¹¹ some commentators have suggested that these detainees are in an even worse position because only the cessation of hostilities will trigger their release.¹² However, Homeland Security Secretary Jeh Johnson has suggested that the United States could reach a “tipping point”; as hostilities stemming from 9/11 are dying down, continued indefinite detainment at Guantanamo in instances where no charges have been filed may soon no longer be justified.¹³

The reasons for delay are varied. In capital cases, defense counsel seem to be happily contributing to the delays with the aim of prolonging their clients’ lives. This is nothing new in the arena of capital defense. In noncapital cases like Mr. Hadi al-Iraqi’s, delays may be more attributable to the government. Even in this case, though, defense counsel has filed its fair share of pretrial motions in an attempt to fairly represent Mr. Hadi al-Iraqi. Other delays may be due to a lack of certainty about what the rules of the game are because these military commissions are in several ways novel,¹⁴ and the difficulty of proffering evidence because it may lie in foreign lands—think Yemeni crime scenes, for example—or raise serious national security concerns. Regardless of the reasons, long waits have become a sobering characteristic of these military commissions proceedings.

2. Security is tight at Gitmo.

I was struck by the tight security measures taken at Guantanamo. Of course I expected the high fences, limits on photography, passing through metal detectors to get into court, and the many men and women with guns. This is not to mention the minefields that litter the Cuban side of Guantanamo and about which I was half-jokingly warned when I arrived on base. What I did not expect were the physical and nonphysical separations between the military commissions proceedings and the observers. The observers are required to sit behind a glass wall that stands approximately 100 feet from the judge. Moreover, the observers cannot hear any sounds directly from the courtroom. Instead, the audio of the proceedings is projected from a large television monitor that is on a forty-second delay. So, observers can view actions in the courtroom and then, forty seconds later, view them again on the closed-circuit television. (At times, the observers seemed grateful for the opportunity to view court actions again, such as when the defense attorney humorously walked around in a penguin-like fashion as he tried to convey how a shackled Mr. Hadi al-Iraqi would not pose a danger to the security guards if the one female guard among the three guards transporting him were not allowed to make contact with Mr.

CNN, July 22, 2015, <http://www.cnn.com/2015/07/22/politics/guantanamo-bay-closing-plans-obama-earnest/>.

11. See Stephen I. Vladeck, *Detention After the AUMF*, 82 *FORDHAM L. REV.* 2189, 2190 (2014).

12. See Jonathan Hafetz, *Detention Without End? Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing*, 61 *UCLA L. REV.* 326, 329 (2014) (“Paradoxically, for many detainees the best hope for leaving Guantanamo in recent years has seemed to be prosecution and conviction for a war crime in a military commission.”).

13. Jeh Charles Johnson, Gen. Counsel, Dep’t of Defense, Speech at Oxford Union: “The Conflict Against Al Qaeda and its Affiliates: How Will It End?” (Nov. 30, 2012), https://www.lawfareblog.com/jeh-johnson-speech-oxford-union#_ftn1; see Vladeck, *supra* note 11, at 2195.

14. See *infra* Lesson No. 4.

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Hadi al-Iraqi.¹⁵) At one point, I apparently raised a red flag for the military guards in the gallery. During a fairly dry part of the proceedings, I started doodling in the margin of my legal pad. In this relatively small room for observers, there are signs prohibiting drawing or recording the security devices in place, and my guess is that a military person manning one of the cameras trained on all of us observers wondered if that was what I was doing. As a result, an armed military person swiftly moved into place next to me. He never said a word, but, to someone who (despite now living in Texas) has never been around many guns, his presence was quite intimidating. I'm quite sure that was the point.

3. But there are inconsistencies about what protections are necessary.

I did not expect a buttoned-up organization like the U.S. Military, which is the most powerful in the world,¹⁶ to lack consistency. I imagine that the military personnel on the base are consistently qualified and vigilant, but they wavered and suffered miscommunication when it came to determining what we visitors on the base would be allowed to see and photograph. Before I headed to Guantanamo, one of my colleagues told me that I should ask to walk the fence line—something he had the chance to do just a few months before. My mind flashed back to Tom Cruise, as Lieutenant Kaffee, having to cover up with some camouflage because he was wearing his “f*\$\$!ty white uniform” along the fence line in the film *A Few Good Men*.¹⁷ According to Corporal Barnes, if “[t]he Cubans see an officer wearing white, they think it might be someone they’d wanna take a shot at.”¹⁸ Okay, take the white suit out of the suitcase. Check. It turns out that I probably could have worn my white suit at Gitmo, as my military escorts shot down my idea of walking the fence line. “That’s not allowed,” they responded. On a different occasion, when I began photographing the Camp Justice sign—with the tents we called home for the week in the background—I was swarmed by a number of well-armed military personnel. (This was somewhat alarming.) They told me that I was not allowed to take any photographs without a military escort. This conflicted with what my escorts had told me (and the miscommunication angered my escorts). I was also told that I was not allowed to photograph Camp X-Ray—the wretched-looking prison camp where the detainees were originally held. I later learned that other visitors were allowed to take photographs of Camp X-Ray. These inconsistencies mean that many people will have very different experiences if they have the opportunity to visit Guantanamo Bay.

4. There are also major questions about which laws apply.

Not only do there seem to be inconsistencies as to what observers may see and photograph, but there are perhaps more important uncertainties about what law actually applies

15. For more on the odd juxtaposition of the grave situation of these proceedings and the moments of levity occasionally found in them and at Gitmo in general, see *infra* Lesson No. 9.

16. See James Fallows, *The Tragedy of the American Military*, THE ATLANTIC, Jan./Feb. 2015, <http://www.theatlantic.com/features/archive/2014/12/the-tragedy-of-the-american-military/383516/>.

17. A FEW GOOD MEN (Columbia Pictures 1992). You may recall that Colonel Jessup, played by Jack Nicholson, said to Kaffee: “You see, Danny, I can deal with the bullets and the bombs and the blood. I don’t want money, and I don’t want medals. What I do want is for you to stand there in that faggoty white uniform and with your Harvard mouth extend me some fuckin’ courtesy.” *Id.*

18. *Id.*

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in these military commissions proceedings. As a criminal law and procedure scholar who has limited experience with international law and hardly any experience with military law, I expected to not know much of the law applied in the Gitmo military commission proceedings, but I did expect to learn a lot. What I learned, though, is different than I expected. I discovered some interesting tidbits about international and military law, but I was also surprised about the general reliance on U.S. federal law. For example, Mr. Hadi al-Iraqi has been charged primarily with conspiracy counts. Conspiracy under international law, though, is much more circumscribed than under the *Pinkerton*¹⁹ doctrine of conspiracy pursuant to U.S. federal law. Accordingly, the prosecutor argued that U.S. federal conspiracy law applies to Mr. Hadi al-Iraqi, while defense counsel argued that the narrower international law applies. Which law is found to apply could determine whether Mr. Hadi al-Iraqi's alleged encouragement of others to flout the rules of international law—such as by encouraging them to pretend like they were medical personnel rather than fighting soldiers and then attack American military personnel—would itself be criminal. Although there are often legal arguments in pretrial proceedings, I was surprised by these basic questions as to which laws apply.²⁰

5. We are lucky to have non-military juries.

Juries are one of the fundamental institutions of American justice. The right to a jury trial is guaranteed by no less than four constitutional provisions.²¹ Article III provides that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”²² The Fifth Amendment states that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”²³ The Sixth Amendment states that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”²⁴ And the Seventh Amendment provides that, “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”²⁵ One of the fundamental principles of the right to a jury is that we ought to be judged by our peers who represent the community.

At Gitmo, because the proceedings are military proceedings rather than ordinary state or federal proceedings, the detainees are not entitled to the typical jury. Rather, they have a right to a “panel.” Instead of potential jurors being randomly drawn from voter and driver’s license lists, the panel “members” who will judge the detainees’ fates are hand-

19. *Pinkerton v. United States*, 328 U.S. 640 (1946). The doctrine “impos[es] liability on a conspirator for all offenses committed in furtherance of the conspiracy, even if those offenses are actually performed by coconspirators.” BLACK’S LAW DICTIONARY 1186 (8th ed. 2004).

20. Of course there are often questions of law in U.S. state and federal courts as well. Still, the amount of gray area in the military commission proceedings stunned me.

21. See Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 856–57 (2014).

22. U.S. CONST. ART. III, § 2.

23. U.S. CONST. amend. VI. The Amendment provides an exception for “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” *Id.*

24. U.S. CONST. amend. VI.

25. U.S. CONST. amend. VII.

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picked by the Convening Authority.²⁶ They are handpicked by the individual who determined that they ought to be criminally charged in the first place.²⁷ Under the rules of U.S. federal and state courts, this would never fly. It would be like having the prosecutor decide which jurors would judge the case. In ordinary courts, this would reek of unfair, and unconstitutional, bias. As one judge advocate put it, this “is entirely at odds with” the constitutional requirement that a jury be drawn “from a fair cross-section of the community.”²⁸ It also violates basic separation-of-powers requirements.²⁹ The potential for bias is heightened in cases like this where the crimes at issue, as well as the defendants, are politically charged.

6. This is a public relations war.

After viewing some of the military commission proceedings, General Martins, the Chief Prosecutor in these military commissions, generously took the time to speak to us generally about the military commissions proceedings at Guantanamo. He answered a few questions, asked that everything remain off the record, and kindly took a photo with us. General Martins, perhaps not unexpectedly, had very strong views about the propriety of the proceedings at Guantanamo Bay. I was somewhat surprised, though, by the extent to which he was trying to persuade us. The proceedings at Gitmo have certainly gotten some bad press since they commenced in 2004.³⁰ There have been allegations that the charges against the detainees are vague and the evidence against them “shoddy,”³¹ that exculpatory evidence hasn’t been properly disclosed,³² that the wrong people—innocent people—are being indefinitely detained,³³ that the proceedings unnecessarily lack transparency, and that military commanders pressure the tribunals (judges) to rule against the detainees and interfere in the legal proceedings.³⁴ It is widely believed that Guantanamo

26. 10 U.S.C. § 825(d)(2) (2006). Moreover, the members must be officers, rather than enlisted men and women. Considering that the U.S. military consists of approximately 17% officers and 83% enlisted persons, this seems far from representative. See Office of the Deputy Assistant Sec’y of Def., *2013 Demographics: Profile of the Military Community* (2013), <http://download.militaryonesource.mil/12038/MOS/Reports/2013-Demographics-Report.pdf>.

27. 10 U.S.C. § 825 (2006); *United States v. Woods*, 74 M.J. 238, 239 (C.A.A.F. 2015).

28. Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 4 (1998); see also Isaac Kennen, *The Jury is Out on Military “Juries”: Seeking Fair Criminal Trials in Military Court*, CRIM. JUST., Winter 2015, http://www.americanbar.org/content/dam/aba/administrative/young_lawyers/committee_newsletters/2015/criminal_justice_2015_winter_newsletter.authcheckdam.pdf (reporting on the question of the constitutionality of military juries).

29. See *id.*

30. See *Military Commissions History*, OFFICE OF MIL. COMM’NS, <http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx> (last visited Sept. 13, 2015).

31. Glenn Greenwald, *Newly Leaked Documents Show the Ongoing Travesty of Guantanamo*, SALON, Apr. 25, 2011, http://www.salon.com/2011/04/25/guantanamo_19/.

32. *Why Guantánamo Is Unjust*, N.Y. TIMES, July 28, 2007, http://www.nytimes.com/2007/06/28/opinion/28iht-edguat.1.6383085.html?_r=0.

33. Conor Friedersdorf, *Dead After 11 Years of Despair: A Prisoner Who Proved Gitmo Is Immoral*, THE ATLANTIC, Sept. 13, 2012, <http://www.theatlantic.com/politics/archive/2012/09/dead-after-11-years-of-despair-a-prisoner-who-proved-gitmo-is-immoral/262317/>.

34. See Morris D. Davis, *Guantánamo’s Charade of Justice*, N.Y. TIMES, Mar. 27, 2015, <http://www.nytimes.com/2015/03/28/opinion/guantanamos-charade-of-justice.html>.