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A TRIUMPH OF ILL-CONCEIVED LANGUAGE: THE LINGUISTIC ORIGINS OF GUANTANAMO'S "ROUGH JUSTICE"

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THE TERROR COURTS: ROUGH JUSTICE AT
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INTRODUCTION

"The American story," Bush said, was "a story of flawed and fallible people, united across the generations by grand and enduring ideals."

"We are not this story's author, who fills time and eternity with His purpose," the president continued. "Never tiring, never yielding, never

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finishing, we renew that purpose today, to make our country more just and generous, to affirm the dignity of our lives and every life.”

President George W. Bush, Jan. 20, 2001¹

Throughout the years, the Naval Base at Guantanamo Bay has witnessed an abundance of intriguing linguistic words and phrases. For example, “Freedom Vanilla” replaced French Vanilla ice cream in the mess hall,² and the area where journalists and others were often sequestered during their visits to the base was re-named “Camp Justice.”³ The list goes on. However, the language that has had the most significant impact throughout the years has been the words and phrases used in the administration of justice regarding the detainees being held on terrorism charges.

Wall St. Journal Supreme Court reporter Jess Bravin’s book, *THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY*, thoroughly chronicles how the use of military commissions came about for the first time since the Second World War, and pointedly demonstrates the abundance of problems they faced once established. In addition to telling the story of Marine Corps lieutenant colonel Stuart Couch, an earnest military prosecutor who later becomes exhaustively disenchanted with the commissions, the book chronicles the new linguistic frontiers in the American legal community. In particular, the disturbing treatment of detainees and the hasty establishment of the commissions significantly troubled the process, leading to numerous problems that the commissions still face today, more than a decade after their establishment.

Noting in his first inaugural address that it was “a time of blessing,” President George W. Bush stated that he would “bring the values of our history to the care of our times,” and that he would confront the nation’s problems “instead of passing them on to future generations.”⁴ Though it may have been inaugural rhetoric, these phrases are a far cry from the language and policies employed under the administration. This is especially true in the context of the “war on terror.”⁵ As Bravin declares approximately a third of the way into his book:

“The Bush administration . . . acted as though 9/11 had forever changed the constitutional order, creating a permanent state of emergency where legislative and judicial powers must yield to executive policy decisions. Even so, the administration insisted there was no risk to human rights, because its secret policies were consistent

1. JESS BRAVIN, *THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY* 16 (2013).

2. *Id.* at 218.

3. *Id.* at 317.

4. Bravin, *supra* note 1, at 16.

5. HOWARD BALL, *BUSH, THE DETAINEES, AND THE CONSTITUTION: THE BATTLE OVER PRESIDENTIAL POWER IN THE WAR ON TERROR* (2007); see generally JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006).

with legal obligations and American traditions.”⁶

This book review analyzes how particular language used throughout the establishment and execution of the commissions differed from American legal traditions and proactively disrupted the job of commission officials, prosecutors and defense attorneys. In particular, it focuses on four linguistic changes that had considerable influence: (1) From Due Process to “Full and Fair”; (2) From Classified to “Protected”; (3) From Custodial Interrogation to “Enhanced Interrogation”; and (4) From Acts of Terrorism to “Material Support for Terrorism.” These phrases consistently usurped traditional American legal language found in the Constitution, Acts of Congress, ratified treaties (such as the Geneva Conventions), and led the commissions down a perilous path of ambiguity.

I. FROM DUE PROCESS TO “FULL AND FAIR”

The Fifth Amendment provides that no person shall “be deprived of life, liberty, or property, without due process of law.”⁷ Bush’s November 13, 2001 Military Order fell significantly short of this standard, noting that the commissions will “at a minimum provide . . . a *full and fair* trial, with the military commission sitting as the triers of both fact and law.”⁸ Bravin’s text, which spans more than a decade, emphasizes that the meaning of “full and fair” was never fully realized. It was not defined in the 2001 Military Order, and much of the confusion between the members of the Prosecutor’s Office that Stuart Couch works for is attempting to determine what exactly the phrase means.

Analyzing the evolution of Bush’s Military Order, Bravin notes that an almost complete “draft declared it ‘not practicable’ for military commissions to follow ‘the principles of law and the rules of evidence’ that defined American justice.”⁹ Additionally, the document “made no reference to basic elements of due process – proof beyond a reasonable doubt, presumption of innocence, the right to remain silent. The only standard was that evidence hold ‘probative value to a reasonable person.’”¹⁰ After seeing the draft Order, a group of top Judge Advocate Generals reacted in “disbelief,” and one noted that the document was “insane.”¹¹

Perhaps unsurprisingly, Vice President Cheney may have been most forthright in terms of how the “full and fair” commissions developed,

6. Bravin, *supra* note 1, at 168.

7. U.S. Const. amend. V.

8. Military Order –Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 1665 (Nov. 13, 2001) (emphasis added).

9. Bravin, *supra* note 1, at 39.

10. *Id.*

11. *Id.* at 39.

noting that prisoners “will have a fair trial, but it will be under the procedures of a military tribunal, under rules of and regulations to be established in connection with that We think it guarantees that *we’ll have the kind of treatment of these individuals that we believe they deserve.*”¹² Given the evolution of the commissions and the treatment of Guantanamo detainees, one assumes that the former Vice President accurately expressed the Administration’s perspective on the trials.

After much confusion, wasted time, and squandered resources, Stuart Couch drafted a list of prosecution standards which could have guided standards for “full and fair” trials in order to protect due process concerns. These included not pursuing “Special Project” detainees that have been subjected to enhanced interrogation unless all documents regarding the interrogation were released, and providing defense counsel classified and unclassified materials. The proposed standards were largely ignored.¹³

One voice that administration and commission officials could not ignore was John Paul Stevens, writing for the majority in *Hamdan v. Rumsfeld*.¹⁴ Stevens declared that the commissions in their current form violated the Uniform Code of Military Justice (“UCMJ”) and the Geneva Conventions. Stevens further noted that “Common Article 3, then, is applicable here and as indicated above, requires that Hamdan be tried by a ‘regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’”¹⁵ Subsequent to this ruling, however, Congress passed the Military Commissions Act of 2006,¹⁶ which stipulated that commissions’ procedures would proceed according to UCMJ regulations. Yet, the Act also stated that no defendants could “invoke the Geneva Conventions as a source of rights.”¹⁷ Additionally, because of the problems associated with the “full and fair” procedures that were already being administered, the Act deemed inapplicable the speedy trial,¹⁸ compulsory self-incrimination,¹⁹ and investigation²⁰ sections of the UCMJ.

Ultimately, the “full and fair” standard deviated so far from traditional American justice that its meaning never fully materialized, and the phrase provided numerous problems for prosecutors in their early attempts to try the Guantanamo detainees.

12. *Id.* at 47 (emphasis added).

13. *Id.* at 159-61.

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

15. *Id.* at 631-32.

16. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

17. *Id.* § 948(b)(g).

18. UCMJ art. 10, 10 U.S.C. § 810 (2006).

19. *Id.* § 831

20. *Id.* § 832

II. FROM CLASSIFIED TO “PROTECTED”

One of the major barriers in assessing whether there was “reason to believe” that an individual should be prosecuted was a new classification designed to withhold evidence. While governmental information has a well-established system in terms of categorizing classified and unclassified materials, Commissions’ authorities added an additional status category to unclassified information that they wanted suppressed.²¹ Bravin writes that the commissions added the “protected” status but provided no definition for the term,²² therefore complicating matters for those individuals involved in and reporting on the commissions.

Although Bush’s Military Order mentioned Clinton’s Executive Order regarding classified national security information, administration officials did not seem to abide by the “uniform system for classifying, safeguarding, and declassifying national security information” that the document provided.²³ During a Pentagon briefing, appointing authority of commissions, John Altenburg attempted to shed some light on the intricacies of the term, stating, “I try to draw a balance – Should I release this name? Should I allow this to be public? Should we put this up on the website? When I analyze and I see that there are national security interests or potential intelligence issues, I’m inclined to err on the side of being careful.”²⁴ This explanation hardly explains the differences in thought processes, let alone the differences in official administrative standards regarding what constitutes “classified” versus “protected.”

The new classification caused particular problems with journalists that were covering the commissions, including Bravin. Journalists viewed the video feed of the trials on a five-minute delay, so that nothing “protected” would slip out. However, for those privileged reporters that acquired seats inside the courtroom, officials noted that if any “protected” information was revealed, “soldiers would seize [the journalists’] notebooks, read them for proscribed information, and tear out the offending pages.” Photocopies of seized pages would later be returned with the “protected” information blackened out.

The Order went even further in prohibiting “protected” evidence from being seen by defendants or their attorneys. In a stirring reminder of how this differed from traditional American legal values, Bravin quotes Presiding Officer of Commissions Col. Pete Brownback asking defendant al-Bahlul: “Do you realize that because – well, that in accordance with the president’s Military Order and Military Commission Order No. 1, there may be evidence against you which you would not be

21. Bravin, *supra* note 1, at 183, 199.

22. *Id.* at 183.

23. Exec. Order No. 12958 – Classified National Security Information, 60 Fed. Reg. 634 (April 17, 1995).

24. Bravin, *supra* note 1, at 183.

allowed to see because of its protected nature?”²⁵ These words would likely never be uttered inside an American courtroom. *Hamdan v. Rumsfeld* attempted to remedy this situation, noting that it is an indisputable part of customary international law²⁶ that the accused must “be privy to the evidence against him.”²⁷ As noted above, however, the Military Commissions Act of 2006 deemed the investigation section of UCMJ inapplicable.

In all, the introduction of the “protected” classification further muddled the commission’s process, especially with regard to journalists and defendants.

III. FROM CUSTODIAL INTERROGATION TO “ENHANCED INTERROGATION”

Custodial interrogation procedures are some of the most litigated, adjudicated and sophisticated aspects of America’s criminal justice system, designed to protect defendant rights and allow interrogators to lawfully, although at times questionably, obtain information. Interrogation practices among U.S. police forces continue to have their problems, but the vast majority of these difficulties revolve around deception, not physical abuse or torture.²⁸ Two Supreme Court cases, one of them over a century old, virtually eliminated the practice of physical torture during custodial interrogation: the 1884 case of *Hopt. v. Utah*²⁹ and the 1936 case of *Brown v. Mississippi*.³⁰ Even where physical abuse was not a concern, the Supreme Court ruled in *Chambers v. Florida* that “persistent questioning and ‘other ingenious forms of entrapment’ could constitute compulsion.”³¹ Nevertheless, interrogation practices under the commissions radically diverged from traditional custodial practices.

Bravin notes that early on the administration attempted to present a rosy picture of detainees’ treatment, stating that “[o]fficials insisted that treatment of prisoners was ‘humane’ and ‘consistent with’ Geneva

25. *Id.* at 199.

26. This references obligations arising from established state practices, as opposed to formal international treaties. In *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006) Stevens goes on to note that: Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.” Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 *Yale J. Int'l L.* 319, 322 (2003). Among the rights set forth in Article 75 is the “right to be tried in [one.s] presence.” Protocol I, Art. 75(4)(e).

27. *Hamdan*, 548 U.S. at 634.

28. Irina Khasin, *Honesty Is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42(3) *VAND. J. TRANSNAT'L L.* 1029, 1043-1049 (2009).

29. *Hopt v. Utah*, 110 U.S. 574 (1884).

30. *Brown v. Mississippi*, 297 U.S. 278 (1936).

31. Khasin, *supra* note 27, at 1044.

conventions. In June 2003, President Bush underscored those claims with a statement marking the United Nations International Day in Support of Victims of Torture.³² Additionally, Bravin reports that “Jim Haynes, responding to a query from Senator Patrick Leahy, sent a letter stating that the United States conducted interrogations ‘consistent with’ the Convention Against Torture and its implementing legislation.”³³

However, John Yoo, now a professor of law at the University of California, Berkeley Law School, wrote a confidential Office of Legal Counsel opinion noting that federal law banning torture did not apply to suspected terrorists,³⁴ and Rumsfeld himself signed off on “special interrogation plans.”³⁵ During these sessions, interrogators often used a set of Army “approaches” including: “incentive”, “Fear-Down,” “Fear Up,” and “Pride and Ego Down.”³⁶ Bravin also cites “[a]dditional ‘tactics to induce control, dependence, compliance, and cooperation’ [that] included ‘isolation/solitary confinement,’ ‘degradation,’ ‘sensory deprivation,’ ‘manipulation of diet,’ ‘disruption of sleep and biorhythms,’ and ‘sensory overload.’”³⁷ These tactics are far beyond practices that occur in traditional custodial interrogations, and as far as prisoners of war are concerned, such practices have been banned since the U.S. signed the Geneva Conventions in 1949 and formally ratified them in 1955.³⁸

Some suspects wished that their captors turned them over to the United States, presumably based on the traditional American protections afforded to defendants and the United States’ record of abiding by the Geneva conventions. In fact, Bravin asserts that this was Mohamedou Ould Slahi’s wish.³⁹ Yet after Slahi completed a disturbing stint in Jordan, he had no idea what was in store for him as the US was adapting to its novel “rough justice” standards. Bravin states that his “enhanced interrogation” techniques included the following:

“Slahi was forced to stand, stripped naked, bent over; his anal cavity was searched. He was beaten – medical records later recorded ‘rib contusions’ as well as bruises and cuts to his lip and head – placed in

32. Bravin, *supra* note 1, at 81.

33. *Id.* at 82. Yet over time these assertions would prove false. A recent report by a non-partisan commission noted that the United States “indisputabl[y]...engaged in the practice of torture” at Guantanamo Bay, Afghanistan, Iraq and other areas. Constitution Project, *The Report of the Constitution Project’s Task Force on Detainee Treatment*, pp.1-8 (2013), available at <http://detainee-taskforce.org/pdf/Full-Report.pdf>.

34. Bravin, *supra* note 1, at 92. This memorandum remains classified, but is referenced in other memorandums.

35. *Id.* at 105, 257.

36. *Id.* at 88-89.

37. *Id.* at 92.

38. Geneva Conventions of 12 August 1949, Aug. 12, 1949 (ratified Aug. 30, 1955), 6 U.S.T. 3316, 1125 U.N.T.S. 609.

39. Bravin, *supra* note 1, at 101.

isolation, subjected to temperature extremes, including a room called the ‘freezer.’ He would be accused of breaking rules, of hiding things in his cell, then insulted and disciplined again. The ‘interrogation team will make detainee feel psychologically uncomfortable, emotionally uncomfortable, assert superiority over detainee, escalate stress, play loud music, and continue to condition detainee to menial tasks,’ the plan said.”⁴⁰

The label of “enhanced interrogation” framed the issue in such a way that established principles of justice were shunned and gaining information, any information, was supported. Additionally, the phrase undermined the legitimacy of the military commissions and its ability to prosecute many of the Guantanamo Bay detainees. Its common use by administration officials further demonstrates how the traditional values of the American justice system, giving due respect for defendants’ rights and the protections of the Geneva Conventions, were routinely swept aside.

IV. FROM ACTS OF TERRORISM TO “MATERIAL SUPPORT FOR TERRORISM”

The United States encountered numerous acts of terrorism before September 11, 2001, even at the hands of al-Qaeda.⁴¹ Indeed, crimes regarding terrorism and specific acts of terrorism were already present in American law.⁴² However, since Guantanamo largely housed “the butcher[s], the baker[s] and the candlestick maker[s]”⁴³ of 9/11 and those found on the battlefields of Afghanistan, established law provided little recourse for prosecuting such defendants. The Military Commissions Act of 2006 somewhat alleviated that problem, stipulating a novel terrorism-related crime: “providing material support for terrorism.”⁴⁴ The inclusion of this offense in the Act was essential, because *Hamdan v. Rumsfeld* found that “conspiracy” was not included in any congressional Act and was not recognized under international law.⁴⁵ The 2006 Act remedied this situation for a spell and eventually Australian David Hicks, in addition to Hamdan, were convicted of this crime.

When attempting to convict and sentence defendants, however, the phrase was not just used as a defined crime or offense that juries may consider, but as a prominent slogan for prosecutors. Bravin notes that

40. *Id.* at 105.

41. Examples include the first World Trade Center bombing on February 26, 1993, the August 1998 bombings in Kenya and Tanzania, and the USS Cole bombing on October 12, 2000.

42. See 18 U.S.C. 113B (2000); see also, the Anti-Terrorism and Arms Export Amendments Act of 1989, Pub. L. No. 101-222; Biological Weapons Anti-Terrorism Act of 1989, Pub. L. No. 101-298; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132.

43. Bravin, *supra* note 1, at 128.

44. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, § 950v(b)(25).

45. *Hamdan v. Rumsfeld*, 548 U.S. 557, 563 (2006).

during Hamdan's sentencing hearing, prosecutor John Murphy repeatedly stated the phrase "material support for terrorism" in his closing argument. In fact, he used it over twelve times (that the text documents) and Bravin states that he emphasized the word "terrorism" over "material support."⁴⁶ At one point prosecutor Murphy stated, "His material support of terrorism has changed our world as we knew it. They changed it dramatically in our lifetime and perhaps changed it forever Think of the victims of his material support for terrorism and their families, living each day without loved ones, and their photographs that are forever changed."⁴⁷ Additionally, one of his final statements to the sentencing panel in Mr. Hamdan's case was "[t]ake one second, just one second, and think about the victims of Hamdam's material support for terrorism Please, do justice for all the victims of material support for terrorism in this case."⁴⁸

Although Murphy asked for a life sentence, the panel gave Hamdan a sentence of five months and eight days, including time already served. The D.C. Circuit Court of Appeals eventually vacated Hamdan's conviction based on the fact that "material support for terrorism," as defined in the 2006 Act, could not retroactively apply to Mr. Hamdan's actions.⁴⁹ The ruling potentially brought into question some of the other defendants that have been tried or convicted under the charge of "material support for terrorism," such as the above-mentioned David Hicks, an Australian citizen who was caught among Taliban fighters in Afghanistan 2001, pled guilty in 2007, and was subsequently repatriated to Australia.⁵⁰

Though "providing material support for terrorism" still stands as a crime by which new offenders can be convicted, the novel phrase nevertheless provided many difficulties for the Guantanamo Bay commissions, and especially for some of the early trials.

CONCLUSION

THE TERROR COURTS, in addition to being an engaging and thoroughly researched text, is a valuable demonstration of what can happen when traditional notions of American justice are replaced with ill-conceived, ad hoc legal phraseology. It is also a reminder that the language of current and future administrations should be monitored to ensure that we do not stray from the traditional and constitutionally appropriate legal values we have developed as a nation. For example, in

46. Bravin, *supra* note 1, at 337.

47. *Id.*

48. *Id.* at 338.

49. Hamdan v. United States, 696 F.3d 1238, 1247 (D.C. Cir. 2012); Bravin, *supra* note 2, at 378.

50. However, the charge itself was upheld in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

a recent letter by Eric Holder to Judiciary Committee Chairman Patrick Leahy on the killing of American citizens using drones,⁵¹ Mr. Holder stated that it was “*clear and logical* that United States citizenship alone does not make individuals immune from being targeted.”⁵² Yet, what is “clear and logical” to Mr. Holder may not be so to other members of Congress and to other legal scholars.

Rather than “bring[ing] the values of our history to the care of our times,” the Bush administration set their own course regarding the administration of justice and the linguistic phrases they concocted for the military commissions at Guantanamo Bay. Some of this phrasing has been altered or rendered obsolete because of court opinions and a change in administration. Yet, some of it remains. The introduction of these novel terms into the administration of justice made it significantly more difficult to try and convict detainees. The linguistic acrobatics further transformed the commissions into a charade, threatening the legitimacy not only of the commissions themselves but of the United States’ competency to deal with suspected terrorists and the larger “war on terror.” Ultimately, the pioneering language transformed traditional notions of American justice into “rough justice.”

51. Letter from Attorney General Eric Holder to Senate Judiciary Committee Chairman Patrick Leahy (May 22, 2013), *available at* <http://www.justice.gov/slideshow/AG-letter-5-22-13.pdf>.

52. *Id.* at para. 5.