



The "Who, What, and Why" Behind Guantánamo: An Interview with Jess Bravin

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By: Mark Robertson

The following interview took place during the April 2013 Los Angeles Times Festival of Books, a few months after the publication of Jess Bravin's *The Terror Courts: Rough Justice At Guantanamo Bay*.

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MARK ROBERTSON: Thank you again for taking the time to do this interview, especially over breakfast. The first question that I have is what was it about this subject matter that drew you to it and made you want to write about it extensively?

JESS BRAVIN: After 9/11, which I experienced in New York — I was based there at the time, and I saw the towers fall from my window — that was a very serious and disturbing month, certainly, September of 2001. Right after, on September 12 I made my way to ground zero and spent the day there covering stuff, trying to avoid getting kicked out by the guards and police. And it was an incredible thing to see the place where I went every day — because our newsroom was across the street from the World Trade Center. I used the subway stop that was under the World Trade Center. So seeing the complete transformation of my workaday world was a nightmarish scene. There were bodies in the lobby of my building; we were using it as a ward. It was a very serious event in New York.

That month, those of us at the newspaper were scrambling to figure out what was going on, and to write about it over significant reporting obstacles. And in October the paper asked me to go down to Washington to cover the legal aftermath of 9/11. A number of things were percolating, including the legislation that became the Patriot Act. One of the things I caught wind of was this plan for military commissions, which I found a fascinating development. I thought it was actually a much more significant development than, say, the Patriot Act, and some of this other legislation that was going through Congress. This wasn't even legislation, this was a pure executive order. I thought military commissions were a dead and buried type of procedure that hadn't happened for generations. It was like the legal equivalent of Jurassic Park. I mean, taking the DNA of an extinct species and trying to revive it into the modern era.

To me, it was an extraordinary legal story that I was quite interested in. I was covering it then, and have since even before the military order that President Bush signed came out on November 13, 2001, through today. And it's related to some other things, such as the detentions at Guantanamo, and so forth. But, all the way through, I just continued to cover it because it seemed that such a significant and consequential legal story ought to be told. I started covering the Supreme Court in 2005. The following year, these two topics met at the Salim Ahmed Hamdan case in the Court. So, there was occasionally some overlap.

The book is necessary because there is an incremental way you can tell a story [this big] in a newspaper, even longer newspaper stories. But to really put out the context and get into the characters, and really illuminate the who, what, and why, a book's really the way to do it. Newspaper stories, of course, are great, but no one story can really convey the sweep and the significance of what's going on. So, that's pretty much why.

MR: You visited Guantanamo several times now.

JB: Many, many times, yes.

MR: What were your first impressions upon hearing the plan, and then your impressions when the military commission was implemented?

JB: Well, there was a big lag between those two events, because the first time I was in Guantanamo was in January of 2002, which is when they opened. I wasn't there to see the first detainees brought, but I saw one of the first shipments of them unloaded from transport planes. It wasn't until August of 2004 that there was a military commission hearing. So, there was a lot of water over the dam in between. Initially, it was a fairly ad hoc operation at Guantanamo. I mean they sort of built some outdoor cages — it was called Camp X-ray — that they put the detainees in. And over the years they've spent many, many millions of dollars to build a prison facility there. You know, it's interesting — if you're curious to see what I thought at the time — the second time I went was when the defense secretary Donald Rumsfeld went down there in late January of 2002 and I was one of the reporters with him on his plane. CSPAN came along and managed to interview several of the visitors, including me, about what we thought about what we saw, and whether we were satisfied. It's on their website in their video library. I watched it a few weeks ago to see what I said. I told them that the problem here is that you come here and you can only see what they want to show you. If you're covering a prison on the mainland the warden is not the only source of information. You can go to the bar where the guards hang out afterwards, you can go to the bus depot where relatives of inmates come to visit them. I mean, you have other ways to figure out what's going on. There's no way [at Guantanamo] other than what they choose to let you see, so I can't say it's fully satisfactory. I don't know that's not true to this day.

MR: Throughout the book, one of the overarching themes is the conflict between the legal component of setting up a commission, the political component, and the ethical and moral considerations. What to you is the most compelling aspect of that conflict in the creation of the commissions?

JB: What struck me was — and I think there are several things — but one that struck me was, particularly for many of the military officers that were assigned to implement the commissions project, how deeply ingrained in them were certain bedrock American values about fairness and due process, which could not be ordered away by executive fiat. They never, ever expected to have to reach into that core of their values, never thought it would arise, certainly not in the context of a presidential order sending them in the opposite direction time and again. I focus on one officer in particular, Lt. Col. Stuart Couch. When, in coming down to following what they thought about their core values — core American values — or doing what their political leadership instructed against an enemy — not against the good guys really, but against people who in most instances probably were really fearsome enemies of the United States — those values couldn't really be destroyed. And it was something that, in a way, linked some of these conservative military officers to some of these radical lawyers over a very broad section of American society. It turns out that when you strip away a lot of it, you push them to the edge, what remains is a shared sense of values, which I thought in a sense was kind of inspiring.

MR: It seems the source of the underlying conflict is this concept of the unitary executive. How do you think that aspect added to the tension, or created the tension, between the military officers and the civilian leadership, the administration appointees?

JB: Well, their idea of a unitary executive meant that all executive power in the United States government was embodied in the president. And the executive branch is a limb of the president. Its sole function is to be at the will of the president. And now, I don't know that is really the best reading of the constitutional structure, to say that there is a sole source of power. But that was really their operating principle. Therefore, the military, being not only under the president's executive authority but also under his commander-in-chief's authority, was, even more than usual, expected to be just a pure vessel for executive will. And the fact is that's not how these military officials saw themselves — they didn't believe that they were just supposed to be robots, implementing whatever program was written at the highest level. They saw themselves as saying, "Well, you know, we take an oath to the Constitution, not to the president." So their understanding — yes, they absolutely believe in the chain of command and command authority and "respect your superiors," and so forth, but they ultimately did not see themselves as merely servants to the president whose sole job was implementing his will with as much fealty as possible. So they came into conflict.

MR: Another component of this that struck me — the afterthought nature of a lot of the procedural constructs. Where do you think the failing occurred in the conception of the military commission (or the revival of the military commission) that led to situations where the panel was flabbergasted when a detainee asked to represent himself, or the panel was unable to articulate the standard of review?

JB: Well, it comes down to what they were designed to do. Normally, when the government does something, what they're trying to do is solve a problem, or prevent a problem from arising. And there are deliberate ways the government goes about doing that. Often they are inefficient; sometimes they work well, whatever. But the problem many people may have thought was, "Well, we have a diabolical enemy that plays by its own rules, so we need to find some way to deal with them once we capture them. So let's think about that and come up with the best way to do that." That's not the problem that military commissions were intended to solve, because no one in the government who'd actually dealt with terrorism directly had any interest in them or had thought of them, or thought that the existing court system was inadequate.

And it was contrary to what the CIA wanted, as I say in the book — they were very happy with the system they had dealing with the US Attorney and the Southern District of New York judges. They had worked with them before. Those people had security clearances. They had confidence in them. They didn't have any leaks or problems. They could deal with that.

MR: And they got convictions!

JB: They got convictions, and the CIA was able to keep doing its work. The CIA was not interested in dealing with a bunch of people who they had never heard of before, at the military reserve or wherever. So no one, whose job it was actually dealing with terrorism, had any problem with the existing courts, or wanted to come up with some alternative to them. In fact, most of those groups, individuals and agencies were excluded from the development process. I mean, the problem that they were trying to address was not "What is the best way for America to deal with a terrorist enemy?" The problem was "How can executive authority and the flexibility to do what it considers necessary best be demonstrated?" And "What is the most extreme outlier of presidential authority that can be asserted so that the president will have flexibility to do anything within that boundary that he deems necessary?" And if that's the problem that you want to solve, then asserting the right to set up a court system that answers to you (over which you have the sole power of life and death), one where you alone decide what privileges and rights to defend and how, without any kind of judicial review, and you deny any kind of congressional oversight — then that becomes a useful tool in achieving that goal. Whether it's useful or not in dealing with terrorists is beside the point. What it's useful for

doing is asserting a far boundary of executive authority in which you have complete freedom of operation.

And that's why, once they asserted it, there was very little interest in following up. Because the whole mission was accomplished by asserting it! So, the presidential interest in following up was minimal. They had other things to do. There was a war in Iraq to start, you know, they had other missions. So they lost interest. They thought "Our job is done. We've issued this order, you carry it out." And therefore, there was no guidance, really. The only interest was occasionally there would be some questions like, "What's going on?" But not like, "What's taking so long?" There wouldn't be guidance in terms of these other matters. When there was guidance, it was all designed around this first goal, which was to preserve as much flexibility or power for the president as possible. So whenever there'd be a question like, "Well what is the standard, what is the rule?" you inherently are saying that there are certain things you can't do. If you're saying that the standard of proof is going to be beyond a reasonable doubt, then what you're saying is we can't convict someone unless we can prove it beyond a reasonable doubt. We are hamstringing ourselves by that. Now maybe as a policy matter we would prefer to have it beyond a reasonable doubt. We are not saying we are against reasonable doubt. If you can get it, great! But, are we saying that if we can't get it we have to let the guy go? We're not interested in that! We don't want to constrain our flexibility because who knows what's going to happen? So that's why every time there was a request for clarification there would be basically no answer, or a couple answers, or what have you. Even if you went to the office of legal counsel, there were memorandums that all said the president can have an individual executed on site, so anything short of that is permissible.

So, we're not required to impose proof beyond reasonable doubt. And again, that advances the cause of demonstrating nearly unbounded presidential power. It's helpful if that is the goal. It's not helpful if the goal is adhering to the trial system where everyone knows the rules and can operate within them. If that's your goal, then it's not that helpful to have such ambiguity.

MR: In terms of the moral question, much of that narrative is driven by Lt. Col. Stuart Couch. It seems like he was very accessible during the process of writing the book. Why do you think he agreed to be as cooperative as he was?

JB: Well, you know, for many years I wanted to do stories about the prosecution. In fact, starting in 2002, I started trying to write about the military prosecutions. So, I thought that this would be a really interesting angle. And I really approached it, at the time, as sort of a detective story. You know these guys happen to get put on these cases, in a really extreme environment, and I was interested in how they managed. But the Pentagon kept putting me off. And eventually they gave me a consolation prize — they let me interview their defense attorneys. Which I think they, in retrospect, considered an error, because I was surprised to find out how

incredibly zealous they were about their assignment, and how suspicious they were of me because I had been given permission to interview them.

And so I wrote this story that introduced the world to Charlie Swift, who was a naval commander, and his case. I started out talking about him and the driver, Salim Hamdan, and from that point on, that's where the story got followed by a lot of places. Those guys became almost minor celebrities because they were out there and totally embraced the role of challenging the system as we know it, and it went to the Supreme Court. But it was very difficult getting access to the prosecution. And I subsequently learned that most of the prosecutors were frustrated by that. They wanted to tell their stories, they did not want to be bottled up. But the Bush administration was very secretive.

Policy changed from time to time and, at one point, the Defense Department changed its mind and decided to let me do a story about the prosecutors. [The department] asked several prosecutors to meet with me separately, and Lt. Col. Couch was one of them. He had not been given any parameters, he had not been told not to talk about this or that, or pretend everything's great, so he said, "Well they authorized me to talk to a reporter and this guy wants to know what's going on, so I'm going to tell him." In the course of interviewing him it became clear that this guy had seen a lot of stuff that he found troubling, and I continued to meet with him and talk with him and report the story. And it turned out he's the kind of character that, if he wasn't really there, you'd think he was made up, because he just so perfectly encapsulates the national dilemma, as well as the individual one. He's a guy who is involved in one way or another with almost every major case that is still there. I mean, Khalid Sheikh Mohammed, to Salim Hamdan, to Abd al-Rahim al-Nashiri, who is the USS. Cole bombing suspect. He's someone who is dealing with extreme sorts of torture, as well as cases that are ruined by political interference from above. He was involved in all these things and approached it in such a relatable way. He's a conservative southern evangelical Christian. Every reader in America is not like that, but wherever you're coming from, you can sort of see the situation, how he tries to reconcile his mission with his values. And I think he does so in an exemplary way. I try not to be too judgmental, but it's very hard not to look at Lt. Col. Couch as a kind of hero. Maybe there are countless numbers of them — I don't know for sure — but they are not the ones you usually hear about. He's not the one who got the Medal of Freedom. That would be George Kennedy.

MR: Also throughout the book, there are very telling comparisons. One of which is with Nuremberg, and the decisions to videotape those proceedings versus, in Guantanamo Bay, not having video. Another was the participants' different personal connections to 9/11. On the one hand, you had Lt. Col. Couch, whose friend was one of the co-pilots of one of the planes hijacked on 9/11, and on the other hand some of the commission panelists, who were involved

in the operational components of Guantanamo Bay. Why did you think it was important to draw those comparisons and pull them out in the narrative?

JB: There were really two models of military commission that were in the back — or the front — of everyone's minds. One was Nuremberg which, although controversial at the time, is now recognized as a triumph for international justice, and accomplished its goals of documenting the morality of the Allied cause and established a principle that the state does not have free reign to treat individuals however it wishes. So one of them is Nuremberg. The other one is on the other end of the scale. Quirin, the 1942 Nazi saboteur case, which stands for unchecked presidential power to use a judicial-seeming process for political ends. Those two examples are sort of hanging over everything. The Bush administration's top lawyers focused on Quirin, and most of them had very little trial experience and no military experience. [They had] academic experience, you know, smart guys. [They were] very interested in validating the holding of Quirin. That's what turned them on.

That's not what got the military lawyers and related officials excited. That idea of "Let's have a secret trial where we control everything and send defendants to the electric chair a week after the conviction is affirmed," that wasn't really what they thought they wanted to go down in history for having done. They were much more attuned to the Nuremberg example — of basically creating a special forum to deal with a monumental type of evil — and that would validate how right what they were doing was, not create doubt over it. So, in early memos, they are always talking about Nuremberg, and once the Hamdan trial begins, the prosecution is approaching it by kind of following the Nuremberg model. They make a movie that is explicitly modeled on the movie the Schulberg brothers made at Justice Jackson's request in 1945. And the thing is, when you want to use a major historical parallel for what you're doing, if what you're doing really resembles it, well, that can be illuminating. If what you're doing actually doesn't really resemble it, and the parallels exist only in your imagination, it can have another effect. If you look at newsreels of Nuremberg and you see Hess and Göring, and the Allied judges and Justice Jackson, and you see the courtroom in Nuremberg and the smartly dressed MPs with their shining helmets, you know there was a certain image there. And then set it back in the Guantanamo air control tower, in a windowless room with a kind of smiling nobody as the defendant and a bunch of people who I think are well meaning — but they're not Justice Jackson.

The point is that this was not really like Nuremberg. To this day the military commissions will attempt to favorably compare what they are doing to Nuremberg. They'll have a list of what rights the defendants have, saying, "our defendants have way more rights; the Nazis would be overjoyed to be tried by our military commission." So you know, I'd say yes and no, because there was an excellent book called *Interrogations*, which is about the interrogation of Nazi high

command, before they were tried. They were captured and, before they were put on trial at Nuremberg, they were interrogated by Americans and British and Allied forces. As far as I understand, none of the Third Reich leaders were waterboarded or otherwise tortured by the Allies. It might have been a very different trial had those guys been brought into the courtroom after having been tortured, and have information stream out of them. And be told their mothers would be raped and all those other things if they didn't cooperate. And then the first motion of the Allied government was to make everything they say secret because — you know, okay, I mean, maybe on paper the due process that the defendants have under the third military commissions is greater than the due process rights on paper that the Nazi leadership had. I just think you have to look at the broader concept of what is going on, both in terms of the allegations and the treatment of the enemy prisoners. I don't think there's any evidence of the Nazi war leadership was given any enhanced treatment after it was captured. Even though maybe the argument that they know a lot of stuff would be valid. Who knows, you've got a whole country, who knows how it is booby-trapped or what sort of secret wolf packs are ready to launch into action to start trying to create a guerilla campaign. Who knows what's going on: this is a country that was trying to build an atomic bomb and V-2 rockets. Who knows what they've got in store. So, you could have made an argument about torturing them, too. That would be as plausible, I think. But for whatever reason they didn't do that.

So, then there are other things where you're really considering — I mean, the order that President Bush signed, I want to make clear, was actually more aggressive than the one that FDR signed. FDR specifically identified eight people; it was a one-off thing invoked under very specific emergency powers, not even saying it would be effective as long as World War II goes on. It was just this one group. President Bush's order was an open-ended thing that would exist in perpetuity.

The other point would be that although these are called military commissions, under each of the three iterations, the Military Commissions Act is not like prior military commissions, which all were ad hoc tribunals. Either the one example of the Quirin case by President Roosevelt, or the hundreds of military commissions and naval commissions that were held after World War II for the access to the prisoners, or ones that were held in various other wars — the Mexican War and so forth from other centuries — those were all ad hoc, common law courts established by the commander in the field for a limited purpose, while this current apparatus is a permanent structure under the control of a political appointee — General Counsel of the Department of Defense — and not an ad hoc, common law response to conditions in the field. It's conceived as a permanent offshore (could be onshore) permanent structure that exists for basically a set of aliens that the executive decides it would have a better chance of convicting without a court with Bill of Rights provisions. That's what it is.

MR: To some extent, the military commissions in Guantanamo have been pushed from the nation's collective attention — there's been healthcare legislation, there's been a presidential election, there have been birth certificates. This week brought us an op-ed in The New York Times by a prisoner at Guantanamo Bay detailing the treatment there. It also brought us the Constitution Project's report on torture, which states:

There is no evidence that there had ever been before the kind of considerate and detailed discussions that occurred after September 11th directly involving a president and his top advisors on the wisdom, propriety and legality of afflicting pain and torment on some of the detainees in our custody.

So, this question of torture, which is tied to the validity and justness of the military commissions, is re-emerging, and the Obama administration is pushing forward with a revised form of military commissions. Do you see an end to the military commissions or are they here to stay?

JB: Well, a couple questions there. One, just going to this issue of high-level involvement in the torture policies — I think that there has been, and I think the Constitution Project court concedes, abusive conduct by US forces in every war, as there is in every military in every war; it being just an incident of war, that there are lives at stake and people acting in the extreme and that happens. And often the general view is, that when superiors find out about atrocities, not infrequently they just kind of shine them on. Even Lieutenant Calley was sentenced to what, a year of house arrest after commanding a unit in the My Lai massacre? And everyone else was acquitted. Holding U.S. forces accountable for treatment of the enemy has never been a real big part of our tradition. Or any country's tradition, it's not just the United States.

Nevertheless, there was not this effort to have it both ways — to simultaneously have mistreatment be a principal part of policy and get it all cleared in advance as lawful. It's hard to imagine Roosevelt or Nixon sitting there talking about how they can prophylactically get legal authority to abuse prisoners. It's more that, like it or not, things just kind of happen, and that's war. Maybe that sounds crass, but I think that's the historical reality of how countries conduct wars. It's one of the reasons why people don't like war. Here, the remarkable aspect was the sort of effort to have to have lawless acts prophylactically legalized — in other words, to have it risk-free. Because even if there's not a lot of accountability for prisoner abuse, I think the command structure did not want to take the extra step of authorizing it. It's one thing if everyone knows that there's not going to be a lot of accountability unless it ends up on 60 Minutes. It's another thing to say we want it to happen.

So, that's one point. The next point about military commissions — and are they here to stay or not — is that all the current cases originated before 2004. They are all infected by allegations of

misconduct by the government. The question is really if the administration can initiate a new case that is not infected by those kinds of allegations, a clean case that offers a real chance to test the system without the taint of prior misconduct. And the military commissions office has identified one suspect who is not in US custody who they would like to bring charges against and would like to prosecute. I think he's in Iran — I'm not sure. If they get him, and that is proceeded by military commission, that might be an interesting test case to see how the system would work if we're not burdened by this history. And since on paper the rules are pretty fair, that's sort of a plus.

But since on paper the rules are so similar to those in courts martial or federal court, it raises another question, which is: "Why bother?" If it's so similar, is it really worth the huge expense of setting up something that is almost as fair, that brings in or still carries a kind of whiff of illegitimacy in the legal institutions of this country and legal authorities around the world, that foreign governments won't cooperate with, that other countries with less admirable human rights records than ours might invoke as an excuse for their own kinds of summary trials? Is it worth it, if it is ninety-three percent as fair? What are you getting from that seven percent? So, that's a policy question. And if you talk to the officials at the Pentagon, they're not going to emphasize — as they never did — that these commissions are great because they are so unfair, that they allow us to convict people without presenting evidence beyond a reasonable doubt and by denying them the chance to fully defend themselves — that that's the great thing about commissions, that we can convict people who would walk free because there isn't evidence! That's not what they are going to say. They're going to say, these are really, really fair, we're proud of them, no one should feel that if they were tried under these procedures, they wouldn't get a fair day. That's what they're going to say.

So, if they are so fair, what is the value? I don't know. The military commissions office will say that there is a very small group of potential offenders, or wartime offenders, who might fall between the cracks of civilian jurisdiction and therefore are appropriate for this venue. There are thousands and thousands of offenses in law books; there are only, like, three dozen in the military commission code. They're going to say that for this small group of potential offenders, it's a useful tool to have. It's never going to be the front and center of the war on terror and what have you, but it's useful just in case. So why not? We already went through all this effort to set it up, why not try it? That's going to be their position.

And you know, I can't argue with that. That's where they are coming from. People can make their own sorts of policy judgments about it, but I think— from what I have heard from people in the administration — there is zero interest in starting any new cases. They're basically treating it like a legal superfund site, like Guantanamo is a horrible, toxic mess of legal and political and diplomatic problems. And military commissions are the only venue that we have,

because congress has tied our hands in other ways, so we'll just use them. That seems to be their view: to leave these cases linked to all the problems of the past.

When there's another president, I have trouble imagining that this Military Commissions Act would be outright repealed. I don't see anyone doing that any time soon — maybe some day, but at the moment, even if they don't use them, I don't see them taking any effort to give up the authority to have them. If there's a future president who wants to use them, they might have another life, but I think they will continue, at least in theory, past the Obama administration.