



February 2019

MILITARY COURTS

DOD Should Assess the Tradeoffs Associated With Expanding Public Access to and Information About Terrorism Trials

GAO Highlights

Highlights of [GAO-19-283](#), a report to congressional committees

Why GAO Did This Study

DOD is in the pre-trial phase of the military commissions' proceedings it is conducting to try the alleged perpetrators of terrorist attacks on the USS Cole and September 11, 2001. The Military Commissions Act of 2009 specifies that proceedings shall be publicly held unless the judge makes findings that justify a closed session, such as national security concerns.

The National Defense Authorization Act for Fiscal Year 2018 included a provision for GAO to study the feasibility and advisability of expanding access to commissions' proceedings that are open to the public. This report describes (1) how DOD currently facilitates public access to proceedings; (2) challenges the public faces in gaining access to or obtaining information on proceedings; and (3) what is known about potential options to address public access challenges, including any related tradeoffs. GAO analyzed relevant laws and guidance; conducted a non-generalizable survey that received responses from 248 victims of terrorist attacks and their family members; collected data from DOD's website to analyze timeliness of court document postings; and interviewed relevant DOD officials and other government and non-government stakeholders.

What GAO Recommends

GAO recommends that DOD identify and analyze the risks associated with potential options for expanding public access to proceedings, and develop a strategy, as appropriate, for how it will meet its public access goals with the expected increase in public interest. DOD concurred with the recommendation.

View [GAO-19-283](#). For more information, contact Brenda S. Farrell at (202) 512-3604 or farrellb@gao.gov.

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DOD Should Assess the Tradeoffs Associated With Expanding Public Access to and Information About Terrorism Trials

What GAO Found

The Department of Defense (DOD) currently facilitates public access to and information about military commissions' proceedings at Naval Station Guantanamo Bay (NSGB) in Cuba by:

- communicating directly with victims and their family members about hearings;
- enabling selected members of the public to view proceedings in-person;
- providing five sites in the United States to view proceedings remotely via closed circuit television (CCTV); and
- making information such as court documents available on the Office of Military Commissions' website.

The public faces various challenges in gaining access to military commissions' proceedings or obtaining information about them. First, some aspects of the proceedings limit public access, but addressing them is largely outside of DOD's control. For example, proceedings, by law, are held on NSGB—a location that is largely inaccessible to the general public. Further, cases currently before the military commissions have spent 4-10 years in pre-trial hearings with trials yet to be scheduled, which some suggest has lessened media coverage and public visibility. Second, there are other challenges that DOD officials have acknowledged that they have a greater ability to address. For example, the courtroom gallery is limited to 52 seats for those permitted to travel to NSGB. Additionally, all five CCTV sites are located within a span of 600 miles on the East Coast of the United States. However, victims and their family members—the primary intended users of these sites—often live a significant distance from these locations.

A number of options may potentially address some of the public access challenges identified. DOD could potentially expand the viewing gallery to accommodate more people as part of an ongoing project to renovate the NSGB courtroom. However, DOD officials cautioned that it would require a commensurate increase in the lodging needed to house more visitors, which may not be supported by current levels of resources. Further, DOD has two potential options for addressing challenges with the remote viewing of proceedings. First, DOD could potentially increase the number and geographic dispersion of CCTV sites. Second, DOD could potentially maximize public access by broadcasting proceedings via the television or internet. DOD officials acknowledged that both options are possible and likely would require a relatively small outlay of resources. However, broadcasting proceedings via the television or internet is currently prohibited by DOD's regulation, and DOD officials were especially concerned with the security implications of this option.

DOD has not assessed the tradeoffs nor identified or analyzed the risks of options for expanding public access to military commissions' proceedings. Consequently, DOD has not developed a strategy to address challenges or identified the resources needed to achieve its public access goals. Until DOD does so, it cannot be sure that it is meeting its goal of maximizing public access and may not be prepared for the potential increased demand for public access that is anticipated when proceedings move into the trial phase.

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Abbreviations

9/11	September 11, 2001
CCTV	Closed Circuit Television
commissions	military commissions
DOD	Department of Defense
motions	legal motions
NSGB	Naval Station Guantanamo Bay
OMC	Office of Military Commissions
regulation	Regulation for Trial by Military Commission
relevant case studies	relevant case studies of terrorism trials in federal court
the accused	accused individuals undergoing trial

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February 12, 2019

The Honorable James M. Inhofe
Chairman
The Honorable Jack Reed
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Adam Smith
Chairman
The Honorable Mac Thornberry
Ranking Member
Committee on Armed Services
House of Representatives

Department of Defense (DOD) officials and non-government experts in national security and legal matters have referred to the current military commissions' (commissions) proceedings as the most important criminal trials in United States history. These trials, which are currently held at Naval Station Guantanamo Bay (NSGB), Cuba, are for the alleged terrorists the U.S. government has charged with a variety of war crimes, including attacks against the United States, such as the USS Cole and September 11, 2001 (9/11) attacks.¹ The Military Commissions Act of 2009 and DOD guidance provides that commissions' proceedings shall be publicly held unless the military judge makes findings that justify a closed session, such as national security concerns. From fiscal years 2012 to 2018, according to DOD, it has spent \$679.6 million on conducting these commissions and plans to spend almost \$1.0 billion more from fiscal year 2019 through at least fiscal year 2023.

The *National Defense Authorization Act for Fiscal Year 2018* included a provision for us to conduct a study on the feasibility and advisability of expanding the public availability of commissions' proceedings that are

¹The USS Cole bombing was a terrorist attack against the United States Navy guided-missile destroyer USS Cole (DDG-67) that took place on October 12, 2000.

open to the public.² Further, the accompanying conference report included a provision for us to collect and evaluate views from a wide variety of sources—both in the government and the public—on expanding public access to commissions’ proceedings.³ Such sources include various government departments and offices, non-governmental and civic organizations, the media, legal and national security experts, and victims of terrorism and their family members.⁴

This report describes (1) how DOD currently facilitates public access to military commissions’ proceedings; (2) the challenges, if any, that the public faces in gaining access to or obtaining information on these proceedings; and (3) what is known about potential options to address public access challenges, including any related tradeoffs.

At the beginning of our review in January 2018, there were five active commissions’ cases, which are included in the scope of this review: United States of America v. Khalid Shaikh Mohammad et al. (2); United States of America v. Abd al Hadi al-Iraqi; United States of America v. Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2); United States of America v. Majid Shoukat Khan; and United States of America v. Ahmed Mohammed Ahmed Haza al Darbi (2).⁵

To address our first objective, we reviewed relevant guidance, policies, and regulations related to public access to military commissions’

²See Pub. L. No. 115-91 § 1038 (2017). For the purposes of this report, we considered the public to include victims and family members; the entities we refer to collectively as non-government stakeholders, including academic and legal experts, non-governmental and civic organizations, and the media; and the general public. Also, for the purposes of this report, we considered the potential “expansion” of the public’s access to commissions’ proceedings to include increasing or improving the capacity of DOD’s current public access methods, as well as new methods.

³H.R. Rep. No. 115-404, at 920. (2017).

⁴For the purposes of this report, we defined victims as those who were directly impacted by the attack on the USS Cole, the events of 9/11, or other terrorist attacks associated with commissions’ cases in the scope of our review. We defined a family member as a person who is related to a victim.

⁵Khalid Shaikh Mohammad et al. (2) includes four additional defendants: Walid Muhammad Salih Mubarak Bin Attash; Ramzi Binalshibh; Ali Abdul Aziz Ali; and, Mustafa Ahmed Adam Al Hawsawi. Subsequently, we refer to these case names in shortened form, e.g. Khalid Shaikh Mohammad et al. (2).

proceedings.⁶ In addition, we attended military commissions' proceedings on NSGB and while visiting relevant facilities, in April and May 2018. To supplement our observations, we interviewed relevant DOD officials to discuss how DOD facilitates public access to commissions' proceedings. We also observed hearings at the Fort Meade, Maryland Closed Circuit Television (CCTV) site, visited the Naval Station Norfolk, Virginia CCTV site, and interviewed DOD officials working at both locations to understand and observe how the public utilizes these facilities to view commissions' proceedings remotely. Further, we reviewed relevant documentation on DOD's assistance to victims and family members and discussed these efforts with department officials. Also, we reviewed a variety of content on the Office of Military Commission's (OMC) website to determine what information is available to the public about access to military commissions' proceedings and how it is organized.

For our second objective, we reviewed applicable sections of the United States Constitution, U.S. statute, and relevant case studies of terrorism trials in federal court (case studies), executive orders, DOD guidance and policy, and relevant reports to understand the legal and policy issues related to public access to both military commissions' proceedings and certain terrorism trials conducted in federal court.⁷ In addition, we gathered information from DOD officials, victims and family members, and non-government stakeholders to identify whether there are any challenges that DOD faces in facilitating public access. Specifically, we conducted a non-generalizable survey of victims and their family members to determine the extent to which respondents support various potential options for expanding public access and their views on the timeliness of court document postings to OMC's website. Of the 2,640 victims and family members that we surveyed, 248 responded. We anticipated a fairly low response rate because of sensitivities related to surveying victims and family members about terrorist events. Therefore the survey results reflect the views of only those who responded, who provided relevant and important views, which we combined with information gathered through additional methodologies. Also, we informed our methodology approach and survey development through interviews

⁶Examples include Department of Defense, *Manual for Military Commissions United States*, 2016 Revised Edition (Jan. 12, 2017) and Department of Defense, *Regulation for Trial by Military Commission* (Nov. 6, 2011).

⁷Examples include the First and Sixth Amendments to the U.S. Constitution, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and Executive Order 13526, *Classified National Security Information*, 75 Fed. Reg. 707 (Jan. 5, 2010).

and other communications with representatives from eight victim's organizations. Further details regarding the survey methods are described in appendix II.

As discussed previously, for the purposes of this report, we defined victims as those who were directly affected by the attack on the USS Cole, the events of 9/11, or other terrorist attacks associated with commissions' cases in the scope of our review. We defined a family member as a person who is related to a victim. Similarly, we developed a standardized set of 10 questions that was used to obtain the perspectives of 55 selected non-government stakeholders on challenges to public access to military commissions' proceedings. We analyzed responses from the completed questionnaires to determine the extent to which respondents support various potential options for expanding public access as well as their views on other issues, such as the timeliness with which court documents are posted to OMC's website. Our analyses of both groups' responses were incorporated into each objective to supplement our observations, as appropriate.

Also, we gathered data from an inter-agency review team that reviews documents to be posted on OMC's website, as well as the website itself, and analyzed these data to determine the timeliness of information posted to the website.⁸ In regard to data from the inter-agency review team, we obtained and analyzed data on when court documents were filed with OMC and the date on which the inter-agency review team returned them to OMC for posting, comparing that amount of time to a timeliness standard laid out in DOD's Regulation for Trial by Military Commission (Regulation).⁹ According to the Regulation, DOD is supposed to post documents to the OMC website generally no later than 15 business days after documents have been filed with OMC's Trial Judiciary, known as the "file date." We performed reliability assessments on the data obtained from the inter-agency review team on the posting of court documents on the commissions' website. When, in the course of these discussions, we determined that agencies' data could be improved, we worked with the appropriate agency to do so—to the extent possible—

⁸<https://www.mc.mil/home.aspx>. For the data we gathered from DOD, we analyzed all available data that the department could provide, from October 2011 to October 2018. For the data we gathered from the website, we analyzed data from April 2011 to November 2018. The earliest document posted by DOD to the website is from April 2011, because the department updated the website in 2011.

⁹Department of Defense, *Regulation for Trial by Military Commission* (2011).

and note relevant data limitations. Based on the steps we took, we determined that these data were sufficiently reliable for the purposes of our research objective. Please see appendix I for more details about our scope and methodology.

In regard to data from OMC's website, we collected this information using a "web-scraping tool" that we developed and that regularly visited OMC's website, capturing data about court documents' file date and the date on which these documents were posted on OMC's website.¹⁰ We selected these two dates because it allowed us to compare the time DOD took to post court documents to its website with the department's timeliness standard. Using our analysis of data obtained from the inter-agency review team as well as from OMC's website, we determined the extent to which DOD posted court documents in a timely manner.

For our third objective, we reviewed relevant reports to identify potential options for expanding public access to commissions' proceedings and any concerns associated with doing so, and discussed these issues with DOD officials, victims and family members, and non-government stakeholders. We also met with DOD officials to discuss any efforts the department had underway to determine the tradeoffs associated with potential options. We then compared these efforts with *Standards for Internal Control in the Federal Government*, which state an agency should identify and analyze risks related to achieving its defined objectives, and to leading practices for sound strategic management planning.¹¹ We also compared these DOD efforts to selected principles of effective federal strategic planning that state, among other things, that it is good practice for agencies to develop a strategy to address management challenges and to identify resources needed to achieve goals. We used the results of our comparison to determine the extent to which DOD's efforts adhered to these principles.¹²

¹⁰This is a software tool we developed that automatically visited and collected certain data from the website. For more information on the web-scraping tool, see appendix III.

¹¹For internal controls, see GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: Sep., 2014).

¹²For leading practices of effective federal strategic planning, our prior work has identified leading practices of effective federal strategic planning, which we derived in part from the Government Performance and Results Act (GPRA), as updated by the GPRA Modernization Act of 2010, associated guidance, and our prior work. For example, see GAO, *Executive Guide: Effectively Implementing the Government Performance and Results Act*, [GAO/GGD-96-118](#) (Washington, D.C.: June, 1996).

We conducted this performance audit from January 2018 to February 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Brief History of Military Commissions

DOD describes military commissions as a form of military tribunal convened to try individuals for unlawful conduct associated with war.¹³ According to DOD, military commissions—as they came to be known in the 19th century—were preceded by military tribunals during previous conflicts, beginning from the Revolutionary War. After the September 11, 2001 terrorist attacks on the United States, the President issued an order,¹⁴ directing the Secretary of Defense to establish commissions to try certain individuals for violations of the laws of war and other offenses. In 2006, the United States Supreme Court invalidated the military commissions established under the President's order.¹⁵ In response to the court's ruling, Congress passed the Military Commissions Act of 2006.¹⁶ In 2009, the President ordered a review of military commissions and detention at NSGB which led to a halt in all pending military commissions' proceedings. In 2009, Congress passed the Military Commissions Act of 2009 which replaced the Military Commissions Act of 2006 and led to the reinstatement of criminal proceedings against certain detainees.¹⁷ Held on NSGB, Cuba, current commissions' proceedings include alleged terrorists accused of engaging in attacks against the United States, such as the USS Cole attack in which 17 people were

¹³DOD, <http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx>

¹⁴The President's order was issued on November 13, 2001 and later implemented when the Secretary of Defense published the order on March 21, 2002 as Military Commission Order No. 1.

¹⁵See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁶See Pub. L. No. 109-366 (2006).

¹⁷See Pub. L. No. 114-84, §§ 1801-1807 (2009) and codified at Chapter 47A, Title 10 of the U.S. Code.

killed and the September 11, 2001 attack in which 2,976 people were killed.¹⁸

Military Commissions' Legal Framework

The Military Commissions Act of 2009 establishes procedures governing the use of military commissions to try alien unprivileged enemy belligerents engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission. The Act defines an alien unprivileged enemy belligerent as a person who has engaged in hostilities against the United States or its coalition partners; has purposefully and materially supported hostilities against the United States or its coalition partners; or was a part of al Qaeda at the time of the alleged offense.

While the Military Commissions Act of 2009 also provides protections for the accused individuals undergoing trial (the accused) similar to rights afforded to defendants in a federal criminal trial, the Act is more closely aligned with military court-martial practice.¹⁹ For example, the Act states that procedures for military commissions are based upon the procedures for trial by general courts-martial under the Uniform Code of Military Justice, Chapter 47 of the U.S. Code, except for certain provisions such as provisions related to speedy trial and pretrial investigations.

Article 36 of the Uniform Code of Military Justice states that the President may prescribe regulations for pretrial, trial and post-trial procedures for cases triable in courts-martial and military commissions which shall, so far as the President considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district court but which may not be contrary to other provisions of the Uniform Code of Military Justice. Article 36 also states that all rules and regulations prescribed by the President or the Secretary of Defense as his designee shall be uniform insofar as practicable. In addition to relevant law, commissions' proceedings are conducted in accordance with certain DOD manuals and regulations and rulings by military judges who preside over the proceedings.

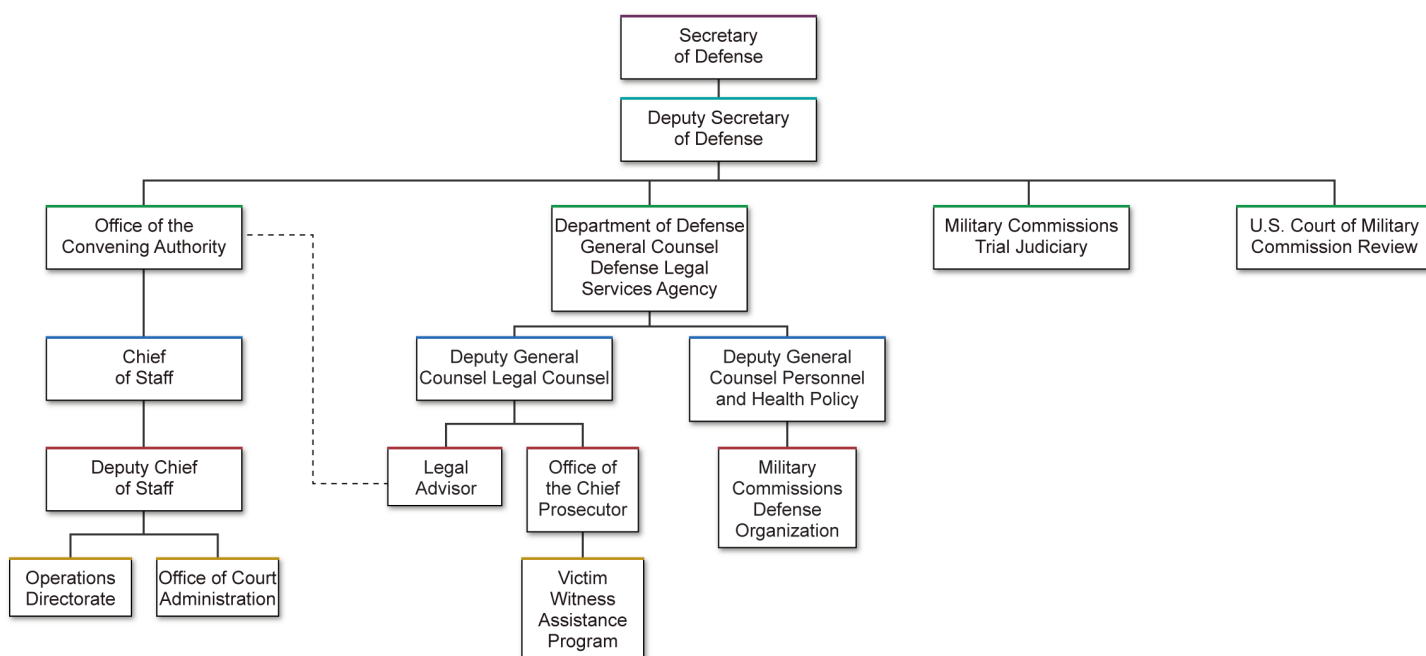
¹⁸The number of people killed during the attacks of 9/11 is according to the charges filed by the United States government against the alleged attackers.

¹⁹For a chart comparing selected military commissions' rules under the Military Commissions Act of 2009, as amended, to the corresponding rules that apply in federal court, see Congressional Research Service: Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court (Washington, D.C.: Mar. 21, 2014).

Roles and Responsibilities within DOD for Military Commissions

There are a number of DOD organizations responsible for conducting the commissions' proceedings included in the scope of our review. Each has separate functions and responsibilities, as shown in figure 1.

Figure 1: Organizational Chart for Military Commissions' Proceedings



Source: GAO analysis of Office of Military Commissions' website and information from Department of Defense officials. | GAO-19-283

Key organizations include:

- The Convening Authority is responsible for the overall management of the commissions' process and is empowered to convene the commissions, refer charges to trial, negotiate pre-trial agreements, review records of trial, and maintain the public website, among other responsibilities.
- The Office of the Chief Prosecutor includes attorneys, paralegals, and support staff from each branch of the United States Armed Forces, DOD, and attorneys from the Department of Justice. These attorneys coordinate investigative efforts, prepare charges, and represent the United States government in commissions' proceedings. Located in the Office of the Chief Prosecutor, DOD's Victim and Witness

Assistance Program provides services to approximately 2,000 victims and their family members.

- The Military Commissions Defense Organization maintains a structure separate from the structure of OMC, to help ensure fairness and independence of the commissions' legal system. Defense attorneys representing the accused can be military and/or civilian, either employed by DOD and/or a civilian attorney retained by the accused at their own expense. These attorneys are appointed by the Chief Defense Counsel to represent the accused. In capital cases, i.e. those cases in which the United States government is seeking the death penalty for the accused, the Military Commissions' Defense Organization will also appoint a "learned counsel"—that is, an attorney with specialized training and experience in trials involving the death penalty.
- The Military Commissions' Trial Judiciary consists of military judges nominated by the Judge Advocate Generals of the military departments to preside over trials. The Trial Judiciary also includes the judges' support staff that, among other responsibilities, manages court documents—such as legal motions and judges' rulings—that are part of the commissions' process. According to OMC officials, the Trial Judiciary has also established certain practices—followed by OMC—for the review of these documents before they are posted on OMC's public website.

NSGB Expeditionary Legal Complex

The Expeditionary Legal Complex at NSGB was completed in January 2008 and consists of various facilities, including a courtroom in which classified and unclassified proceedings may be conducted, office space and equipment for court administration employees as well as the prosecution and defense legal teams, and expeditionary lodging capable of housing up to 300 personnel, according to an OMC official. Key elements of this complex are highlighted below.

The Courtroom

The courtroom, shown in figure 2, is a multi-defendant courtroom capable of trying up to six defendants jointly. The courtroom can accommodate a case with the possibility of the death penalty, and has unique features that permit the use of highly-classified information at the Top Secret/Sensitive Compartmented Information level or below during closed proceedings.

Figure 2: Courtroom in the Expeditionary Legal Complex on Naval Station Guantanamo Bay, Cuba



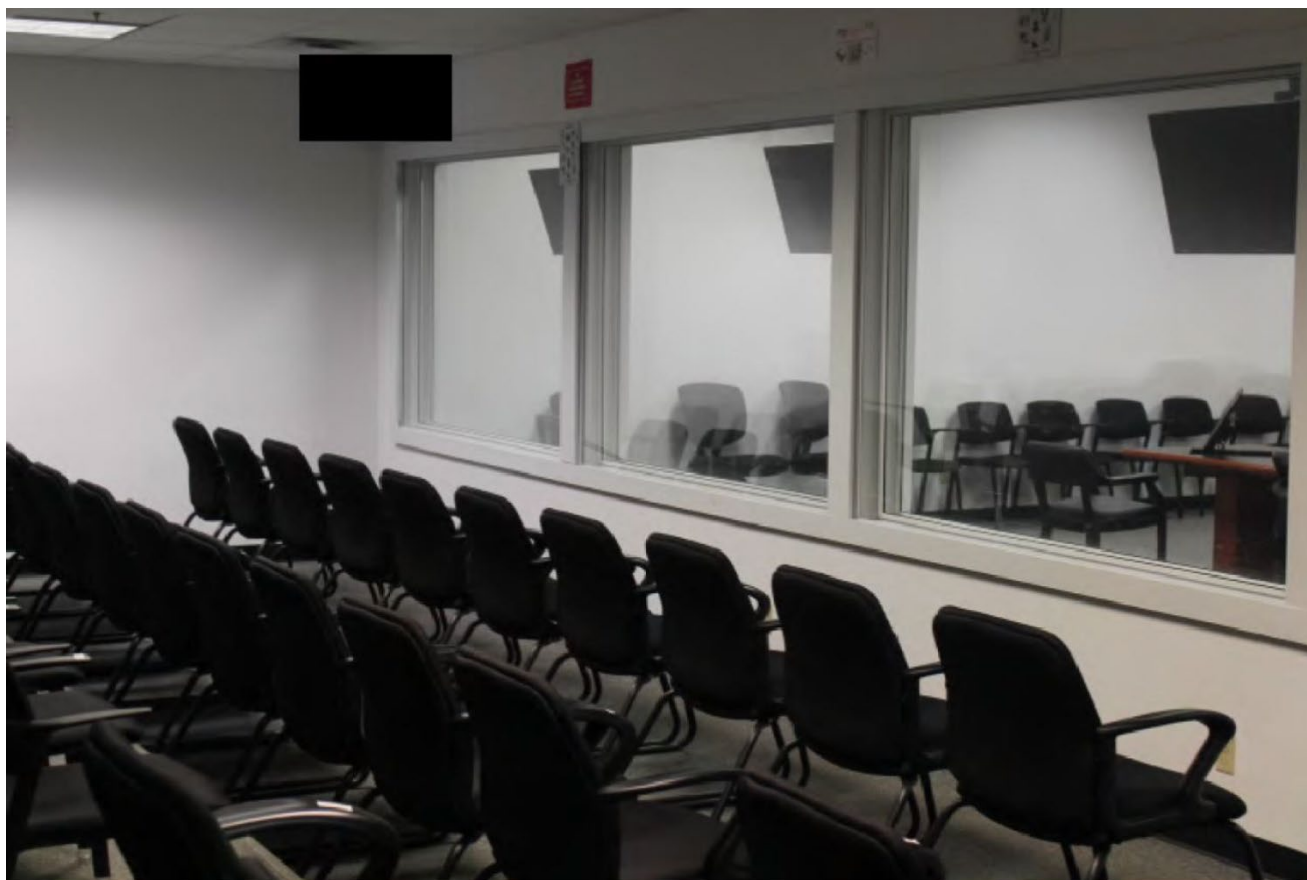
Source: GAO. | GAO-19-283

The Viewing Gallery

The courtroom within the Expeditionary Legal Complex has a viewing gallery (gallery), as shown in figure 3, where selected members of the public may view commissions' proceedings, through soundproof glass. This is because the gallery was designed to permit public viewing of the proceedings even in the event that classified information is inadvertently disclosed. Specifically, according a DOD official, the gallery has video display monitors that play a closed-circuit television feed of the proceedings, on a 40-second delay between live action in the courtroom and the video transmitted to the gallery. This system provides United States government officials with time to prevent any inadvertent disclosure of classified information from being disseminated to the public. If victims or family members are present in the gallery, they enter last and are seated nearest to the exit. A curtain is available to separate the

victims and family members from other members of the public, if they desire privacy.

Figure 3: Viewing Gallery of the Courtroom in the Expeditionary Legal Complex on Naval Station Guantanamo Bay, Cuba



Source: GAO. | GAO-19-283

Note: The viewing gallery includes the rows of seating located in the foreground of the photo.

Media Operations Center

Commissions' proceedings that are open to the public are transmitted by closed-circuit television to the media operations center located outside of, but nearby, the Expeditionary Legal Complex courtroom. The media operations center, shown in figure 4, also includes telephone and computer support, which enables up to 60 members of the media to simultaneously watch the proceedings, with the 40-second delay to prevent the inadvertent disclosure of classified information, while they work. The center also has a room for conducting press briefings.

Figure 4: Inside the Media Operations Center Near the Expeditionary Legal Complex on Naval Station Guantanamo Bay, Cuba

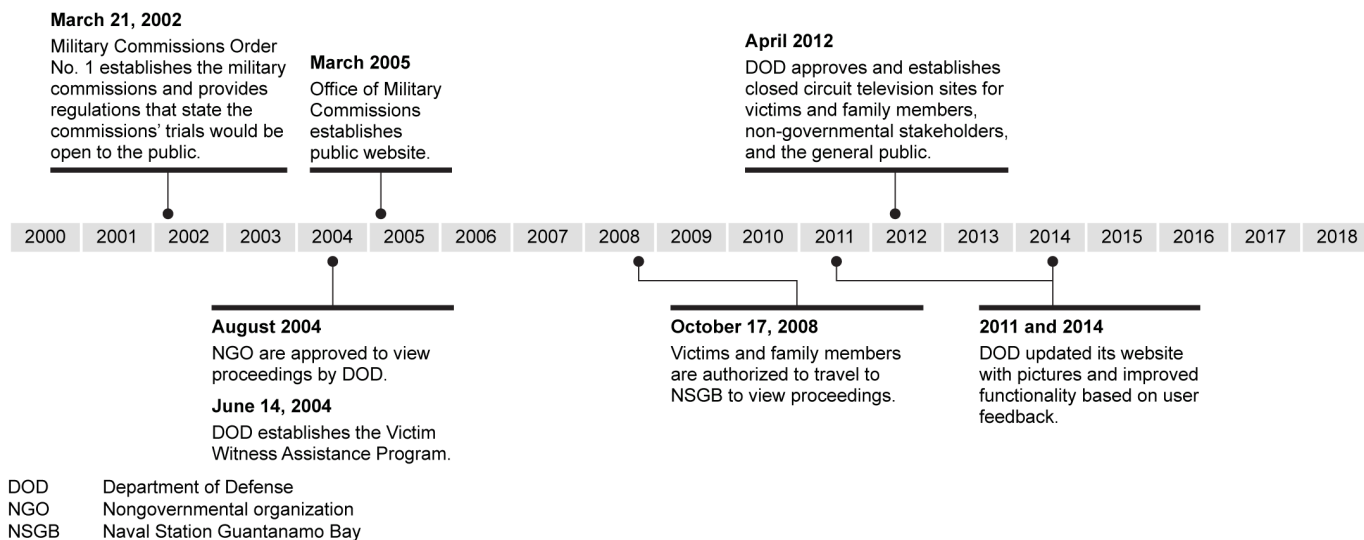


Source: Office of Military Commissions. | GAO-19-283

DOD Uses a Variety of Methods to Facilitate Public Access to Commissions' Proceedings

DOD has taken various steps to facilitate public access to commissions' proceedings, using four primary methods to do so. Rule 806 of DOD's Manual for Military Commissions specifies that, except in certain instances, such as to protect national security, that military commissions shall be publicly held.²⁰ In accordance with this guidance, DOD facilitates public access to commissions' proceedings by (1) communicating directly with victims and their family members about the status of scheduled hearings and other administrative matters; (2) enabling selected members of the public to view proceedings in-person at NSGB; (3) providing CCTV sites within the United States for viewing proceedings remotely; and (4) making information, such as court documents that will be used during proceedings, available to the public on the commissions' website. In figure 5, we summarize key DOD efforts to facilitate public access to commissions' proceedings, followed by a description of each method.

Figure 5: Timeline of Key Actions Taken by the Department of Defense (DOD) to Facilitate Public Access to Military Commissions' Proceedings



Source: GAO analysis of DOD data and information from DOD officials. | GAO-19-283

Note: The date DOD established the Victim Witness Assistance Program is based on the hiring date of the first Director of the program.

²⁰Department of Defense, *Manual for Military Commissions United States* (revised 2016).

Direct Communication With Victims and Their Family Members

According to officials, DOD established its Victim and Witness Assistance Program in June 2004 to provide support services to the approximately 2,000 victims and their family members who opted to participate in the program. The program, which falls within the Office of the Chief Prosecutor, provides updates to victims and their family members on pending military commission cases, notifies them of scheduled hearings, and assists with the logistics associated with viewing proceedings at NSGB or a CCTV site. In our survey of victims and family members, we asked about their perspectives on communication originating from the prosecution team and found that a majority of those who responded (72 percent) were satisfied or very satisfied with DOD's efforts.²¹

In-person Viewing of Proceedings at NSGB

Due to space limitations, DOD is currently able to allot 52 seats for selected members of the public to view "open" commissions' proceedings in-person from the courtroom gallery on NSGB.²² DOD is responsible for selecting these individuals who generally fall into three categories: (1) victims and their family members, (2) non-government stakeholders, and (3) the general public. DOD provides air transportation to and from NSGB for all individuals approved to view the proceedings in-person. Further details about DOD's selection process and seating allocation, by category, are provided below.

- **Victims and their family members:** Per DOD policy, up to 5 victims or their family members and the person accompanying them to provide support are allotted seating in the courtroom gallery.²³ There are also seats reserved for a grief counselor and an escort from the Victim and Witness Assistance Program for a total of 12 seats.²⁴ Due to the limited number of total seats and lodging currently available,

²¹For more information on this survey and responses to it, see Appendix II.

²²Members of the public are permitted to attend "open" proceedings during which classified information should not be discussed. Conversely, "closed" proceedings involve a discussion of classified material and the public is not permitted to attend. In this review, we focus on the public's access to open proceedings.

²³An October 17, 2008, memorandum from the Deputy Secretary of Defense noted that the Department of Defense supports limited attendance by victims and family members at military commission proceedings on NSGB. The memorandum further defines "limited" as meaning 5 victims and family members, each of which may be accompanied by 1 family member for a total of no more than 10 people attending a particular session.

²⁴According to OMC, a support person is a family member that accompanies a victim or their family member to provide them with support during travel to NSGB and while viewing proceedings.

DOD asks the approximately 1,140 victims and family members who have expressed an interest in attending proceedings to identify the proceedings they would prefer to attend. DOD then uses these preferences to select victims and family members to travel to NSGB for each week that proceedings are held.²⁵ According to DOD officials, this procedure works better than the lottery system that the Victim and Witness Assistance Program previously used because it provides victims and their family members more flexibility with their travel dates.

- **Non-government stakeholders:** This category includes individuals who represent 25 non-governmental organizations pre-approved by DOD to view proceedings in-person, as well as members of the media.²⁶ DOD currently allots 12 seats in the courtroom gallery to representatives of approved non-governmental and civic organizations and 10 seats to the media.²⁷ All individuals within this category who are approved for travel to NSGB are required to sign a list of “ground rules” developed by DOD and to be escorted by military personnel while on the base.
- **General public:** The remaining 18 seats are filled on a “first come, first served” basis by members of the public who live on NSGB or who have been cleared by the Navy to visit the base.

Remote Viewing of Proceedings at CCTV Sites

In 2012, DOD established five CCTV sites on the East Coast of the United States where individuals may view commissions’ proceedings remotely. Specifically, four CCTV sites are reserved for victims and their family members, and are located at Fort Hamilton, New York; Fort

²⁵According to the official in charge of the Victim Witness Assistance Program there are 1,140 victims and family members interested in attending proceedings at NSGB.

²⁶The 25 non-governmental and civic organizations are as follows: American Bar Association, Amnesty International, Human Rights First, Human Rights Watch, American Civil Liberties Union, National Institute for Military Justice, National Association of Criminal Defense Lawyers, Heritage Foundation, The Brennan Center, New York City Bar Association, Seton Hall University School of Law, Judicial Watch, University of Toledo, Duke University, National District Attorney’s Association, University of New Mexico School of Law, Pacific Council on International Policy, Henry Jackson Society (London), Open Society Foundation, Indiana School of Law, Geneva Academy, Georgetown University Law Center, September 11th Families for Peaceful Tomorrows, National September 11th Memorial and Museum, Reprieve.

²⁷According to a DOD official, the gallery can—in addition—seat DOD personnel assigned as media escorts. Also, the Media Operations Center can accommodate up to 60 additional members of the media.

Devens, Massachusetts; Joint Base Dix/McGuire/Lakehurst, New Jersey; and Naval Station Norfolk, Virginia. The fifth CCTV site is located at Fort Meade, Maryland, and is open to victims and their family members, non-government stakeholders, and the general public. According to officials, at these sites, large video display monitors display the same video feed that appears on monitors in the viewing gallery at NSGB, with the same 40-second delay to prevent the inadvertent disclosure of classified information. This feed is delivered to CCTV sites by both fiber optic cable and satellite transmission. According to court documents, these sites are the result of DOD acknowledging both the importance of the public's physical access to proceedings held at NSGB and the limited ability of the general public to do so.

According to our analysis of available data from DOD on attendance at NSGB and the CCTV sites, there have been a total of 2,304 recorded visitors, beginning in 2011. It is important to note that DOD did not record the number of visitors from the general public at NSGB until approximately September 2018. Also, according to officials, DOD did not begin recording visitors from the general public at the Fort Meade CCTV site until September 2018, and did not record data on non-government stakeholder visitors to the Fort Meade CCTV site from 2012 to 2015. However, our review of available data indicates that of the recorded visitors, the majority—64 percent—were non-government stakeholders, while victims and family members made up 34 percent of attendees, and the general public made up 2 percent. Table 1 summarizes available DOD data on attendance at NSGB and CCTV sites, from November 2011 to September 2018.

Table 1: Attendance of Victims and Family Members, Non-Governmental Organizations, Media, and the General Public at Military Commissions' Proceedings, November 2011 to September 2018

	2011 ^a partial year data	2012	2013	2014	2015	2016	2017	2018 ^b partial year data		
Naval Station Guantanamo Bay (NSGB)										
Victims and family members	7	25	63	49	31	81	48	55		
Media	Not available	105	50	15	17	29	64	57		
Non-governmental organizations	Not available	73	174	172	114	146	150	128		
General public	Not available							45 ^c		
Totals	7	203	287	236	162	256	262	285	Overall NSGB viewing total	1698
Closed Circuit Television (CCTV)										
Victims and family members	10	146	138	28	30	25	37	19		
Media	Not available	62	28	10	7	9	19	4		
Non-governmental organizations	Not available					11	13	10		
General public	Not available									
Totals	10	208	166	38	37	45	69	33	Overall CCTV viewing total	606

Source: GAO analysis of Department of Defense (DOD) data. | GAO-19-283

^aFor 2011, there was a single hearing in November, which DOD provided data for on victim and family member attendance. DOD provided data for non-governmental organizations and the media starting in 2012.

^bFor 2018, OMC provided data through August for victims and family members and the media, and through September for non-governmental organizations.

^cOMC was only able to provide data for general public attendance for September 2018.

Providing Information Through the Commissions' Public Website

According to a DOD official, DOD established the Office of Military Commissions' website as an online resource for the public in March 2005 to provide a variety of information about OMC's organization, its facilities and services on NSGB, active and inactive cases, and court documents approved for public dissemination, among other things. Court documents may include legal motions (motions) filed by the prosecution and defense, docket-related documents (e.g., documents that list motions to be argued during a specific hearing), judges' rulings on motions, and transcripts of hearings. According to officials, DOD updated the website in 2011 and 2014, which government and non-government stakeholders told us made it easier to use and provided additional information, thereby facilitating public access to information about the commissions' proceedings. In addition, DOD officials told us the website has the only official, public calendar of scheduled hearings.

The Public Faces a Variety of Challenges Accessing or Obtaining Information on Commissions' Proceedings

The public faces a number of challenges in gaining access to commissions' proceedings or obtaining information about them. These challenges can be categorized into two groups: (1) those that DOD has limited ability to address, and (2) those that DOD has greater ability to address.

Public Access Challenges Created by Factors Outside DOD's Control

During our review, we identified several aspects of commissions' proceedings that constrain the extent of public access that DOD is able to provide. Specifically, DOD has limited ability to address these challenges because they result, in part, from factors that are not under the department's control. As confirmed by DOD officials, these challenges are (1) the location of proceedings, (2) the prevalence of classified information associated with them, and (3) the duration of time awaiting trial—each of which are discussed in more detail below.

Location of Commissions' Proceedings

DOD's ability to address the location of commissions' proceedings is limited by statute, with a long-standing prohibition against the transfer of NSGB detainees to the United States.²⁸ According to our survey of

²⁸See, for example, Pub. L. No. 113-291 § 1033(2014) and section 1033 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1033 (2018).

Prevalence of Classified Information

victims and their family members, about half of the respondents expressed support for moving military commission s' proceedings from NSGB to the United States, while the other half of respondents opposed such a move.²⁹ The non-government stakeholders who completed our self-administered questionnaire were generally supportive of this idea, with the majority favoring it. According to DOD officials, the members of the general public who live in the local area of a federal courthouse, or can travel there, have relatively easy access to trials held in the United States. In contrast, holding commissions' proceedings on NSGB in Cuba severely constrains the general public's ability to view them, in-person.

While DOD plays a role in determining the classification level of information used in commission s' proceedings, it is a responsibility shared with other intelligence agencies.³⁰ As such, DOD does not have the unilateral authority to declassify such information and is thus limited in its ability to share it with the public.³¹ Nonetheless, several non-government stakeholders we contacted expressed their perspectives on this issue, with concerns over the extent to which evidence and other information used in commission s' proceedings is deemed "classified." For example, a non-governmental observer of the hearings stated that "[court] documents that should not be blocked from public access are frequently not available when they should be." The American Bar Association's longstanding policy—reflected in the association's Standards for Criminal Justice—is that "in any criminal matter, the public presumptively should have access to all judicial proceedings, related documents and exhibits, and any record made thereof not otherwise required to remain confidential."³² However, this standard—which reflects

²⁹Of those who responded to our survey question about moving the commissions' proceedings to the United States, 42 percent supported or strongly supported; 43 percent opposed or strongly opposed; 15 percent did not know.

³⁰According to DOD documentation and our discussions with officials from the intelligence agencies, there are four intelligence agencies with chief responsibility for reviewing court documents for potentially classified information. They are the Defense Intelligence Agency and the three agencies we refer to, in this report, as intelligence agency #1, intelligence agency #2, and intelligence agency #3.

³¹According to an official from the Office of the Chief Prosecutor, these agencies are the original classification authorities for this potentially classified information, and thus, have the legal authority to determine the classification of much of the evidence used in pre-trial hearings. This authority is established in Executive Order 13526.

³²American Bar Association Standards for Criminal Justice, Fair Trial & Public Discourse, Standard 8-5.2. Public Access to Judicial Proceedings and Related Documents and Exhibits (June 16, 2016).

the views of the American Bar Association and applies to all criminal cases including both commissions' proceedings and federal criminal proceedings—is subject to limitations and states that a court may impose reasonable limitations on public access. Also, based on our review of relevant case studies, these trials have also involved classified information that was not released to the public.³³ According to DOD officials, unlike most—if not all—federal criminal trials or courts-martial, commissions' court documents and proceedings regularly involve an unprecedented amount of classified information that cannot be shared with the public. For example, DOD officials told us that a substantial amount of evidence used in the commissions' proceedings relates to partially-classified activities conducted by intelligence agencies outside the department—such as the Central Intelligence Agency's former Rendition, Detention, and Interrogation Program.

Duration of Pre-trial Hearings

Given the unprecedented nature of these proceedings, attorneys from the prosecution and defense teams and other legal experts told us that the commissions' extensive litigation of legal rules and processes has been necessary to address pre-trial matters. Further, the prosecution and defense make their litigation decisions—and military judges make their rulings—independently of DOD. Thus, the department cannot fully address the key factors that drive the duration of pre-trial hearings.

As discussed previously, commissions' proceedings in their current form are a hybrid of the federal and military justice systems, and—according to legal experts who we contacted—are unlike any previously practiced. According to DOD officials, a case begins with a number of steps, including arraignment by the military judge.³⁴ Of the five cases before the commissions and included in the scope of our review,³⁵ one has been completed, one is awaiting sentencing, and three have spent from 4 to 10 years in pre-trial hearings; the starting dates of their trials are currently

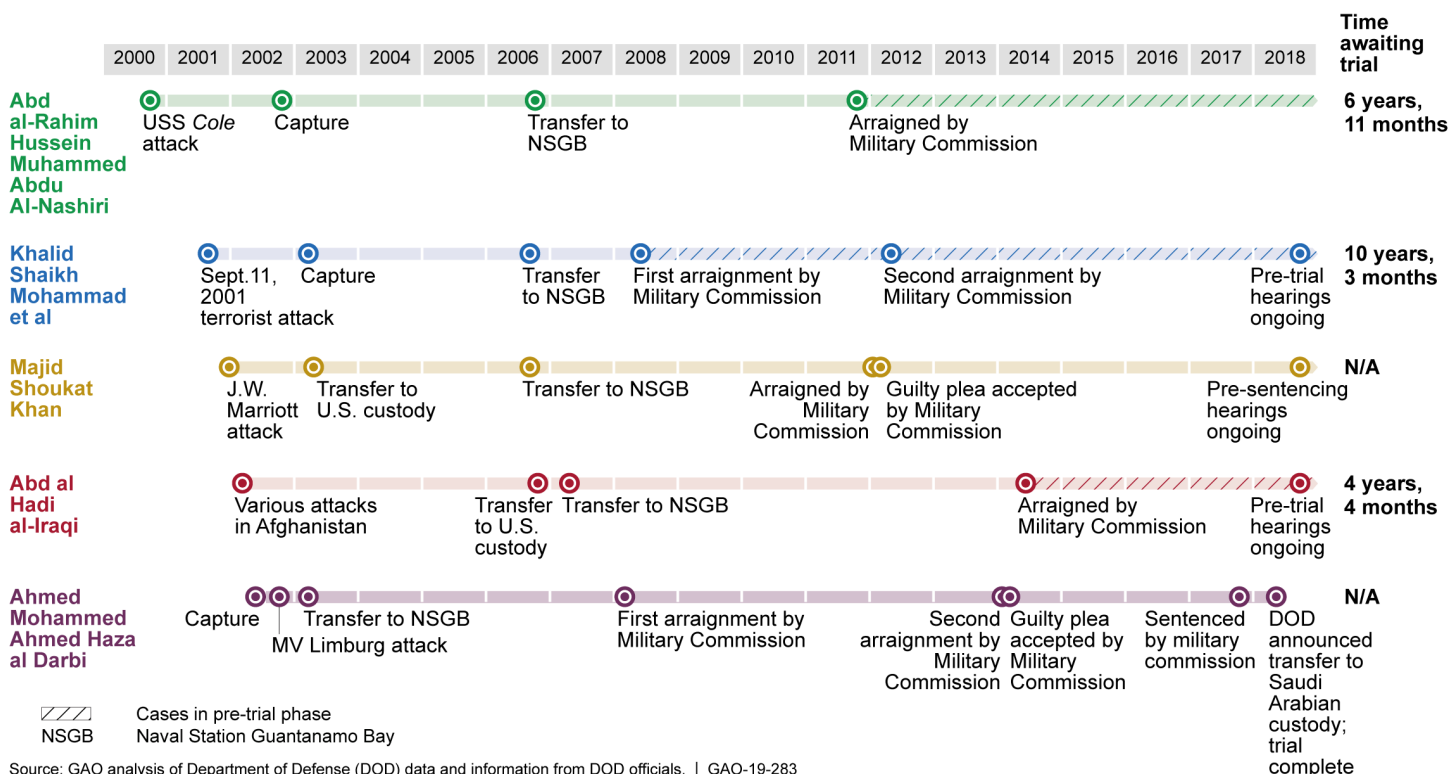
³³Federal Judicial Center, *National Security Case Studies: Special Case-Management Challenges*, Sixth Edition (2015).

³⁴These include the swearing of charges and referral by the Convening Authority, who is—as discussed previously—responsible for the overall management of the commissions' process, and is empowered to, among other actions, refer charges to trial. Further, a military judge may call a military commission into session without members to conduct a hearing and to determine motions raised by defense counsel or the prosecution.

³⁵As discussed previously, these cases are: Khalid Shaikh Mohammad et al. (2); Abd al Hadi al-Iraqi; Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2); Majid Shoukat Khan; and Ahmed Mohammed Ahmed Haza al Darbi (2).

unknown.³⁶ Figure 6 illustrates key milestones in these five cases, for the time period 2000 through 2018.

Figure 6: Key Milestones for Five Active Military Commissions' Cases, Calendar Years 2000 to 2018



Source: GAO analysis of Department of Defense (DOD) data and information from DOD officials. | GAO-19-283

Note: The cases represented here do not include all cases subject to military commissions, only those that were active during the GAO review, January 2018 – October 2018. Further, the milestones for Khalid Shaikh Mohammad et al apply only to Khalid Shaikh Mohammad and do not include the four co-defendants, also named in the Khalid Shaikh Mohammad et al (2) case. Further, according to DOD officials, in 2009 Executive Order 13492 was issued that halted all military commissions' proceedings and resulted in cases arraigned prior to 2009 to have charges withdrawn and dismissed. For this reason some of the cases have involved more than one arraignment, the length of time awaiting trial was calculated from the earliest arraignment to October 2018.

Government and non-government stakeholders told us they believe that the extensive number of pre-trial hearings has resulted in decreased

³⁶The cases of Almed Mohammed Ahmed Haza al Darbi and Ahmed Mohammed Ahmed Haza al Darbi (2) continued for almost ten years until his transfer to Saudi Arabia in 2018. According to a DOD official, Mr. Darbi pled guilty pursuant to a pretrial agreement and was sentenced in October 2017.

media coverage and a commensurate decrease in public access and interest given that the media is a primary source of information on commissions' proceedings for the general public. Further, several of the victims and family members who responded to our survey expressed frustration over the length of the pre-trial hearings. In written comments on the survey, one respondent noted that, "Pretrial hearings are prolonged unnecessarily on trivial matters." Another respondent stated that, "The process is taking too long because legal teams and the judge are not in session enough." Similarly, several non-government stakeholders told us they believe that the extended period without trials has generally resulted in a decrease in the public's awareness of commissions' proceedings, thereby decreasing the amount of resources that the media is willing to devote to cover them.

Public Access Challenges Created by Factors Within DOD's Control

We also identified other public access challenges that DOD has a greater ability to address because the challenges result largely from factors under DOD's control. As confirmed by DOD officials, these challenges to public access of military commissions' proceedings involve limitations related to in-person viewing of proceedings at NSGB, remote viewing of proceedings, and the timeliness with which key information is posted on the commissions' website.

In-Person Viewing of Commissions' Proceedings at NSGB

DOD policy and processes, the size of the gallery DOD built, and the limited logistical support DOD provides to non-government stakeholders substantially constrain the public's ability to view commissions' proceedings at NSGB. As discussed previously, DOD policy and the size of the courtroom gallery on NSGB currently limit in-person attendance to a total of 52 seats for each week of hearings—12 of which are reserved for victims or their family members, as well as the support people and DOD escorts accompanying them. The relatively limited number of seats means that—in the 10 years since victims and their family members were permitted to travel to NSGB—according to a DOD official, fewer than half have been selected to do so. According to our review of DOD data on total attendance at NSGB since 2011, victims and family members comprise 21 percent of attendees.

The limited weekly attendance for all visitors to commissions' proceedings is in contrast to United States district court that conducts federal criminal trials and can generally accommodate a new set of attendees each day, if those attendees are in the local area or can travel to the court house. However, as discussed previously, DOD provides air transportation to and from NSGB, the department must approve all individuals who fly to

NSGB to view the proceedings in-person, and the seats available to the general public in the gallery are filled on a “first come, first served” basis by members of the public who live on NSGB or who have been cleared by the Navy to visit the base. These constraints do not exist at federal courthouses. Thus, the portion of the general public that can attend commissions’ proceedings is substantially smaller than the portion of the public that can attend federal criminal trials.

In addition, according to non-government stakeholders, DOD provides limited logistical support for their work at NSGB, which constrains their ability to provide the public with access to information about the commissions’ proceedings. Based on discussions with non-government stakeholders, the logistics of traveling to NSGB and the inherent limitations of working in a challenging environment made it difficult for some of these non-government stakeholders to be able to view proceedings in-person with the frequency that they believe is needed. For example, one national security policy expert told us that they “cannot afford the time required to attend another hearing.” This is because “...hearings are frequently cancelled or closed to the public,” and as a result, attendees “...typically spend at least a week there to see maybe two days of hearings.” We also spoke with a legal expert who explained that the lack of reliable internet and phone service while on NSGB presented challenges in maintaining contact with the individual’s law practice, thus limiting their ability to travel to NSGB and view proceedings in-person. Similarly, a member of the media told us that the conditions of reporting the commissions’ proceedings are “an extreme hindrance.” This member of the media noted that while at NSGB, visitors have access to limited and unreliable internet and telephone service. This has made covering the trials “extremely difficult,” according to the freelance journalist because the cost, lack of resources and unreliable schedule make it increasingly difficult to take a week away from reporting on other events “in order to cover only a couple of days of open hearings.”

For many of the non-government stakeholders included in our review, their role as observers, scholars, or reporters on the commissions’ proceedings is not their full-time job. Instead, they do so as one part of their professional responsibilities or as volunteers. In this context, they told us generally that the time required to travel to NSGB due to infrequent flights, the difficulty of working there, and the frequent closings or cancellations of hearings discourage non-government oversight and reporting on the proceedings. This, in turn, reduces the amount and quality of the information that they can provide to the public.

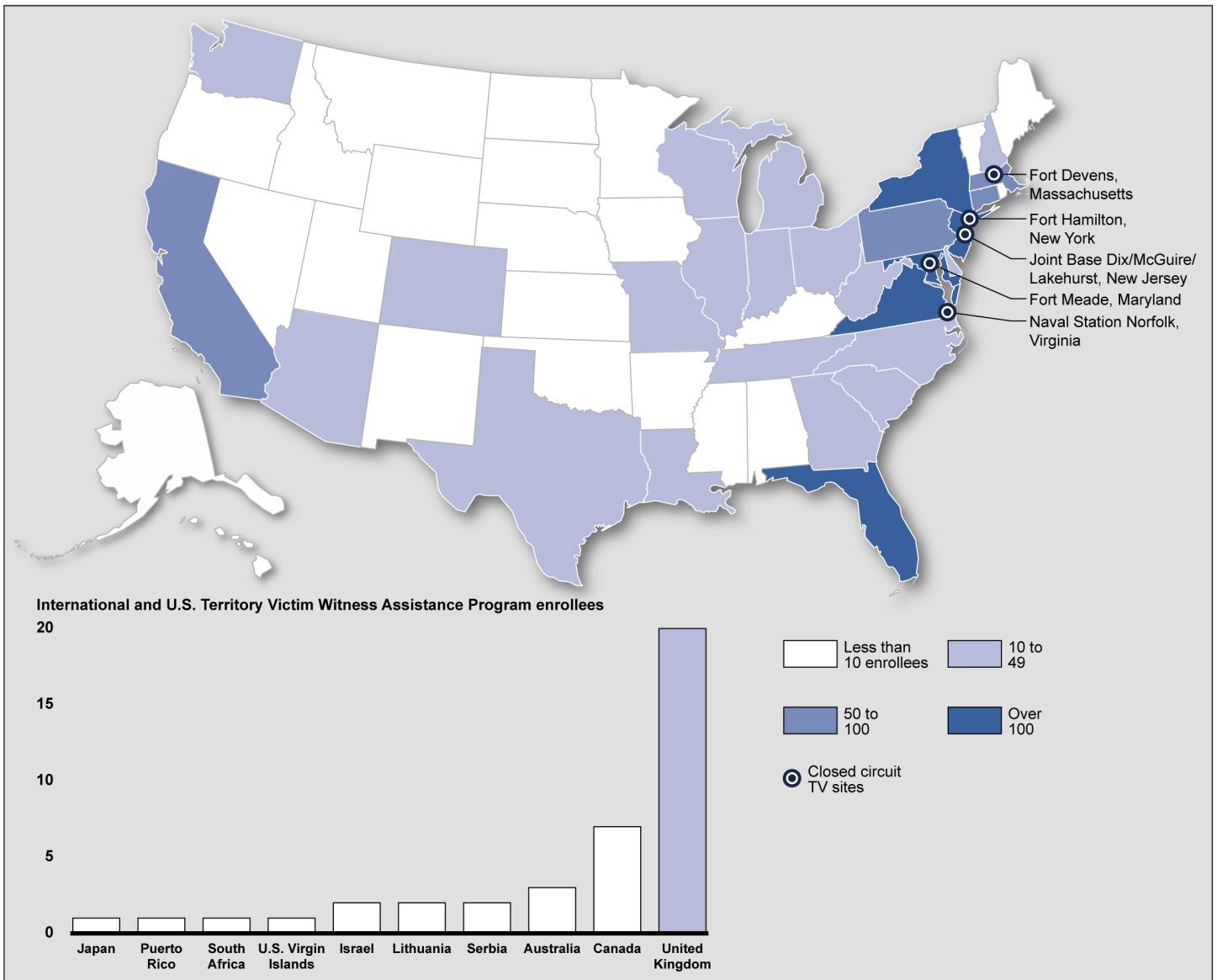
Remote Viewing of
Commissions' Proceedings

Also, while selected victims and family members and non-government stakeholders are able to view proceedings in-person on NSGB, the vast majority of the general public cannot, due to DOD policy. The exceptions are—according to a DOD official—civilians traveling to NSGB on official business and those who have a sponsor living at NSGB.

DOD's decision to locate all CCTV sites on military bases on the East Coast of the United States has resulted in several challenges that limit the current usefulness of CCTV sites in facilitating public access to commissions' proceedings. First, all five CCTV sites are concentrated within a 600 mile span on the East Coast of the United States. However, victims and their family members—the primary intended users of these sites—are located throughout the world or are concentrated in areas of the United States that are a significant distance from one of these five locations. According to our survey of victims and their family members, a majority of those who responded (71 percent) said that it was important to have the location of the hearings close to where they live. For example, the victim and family member population served by DOD's Victim and Witness Assistance Program has a significant presence in California and Florida, as well as smaller populations in eight other countries.³⁷ Further, survey respondents from Texas, Florida, and the United Kingdom noted that it was impractical for them to travel to the current CCTV sites, especially considering the unpredictable hearing schedule. Figure 7 shows the location of the CCTV sites along with the dispersion of victims and their family members served by DOD's Victim and Witness Assistance Program.

³⁷It is important to note that the population of victims and their family members served by DOD's Victim and Witness Assistance Program does not represent all victims associated with the terrorist attacks that are the focus of the five cases in the scope of our review.

Figure 7: Location of Closed Circuit Television (CCTV) Sites and Dispersion of Victims and Family Members Served by DOD's Victim and Witness Assistance Program



Source: GAO analysis of Department of Defense data; Map Resources (map). | GAO-19-283

The logistics of traveling to the CCTV site at Fort Meade, Maryland—the only location open to non-government stakeholders and the general public—is also a factor that limits the public's access to information about commissions' proceedings. For example, non-government stakeholders

who observe the commissions' proceedings and were included in our review explained that the majority of their organizations are located in cities that either do not have a CCTV site, or are not near a site to which they have access. Examples include Los Angeles, California, and New York City, New York. Non-government stakeholders also expressed that there are challenges associated with the amount of time and travel it takes to get to Fort Meade, which can be difficult especially when hearings are often cancelled or closed with little or no notification, according to these stakeholders. Further, although the CCTV site at Fort Meade is open to the general public, DOD officials acknowledged that there is no practical way for the department to advertise the availability of the opportunity to view proceedings at the CCTV site on Fort Meade.

In addition to the challenges of traveling to CCTV sites, some victims and family members and non-governmental stakeholders noted challenges regarding their ability to access military bases that host these sites. For example, some victims and family members told us that they or their relatives had been denied access to certain CCTV sites because, according to DOD, they did not meet the department's definition of a victim or family member.³⁸ Further, non-government stakeholders who are foreign nationals are required to be escorted while on Fort Meade, per DOD policy. However, DOD officials told us that Fort Meade does not always have the personnel necessary to escort these individuals, which could preclude certain non-government stakeholders from being able to access the site. Further, a senior DOD official acknowledged that by locating CCTV sites on military bases, DOD is running the risk that—in certain scenarios—no member of the public would be able to access the sites. This is because, in the event of a threat to base security, it may be closed to civilians who do not live or work on the installation.

³⁸According to the DOD *Regulation for Trial by Military Commission*, a victim is defined as a person who has suffered direct physical, emotional or pecuniary harm or loss as a result of an offense as defined in chapter 47A of title 10, United States Code, or the law of war. Victims may include: military members, civilians and citizens of foreign countries; and, a person who is an immediate family member of the victim of a crime, if so designated by the Convening Authority or her designee. Examples of immediate family members are spouses, children, parents and siblings; and any person can make an application to the Director of the Victim and Witness Assistance Program to be designated as a victim in a particular case. The Director of the program shall forward the request to the Convening Authority with a recommendation for approval or disapproval. The decision of the Convening Authority is not appealable.

Timeliness of Information
Posted to the Commissions'
Website

As discussed previously, OMC's website is a key enabler of public access to information about commissions' proceedings because it provides the public with a way to retrieve unclassified court documents related to the commissions' proceedings, such as legal motions and transcripts, and a schedule of the proceedings' hearings. According to DOD's Regulation for Trial by Military Commission (Regulation), court documents are provided by OMC to an inter-agency review team, which examines them and removes any classified or protected information that is identified.³⁹ Once this examination is completed, the inter-agency review team returns the document to OMC to be posted to its website.⁴⁰ DOD's Regulation's sets a timeliness standard for reviewing and posting court documents—noting that the entire process generally should take no longer than 15 business

³⁹DOD, *Regulation for Trial by Military Commission* (2011) specifies a process for court documents to be posted on the website, in which OMC provides court documents to an inter-agency security classification review team that identifies and removes information that should not be released to the public, before providing the reviewed documents back to OMC for posting. DOD's Regulation also lays out two options for timeframes in which court documents are to be posted, depending on whether the documents contain information that cannot be released to the public. First, it states that for court documents that contain no classified or protected information, DOD has 1 business day to post them to the website. Second, for all other court documents, they shall be publicly released after the review team confirms that the court documents are in publicly releasable form, a review that shall generally take no longer than 15 business days. According to the Regulation and our discussions with DOD officials, this process begins with the file date and continues with the inter-agency review team examining the majority of court documents in order to remove information that is not publicly releasable. The inter-agency review team's efforts are coordinated by the Defense Intelligence Agency, specifically the agency's DOD Security Classification/Declassification Review Team, in coordination with other intelligence agencies, characterized by the Regulation as the appropriate non-DOD federal department and agency original classification authority. Each member of the team reviews a document if that agency's personnel believe the document contains information for which that agency is the original classification authority. The process concludes with the Defense Intelligence Agency providing the documents—now cleared for public release, sometimes with redactions—back to OMC, which posts them on the website.

⁴⁰In regard to unofficial, unauthenticated transcripts, the Regulation states that except under exceptional circumstances, including equipment failure, the Convening Authority shall ensure the custodian of the OMC website posts a draft, unofficial, unauthenticated transcript of the public portions of the military commission proceedings to the OMC website as soon as practicable after the conclusion of a hearing each day the military commission is in session (whether the hearing is recessed, adjourned, or closed).

days.⁴¹ However, based on our analysis of available data, we determined that DOD has generally not met this standard for the timely posting of documents, which substantially limits public access to information about proceedings.

Specifically, we obtained and analyzed data on when court documents were filed with OMC and the date on which the inter-agency review team returned them to OMC for posting and found that from October 2011 to October 2018, DOD frequently missed the timeliness standard laid out in its Regulation. For example, since 2011, we found that 8 percent of court documents reviewed by the inter-agency review team were returned to OMC after the 15 business day standard. Further, we found that—since 2015—DOD missed its timeliness standard with greater frequency. For example, approximately 7 percent of documents reviewed in 2015 were returned to OMC after the 15 business day standard whereas in 2018, more than 50 percent of the documents submitted for review missed the timeliness standard. Our analysis of data from the inter-agency review team is summarized in table 2.

⁴¹The Regulation states that the 15 business day security classification review period shall be extended for a reasonable period if the appropriate non-DOD federal department and agency original classification authority or the Officer in Charge of the DoD Security Classification/Declassification Review Team submits a notification to the Chief Clerk of OMC's Trial Judiciary declaring that such additional time is required by exceptional circumstances. However, according to our discussions with officials from the prosecution, they are not aware of any waivers being submitted for review periods lasting for more than 15 business days.

Table 2: Review of Court Documents by Inter-agency Review Team for Posting on Military Commissions' Website in Accordance with Department of Defense Timeliness Standard, October 2011 – October 2018

Year	Number of documents submitted by Office of Military Commissions (OMC) to review team	Number of documents returned to OMC after the 15 business day standard	Percentage of documents returned to OMC after the 15 business day standard	Median number of business days after 15 business day standard that documents were returned to OMC
2011 ^a	53	0	0	0
2012	882	0	0	0
2013	1973	10	0.51	22.5
2014	1597	5	0.31	23
2015	986	65	6.59	26
2016	1371	4	0.29	55
2017	2017	158	7.83	30
2018 ^b	961	545	56.71	42
Total	9,840	787	8	32

Source: GAO analysis of Department of Defense (DOD) data. | GAO-19-283

Note: While DOD's Regulation generally allots no longer than 15 business days to review and post documents, the Regulation allows for an undefined amount of time for administrative processing. DOD officials familiar with the process estimate that the average amount of administrative time is about three business days. Thus, based on the regulation and these officials' estimate, we used 18 business days after a document's file date to determine whether DOD had posted a document by the timeliness standard. Also, in the columns with data on Percentage of Documents Returned to OMC after the 15 Business Day Standard and the Median Number of Business Days After 15 Business Day Standard that Documents Were Returned to OMC, the total percentage and median number of business days—respectively—reflect analysis over the entire timespan presented in the table—2011 to 2018—as opposed to averages of the individual years' data.

^aThe review team was only able to provide partial data for 2011, October to December.

^bThe review team provided partial data for 2018, January to October.

In addition to the data provided by the inter-agency review team, we independently collected and analyzed data from the commissions' website on the filing and posting dates for more than 11,000 court documents filed between June 19 and November 19, 2018.⁴² Our analyses of these data further demonstrate DOD's challenges with timely posting of court documents. For only one category of court documents—unofficial, unauthenticated transcripts from open hearings—our analysis of data collected from the website from June to November 2018 show that

⁴²The data provided by the inter-agency review team and the data we collected independently may differ in certain ways. For example, according to a DOD official, the data provided by the inter-agency review team may not be complete, as some data storage documents were damaged during software upgrades.

these transcripts were posted in a timely manner. For the remainder, over a five month period, nearly 1,300 court documents either remained unposted or were posted to OMC's website after the 15 day business standard.⁴³ Furthermore, the total for the median number of business days these documents were filed after the 15 business day standard ranged from 90-103.5 days—that is, from almost four months to more than five months past DOD's timeliness standard. Table 3 summarizes our analysis for the five cases in the scope of our review.

⁴³Specifically, if a filed document was posted within this five month period or remained unposted during the period, we were able to determine if it was posted after DOD's 15 business day timeliness standard and by how many business days. As discussed previously, because OMC's website does not provide the dates on which court documents are posted, we could not determine the posting dates of documents posted before June 19, 2018. However, our web-scraper visited the website each day from June 19, 2018 to November 19, 2018 and determined whether or not each filed document had been posted. Thus, for this five month period, we have this information.

Table 3: Posting of Court Documents on the Office of Military Commissions' Website in Accordance with DOD's Timeliness Standard by Case, June 19, 2018 – November 19, 2018

Case name	Documents posted		Documents not posted	
	Number of documents posted after 15 business day standard	Median business days after 15 business day standard	Number of documents posted after 15 business day standard	Median business days past 15 business day standard
Data collected June 19, 2018 – November July 19, 2018				
Khalid Shaikh Mohammad et al. (2)	528	80.5	483	95
Abd al Hadi al-Iraqi	89	107	108	123.5
Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2)	44	127	12	203
Data collected July 19, 2018 – November July 19, 2018				
Majid Shoukat Khan	9	44	16	66.5
Ahmed Mohammed Ahmed Haza al Darbi (2)	0	-	3	280
Total for five cases	670	90	622	103.5

Source: GAO analysis of Department of Defense (DOD) data. | GAO-19-283

Note: On June 19, 2018 we began collecting data on the three cases responsible for the majority of documents filed with the Chief Clerk of OMC's Trial Judiciary: 9/11: Khalid Shaikh Mohammad et al. (2), Abd al Hadi al-Iraqi, and USS Cole: Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2). Subsequently, we expanded our data collection in order to gather more information on all active cases in the scope of this review. On July 19, 2018 we began collecting data on the cases of Majid Shoukat Khan and Ahmed Mohammed Ahmed Haza al Darbi (2). In addition to the Regulation's stipulation that DOD generally has no longer than 15 business days to review and post documents, the Regulation allows for an undefined amount of time for administrative processing. DOD officials familiar with the process estimate that the average amount of administrative time is about three business days. Thus, based on the regulation and these officials' estimate, we used 18 business days after a document's file date to determine whether DOD had posted a document by its timeliness standard. For the case Ahmed Mohammed Ahmed Haza al Darbi (2), in regard to documents posted, because there were no documents posted after 15 business day standard, the table does not reflect a median of business days after the 15 business day standard. Also, in the column with data on Median Business Days Past 15 Business Day Standard, the total median number of business days reflects analysis over the entire timespan presented in the table—June 19, 2018 to November 19, 2018—as opposed to averages of the individual cases' data.

We reviewed relevant case studies in federal criminal proceedings involving both terrorism charges and certain matters related to commissions' cases, and identified instances in which federal judges adopted processes for review and release of classified documents that are similar to processes specified in DOD's regulation. However, we also identified differences, such as shorter timeframes in the federal court systems for the government's review and public release of documents with the potential for classified information. For example, in one case,

court security experts had 48 hours—and in another, 72 hours—to complete this process.⁴⁴

According to various non-government stakeholders, DOD's inability to post court documents in a timely manner has negatively impacted their ability to perform their role in facilitating public access to information about commissions' proceedings. For example, according to our analysis, DOD posted legal motions filed by the prosecution and defense teams a median of 97 business days past DOD's timeliness standard; military judges' rulings were posted a median of 69 days past DOD's timeliness standard. One member of the media explained that DOD's delayed posting of court documents limits their access to information needed to justify travel to NSGB. They further explained that not being able to travel to NSGB impedes their ability to conduct interviews and research about the proceedings, which are needed to inform the general public. Similarly, other stakeholders told us that they believe the delays in posting docket-related documents have made it difficult for them to assess the proceedings and communicate their assessments to the public. According to our analysis, DOD posted these documents a median of 99 business days past DOD's timeliness standard. Further, for hearings held between June 19, 2018 and November 19, 2018, we found that of the 74 docket-related documents filed with the court, three were posted in advance of the hearing.

We also found that the hearing schedule posted on the commissions' website—the only official, publicly-accessible schedule of proceedings, according to DOD officials—frequently is not updated in a timely manner to reflect schedule changes. According to DOD officials, this is because information on schedule changes is often not provided to the webmaster for timely updates, as the inter-agency review team is examining it; much like the inter-agency review team does with court documents. As a result, several non-governmental stakeholders told us that it is difficult to justify the time and costs of traveling to Fort Meade, Maryland—the only CCTV site open to them—given the risk of arriving only to learn that the scheduled hearing has been canceled or closed to the public. We observed the effect of these cancellations on public access firsthand during our review. For example, we attempted to attend hearings at Fort Meade on various occasions. On several of those occasions, the hearing

⁴⁴Federal Judicial Center, *National Security Case Studies: Special Case-Management Challenges*, Sixth Edition (2015).

was canceled. While we learned this information directly from our DOD contact, none of these changes were reflected on the website's schedule. Also, when we asked for updates on scheduled hearings, multiple DOD officials told us that we should not bother checking the website's hearing schedule. Instead, they recommended that we check the Twitter feed of a certain reporter who spends a lot of time at NSGB and routinely provides updates on hearings. In addition, according to DOD officials, victims and family members who attempt to access the website from certain locations outside of the United States are sometimes unable to do so. OMC officials are aware of this issue and an OMC information technology expert told us that while OMC has tried to fix this issue several times, it is based on security for the website. In addition, according to DOD officials, victims and family members who attempt to access the website from certain locations outside of the United States are sometimes unable to do so. OMC officials are aware of this issue and an OMC information technology expert told us that while OMC has tried to fix this issue several times, restricting access from certain locations outside of the United States is based on security for the website.

DOD officials acknowledged that they are regularly not meeting their timeliness standard for posting court documents to OMC's website—something that they largely attribute to the volume of documents submitted and the government-wide security classification review process to which they are subjected. Specifically, in this process for the military commissions' proceedings, there are two DOD and two non-DOD intelligence agencies with the chief responsibility for conducting the security classification review of court documents filed for commissions' proceedings. The Defense Intelligence Agency (DIA) is responsible for coordinating the process and all four agencies may be required to review a document depending on the type of information it contains.

In accordance with DOD's Regulation and the interests of national security, a review of certain documents submitted must be conducted to confirm that such filings are in publicly releasable form.⁴⁵ Due to the multiple levels of review and depending on the amount and complexity of classified information involved, intelligence agency officials told us that—in the course of the inter-agency review team's efforts—it can take anywhere from one day to several weeks to review a single document. These officials also told us that it is very difficult to hire personnel with the

⁴⁵DOD, *Regulation for Trial by Military Commission* (2011).

requisite expertise and experience to serve as reviewers, given that classified information that may be in these documents can be complex, esoteric, and decades old. Thus, it is unlikely that a significant number of new reviewers could be hired to help expedite the review team's processes. According to our review of available information from intelligence agency officials, the agencies have a relatively small number of personnel reviewing large numbers of documents.

Further, those personnel responsible for reviewing OMC-related documents spend only a portion of their time reviewing court documents for the purpose of posting them on the commissions' website. This is because inter-agency review team personnel are also responsible for reviewing documents not released on the commissions' website. According to a senior official from the review team, it has been tasked with competing requests for document reviews that have impacted the team's ability to review court documents for posting on OMC's website. For example, the official explained that—from May 2017 to February 2018—the review team completed seven of these large-scale, time-sensitive tasks, involving about 31,400 pages of document review, according to the official's estimate.

Table 4 summarizes available information about the agencies' review of court documents to be posted on the website.

Table 4: Information on Intelligence Agencies' Review of Court Documents for Posting on the Office of Military Commissions' (OMC) Website, for Various Timeframes

Organization	Total OMC court documents reviewed for web posting ^a	Total pages of OMC court documents reviewed for web posting ^b	Number of personnel currently reviewing OMC related documents ^c	Average portion percent of personnel time spent reviewing OMC court documents for web posting
Intelligence Agency #1 ^f	Numerical estimate not available ^d	Agency could not provide	2	26
Intelligence Agency #2 ^g	Agency could not provide	Agency could not provide	Agency data not publicly releasable	Agency data not publicly releasable
Intelligence Agency #3 ^h	10,687	184,125	Not made available to GAO ^e	Not made available to GAO ^e
Defense Intelligence Agency	9,840	121,810	9	60

Source: GAO analysis of intelligence agency-provided data. | GAO-19-283

^aIntelligence agency #2 could not readily provide a complete set of the requested data.

^bIntelligence agency #1 does not track these data and intelligence agency #2 could not readily provide a complete set of the requested data.

^cFor Intelligence Agency #1, these personnel review a variety of OMC-related documents that are not posted on the military commissions' website.

^dIntelligence agency #1 estimates it has reviewed all documents filed with the Office of Military Commissions' (OMC) Trial Judiciary for eventual posting on the website.

^eIntelligence agency #3 told us that it finds these data to exceed the scope of the mandate requiring our review and are only within the purview of committees with primary responsibility for oversight of the intelligence community.

^fThe data provided by Intelligence Agency #1 are for fiscal years 2011 through 2018.

^gThe data provided by Intelligence Agency #2 are for fiscal year 2018.

^hThe data provided by Intelligence Agency #3 are for calendar years 2011 through 2018.

Based on our discussions with officials from DOD and the inter-agency review team, factors such as—the complexity of documents, relative scarcity of qualified reviewers, and other document review tasks unrelated to web posting—are somewhat out of DOD's control. For example, a senior official from the inter-agency review team explained, the complexity of court documents is the responsibility of the prosecution and defense teams that write them; the other document review tasks are often driven by the schedule of individual cases or military judges' rulings. However, there is a key factor driving the timeliness challenge that may be in the department's control. According to our discussions with DOD officials, they attributed document posting delays to a policy decision by

the department to subject the extremely large volume of court documents filed—including schedule changes—to the same type of security review.

A Number of Options Exist to Potentially Address Public Access Challenges, However Each Option Has Tradeoffs That Have Not Been Assessed by DOD

Options Exist to Address Challenges That Are Well Supported by Victims, Their Family Members, and Non-Government Stakeholders

Through our review of agency documentation and discussions with DOD officials, victims and family members, and non-government stakeholders, we identified a variety of potential options for expanding access to commissions' proceedings. We have organized these options into three categories, as shown in table 5.

Table 5: Potential Options for Expanding Public Access to Military Commissions' Proceedings

Category	Potential options for expanding public access
In-person viewing of proceedings at Naval Station Guantanamo Bay (NSGB)	Increase the number of seats in the courtroom viewing gallery on NSGB that are open to the public
Remote viewing of proceedings	Add more CCTV sites that are open to the general public
	Add more CCTV sites solely for use by victims or family members
	Move CCTV sites to locations other than military bases (e.g.; federal courthouses)
	Televise proceedings so that they are accessible by the general public
	Broadcast proceedings over the internet so that they are accessible by the general public
Timeliness of posting information to the military commissions' website	Establish a password protected internet broadcast for access only by victims or their family members
	Post court documents in accordance with DOD's established timeliness standard
	Post changes to the hearing schedule before the hearing occurs

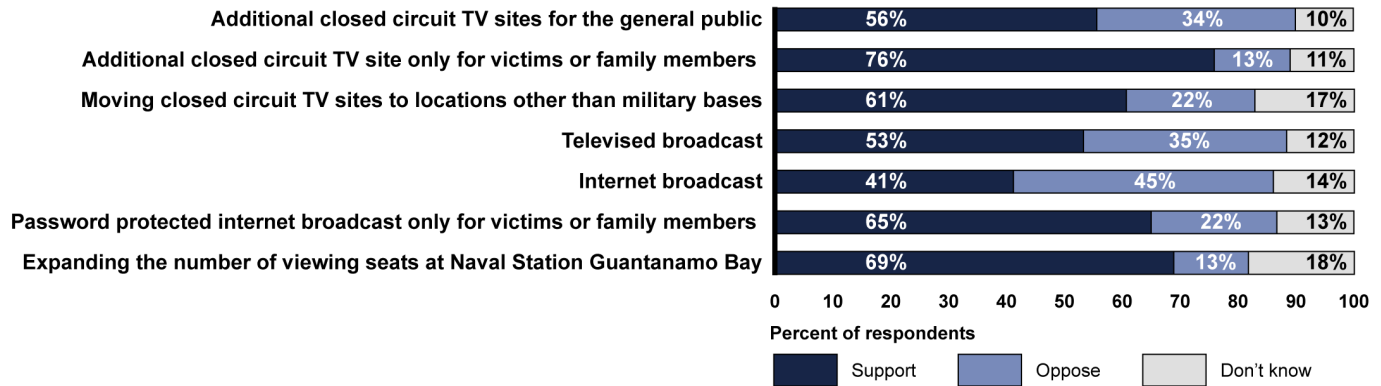
Source: GAO summary of information from relevant documentation, victims and family members, Office of Military Commissions (OMC) officials, and non-government stakeholders. | GAO-19-283

Note: The potential options for expanding in-person viewing of commissions' proceedings, as well as posting court documents and changes to the hearing schedule would require DOD to change departmental policy.

The majority of both victims and family members who responded to our survey and non-government stakeholders who responded to our questionnaire support most potential options for expansion of public access. Specifically, the majority of victims and family members who responded to our survey supported six of the seven potential options about which we asked. The majority of non-government stakeholders supported seven of the ten potential options. There was general agreement between these two groups on the potential options they supported.⁴⁶ This information is summarized in figures 8 and 9.

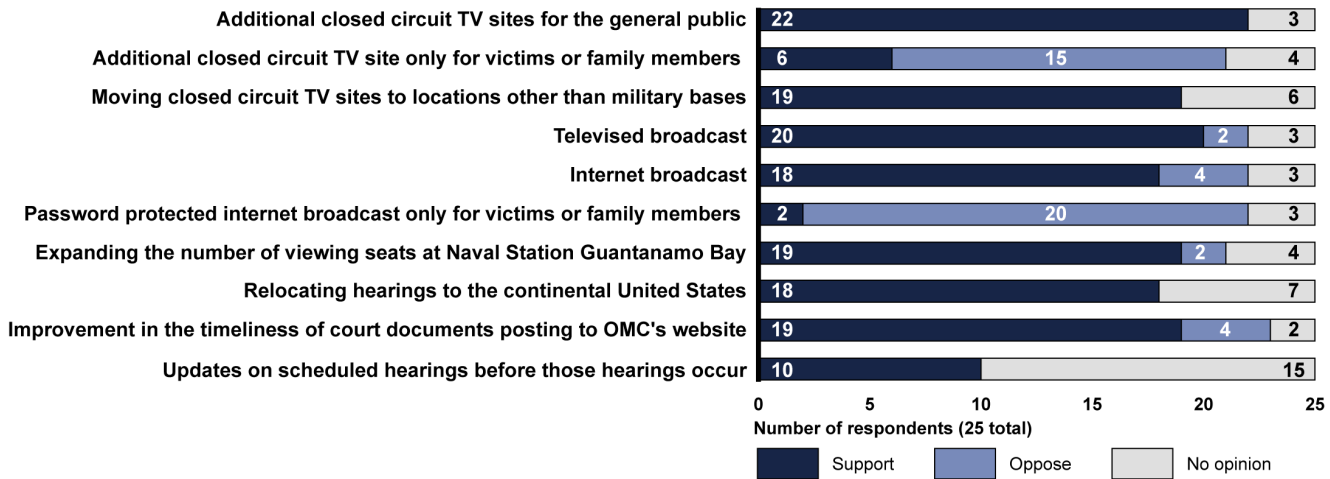
⁴⁶In our summary of non-government stakeholders' opinions on options to expand public access, we included two options that we did not include in our summary of the opinions of victims and family members on these options. This is because, based on our research, the non-government stakeholders we contacted generally use the website more than victims and family members we surveyed, for the specific purposes of reviewing court documents and receiving changes to the hearing schedule before the planned hearing occurs. This may be due to unique resources provided to victims and family members. Specifically, they do not need to rely on the website for information on legal issues discussed in hearings or updates to the hearing schedule. Instead, as previously discussed, the Victim and Witness Assistance Program provides victims and family members with updates on pending military commissions' cases and notifies them of scheduled hearings. These services are for the exclusive use of victims and family members.

Figure 8: Opinions of Surveyed Victims and Family Members on Potential Options for Expanding Public Access to Military Commissions' Proceedings



Source: GAO analysis of victims' and family members' survey responses. | GAO-19-283

Figure 9: Opinions of Non-Government Stakeholders Who Responded to Questionnaire on Potential Options for Expanding Public Access to Military Commissions' Proceedings



Source: GAO analysis of non-government stakeholders' questionnaire responses. | GAO-19-283

In-person Viewing of Proceedings at NSGB

Options exist that may potentially help DOD address the challenges the public faces attending hearings at NSGB. Specifically, a physical expansion of the courtroom viewing gallery that increases the number of seats open to the public, along with a change in DOD policy to allow more visitors, would enable NSGB to accommodate more people wishing to

view proceedings in-person. An OMC official responsible for management of the office's infrastructure at NSGB acknowledged that an expansion of the NSGB gallery and the number of the people it can accommodate is theoretically possible, potentially in the context of an ongoing project to renovate the complex of buildings that contains the courtroom, gallery, and other facilities that support the commissions' proceedings.

DOD officials expressed a number of concerns with this option. First, an OMC official cautioned that expanding the gallery's capacity would likely increase the cost of the current \$14 million expansion project, though the official was unable to estimate by how much. Second, an increase in the number of visitors would require a commensurate increase in logistical support—for example, more lodging and utilities—which an OMC official said may not be supported by the current level of resources. Third, according to an OMC official, an expansion of the gallery would require it to be temporarily closed, thus delaying commissions' proceedings. This is because, the official explained, the current courtroom is the only venue at NSGB that can accommodate a multi-defendant trial and any highly classified evidence required for the proceedings. Further, according to a senior DOD official, renovation of the gallery will require it to be re-accredited before DOD could resume discussing highly classified evidence in the adjoining court room.⁴⁷ This could result in a substantial increase in both the period of time in which the gallery and court room are unavailable, as well as the cost of a renovation.

In our review of DOD documents and discussions with department officials, we learned that there may be ways to address some of these concerns. For example, DOD is planning to accommodate at least some additional visitors to NSGB. According to OMC documentation, it is planning to support about 350 total attendees per week of hearings during the trial phase of Khalid Shaikh Mohammad et al (2).⁴⁸ This is an increase

⁴⁷The official explained that any physical changes to the building would result in the courtroom losing its accreditation as a facility permitted to host discussions of highly classified evidence. This is because, among other issues, all construction changes would require inspection and re-accreditation by DOD before the courtroom could be used again. Such a re-accreditation would be complicated by the fact that the courtroom was accredited according to 2007 standards. New standards for a facility permitted to host discussions of highly classified evidence would likely require significant changes to the courtroom.

⁴⁸According to DOD documentation and a DOD official, this total is based on OMC's analysis of the personnel projected to be required for a week of hearings, including all OMC personnel, 10 victims and family members with 3 required escorts, 14 observers from non-governmental organizations, and 60 media.

Remote Viewing of Proceedings

of about 260 percent, compared to the average total number of visitors for a week of pre-trial hearings in this case.⁴⁹

Based on our review of relevant court documents and discussions with DOD officials and stakeholders, we identified two broad categories of potential options that may help DOD address the public access challenges associated with CCTV sites: (1) adding or changing the locations of CCTV sites and (2) broadcasting video from NSGB using other technologies, such as the internet.

CCTV sites: Additional CCTV sites—that are more evenly distributed across the country—could potentially be established for the general public or for use solely by victims and their family members. DOD officials acknowledged that most military bases have the requisite technology and physical infrastructure to host a CCTV site and that expanding the number of CCTV sites would require a relatively small outlay of resources. Further, they also acknowledged that there may be opportunities to establish CCTV sites at locations other than military bases, such as federal courthouses, which may help address the public access challenges posed by bases' security procedures, such as foreign nationals' difficulty when serving as observers or reporters.

DOD officials noted however, that expanding CCTV sites would require approval by the Secretary of Defense or a military judge, because—according to DOD's Manual for Military Commissions—the broadcasting of proceedings in the court room, to include video and audio recording or television broadcasting, shall not be permitted.⁵⁰ The military judge, however, may permit contemporaneous closed-circuit video or audio transmission.⁵¹ For example, the prosecution requested this permission in 2012 and the military judge authorized the transmission of all open

⁴⁹According to an OMC official, the average number of visitors for a week of pre-trial hearings in the case of Khalid Shaikh Mohammad et al (2) is about 135.

⁵⁰*Manual for Military Commissions* (2016), Rule 806(c). This rule is consistent with military court-martial and federal criminal practice. See, for example, Federal Rules of Criminal Procedure, Rule 53, which prohibits the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

⁵¹Rule 806(c) of the Manual for Military Commissions states that the military judge may, as a matter of discretion, permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed from the court room or by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

proceedings, by CCTV, to several sites.⁵² Similarly, based on our review of relevant selected case studies of terrorism trials in U.S. federal court, there are previous examples of federal terrorism trials using CCTV sites for the benefit of the public, victims and family members.⁵³ Further, DOD officials were hesitant to support such an expansion based on their perception that relatively few people have utilized the current CCTV sites, but they were unable to provide complete or fully accurate and reliable data on attendance of certain groups, such as the media and general public. In addition, according to DOD officials, the demand for public access during the current cases' decade-long pre-trial phase likely does not represent the magnitude of future public interest, which DOD officials believe will increase significantly once the trial phase begins.

Television and internet broadcast: Broadcasting video of hearings via other technologies, such as the television or internet would increase opportunities for the general public to view commissions' proceedings remotely. An OMC information technology expert told us that it would be relatively simple and inexpensive to transmit the existing video feed from the proceedings on NSGB to either television stations, such as C-SPAN, or through the internet using the same cyber security protocols used for CCTV sites. Further, internet broadcasts could either be password-protected so that they could be viewed only by a specific group, such as victims and family members, or they could be made available to the general public.

This option raised mixed views from the experts and officials we interviewed. According to Rule 806(c) of the Manual for Military Commissions, television or internet broadcasting would require express authorization by the Secretary of Defense—and as previously noted—this rule is consistent with federal criminal practice which prohibits the broadcasting of judicial proceedings from the courtroom. Legal experts who we contacted had varying perspectives on this issue. For example, officials from the Office of the Chief Prosecutor had concerns that parallel

⁵²In April 2012, the military judge presiding over Khalid Shaikh Mohammad et al. (2) granted the prosecution's request for several sites including Fort Meade, MD, among others.

⁵³See, for example, the case study of United States v. Moussaoui, in which family members of 9/11 victims were provided with CCTV sites in Manhattan and Central Islip, New York; Boston, Massachusetts; Philadelphia, Pennsylvania; Newark, New Jersey; and Alexandria, Virginia. Federal Judicial Center, *National Security Case Studies: Special Case-Management Challenges*, Sixth Edition (2015).

those of the Judicial Conference of the United States—the national policy-making body for the federal courts—on the negative impact of cameras in the courtroom on jurors and witnesses, among other reasons.⁵⁴

Specifically, the Judicial Conference cited concerns such as publicity that could threaten jurors' privacy and witnesses that could be by subjected to distractions, intrusions or influences. In contrast, a senior official in the Military Commissions' Defense Organizations generally supported television and internet broadcasting of proceedings. This perspective was shared by the American Bar Association, which stated that it would support adoption of such an initiative in the future to protect the integrity of the military commissions' process and better educate the public about these proceedings.

Also, in our discussions with DOD officials, they too expressed mixed perspectives regarding internet or television broadcast of proceedings from NSGB. On one hand, according to an OMC information technology expert, broadcasting is technologically possible and could use certain existing security procedures. Specifically, because safeguarding classified information is critical, any television or internet broadcast of proceedings would use the same video feed currently transmitted to the NSGB gallery and CCTV sites, and thus would use the same safeguards provided by the 40-second delay previously discussed. Further, DOD information technology experts suggested that using a limited internet broadcast, it could be possible for DOD to create temporary viewing sites almost anywhere they are needed; for instance, in a hotel conference room.⁵⁵ On the other hand, senior DOD officials expressed several concerns regarding the security implications of broadcasting video outside of the current CCTV framework. For example, they highlighted the potential for adversaries of the United States to copy and alter the video feed from an unsecured broadcast—thus creating a new and inaccurate record of proceedings that could be used as propaganda. Further, while internet broadcasts could be password-protected for victims and their

⁵⁴According to the Revised Report Of The Judicial Conference Committee On The Operation Of The Jury System On The "Free Press-Fair Trial" Issue, the conference recommended that each United States District Court adopt a rule of court providing: the taking of photographs and operation of tape recorders in the courtroom or its environs, and radio or television broadcasting from the courtroom or its environs during the progress of or in connection with judicial proceedings, including proceedings before a United States Magistrate, whether or not court is actually in session, is prohibited.

⁵⁵Specifically, the video could be received on a DOD laptop and then transmitted to a larger video display monitor for viewing, much like the process currently used at CCTV sites.

family members only, DOD officials were concerned that the size of the group may make it more likely that the password would be shared with people outside of the group.

In regard to these concerns, DOD's technology experts suggested that they could potentially be addressed, at least in part, by using security procedures already in place at the NSGB gallery and CCTV sites. Specifically, at the temporary viewing sites they proposed, DOD officials would not allow recording of the video feed, following the rules currently in place at NSGB and CCTV sites. However, regarding this proposal, senior DOD officials conveyed force protection concerns for government personnel and any attendees. For example, an official noted that there have been investigations into allegations that OMC personnel have been surveilled by unknown persons, both in the United States and overseas, when on official travel. Also, in a relatively unsecure civilian location like a hotel, DOD would not be able to enforce the rules of the commissions. For instance, according to this official, if someone wanted to attend a temporary viewing site but refused to relinquish their electronic recording devices, per rules currently in place at NSGB and CCTV sites, DOD's only recourse would be to call local law enforcement authorities.

Timeliness of Posting Information to the Commissions' Website

DOD's Regulation suggests two possible approaches the department can take when reviewing court documents, prior to posting on the website, and one of these could help the department post court documents in a timelier manner. The first approach would allow for an OMC security classification expert to independently determine whether a court document may contain classified information. If it is determined that the document does not contain classified information, the document is to be posted within 1 business day of it being filed. In contrast, according to OMC officials, the second approach provided by the Regulation—and since at least 2014—has been interpreted as directing that every document filed must undergo a security review before it is posted to the OMC website. As discussed previously, DOD officials told us that they attributed the department's document posting delays to DOD's policy decision to subject the extremely large volume of court documents filed, including schedule changes, to the same type of security review. DOD's practice has resulted in nearly every document filed with the commission

undergoing a security review before it could be posted to the OMC website.⁵⁶

However, at the end of our review, a military judge's ruling on a pre-trial motion in the case of *U.S. v. Khalid Shaikh Mohammad et al.*(2) is expected to substantially change DOD's previous practice of submitting every document for security review prior to posting to the OMC website.⁵⁷ Specifically, in December 2018, a military judge found that DOD's practice, based on the interpretation of the relevant provisions of the Regulation by the previously assigned military judge and the office of the convening authority, resulted in all pleadings—classified or not—undergoing a more laborious classification review intended for classified (or arguably classified) filings. As a result, the military judge found that compliance with DOD's timeliness standard has, since at least 2017, been the exception rather than the rule.⁵⁸ In this ruling, the military judge ordered that commencing on January 16, 2019, the OMC Trial Judiciary's Chief Clerk will instead send all filings that do not require a classification security review directly to the OMC Webmaster for posting within one business day of filing. Further, per the regulation, filings requiring a classification security review will be sent to the inter-agency review team to coordinate the classification review. Implementation of the military judge's ruling is expected to reduce the volume of documents submitted for security classification review and thus may improve the timeliness of posting information to OMC's website.

⁵⁶Regulation for Trial by Military Commission, section 17-1.c.3. states that “[o]nce a filing is properly filed with the Chief Clerk, the Court Security Officer [CSO] for the Trial Judiciary shall promptly examine the filing or document and, in consultation with DOD Security Classification/Declassification Review Team and any appropriate non-DOD federal department and agency, determine whether the filing or document contains classified information...”

⁵⁷See Appellate Exhibit 5511, Ruling, *Mr. al Baluchi's Motion to Dismiss For the Government's Denial of a Public Trial*, (Dec. 20, 2018).

⁵⁸The military judge's ruling interpreted the consultation provision of the Regulation's section 17-1.c.3. “to only pertain to those documents as to which some question of classification remains after review by the court security officer and those filed under seal pursuant to [Regulation for Trial by Military Commission] 17-1.c.1.”

Each Potential Option for Expanding Public Access Has Tradeoffs That DOD Has Not Yet Assessed

Current law and DOD guidance establish a framework in which DOD and military judges are to weigh the interests of public access to commissions' proceedings against other considerations, including national security. For example, paralleling the statutory requirement for public access found in the Military Commissions Act of 2009, DOD's Regulation for Trial by Military Commission states that its goal is to make commissions' proceedings accessible to the public to the maximum extent possible, consistent with the interests of national security, the rights of the accused, and other interests protected by law. *Standards for Internal Control in the Federal Government* state that agencies should identify and analyze risks related to achieving their defined goals.⁵⁹ These standards also maintain that—based on an agency's assessment of risks—it should design specific actions as part of their response to the risks. However, DOD has not yet assessed the tradeoffs made by maintaining its current approach in pursuit of its goal of maximizing public access to the extent possible versus expanding public access by implementing other options. This is because the department has not yet identified these options and analyzed the risks associated with them for expanding public access.

For example, we spoke to senior DOD officials who expressed strong support for public access to commissions' proceedings. While they were not necessarily opposed to the concept of expanding public access, they did express concerns about the potential risks and challenges associated with how it may be achieved. Specifically, according to the former Acting Convening Authority,⁶⁰ open and transparent commissions' proceedings are "very important," adding that public access must be weighed against the need to protect the proceedings' large amounts of classified information. Similarly, the current Chief Prosecutor for Military Commissions stated that public access to commissions' proceedings is

⁵⁹GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: Sep., 2014). For leading practices of effective federal strategic planning, our prior work has identified leading practices of effective federal strategic planning, which we derived in part from the Government Performance and Results Act (GPRA), as updated by the GPRA Modernization Act of 2010, associated guidance, and our prior work. Among other elements, a strategy should contain a description of how the goals are to be achieved, including the resources required to meet these goals. For example, see GAO, *Executive Guide: Effectively Implementing the Government Performance and Results Act*, [GAO/GGD-96-118](#) (Washington, D.C.: June 1, 1996).

⁶⁰As discussed previously, the Convening Authority is responsible for the overall management of the commissions' process and is empowered to convene the commissions, refer charges to trial, negotiate pre-trial agreements, review records of trial, and maintaining the public website, among other things.

“hugely important” and that they are “owned by the American People,” but also noted the importance of protecting classified information, especially the sources and methods of the intelligence community. Further, the current head of the Military Commissions Defense Organization, while acknowledging the necessity of processes to protect classified information, stated that “nothing is more important” than public access to the proceedings, calling them “the most important cases of our lifetime.” While these officials generally acknowledge that there are tradeoffs to be made, for example, in facilitating public access while protecting classified information, they have not identified how this could be accomplished or assessed the extent of the tradeoffs associated with any potential options for expanding public access to proceedings.

As discussed previously, there are a number of potential options for expanding public access—well supported by victims, their family members that we surveyed, and non-government stakeholders. However, DOD officials have cited various tradeoffs, in the form of concerns over resources and national security, among others. While DOD officials’ concerns may be warranted, until it fully assesses these tradeoffs by identifying and analyzing the potential risks and challenges, it may be missing an opportunity to expand public access. For example, DOD officials have expressed concern with the potential cost and logistical challenge of expanding the viewing gallery on NGSB. However, DOD officials have not assessed such options for increasing public access to proceedings at NSGB while weighing the risks of doing so—such as cost or potentially delaying hearings—and not doing so—such as the current situation, with hundreds of victims and family members who have not been able to attend hearings.

Our prior work on leading practices for effective strategic planning has also shown that agencies should define strategies that address management challenges and identify resources needed to achieve their goals.⁶¹ However, according to DOD officials, the department has not developed a strategy that explains how DOD will achieve its goal of maximizing public access to the military commissions’ proceedings in the context of public access challenges and the expected increase in demand for public access, once the cases’ trial phases begin. For example, DOD

⁶¹ [GAO/GGD-96-118](#). For leading practices of effective federal strategic planning, our prior work has identified leading practices of effective federal strategic planning, which we derived in part from the Government Performance and Results Act (GPRA), as updated by the GPRA Modernization Act of 2010, associated guidance, and our prior work.

officials acknowledged that there are large populations of victims and family members who are “underserved” by the current number and locations of CCTV sites and that they need to be expanded. Further, the former acting convening authority noted that there would be a substantial amount of time required to plan for additional sites. Some DOD officials estimate that there will likely be 12-24 months advance notice before trials are held and therefore believe that this will provide sufficient time to develop a strategy that addresses challenges with opening additional sites. However, based on our discussions with DOD officials, this may not be enough time given the substantial planning and coordination that will need to take place within and outside the department on such efforts and the lengthy lead time typically needed to secure additional resources through DOD’s budget process.

For example, DOD officials told us that they do not have many facilities anymore in urban communities, which necessitates that they have partners in these areas to facilitate additional CCTV sites. DOD officials said that they have tried working with government officials in New York City—a city with a high concentration of victims and family members—to identify ways to expand options for remote viewing of proceedings. However, DOD officials said that the coordination has been challenging, given management challenges—such as finding adequate space that is accessible for victims, family members, and the media—and required resources—such as reimbursing the City of New York for required security. In addition, while other agencies’ facilities could potentially be used, DOD officials noted that they have not begun coordinating with other agencies because the trial dates are currently unknown. But, given the logistical constraints and budget challenges, if DOD waits until the announcement of a trial dates, the department runs the risk of not having adequate time to plan and budget for a new CCTV site in New York City or any other appropriate location.

This example illustrates the complexities of addressing public access, the usefulness of assessing the tradeoffs between DOD’s current approach to public access and options for expanding access, and a strategy that addresses management challenges and identifies needed resources. Until DOD comprehensively identifies and analyzes the risks of maintaining its current approach compared with those posed by potential options for expanding public access, it cannot be assured that it has met its objective of maximizing public access to the extent possible. Furthermore, until DOD develops a strategy, as appropriate, to deal with potential options and describes how the department plans to achieve its public access goals, it cannot ensure that it is well-positioned for the

substantial increase in demand for public access that is anticipated when the commissions' proceedings move into the trial phase.

Conclusions

With the responsibility to carry out military commissions' proceedings for cases that many believe to be the most consequential in United States history, DOD also has—according to its guidance—the responsibility to provide the public with as much access as possible, consistent with national security interests. Although this is a complex set of responsibilities, DOD has facilitated public access to commissions' proceedings in a variety of ways. These complexities and constraints notwithstanding, there are a number of challenges posed to the public's ability to access commissions' proceedings and obtain information about the proceedings. While there are potential options to address these challenges, there are also potential risks that need to be assessed. Whether or not DOD should expand public access—as outlined by these potential options—is a determination the department must make. Given that the public's demand for access will most likely increase substantially when the commissions' enter into their trial phases, the longer DOD waits to determine its strategy, the greater the risk of not fully meeting the demand from victims and family members, non-government stakeholders, and the general public.

Recommendation for Executive Action

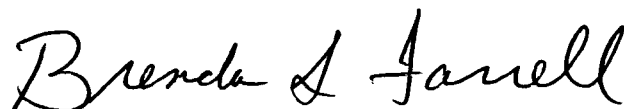
The Secretary of Defense should ensure that the Deputy Secretary of Defense assesses the tradeoffs of potential options for expanding public access to military commissions' proceedings by identifying and analyzing associated risks, and, as appropriate, developing a strategy to implement any viable options.

Agency Comments

We provided a draft of this report to the DOD, Department of Justice, and relevant intelligence agencies for review and comment. In written comments provided by DOD (reproduced in appendix IV), DOD concurred with our recommendation, noting planned actions to address it. DOD and certain intelligence agencies also provided technical comments, which we incorporated in the report as appropriate.

We are sending copies of this report to the appropriate congressional committees, the Acting Secretary of Defense, the Office of Military Commissions, Department of Justice, and four relevant intelligence agencies. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-3604 or FarrellB@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix V.



Brenda S. Farrell
Director
Defense Capabilities and Management

Appendix I: Objectives, Scope, and Methodology

This report describes (1) how the Department of Defense (DOD) currently facilitates public access to military commissions' proceedings; (2) the challenges, if any, that the public faces in gaining access to or obtaining information on these proceedings; and (3) what is known about potential options to address public access challenges, including any related tradeoffs.

Specifically, the military commissions' cases included in our review are 9/11: Khalid Shaikh Mohammad et al (2), USS Cole: Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri, Majid Shoukat Khan, Abd al Hadi al-Iraqi, and Ahmed Mohammed Ahmed Haza al Darbi.¹

To address our first objective, we reviewed relevant guidance, policies, and regulations related to public access to military commissions' proceedings.² We attended military commissions' proceedings at U.S. Naval Station Guantanamo Bay (NSGB) from April 30, 2018, to May 4, 2018 to observe how the public accessed and viewed the proceedings, in person. During this visit we also visited the facilities relevant to public access. For example, in the Expeditionary Legal Complex, where proceedings are held, we inspected the courtroom where hearings occur, discussing the equipment used to facilitate the 40-second delay used to ensure that classified information is not transmitted to Closed Circuit Television (CCTV) sites during open hearings. We also inspected the gallery, from which the public watches hearings. In addition, we visited facilities where certain of the accused are detained, discussing with DOD officials the access granted by the department to visiting victims and

¹At the beginning of our study in January 2018, there were five active military commissions' cases. As of November 2018, one case had concluded, one case had begun its pre-sentencing phase, with three still in their pre-trial phases. Although the case of Ramzi Bin al Shibh is listed on the commissions' website as a separate case, we have—for the purposes of our review—considered court documents and data associated with Mr. Bin al Shibh to be part of the 9/11: Khalid Shaikh Mohammad et al. (2) case. This is because, according to a senior OMC official, Mr. Bin al Shibh has been a defendant in the 9/11: Khalid Shaikh Mohammad et al. (2) case since that case's inception, aside from a brief period in August 2014. During this period, which lasted a couple of weeks, Mr. Bin al Shibh was separated from the 9/11: Khalid Shaikh Mohammad et al. (2) case, and a case specific to Mr. Bin al Shibh existed. However, Mr. Bin al Shibh was quickly re-added to the 9/11: Khalid Shaikh Mohammad et al. (2) case. The Khalid Shaikh Mohammad et al.(2) case includes four additional defendants: Walid Muhammad Salih Mubarak Bin Attash; Ramzi Binalshibh; Ali Abdul Aziz Ali; and, Mustafa Ahmed Adam Al Hawsawi.

²Examples include Department of Defense, *Manual for Military Commissions United States*, 2016 Revised Edition (Jan. 12, 2017) and Department of Defense, *Regulation for Trial by Military Commission* (Nov. 6, 2011).

family members and non-government stakeholders. We also discussed key issues with DOD officials, such as the Chief Prosecutor and the Military Commissions Defense Organization.

To observe how the public utilized remote viewing sites we viewed military commissions' proceedings remotely at one CCTV site, and visited another. These include Fort Meade, Maryland, which is a site for victims and their family members, as well as being the site for use by the media, non-governmental organizations, and members of the general public. In addition, we visited the Norfolk Naval Station, Virginia CCTV site, which is open to victims and family members only. In addition to watching the hearings, we spoke with Office of Military Commissions (OMC) representatives at the sites regarding their responsibilities and they provided us with an overview of how the sites operate. In addition, to determine what information was available on OMC's public website and how it is organized, we reviewed its content, including the portion of the site reserved for victims and their family members. Further, to obtain information on how public access is provided in federal criminal courts, we conducted interviews with officials from the Department of Justice and the Administrative Offices of the U.S. Courts, also discussing with these organizations whether they provided support to DOD's public access procedures for the commissions' proceedings.

To address our second objective, we reviewed applicable sections of the U.S. Constitution, relevant case law, executive orders, DOD guidance and reports from experts on public access to military commissions' proceedings to understand the role that current laws, policies, and judicial precedence play in decisions about public access to military commissions' proceedings.³ We then took selected examples of public access issues at military commission proceedings and compared them to the access afforded to the public at terrorism trials held in U.S. federal courts. To identify and understand any challenges facing public access, we obtained the perspectives of both victims and their family members and other non-government stakeholders on any challenges associated with public access to commissions' proceedings. We developed a non-generalizable survey to obtain perspectives on public access from a sample population of victims and their family members associated with terrorist attacks being adjudicated by military commissions' proceedings,

³Examples include the First and Sixth Amendments to the U.S. Constitution, *Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555 (1980), and Executive Order 13526 *Classified National Security Information*, 75 Fed. Reg. 707 (Jan. 5, 2010).

such as the attacks on the USS Cole and September 11, 2001.⁴ See appendix II for further details regarding our survey of victims and family members.

We also developed a standardized set of 10 questions that was used to obtain the perspectives of 55 selected non-government stakeholders on challenges to public access to military commissions' proceedings. The questions were delivered to these stakeholders in the form of a self-administered questionnaire.⁵ To identify the non-government stakeholders included in our review, we first obtained a list of the non-governmental organizations that DOD has approved to observe military commissions' proceedings in-person at NSGB. These organizations include victim advocacy groups, universities, civic organizations, and independent professional associations. During the course of our review, we identified additional individuals with relevant expertise, such as legal and national security policy experts and members of the media whom we also asked to complete our self-administered questionnaire.

We pre-tested the self-administered questionnaire with four non-government stakeholders to ensure functionality and ease of understanding—after which we distributed the questionnaires via email to the remaining non-government stakeholders included in our review. Of the 55 non-government stakeholders who received our questionnaire, 25 completed it. The analysis was conducted by two analysts who reviewed and coded responses according to a pre-determined coding scheme. A third analyst was used to reconcile any conflicting conclusions from the first two analysts. The results of our analysis were used to describe non-

⁴The victims and family members we refer to in the report are those included in our survey. Our survey population was a portion of victims and family members who were directly impacted by the attack on the USS Cole, the events of 9/11, or other applicable terrorist attacks and was based on our coordination with DOD and two private victims' organizations. The survey respondents identified themselves as a victim or survivor of terrorist attacks or as a relative or friend of someone who was killed as a result of these attacks. Our survey's population totaled 2,638 victims and family members. Our scope was limited to the memberships of these organizations because of concerns from some other victims' organizations about the applicability of their data. However, many more people were significantly impacted by the events of 9/11 than are represented in our survey population. For example, according to the World Trade Center Health Program there are 88,484 individuals who have received medical treatment for 9/11 related injuries or illnesses.

⁵Non-government stakeholders include representatives of the 25 non-governmental organizations approved as official observers by DOD, academics, journalists, and national security and legal experts.

government stakeholders' perspectives in the report, as appropriate. We supplemented data obtained through our survey and self-administered questionnaire with interviews of victims and their family members, DOD officials, and observers from non-governmental organizations to better understand their perspectives.

To assess the timeliness of information posted on OMC's website, we gathered and analyzed data from an inter-agency review team that reviews documents to be posted on OMC's website, as well as the website itself.⁶ In regard to data from the inter-agency review team, we obtained and analyzed data on when court documents were filed with OMC and the date on which the inter-agency review team returned them to OMC for posting; comparing that amount of time to a timeliness standard laid out in DOD's Regulation for Trial by Military Commission (Regulation).⁷ According to the Regulation, DOD is supposed to post documents to the OMC website generally no later than 15 business days after documents have been filed with OMC's Trial Judiciary, known as the "file date." In regard to our analysis of data from OMC's website, we collected this information using a "web-scraping tool" that we developed to regularly visit OMC's website and capture data about a court document's file date and the date on which it was posted on OMC's website. We selected these two dates because they allowed us to compare the time DOD took to post court documents to the department's timeliness standard. Using our analysis of data from the review team and OMC's website, we determined the extent to which DOD posted court documents in a timely manner. Please refer to appendix III for additional details on the scope and methodology for our collection of data using the web-scraping tool and our analysis of these data.

For data provided by DOD, we performed a number of assessments. As a result of discussions with the Defense Intelligence Agency about the timeframes and completeness of available data, the agency clarified timeframes and explained why the data are not fully complete. As a result of these assessments, we determined that data from DOD on timeliness of information posted to the commissions' website are sufficiently reliable

⁶<https://www.mc.mil/home.aspx>. For the data we gathered from DOD, we analyzed all available data that the department could provide, from October 2011 to October 2018. For the data we gathered from the website, the earliest document posted by DOD to the website is from April 2011, because the department updated the website in 2011. We analyzed data from April 2011 to November 2018.

⁷Department of Defense, *Regulation for Trial by Military Commission* (2011).

to serve as one of several sources of information used to determine that DOD faces challenges in the timeliness with which it posts court documents to the commissions' website. In addition, through discussions with OMC officials about the way information is added to the commissions' website, we determined that the data we independently collected and analyzed from the website are sufficiently reliable to serve as another source of information used in our determination of challenges that DOD faces.

To address our third objective, we reviewed relevant reports to identify potential options for expanding public access to commissions' proceedings and any concerns associated with doing so. To determine potential options for expanding public access to the commissions' proceedings, we obtained the perspectives of victims and their family members, other non-government stakeholders, and DOD officials on (1) what potential options for expansion or improvement exist, and (2) any associated concerns with potential options for expansion or improvement. We conducted a survey of victims and their family members to determine the extent to which respondents support various options for expanding public access and their views on the timeliness of court document postings to OMC's website.⁸ Similarly, we provided standardized question sets to non-government stakeholders and analyzed responses from the completed questionnaires to determine the extent to which respondents support various options for expanding public access as well as their views on other issues, such as the timeliness with which court document are posted to OMC's website.

Further, to examine the potential risks associated with these options for expansion—and ways to mitigate those risks—we discussed these potential options with DOD officials. Finally, we asked OMC officials to identify any DOD-led efforts to assess the current level of public access to commissions' proceedings. We then compared any related efforts with Standards for Internal Control in the Federal Government, which state that agencies should identify and analyze risks related to achieving its defined objectives, and to develop leading practices for sound strategic management planning.⁹ Further, we compared any related DOD efforts to

⁸<https://www.mc.mil/home.aspx>

⁹GAO, Standards for Internal Control in the Federal Government, [GAO-14-704G](#) (Washington, D.C.: Sep., 2014). Among other elements, a strategy should contain a description of how the goals are to be achieved, including the operational processes, skills and technology, and other resources required to meet these goals.

leading practices of effective federal strategic planning, which we derived in part from the Government Performance and Results Act (GPRA), as updated by the GPRA Modernization Act of 2010, associated guidance, and our prior work.¹⁰ To assess the extent to which DOD has applied selected principles of effective federal strategic planning in its facilitation of public access to military commissions' proceedings, we compared actions DOD has taken to address challenges that it faced with meeting its goal of maximizing public access, consistent with the interests of national security, to these leading practices of effective federal strategic planning.

We conducted this performance audit from January 2018 to February 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

¹⁰For example, see GAO, Executive Guide: Effectively Implementing the Government Performance and Results Act, [GAO/GGD-96-118](#) (Washington, D.C.: June 1, 1996). Among other elements, a strategy should contain a description of how the goals are to be achieved, including resources required to meet these goals.

Appendix II: Scope and Methodology for Survey of Victims and Their Family Members

Overview

To obtain information about the perspectives of victims and their family members on public access to military commissions' proceedings, we administered a survey to the memberships of three victim's organizations. In the survey questionnaire, we asked victims and their family members to provide their perspectives on the different ways they access information about, or participate in viewing military commissions' proceedings. We administered the survey from July to September 2018. A reproduction of the questions and answers in the questionnaire and aggregate responses from the survey are included in this appendix.

We informed our methodology approach and survey development through interviews and other communications with representatives from eight victim's organizations. From these interviews we gathered information from the organizations about their membership, such as, the number of members, criteria for becoming a member, and how information about the members was recorded and stored. We also ascertained their willingness to share contact information for their membership with us for the sole purpose of administering the survey.

Survey Population and Selection of Victims and Their Family Members

We defined and identified the survey's target population of victims and family members through interviews with victims' organizations whose memberships were impacted by the attack on the USS Cole, the events of 9/11, or other terrorist attacks for which there are military commissions cases being tried or that have been completed. Our survey population was composed of the memberships of the Department of Defense's (DOD) Victim and Witness Assistance Program (VWAP) (1,928 eligible members), which includes victims who were impacted by the attack on the USS Cole, the events of 9/11, or other terrorist attacks, for which Hadi Al-Iraqi is accused, as well as Massachusetts 9/11 Fund, Inc. (470 eligible members), and 9/11 Families for Peaceful Tomorrows (200 eligible members). Membership in these organizations, and inclusion in our survey population, was limited to those family members or surviving victims who chose to join one or more of these organizations. In addition, we added 42 other qualifying victims and family members (who may not have been members of the three organizations) that we identified in answers to a survey question that respondents were asked. Our survey's population totaled 2,640 victims and family members, and we attempted to contact each one in our survey. Our survey population was limited to the memberships of these organizations because of concerns from some other victims' organizations about the applicability of their data. However, many more people were significantly impacted by the events of 9/11 than

are represented in our survey population. For example, according to the World Trade Center Health Program there are 88,484 individuals who have received medical treatment for 9/11 related injuries or illnesses. Thus, the survey results presented in the body of this report represent the views of only those responding, and are not generalizable to any broader population because it is difficult to determine with certainty the total population that was impacted by the events of 9/11 and would therefore have an interest in access to military commissions' proceedings.

Survey Development and Administration

We informed the development of our methodological approach and the actual questionnaire through four meetings with eight victims and their family members during our visit to Naval Station Guantanamo Bay (NSGB). In these meetings, we piloted an interviewer administered questionnaire that included items that (1) related to their views on various topics related to the military commissions' proceedings, and (2) solicited input on the best approaches for gathering the views of victims and family members. These meetings confirmed that a survey would be a valuable method for gathering the views of a broad range of victims and family members and informed the development of a draft instrument for further pre-testing.

In developing, administering, and analyzing this survey, we took steps to minimize the five types of potential errors that the practical difficulties of conducting any survey may introduce. Because we surveyed all members of the population we identified, there was no statistical uncertainty in our estimates due to sampling error. A different issue, measurement error, can result from differences in how a particular question is interpreted, and the sources of information available to respondents. We conducted 4 pre-tests of the draft questionnaire with 4 victim family members and made revisions to (1) ensure that survey questions were clear, (2) obtain any suggestions for clarification, (3) determine whether victims and their family members would be able to provide responses to questions with minimal burden, and (4) ensure that the survey was comprehensive and unbiased. We also provided GAO contact information in our communications for respondents who had questions about the survey or experienced technical problems.

To minimize the effects of coverage error—the exclusion of some eligible members of the population, duplicate responses, or inclusion of ineligible members—we consulted the three victims' organizations to determine the coverage of their membership lists and what survey methodology options for contacting them existed based on their willingness to provide us with

contact information for their membership. All three of the organizations preferred to retain their member contact information citing privacy concerns, but agreed to send their membership unique usernames and passwords provided by GAO via email that their members could use to access the survey. Additionally, DOD VWAP also agreed to send postal mail questionnaires provided by GAO to approximately 500 of their members who did not have email addresses on record. GAO also provided an introductory email or letter, and postal questionnaires. Survey respondents received the email and used their associated username and password to access the survey website, and before opening their questionnaire, were required to change their password to further prevent unauthorized access to their responses. Those respondents who received postal mail questionnaires were given the option to complete the paper questionnaire or to log into and complete the web-based version. Because we did not obtain contact information from the organizations we worked with we were unable to determine if more than one survey was sent to any of the respondents. For example, if a respondent was a member of both 9/11 Families for Peaceful Tomorrows and DOD VWAP it is possible that they would have received two sets of unique usernames and passwords. However, we did include statements in the introductory email that directed respondents to disregard the email if they had already received a copy of the survey.

Non-response error can result when a survey fails to capture information from all population members selected into the survey. To encourage survey response, for emails that were undeliverable, their respective organizations contacted them via telephone and attempted to obtain new email addresses. We were also able to send reminder emails out to respondents who were members of the two private victims' organizations. However, DOD VWAP preferred not to send reminder emails to its members because of concerns of being overly intrusive. In an effort to increase the number of respondents to the survey we included a question asking respondents if they wanted to provide contact information for any other victims and family members who might be eligible to respond to the survey, and we administered the survey to them as well.

We received 248 responses to the 2,640 questionnaires that were sent out, which after removing two ineligible population members confirmed to have died, resulted in a response rate of 9.4 percent. We anticipated a fairly low response rate because in our discussions with the leadership of each of the victims' organizations they had pointed out that this population was quite private. In addition, the issues were sensitive, and not all organization members may wish to engage in discussions or

surveys regarding activities related to the terrorist events. There were 70 responses by mail and the remaining 178 responses were to the web based survey. Also, there were 11 partial, but usable responses and 22 partial, but not usable responses.

Finally, to limit the possibility of processing error, survey responses were checked for invalid or illogical answer patterns, and edits were made as necessary. All analysis programming was verified by a separate data analyst.

Survey Questions and Results

Reproduced below are the questionnaire text and question and answer wording presented to victims and family members in our survey. The percentage of responses for each answer to a question is displayed. Not all 248 respondents to the survey answered each question—some questions were only asked of a subset of respondents giving a qualifying answer to an earlier question, and not all qualifying respondents may have answered a particular question. Percentages may not sum to 100 percent due to rounding. Narrative answers to open-ended text questions are not displayed for brevity and to limit the possibility of identification of individual respondents.



United States Government Accountability Office
**Public Access to Military Commission
Proceedings**

Introduction

This survey is being done by the Government Accountability Office, or GAO. GAO is sometimes called the Congressional Watchdog because it reviews federal programs for the United States Congress. Congress directed us to consider if it's possible, and a good idea, to expand the public's access to Military Commission proceedings (usually referred to as hearings) that are open to the public. As part of this effort, Congress also asked us to speak with those affected by terrorism and their families.

We are very appreciative of your willingness to respond to this survey. We will combine your answers with those of many others, and we will not publish any information that could identify you. We will not share any identifiable information from this survey unless required by law or a member of Congress.

If you have any questions about this survey, or the GAO study, please contact _____, an analyst on this study, at proceedings@gao.gov _____.

About You

1. To better understand your perspective on the events of 9/11 or the attack on the USS Cole, which one of the following best describes you?

Answer choices	Percent
Victim (survivor)	14.8
Spouse/Life partner of a victim	18.9
Family member of a victim (parent, sibling, daughter, son)	60.9
Family member of a victim (aunt, uncle, niece, nephew, grandparent)	5.3

Note: 243 responses

**Appendix II: Scope and Methodology for
Survey of Victims and Their Family Members**

2. How easy or difficult is it to find information about the location of the hearings?

Answer choices	Percent
Very easy	29.9
Easy	36.1
Difficult	14.5
Very difficult	4.1
Don't know	15.4

Note: 241 responses

3. Do you get information about Military Commission hearings from any of the following sources?

	Answer choices			Responses
	Percent			
	Yes	No	Don't know	Total
1. News media, such as newspapers, magazines, or other news publications (in print or online)	29.1	66.0	4.9	206
2. Office of Military Commissions' public website (www.MC.mil)	37.8	53.6	8.6	209
3. Other websites, such as LawDragon	4.7	84.9	10.4	192
4. DOD Victim and Witness Assistance Program's (VWAP's) communications sent by mail or email	81.9	14.1	4.0	227
5. Communications from other organizations	29.2	65.3	5.4	202
6. Other source– please describe: (Narrative answers not displayed)	19.2	72.9	7.9	177

	Percent
I don't usually look for information about Military Commissions' hearings.	22.2

Note: 248 responses

The Office of Military Commissions Website

4. Have you ever visited the Office of Military Commission’s website (www.MC.mil)?

Answer choices	Percent
Yes	31.3
No – SKIP to question 6	59.2
Don’t know or Don’t remember – SKIP to question 6	9.6

Note: 240 responses

5. How helpful or not is the Office of Military Commission’s website for:

	Answer choices					Responses Total
	Percent					
	Very helpful	Helpful	Somewhat helpful	Not helpful	Don’t know	
1. Finding the dates of specific hearings or proceedings?	39.5	35.8	12.3	4.9	7.4	81
2. Finding information about the location of specific hearings or proceedings?	38.8	37.5	8.8	5.0	10.0	80
3. Reading documents related to hearings or proceedings?	42.5	25.0	18.8	7.5	6.3	80
4. Making court documents available in enough time for you to read them before you watch or attend the hearing?	28.8	27.5	12.5	13.8	17.5	80

6. Have you ever watched a hearing at any of the following CCTV sites?

	Answer choices			Responses Total
	Percent			
	Yes	No	Don’t know	
1. Fort Meade, MD	1.6	96.7	1.6	184
2. Fort Hamilton, NY	11.2	86.7	2.0	196
3. Joint Base Dix/McGuire/Lakehurst, NJ	3.3	95.1	1.6	182
4. Fort Devens, MA	1.6	96.7	1.6	182
5. Naval Station Norfolk, VA	2.8	95.6	1.7	180

If you have NOT watched any hearings, SKIP to question 9

7. IF YOU HAVE WATCHED A HEARING AT A CCTV SITE:

How easy or difficult was it for you to arrange:

	Answer choices					Responses
	Percent					
	Very easy	Easy	Difficult	Very difficult	Don't know / Not applicable	Total
1. Time away from work or home to attend?	23.4	23.4	19.1	14.9	19.1	47
2. Travel arrangements to attend?	22.2	33.3	15.6	11.1	17.8	45
3. Getting on to the military base where the CCTV site was located?	21.7	32.6	19.6	13.0	13.0	46
4. Lodging for the time away from home?	8.9	8.9	6.7	8.9	66.7	45

8. IF YOU HAVE WATCHED A HEARING AT A CCTV SITE:

How satisfied or dissatisfied are you with communication from personnel assisting you at CCTV Sites?

Answer choices	Percent
Very satisfied	45.7
Satisfied	32.6
Dissatisfied	2.2
Very dissatisfied	2.2
Don't know / Not applicable	17.4

Note: 46 responses

Attending Hearings in Person

These questions are about attending military hearings in person at Naval Station Guantanamo Bay, Cuba.

**Appendix II: Scope and Methodology for
Survey of Victims and Their Family Members**

9. Based on what you know, how satisfied or dissatisfied are you with:

	Answer choices					Responses
	Percent					
	Very satisfied	Satisfied	Dissatisfied	Very dissatisfied	Don't know	
DOD's process for determining who is eligible to attend military hearings in person?	23.4	39.8	7.4	4.9	24.6	244
DOD's process for selecting individuals to attend hearings at Guantanamo?	23.3	37.1	7.5	6.7	25.4	240

10. Have you ever attended a hearing at Naval Station Guantanamo Bay?

Answer choices	Percent
Yes	32.4
No – SKIP to question 13	67.6
Don't know or Don't remember – SKIP to question 13	0.0

Note: 244 responses

11. IF YOU HAVE ATTENDED A HEARING AT GUANTANAMO:

How easy or difficult was it for you to arrange time away from work or home to attend?

Answer choices	Percent
Very easy	43.6
Easy	33.3
Difficult	16.7
Very difficult	1.3
Don't Know	0.0
Not applicable	5.1

Note: 78 responses

12. IF YOU HAVE ATTENDED A HEARING AT GUANTANAMO:

How satisfied or dissatisfied were you with:

	Answer choices					Responses Total
	Very satisfied	Satisfied	Dissatisfied	Very dissatisfied	Don't know	
Being required to be escorted by personnel from the DOD Victim and Witness Assistance Program?	74.7	15.2	3.8	3.8	2.5	79
Communication from personnel who escort you at Naval Station Guantanamo Bay, Cuba?	81.0	15.2	1.3	1.3	1.3	79

Military Commission Prosecution and Defense Teams

13. How satisfied or dissatisfied are you with:

	Answer choices						Responses Total
	Very satisfied	Satisfied	Dissatisfied	Very dissatisfied	Don't know	Not applicable: no communication	
Communication originating from the Prosecution team?	42.9	29.4	6.5	3.7	6.5	11.0	245
Communication originating from the Defense team?	14.2	21.8	7.5	6.3	10.5	39.7	239

Expanding Access to Military Commission Hearings

14. Here are the ways in which victims and family members, the media, and professional observers can currently watch military commission hearings:

- View the hearings in person at Guantanamo Bay
- View the hearings at CCTV sites

**Appendix II: Scope and Methodology for
Survey of Victims and Their Family Members**

There has been discussion about expanding access to the hearings. The discussion has included expanding access for:

1. Victims and their family members
2. The media
3. Professional observers
4. The general public

A number of alternatives have been suggested for expanding access – do you support or oppose each of the following?

	Answer choices					Responses
	Percent					
	Strongly support	Support	Oppose	Strongly oppose	Don't know	
Additional CCTV sites available to all: victims and family members as well as the media, professional observers, and the general public?	22.2	33.5	20.1	14.2	10.0	239
Additional CCTV sites available only to victims and family members?	45.6	30.4	9.3	3.8	11.0	237
Moving CCTV sites to locations other than military installations?	28.5	32.2	11.7	10.5	17.2	239
Broadcast television, such as CSPAN, available to all?	26.4	26.9	15.7	19.4	11.6	242
Broadcast over the internet, available to all?	21.8	19.3	22.2	22.6	14.0	243
Password protected internet broadcast only for victims and family members?	34.6	30.4	15.4	6.3	13.3	240
Expanding the number of seats available at the hearings at Guantanamo, available only to victims and family members as well as the media and professional observers?	34.4	34.4	9.5	3.3	18.3	241
Relocating the hearings to a facility in the continental U.S.?	23.6	18.3	14.2	28.5	15.4	246

15. When you think about your access to military commission hearings, how important or not are:

	Answer choices					Responses
	Percent					
	Extremely important	Very important	Slightly important	Not at all important	Don't know	Total
The physical safety and protection of those who are viewing the hearings?	58.2	23.0	11.1	5.7	2.0	244
The privacy of those who are viewing the hearings?	50.6	26.3	13.2	7.8	2.1	243
Having the location of the hearings close to where you live?	34.3	16.1	21.1	22.7	5.8	242
Easy transportation alternatives for getting to the hearings?	37.7	23.8	23.4	9.4	5.7	244
The costs of traveling and lodging to attend the hearings?	39.9	22.2	22.6	10.7	4.5	243

16. Do you think your interest in viewing hearings will increase, or decrease, when the current pre-trial phase finishes, and the trial phase begins?

Answer choices	Percent
Greatly increase	51.4
Increase	32.0
No change	10.5
Decrease	1.2
Greatly decrease	1.2
Don't know	3.6

Note: 247 responses

Anything Else?

17. What other thoughts do you have about Military Commission proceedings that we haven't covered?

(Narrative answers not displayed)

Would you consider speaking with us?

18. We would like to speak further with several people individually who have responded to this survey, so we can gain additional information about these topics. Would you be willing to speak with us? We cannot speak with a great number of people, but we would appreciate the opportunity to speak with some of you!

If you are willing to be considered for a discussion with us, please provide your name, your preferred contact information, and the best times to contact you:

(Narrative answers not displayed)

19. Do you think there are any immediate family members who did NOT receive their own questionnaire invite because they are not on the contact list of the organization who sent you this one, but who would want to fill out their own copy?

If so, you can list their contact information below, and we will send them the link to the questionnaire with their own usernames and passwords:

(Narrative answers not displayed)

Thank you very much for taking the time to respond to this survey!]

Appendix III: Scope and Methodology for Timeliness Analysis of Department of Defense Posting Court Documents Online

This appendix outlines the scope and methodology for our analysis of the timeliness with which OMC posts military commissions' (commissions) court documents on its public website. In the processes described below, we obtained data on these documents using the web-scraping tool discussed in appendix I and, subsequently, analyzed these data in a number of ways.

Data Collection

In order to capture all documents for each of the five cases in the scope of our review,¹ we took the following steps.

- Our web-scraping tool first visited the site for each of our five cases and recorded all of the documents displayed on the website at that time. It recorded each document's description, filing date, designation, date of the web-scraping tool's visit, and whether or not the document had been uploaded. To determine whether a document had been uploaded, we electronically examined the name of the uploaded pdf file. If a document was not uploaded, that document would contain "File Not Available.pdf" in its name. In contrast, if a document was uploaded, its filename would contain other text (for example, the uploaded document's title).
- The web-scraping tool then revisited the sites for the 5 cases each day thereafter and recorded any new documents that had appeared since the previous visit. The tool visited the sites at about 11:00 PM

¹At the beginning of our study in January 2018, there were five active military commissions' cases. As of November 2018, one case had concluded, one case had begun its pre-sentencing phase, with three still in their pre-trial phases. On June 19, 2018 we began collecting data on the three cases responsible for the majority of documents filed with the Chief Clerk of OMC's Trial Judiciary: 9/11: Khalid Shaikh Mohammad et al. (2), Abd al Hadi al-Iraqi, and USS Cole: Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2). On July 19, 2018 we began collecting data on the cases of Majid Shoukat Khan, and Ahmed Mohammed Ahmed Haza al Darbi (2). Although the case of Ramzi Bin al Shihb is listed on the commissions' website as a separate case, we have—for the purposes of our review—considered court documents and data associated with Mr. Bin al Shihb to be part of the 9/11: Khalid Shaikh Mohammad et al. (2) case. This is because, according to a senior OMC official, Mr. Bin al Shihb has been a defendant in the 9/11: Khalid Shaikh Mohammad et al. (2) case since that case's inception, aside from a brief period in August 2014. During this period, which lasted a couple weeks, Mr. Bin al Shihb was separated from the 9/11: Khalid Shaikh Mohammad et al. (2) case, and a case specific to Mr. Bin al Shihb existed. However, Mr. Bin al Shihb was quickly re-added to the 9/11: Khalid Shaikh Mohammad et al. (2) case. Thus, we have collected data on court documents identified in Mr. Bin al Shihb's case and combined those data with the data on court documents from 9/11: Khalid Shaikh Mohammad et al. (2). For the purposes of our analysis of these data, we consider all of these documents to be part of the 9/11: Khalid Shaikh Mohammad et al. (2) case.

Eastern Standard Time on each business day for about five months, from June 19, 2018 to November 19, 2018.²

- On each daily visit, the tool recorded the same information as before, but only for new documents or for documents where we observed a file upload. We defined a new document as one that was not on the website the previous day and we defined an observation of a document upload as an instance in which the document was previously not uploaded (that is, a document with a file that included "File Not Available.pdf" in its name), but was uploaded on the day the web-scraping tool visited the site.

Data Analysis

We used these data collected from the commissions' website in three analyses, as discussed below.

Analysis, as of June 19, 2018: According to our research, the first document recorded as being filed with the Trial Judiciary, and included in our scope, on the current OMC website has a file date in April of 2011. On June 19, 2018, we began data collection using the web-scraping tool, as described above. While the website provides a file date for all documents, the website does not provide a date when documents are uploaded. Thus, for documents uploaded before June 19, 2018, we were not able to assess the Department of Defense's (DOD) timeliness performance with data from the web-scraping tool. However, our analysis as of June 19, 2018, allowed us to assess other aspects of performance. Specifically, we determined the following:

- On June 19, 2018, the number of documents that had been filed with the Trial Judiciary, number that had been uploaded, or number that had yet to be uploaded.

²On June 19, 2018, we began collecting data on the three cases responsible for the majority of documents filed with the Chief Clerk of OMC's Trial Judiciary: 9/11: Khalid Shaikh Mohammad et al. (2), Abd al Hadi al-Iraqi, and USS Cole: Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2). Subsequently, we expanded our data collection in order to gather more information on all active cases in the scope of this review. On July 19, 2018 we began collecting data on the cases of Majid Shoukat Khan and Ahmed Mohammed Ahmed Haza al Darbi (2).

- On June 19, 2018, the number of documents that had not been uploaded within 15 business days of the file date.³ We refer to these documents as having missed DOD's 15 business day timeliness standard.
- On June 19, 2018, for documents that missed the 15 business day standard, the median number of days that they were uploaded after the timeliness standard.
- On June 19, 2018, DOD's performance in these parameters, for five different types of court documents: motions, rulings, transcripts from open hearings, transcripts from closed hearings, and docket-related documents.

Recent performance analysis, June 19 to November 19, 2018: While the website does not provide a date when documents are uploaded, our web-scraping tool provided this information for each document uploaded on or after June 19, 2018. Thus, for the five months we used the tool, we were able to assess DOD's timeliness performance for each document filed with the Trial Judiciary or uploaded. For these documents, we determined the following:

- The number and percentage of documents that were uploaded after DOD's 15 business day timeliness standard.
- For documents uploaded after the 15 business day standard, the median number of days that the standard was missed.
- DOD's performance in these parameters, for five different types of court documents: motions, rulings, transcripts from open hearings, transcripts from closed hearings, and docket-related documents.

Docket availability analysis, June 19 to November 19, 2018:

According to DOD guidance and an OMC official, there is a set of documents that list the legal motions on which the military judge plans to hear arguments from the prosecution and defense during a specific hearing. We refer to these documents as docket-related documents. This

³In addition to the Regulation's stipulation that DOD generally has no longer than 15 business days to review and post documents, the Regulation allows for an undefined amount of time for administrative processing. DOD officials familiar with the process estimate that the average amount of administrative time is about three business days. Thus, based on the regulation and these officials' estimate, we used 18 business days after a document's file date to determine whether DOD had posted a document by the timeliness standard.

set of documents includes dockets and amended dockets, among others, that are a sub-category of all the court documents that we discuss in this report.⁴ For hearings that occurred during the five months in which we used the web-scraping tool, we reviewed the commissions' public website to identify hearings that occurred during this timeframe, cross-referencing the hearings with the posted court documents to identify docket-related documents related to these hearings. Because docket-related documents for a specific hearing share an alphanumeric designation, we were able to use this information to determine DOD's timeliness performance for posting docket-related documents for these five hearings. For these documents, we determined the following:

- For each hearing that occurred from June 19, 2018, whether the relevant docket-related documents for a hearing were posted at least one day before the hearing for which those docket-related documents list the motions to be argued in the hearing.

⁴After consultation with the Trial Judiciary on which types of court documents contain information on motions to be argued at a hearing, we determined that for the purposes of this review, docket-related documents include: docketing orders, amended docketing orders, revised docketing orders, motions for the removal or cancellation of a docketing order, and other motions regarding docketing order.

Appendix IV: Comments from the Department of Defense Office of Military Commissions



DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
4800 MARK CENTER DRIVE
ALEXANDRIA, VA 22350-2100

JAN 11 2019

Ms. Brenda S. Farrell
Director
Defense Capabilities and Management
U.S. Government Accountability Office (GAO)
Washington, DC 20548

Dear Ms. Farrell:

I am writing on behalf of the Acting Secretary of Defense in my capacity as the Director of the Office of Military Commissions to provide you with the Department of Defense (DoD) response to the GAO Draft Report, GAO 19-283, "MILITARY COURTS: DOD Should Assess the Tradeoffs Associated with Expanding Public Access To and Information about Terrorism Trials," dated December 13, 2018. After careful review, DoD concurs in the GAO's recommendation to assess the tradeoffs of potential options for expanding public access to commissions' proceedings by identifying and analyzing associated risks and, as appropriate, develop a strategy to implement any viable options.

I want to thank the GAO for its collaboration with DoD on this important review of military commissions, and for its thorough examination of this complex subject. As an Executive Branch Department, DoD remains committed to adhering to the practice of the Department of Justice in Article III courts in high-visibility terrorism cases where the right to an open trial is balanced against the protection of national security information.

The Office of Military Commissions will form a working group, in conjunction with the DoD Office of the General Counsel, to study this issue and render a report to the Deputy Secretary of Defense no later than December 31, 2019.

Thank you for your support.

Sincerely,

A handwritten signature in cursive script that reads "Melinda L. Perritano".

Melinda L. Perritano
Director and Convening Authority

GAO DRAFT REPORT DATED DECEMBER 13, 2018
GAO-10-283 (GAO CODE 102580)

“MILITARY COURTS: DOD SHOULD ASSESS THE TRADEOFFS ASSOCIATED
WITH EXPANDING PUBLIC ACCESS TO AND INFORMATION ABOUT
TERRORISM TRIALS”

DEPARTMENT OF DEFENSE COMMENTS
TO THE GAO RECOMMENDATIONS

RECOMMENDATION: The GAO recommends that the Secretary of Defense should ensure that the Deputy Secretary of Defense assesses the tradeoffs of potential options for expanding public access to commissions’ proceedings by identifying and analyzing associated risks and, as appropriate, develops a strategy to implement any viable options.

DoD RESPONSE: The Department of Defense concurs with the recommendation. The Office of Military Commissions, in conjunction with the DoD Office of the General Counsel, will form a working group to study this issue and render a report to the Deputy Secretary of Defense no later than December 31, 2019.

Appendix V: GAO Contact and Staff Acknowledgments

Contact

Brenda S. Farrell, (202) 512-3604 or FarrellB@gao.gov

Acknowledgments

In addition to the contact named above, Kimberly Mayo, Assistant Director; Tracy Barnes; Kathryn Bassion; Steven Campbell; Signe Janoska-Bedi; Jill Lacey; Ronald La Due Lake; Amie Lesser; Ying Long; Ned Malone; Samuel Moore; Christina Murphy; Samuel Portnow; Carl Ramirez; Clarice Ransom; Paul Seely; Chris Turner; and John Van Schaik made key contributions to this report.

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