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Guests:

[Jess Bravin](#) , Supreme Court correspondent for *The Wall Street Journal*. He has covered the military commissions at Guantánamo for 10 years. His book, *The Terror Courts: Rough Justice at Guantanamo Bay* , has just been published.

[Lt. Col. Stuart Couch](#) , retired U.S. Marine Corps prosecutor who served in the Office of Military Commissions from 2003-2006. He currently serves as an immigration judge in Charlotte, North Carolina.

AMY GOODMAN: We are talking to Lieutenant Colonel Couch, Lieutenant Colonel Stuart Couch, retired U.S. Marine Corps prosecutor, served in the Office of Military Commissions from 2003 to 2006, now is an immigration judge, speaking to us from Charlotte, North Carolina. And we're joined by Jess Bravin, who focuses on this case and others in his new book, *The Terror Courts: Rough Justice at Guantanamo Bay* . Jess Bravin writes for *The Wall Street Journal* . Talk about the defense of what's been taking place at Guantánamo and what these terror courts are, why you chose not only to write articles about this, but write a book.

JESS BRAVIN: Well, I chose to write a book because it was, you know, to me, perhaps the biggest legal story in decades that I had a chance to follow as it unfolded. *The Journal* sent me down to Washington in October—from New York in October 2001 to cover the legal aftermath of 9/11. And as all kinds of things were happening, including the bill that became known as the PATRIOT Act, were moving through Congress, I got wind of work in the Bush administration to authorize military tribunals, what they call "military commissions," to prosecute the people behind 9/11. That was the plan. And I thought that was an astounding development, because this type of justice is a sort of

ad hoc

sort of trial that has occasionally been held by the United States during or after wartime. These hadn't been held since World War II. And so, it was a dormant area of law that suddenly might be very much alive. And so I followed that.

The president, Bush, issued his order in November of 2001. And it was a remarkable document, because it laid out a concept of trial that was—it would be unrecognizable in modern courtrooms. It was drafted from a document that FDR had signed in 1942, shortly after Pearl Harbor, that had authorized a single specific trial of eight Nazi saboteurs. And that was a secret trial that was held in the Department of Justice building. The Supreme Court, very quickly in a secret proceeding, approved it. And six of those eight were electrocuted within days; two later had their sentences commuted. And it was a—it was a remarkable historical incident in the 1940s. This document that President Bush signed envisioned a similar type of proceeding, not as one trial for a handful of people who had been picked up during a sabotage operation inside the United States, but as a permanent new form of justice going forward, one that would be wholly walled off from the existing federal courts, wholly walled off from any kind of congressional oversight. So that was the legal origin. And it took—and that was at a place before the United States had captured anybody, before Guantánamo had been selected as a place to hold them. So, it was a legal story.

And what I have done over the past years since then is covered the way that project has unfolded. And what's going on now, in some ways, is very different from what could have taken place under that initial order. On the other hand, in some ways, it is tied to that, because the people who are subject to those trials are people like Mr. Slahi. Now, he has not been charged since Colonel Couch filed that memo. No one else apparently has been willing to take up the case, either.

AMY GOODMAN: He hasn't been charged. How long has he been held?

JESS BRAVIN: He has been held a decade.

JUAN GONZÁLEZ: But, you know, the interesting thing in your account—it's a fascinating account—not only because you go into the history of military commissions, from the time of George Washington to now, but you also detail the behind-the-scenes battles that occurred within the Bush administration. The executive order that Bush signed, apparently he didn't even bother to read it very carefully. As you explain, he was on his way to his ranch in Texas at

the time. But that, really, the battles that occurred between David Addington, John Yoo, Attorney General Ashcroft, there was a real tug-of-war within the administration over these military commissions.

JESS BRAVIN: Well, that's right, because the commissions project, it was not something that arose because the Justice Department or the Defense Department or the CIA said, "Gosh, we don't know how we're going to deal with, you know, this terrorist organization. We have—our justice system is incapable of handling it. We just don't know how to handle it. We need to create something brand new to solve this problem," and then they studied different options and came up with this. It wasn't—it didn't arise that way. It was a top-down idea. There were a number of people in the administration who had been thinking about this for many years. In fact, since the 1980s, following the Pan Am 103 bombing, the airliner that blew up over Scotland, this idea had been circulating in some conservative legal circles to resurrect this form of justice. So it was a top-down kind of idea.

And other people in the administration weren't big fans of it. And one, of course, as you point out, was Attorney General Ashcroft. Some people found that surprising when they learned that in the book, because right after 9/11, people, you know, who were there at the time, right, remember he was the face of the administration's response, and he was highly criticized by civil libertarians for what they said was a very harsh reaction to 9/11. But behind the scenes, he was trying to preserve the Justice Department's authority to handle criminal prosecutions. Now, his critics, people in—some in the Defense Department and some others, said, "Well, it's just a turf battle over which department is going to have this very important mission." But he was against this. He didn't see a reason to have it, because his own staff was opposed to the idea of setting up some alternative to regular prosecutions.

JUAN GONZÁLEZ: And you note in the book that unlike other types of major decisions like this, this wasn't circulated among key officials in the administration, so that Condoleezza Rice, national security adviser, and Secretary of State Colin Powell had no idea of the decision until it was later announced?

JESS BRAVIN: That's right. Well, they learned about it from CNN. And even more—even more important for the way this issue played out was that the CIA was not informed about it. And what has characterized this project for its entire history has been conflict between the CIA and the Department of Defense over the access to evidence. And this again, given what

happened later with the

CIA

and their secret prison network and so on, might be surprising, but it turns out, as least from my reporting and talking to

CIA

officials, is that they were quite comfortable with the existing pre-9/11 setup here in New York. In the Southern District of New York, they're very experienced prosecutors and judges who deal with very sensitive cases, and the

CIA

had worked with them for years and was comfortable that they could handle very important, classified, national security evidence and still get their trials underway.

The CIA had no involvement in setting up military commissions; did not know the military officers involved in them; did not have a high regard for a bunch of unknown, mid-level people, reservists and so forth; and was very uncooperative with military commissions all the way.

Colonel Couch and other prosecutors frequently, trying to get information from the CIA

, not because they wanted to know what evidence there was and also because they felt they had a duty to present the defense with anything that could be exculpatory, ran into roadblock after roadblock. And to this day, the

CIA

continues to have a somewhat conflicting relationship with military commissions, as recently as a few weeks ago, when apparently a

CIA

censor, unknown to the military judge, briefly blocked the audio transmission from the Guantánamo courtroom.

AMY GOODMAN: Explain.

JESS BRAVIN: Well, there is right now—I mean, and again, there are military commissions now. They are a modified version of what originally was envisioned. There are a number of changes that make them significantly less unfair than what could have occurred. But there is a—in a high-security courtroom down there, the proceedings take place behind soundproof glass. And if you are in the press and you're there watching, or if you're watching the video feed here on the mainland at Fort Meade, Maryland, there is a 40-second delay. So what you're seeing is actually taking place 40 seconds in the future from what you're hearing. And that is so government censors can cut the feed if what they deem to be secret information is released in the courtroom by a witness or a prisoner or a lawyer, what have you.

So, that button has been pushed several times. Up until now, it had always been pushed by the courtroom security officer. Most recently, it was pushed by someone who the judge didn't even know was listening, and we assume that it was the CIA, because it has classification authority, as they say in government speak, over this information. Now, to be fair, in every instance, the military judge has concluded that the censor was in error. And what was said during that period was put back on the record. So, there hasn't actually been anything said in that courtroom that has been kept down. But that potential is there.

AMY GOODMAN: The trajectory from President Bush to President Obama? What President Obama did?

JESS BRAVIN: Well, President Bush's initial order, which envisioned this sort of legal time machine going back to 1942, the Supreme Court threw out that project in 2006 in a very long, almost 80-page opinion by Justice John Paul Stevens, said that the Bush administration had misread the legal precedents and that the president lacked authority to set up this system. So, a number of things happened after that, but the end result was a bill that Congress passed in 2006 called the Military Commissions Act, which authorized a version of military commissions which didn't look anything like U.S. district courts but was also considerably more fair than what President Bush initially had in mind. And one reason was that the Bush order said, "No one who's convicted here has any appeal to the federal courts. I will have the last word." The statute says, actually, the federal courts do get final oversight of military commissions.

President Obama did not support that. He thought it was not fair enough. And he made a lot of statements during the campaign for president in 2008 suggesting tremendous skepticism for military commissions and saying that both civilian courts and the existing military justice system—the one that Colonel Couch was trained in and other military lawyers that courts-martial, that prosecute servicemembers—that either of those systems would be a better way to go. Once he took office, he got a lot of advice, conflicting advice, over this, and he chose to take a sort of middle path. He asked, "What changes in military commissions do you need to do to make them fair enough?" And a number were proposed involving the—how hearsay can be admitted, a few other things. And he sent those to Congress in 2009. Those changes were adopted, and military commissions were reauthorized. So now we're basically on commissions 3.0, which looks something in between what President Bush had in mind but not a district court.

AMY GOODMAN: We have to break, but we're going to come back to this discussion. Jess Bravin is the author of *The Terror Courts: Rough Justice at Guantanamo Bay*. The book has just been published. And we're also joined by Lieutenant Colonel Stuart Couch,

who's speaking to us from Charlotte, now an immigration judge, was at Guantánamo. And we're going to talk about some other cases at Guantánamo. Stay with us.

[break]

AMY GOODMAN: Our guests: in Charlotte, North Carolina, Lieutenant Colonel Stuart Couch; here in New York, Jess Bravin, author of the new book, *The Terror Courts: Rough Justice at Guantanamo Bay*. Juan?

JUAN GONZÁLEZ: Jess, one of the things that you raised in your book is that the relative independence—unusual independence—of the military commissions and the military prosecutors, much more so than many people might have expected, and you specifically also highlight the *Hamdan* case, the supposed driver of Osama bin Laden, as a demonstration of how the military commissions exhibited enormous independence.

JESS BRAVIN: Well, the *Hamdan* case is really the signature case for this effort so far, because it is the first one that ended up going to trial. It is the first case that went to the Supreme Court in 2006. And it was the first contested trial that yielded a conviction. And it's also the first military commissions conviction to be examined by a federal court. And so, it really is the premier way to look at this whole idea of prosecuting suspected terrorists through a new justice system.

Hamdan, by any account, actually was Osama's driver. He never denied it. There is no question about it. But as Colonel Couch mentioned, initially the military had very few serious suspects at Guantánamo. The most serious suspects were held secretly by the CIA somewhere else. So, the military prosecutors had to pick from those available to them. And after several other candidates were removed for various political or other reasons, they settled on prosecuting Salim Hamdan as sort of a stand-in for Osama. Because Hamdan had spent many years very close to bin Laden, Hamdan had bin Laden's trust. He was a bodyguard, as well as a driver. And he was—and they had photos of him with bin Laden, carrying a rifle and so on. And, you know. So, that was the first guy who went up.

And his lawyers challenged the validity of military commissions entirely. They said it was illegal

for President Bush to set up this system. And that, of course, as I say, is a case that went to the Supreme Court. After he won, in a case called *Hamdan v. Rumsfeld*, as the book recounts, Rumsfeld was quite unhappy to be the loser in that case. After it was—after it was decided, he met with his top advisers and says, "I'm the first defense secretary to lose a case to a terrorist?" He wasn't pleased.

But once the Congress enacted the Military Commissions Act authorizing a new version, Hamdan was immediately charged again and prosecuted. But that trial, which I covered at Guantánamo in 2008, really it showed a lot of things. It showed how perhaps the authors of this project didn't really know what they were going to get from it, because many of the people in the Bush administration, while quite well educated and with very strong academic pedigrees, did not have a lot of military experience or even courtroom experience. And so, many of them, at least ones who talked to me, expected the military to be a very top-down organization that got the message and carried out the mission. And instead, the military legal corps, in particular, is a culture that feels it has an independent duty to carry out its own legal code books and doesn't view itself as an arm of a political administration. So Hamdan actually was acquitted by a military jury of the most serious charge brought against him, which was conspiracy.

Furthermore, the charge he was convicted of was something called "material support for terrorism." The government prosecutor at Guantánamo asked for a sentence of 30 years to life. And they said, "Send a message to anyone around the world who might contemplate providing material support to terrorism that they will have a tremendous price to pay." And the jury, made up of six military officers, rank of colonel or lieutenant colonel equivalent, spent less than two hours deliberating and sentenced Hamdan to five-and-a-half months plus time served. And I remember being in the courtroom and being stunned, because when they said it, I mean, were they—do they mean "years"? Wait, no, it turned out to be essentially a token sentence, and he was then—he was released in early 2009, and he's back home in Yemen. And it turned out that the military jury, as had been suggested by defenders of the military at the beginning, was quite independent and not simply there to rubber-stamp any kind of conviction. And I interviewed the foreman of the jury after that.

That story has a fascinating coda, because Hamdan was released—he's gone, he's back home—but he was convicted. And technically, he was convicted of a war crime, which is a terrible thing to have on your record. So, his attorneys continued to appeal and said this conviction, which is on his record, is invalid. And they made a number of arguments. The military appeals court upheld the conviction. Then he got to come into the regular U.S. court system, to the D.C. Circuit Court of Appeals, among the—made a number of arguments. And in October, the D.C. Circuit Court of Appeals vacated Hamdan's conviction. And the reason was this: The panel said that material support for terrorism was not a war crime. It may be a crime under domestic civilian law, but it has never been understood as a war crime at the time that

Hamdan committed those acts. And so, the conviction was invalid, and they vacated it.

And very recently, the Obama administration let pass the deadline to appeal that decision. So, this tremendous case that began this project in 2004, when Hamdan was first brought into court, went to the Supreme Court once, went back to trial, got comments on the conviction from both Obama and McCain—it took place during the 2008 campaign—all this went through, all these turns, and in the end it turns out to be a complete legal nullity because the conviction was invalid.

AMY GOODMAN: Lieutenant Colonel Stuart Couch, we only have three minutes. I was wondering if you could discuss the case of Mamdouh Habib, who was the Australian-Egyptian prisoner at Guantánamo, and also if you could just sum up how you feel today, having participated in and then pulled out of the prosecution at Guantánamo because of issues of torture.

LT. COL. STUART COUCH: Amy, the case of Habib, very complex, and again, Jess does a really good job of covering it in the book. But briefly, it was an individual. He was of Egyptian nationality but that had obtained Australian citizenship. I was asked to review the evidence in that case to determine what charges could be brought. Based upon the evidence that I was presented, I couldn't see a charge, because merely being affiliated with al-Qaeda does not rise to the level of an offense under the law of armed conflict. And ultimately, Habib was released back to Australia within a couple of weeks of the final assessment that we made in his case. As for the second part of your question as to how—

AMY GOODMAN: Although he was held for years before.

LT. COL. STUART COUCH: He was. As to your second question about how I feel about military commissions now, what I would say is I am familiar with some of the participants in the current iteration of military commissions: Judge Pohl; the chief prosecutor, Brigadier General Mark Martins; and some of the defense attorneys. In my view, each one of these groups of people are doing their level best to work within this process that's been established, and that tension is a healthy tension when it comes to arriving at justice. And so, at least my confidence is within the people that I know that are participating in the process and that I believe are doing their level best to see that justice is done, especially in these cases of the 9/11 conspirators. It's my opinion that these criminal prosecutions of the 9/11 conspirators are the most significant criminal prosecutions in the history of the nation.

AMY GOODMAN: And the legacy of torture? I mean, we still have what? There are 166 men still being held at Guantánamo. But the message that went out around the world about the United States?

LT. COL. STUART COUCH: Well, as far as the detainees that are still being held, the Supreme Court has reaffirmed the customary international law position that they can be held until the end of hostilities. And the Supreme Court has uniformly held that in the cases involving Guantánamo that they have decided in recent years. So, that said, they can be held to the end of hostilities.

As to the issue of torture, what I would say is a policy that permits that, a policy that allows torture to occur, for lack of a better term, is un-American. And my hope would be that, with the issues raised about torture in the past few years, that there will be this robust discussion within this country, both on a political level and on a social level. And like we like to say here in the South, they can bring some Clorox and sunlight to this issue so that it's not repeated in the future.

AMY GOODMAN: Lieutenant Colonel Stuart Couch, I want to thank you for being with us, and Jess Bravin, author of *The Terror Courts: Rough Justice at Guantanamo Bay*

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