

2010

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Recommended Citation

Tonn, Michael (2010) "Misguided Men: International Law and the Closing of Guantanamo," *PSU McNair Scholars Online Journal*: Vol. 4: Iss. 1, Article 10.
<https://doi.org/10.15760/mcnair.2010.114>

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Portland State University McNair Research Journal 2010

Misguided Men: International Law and the Closing of Guantanamo

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Citation: Tonn, Michael. Misguided Men: International Law and the closing of Guantanamo. Portland State University McNair Scholars Online Journal, Vol. 4, 2010: pages [114-139]

Misguided Men: International Law and the Closing of Guantanamo

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Abstract

With the signing of the Executive Order to close Guantanamo Bay, the need for research has arisen to address the possible solutions. A framework of analysis, built upon various legal factors, is needed to formulate acceptable legal options that coincide with political goals. The difficulty lies in the moral and ethical willingness to pursue these ends. However, only by adhering to the rule of law can the US government effectively close the detention center at Guantanamo and also implement a plan to deal with future incidents regarding possible terrorist suspects.

Introduction

Closing the detention center at Guantanamo Bay is a complex, intricate, and important problem facing the US government today. Much has already been written discussing treatment of the detainees, evidence regarding the detainees gained from interrogation, and the difference between torture and degrading treatment. Key issues of debate among scholars have been the limits of presidential power¹ and the need for balance between the three branches of government.² While these issues are of utmost importance, they are not the main focus of this paper. The purpose of this paper is to discuss the current condition facing the Obama Administration as it searches for solutions on how to properly release the detainees held at Guantanamo Bay. Past conditions will be addressed to construct a framework of analysis and thus making an informed policy recommendation.

This analysis will begin by considering context provided by the “War on Terror.” The strategic logic employed by the Bush Administration will be discussed to draw attention specifically to the detainees’ legal status. This legal status will then be compared to provisions of international law.

¹ Joseph Marguiles. *Guantanamo and the Abuse of Presidential Power*. New York: Simon & Schuster, 2006.

² Benjamin Wittes. *Law and the Long War*. New York: Penguin Press, 2008.

Turning back to domestic policies, a review of policy actions and reactions will show how the separate branches of the US government addressed the concerns of national security and international law. Lastly, by analyzing the commission process, a legal solution is recommended that acts in concurrence with both domestic and international law.

Context of “War on Terror”

In the week following the attacks of Sept. 11th, Congress authorized the President to use force in what would become the “War on Terror.” The Authorization for Use of Military Force (AUMF) states quite well the range of actions available to the President. As Section 2 (a) states:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Osama bin Laden was soon named public enemy number one along with the al-Qaeda network. The connection between the Taliban government of Afghanistan and bin Laden, who had been allowed to run terrorist training camps within the Afghan countryside, was established by US intelligence. Quickly, the US military was mobilized to invade Afghanistan and overthrow the government, in accordance with the AUMF of Sept. 18th, 2001. Even though customarily forbidden by international law³, Congress made no objection to the President instructing the US military to overthrow a foreign government. The political atmosphere following Sept. 11th, both

³ Charter of the United Nations, Chapter 1, Article 2

domestically and internationally, was filled with claims of solidarity, knowledge of the new threat, and calls of action ranging from justice to revenge.

In this frenzied environment of political and military activity, operations were begun in Afghanistan with little regard to international customs of war. Parts of Afghanistan were carpet bombed, even though they contained civilians, including women and children⁴. Pamphlets were distributed promising “wealth and power” to anyone who turned over al-Qaeda suspects⁵. Those captured or handed over to the US military were shipped to Bagram Air Base in Afghanistan. Bagram became the jump off point for interrogations and for some, the first step towards indefinite detainment at Guantanamo.

Bush Administration Strategic Logic

Following the recommendation contained in a memo sent by Deputy Assistant Attorney General John Yoo and Deputy Assistant Attorney General Patrick Philbin to Department of Defense General Counsel William Haynes II in December 2001, men began to arrive at Guantanamo.⁶ As part of the Department of Justice Office of Legal Counsel, Yoo and Philbin maintained that if the detainees were held at Guantanamo, they could be denied access to the US legal system. The Naval base was assigned to US jurisdiction and control as part of 1903 treaty agreement with Cuba. While the Cuban government still retains ultimate sovereignty over the land itself, the US has complete jurisdiction and control over the base.

⁴ Moazzam Begg, *Enemy Combatant* (New York: The New Press, 2006), 100-101.

⁵ Mark Denbeaux, “Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data,” *Seton Hall University School of Law*, February 2006, http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf.

⁶ Patrick Philbin and John Yoo, “Memo for William J. Haynes II, General Counsel, Department of Defense.” In *The Torture Papers*, edited by Karen Greenberg and Joshua Dratel (New York: Cambridge University Press, 2005), 29.

The Bush Administration needed a place to further interrogate men captured in the war in Afghanistan. They justified the detention center at Guantanamo by exploiting the difference between sovereignty and jurisdiction. The Office of Legal Counsel claimed that by holding them on foreign land, the detainees would not have access to the American court system and could be held indefinitely or until the War on Terror concluded. Using this justification created a “legal black hole” as British Lord Steyn described it.⁷ The detainees could not seek due legal process in American courts or any court system initially. Given the amorphous character of the War on Terror, detainees could be held indefinitely by claiming that they would return to the field of battle to plot more terrorist attacks and kill more Americans.

On January 9, 2002, Yoo and Special Counsel Robert Delabunty produced another memo concluding that international treaties and federal laws do not apply to members of al Qaeda or the Taliban.⁸ In this memo, the authors state that al-Qaeda and the Taliban are not nation-states and therefore, the Geneva Conventions do not apply. Also, the War Crimes Act, Title 18 U.S. Code 2441, does not apply for the same basic reason. But even more disturbing is that the authors of the memo concluded that “customary international law, whatever its source and content, does not bind the President, or restrict the actions of the US military, because it does not constitute federal law recognized under the Supremacy Clause of the Constitution.”⁹

Within this legal black hole came a new legal definition by the Bush Administration- “unlawful enemy combatant.” Both of these adjectives have been used in place of each other to denote the same detainee’s status- either “enemy combatant” or “unlawful combatant.”

⁷ Lord Johan Steyn, “Guantanamo Bay: The legal black hole,” *Statewatch News*, 25 November 2003, <http://www.statewatch.org/news/2003/nov/Guantanamo.pdf>

⁸ Greenberg et al., *Torture Papers*, 38.

⁹ *Ibid.*, 39.

Although used as an official status, the definition of an unlawful enemy combatant was not codified until the Military Commissions Act (MCA) of 2006. According to the MCA, an “unlawful enemy combatant” is a person who:

- (1) “has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant,” or (2) “has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal (CSRT) or another competent tribunal” by a certain date.¹⁰

While it echoes similar language contained in the AUMF, this definition contains a discrepancy when put into practice. To determine an “unlawful enemy combatant”, many CSRT’s relied on faulty information gleaned through harsh interrogation techniques, unreliable sources, or plain nonsense. For example, according to a report by Seton Hall law professor Mark Denbeaux, some CSRT decisions were based upon the detainee using a guest house (a common sleeping arrangement in the country of Afghanistan), wearing olive drab clothing, or possessing a Casio watch.¹¹ Too often, CRSTs based their determinations upon the recommendations already contained in the detainee’s files, most of which came from interrogators. It’s crucial to point out the circular reasoning here: men were determined to be “unlawful enemy combatants” because someone had claimed them to be “unlawful enemy combatants.” Then, using this determination as a legal status, these men were prohibited from seeking redress through US courts on the basis of habeas corpus, a universal right of international law, domestic law and common law.

¹⁰ Michael Garcia, et al, *Closing the Guantanamo Detention Center: Legal Issues*, Congressional Research Service Report R40139, Jan 22, 2009, 16.

¹¹ Denbeaux, *Report on Guantanamo Detainees: A Profile*, 17.

The Bush Administration was looking to glean vital intelligence from these captured men but the only way they could have detained and interrogated them was by denying them habeas corpus through this new definition of “unlawful enemy combatant.” Prisoners of war are normally given protection against unending questioning by Article 17 of the Third Geneva Convention: “Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.” If given POW status, the detainees could no longer be subjected to endless interrogations, thus jeopardizing their usefulness to intelligence officials.

International Law

By deeming these men “enemy combatants” the Bush administration tried to justify their indefinite detainment by denying them status as prisoners of war. Article 4 of the Third Geneva Convention gives various criteria in regards to status as a prisoner of war. A person must belong to one of the following categories:

- A. Be a member of the armed forces of a party in conflict
- B. Be a member of a militia belonging to a party in conflict and fulfill the following:
 - 1. Must be commanded by a person responsible for his subordinates.
 - 2. Wear a fixed distinctive sign recognizable at a distance.
 - 3. Carry arms openly.
 - 4. Conduct their operations in accordance with the laws and customs of war.
- C. Be a member of an armed force that professes allegiance with a government or authority not recognized by the detaining power.

Delineation must be made between the Taliban and al-Qaeda with regards to these criteria.

Members of the Taliban could fall under either criterion A or C. The Taliban was the ruling government and also the armed forces of the country of Afghanistan, which is a signatory of the Geneva Conventions thus fulfilling criterion A. Or, the Afghani armed forces professed allegiance to the Taliban government which is not recognized by the detaining power (i.e. the US), thus fulfilling criterion C.

Now, consider these criteria in regards to al-Qaeda, with criterion B being the essential condition. The first conditional could be argued to exist. The hierarchy structure of al-Qaeda is not under the command of true military commanders, but de facto leaders. As for a fixed sign, al-Qaeda carries no emblems, no flags, or insignia traditionally associated with military forces. However, they have been known to carry arms openly. As for the last condition, terrorists intentionally obscure the laws of war to conduct their operations. By avoiding the laws and customs of war, they can achieve their political goals through dramatic means. A definition of terrorism would be beneficial at this point. As Resolution 1566 of the United Nations states, terrorism is:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act.

Osama bin Laden and the al-Qaeda network definitely fit the definition of a terrorist. Most of the detainees do not. However, they drew no distinction between those captured and those actually

confirmed to be members of al-Qaeda, the Taliban or otherwise. Therefore, the Bush administration denied all the detainees' status as prisoners of war, as the memo from Alberto Gonzales to the President, dated January 25, 2002, clearly indicates in which Gonzales provides the legal justification for such a decision.¹² The Geneva Conventions makes it clear that anyone captured during armed hostilities is considered a prisoner of war and afforded protection under the Third Convention until deemed otherwise by competent tribunal, under Article 5.

Even though the Bush Administration maintained that the CSRT fit this necessity, using the word "tribunals" in this case is an equivocation: Article 5 tribunals are to establish status as POW's, if such doubt exists. CSRT's determine status as enemy combatants. The Bush Administration had already maintained that the detainees were not POW's, so the CSRT's are unable to replace or replicate the Article 5 tribunals. Unless used to grant POW status, CSRT's do not qualify as Article 5 tribunals.

Even if detainees were deemed not to be POW's they were still afforded protections under the Fourth Geneva Convention as Civilian Persons in Time of War. Everyone during a time of war is afforded protection by either the Third or the Fourth Convention; there is no lack of legal coverage. A person captured is given status as a POW and given protection under the Third Convention or they are considered a civilian and given protection under the Fourth Convention. However, the Bush Administration found a clever strategy: they made a new category of "enemy combatant," labeled whomever they wanted, and placed these individuals outside the protections of the Third and Fourth Conventions. But as the United Nations stated in a report on the situation

¹² Greenberg et al., *Torture Papers*, 118.

of the detainees, ‘the ongoing detention of the Guantanamo Bay detainees as “enemy combatants” does in fact constitute arbitrary deprivation of the right to personal liberty.’¹³

Action/Reaction

The Supreme Court and Congress had been doing a legal dance the entire time. The first step was the decision of *Rasul v. Bush* where the legality of the detainment was first broached. However, this case was not to determine whether the indefinite detainment was legal but whether the US courts actually had the jurisdiction to hear the prisoners’ cases. The decision in *Rasul* was merely to determine if the men held at Guantanamo could pursue habeas corpus through US courts. The dissenting judges stressed the point that America should not extend any protections to prisoners held under Department of Defense custody, citing the case of *Johnson v. Eisentrager*.

Eisentrager involved German nationals captured in China and tried in the American-occupied section of Germany. The distinction in this case is that the Guantanamo detainees are under American civil jurisdiction from the terms of the original lease with Cuba while the respondents in *Eisentrager* were never within territorial jurisdiction of the American civil system.

Congress reacted by signing into law the Detainee Treatment Act of 2005 (DTA). The DTA set up the Combatant Status Review Tribunals (CSRT) and the Administrative Review Boards (ARB). CSRT’s weigh available evidence to determine a combatant’s status is lawful or not. The ARB’s act much like parole boards, to determine whether the DOD should continue holding these men. The DTA also states that “no federal court, justice or judge shall have jurisdiction to

¹³ UN Commission on Human Rights, *Situation of detainees at Guantanamo Bay*, February 15, 2006.

hear or consider the application for the writ of habeas corpus filed by or on the behalf of an alien detained by the DOD at Guantanamo”.¹⁴

In 2006, the Supreme Court stepped forward with the decision of *Hamdan v. Rumsfeld*. Hamdan petitioned that the neither congressional act nor law of war supports trial by commission for conspiracy, and that the procedures adopted to try him violate basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.¹⁵ The District of Columbia Circuit court dismissed Hamdan’s challenge on the grounds that the Geneva Conventions are not judicially enforceable and that, in any event, Hamdan is not entitled to their protections. The Supreme Court ruled that neither of these grounds is persuasive.¹⁶

Congress made another concerted side step with the Military Commissions Act (MCA) of 2006. The legislature returned to the notion that the detainees should be placed outside the protection of the Geneva Conventions. Section 948b of the MCA states: “No unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.” Here we have the highest law making body of the United States stating that they want to deny the universal human rights protection of the Geneva Conventions, afforded to all people of the world. According to Article 3 of Fourth Geneva Convention, the following are prohibited at all times and apply to those not taking part in hostilities, including those who have laid down their arms:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture

¹⁴ DTA Section 1004(a).

¹⁵ *Hamdan*, 548 U.S. 05-184 (2006), 2.

¹⁶ *Hamdan*, 62-63.

(b) taking of hostages

(c) outrages upon personal dignity, in particular humiliating and degrading treatment

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Perhaps it was political pressure not to give alleged terrorists any safe haven, even under law, or perhaps it was pressure from the Bush Administration to keep these men held there indefinitely.

Again we find the similar limited jurisdiction found in the DTA, which amends Section 2241 of Title 28 of the US code: “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf on an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or *is awaiting such determination*” (emphasis mine).¹⁷ Not only has Congress authorized the President to indefinitely hold anyone, but even those that are not yet deemed to be “enemy combatants”.¹⁸

Consider the cases of Jose Padilla and Yaser Hamdi, both of which were US citizens. Padilla was arrested in Chicago and held as an enemy combatant in a military brig in North Carolina. Hamdi

¹⁷ MCA Section 7(a).

¹⁸ This is what happened to Brandon Mayfield of Portland, OR. In Steven Wax’s book *Kafka Comes to America*, (New York: Other Press, 2008) he gives a vivid description of his defense of Mr. Mayfield as federal public defender. Brandon had been, for all intents and purposes, ‘detained’ by the FBI during an investigation that pointed to Mr. Mayfield being an accomplice to the bombings in Madrid in 2004. The FBI did not present a warrant to Brandon when they took him from his private practice law office. Their investigation rested upon a fingerprint they had received from the Madrid police that matched Brandon’s. It was later found out that the fingerprint was not his, the obvious revelation being that Spanish police arrested the real suspect.

was captured in Afghanistan, sent to Guantanamo, but then transferred to the same military brig once his American citizenship was discovered. Not only were these men denied their international human rights but also their rights as citizens of the United States because of being labeled “enemy combatants.”

Once again, the Supreme Court answered with another decisive step in 2008. In *Boumediene v. Bush*, the Court ruled that the MCA “operates an unconstitutional suspension of the writ of habeas corpus”.¹⁹ It was argued that there were courts with applicable ability and jurisdiction to try the detainees and the military commissions were therefore unneeded. The Suspension Clause of the Constitution allows only Congress, and not the President, to suspend the writ of habeas corpus for the security of the United States in extreme circumstances. The judges also argued that with a fully functional court system, Congress was not authorized to suspend the writ for anyone, especially those held under detention by the Department of Defense. Once again, the Executive branch was treating the detainees as military personnel for prosecution purposes (to secure trial by military commission and to avoid the Judicial branch) and then also denying them status as military personnel (to escape the protections of the Third Geneva Convention).

The commissions lack due process in many crucial regards. Detainees are required to be assigned military counsel and cannot waive this right, effectively limiting their ability to act as their own counsel.²⁰ They can also be denied notification of the charges against them, an essential element of habeas corpus, due to national security concerns.²¹ If told of their charges, detainees were thought to be able to notify operatives either inside or outside the prison of sensitive information in the making, and thus sparking more terrorist attacks. For the same reason, it was accepted that

¹⁹ *Boumediene v. Bush*, 553 U.S. 06-1195 (2008), 6.

²⁰ Clive Stafford Smith, *Eight O'clock Ferry to the Windward Side: Seeking Justice in Guantanamo Bay*, (New York: Nation Books, 2007), 88 and 111.

²¹ Military Commissions Act of 2006, Subchapter IV, Section 949d.

detainees were not required to actually be present for their trial. In fact, they could be removed if it was thought they were creating any kind of disturbance.²² However, a compromise was reached in which their counsel would be notified of all charges, but, of course, counsel could not actually discuss the charges with the detainee, limiting their ability to build a case and provide a thorough defense. Additionally, given the classified nature of some information, only lawyers able to secure a top secret clearance were able to represent the men at Guantanamo. Anything discussed between the detainee and counsel was subject to the military censor's review, violating attorney-client privilege, although it was claimed to be for strictly security purposes.²³ Counsel could not notify detainees of current world events that might have contributed to their case, also due to security concerns.²⁴ The military commission process effectively placed lawyers and detainees incommunicado, with the military as the mediator of anything that could be said. Additionally, the court of last resort is also placed within the military- meaning, the Commander in Chief, or someone from the Department of Defense he so designates.²⁵ This means that all detainee appeals would eventually reach the President, the very official calling for their detainment, which clearly violates the impartiality factor required by a court of law.

Detainees have also been unable to provide for their own defense by being denied the ability to contact key witnesses. Most of these men are poor and come from very rural parts of countries thousands of miles away from Guantanamo. At Guantanamo, it is ludicrous to think that providing legal processes in legislation is the same as providing them in reality.

²² Ibid.

²³ Smith, *Eight O'clock Ferry*, 132.

²⁴ Ibid., 135.

²⁵ Leonard Cutler, "Human Rights Guarantees, Constitutional Law, and the Military Commissions Act of 2006," *Peace & Change*, Vol. 33, No. 1 (January 2008), 35.

Boumediene also challenged the CSRT's by pointing out that detainee's have limited means to find or present evidence to challenge the Government's case, do not have assistance to counsel, and may not be aware of the most critical allegations that the Government has relied upon to order their detention. However, once a prisoner is labeled an 'enemy combatant' by the CSRT, he is then forced to convince them of his innocence. These men were considered guilty until proven innocent.

Current Situation

Of the approximately 800 men that have been detained as "enemy combatants" at Guantanamo, approximately 200 remain. With 200 dangerous, slightly dangerous or innocent men grouped together for release, the Obama Administration is faced with cleaning up a difficult situation within a self-imposed time frame of one year, commencing January 22, 2009.

Now that the executive order has been signed, what is to be done with the remaining 200 men that currently occupy Guantanamo? How should the dangerous detainees be tried? And, what kind of precedent is this setting?

The men fall into three categories.

First, there are the ones who have no ties to terrorist organizations. They have been held there arbitrarily and are awaiting release. However, finding them a home is the problem. Many come from countries that been known to violate human rights and returning these men to such countries would be a practice incongruent with international law. These men also carry the stigma of being detained at Guantanamo. Many countries are afraid to take these men because they have been labeled terrorists.

Second, there are the hard-line terrorists that deserve to be imprisoned for the crimes they have committed and readily admit. Khalid Sheikh Mohammed is such an example.

For the third grouping, the line becomes hazier. There are men who have spent time alongside al-Qaeda, often as support, such as drivers and suppliers. These men are dangerous enough to prosecute but it will be difficult to conduct a fair trial if the only evidence brought forth is hearsay evidence obtained through US intelligence or interrogation.

In a Congressional Research Service Report dated Jan 22, 2009, a three part solution was proposed:²⁶

1. Release those with no terrorist ties
2. Trial by commissions
3. Trial in civilian courts

Option number one has worked rather slowly for the innocent at Guantanamo. Nations around the world have been reluctant to take in these men. Bermuda took 4. France and Ireland have each taken one. The tiny Pacific island nation of Palau has taken 17 of the Uighurs, a group of Muslims from the southwestern Chinese Province of Xinjiang that are labeled as terrorists by the People's Party of China. The Chinese had been expecting extradition but the US refused to send them there based upon Article 3 of the UN Convention Against Torture which prohibits sending prisoners to countries where it would be reasonable to assume that they would be tortured. This process is ongoing and depends much on the political savvy of diplomats and the willingness of foreign nationals to trust the reports of US intelligence asserting the detainees' innocence.

²⁶ Michael Garcia, et al, *Closing the Guantanamo Detention Center*.

Option three has been utilized in the trial of Ahmed Ghaliani, a suspect in the bombings of the US embassies in Kenya and Tanzania, in the US District court located in New York City.

As for option two, the Obama Administration has expressed that the military commissions will be revived to try the detainees, albeit with greater legal protections. In a news story from May 16, 2009, White House spokesman Robert Gibbs stated that the new commissions will no longer use statements obtained by cruel, inhumane and degrading interrogations methods as evidence. Hearsay will also be limited, removing the burden of proof from the party who objects to its reliability. The accused will also have greater latitude in selecting their counsel. Additionally, basic protections will be provided for those who refuse to testify and the military commission judges may establish the jurisdiction of their own courts. These renovations of the commission process still seem to be at ends with the decision of *Boumediene v. Bush*. It was ruled that the commissions set up by the MCA were unconstitutional but now the Executive is again authorizing their continuation regardless, albeit with new rules. Some are calling this a step in the wrong direction. The military defender for Salim Hamdan, Lt. Colonel Brian Mizer, called them “disappointing.”²⁷

Tracy Schmalzer, a Justice Department spokeswoman, said in a statement: “The administration is working on a legal framework that will restore military commissions as a legitimate forum for prosecutions in line with the rule of law. Under the previous administration, only three detainees were successfully prosecuted in over seven years. Meanwhile, federal courts have ordered some

²⁷ Reported by Kim Landers, *Obama Revives Guantanamo Bay Military Commissions*, radio, ABC News, May 16th, 2009, found at <http://www.abc.net.au/am/content/2008/s2572376.htm>

detainees released and declared the flawed judicial system established to prosecute these detainees unconstitutional.”²⁸

Exactly how the commissions can be changed to be both constitutional and effective in the face of the same legal obstacles that were faced previously is unclear. If the statements obtained through torture are thrown out, hearsay is limited, the accused select their own counsel, and other basic protections are provided, then the commission process effectively becomes equal to that of a civilian court. Once again, the commissions are no longer needed and thus, unconstitutional.

End in Sight?

On May 5th, 2009, the Obama Administration was dealt a significant blow when the Democratic Congress refused to appropriate funds for the closure of the Guantanamo detention facility.²⁹ The proponents of the funding freeze lambasted the President for not providing a clear plan for the money. They were not ready to give the President a blank check regarding the closure of the facility, yet years prior many of these same men felt it necessary to give President Bush a blank check to detainee these men for the sake of American security. As the Associated Press reported on May 21st, 2009, a bipartisan contingency voted 90-6 to keep the prison open and forbid the transfer of detainees to facilities in the US.³⁰

Time and again, American politicians have expressed their dissatisfaction with the Obama Administration’s handling of the closure. Some have criticized the President for not having a

²⁸ David Johnston, “New Guidance Issued on Military Trials of Detainees,” *The New York Times* (New York, New York), June 29, 2009. <http://www.nytimes.com/2009/06/29/us/29gitmo.html?ref=global-home>

²⁹ Megan Scully and Humberto Sanchez, “Obey Rejects Obama’s Request For Funds to Shutter Guantanamo Detention Center,” *NationalJournal.com*, May 5, 2009, http://www.nationaljournal.com/congressdaily/cda_20090505_9844.php.

³⁰ Associated Press, “Inouye measure to keep Guantanamo open wins OK,” *Star Bulletin* (Honolulu, HI), May 21, 2009, http://www.starbulletin.com/news/20090521_inouye_measure_to_keep_guantanamo_open_wins_ok.html

strategy in place once he signed the executive order.³¹ They have also stressed to their constituents that President Obama wants to free terrorists onto American streets.³²

Policy Recommendations

Perched precariously between politically acceptable options and the rule of law, the solution to the closing of Guantanamo consists of three crucial elements based upon timeframes.

The first element to address is the past. The main recommendation here is to ban the inherited faulty military commissions. It would be disastrous to Obama's human rights legacy to continue with the "ad hoc" legal system he condemned in his speech before the National Archives on May 21st, 2009.³³ The very nature of the commissions stands in direct opposition to basic elements of due legal process, as was described above. Overcoming the unfair aspects of the military commission effectively renders them moot. As has been shown with the federal trial of Ghaliani, prosecution in US civilian courts is acceptable on a political front, and adheres to the rule of law.

The second element to address is the present. While it has been slow going, the Obama Administration is making small strides to resolve the release of innocent detainees to other countries. However, there still looms the possibility that some men will not be accepted by foreign governments, in which case the responsibility for their care will remain with the US. This predicament would most likely offend the political sensitivities of many American citizens and

³¹David M. Herszenhorn, "Senate G.O.P Leader Warns Against Closing Gitmo," *The New York Times*, April 21, 2009, <http://thecaucus.blogs.nytimes.com/2009/04/21/senate-gop-leader-warns-against-closing-gitmo/>

³² Congressman Louie Gohmert, "Keep Guantanamo Open, Mr. President," *Pajamas Media*, May 22, 2009, <http://gohmert.house.gov/?sectionid=44§iontree=4,44&itemid=582>.

³³Primary source, "Obama on National Security and American Values," *The Washington Post*, May 21, 2009, http://voices.washingtonpost.com/44/2009/05/21/obama_on_national_security_and.html.

government officials, even though their judgment is passed primarily upon stigma, rather than true legal determination. The label of “Guantanamo detainee” is one that is not easily erased, regardless of whether the label “innocent” is attached as well. Additionally, there is legislation being pursued to ban the transfer of detainees to the US.

Perhaps the next best solution would be to return every detainee to their country of citizenry, regardless of circumstances. While a politically viable option in some cases, this could result in a blow to the rule of law, as international law forbids repatriation to countries under the reasonable assumption that one will be tortured. Either way, the Obama Administration needs to continue pursuing its present course of action for releasing the innocent detainees: using diplomacy, reaching out to foreign governments, and making compromises.

The third element to address is the future. The US will need to imprison those they try and convict in federal courts. It is very unlikely that any foreign government will accept these men. The city council of Hardin, Montana passed a resolution to accept detainees into the Two Rivers Detention Facility located there.³⁴ While immediately opposed by Montana’s congressional members, this kind of solution is still present. Perhaps, it will take some federal handouts and promises that have come to be part of the Guantanamo closing solution.³⁵ The legislation forbidding transfer of detainees will need to be vetoed as well. While politically unacceptable to some, this option is already a necessity being brought about with the federal trial of Ghaliani. Turning a US-convicted terrorist over to another country for imprisonment seems ironic and lacking in justification.

³⁴ Pat Dawson, “Postcard: Hardin,” *TIME magazine*, May 18, 2009, 6.

³⁵ Palau has been promised \$200 million in support for accepting the 17 Uighurs.

Another aspect of the future that needs to be addressed will be the precedent set by the trial of suspected terrorists in federal courts. Not all aspects of seeking a conviction in matters of national security lend themselves well to the civilian court process- namely the occasional need to rely on hearsay evidence and classified information for prosecution. A plan needs to be formulated to address these concerns. As has been suggested by some scholars, a national security court could be implemented.³⁶ More than a federal court system, but not quite a military commission, the national security court could use hearsay evidence on a case by case basis. The use of classified information will still need to be reconciled. The main advantage of a national security court would be to conduct trial proceedings in an impartial civilian setting, outside the ‘command influence’ that is characteristic of the military commissions. Perhaps both civilian and military judges could preside together as a panel.

There is the need for stronger legislation outlining exactly what kind of legal process is necessary to try and convict future terrorists that attack the United States. As we have seen with the Bush Administration, inventing new legal processes while currently facing a situation can produce unwanted results. The time is now to address the prosecution of terrorists domestically, consistent with both US and international law.

Conclusion

Although closing the detention center at Guantanamo Bay is a complex and critical problem, it is not without possible solutions. The current situation facing the Obama Administration has been borne out of the Bush Administration’s strategic logic, the push-pull between the three branches

³⁶ Nicholas Kittrie, “The International Law of War and America’s War on Terrorism,” *International Journal on World Peace* XXV No. 3 (September 2008):100-101.

of government, and the call for the application of the rule of law, both domestically and internationally.

A framework of analysis has been constructed by dissecting the military commissions, political situations, international law, and the standing Supreme Court ruling regarding the rights of detainees to pursue habeas corpus. Then the detainee's status, in regards to evidence collected, has been summarized to place them into one of three groups. Overlapping these two parts, we can derive policy recommendations that include:

- Ending the military commissions
- Pursuing more cases in the federal court system
- Releasing those who are not to be tried
- Imprisoning those convicted of terrorist attacks
- Developing a plan to address future terrorist prosecution and imprisonment

The overwhelming issue in closing Guantanamo Bay is really a matter of moral and ethical fortitude. Time and again, the US government has been given a chance to readily apply the rule of law and grant the detainees basic human rights guaranteed both through the US Constitution and the Geneva Conventions, among other international laws.

It was abhorrent to hear the Bush Administration speak of idealistic concepts such as freedom and democracy, while it continued to detain innocent men for years, using unsubstantiated national security fears as justification. It is equally abhorrent to hear the Obama Administration

speaking of resurrecting the same military commissions that denied these men their ability to seek recourse in a court of law.

What is needed is not a new system of laws, or rules, or processes, but men and women of government willing to implement the existing rule of law, regardless of the potential repercussions. If there needs to be a new system of addressing a new classification of combatant, such as terrorist, then it needs to be built using existing principles of law, with their original intent intact. Distorting existing holes between domestic and international law (or creating new definitions arbitrarily) hurts the rule of law, the legitimacy of the government, and especially those that suffer under these new ‘ad hoc’ legal regimes. The conditions of prosecution and defense under the laws of war are changing; it is an appropriate time for the United States to honor the laws and treaties it has signed by pursuing a legal framework that can address these changes.

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Acknowledgements

I would like to thank everyone at the Portland State McNair's Scholar Program-Jolina, Tyanne, Foday, Holly, and Toeutu. This research would not have been possible without all their guidance, support, and hard work. Words cannot accurately express my gratitude.

I would also like to thank everyone in the 2009 cohort. This was an amazing experience, scholarly as well personally, professionally, and socially. I have learned more from our interactions than from any of the research I have conducted.

Dr. David Kinsella, as my mentor, has made the largest contribution to the outcome of my work. I am grateful for his influence and willingness to work with me. He is an invaluable resource to Portland State and the Political Science department.

Lastly, I would like to thank all my family and friends who were with me this entire time. There are too many of you to name directly. However, my fiancée Joni Claypool deserves the most recognition. Without her love and support, this work, and my life, would have been severely lacking.

I dedicate this paper to the men who suffered injustice at Guantanamo Bay and to those who fought for freedom for all, regardless of ethnicity, citizenship, or religious conviction.

Above all else, I thank God.