



INTERNATIONAL POLICY REPORT

TORTURE, TERROR AND INNOCENCE WHY THE PRISON AT GUANTANAMO MUST BE CLOSED

By Jennifer Schuett and Abigail Poe

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After the terrorist attacks on September 11, 2001, the U.S. naval base at Guantanamo Bay opened its doors to some of the earliest government-designated “enemy combatants” in the war against terrorism. The prison has subsequently become the site of documented cases of torture, systemic violations of the Geneva Conventions and international human rights, and is receiving world-wide criticism and calls from high-level officials to be shut down.

In January of this year, the Center for International Policy held a conference to call on Congress to close the prison at Guantanamo Bay. Conference participants cited the violation of the 1903 treaty with Cuba, the denial of *habeas corpus*, multiple cases of torture and systematic violations of the Geneva Conventions. Since January, much has happened in respect to the prison: military judges questioned the jurisdiction of military commissions and calls for the prison’s closing have come from presidential candidates, members of Congress, respected scholars and human rights advocates. On June 10, 2007, former Secretary of State Colin Powell called for the prison at Guantanamo Bay to be closed and its inmates moved to the United States. “Guantanamo has become a major, major problem ... in the way the world perceives America and if it were up to me I would close Guantanamo not tomorrow but this afternoon.” Despite the increased support behind the campaign to close the prison, hundreds of detainees continue to be held at the prison without the international protections guaranteed to them as prisoners of war.

In late June, however, just as this report was going to press, the Supreme Court reversed itself and said that it would hear the question of whether *habeas corpus* should apply to the detainees at Guantanamo. As one observer put it: “Justice may yet win out.”



GUANTANAMO TIMELINE

1903 – U.S. signs the Treaty of Relations, creating the U.S. Naval Base at Guantanamo Bay, Cuba.

January 11, 2002 – The first 20 detainees are transferred to Guantanamo.

January 25, 2002 – Attorney General Alberto Gonzales advises President George W. Bush in a memo to disqualify Guantanamo detainees from Geneva Convention protections.

February 7, 2002 – President Bush issues a military order exempting al-Qaeda and Taliban detainees from Geneva protections.

February 19, 2002 – *Rasul v. Bush* filed on behalf of 3 detainees in protest of the denial of habeas corpus.

February 27, 2002 – Two-thirds of the detainees go on hunger strike.

April 22, 2003 – Rumsfeld approves coercive interrogation techniques.

December 3, 2003 – The first lawyer is assigned to Australian detainee David Hicks.

June 28, 2004 – The Supreme Court rules 6-3 in the case of *Rasul v. Bush*, clarifying detainee's rights to use federal courts to challenge their captivity.

July 7, 2004 – The Pentagon creates Combatant Status Review Tribunals to determine the status of detainees as "enemy combatants."

August 13, 2004 – Military commissions begin at Guantanamo for 4 of the 550 plus detainees.

November 8, 2004 – U.S. district judge James Robertson declares military commission process unconstitutional.

July 15, 2005 - U.S. Court of Appeals overturns Judge Robertson's decision, supporting President Bush's authority to create military commissions.

June 29, 2006 – *Hamden v. Rumsfeld* is heard by the Supreme Court which rules 5-3 stating that detainees are protected by the Geneva Conventions.

October 17, 2006 – Military Commissions Act passed allowing for extended detentions and military commissions for "unlawful enemy combatants."

September 2006 – 14 "high-level detainees" are transferred into the prison at Guantanamo.

March 27, 2007 – David Hicks pleads guilty in the first complete Military Commission.

May 4, 2007 – 82 detainees are cleared for release.

May 30, 2007 – U.S. military reports the "apparent suicide" of a Saudi veteran detained at Guantanamo.

June 5, 2007 – Military judges throw out the cases of 2 detainees citing a lack of jurisdiction.

June 29, 2007 – The Supreme Court reversed itself and said that it would hear the question of whether *habeas corpus* should apply to the detainees at Guantanamo.

The naval base at Guantanamo Bay, Cuba has fulfilled many purposes for the United States. In 1898 it was used as a campsite for U.S. Marines during the Spanish-American War. After the war ended, the Platt Amendment, embedded within Cuba's first post-independence constitution, laid the groundwork for the creation of a U.S. naval base. In 1903, the United States signed a Treaty of Relations formalizing the lease of Guantanamo. The lease stipulates that the land be used as coaling and naval stations only. The first systemic violations of the lease agreement arose during the Clinton administration, when Guantanamo was used as a detention center for Haitian and Cuban refugees interdicted at sea to prevent their migration to the United States. The second arose after September 11, 2001, when the United States began housing "enemy combatants" in the war on terrorism.

I. "LEGAL EQUIVALENT OF OUTERSPACE"

The appeal of opening a prison at Guantanamo Bay has always been its existence in "the legal equivalent of outer space," according to one U.S. official: a secretive place where laws do not apply and even international agreements fail to protect human rights.¹ The prison is serving in exactly that capacity. As Christopher Anders, of the American Civil Liberties Union (ACLU), explained at the Center for International Policy's conference in January of 2007, this practice is intended to circumvent the Geneva Convention III on the Treatment of Prisoners of War (GPW). Common Article 3 (CA3) prohibits certain inhumane acts such as "degrading treatment", "cruel treatment" and "torture" and violators can be tried for war crimes in international courts. "If you violate CA3 of the Geneva Conventions - that's a war crime. So, if the president were to make CA3 inapplicable, there would not be war crime prosecutions against U.S. officials," explained Anders. Thus, the administration's purpose for the prison at Guantanamo has always been, "to create a legal black hole, where...they could make up their own laws."

The reports of torture, initially denied, have now been amply documented, along with the involvement of top-level U.S. officials, in violation of international² and U.S.³ laws prohibiting torture.

On January 25, 2002 Attorney General Alberto Gonzales

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- Christopher Anders, ACLU

les advised President George W. Bush in what became known as the "torture memo" that GPW should not apply to the prisoners being held at Guantanamo. With that advice, Bush issued a military order on February 7 authorizing treatment "consistent with military necessity,"⁴ effectively stripping al-Qaeda and Taliban detainees of Geneva protections.

On February 19, 2002 three detainees, represented by the Center for Constitutional Rights (CCR), challenged their imprisonment and petitioned for a writ of *habeas corpus*. After being dismissed by U.S. district courts for lack of jurisdiction, *Rasul v. Bush* ultimately reached the Supreme Court. In June 2004, the court ruled 6-3 that detainees could use federal courts to challenge their captivity.

In July of that same year, the Pentagon created Combatant Status Review Tribunals (CSRTs) to categorize each detainee as either an "enemy combatant" or suitable for release. Labeling a detainee an "enemy combatant" effectively circumvents *Rasul v. Bush*, stripping detainees once again of *habeas corpus*. A month later the first ever military commissions at Guantanamo began, but only four of the 550 plus detainees were charged with crimes and put on trial. The process was interrupted after just two months in early November of 2004 when U.S. District Judge James Robertson declared the military commissions to be an unlawful process. In July of 2005, however, the U.S. Court of Appeals for the District of Columbia overturned Judge Robertson's decision by supporting Bush's authority to create military commissions.

Two years into the debate over the legality of the military commissions, the Supreme Court heard the case of

Hamden v. Rumsfeld and ruled 5-3,⁵ in July of 2006, that the military commission process at Guantanamo Bay violated both U.S. and international law. The Supreme Court went on to say that the detainees were indeed protected by the Geneva Convention, essentially repudiating the conclusions of the Gonzales torture memo.

With the help of Congress, Bush responded to the Supreme Court decision by signing into law the Military Commissions Act (MCA) in October 2006. Though its stated purpose is to “facilitate bringing to justice ... unlawful⁶ enemy combatants through full and fair trials by military commissions,” conference participant Col. (Ret.) Ann Wright explained that it serves to deny detainees *habeas corpus*, the presumption of innocence, the right to trial within a reasonable period of time, the right to a lawyer of choice, and the right to challenge and present evidence.

In Wright’s view, the MCA defines “torture” narrowly and clears more than 5,000 military personnel who could otherwise be connected to the cases of abuse. She added that the MCA gives the Executive Branch control over an essentially judicial function, removing Guantanamo from the Judicial Branch’s jurisdiction.

The MCA covers self-proclaimed terrorists such as Khalid Sheik Mohammed, intellectual author of the 9/11 attacks, who was transferred along with 13 other high-level detainees to Guantanamo in September of 2006. However, the case of Khalid Sheik Mohammed was unusual. That of Australian David Hicks is more typical. Hicks was held at the prison for 5 years. In the first military commission trial held, Hicks pleaded guilty as a part of a plea bargain in which he exchanged his life sentence for a 9 month stint and a gag order.⁷

Further highlighting the inherent flaws of the military commission process, the trials of 20 year-old Canadian Omar Khadr and Yemeni Salim Ahmed Hamdan were dismissed in early June of 2007 by military judges citing the administration’s lack of jurisdiction.

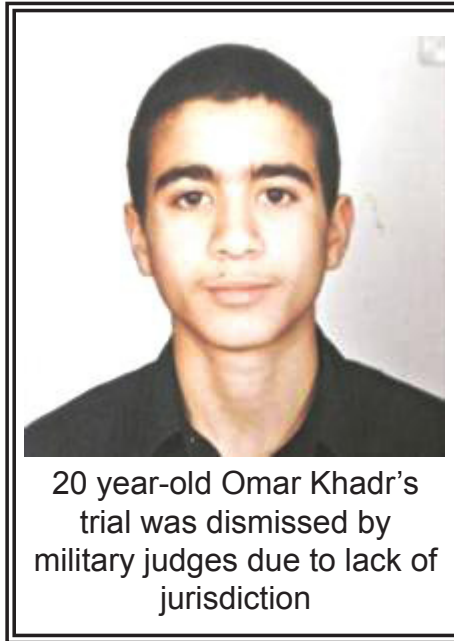
II. DETAINEES IN LIMBO

The Bush administration has characterized the detainees as “the most dangerous, best trained, vicious killers on the face of the earth.” But, according to conference participant Wright, “95 percent of the people that are in Guantanamo were purchased by the United States” from foreign governments and brought to Guantanamo via extraordinary renditions. “U.S. troops only captured 5 percent.”

Included in the 5 percent is Khalid Sheik Mohammed, who recently confessed to terrorist activities. To many, his confessions are proof that genuine terrorists are being held at Guantanamo and thus the prison must remain open. But the prison was opened in January 2002, and he was transferred to the prison in November of 2006. Khalid Sheik Mohammed is the extreme case, having entered the prison bragging of acts such as beheading American journalists. Approximately 775 other detainees have passed through Guantanamo, all but 10 of whom are yet to be tried for any crime.

The U.S. government has estimated that of the 400 detainees now at Guantanamo, 335 to 340 will be

released without accusation or trial. And according to conference participant Carolyn Patty Blum, consultant to the Center for Constitutional Rights, the Red Cross believes that there may be 15 to 20 prisoners unaccounted for at Guantanamo. The fate of these detainees rests in the hands of the Department of Defense (DoD). Each detainee is put under an annual “administrative review” to determine the level of threat he or she poses. In this narrow review process, each is assigned a “personal representative” from the U.S. military but denied the right to bring evidence or witnesses in their defense. If the review is favorable, the DoD will then initiate a transfer for the prisoner to his home country. If the life of a detainee is threatened in the home country, a suitable third country must be identified. By May of 2007, military review panels had cleared 82 detainees for release; however, most remain in U.S. custody at Guantanamo due to complications in the release process.⁸



20 year-old Omar Khadr's trial was dismissed by military judges due to lack of jurisdiction

Few of those released have been tried for criminal acts in their home countries; all who were tried were found innocent. Detainees face a challenging reorientation as the stigma of their detention with terrorists at Guantanamo makes it difficult for them to reintegrate into society.

III. TREATMENT AND CONDITIONS

The extensive reintegration problems former detainees experience upon release stem from various factors, among them the abusive treatment received during time at Guantanamo. “To hear the stories of what has happened...makes you want to weep,” Wright told the conferees, adding “It’s staggering the amount of abuse that people suffered.”

These incidents began early. The ACLU received reports of torture at Guantanamo six months before the Abu Ghraib story broke, according to Anders. Since that time, further allegations (especially from those detainees released from Guantanamo) have been made against the U.S. government concerning, but not limited to, psychological, physical, sexual, medical and religious torture. “They still use stress positions [and] they still use temperature control torture,” Wright told conferees. One detainee reported a female guard rubbing lotion on him during sacred Islamic holidays which strictly prohibit cross gender interaction.⁹ Routine body cavity searches, stress positions for days at a time, isolation for months, forced medication and religious violations are among the abuses at Guantanamo.

Patty Blum said that she is constantly “disturbed” by the level of abuses and the level of control over life at Guantanamo. Various prisoners have protested against harsh treatment, only to be met by further abuse via Instant Response Forces, which, according to Blum, could consist of throwing detainees on the ground in response to minor infractions, or forced feedings with restraints for those on hunger strikes.

Blum reported that detainees have experienced solitary confinement, sleep deprivation and violation of religious practices in this Supermax, high-security prison. According to FBI reports, guards at Guantanamo have thrown the Koran on the ground, kicked the book and flushed it in a toilet.

In a world where detainees have little contact with one another and are often held in dark cells with extreme

temperatures for extended periods of time, “tremendous deterioration in the mental health of the prisoners” has resulted. Blum cited disturbing estimates that 50 to 60 percent are severely depressed, with a 20 percent psychosis rate, and 4 suicides within the past 5 years - making rates at Guantanamo much higher than those found in free societies or other detention centers.¹⁰ Many of these practices violate Common Article 3 of the Geneva Convention, and are prohibited in most countries.

The Guantanamo prison has become a source of shame. Respected opinion leaders, from former Secretary of State Colin Powell to the editorial board of *The New York Times* are calling for its closure. Legislation recently introduced by Rep. William Delahunt (D-MA) would close the prison, putting an end to what Colin Powell, presidential candidates Barack Obama and John Edwards, and human rights advocates agree is a tragic stain on America’s reputation.

Endnotes

1 United States. Cong. Senate. Committee On The Judiciary Hearing On Detainees. Statement Of Senator Patrick Leahy. Hearing, June 15, 2005. 109th Cong., 1st sess. Washington: Office of Senator Leahy, 2005.

2 GPW: Shown in the Jan. 25, 2002 Memo to President Bush from Alberto Gonzales.

3 War Crimes Act (18 U.S.C. 2441): Shown in the Jan. 25, 2002 Memo to President Bush from Alberto Gonzales.

4 Press Release February 7, 2002 on the “Humane Treatment of al Qaeda and Taliban Detainees.” The White House President George W. Bush.

5 Roberts took no part in the consideration or decision of the case. (wikipedia.org)

6 The word “unlawful” held the utmost importance on Monday, June 4, 2007 when two military judges threw out the cases of Omar Khad and Salim Ahmed Hamdan. During their CSRTs they were labeled as “enemy combatants” (lacking the word unlawful), as were all other detainees. The military judges said the Bush administration did not have jurisdiction to try them in military commissions as they were not “unlawful” enemy combatants as the Military Commissions Act stated.

7 This restraint, which Australian law confirms, will inhibit Hicks from selling his story for an approximated \$3.3 million. Though Hicks was originally known as the “Australian Taliban,” his extended captivity and denial of habeas corpus changed popular opinion toward his case in Australia. By 2006 Hicks had become a national celebrity and sympathy for his cause had made his case a political issue. With upcoming elections there was great pressure on the government to resolve the issue, thus putting pressure on the U.S. government to act in the Hicks case.

8 Some countries, such as Yemen, are refusing to accept former detainees by questioning the legality of citizenship. Other countries pose a threat to the detainee and are awaiting the acceptance of a third country.

9 Released Pentagon documents dated 9/1/2002 and 9/7/2002.

10 At the conference, Blum noted that the 3 suicides that had occurred. In late May of 2007, a fourth suicide occurred. Official reports stated that the “apparent suicide” was of a Saudi military veteran who had received U.S. military training.

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