GUANTANAMO: IT IS NOT ABOUT THEM – IT IS ABOUT US

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CHAPTER 6

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> *"The whole purpose of setting up Guantánamo Bay is for torture. Why do this? Because you want to escape the rule of law. There is only one thing that you want to escape the rule of law to do, and that is to question people coercively – what some people call torture. Guantánamo and the military commissions are implements for breaking the law."*[1]

Lieutenant Commander Charles Swift, is the naval officer who was appointed to represent detainee Salim Ahmed Hamdan before the United States Supreme Court.[2]

I. INTRODUCTION

The legal challenges to the methods and duration of the imprisonment of the detainees in Guantánamo Bay Cuba is not only about the detainees, it is about the rule of law in America. The Bush Administration has used 9-11 and the "War on Terror" to attack the rule of law. Bush's Administration claimed the War on Terror allowed the President to pick and choose what laws the Executive Branch would follow and what laws it would ignore. The War on Terror has been used to justify ignoring treaties the United States has signed - - treaties the United States expects other countries to obey. Because of this ill–defined and perpetual "war," the administration claimed it could brush aside long-standing principles of human rights recognized by civilized nations throughout the world.

In addition to undermining the rule of law at home, Guantánamo is causing harmful consequences throughout the world. Guantánamo has become a "poster child" for global anti-Americanism that weakens our influence and effectiveness in fighting terrorism. The message we are sending to the Muslim world is that we abuse Muslims - - giving ammunition to those who spread hate of America, the "Great Satan." Our enemies loudly proclaim that our military tribunals are sham political "show trials," the same types of trials that we condemn in other parts of the world. We are enabling our enemies to take the moral high ground from us.

The mistreatment of detainees harms America more than its enemies. To overcome and defeat the Islamist extremist who engage in acts of terrorism, America must have the support of the international community. Taking the position that principles of international law and human rights apply to all others, but not to us, will not win the support we must have from the global community.

II. WHO IS AT GUANTÁNAMO?[3]

Since January 2002, over 770 detainees have been imprisoned at Guantánamo Bay. It is estimated that over 500 detainees have been released, leaving approximately 250 men still detained in a state of legal limbo in Cuba. Who are these men who have been detained, or still remain at Guantánamo?

Claiming "national security," the government has told the American public very little about the individuals detained at Guantánamo and has refused to release information about what these men have allegedly done that justifies their detention. Government officials, however, have not been hesitant to tell the media that these men are dangerous terrorists. The Bush Administration has consistently referred to the detainees as the "worst of the worst." According to Vice President Cheney, "The people that are there are people we *picked up on the battlefield*, primarily in Afghanistan. They're terrorists. They're bomb makers. They're facilitators of terror. They're members of Al Qaeda and the Taliban..."[4] (emphasis added). Former Secretary of Defense Donald Rumsfeld told the press, "[The detainees are] among the most dangerous, best-trained vicious killers on the face of the Earth. These are the people *all of whom were captured on a battlefield*."[5] (emphasis added). The Government's own documents, however, contradict these "official" claims.

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1 - Brenner, Marie, *Taking on Guantánamo,* Vanity Fair, March 2007

2 - After successful representing Hamdan before the United States Supreme Court, Lt. Commander Swift was forced out of the navy. As a civilian attorney, Charles Swift was one of defense counsel in Hamdan's Military Commission.

3 - In May of 2005, the author volunteered through the Center for Constitutional Rights (CCR) to represent a detainee at Guantánamo Bay. After attending a seminar conducted by CCR, the author was assigned an Afghani client, Mohammad Akhtiar. With the assistance of CCR, a habeas corpus petition was filed for Mohammad Akhtiar in the District Court of the District of Columbia. In December of 2006, three and a half years after being imprisoned, Mohammad Akhtiar was transferred back to Afghanistan. Upon his arrival in Kabul, he was promptly set free by the government of Afghanistan. In conjunction with CCR, the author is presently representing a second Afghani detainee, Abdul Naseer.

4 - Vice President Dick Cheney, (June 23, 2005) available at *http://rastaban.livejournal.com/312082.html*

5 - Former Secretary of Defense Donald Rumsfeld, (January 27, 2002) available at http://www.defenselink.mil/news/Jan2002/n01272002_200201271.html

Professor Mark Denbeaux and his students at the Seton Hall School of Law have written two excellent reports comparing the actual Government data to government officials claims that all detainees are the "worst of the worst."[6] (Author's Note: I highly recommend reading these reports. They provide the reader with an excellent insight into who is being detained at Guantánamo.) The Seton Hall analysis considered only Government documents and only the Government's conclusions, assuming for purposes of the report that the Government evidence was accurate. The reports did not consider denials of wrongdoing by the defendants, nor claims of innocence made by defense attorneys. The Government's own data strongly contradicts "official" claims being made to the media and the American public. Analysis of the Government data shows:

- Only 8% of detainees were determined to be al Qaeda fighters;
- Only 5% of the detainees were captured by United States forces; 86% were arrested by either Pakistan or Afghanistan's Northern Alliance forces and turned over to Americans;
- The Department of Defense considered an individual's affiliation with any of 72 different alleged "terrorist" groups sufficient for a detainee to be classified as an "enemy combatant" - - however, 52 of these groups are not listed as terrorist organizations on *any* government lists maintained to protect our borders; and
- Fifty-five percent (55%) of the detainees were determined *not* to have committed hostile acts against the United States.

An alarming revelation in the Government's data is the inconsistency between the Defense Department and State Department's lists of "terrorist" organizations. The State Department is required by statute to keep a list of terrorist organizations in order to prevent a terrorist from crossing our borders, and the State Department furnishes these lists to border patrol and customs agents. Fifty-two (52) of the 72 groups the military has classified as "terrorist" organizations are not on any lists maintained by the State Department that are furnished to the men and women responsible for keeping our borders safe. A prisoner detained because he was a member in one of these fifty-two "terrorist" organizations could have walked across the bridge at Laredo or landed at DFW, shown his "membership card" to the border patrol or customs agent, and been admitted into the United States. "This inconsistency leads to one of two equally alarming conclusions: either the State Department is allowing persons who are members of terrorist groups into the country or the Defense Department bases the continuing detention of the alleged enemy combatants on a false premise."[7]

Another disturbing revelation derived from an analysis of Government data is the questionable circumstances under which the majority of the detainees were "captured." If less than 10% of the detainees were captured by the United States, where did the other 90% come from? Unfortunately, many were captured by bounty hunters and turned over to Americans for money. The CIA paid monetary rewards for terrorists, in both Afghanistan and Pakistan - - one could get rid of a tribal enemy and make money doing it.[8] The worse a reward-seeker could make his captive appear, the more money he could pocket. The Geneva Convention requires hearings to be held in the field as soon practical to determine the status of a captive.[9] Since the military was not permitted to hold hearings in the field, many detainees were simply imprisoned and are being held indefinitely based on very suspect hearsay, or what the military refers to euphemistically as "not fully evaluated intelligence."

III. HISTORICAL OVERVIEW

A. Early Actions by the Bush Administration

The week after 9/11, Congress handed President Bush vast authority to wage the "war on terror." In its *Authorization to Use Military Force,* Congress gave the President:

> "Authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and authorized him to use "all

6 - Denbeaux, Mark, *Report on Guantanamo Detainees, A Profile of 517 Detainees through Analysis of Department of Defense Data* (2006) (with Joshua Denbeaux, David Gratz, John Gregorek, Matthew Darby, Shana Edwards, Shane Hartman, Daniel Mann, and Helen Skinner). Available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf: and Denbeaux, Mark, *Second Report on the Guantanamo Detainees: Inter and Intra Departmental Disagreements About Who Is Our Enemy* (2006) (with Joshua Denbeaux, David Gratz, John Gregorek, Matthew Darby, Shana Edwards, Shane Hartman, Daniel Mann, and Helen Skinner). Available at http://law.shu.edu/news/second_report_guantanamo_detainees_3_20_final.pdf

7 - *Id* at 2.

8 - Denbeaux, Mark, *Second Report on the Guantanamo Detainees: Inter and Intra Departmental Disagreements About Who Is Our Enemy* (2006) at 15.

9 - See Section IV. B. 1, *infra*

> 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."[10]

In October of 2001, American and British forces invaded Afghanistan. President Bush announced that Taliban and al Qaeda captives would not be classified as prisoners of war but as "unlawful enemy combatants," a term created by the administration.

On January 11, 2002, twenty detainees from the war in Afghanistan were flown to Cuba and imprisoned at the United States Naval Base at Guantánamo Bay. These men were imprisoned in what amounted to little more than wire mesh dog cages. The administration took the position that these men could be imprisoned indefinitely without charges being filed against them and that they had no right to legal counsel.

In a January 25, 2002, memo to the President, then White House Counsel, Alberto Gonzales, advised President Bush that the Geneva Convention need not be applied to the prisoners; further, he recommended that the treaty not be applied.[11] Gonzales told the President that ignoring the treaty would: (1) eliminate any argument regarding the need for a case-by-case determination of prisoner of war (POW) status; (2) render obsolete the Geneva Convention's limitations on questioning the detainees; and (3) substantially reduce the threat of administration officials being prosecuted under the War Crimes Act. In a strongly worded opposition to Gonzales' memo, then Secretary of State Colin Powell argued that the Geneva Conventions should be followed.[12] Powell pointed out that applying the Conventions would: (1) aid future American POWs; (2) reduce legal challenges to the treatment of detainees; (3) put America in a positive international posture; and (4) preserve America's credibility and moral authority. Powell's pleas, and those of military judge advocates, were ignored by the Bush Administration. The Administration relied on "hand-picked political appointees" who provided the "desired bottom line" - - the "quaint" and "obsolete" Geneva Conventions were ignored.[13] In March of 2002, the government decided these men would have no access to civilian courts, but would be tried by military tribunals.[14]

In an August 2002 memo, the Justice Department concluded that the United States government could use interrogation techniques that are commonly recognized as torture.[15] In order to evade United States and international laws prohibiting torture, this "torture-lite memo" narrowed the definition of torture, allowing interrogators to inflict severe pain before it is classified as "torture." According to the Justice Department, to constitute torture, interrogations methods "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." The memo further stated that psychological harm must last "months or even years" to rise to the level of mental torture. This "legal" opinion allowed interrogators to use tactics that under the Geneva Convention would be classified as torture. The definitions of torture approved by the Justice Department would allow abuse of detainees in violation of the *United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*,[16] which the United States signed in 1988. By redefining torture, the civilian lawyers in the Justice Department ignored long established United States military doctrine strictly prohibiting "acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation."[17] Not only does the

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10 - Authorization for Use of Military Force (AUMF) Pub 1 No. 107-40, Preamble and § 2a, 115 Stat. 224

11 - Alberto Gonzales, *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (Jan. 25, 2002). Available at http://www.msnbc.msn.com/id/4999148/site/newsweek

12 - Powell, Colin, *Memorandum to Counsel for the President: Draft Memorandum on the Applicability of the Geneva Convention to the Conflict in Afghanistan* (January 26, 2002). Available at http://www.msnbc.msn.com/id/4999363/site/newsweek/

13 - Richard Rosen, *America's Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror,* The Georgetown Journal of Law & Public Policy, Vol5:No1 (Winter 2007) at 137. (Richard Rosen is a Colonel, U.S. Army (retired); Associate Professor and Associate Dean, Texas Tech University School of Law and Director, Texas Tech University Center for Military Law & Policy)

14 - Military Commission Order No. 1, March 22, 2002, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism." Available at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf

15 - Memorandum for Alberto R. Gonzales, Counsel for the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340 – 2340A,* (August 1, 2002). Available at http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html

16 - G.A. REs. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51, *entered into formce,* June 26, 1987, 1465 U.N.T.S. 85 (1987)

17 - Department of Army Field Manual No. 34-52, *Intelligence Interrogation* (1992), at 1-8.

United Sates military prohibit torture, the Army Manual notes that torture techniques are not operationally sound practices.[18]

> "Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear."[19]

B. Rasul v. Bush

In February of 2002**,** the Center for Constitutional Rights (CCR)[20] filed *Rasul v. Bush*, a habeas corpus petition on behalf of three detainees. CCR took the position that detainees had the right to a fair hearing and due process. On June 28, 2004, the Supreme Court ruled in *Rasul that* detainees could legally challenge their detention in federal courts.[21] The court made no determination as to whether the detention was legal or whether detainees are entitled to due process.

In the aftermath of the *Rasul* decision, CCR organized a network of approximately 500 attorneys, working pro bono, to represent Guantánamo detainees. The "Guantánamo Bar Association" soon filed habeas corpus petitions on behalf of many detainees. (Author's Note: On March 9, 2004, two years after he was first imprisoned, Shafiq Rasul was returned to the United Kingdom with no charges ever having been filed. He was released by the British government. Due to his release, the Rasul litigation now bears the name of another litigant, Al Odah.)

C. Combatant Status Review Tribunals

In response to *Rasul*, Deputy Secretary of Defense Paul Wolfowitz sent a memo to the Secretary of the Navy creating "Combatant Status Review Tribunals" (CSRTs).[22] The goal was to demonstrate that the CSRTs were sufficient hearings for detainees; therefore, no habeas corpus hearings by a federal court would be required. Human rights and civil rights activists took the position that the CSRTs were sham proceedings to justify the unlawful imprisonment of detainees.

1. The Geneva Convention

The Geneva Convention requires that a hearing be held in the field to determine if a captive should be classified as a prisoner of war (POW), an unprivileged combatant (not entitled to POW status), or an innocent civilian picked up by mistake[23]. By holding hearings as close to the time and place of capture as practical, relevant witnesses and evidence are most readily available.

In World War II, the vast majority of prisoners were uniformed soldiers captured in battle and the issue of prisoner status was rare. However, in Vietnam and the First Gulf War, a large number of the captives were taken into custody dressed as civilians. In both wars, the military held "Article 5 Tribunals" in the field in accordance with the Geneva Convention. In the First Gulf War, approximately 1200 hearings were held and in 75% of the cases the captives were determined to be innocent civilians and were released.[24] The military was prepared to hold hearings for persons captured or arrested in the Afghanistan conflict, but civilian officials in Washington vetoed having hearings in the field.

2. The Structure of the Government's CSRT "Hearings"

In response to *Rasul*, Paul Wolfowitz sent a memo to the Secretary of the Navy creating "Combatant Status Review Tribunals" (CSRTs).[25] The Department of Defense took the position that CSRTs were adequate hearings; therefore, a habeas corpus hearing by a federal court was unnecessary. Within four months

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18 - Richard Rosen, *America's Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror,* The Georgetown Journal of Law & Public Policy, Vol5:No1 (Winter 2007) at 135.

19 - Department of Army Field Manual No. 34-52, *Intelligence Interrogation* (1992), at 1-8.

20 - For the last three years, CCR has been at the forefront of the fight for detainee rights. In writing this paper, the author has relied extensively on material prepared by CCR. More about CCR is available at http://www.ccr-ny.org/v2/home.asp

21 - *Rasul v. Bush***,** 542 U.S. 466 (2204); 124 S. Ct. 2686

22 - Paul Wolfowitz, *Order Establishing Combatant Status Review Tribunal* (Jul. 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf

23 - Art. 5, Geneva Convention Relative to the Treatment of Prisoners of War art. 102, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135

24 - *See* DEP'T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 663 (1992), *available at* http://www.ndu.edu/library/epubs/cpgw.pdf. According to Department of Defense documents, nearly 1200 tribunals "were conducted to verify status" during the Persian Gulf War, 310 of which found that the detainee was entitled to conclusive POW status. *Id.*

25 - Paul Wolfowitz, *Order Establishing Combatant Status Review Tribunal* (Jul. 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf

over 500 CSRT hearings were conducted.

The CSRTs set up by the Department of Defense provided that: (1) the detainee had no right to have an attorney present; (2) the detainee was not allowed to see the classified evidence against him; and (3) the classified evidence was presumed to be "reliable and valid." Although the detainee was denied counsel, CSRT procedures recommended that the Government have an attorney present at the hearing. Instead of attorneys, detainees were assigned a "personal representative" who was required to advise each detainee that he was not the detainee's lawyer nor his advocate, and that anything that the detainee told the personal representative could be used against him.[26]

Detainees were allowed to call witnesses *if* available. Since CSRTs were conducted two years after detainees were captured and thousands of miles away from where they were captured, few witnesses with relevant knowledge were "available." The only witnesses available were other "enemy combatants" imprisoned in Guantánamo. CSRT tribunals are not bound by the rules of evidence that would apply in a court of law. They are free to consider any information that is deemed relevant and helpful, including hearsay evidence and evidence obtained through coercion.

3. Analysis of the CSRT "Hearings"

A comprehensive analysis of how CSRTs were working in practice was done by Professor Denbeaux and his students at the Seton Hall University School of Law.[27] (Author's Note: I highly recommend reading this short report as it gives an excellent overview of the CSRT system and how it works in practice.) Professor Denbeaux, who also represents two Guantánamo detainees, and his students analyzed Government records from CRST proceedings. Their Report is based on "the records that the United States government has produced for 393 of the 558 detainees" who had CSRT hearings.[28] The Seton Hall report "is based exclusively upon Defense Department documents."[29]

The Seton Hall analysis revealed some very troubling aspects of how CSRTs are actually conducted. The analysis revealed:[30]

- The Government did not produce any witnesses at any hearing;
- All requests by detainees to inspect the classified evidence were denied (Remember, the Government's classified evidence was always presumed to be "reliable and valid.");
- All requests by detainees for witnesses not already detained in Guantánamo were denied; therefore, all witnesses had been previously declared enemy combatants by the Government;
- The only documentary evidence that detainees were allowed to introduce were letters from family and friends. (This was true even when the evidence requested was available and in possession of the government.); and
- In the vast majority of cases, the only evidence offered in a detainee's behalf was his own testimony.

While the CSRT procedures formally place the burden of proof on the Government, the tribunal was informed that "[e]ach detainee subject to this Order has been determined to be an enemy combatant *through multiple levels of review* by officers of the Department of Defense." (emphasis added)[31] In order to hold that a detainee was not an enemy combatant, the Tribunal would have to overturn the decisions made by "multiple levels" of review. Thus, CSRTs are intended to confirm a decision that was already made.

The theoretical presumption that the detainee was innocent was, for all practical purposes, irrelevant because the Tribunal was required to presume that the Government's evidence was valid and correct.

In all cases examined in the study, detainees were determined to be enemy combatants. Three detainees, who were initially found not to be enemy combatants, were subjected to multiple re-hearings until they were found to be enemy combatants.[32]

D. Detainee Treatment Act of 2005[33]

Even though the Supreme Court had held that detainees had the right to access the courts, the Bush administration persuaded Congress to pass the Detainee Treatment (DTA). The DTA consisted of two

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26 - Gordon England, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (Jul. 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf

27 - Mark Denbeaux, *et al*, *No-Hearings Hearings, CSRT: The Modern Habeas Corpus* Seton Hall School of Law (Oct. 2006) available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf

28 - *Id at 4*

29 - *Id* at 2

30 - *Id* at 2,3

31 - *Id* at 18

32 - *Id* at 3

33 - Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005)

parts: (1) a part concerning interrogation procedures to be used by the Department of Defense, commonly known as the *McCain Amendment*; and (2) a part limiting judicial review of detainee cases, commonly referred to as the *Graham-Levin Amendment.* The DTA purportedly protected detainees from abuse, but also attempted to undo the Supreme Court's ruling in *Rasul* by eliminating the right of detainees to file habeas corpus petitions.

E. Hamdan v. Rumsfeld[34]

On June 29, 2006**,** in *Hamdan,* the Supreme Court held that the military commissions set up by the Pentagon violated United States and international law, and that the Geneva Conventions applied to Guantánamo detainees. [35]

F. Military Commissions Act of 2006[36]

In response to *Hamdan*, the administration made a second attempt to skirt a Supreme Court decision favorable to detainees. Immediately prior to the mid-term elections, the administration forced the Military Commissions Act (MCA) through Congress. The MCA was another attempt to deny detainees the right to a fair hearing to challenge their detention.

In part, the MCA attempted to (1) retroactively abolish the right of Guantánamo detainees to challenge their detention; (2) provided for military tribunals very similar to those that were rejected by the Supreme Court as unconstitutional in *Hamdan*; (3) gave retroactive immunity to U. S. personnel for war crimes; and (4) prevented persons harmed by violations of the Geneva Conventions from filing claims in United States courts.

G. Boumediene v. Bush[37]

In *Boumediene*, CCR challenged the Military Commissions Act. On June 12, 2008, the Supreme Court, in a 5-4 decision, held that the part of the MCA that blocked the federal courts from hearing habeas corpus claims of detainees at Guantánamo was unconstitutional and that procedures set out by the DTA are an inadequate substitute for habeas. The majority held, "[T]he cost of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing."

IV. CURRENT LEGAL STATUS OF DETAINEES

Presently[38] there are approximately 215 men imprisoned at Guantánamo. There future is on one of three tracks: habeas corpus petitions filed in federal court, trial before a military commission, or criminal trial in federal court.

Approximately 200 habeas corpus petitions are presently pending before 15 judges in the United States District Court for the District of Columbia.. As of today, the courts have granted 30 habeas corpus petitions and denied eight. In approximately 80% of the cases heard, the judge has ruled that the government does not have the legal right to imprison the detainee. Yet of the 30 prisoners ordered released, only 9 have been freed. Another major problem with the habeas cases is that in the 18 months since the Supreme Court ruled that a detainee was entitled to a "prompt" hearing, only 38 cases have been heard.

Currently, 21 detainees have cases pending before military commissions. In over seven years, only three cases have been adjudicated by military commissions. "Kangaroo Skinner" David Hicks pled guilty and was sentenced to nine months in prison to be served in Australia. He is now a free man. Salim Hamdan, Bin Laden's driver, was tried by a jury of military officers and convicted of "providing material support" to al Qaeda, but was cleared of the more serious charge of conspiracy. The sentence knowingly handed down by the military jury required Hamdan to serve an additional five months in prison. He is now a free man living with his family in Yemen.

Finally, Attorney General Eric Holder has ordered that five detainees, including self-proclaimed mastermind of 9/11, Khalid sheik Mohammed, will be tried in civilian federal court in Manhattan. The five defendants have been accused of conspiring to commit the 9/11 attacks.

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34 - *Hamdan v. Rumsfeld*, 548 U.S. ___; 126 S. Ct. 2749 (2006)

35 - Salim Ahmed Hamdan, a citizen of Yemen, admitted serving as a personal driver for Osama bin Laden, but denied participating in any hostile acts against the United States. In August of 2008, Hamdan became the first detainee to be tried a Military Commission. A jury of military officers convicted him of providing support to terrorist, but found him innocent of the more serious charge of conspiracy. The commission sentenced him to an additional 5 month in prison.

36 - Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600

37 - *Boumediene v. Bush*, 553 U.S. (2008)

38 - This paper was written in November, 2009

V. PRESIDENT OBAMA'S EXECUTIVE ORDER

A. President Obama's Executive Order

On January 22, 2009, President Obama signed *Executive Order – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities.* [39] The president declared that "prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice." In order to accomplish these goals, the president called for Guantánamo to be closed "as soon as practicable, and no later than 1 year from the date of this order."

The order requires, "a prompt and thorough review of the factual and legal basis for the continued detention of all individuals currently held at Guantánamo." The Review will determine, "whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States." During the pendency of the Review, all proceedings under the military commissions are to be halted. The president has charged the Review with determining a "lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice" for the disposition of individuals who are not to be released.

To "clarify" rulings of the prior administration, President Obama clearly ordered that detainees are to be treated in "conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions."

B. Obama Administration's Handling of Detainee Issues

The administration has found the realities of governing to be much more difficult than the rhetoric of campaign promises. It has become obvious that the January deadline for closing Guantánamo will not be met. As pointed out above, 215 men are still imprisoned at the base. The "prompt and thorough" review of the individual cases, scheduled to be completed in July, is still unfinished.

Perhaps the most problematic task facing the government is trying to relocate the people who have been approved for transfer, finding places where they can be relocated. Twenty-one of the men who won their cases in court and numerous detainees who have cleared are still among the 215 detainees at Guantánamo. Finding countries willing to take the detainees has proved difficult. Since Obama took office, only 25 detainees have actually left. Congress voted overwhelmingly to bar relocating detainees in the United States and this has made it difficult to convince other countries to agree to take detainees.

The President has decided to try some of the detainees before military commissions. Although the rules for thee military commissions have been revised to not allow evidence obtained by torture and to afford more rights to the defendants, many civil rights groups are still uncomfortable with the commissions.

That leaves 70 to 80 men considered too dangerous for release but whom the administration neither plans to charge in federal or military courts nor transfer to foreign countries. These men are subject to being detained indefinitely without the benefit of any kind of trial.

C. Steps That Need to be Taken by the Administration

In the author's opinion, the Obama Administration should consider taking the following steps in resolving the issues surrounding Guantánamo:

1. Setting a new deadline fro closing Guantánamo, rather than simply letting the January deadline slip.
2. Prosecuting the alleged 9/11 conspirators in federal court and limiting military commissions, if at all, to battlefield crimes.
3. Sending those convicted in federal courts to maximum security prisons in the United States.
4. Relocating some detainees who have been approved for transfer in the United States.

VI. CONCLUSION

Guantánamo is an embarrassment to the United States and a source of outrage to the world. According to the *New York Times,* Secretary Gates told President Bush that the world would never consider trials at Guantánamo to be legitimate.[40] Mr. Gates is right. Guantánamo has been tried and found guilty in the court of world opinion.

Benjamin Franklin said, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." The rule of law that has been the foundation of American jurisprudence for over two hundred years can afford the detainees a fair forum to contest the factual and legal basis for their

39 - http://www.whitehouse.gov/the_press_office/Closure OfGuantanamoDetentionFacilities/

40 - Thom Shanker and David Sanger, *New to Job, Gates Argued for Closing Guantánamo,* The New York Times, (March 25, 2006)

detention and still protect our country. Trying detainees under the rules of a military court-martial would meet standards of fundamental rights and fairness, while protecting national security. The prior administration's "distorted interpretation" of the law has forced the nation to, "expend enormous energy and good will in defending its motives and practices, rather than focusing on those who have caused so much real harm."[41]

This paper ends as it begins, with a quote from Lieutenant Commander Charles Swift, "The question is not, will we survive Guantánamo, because of course we will survive Guantánamo. The question is: Will we survive Guantánamo as a great nation?"[42]

What makes America "a great nation" is the Rule of Law.

41 - Richard Rosen, *America's Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror,* The Georgetown Journal of Law & Public Policy, Vol5:No1 (Winter 2007) at 137.

42 - Brenner, Marie, *Taking on Guantánamo,* Vanity Fair, March 2007