

CLOSING GUANTANAMO BAY: THE FUTURE OF DETAINEES

by Jessica Ross

Barack Obama's presidential victory will continue to lead to a reversal of many of former President Bush's defense policies, but his decision to close the Naval Base at Guantanamo Bay is perhaps the most important to date. The Executive Order released by the Press Office of the White House in January 2009 proclaimed that, "to the extent practical, the prompt and appropriate disposition of the individuals detained at Guantanamo should precede the closure of the detention facilities."¹ First, however, many obstacles must be overcome, most notably how to close the base, how to adjudicate detainees, and where to transfer detainees in the interim. Legal scholars have suggested parole programs within the US or release into detainee's home countries as possible solutions. In this paper, I argue that detainees from Guantanamo Bay should be transferred to prisons within the United States and tried in federal courts. I also contend that Guantanamo Bay should be closed, followed by an extensive government investigation exploring the events that took place there. To illustrate these points, I will examine the nature of the President's Executive Order and documents that outline protections granted to detainees including the Geneva Conventions, the Uniform Code of Military Justice, and various Supreme Court rulings. This examination will lead to an analysis of how to proceed with the closure of Guantanamo Bay and the trials of detainees.

First, let us explore the history of the detention of detainees at Guantanamo Bay, Cuba. Since its reopening in 2001 by the Bush Administration, over 775 people have been detained and 420 released without any charges. Some detainees had been held for years upon release. As of December 1, 2009, 211 detainees remained in Guantanamo, at least 90 of which could not be returned to their homes due to feared persecution.² In 2005, President Bush signed a bill that banned all habeas corpus cases brought by detainees to federal courts. This rendered detainees ineligible for judicial review and defaulted their cases to military tribunals. Since 2004, the Supreme Court has consistently held that the executive was not equipped with the power to indefinitely detain prisoners or ban their right to petition the government. In response to the Supreme Court's decisions, the Bush administration enacted the Military Commissions Act of 2006 (MCA), which aimed to create fair military trials for detainees.

The Military Commissions Act of 2006 was unconstitutional. The tribunals endorsed by the MCA do not comply with the rules of international warfare or with the Constitution. This issue was the focus of judicial debate in the Supreme Court decision *Hamdan v. Rumsfeld* (2006). Salim Hamdan, Osama bin Laden's chauffeur, was arrested as a suspected terrorist. The Court granted Hamdan's petition for habeas corpus and used his case to tackle the constitutionality of the MCA as well as the habeas corpus issue. The Court held "the military commission at issue lacks the power to proceed because its structure and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949."³ The case was deemed "a major Court intrusion into executive war powers and thus a setback not

¹ Barack Obama. Executive Order 13492. January 22, 2009, Sec 2B

² Finn, Tate. "4 from Guantanamo are sent to Europe." *The Washington Post*. December 1, 2009.

³ *Hamdan v. Rumsfeld*. 548 (Supreme Court of the United States, 2006), 560.

just for this Presidency, but for future ones,”⁴ and as displaying “a lack of judicial restraint that would have shocked its predecessors,”⁵ by some legal scholars.

In actuality, however, *Hamdan* represents a landmark in habeas corpus jurisprudence of the 21st century. Peter Shapiro, legal scholar at Temple University, responds that the decision in *Hamdan* “by no means pretends to offer the last word on the domestic law legitimacy of military tribunals, but it has at the least brought the legislative branch back into the picture.”⁶ In *Hamdan*, the Supreme Court made each branch of government equally responsible for the detainees’ trials, not only the executive. The Patriot Act enacted by Congress on October 26, 2001, granted President Bush abilities in response to the events of September 11, 2001 that represented a frightening increase in presidential power. The Patriot Act allowed law enforcement officers more freedom in search and seizure, expanded the definition of terrorism to include a wider range of activities, and gave immigration authorities more influence in detainment and deportment of suspected immigrants.⁷ The Court’s decision in *Hamdan* represents a dismissal of increased presidential powers in favor of a more rational path towards compliance with international law and historic US military code and the Uniform Code of Military Justice.

An explanation of why the Court declared the MCA unconstitutional is necessary. Historically, the Court rarely overturns decisions it has made and gives much deference to the executive and legislative branches in cases involving war powers or national security. The Court’s vehemence in disputing Congress shows they have found this to be a pressing issue and want future generations to be able to rely on it as a precedent. The execution of military commissions is governed by Article 36(b) of the Uniform Code of Military Justice and is the basis of the Court’s ruling. Article 36 “provides that procedural rules the President promulgates for courts-martial and military commissions alike must be uniform insofar as practical.”⁸ If the detainees are tried in military tribunals, each trial should imitate a court martial as close as possible. This premise is found in the text of the Uniform Code of Military Justice. There is no practical reason why trials for detainees at Guantanamo Bay should not have followed court-martial procedures. President Obama recognized the illegitimacy of the military tribunals when he ordered that “no [detainees] are sworn or referred to a military commission...and that all proceedings of such military commissions are halted.”⁹ President Obama also endorsed the Court in recognizing the inconsistency of the Military Commissions Act’s policies with international and historical laws.

To illustrate the inconsistencies of the MCA with international and historical law, we’ll turn to a discussion based on precedent. To take an international precedent, consider World War 2. Nazi Germany aggressed against Western countries, and the US responded defensively. A few months after the armistice was signed on August 15, 1945, trials of Nazi leaders began. Within two years, the trials were finished. Similarly, consider the Barbary Wars of the 19th century between the US and pirates based in North Africa. The pirates pillaged US cargo ships and appropriated goods that were being imported and exported. The US was able to capture the pirates, and followed the tenets of international law to insure

⁴ *After Hamdan*. (Wall Street Journal, 2006).

⁵ John Yoo. “The High Court’s *Hamdan* Power Grab”. (Los Angeles Times, 2006).

⁶ Peter J. Spiro. “*Hamdan v. Rumsfeld*. 126 S. Ct. 2749;” *American Journal of International Law* 100 (2006-2007): 892.

⁷ The Patriot Act PL 107-56, 2001 HR 3162 (115 Stat 272)

⁸ Uniform Code of Military Justice. May 5, 1950. Art. 36B.

⁹ Barack Obama. Executive Order 13492. January 22, 2009. Sec. 7.

appropriate treatment of prisoners.¹⁰ Even in the 1800s, prisoners of war were given fair trials in the US and were convicted accordingly.¹¹ In comparison to these situations, the MCA-endorsed military tribunals impose narrow rules, which do not resemble civilian proceedings. Military tribunals do not allow for trial by jury, adequate representation of defendants through time limits in evidence gathering and selection of counsel, or an equitable discovery and introduction of evidence.

One of Hamdan's defense attorneys, Navy Lieutenant Commander Charles Swift, remarks in response to the trial of Adolf Hitler's chauffeur, "They didn't prosecute him. They interviewed him. In the law of war, the idea is to charge the principals, not the foot soldiers."¹² Hamdan was a foot soldier who could have been a useful source of intelligence. Instead, the treatment of Hamdan called US military practice into question internationally. Hamdan was charged with attending al Qaeda training camps, organizing weapon transfer, having associates that were involved with terrorism, and being Osama bin Laden's driver.¹³ These charges would be difficult to prove and not indicative of Hamdan's personal involvement with terrorists at all. Lieutenant Commander Swift acknowledges in his interview that Hamdan's detainment and charges mirror the US charging a 'foot soldier' with crimes that represent the principals of an entire terrorist organization.¹⁴ The Court agreed with Swift, as shown by their decision that Hamdan had the right to judicial review.

An examination of legal precedents cited in *Hamdan* further illustrates that detainees are entitled to trials. United States precedent and legislative intent clearly gives petitioners the right to federal trials. The Court cites a 1942 case, *Ex Parte Quirin*, which dealt with the arrest and trial of German saboteurs in New York and Florida. To ensure just trial proceedings, the Court intervened. In the *Hamdan* opinion, the Court writes, "*Quirin* provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the purpose of military commissions."¹⁵ The Court uses *Quirin* to show that their abstention from the *Hamdan* case would be inappropriate because the MCA creates an opportunity for detainees to have unfair trials. In addition to case precedent, the intent of the Suspension Clause in Article 1 Section 9 of the US Constitution was misinterpreted by the Bush administration in its ban of habeas corpus for detainee cases in 2005. The clause set down by the founding fathers states that "the privilege of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." It was argued by some Senators, notably South Carolina Senator Lindsey Graham, that detainees were capable of endangering public safety and that military tribunals would be sufficient for trying them.¹⁶ Once a combatant is declared non-threatening, however, it is difficult to make the connection Senator Graham does.

A discussion of global warfare and conflict serves to put the implications of *Hamdan* on a larger scale. The evolution of warfare affects the way enemy combatants are viewed. Professor of Law at George

¹⁰ Friedman, Lurie, Rubin. Brief for Petitioner *Hamdan v. Rumsfeld* 126 (*Supreme Court of the United States*, 2006).

¹¹ Friedman, Lurie, Rubin. Brief for Petitioner, *Hamdan v. Rumsfeld* 126 (*Supreme Court of the United States*, 2006).

¹² Nina Totenberg. "Hamdan v. Rumsfeld: Path to a Landmark Ruling." *NPR*, <http://www.npr.org/templates/story/story.php?storyId=5751355> (accessed Mar. 23, 2009).

¹³ *Hamdan v. Rumsfeld*. 548 (*Supreme Court of the United States*, 2006), 570.

¹⁴ *Hamdan v. Rumsfeld*. 548 (*Supreme Court of the United States*, 2006), 568.

¹⁵ *Hamdan v. Rumsfeld*. 548 (*Supreme Court of the United States*, 2006), 589.

¹⁶ Friedman, Lurie, Rubin. Brief for Petitioner, *Hamdan v. Rumsfeld* 126 (*Supreme Court of the United States*, 2006).

Washington University Sean Murphy suggests that the intangibility of global warfare makes it easier for the Geneva Conventions to lose importance and be loosely enforced by member parties.¹⁷ After the attacks on the World Trade Center by al Qaeda, three separate conflicts erupted. First, there was civil unrest in Afghanistan and Iraq. Then, war between the US and Afghanistan and Iraq broke out. Lastly is the intangible concept of the US ‘war on terror.’ The vagueness of a ‘war on terror’ need not be expounded upon here. These three separate conflicts created situations of civil war, international war, and conceptual war. This makes adhering to any kind of regulatory parameter difficult. Murphy indicates two possible scenarios to determine whether the use of domestic or international law is appropriate. The situation had either been conglomerated into one international armed conflict, meaning governance by the Geneva Conventions in their entirety was appropriate; or it had become two separate conflicts, one international and one domestic, meaning the conflict dealing with Taliban and Coalition forces was governed by the Geneva Conventions.¹⁸ For Hamdan, this suggests a trial using international law is appropriate, and eradicates some of the charges against him. For detainees as a whole, this suggests fair trials must take place in a timely manner. Based on Murphy’s premise, detainees must be tried in some type of court of law, not in a tribunal.

Accepting that all detainees must have trials, let’s turn to a discussion of how the Obama administrations’ plans to commence these trials. President Obama’s Executive Order proclaimed that all trials would be halted until an administrative panel independently reviews the case of each detainee.¹⁹ The review process will include the classification of detainees as enemy combatants or non-threatening. In his article, Murphy interprets Article V of the Geneva Conventions “as see[ing] the detaining power as having a responsibility to review carefully and expeditiously whether persons detained are in fact combatants at all.”²⁰ In form with his commitment to international law, President Obama will do exactly this, using the review process to determine whether detainees are in fact enemy combatants. Murphy expresses the intent of the Geneva Conventions as serving to protect persons detained in conflict no matter how they are classified, but allows that different levels of protection adhere to different classifications.²¹ Therefore, once combatant status has been determined, the review committee can decide whether detainees will receive a federal or military trial as part of their protective rights.

Again, we return to a discussion of global warfare. The difficulty with assessing the level of threat brought by an internee lies with the temporality of warfare. As Murphy points out, the level of danger imposed by networks like al Qaeda cannot be known or forecast.²² This makes it difficult to determine if a detainee will in fact pose a threat upon their release. The way to combat this impediment is to consider the relationship the detainee had with the organization prior to their internment.²³ The mere existence of

¹⁷ Sean D. Murphy. “Applying the Core Rules to the Release of Persons Deemed Unprivileged Combatants,” *George Washington Law Review* 75 (2006-2007): 1120.

¹⁸ Sean D. Murphy. “Applying the Core Rules to the Release of Persons Deemed Unprivileged Combatants,” *George Washington Law Review* 75 (2006-2007): 1122.

¹⁹ Barack Obama. Executive Order 13492. January 22, 2009. Sec. 4.

²⁰ *Ibi*, 1131.

²¹ *Ibid*, 1132, 1140.

²² Sean D. Murphy. “Applying the Core Rules to the Release of Persons Deemed Unprivileged Combatants,” *George Washington Law Review* 75 (2006-2007): 1162.

²³ *Ibid.*, 1162.

al Qaeda will always constitute some level of threat to the US. This does not mean that anyone remotely linked with al Qaeda should be considered dangerous. The existence of a lower level person, such as Hamdan, does not always create a threat. He was captured, gave no valuable information, and cannot possibly pose much of a threat upon his release. The problem that should be focused on is where to put Hamdan.

Now, let us investigate the severity of punishments adhesive to detainees based on protective rights and international law. Prisoners of war are given certain rights, which are designed to protect them from being treated unjustly within a court system of the country that captures them. Protective rights have been interpreted different ways, but international precedent is the most effective avenue. International precedent established by Common Article 3 of the Geneva Conventions and the 1977 addition to the conventions, Protocol I, provides the framework of humanitarian laws protecting persons captured during conflict. These documents outline that “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”²⁴ is unacceptable. As stated, pirates and Nazis were granted trials without question before being punished. These situations were treated according to international law, but detainees today are not being treated the same way.

Subsequently, let us consider options available to President Obama in the placement of detainees. Detainees can return to their home countries, be held in prisons in other countries, or go to US prisons. Once detainees have been cleared, the social stigma attached to being a suspected enemy combatant often hinders them from returning home due to safety concerns. In February 2009, for example, seventeen Chinese Uighur Muslim detainees who had been held for seven years at Guantanamo were released after being cleared by a panel of judges. Courts barred their release into the US, and China would have been hostile to their return. The administration has not yet found a country willing to accept them, so they are still being held in Guantanamo.²⁵ Geneva Convention IV makes it clear that detainees “shall be released by the Detaining Power as soon as the reasons which necessitated internment no longer exist.”²⁶ The problem arises when a detainee has been declared non-threatening, but cannot return home.

Since President Obama took office, several European countries have allowed detainees to be transferred or released within their borders. Participating EU countries include Belgium, Denmark, France, Germany, Spain, Sweden and the United Kingdom. All detainees that have been transferred or returned to these countries were citizens or former residents prior to their internment.²⁷ Russia, the Netherlands, Bosnia, Albania, and several other Eastern European countries have also accepted detainees. Albania is the only country that has offered political asylum to detainees while they were still in prison; other countries have offered some released detainees political asylum.²⁸ These European countries have offered long term solutions for the detainees regarding where to start life anew upon release. Detainees

²⁴ International Committee for the Red Cross. *The Geneva Conventions for the Amelioration of the Wounded in Armies in the Field*. 1864. Article 3.

²⁵ William Glaberson, “Chinese Inmates at Guantanamo Pose A Dilemma,” *New York Times*, April 1, 2009.

²⁶ International Committee for the Red Cross. *The Geneva Conventions for the Amelioration of the Wounded in Armies in the Field*. 1864. Article 4.

²⁷ “Q&A: Resettlement of Guantanamo Bay Detainees.” *Human Rights Watch*. February 23, 2009.

²⁸ “Q&A: Resettlement of Guantanamo Bay Detainees.” *Human Rights Watch*. February 23, 2009.

still awaiting trial have proven to pose more complicated problems.

Next, we will discuss what to do with those detainees who are awaiting trial. Detainees awaiting trial should continue to be moved to US prisons. Murphy suggests that ideally, they would be released on parole until the Obama administration can adequately review their case to determine if there will be a trial or not.²⁹ The only states within the US that have accepted detainees as of February 2010 are Illinois and New York. A small number of detainees, estimated around 70, have been transferred to a maximum-security, federally owned prison in Illinois.³⁰ Detainees involved directly with the attacks of September 11, 2001 will be transferred to the federal courts of New York for trial.

The American people have expressed their concern with released detainees being allowed to live freely in the US. In a letter to the Governor of Illinois, Pat Quinn, the White House expressed that “the President has no intention of releasing any detainees in the United States.”³¹ In the long term interest of preserving international peace and deterring armed conflict, releasing at least some of the detainees from Guantanamo Bay into the US is the best strategy available. Professor and Director of the Transnational Law Institute at Washington & Lee University School of Law, Mark Drumbl explores the motivation behind the treatment of alleged terrorists in a way that the American people should understand. He describes five categories: retribution, deterrence, expressivism, reconciliation, and reintegration.³² Of these, deterrence and reintegration are the most important to the future of global politics and the avoidance of armed international conflict. Preferably, Drumbl says, punishment is carried out for convicted detainees in a way that discourages them from wanting to exact revenge on the detaining power, and that helps them to appreciate a culture they had been fighting against. However, this is fundamentally unrealistic. Most internments end similar to the way Guantanamo Bay has: detainees have been held for far too long, in questionable conditions, without knowledge of their rights, and must learn to live with a permanent social stigma of having been a suspected terrorist.

In addition, most terrorist organizations are committed to a cause with deep theological roots that will not be easily abandoned. Despite the unlikelihood of deterrence, there is still a difference, as Drumbl points out, between how a dictator who had actively participated in genocide should be punished, and a member of a widespread network of terrorist activities who could have had a large or small role in previous events.³³ The similarity of the situation Drumbl discusses to Hamdan does not need to be pointed out here. The ideology behind detaining facilities and internment camps is an issue that will be of increasing importance to the American people as warfare becomes increasingly fluid and less tangible. President Obama has expressed that in closing Guantanamo Bay and encouraging detainee transfer to the US, he hopes to encourage the communication of Federal and state agencies and authorities, use federal courts for prosecution, reform and utilize military tribunals for violations of war trials, and overall

²⁹ Sean D. Murphy. “Applying the Core Rules to the Release of Persons Deemed Unprivileged Combatants,” *George Washington Law Review* 75 (2006-2007): 1162.

³⁰ Dougherty, Lothian. “Some Guantanamo detainees to be moved to Illinois.” December 15, 2009. Available at: <http://www.cnn.com/2009/US/12/15/gitmo.illinois/index.html>

³¹ Clinton, Hillary Rodham. White House Letter to Governor Pat Quinn. December 15, 2009. Available at: <http://www.whitehouse.gov/sites/default/files/091215-letter-governor-quinn.pdf>

³² Mark A. Drumbl. “Hamdan, the Geneva Conventions, and International Criminal Law,” *George Washington Law Review* 75 (2006-2007): 1182-3.

³³ *Ibid.*, 1184.

to continue the war against Al Qaeda by keeping pressure on its leadership on a global stage.³⁴ As more states accept the transfer of detainees into their prisons, and more foreign countries agree to the release of detainees within their borders, Guantanamo Bay will finally be able to be closed.

In summary, the relevance of issues presented by the events at Guantanamo Bay will be important to President Obama's regime as steps towards the adjudication of detainees are continued. It is important that international and historical norms are taken into account, most notably the Geneva Conventions and Protocol I. The review panel cannot view detainees as microcosms of the al Qaeda network. Each prisoner's case should be reviewed individually within the larger scheme of the terrorist network, and tried on a federal level as terrorists have been effectively for years. While the expatriation to international countries of some detainees after prosecution will be necessary, it is important to the long-standing goal of the prevention of international aggression that as many detainees as possible are released into the United States.

³⁴ Clinton, Hillary Rodham. *White House Letter to Governor Pat Quinn*. December 15, 2009. Available at: <http://www.whitehouse.gov/sites/default/files/091215-letter-governor-quinn.pdf>

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