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Defending the Detainees at Guantánamo Bay

by Richard J. Wilson

FOLLOWING THE SEPTEMBER 11TH ATTACKS, the United States began a military operation in Afghanistan on October 7, 2001, targeting Al Qaeda, the terrorist network believed to be responsible for the attacks, and the Taliban government, which sheltered Al Qaeda's leader, Osama Bin Laden, and his followers. A month after the U.S. invasion of Afghanistan, President Bush issued a Military Order for the capture and detention of those he broadly designated as "enemy combatants." The U.S. military base at Guantánamo Bay, Cuba, soon began to receive detainees. Many detainees who arrived in those first days remain there today, publicly unidentified and held virtually incommunicado, without formal charges and with few prospects for release. Although courts have issued several favorable decisions relating to the rights of detainees, few judges have applied international law, and the basic legal status of the detainees remains unresolved three years after the facility opened.

This article briefly summarizes the defense of the detainees in U.S. courts and the status of those claims. The article first provides an overview of the detainees. It then reviews the litigation on behalf of the foreign detainees that unfolded after the Supreme Court's decisions on detained enemy combatants in June 2004. The article also describes the government's creation of Combat Status Review Tribunals (CSRTs) and Annual Review Boards (ARBs), and the role of counsel in each of these legal contexts. Finally, this article reviews the work of defense counsel in the few military commission trials that commenced before a federal judge ordered all such trials suspended in November 2004.

OVERVIEW OF THE DETAINEES IN GUANTÁNAMO BAY AND THEIR LEGAL SITUATION

SINCE THE OPENING IN GUANTÁNAMO BAY of Camp X-Ray, which later became Camp Delta, the military has not publicly released the names and countries of origin of the occupants of the camp. Approximately 550 detainees from more than 40 countries are currently at Guantánamo. More than 100 detainees have been released, most without charges or detention in their home countries upon return. Some 450 detainees remain officially unidentified as of early 2005. Some have been detained for over three years without access to counsel or the courts of any country. The U.S. government asserts that the detainees remain detained because of the threat of their return to hostilities and because they continue to provide useful intelligence to the United States.

The detainees are permitted only limited mail access with the outside world—to immediate family and counsel. Initially, the detainees could only send and receive messages through the International Committee of the Red Cross, which has continuously, but not publicly, monitored detention conditions. There were more than 120 "self-harm" or suicidal events by detainees during 2004. Reports of torture and severe abuse of the detainees continue to emerge, but the government continues to deny any serious mistreatment of detainees at the facility. The military recently

decided to build a more permanent facility, thus indicating its intent to treat the detainees as long-term, perhaps lifelong, prisoners.

There are now over 140 detainees whose families or friends have taken legal action on their behalf. For those few, legal action began in U.S. courts almost immediately after the first detainee arrivals. Those legal actions were unavailing until the U.S. Supreme Court reviewed a group of cases—*Rasul v. Bush*, *Hamdi v. Rumsfeld*, and *Rumsfeld v. Padilla*—with the common question of the meaning and implications of enemy combatant status, as applied to citizens within the United States and foreign nationals detained in Guantánamo. The *Rasul* decision dealt with a group of foreign detainees at Guantánamo Bay, while the *Hamdi* and *Padilla* decisions dealt with individual U.S. citizens held as enemy combatants on the U.S. mainland. Since those decisions, the government released Yasar Hamdi and returned him to his native

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Australia without charges. A federal judge ordered the release of Jose Padilla from custody, but the government is appealing the decision.

LEGAL DEVELOPMENTS AND GOVERNMENT STRATEGIES FOLLOWING THE SUPREME COURT DECISION IN *RASUL*

IN *RASUL*, THE SUPREME COURT FOUND that the Guantánamo detainees could seek review of their detention through a Writ of Habeas Corpus, which allows prisoners to challenge the lawfulness of their incarceration. The Court also held that territorial jurisdiction did not depend on the location of the detainees, but lay in the location of their custodians. Therefore, the proper venue was with the federal district court of Washington, D.C., where all relevant federal officials hold office. Because the Supreme Court had consolidated several individual detainee cases, each of those cases was assigned to a different judge after the high court remanded the cases. The Center for Constitutional Rights (CCR), an activist legal organization in New York City which gathered the names of many detainees who were awaiting access to the courts, sought volunteer lawyers to take new cases into the federal district court.

Immediately after the Supreme Court's decision, counsel filed new cases on behalf of more than 60 detainees. Counsel immediately began efforts to gain access to their clients, access that the government denied any detainee for the preceding two years. Over time, additional detainees joined the initial group that filed in court, and CCR filed a "John Doe" petition on behalf of all of the unnamed detainees whose identities and particular facts are not yet known publicly. The government has opposed these petitions with a combination of post-hoc administrative procedures that attempt to meet the concerns of the Supreme Court and aggressive litigation to continue to prevent the detainees' access to the outside world. These government strategies are discussed below.

COMBAT STATUS REVIEW TRIBUNALS

Within days after the Supreme Court decision, Deputy Secretary of Defense Paul Wolfowitz called for the creation of Combat Status Review Tribunals, or CSRTs. The CSRT process purports to determine whether an individual is properly designated as an enemy combatant. This new procedural device was adopted in place of the traditional rules governing the determination of status of persons captured on the battlefield by a "competent tribunal." These traditional rules are articulated in both the Third Geneva Convention and U.S. Army Regulation 190-8, which codifies the Geneva Convention's rules on treatment of possible prisoners of war. Although those military regulations were operational before the detentions at Guantánamo and during the U.S. military occupation of Iraq, the U.S. government argues they do not apply at Guantánamo because there is no doubt as to the detainees' status as enemy combatants, as declared by President Bush.

An enemy combatant, under the CSRT definition, is "an individual who was part of or supporting Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Because of the broad definition of enemy combatant used in both the Military Order and the CSRTs, foreign enemy combatants also may have come to Guantánamo other than by capture on the battlefield in Afghanistan. The detainees' lawyers argue that the vague and overbroad definition of enemy combatant is the very reason why the President's designations lack legal consistency and coherence.

Moreover, the initial order creating the CSRTs asserts that all detainees at Guantánamo Bay have already been determined to be enemy combatants, thus casting doubt on the neutrality of the entire subsequent process. Nevertheless, in July 2004, the Department of Defense issued its rules for the operation of the CSRTs. Casting further doubt on the process' neutrality, the CSRT rules gave evidence of enemy combatant status a rebuttable presumption of being "genuine and accurate," even prior to the proceeding's commencement.

The CSRTs were panels of three commissioned officers who reviewed the evidence, both classified and public, regarding each enemy combatant designation and determined enemy combatant status by majority vote. Although the detainee was allowed to be present for some of the process, he could be excluded during the consideration of classified material. Witnesses on his behalf would only be produced if they were "reasonably available." This standard resulted in the denial of many potentially exculpatory witnesses. Detainees could only appeal the tribunal's decision to the director of the CSRT process, the convening authority.

Under the CSRT rules, each detainee was provided with a Personal Representative, a commissioned officer with at least top-secret security clearance, to advise the detainee for his CSRT hearing. No other legal representation was allowed. The Personal Representative did not have a confidential relationship with the detainee, and had to advise the detainee that the representative "may be obliged to divulge [information provided by the detainee] at the hearing." The detainee did not have the option of objecting to the Personal Representative or other aspects of the CSRT process, but instead could only decline to participate at all, a choice that a large number of the detainees exercised.

Compliance by the CSRTs with domestic and international precepts of due process and a neutral and fair hearing has become a central issue in the ongoing federal court litigation on behalf of the detainees. Federal court judges in Washington, D.C. reached opposite conclusions on the issue in January 2005. Judge Joyce Hens Green found that "the procedures provided in the CSRT regulations fail to satisfy constitutional due process requirements in several respects." Judge Richard Leon, who dismissed the detainee cases before him on motion by the government, did not reach the question of whether the CSRT process was adequate.

As of March 2005, the Department of Defense announced that the CSRT process had been completed for all detainees, a total of 558 cases. Of those, only 38 detainees were found not to be enemy combatants, some as long ago as September 2004, and only five of those have been released from Guantánamo.

THE ANNUAL REVIEW BOARD PROCESS

The government devised a second process, Annual Review Boards, or ARBs, as a means for annual review of enemy combat-

Photo permission of the Khadr family



Omar Khadr, a Canadian citizen captured at age 15 in Afghanistan, was sent to Guantánamo Bay in October 2002.

ant status. The ARB review standard is whether the enemy combatant “presents a continuing threat to the U.S. or its allies in the ongoing armed conflict against Al Qaeda and its affiliates and supporters (e.g. Taliban) and whether there are other factors that could form the basis for continued detention (e.g., the enemy combatant’s intelligence value and any law enforcement interest in the detainee).” Like the CSRTs and military commissions, the three members of an ARB panel are military officers, one with experience in the field of intelligence. The panel’s decisions include continued detention, transfer, or release. The ARBs began to operate in late 2004, and as of the time of this writing, about 70 such reviews have taken place, all without access to counsel and, until recently, in closed hearings.

THE PROTECTIVE ORDER AND OTHER LIMITS ON DETAINEES’ COUNSEL

Almost as soon as the litigation in federal court began, after remand from the Supreme Court in June 2004, the government sought to limit unmonitored access by defense counsel to the detainees and to impose other onerous restrictions on communication with clients, co-counsel, and the press or public. Government lawyers cited national security concerns and argued that the right to counsel for alleged enemy combatants was limited. The litigation soon centered on the argument by counsel for the detainees to their unfettered right to full and open communi-

facility located in Washington, D.C., and tight restrictions on client contact and visits at Guantánamo. Classified information could not be disclosed to a detainee-client, even if it related to the grounds for the detainee’s detention. These restrictions made visits and communication with clients extremely cumbersome and slow, and imposed another layer of complex filing requirements on defense counsel.

CONSOLIDATION OF COMMON LEGAL ISSUES AND COMPETING COURT DECISIONS

A subsequent government motion to dismiss all consolidated cases for failure to state viable legal claims presented a serious concern for counsel and detainees. Despite the decisions in *Rasul* and *Hamdi*, which clearly granted jurisdiction to the federal courts to hear detainees’ habeas claims, the government persisted in arguing that those decisions had only resolved the narrow question of whether the federal courts had jurisdiction and not whether the petitioners possessed any legal rights that could be enforced in U.S. courts. The government continued to deny that U.S. or international law applied in Guantánamo Bay.

In January 2005, Judge Leon agreed with the government and dismissed the detainee’s petitions. Two weeks later, Judge Green held the opposite, denying the government’s motion to dismiss the eleven cases consolidated before her. In the wake of her decision, however, due to the conflict within the district and its potential

“The [United States] government has achieved its primary goal: it largely has been able to keep the detainees in a ‘legal black hole.’”

cation with their clients. The issue was particularly sensitive with regard to detainees subjected to continuous interrogation, who were likely to be extremely suspicious of any new visitor purporting to act in their interests.

In October 2004, in *Al Odah v. Bush*, Judge Colleen Kollar-Kotelly held for the first time that the right to counsel applied to the detainees, and that visits to certain detainees by their counsel could not be subjected to real-time video and audio monitoring, nor could the government engage in “classification review” of notes from attorney-client meetings of this limited group. The court rejected the government’s argument that the “detainees would ‘attempt to use their [unknowing] counsel to engage in communications that would facilitate terrorist acts.’” The court instead emphasized the importance of attorney-client privilege, stating that “[t]he privilege that attaches to communications between counsel and client has long held an exceptional place in the legal system in the United States.”

In November 2004, in *In re Guantánamo Detainee Cases*, Judge Green issued a broad protective order requiring that the detainees’ lawyers meet a series of national security restrictions. Among other impediments, it required security clearances for all counsel and staff, review of classified documents only in a secure

impact on remaining issues in the litigation, Judge Green stayed all proceedings until the issues are resolved on appeal. At the time of this writing, the cases are pending and appear likely to proceed to the Supreme Court again before the detainees eventually, if ever, have their day in court.

MILITARY COMMISSION TRIALS IN GUANTÁNAMO

The U.S. government created the detention facility at Guantánamo Bay primarily for military commission trials designed to prosecute enemy combatants. The habeas litigation, however, has taken precedence over such trials. Only 15 detainees have been declared eligible for military trials, and only two began their military commission trials at the base. In November 2004, a federal judge ordered the trials stopped, but these trials may be only on temporary hold and may re-emerge as the focus of the legality of detention at Guantánamo.

Despite prior use of military commissions in U.S. history, the government designed this commission process specifically for the unique situation of enemy combatants who, according to the administration, fell outside of the protections of both the law of armed conflict, or international humanitarian law, and the traditional criminal process. Military commission trials most resemble

a traditional criminal trial, with notable exceptions, particularly regarding the right to defense. The commissions call for trials before three to seven military officers chosen by the Appointing Authority, whom the Secretary of Defense appoints. The Appointing Authority chooses a presiding officer for each tribunal, as well as the Chief Prosecutor and Chief Defense Counsel, with only the latter two positions required to come from the military's legal branch, the Judge Advocate General's (JAG) Corps.

Possible offenses on the list of crimes within commission jurisdiction include war crimes, such as the willful killing of protected persons and the use of human shields, and terrorism crimes, such as skyjacking. The list can include offenses occurring before the instruction took effect. Conviction is by a two-thirds majority of those finding guilt beyond a reasonable doubt. A separate two-thirds vote imposes sentences of up to life imprisonment, and a unanimous vote of seven members is needed to impose a death sentence. Review is permitted within the executive branch, but review by any domestic, foreign, or international court is expressly forbidden. Even if acquitted, a detainee is subject to indefinite detention at Guantánamo.

The defendant may be represented by a Detailed Defense Counsel, assigned by the Chief Defense Counsel, who can be assisted by civilian counsel retained by the detainee or a member of the JAG Corps chosen by the detainee. The civilian counsel must be a U.S. citizen with at least a "secret" security clearance and must sign an agreement to comply with all rules of the tribunal. Those rules require counsel to keep the identities of judges, witnesses, and other participants secret forever; bar counsel or the defendant from certain closed hearings at which classified information is discussed; and allow for monitoring of attorney-client communications for "security and intelligence" purposes, but not for evidentiary reasons.

The National Association of Criminal Defense Lawyers, a U.S. association of public and private criminal defense lawyers, declared that these conditions made it impossible for criminal defense lawyers to provide adequate or ethical representation for detainees and, therefore, found it unethical to represent detainees before the commissions. The American Bar Association also called on Congress and the executive branch to ensure that defendants before the commissions "receive the zealous and effective assistance of Civilian Defense Counsel."

The military commission trials were under close public scrutiny even before they began and barely commenced before a judicial order closed them down. In *Hamdan v. Rumsfeld*, Judge James Robertson, hearing a habeas challenge to the commissions, rejected the government's position that Article II of the U.S. Constitution gave the President unreviewable powers as Commander-in-Chief to establish and run military commissions. The court found that the Third Geneva Convention on Prisoners of War applied to the conflict in Afghanistan, and that Salim Ahmed Hamdan, who was captured there, could avail himself of its provisions. The court found that there was doubt as to Hamdan's status and that until a "competent tribunal" resolved his status, a military commission could not try him. The court further held that a commission trial could not go forward if Hamdan was appropriately a prisoner of war. If determined to be a prisoner of war, a traditional court-martial would be required to try Hamdan with all procedural guarantees. A government appeal of that decision was pending at the time of this writing.

CONCLUSION

THE LITIGATION OF THE GUANTÁNAMO detainee cases has taken many diverse directions since the Supreme Court decisions in June 2004. No less than ten substantive and procedural decisions have come down from the federal court in Washington, D.C., each offering a unique contribution to U.S. jurisprudence on the war on terror and an interpretation of plenary presidential powers balanced against the guarantees of due process and fair trial enforced by judicial oversight. Of those decisions, only one favors the government's strict interpretation of the President's war powers, while the rest affirm the detainees' rights to access to counsel and the courts. Remarkably, only the *Hamdan* case used international law as a key element of its analysis. Indeed, had the courts, including the U.S. Supreme Court, turned to the clear rules of international humanitarian law, it is likely that their decisions would have been less opaque and more susceptible to clear and consistent interpretation by the lower courts.

Whatever else can be said of the processes devised to deal with the detainees at Guantánamo Bay, it must be conceded that the government has achieved its primary goal: it largely has been able to keep the detainees in a "legal black hole." The detainees have slow and inadequate legal redress with little hope of release through court action any time in the immediate future. The courts should continue to assert their appropriate role to assure that due process is provided to all of the detainees and that the detainees' appropriate status in international humanitarian law is determined. U.S. courts, the detainees' sole recourse, must assist them in a final decision as to whether and when they should be held or released as criminals, prisoners of war, or innocent civilians.

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