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The Legal Dilemma of Guantanamo Detainees From Bush to Obama

Linda A. Malone
William & Mary Law School, lamalo@wm.edu

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LINDA A. MALONE*

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ABSTRACT. The stage for the Guantánamo detainees' commission proceedings was set by the interplay between the Executive's detention powers and the Judiciary's *habeas* powers. The Bush administration turned to Congress to provide less than what was required by the court, instead of the minimum deemed necessary to comply with each decision, or to explore another legal argument for not complying. This article examines how the law for the Guantánamo detainees has been shaped by the US courts and by Congress. The article begins by observing the guidelines issued by the Supreme Court for compliance with the constitutional and humanitarian law requirements, and the status of the law which set the stage for the landmark decision in *Boumediene v. Bush*. It then turns to the line of cases in the D.C. Circuit that have defined the parameters of *habeas* proceedings and further examines President Obama's 2011 Order and the review procedure it set for the Guantánamo Bay detainees. The article concludes with a reflection on the torture policy of the Bush administration and the future of military commissions.

I THE STATUS OF THE LAW BEFORE BOUMEDINE V. BUSH, AND WHERE THE SUPREME COURT'S COMPLIANCE GUIDELINES FOR CONSTITUTIONAL AND HUMANITARIAN LAW REQUIREMENTS STAND TODAY

In the heated debate over Attorney General Eric Holder's announcement that Khalid Sheikh Mohammed, a member of Al-Qaeda allegedly responsible for the 9/11 attacks on the World Trade Center, would be tried at a Guantánamo military commission, Americans, whether in

* Director of the Human Security Law Center, Marshall-Wythe Foundation Professor of Law, William & Mary Law School. The author can be reached at lamalo@wm.edu.

favor of, or opposed to the decision, seem to be suffering from collective amnesia concerning how this decision came to pass. Mohammed's commission proceeding took place 11 years after 9/11,[1] for two reasons. The Bush administration unnecessarily, immorally, and illegally engaged in the torture of the worst perpetrators of terrorist acts, and the Bush administration repeatedly chose to advance its theory of an all-powerful executive branch at the expense of prosecuting these perpetrators expeditiously, against the urging of the most experienced and knowledgeable military legal advisors. That torture, however narrowly and self-servingly defined, was committed *and* has been acknowledged by President Bush himself.[2] That the supremacy of the executive power was a top priority over these prosecutions and other critical areas of national decision-making has been acknowledged by President Bush and many of his advisors. The second reason for 11 years of delay has as justification only a political agenda to establish the supremacy of the executive branch over the legislative and judicial branches. Whatever minimal guidance the Supreme Court provided in the process for the detainees in the decisions of *Rasul v. Bush,*[3] *Hamdan v. Rumsfeld,*[4] and *Boumediene v. Bush,*[5] was rejected by the Bush administration. Each time the administration turned to a cooperative Congress—not to provide even the minimum deemed necessary to comply with each decision, but to provide less than what was required by the Court or explore another legal argument for not complying. If the administration after *Hamdi*[6] in 2004, and certainly after *Hamdan* in 2006, had declared that the commissions would utilize

[1] The arraignment took place in May 2012 and the trial is tentatively scheduled for May 2013. M. Warner, 'Khalid Sheikh Mohammed Makes First Court Appearance in 3 Years' (*PBS NewsHour,* 7 May 2012) http://www.pbs.org/newshour/bb/military/jan-june12/guantanamo1_05-07.html accessed 14 June 2012; C. McGreal, '9/11 Suspect Refuses to Answer Judge's Questions as Guantanamo Trial Opens' (*The Guardian,* London, 5 May 2012) http://www.guardian.co.uk/world/2012/may/05/9-11-suspects-guantanamo-trial accessed 14 June 2012.

A 2009 presentation of this paper at the Centro Studi Americani in Rome appears in the 2012 edition of RSA, the journal of the Italian Association of American Studies.

[2] P. Owen, 'George Bush Admits U.S. Waterboarded 9/11 Mastermind' (*The Guardian,* London, 3 June 2010) http://www.guardian.co.uk/world/2010/jun/03/george-bush-us-waterboarded-terror-mastermind accessed 22 May 2012.

[3] *Rasul v. Bush*, 542 US 466 (2004), discussed below, text to n 7.

[4] *Hamdan v. Rumsfeld*, 548 US 557 (2006), discussed below, text to n 8–9.

[5] *Boumediene v. Bush*, 553 US 723 (2008), discussed below, text to n 10–15.

[6] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

the long established Uniform Code of Military Justice (again, as the most experienced and knowledgeable military law experts advocated) justice could have proceeded. Instead, courageous military and civilian lawyers seeking to compel compliance with each prior phase of Supreme Court guidance on constitutional and humanitarian law were accused of delaying the commissions and the justice for victims.

In *Rasul v. Bush*, the Supreme Court held that the United States had sufficient jurisdiction and control over Guantánamo Bay under the federal *habeas* statute for *habeas* to be available to detainees to challenge their detention as a statutory matter. After *Rasul*, President Bush, by executive order, established Combatant Status Review Tribunals ('CSRTs') to evaluate whether or not a detainee is an 'enemy combatant', with military commissions to conduct war crime trials of 'unlawful enemy combatants'.[7]

In 2006, in *Hamdan v. Rumsfeld*, the Supreme Court held that these military commissions, as established by the executive branch, were invalid because they were not in compliance with requirements of the Uniform Code of Military Justice and the Geneva Conventions.[8] Working with a cooperative Congress, President Bush, in the 2006 Military Commissions Act ('MCA'), re-established the military commissions with congressional authorization and expanded procedures, but also stripped the federal courts of *habeas* review for broadly defined unlawful enemy combatants (beyond just Guantánamo Bay detainees). The 2006 MCA sanctioned the use of coerced testimony before the military commissions, authorized non-Department of Defense interrogators to use enhanced interrogation techniques so long as they did not 'shock the conscience,' and granted immunity for those who had sanctioned or engaged in common article 3 'outrages upon personal dignity'.[9]

The '*habeas*-stripping' provisions of the 2006 MCA reached the Supreme Court in 2008, which came to a 5-4 decision with the majority opinion by Justice Kennedy and dissents from Justices Alito, Scalia, Thomas, and Chief Justice Roberts.[10] In *Boumediene v. Bush*, five of the Justices concluded that Congress did not have the constitutional authority to suspend *habeas corpus* for detainees, ren-

[7] P. Wolfowitz, Deputy Secretary of Defense, 'Order Establishing Combatant Status Review Tribunal' (*Memorandum for the Secretary of the Navy*, 7 July 2004) www.defense.gov/news/jul2004/d20040707review.pdf accessed 22 May 2012.

[8] See *Hamdan* (n 4 above).

[9] Military Commissions Act of 2006, Pub. L. No. 109-366, § 948, 120 Stat. 2607 (2006).

[10] *Boumediene* (n 5 above).

dering Section 7 of the 2006 MCA unconstitutional because no suspension was allowed unless, 'in Cases of Rebellion or Invasion the public Safety may require it'.[11] Additionally, suspension of *habeas* was not otherwise permissible because the Commission Status Review Tribunal procedures were not an adequate substitute for *habeas* review.

Dissenting Chief Justice Roberts concluded that the majority should not have even reached the second issue, but should have remanded to the lower court to determine if the CSRT procedures were an 'adequate substitute' for *habeas* review.[12] Justice Scalia, writing for all dissenters, argued that *habeas* review did not extend to aliens seized and held outside the United States.[13]

In this landmark 2008 decision of *Boumediene*, the Supreme Court thus held that the US Naval Base at Guantánamo Bay, Cuba, was subject to the 'full effect' of the Suspension Clause of the United States Constitution, and that Section 7 of the MCA, which stripped federal courts of their jurisdiction to consider Guantánamo detainees' *habeas* petitions, 'effects an unconstitutional suspension of the writ'.[14] Accordingly, the alien detainees held by the executive branch at Guantánamo after their capture were entitled to 'invoke the fundamental procedural protections of *habeas corpus*'.[15] With the extension of federal court jurisdiction to Guantánamo detainees' *habeas* petitions, district courts in the District of Columbia Circuit began to: (1) vacate their prior dismissals of such *habeas* petitions that relied on MCA's Section 7 as required by the Supreme Court's ruling in *Boumediene*; or (2) revive detainees' habeas petitions that were stayed until the decision in *Boumediene* was handed down in June 2008.

The decision left many critical questions unresolved. The Supreme Court did not decide:

(i) The statutory or constitutional validity of the CSRT procedure;
(ii) The statutory or constitutional validity of military commissions as set up under the Military Commissions Act of 2006, or their compliance with the Geneva Conventions;
(iii) What must be demonstrated by the government or the detainee at a *habeas* proceeding; or

[11] *Ibid.*, 724 (citing U.S. Const. art. 1, § 9, cl. 2).
[12] *Ibid.*, 802.
[13] *Ibid.*, 827.
[14] *Ibid.*, 728.
[15] *Ibid.*, 798.

(iv) What procedures are necessary to satisfy the due process requirements for *habeas* review.

Yet, President Obama signed another Military Commissions Act into law on October 28, 2009. Under this act:

(i) A military judge presides over commission proceedings;
(ii) The President must approve executions;
(iii) Appeals are permitted to the Military Commissions Court of Review, the District of Columbia Circuit Court, and ultimately the Supreme Court;
(iv) The military judges have jurisdiction over 32 crimes, including conspiracy, terrorism, and material support of terrorism; and
(v) Defendants are guaranteed counsel.[16]

The term alien 'illegal enemy combatant' in the 2006 Act was changed to 'unprivileged enemy belligerents' ('UEBs'), who are defined as persons who either:

(i) Engaged in hostilities against the United States;
(ii) Purposefully and materially supported hostilities against the United States; or
(iii) Were part of Al Qaeda at the time of the alleged offense.[17]

Only alien UEBs are subject to military commissions. Hearsay evidence is still admissible, but is much more restricted than under the 2006 MCA, and statements obtained by torture are excluded: 'No statement obtained by the use of torture or by cruel, or inhuman treatment, or degrading treatment [...] shall be admissible in a military commission under this chapter'.[18]

Self-incrimination is also prohibited, as no one is required to testify against himself/herself.[19] More generally, a statement of the accused may be admitted only if the military judge finds that it is reliable and authentically voluntary.[20] The accused can present evidence in his defense, and examine and respond to all evidence admitted on the issue of guilt or innocence and on sentencing.[21]

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[16] Military Commissions Act of 2009, Pub L 111-84, § 950, 123 Stat 2190 (2009).
[17] *Ibid.,* § 948(a).
[18] *Ibid.,* § 948(r).
[19] *Ibid.,* § 948(b).
[20] *Ibid.,* § 948(r).
[21] *Ibid.,* § 949(a).

II THE PARAMETERS OF HABEAS PROCEEDINGS SET BY THE D.C. CIRCUIT, AND A REVIEW OF PROCEDURE SET FOR GUANTANAMO BAY DETAINEES SET BY PRESIDENT OBAMA'S 2011 ORDER

Following the decision in *Boumediene*, the courts in the D.C. Circuit first outlined a standard to ascertain exactly who could be justifiably detained at Guantánamo. The post-*Boumediene* decisions draw primarily on the broad language of the Authorization for Use of Military Force ('AUMF'), which enables the President to 'use all necessary and appropriate force against those […] persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 […] in order to prevent any future acts of international terrorism against the United States by such […] persons'.[22] At a minimum, the 'all necessary and appropriate force' language of the AUMF 'includes the power to capture and detain those described in the congressional authorization'.[23]

In *Al-Bihani v. Obama*, the D.C. Circuit Court stated that the category of persons subject to detention 'includes those who are *part of* forces associated with Al Qaeda or the Taliban *or those who purposefully and materially support* such forces in hostilities against U.S. Coalition forces.'[24] To meet the threshold showing that a detainee is 'part of' Al Qaeda, it is *not necessary* to show that an individual 'operates within al Qaeda's formal command structure,' although such a showing *is sufficient* to meet this threshold.[25] The inquiry should instead focus 'upon the actions of the individual in relation to the organization' rather than relying on a determination of whether or not the detainee 'formally received or executed any orders' from Al Qaeda, the Taliban, or associated forces.[26] The D.C. Circuit Court has opined that the evidence of action must surpass the bare minimum level of the 'purely independent conduct of a freelancer'.[27] Furthermore, the

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[22] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

[23] *Al-Adahi v. Obama*, 613 F 3d 1102, 1103 (DC Cir 2010) (citing *Hamdi v. Rumsfeld*, 542 US 507, 519 (2004)).

[24] *Al-Bihani v. Obama*, 590 F 3d 866, 872 (DC Cir 2010) [emphasis added].

[25] *Bensayah v. Obama*, 610 F 3d 718, 725 (DC Cir 2010); *Hatim v. Gates* 632 F 3d 720, 721 (DC Cir 2011).

[26] *Uthman v. Obama*, 637 F 3d 400, 403 (DC Cir 2011); *Salahi v. Obama*, 625 F 3d 745, 752 (DC Cir 2010).

[27] *Bensayah* (n 25 above) 725.

evidence must relate to whether the petitioner was a 'part of' an associated force *at the time of capture*, rather than focus entirely on conduct occurring long before the US military took possession of the detainee.[28] Importantly, in the evaluation of whether a detainee should be continually held, the court should not inquire into '[w]hether a detainee would pose a threat to U.S. interests if released', but rather whether the hostilities themselves are still continuing.[29]

Over a course of successive decisions, the D.C. Circuit courts announced that the Government has the burden of showing in the district court, by a preponderance of the evidence, that the petitioner's continued detention is lawful, and that such a standard is constitutional.[30] On appeal, D.C. Circuit panels began summarily dismissing petitioners' challenges that alleged a standard of reasonable doubt or clear and convincing evidence was constitutionally required: '[l]est there be any further misunderstandings, let us be absolutely clear. A preponderance of the evidence standard satisfies constitutional requirements in considering a habeas petition from a detainee held pursuant to the AUMF.'[31] The opinion in *Al-Bihani*, which established the constitutionality of such a preponderance standard for use in these cases, explicitly stated, however, that the court's determination of constitutionality did not include an 'endeavor to identify what standard would represent the *minimum required* by the Constitution.'[32] The court in *Al-Adahi*, after briefly reviewing the history of standards of proof used in habeas petitions, noted that the rationale for adoption of such a preponderance standard by D.C. Circuit courts following *Boumediene* is 'unstated', and proffered its doubt as to whether 'the Suspension Clause requires the use of the preponderance standard.'[33] In *Al-Adahi*, therefore, the court proceeded with the case under the assumption, 'arguendo[,] that the Government must show by a preponderance of the evidence' that the petitioner's detention was lawful because of his association with Al Qaeda.[34]

The cases decided in the D.C. Circuit to date have included detailed analyses of the evidence presented by the Government on whether

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[28] *Salahi* (n 26 above) 750-51.

[29] *Awad v. Obama*, 608 F 3d 1, 11 (DC Cir 2010).

[30] *Odah v. United States*, 611 F 3d 8, 13 (DC Cir 2010) (calling such a standard 'now well-settled law').

[31] *Awad* (n 29 above) 11 [emphasis added].

[32] *Al-Bihani* (n 24 above) 878 [emphasis added].

[33] *Al-Adahi* (n 23 above) 1104-05.

[34] *Ibid.*, 1105.

each petitioner was 'part of' Al Qaeda. The evidence is to be considered as a whole, and not in a piecemeal fashion with individual pieces of evidence viewed in isolation.[35] In *Al-Adahi*, the court, in very strong language, condemned the district court's 'mistaken view that each item of the government's evidence', on its own, 'needed to prove the ultimate issue in the case.'[36] Specifically, each piece of evidence must be examined in the context of the whole of the Government's presentation, and not cast aside before conducting an evaluation of the next individual piece of evidence.[37] A finding that a petitioner was 'part of' Al Qaeda, the Taliban, or associated forces, signifies that continued justification is lawful, and will lead to district court denial of the petitioner's request for the writ of *habeas corpus*.[38] The following non-exhaustive list of factors has been found, by the district courts and appellate courts on review, to be suggestive of a petitioner's being a 'part of' such forces. These factors are therefore supportive of an ultimate conclusion that the requisite standard has been met, when considered along with other listed factors, and all of the evidence offered by the Government in its entirety: admissions of travel to Afghanistan for purposes of fighting U.S. forces[39]; close connections with Al Qaeda operatives[40]; the location of capture,[41] especially significant if in the vicinity of Tora Bora[42] or at a known Al Qaeda guesthouse[43]; being captured along with known Taliban fighters or Al Qaeda operatives[44]; providing arms training to militia members for operations against U.S. forces[45]; receiving military instruction at a known Al Qaeda or associated terrorist training camp[46]; illogical or false explanations for presence in Afghanistan or association with Taliban or Al Qaeda fighters[47]; attendance at religious schools known

[35] *Awad* (n 29 above) 7.

[36] *Al-Adahi* (n 23 above) 1111.

[37] *Salahi* (n 26 above) 753.

[38] *Esmail v. Obama*, 639 F 3d 1075, 1075 (DC Cir 2011).

[39] See, e.g., *Awad* (n 29 above) 10.

[40] See, e.g., *Salahi* (n 26 above) 753; *Al-Adahi* (n 23 above) 1107.

[41] See, e.g., *Barhoumi v Obama* 609 F 3d 416, 432 (DC Cir 2010).

[42] See, e.g., *Uthman* (n 26 above) 404.

[43] See, e.g., *Barhoumi* (n 41 above) 427.

[44] See, e.g., *Esmail*(n 38 above) 1077; *Uthman* (n 26 above) 405; *Al-Adahi* (n 23 above) 1110.

[45] See, e.g., *Barhoumi* (n 41 above) 427.

[46] See, e.g., *ibid*; *Esmail* (n 38 above) 1076; *Odah* (n 30 above) 15–16; *Al-Adahi* (n 23 above) 1109.

[47] See, e.g., *Esmail* (n 38 above) 1077; *Uthman* (n 26 above) 405.

as Al Qaeda recruiting grounds[48]; traveling along known Al Qaeda routes to and from Afghanistan[49]; presence at Al Qaeda guesthouses during travels[50]; lack of passport at capture[51]; following directions of Al Qaeda or Taliban officials[52]; and Al Qaeda documentation listing member names including the detainee's, when presented in conjunction with corroborative testimony from other operatives.[53]

As for the conduct of the habeas proceedings themselves, the court, in *Al-Bihani*, held that the '[*h*]*abeas* review for Guantánamo detainees need not match the procedures developed by Congress and the courts specifically for habeas challenges to criminal convictions.'[54] Basing their decision on the holding in *Boumediene*, which 'explicitly stated that habeas procedures for detainees need not resemble a criminal trial,' the *Al-Bihani* court held that the courts reviewing *habeas* petitions are 'neither bound by the procedural limits created for other detention contexts, nor obliged to use them as baselines from which any departures must be justified.'[55] Therefore, the Guantánamo detainees' *habeas* proceedings are 'not subject to all the protections given to defendants in criminal prosecutions.'[56]

Recognition of this distinction between normal criminal prosecutions and the *habeas* petitions of Guantánamo detainees is especially important in the context of the admissibility of hearsay at such proceedings. *Al-Bihani* established that hearsay is 'always admissible' in such proceedings, and that *habeas* courts must only ask 'what probative weight to ascribe to whatever indicia of reliability it exhibits'.[57] The court in *Awad* clarified the end result of such an inquiry, holding that 'hearsay evidence is *admissible* in this type of *habeas* proceeding *if the hearsay is reliable*'.[58] A successful challenge to such evidence must establish, therefore, not that the evidence simply is hearsay, but that it is unreliable hearsay'.[59]

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[48] See, e.g., *Uthman* (n 26 above) 405.
[49] See, e.g., *ibid.*; *Odah* (n 30 above) 16.
[50] See, e.g., *Uthman* (n 26 above) 406; *Al-Adahi* (n 23 above) 1107–08.
[51] See, e.g., *Uthman* (n 26 above) 406.
[52] *Odah* (n 30 above) 15.
[53] See, e.g., *Awad* (n 29 above) 8–9.
[54] *Al-Bihani* (n 24 above) 876 [quotations omitted].
[55] *Ibid.,* 876–77.
[56] *Al-Adahi* (n 23 above) 1111, n 6.
[57] *Al-Bihani* (n 24 above) 879.
[58] *Awad* (n 29 above) 7 [emphasis added].
[59] *Barhoumi* (n 41 above) 422.

The line of cases in the D.C. Circuit also established the varying standards of review for the pieces comprising the District Court's decision. The factual findings of the District Court are reviewed for 'clear error' regardless of whether they were 'based on live testimony or […] documentary evidence'; this standard applies equally to the 'inferences drawn' from such findings.[60] The clear error standard of review is a high bar to overcome, and the *Awad* court noted that if the District Court's 'account of the evidence' is merely *plausible* in 'light of the record viewed in its entirety,' the appellate court is forbidden from ordering reversal.[61] A 'permissible view' of the evidence can therefore never be clearly erroneous.[62] Beyond the standards for review of the factual records, the appellate courts must review a district court's 'habeas determination de novo, and any challenged evidentiary rulings for abuse of discretion.'[63]

These differing standards are especially important in the review of whether a detainee was part of a force associated with Al Qaeda or the Taliban, as discussed above. This is a 'mixed question of law and fact.'[64] The question of 'whether a detainee's alleged conduct […] justifies his detention under the AUMF is a legal question' which is therefore reviewed de novo; the question of 'whether the government has proven that conduct,' however, is a 'factual question' which is reviewed for clear error under the very difficult standard delineated above.[65]

On March 7, 2011, President Obama issued the Executive Order 13567, entitled 'Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force',[66] which applied to 'those detainees held at Guantánamo' on March 7 who had been either 'designated for continued law of war detention' or 'referred for prosecution'.[67] The Order continues to apply to such detainees even if they are transferred from Guantánamo to another United States detention facility.[68] The Order specifically excludes 'those detainees against whom charges [were] pending' and against whom 'a judgment of conviction'

[60] *Awad* (n 29 above) 7.
[61] *Ibid.*
[62] *Ibid.*
[63] *Barhoumi* (n 41 above) 424 (quoting *Al-Bihani* (n 24 above) 870).
[64] *Ibid.*
[65] *Ibid.*
[66] Exec. Order No 13,567 (2011), 76 Fed Reg 13277 (7 March 2011).
[67] *Ibid.,* § 1(a).
[68] *Ibid.,* § 1(c).

had been entered.[69] The Order establishes a 'process to review on a periodic basis the executive branch's continued, discretionary exercise of existing detention authority in individual cases'.[70] As such, the scope of the Order is specifically limited: it 'does not create any additional or separate source of detention authority', 'does not affect the scope of detention authority under existing law', and, in relation to *Boumediene*, does not 'affect the jurisdiction of Federal courts to determine the legality of [Guantánamo detainees'] detention', or interfere with their 'constitutional privilege of the writ of *habeas corpus*.'[71] This Order, however, stands in direct contravention of a previous Order issued by Obama in January of 2009, which ordered the closure of Guantánamo's detention facilities by no later than January 2010,[72] and also demanded an immediate 'review of the status of each individual currently detained at Guantánamo.'[73]

The 2011 Order's review procedure sets a baseline standard warranting the continued detention of a detainee that turns on whether 'it is necessary to protect against a significant threat to the security of the United States.'[74] The Periodic Review process outlined by the President is to be coordinated by the Secretary of Defense, in conjunction with the Attorney General, and must be consistent with the requirements outlined for (a) an initial review; (b) a subsequent full review; (c) continuing file reviews; and (d) a final review of the decisions made by the Periodic Review Boards (Boards).[75] The Boards consist of one senior official from the Departments of State, Defense, Justice, and Homeland Security, and one official representing the Director of National Intelligence and the Chairman of the Joint Chiefs of Staff.[76]

The Order requires an initial review for every detainee within one year of March 7, 2011.[69] Prior to the initial review, a detainee must be provided a written notice of the review, a summary of the facts the Board will consider in its evaluation, and the reasons outlined by the government for the detainee's continued detention.[77] During these

[69] *Ibid.,* § 1(a).
[70] *Ibid.,* § 1(b).
[71] *Ibid.*
[72] Exec. Order No. 13,492 (2009), 74 Fed. Reg. 4897, 4898, § 3 (22 January 2009).
[73] *Ibid.,* 4898, § 4(a).
[74] Exec. Order No. 13,567 (n 66 above) § 2.
[75] *Ibid.,* 13277–79, § 3(a)–(d).
[76] *Ibid.,* 13280, § 9(b).
[77] *Ibid.,* § 3(a)(1).

proceedings, the detainee shall have the assistance of a government-provided representative or can retain private counsel[78]; the detainee, with counsel, can present a statement, introduce any relevant information, answer questions, and call available witnesses with material information.[79] The Secretary of Defense, in opposition to the detainee's release, shall provide to both the Board and the detainee's representative 'all information […] relevant to the determination' on whether the detainee meets the baseline standard described above, which includes 'all mitigating information.'[80] The information provided to counsel may, on determination by the Board, be provided in the form of a substitute or summary in order to 'protect national security […] intelligence sources and methods.'[81] Following the hearing, the Board shall make a 'prompt determination, by consensus and in writing, as to whether the detainee's continued detention is warranted' based on the above standard which must be provided to the detainee within 30 days.[82]

Beyond the initial review, the Order establishes a subsequent 'full review' and hearings by the Board every three years using the same procedures outlined above.[83] In the interim between full reviews, each detainee's continued detention is subject to a 'file review' every six months, conducted by the Board, consisting of a 'review of any relevant new information' compiled by the Secretary of Defense.[84] At each file review, the detainee can make his own submission: if a 'significant question' is raised as to whether the 'detainee's continued detention is warranted', the Board will 'promptly convene a full review' consistent with the above procedures.[85] Finally, a Review Committee conducts a 'Board review' if a Committee member so seeks within 30 days, or the Board cannot reach an initial consensus.[86]

The failure of the Board to determine that a detainee meets the baseline standard requires the Secretaries of State and Defense to use 'vigorous efforts' to 'identify a suitable transfer location […] outside

[78] I*bid.,* 13278 § 3(a)(2).
[79] *Ibid.,* § 3(a)(3).
[80] *Ibid.,* § 3(a)(4)-(5).
[81] *Ibid.,* 13279, § 5.
[82] *Ibid.,* 13278, § 3(a)(7).
[83] *Ibid.,* 13279, § 3(b).
[84] *Ibid.,* § 3(c).
[85] *Ibid.*
[86] *Ibid.,* § 3(d).

of the United States' that is 'consistent with [US] national security and foreign policy interests'.[87] A Committee is then in charge of reviewing, on an annual basis, the 'status of transfer efforts' for those detainees needing transfer after a Periodic Review, in addition to the transfer efforts for detainees granted a writ of *habeas corpus* from a federal court.[88] The Order, and transfer process, is to be implemented in accordance with 'laws relating to the transfer, treatment, and interrogation of individuals detained in an armed conflict', including the Convention against Torture.[89]

President Obama made a campaign pledge to close Guantánamo by January 2010, returning as many detainees as advisable to their states.[90] Through US Attorney General Holder, the administration proposed trying some detainees in federal court in New York and others in military commissions at Guantánamo, with the possibility of adapting a Thomson, Illinois prison for the detainees.[91] Congress responded by seeking to bar transfer of detainees to the US for prosecution and resisting funding for the Illinois prison (with some Democrats insisting on trials and some Republicans opposed to any imprisonment in the United States).[92] The New York mayor and others resisted trials in New York City; while the American Civil Liberties Union ('ACLU') and others insisted on trials, not commission proceedings.[93] Complicating matters even more, the Christmas Day 2010 attempted airplane bombing by a Yemeni suspended all transfers of Guantánamo detainees to Yemen.[94]

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[87] *Ibid.,* § 4.

[88] *Ibid.,* § 5(a)(1)–(2).

[89] *Ibid.,* § 10(b).

[90] 'Obama: We Are Going to Close Gitmo' (*CBSNews,* 11 January 2009)http://www.cbsnews.com/stories/2009/01/11/national/main4713038.shtml accessed 23 May 2012.

[91] J.Dienst and H. Gittens, '9/11 Terror Trials Will not be Held in New York City' (*NBCNewYork,* 30 January 2010) http://www.nbcnewyork.com/news/local/911-Terror-Trials-Will-Not-Be-Held-in-NYC-83083662.html accessed 23 May 2012.

[92] S. Dinan, 'House Acts to Block Closing of Gitmo' *Washington Times* (Washington D.C., 8 December 2010) http://www.washingtontimes.com/news/2010/dec/8/congress-deals-death-blow-gitmo-closure/?page=all accessed 23 May 2012.

[93] Dienst (n 91 above).

[94] C. Fowler, 'Bombs Sent from Yemen Raise Questions About Guantánamo Detainees' (*National Security Law Brief*, 3 November 2010) http://nationalsecuritylawbrief.com/2010/11/03/bombs-sent-from-yemen-raise-question-about-guantánamo-detainees accessed 24 May 2012.

III THE TORTURE POLICY OF THE BUSH ADMINISTRATION AND WHAT LIES AHEAD FOR MILITARY COMMISSIONS

President Bush transferred 537 detainees.[95] How many reverted to terrorist activities? As of October 2010, 81 were 'confirmed' and 69 'suspected' of terrorist or insurgent activities of the 598 detainees transferred.[96] President Obama has transferred 69 including more than a dozen in Europe.[97] Where to return, or where and how to try the remaining detainees? As of April 2012, approximately 169 of the 779 detainees are remaining.[98] According to a January 22, 2010, Justice (State, Homeland Security, Department of Defense, Justice, CIA, and FBI officials) Task Force Report, 97 of the 240 who might be released were Yemeni.[99] Of those, 36 were eligible for immediate release; and another 30 would be eligible when Yemen is sufficiently stable.[100] According to the same report, 44 detainees were referred for prosecution in federal courts or commissions.[101] Most problematic, there are approximately 48 to be held indefinitely due to evaluations that they are too dangerous to release but for whom there is insufficient admissible evidence for a commission proceeding, according to Guantánamo documents leaked in April of 2010.[102]

Experienced military interrogators are among the first to say that torture is often counterproductive, unproductive in terms of reliable information, and unnecessary despite all the 'ticking time-bomb'

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[95] 'Guantánamo Bay Detainees' *(GlobalSecurity.Org)* http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm accessed 23 May 2012.

[96] *Ibid.*

[97] J. Tapper, 'First Gitmo Detainees in More than a Year Transferred; Uighur Detainees Bound for El Salvador' (*ABC News,* 20 April 2012) http://abcnews.go.com/blogs/politics/2012/04/first-gitmo-detainees-in-more-than-a-year-transferred/ accessed 22 May 2012.

[98] C. Savage, W. Glaberson, & A. W. Lehren, 'The Guantánamo Files: Glimpses of Lives in an American Limbo' *New York Times* (New York, 24 April 2011) http://www.nytimes.com/2011/04/25/world/guantanamo-files-lives-in-an-american-limbo.html?pagewanted=all accessed 23 May 2012.

[99] Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and the Joint Chiefs of Staff, Guantánamo Review Task Force, *Final Report* (22 January 2010) ii http://www.justice.gov/ag/guantanamo-review-final-report.pdf accessed 23 May 2012.

[100] *Ibid.,* 25.

[101] *Ibid.,* ii.

[102] *Ibid.*

scenarios used in its justification. Much of this is a matter of common sense. How many of us would confess to virtually anything if subjected to torture on a daily basis? Many of these detainees are not reticent to assume responsibility for their crimes, and, in their fanaticism, are proud to admit to them. Among many other military heroes, General Fred Haynes, a young captain with the US Marines Combat Team 28 at the battle of Iwo Jima, speaks convincingly against the use of torture, describing how humanitarian treatment of Japanese prisoners in one of the most harrowing ordeals imaginable led to their cooperation in providing valuable information to their US captors.[103] What is the cost for torture of these 'high-value' detainees? Obviously, it provided propaganda to our enemies, prompted problems and often disappointment from our allies, and tarnished a tradition of democratic and humanitarian ideals dearly paid for by those who have served so admirably and humanely in our military. There is also the legal cost. One of the most fundamental tenets of our constitutional law system and humanitarian law is that statements obtained by torture are inadmissible for any purpose. No judge, whether in a military commission or a federal trial, can convict on the basis of evidence obtained through torture. The bottom line is that the very terrorists who should have been treated the most cautiously by experienced military interrogators to satisfy unavoidable evidentiary requirements were not so treated, despite the substantial likelihood that evidence against them and others could have been otherwise obtained. As a practical matter, prosecutors, whether before the commissions or federal court, found themselves in the difficult position of being unable to rely on admissions that might have been otherwise obtained, and were required to find new evidence untainted by the coerced admissions.

So, in 2012, justice has begun for the victims of 9/11, as well as the victims of the Cole bombing in 2000. The proceedings are taking place in the only place they can be held, and in the only form they can be held, due to Congressional restrictions on any detainee even being brought into the US Some commentators, including notably John Yoo, one of the architects of the prior administration's torture policy, have said the decision to try Khalid Sheikh Mohammed is an 'implicit

[103] 'Retired Military Generals Criticize President Bush for Preparing to Veto Anti-Torture Bill' (*Democracy Now,* 6 March 2008) http://www.democracynow.org/2008/3/6/retired_generals_criticize_president_bush_for accessed 23 May 2012.

confession' by the Obama administration that military commissions are the 'best balance of security needs and protections for liberty.'[104] A forced decision is not an implicit admission any more than a statement obtained through torture is a reliable admission of guilt. Whether a Guantánamo military commission is the best option or not, it is for the foreseeable future the only option provided by Congress. If Khalid Sheikh Mohammed can be convicted by a military commission, it will be a testament to the dedication of many unrecognized military investigators and lawyers seeking to undo the damage done from a policy of torture, with admissible evidence of guilt.

[104] J. Yoo, 'Breaking: Khalid Sheikh Mohammed to be Tried by Military Commission at Guantánamo' (*Richochet,* 4 April 2011) http://ricochet.com/main-feed/Breaking-Khalid-Sheikh-Mohammed-to-Be-Tried-by-Military-Commission-at-Guantanamo accessed 23 May 2012.