

Guantanamo Ten Years After 9/11

By Mason C. Clutter

Ten years after the events of 9/11, one of the most identifiable responses to the terrorist attacks remains in full working order—the Guantanamo Bay, Cuba, detention facility. Guantanamo has become a symbol around the world of how the United States will treat, detain, and prosecute those allegedly responsible for the 9/11 attacks. Created with the intent of avoiding the rights afforded in the U.S. Constitution and review by the U.S. judiciary, Guantanamo has been at the forefront of the debate about the proper role of each branch of government during a time of armed conflict.

The last decade has shown distrust by Congress and the executive branch of the judiciary and the traditional criminal justice system by way of various orders and legislation to cut off access to the courts. However, these efforts did not stand in the way of the courts, and this time around, unlike during the Vietnam War, the Supreme Court got involved. Certiorari has been granted in only four Guantanamo cases, each brought by or on behalf of detainees, and the Court has found in favor of the detainees each time. The Court's Guantanamo decisions, the first war-related opinions since World War II, have changed the way America will respond to other terrorist attacks, now and in the future.

Since 9/11, there has been constant rhetoric about the unconventional nature of al-Qaeda and the U.S. "War on Terror"—that this enemy is different because al-Qaeda is not a traditional nation state, they do not wear uniforms, they do not abide by the laws of war, and they are a global network—in an effort to persuade the public and the courts that the traditional laws of war are no longer applicable. However,

the United States has gone from a state of intended lawlessness at Guantanamo to a system of military detention and military trials within a broad legal framework that the current administration, and likely future administrations, will work within. To understand how future conflicts may play out, it is important to examine what has happened during the past ten years.

Authorization for the Use of Military Force and Detention

Three days after the 9/11 attacks, Congress passed the Authorization for Use of Military Force (AUMF) authorizing the president to use all "necessary and appropriate" military force against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons. . . ." While the AUMF says nothing about detention authority, the Bush administration relied on it and Bush's interpretation of Article II Commander in Chief powers to detain individuals without charge.

Following an Office of Legal Counsel opinion that Guantanamo was likely outside of the jurisdiction of federal district courts, and, therefore, outside the reach of the Constitution and habeas corpus protections, the first detainee was brought to Guantanamo on January 11, 2002. Since its opening, 779 individuals have been detained at Guantanamo Bay; 171 detainees remain.

In 2004, a plurality of the Supreme Court held that the AUMF "clearly and unmistakably authorized detention" "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war." *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

The Court cautioned that while detention for the duration of the relevant conflict was implied within Congress's grant of the use of "necessary and appropriate" force, "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." *Id.* at 521. The Obama administration continues to rely on the 2001 AUMF as the legal basis for its authority to detain terrorism suspects remaining at Guantanamo Bay.

Today, ten years after the 9/11 attacks, some question the viability of the 2001 AUMF, and there has been a move in Congress to "reauthorize" or "reaffirm" the conflict with al-Qaeda, the Taliban, and "associated forces" in order to make clear Congress's intent to authorize detention for Guantanamo detainees and others detained pursuant to the AUMF.

The "Battlefield"

In *Hamdi*, the Supreme Court concluded that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war." *Hamdi*, 542 U.S. at 519. This conclusion suggests that the detainee must have been picked up on the battlefield in order to prevent his return to the battlefield. These were the facts in *Hamdi*. However, the Court has never addressed the question of what is the battlefield.

It is clear that an active combat zone is a part of the battlefield. Beyond those confines, especially in the instances of terrorism, the borders of the battlefield become blurry. Use of the "zone of active combat" more clearly defines the situation where there would be a military necessity to justify the deprivation of liberty without all of the due process pro-

tections usually required. Outside the zone of active combat, there are fewer exigencies, and the use of traditional law enforcement methods, including full due process, is available and should be used. Individuals arrested in the United States are outside the zone of active combat, and the exigencies associated with armed conflict do not exist. Those individuals should be arrested by civilian law enforcement, charged with violations of domestic law, and tried in a civilian federal court.

“Enemy Combatants”

On November 13, 2001, President George W. Bush issued a military order providing for the detention, treatment, and trial of noncitizens captured in the “War on Terror.” He labeled this class of individuals “enemy combatants,” a term not previously defined by the laws of war or U.S. domestic law. In 2002, President Bush designated Yaswer Esam Hamdi, a U.S. citizen who was captured in Afghanistan and held in military custody in the United States, an “enemy combatant,” alleging that he was “part of or supporting forces hostile to the United States or coalition partners’ and had ‘engaged in an armed conflict against the United States.’” *Hamdi*, 542 U.S. at 516. Hamdi challenged the legality of his detention and argued that he had a constitutional right to challenge his designation as an “enemy combatant.” The Supreme Court found that Congress had authorized Hamdi’s detention through the AUMF for the narrow category of “individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al-Qaeda terrorist network responsible for those attacks.” *Id.* at 518. It also held that Hamdi had a constitutional right to challenge his detention before a neutral decision maker.

While the Supreme Court has never directly addressed the question of whether the United States can de-

tain a U.S. citizen, captured on U.S. soil, for the duration of hostilities, the *Hamdi* plurality did mention in dicta that the United States could hold one of its own citizens as an “enemy combatant.” Citing its decision in *Ex parte Quirin*, 317 U.S. 1 (1942), the Court stated that while Quirin, a U.S. citizen, was found triable by military commission for his actions during WWII, the *Quirin* opinion said nothing to suggest that Quirin could not also have been held for the duration of hostilities. This very issue was raised in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); however, the Supreme Court denied certiorari due to Padilla’s transfer from military custody to civilian custody.

The Bush administration’s definition of “enemy combatant” remained in place until March 2009 when the Obama administration filed a response in a Guantanamo habeas case in which the government claimed the authority to detain persons pursuant to the AUMF, including those “who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners. . . .” The filing did not reference the term “enemy combatant,” and thus ended official use of the term.

Since 9/11, there has been a tendency in Congress to try to pass legislation that would label every terrorist suspect in a way that would subject the suspect to military custody and require trial by military commission. Whatever their label, the handling of these individuals in a manner inconsistent with the U.S. Constitution and international law has shaped a new paradigm for how the United States will likely treat future captives in this conflict and future conflicts—they will be detained in military custody and, if they are tried at all, they will be tried before military commissions.

Habeas and Administrative Review

Pursuant to domestic law and inter-

national human rights law, detainees must be afforded a mechanism to challenge their detention. The first Guantanamo habeas petition, *Rasul v. Bush*, was filed in 2002 in the District Court for the District of Columbia. The government argued that U.S. federal courts did not have jurisdiction to consider petitions for writs of habeas corpus filed on behalf of foreign nationals. The Supreme Court heard the case and in 2004 held that in fact detainees imprisoned at Guantanamo Bay have a statutory right to bring suit to challenge their detention in federal court. *Rasul v. Bush*, 542 U.S. 466 (2004). Congress responded to *Rasul* by passing the Detainee Treatment Act (DTA) of 2005, attempting to strip federal courts of statutory jurisdiction to hear habeas petitions brought by or on behalf of Guantanamo detainees.

Beginning in 2004, following the *Hamdi* and *Rasul* decisions, the Bush administration conducted Combatant Status Review Tribunals (CSRTs) at Guantanamo to determine whether each Guantanamo detainee was properly classified as an “enemy combatant.” The DTA limited federal court review of decisions of the CSRT to the exclusive jurisdiction of the Court of Appeals for the District of Columbia. In 2006, the Supreme Court again addressed habeas rights of Guantanamo detainees in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Deciding one of the issues before the Court, the majority held that the DTA only stripped federal courts of jurisdiction to hear habeas petitions brought after enactment of the act, not those pending at the time of enactment. Congress responded with the Military Commissions Act of 2006 and retroactively stripped federal courts of jurisdiction to consider detainees’ habeas petitions. The Supreme Court later determined that the CSRT and limited federal court review process enacted by Congress were inadequate and did not provide a “meaningful opportunity” to challenge detention under the U.S. Con-

stitution. *Boumediene v. Bush*, 553 U.S. 723, 779 (2008).

In 2008, the Supreme Court issued *Boumediene*, holding that Guantanamo detainees have a constitutional privilege to habeas corpus. However, the Court did not provide guidance to the lower courts on how to proceed with Guantanamo habeas petitions and instructed the lower courts to refine the substantive and procedural standards to be applied. Currently, there is strong consensus in the D.C. courts, which have exclusive jurisdiction to hear petitions for writs of habeas corpus brought by Guantanamo detainees, that if the government can prove by a preponderance of the evidence that at the time of capture the petitioner was part of or substantially supported al-Qaeda, the Taliban, or associated forces, then the administration can continue to detain the individual without charge.

Of twenty-nine habeas petitions granted to Guantanamo detainees and not appealed by the U.S. government, all but five petitioners have been released. However, it is uncertain whether the courts actually have the power to order the government to effectuate an actual release or simply order the government to “take all necessary and appropriate diplomatic steps to facilitate the petitioner’s release.” The case of *Kiyemba v. Obama*, brought by the five detainees who won their habeas cases but have not yet been released, suggests that not one Guantanamo prisoner has actually been released as a direct result of a court’s order because release has not been ordered without regard to whether the government can find a country to accept that prisoner for resettlement. The Court denied certiorari in *Kiyemba* and seven other Guantanamo Bay detainee cases this year, suggesting that either there is no majority of the Court willing to reexamine the habeas issues or that a majority of the justices are satisfied with the substantive and procedural standards developed by the D.C. courts. As the courts complete review

of each Guantanamo habeas petition and the Supreme Court refuses to comment on them, those whose petitions are denied will remain at Guantanamo until the executive decides to release them.

On March 7, 2011, President Barack Obama issued an Executive Order (EO) providing for periodic review of individuals detained at Guantanamo Bay pursuant to the AUMF. Under this new review system, Guantanamo detainees will continue to be held only “if it is necessary to protect against a significant threat to the security of the United States.” This is different from the determination made by the D.C. courts in the Guantanamo habeas cases, which is whether a detainee’s past conduct brings him within the scope of the AUMF. Arguably, the new EO authorizes detention beyond the scope permitted by the AUMF because the standard for detention is purely based on a risk that the person is harmful to the United States without regard to whether any armed conflict exists.

Military Commissions

Following the successful Supreme Court challenge to the 2001 military commissions created by President Bush in *Hamdan v. Rumsfeld* (the second issue before the Court in that case in addition to the habeas issue discussed above), Congress passed the Military Commissions Act of 2006, which provided for the military commission trial of “enemy combatants.” “Enemy combatants” triable by military commissions were defined as “individual[s] who engaged in hostilities or who purposefully and materially supported hostilities against the United States or its co-belligerents. . . .” Pub. L. No. 109-366, § 948(1)(i), 120 Stat. 2600 (2006).

In late 2009, Congress amended the Military Commissions Act to improve the military commissions and ended use of the term “enemy combatant.” But it created a new class of

individuals—“unprivileged enemy belligerents”—which maintained the 2006 definition of “enemy combatant.” The definition of who may be tried by military commission is different from who may be detained pursuant to the AUMF.

Since 2002, President Bush and President Obama have clearly indicated their intentions to use military commissions to try some of the Guantanamo Bay detainees. The Geneva Conventions, international treaties that comprise international law on how to treat individuals engaged in war, require trial for violations of the laws of war before a “regularly constituted court.” The current installment, the third iteration since 2001, of the Guantanamo military commissions does not meet this standard. The commissions remain inconsistent with the court-martial process, in which the United States tries its own soldiers, and they are seriously lacking in constitutional due process protections. Additionally, the legitimacy of the crimes triable before a military commission remains at issue, as the crimes of conspiracy and material support for terrorism are not traditionally considered war crimes under international law.

While military commissions in general may be a constitutional way to try violations of the laws of war, the current Guantanamo military commissions remain flawed. Continuing the use of the military commissions to try Guantanamo detainees will only solidify the use of the commissions as an unequal parallel “system of justice” to try foreign national civilians from this point forward. Instead, the traditional criminal justice system should be used to try those detainees remaining at Guantanamo Bay—for violations of international and U.S. domestic law. Currently, however, legislative bans on the use of funds to transfer Guantanamo detainees to the United States prohibit the use of U.S. civilian courts. This is an unprecedented

attempt by Congress to tie the president's hands in deciding how and where to prosecute criminal suspects.

Beyond Guantanamo

Recently, especially in response to the killing of Osama bin Laden, politicians and pundits have misguidedly drawn the conclusion that because there may be a link to interrogation undertaken at Guantanamo that led to valuable intelligence, the use of indefinite detention without charge and the use of military commissions at Guantanamo are good policies. However, these people fail to recognize that interrogation, detention, and trial could take place outside of Guantanamo within the traditional U.S. justice system and still result in

the collection of useful intelligence, as well as fair prosecutions and lawful detention. Guantanamo is a red herring. In other words, it is all about Guantanamo these days and it should not be. Guantanamo is an example of how not to do things and should be the starting point for moving forward with legal and constitutional detention and trial policies, not the end point. Legal arguments are now being advanced for the prolonged detention without charge of detainees pursuant to the law of war, further institutionalizing the use of indefinite detention by the U.S. military, setting the stage for how the United States will treat individuals captured in future conflicts. Guantanamo and its policies are lasting injuries of 9/11, and the

United States should seek to heal this wound by ending such policies, not further justifying them.

Mason C. Clutter is counsel to the Rule of Law Program at the Constitution Project. Her practice includes national security and U.S. detention policy advocacy. She also has traveled to the naval base at Guantanamo Bay, Cuba, and served as a legal observer of military commissions proceedings.

This article can be accessed online at www.americanbar.org/publications/human_rights_magazine_home/winter2011_home.html along with a list of works referenced.

Disclaimer: This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.