

## Guantánamo and the “Next Frontier” of Detainee Issues

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Since September 11, the United States has established an unprecedented detention system of global reach. It has imprisoned thousands of individuals without charge or trial, conducted interrogations in defiance of domestic and international prohibitions on torture and other abuse, and transferred prisoners across the globe to outsource torture and escape accountability. The President’s post-9/11 detention policy has sparked vigorous opposition at home and abroad, led to landmark Supreme Court decisions on the scope of executive power, and tarnished America’s longstanding commitment to human rights and the rule of law.

Today, we focus principally on Guantánamo, and with good reason. Guantánamo remains the most prominent symbol of executive lawlessness and the microcosm of this new kind of prison. Guantánamo’s existence was based on two constructs: *first*, that the detainees have no substantive rights under U.S. or international law; and *second*, that the detainees have no right of access to the courts to challenge their imprisonment and mistreatment. Two landmark Supreme Court of the United States decisions have squarely rejected both of those propositions. In 2004, the Court in *Rasul v. Bush* ruled that Guantánamo detainees have the right to challenge the lawfulness of their confinement in federal district court on by filing habeas corpus petitions.<sup>1</sup> And, last June, the Court in *Hamdan v. Rumsfeld* struck down the President’s makeshift military commissions created to try the handful of detainees who have been formally charged with crimes.<sup>2</sup> The Court also held that, at a minimum, Common Article 3 of the Geneva Conventions protects suspected terrorists, prohibiting not only summary military trials but also torture and other mistreatment. These decisions together reject the President’s attempt to

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<sup>1</sup> 542 U.S. 466 (2004).

<sup>2</sup> 126 S. Ct. 2749 (2006).

wage an ubiquitous and perpetual “war on terror” without any legal constraints or judicial scrutiny.

Yet, many important questions remain unanswered at Guantánamo, and approximately 400 individuals remain imprisoned there without charge or a lawful process. Moreover, it has become increasingly clear that Guantánamo itself is not the problem but instead part of a larger phenomenon of a new global-wide detention regime. After *Rasul* established that detentions at Guantánamo were subject to judicial review, the military stopped taking prisoners to Guantánamo and started bringing them in greater numbers to other off-shore prisons, such as Bagram Air Base in Afghanistan, in an effort to avoid the reach of habeas corpus, much like England’s absolute monarchs tried to send prisoners “beyond the seas” centuries ago to avoid the protections of the common law that is our national legal heritage.

Meanwhile, the administration has held other prisoners at secret CIA-run detention centers, also known as “black sites,” and subjected them to “enhanced” interrogation techniques—the new euphemism for torture—including hypothermia, prolonged sleep deprivation, long time standing, and water-boarding, where the subject is made to feel he is being drowned. Prisoners at these secret CIA detention centers—temporarily shut down by *Hamdan* but possibly soon to be reopened thanks to a new law immunizing CIA agents for torture<sup>3</sup>—have included not only alleged high-level al Qaeda suspects like Khalid Sheikh Mohammed but also innocent individuals, like Khaled el-Masri, condemned by mistake to torture and secret imprisonment in America’s twenty-first century dungeons.<sup>4</sup>

In addition to jailing prisoners at U.S.-operated detention centers beyond the law, the United States has rendered prisoners to countries such as Egypt and Syria for torture and detention without due process, allowing nations whose human rights record we publicly condemn to do our dirty work. Indeed, a number of Guantánamo detainees, such as Mamdouh Habib, whose case Joseph Margulies describes in his superb study of Guantánamo,<sup>5</sup> were outsourced to foreign governments for torture. In another, related manifestation of the new global detention regime, the United States has maintained

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<sup>3</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

<sup>4</sup> See generally STEPHEN GREY, *GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM* 79–102 (2006) (describing el-Masri’s rendition and mistreatment).

<sup>5</sup> JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006).

constructive custody of prisoners overseas to conduct detentions and interrogations without oversight by a U.S. court.<sup>6</sup> Guantánamo, in short, is part of a larger network of prisons, where individuals are detained, interrogated, and transferred outside the law.

The rise of this global detention regime—the “next frontier” in the continuing battle for justice and the rule of law—is the subject of today’s panel. It is a particularly timely discussion, in light of recently enacted legislation, the Military Commissions Act of 2006 (“MCA”), which hands the President unprecedented powers to detain and interrogate prisoners.<sup>7</sup> Among other things, the MCA purports to eliminate habeas corpus jurisdiction for “certain foreign nationals detained as enemy combatants” (a provision the administration has interpreted to apply to any foreign national anywhere in the world, including the United States);<sup>8</sup> allows for military commission trials for offenses traditionally subjected to prosecution under criminal law, such as “material support” for terrorism; and weakens enforcement mechanisms against torture and other abuse by making the Geneva Conventions unenforceable and diluting criminal liability under the War Crimes Act for violations of the Conventions.

Thus, today we recognize Guantánamo’s importance as the most prominent example of the effort to subject the Bush Administration’s treatment of prisoners to the rule of law. But, as this panel will explain, we must also remember that Guantánamo remains part of a larger post-9/11 detention system designed to evade legal restrictions and judicial review, and that, by focusing too extensively on Guantánamo, we risk ignoring the continuing absence of meaningful safeguards elsewhere in the Administration’s so-called “war on terrorism.”

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<sup>6</sup> *See, e.g.*, *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004).

<sup>7</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

<sup>8</sup> *Id.* § 7(a).