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# GUANTANAMO BAY: NATIONAL SECURITY VERSUS CIVIL LIBERTIES

*Michael W. Pond<sup>1</sup>*

## INTRODUCTION

**Y**asser Talal al Zahrani was only sixteen years old when he was first captured and later transferred to the Guantanamo Bay detention camp, where he would spend the next four years until allegedly ending his own life on June 6, 2006. He was a citizen of Saudi Arabia, held in extrajudicial detention (or detention without trial) for an alleged connection with the Taliban. Just days before his death, he had written a letter to his father, Colonel Talal al-Zahrani, detailing two other prisoners who seemed to be on the verge of death. Ten days after receiving the letter, the Department of Defense announced the apparent suicide of Yasser Talal al Zahrani and two other prisoners: Salah Ali Abdullah Ahmed Al-Salami and Ali Abdullah Ahmed Naser al-Sullami. The bodies were returned to their families with trauma to the faces, necks, and chests of the bodies. Something even more puzzling: the larynx in each body had been removed without explanation or details regarding the death or the condition the bodies were in.<sup>2</sup> Many critics have speculated foul

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2 See CCR Justice, *Talal Al Zahrani*, (2012) [http://ccrjustice.org/sites/default/files/assets/files/Talal%20Al-Zahrani%20et%20al%20v%20v%20United%20States\\_Petition%208-21-12.pdf](http://ccrjustice.org/sites/default/files/assets/files/Talal%20Al-Zahrani%20et%20al%20v%20v%20United%20States_Petition%208-21-12.pdf)

play.<sup>3</sup> Despite spending nearly a quarter of his life detained, Zahrani was never given a trial.

This anecdote underscores a situation that exists for more than 780 persons that have been detained at Guantanamo Bay since its establishment as a detainment camp.<sup>4</sup> Only one of those detainees has been transferred back to the United States for prosecution.<sup>5</sup> To date, a total of nine Guantanamo Bay Detainees have died alongside Zahrani, with no foreseeable legal repercussions.<sup>6</sup>

### THE UNCONSTITUTIONALITY OF DETAINMENT AT GUANTANAMO

Zahrani's story, and other similarly tragic stories, are evidence of alleged gross injustices made by the United States. The Sixth Amendment to the Constitution of the United States ensures the basic rights of criminal defendants, such as the right to a speedy trial and the right to a lawyer. When a detainee at Guantanamo is held indefinitely without trial, it is unconstitutional. The findings of the United States Supreme Court in four decisions, *Hamdan v. Rumsfeld*, *Boumediene v. Bush*, *Rasul v. Bush*, and *Hamdi v. Rumsfeld*, held that it is unlawful to hold Guantanamo detainees indefinitely without trial, that constitutional habeas corpus protections apply to detainees, and that the combatant status review tribunals are unconstitutional and violate the Geneva Conventions.<sup>7</sup> Despite these findings,

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3 [http://www.it1me.com/learn?s=Yasser\\_Talal\\_Al\\_Zahrani#cite\\_note-3](http://www.it1me.com/learn?s=Yasser_Talal_Al_Zahrani#cite_note-3)

4 Andrei Scheinkman, *The Guantanamo Docket*, N.Y. Times, Jan. 21, 2016, (last visited Nov. 17, 2015) <http://projects.nytimes.com/guantanamo/detainees>

5 <http://projects.nytimes.com/guantanamo/detainees/10012-ahmed-khalfan-ghailani> (subsection of 3, not sure how to format?)

6 Associated Press In San Juan, *Guantánamo inmate becomes ninth detainee to die at prison camp*, (Sept 10 2012) <http://www.theguardian.com/world/2012/sep/10/guantanamo-bay-us-military>

7 *Boumediene v. Bush*, 553 U.S. 723, 725 (2008), *Hamdi v. Rumsfeld*, 542 U.S. 507, 508 (2004), *Rasul v. Bush*, 542 U.S. 466, 467 (2004), *Hamdi v. Rumsfeld*, 542 U.S. 507, 508 (2004)

both the legislative and executive branch of the United States government have been slow to enforce these decisions.<sup>8</sup>

Their hesitancy to act has not been without good reason. A certain number of detainees have resumed fighting the United States and its allies after being released. Studies show that nearly one in six persons released from Guantanamo Bay have returned to combat against the United States.<sup>9</sup> Critics are afraid that, if the detention center is closed, the United States will not have a suitable place to house and interrogate suspected terrorists.<sup>10</sup> Another concern is that if the detention center closes down now, the prisoners will just be released without charge. This does not, however, make less significant the legal question at hand.

#### THE OBAMA ADMINISTRATION'S EFFORTS TO CLOSE GUANTANAMO

In 2009, President Barack Obama, in an effort to fulfill a major campaign promise, issued an executive order aimed at closing the prison at Guantanamo Bay and moving detainees to a replacement prison in Illinois.<sup>11</sup> The executive order was intended to, in President Obama's own words, return the United States to the "moral high ground" and "restore the standards of due process and the core constitutional values that have made this country great even in the

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8 Blake Hulnick, *Out of Sight, Out of Mind in Guantanamo Bay*, 133 Geo. L.J. 133, 135-136. (2015).

9 CNN Library, *Guantanamo Bay Naval Station Fast Facts* <http://www.cnn.com/2013/09/09/world/guantanamo-bay-naval-station-fast-facts/> (last visited Nov 26, 2015)

10 Terrance P Jeffery, DNI 'Confirmed' that 116 Former Gitmo Detainees Returned to Terror or Insurgencies; If More are Related More will, CNS News, March 7, 2015 <http://www.cnsnews.com/news/article/terence-p-jeffrey/dni-confirmed-116-former-gitmo-detainees-returned-terror-or>

11 [https://www.whitehouse.gov/the\\_press\\_office/ClosureOfGuantanamoDetentionFacilities](https://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities) Executive Order 13492

midst of war, even in dealing with terrorism.”<sup>12</sup> However, Congress blocked funding for the displacement of the detainees.<sup>13</sup>

President Obama and a majority of Congress disagree as to whether Article 3 of the Geneva Conventions<sup>14</sup> and Article I, Section 9 of the U.S. Constitution,<sup>15</sup> should be enforced in regards to Guantanamo Bay. Therefore, the law must either be enforced or altered to fit the current parameters of policy and action of the government.

Both the legislative and executive branches of the government have attempted to remedy the conflict, but problems have arisen when one faction attempts to halt the progress of the other. A recent example of this was illustrated in a November 2015 Wall Street Journal article that stated, “President Obama is about to send Congress a doomed plan to close the terrorist prison at Guantanamo Bay, so he can then shut down Gitmo the way he does nearly anything—by executive order.”<sup>16</sup> And in another article, “With no other avenue to shutter the prison, Mr. Obama might look to use executive action to close [Guantanamo]. Such a step would be certain to trigger a backlash.”<sup>17</sup> This backlash is projected to come from Congress, as they are likely to take the President to court—basing their claim on the unconstitutionality of the President’s efforts to step around a united Congress’ decision to keep detainees from entering the

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12 Ed Henry, Barbara Starr and Deidre Walsh, *Obama Signs Order to Close Guantanamo Bay Facility*, Jan. 22, 2009 [http://www.cnn.com/2009/POLITICS/01/22/guantanamo.order/index.html?eref=rss\\_us](http://www.cnn.com/2009/POLITICS/01/22/guantanamo.order/index.html?eref=rss_us)

13 [http://articles.chicagotribune.com/2012-10-02/news/sns-rt-us-usa-prison-bre8911b9-20121002\\_1\\_thomson-prison-guantanamo-detainees-thomson-correctional-center](http://articles.chicagotribune.com/2012-10-02/news/sns-rt-us-usa-prison-bre8911b9-20121002_1_thomson-prison-guantanamo-detainees-thomson-correctional-center)

14 Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135

15 U.S. Const. art. I, § 9

16 *Obama’s Gitmo Workaround*, Wall St. J., Nov. 5, 2015 <http://www.wsj.com/articles/obamas-gitmo-workaround-1446770062> (last visited Nov. 23, 2015)

17 Kristina Peterson, *Obama to Sign Defense Bill Despite Provisions to Keep Guantanamo Open*, Wall St. J., Nov. 10, 2015 <http://www.wsj.com/articles/barack-obama-faces-dilemma-over-defense-bill-1447175692> (last visited Dec. 17, 2015)

United States.<sup>18</sup> These statements demonstrate the intensity of the differing opinions on how to address the legal issues surrounding Guantanamo Bay and the treatment of its prisoners.

The Supreme Court's decision in *Boumediene v. Bush* clearly states that all Guantanamo detainees, despite their status as illegal combatants, are to have the right to habeas corpus—as would any citizen of the United States or prisoner of war. However, members of Congress have, in the National Defense Authorization Act of 2015,<sup>19</sup> refused to provide the means for detainees' "speedy and public trial" to take effect. Congress is not entirely to blame in the situation. The decision made in *Boumediene v. Bush* left many questions open to discretion of the legislative and executive branch.<sup>20</sup>

While the National Defense Authorization Act's blocking of the transfer of Guantanamo detainees to the United States hinders the executive branch's capacity to apply the prescriptions of *Boumediene v. Bush*, an executive order to move detainees to the United States will be in direct opposition to a 91-3 bipartisan decision to keep detainees out of the United States.<sup>21</sup> Therefore, any executive order to close Guantanamo should include provisions for the transfer to third party detainee hosting countries to avoid sparking resistance from Congress to the executive.

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18 Austin Wright, McCain threatens court battle if Obama bypasses Congress on Guantanamo, Politico (Nov. 11, 2015, 7:06 PM) <http://www.politico.com/story/2015/11/guantanamo-gitmo-john-mccain-barack-obama-constitution-executive-orders-215779>

19 FY2015 NDAA

20 Mary Van Houten, *The Post-Boumediene Paradox: Habeas Corpus or Due Process?*, SLR Online, (June 25, 2014) <http://www.stanfordlawreview.org/online/post-boumediene-paradox-habeas-corpus-or-due-process>

21 Kristina Peterson, *Obama to Sign Defense Bill Despite Provisions to Keep Guantanamo Open*, Wall Street Journal (Nov. 10, 2015, 3:17 PM) <http://www.wsj.com/articles/barack-obama-faces-dilemma-over-defense-bill-1447175692>

## HISTORICAL BACKGROUND

The Geneva Conventions<sup>22</sup> refer to four treaties and other additional protocols that establish the base international law for the ethical and humanitarian treatment of warfare. They govern the basic rights of wartime prisoners, the wounded, and civilians. They were designed with conventional warfare in mind and did not include much regarding unconventional warfare techniques and strategies such as those used by terrorist organizations.

At the end of World War II, there were over 700 camps housing over 400,000 prisoners of war across the United States in every state except five.<sup>23</sup> *Most were put to work, and, per the Geneva Convention's mandate of equal treatment for prisoners, this meant that they were paid American military wages for their service.*<sup>24</sup> *Conditions for the prisoners were favorable, and this was made possible through the Geneva Conventions. This example highlights the very purpose for which the Convention was devised. However, it does not provide for clear direction on every war-time scenario. During World War II, it was easily definable who the enemy was, and how the enemy should be treated. The status of the assailants that the United States is faced with today is not so easily definable.*

In 2002, the first detainees were brought to Guantanamo Bay detention center. The Bush Administration had recently made the decision to classify members of terrorist organizations such as al-Qaeda or the Taliban as unlawful enemy combatants. The phrase “unlawful enemy combatant” refers to the denial of prisoner-of-war status to such persons and has sparked a fiery dispute over how they should be treated. This dispute has been ultimately unresolved since the first legislation was passed to alter the original legal definition.

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22 See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]

23 Chip Walker, German Creative Activities in Camp Aliceville, 1943-1946 19 (1985).

24 Antonio Thompson, Men in German Uniform: POWs in America during World War II p.84 (2010).

Until armed conflicts in the Middle East during the last decade, the obscure legal term was largely unknown.

The rarely used legal term “non-combatant” has only recently come into wide usage since the United States’ involvement in the Middle East, particularly in Afghanistan and Iraq. It has been a buzzword in the mainstream media and legal community in large part because of the Bush Administration’s position regarding the status of such individuals. Their view was that the laws of war and fair treatment under the Geneva Convention did not cover the conflict with al-Qaeda or other affiliated terrorist organizations such as the Taliban. Therefore, those affiliated with the Taliban or al-Qaeda were labeled as unlawful enemy combatants, which eliminated prisoner of war status for those individuals.<sup>25</sup>

Many times the argument has been made, in consideration of the current security situation and perceived threat, to deny unlawful enemy combatants the benefit of protection of the law. This legal practice was first evidenced in the Military Commissions Act of 2006, which clearly stated that unlawful enemy combatants are not entitled to access of the United States legal system, and habeas corpus for persons detained in Guantanamo Bay were indefinitely stayed.<sup>26</sup>

Since 2002, Guantanamo Bay Naval Base has contained a military prison known as the Guantanamo Bay detention camp; this has been the center of controversy amid allegations of torture and inhumane treatment. The camp was created to be a place of quarantine for “extraordinarily dangerous people, to interrogate detainees in an optimal setting, and to prosecute detainees for war crimes,” said then Secretary of Defense Donald Rumsfeld.<sup>27</sup>

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25 Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model For Holding And Releasing Guantanamo Bay Detainees*, 29 *Harrv. J.L. & Pub.* 149, 163-172 (2005) (explaining the differences between criminal law and the law of warfare).

26 Pub. L. No. 109-366, 120 Stat. 2600

27 George Allison, U.K. *Defense Journal* Nov. 12, 2015 <https://ukdefence-journal.org.uk/united-states-looking-to-shut-down-guantanamo-bay/> (last visited Feb. 10, 2016)



When the Bush administration adopted the policy that the rights and laws governing the Geneva Conventions did not apply to terrorist individuals engaging the United States (and specifically the conflict the United States was engrossed in in Afghanistan), the main target was the group known as al-Qaeda. Because the Geneva Conventions did not pertain, the minimal humane treatment was extended. This translated to indefinite detainment without trial and subjection to the Central Intelligence Agency's enhanced interrogation program.<sup>28</sup>

Since the detention center's inception, critics have been concerned about the ethics and legality of the practices therein over the last decade. The international legal community has been concerned that immense damage has been done to the standard of international human rights law. The practices of the Naval Base have been condemned by much of the international legal community, as well as the general makeup of the United States model of the war on terror.<sup>29</sup> Already, because of the status of the detainees maintained by the United States,<sup>30</sup>

84 percent of Guantanamo prisoners have been in custody for over ten years with no apparent legal implications.

The justification of the continued detainment of these prisoners is logically and morally based on several factors. These individuals are considered too dangerous to be transferred to normal prisons or are too hardcore to undergo normal interrogation techniques. Those deemed terrorists that are captured and not transferred to Guantanamo are at least afforded a trial.<sup>31</sup> Those outside of the United States get a military tribunal, and grassroots terrorists are tried as criminals.

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28 Manooher Mofidi, *Unlawful Combatants or Prisoners of War: The Law and Politics of Labels*, 36 Cornell Int'l L.J. 59 72 (2003) (discussing the termination of captivity of unlawful enemy combatants).

29 <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1910&context=facpub> (page 13)

30 Andrei Scheinkman, *The Detainees*, N.Y. Times, 2002, <http://projects.nytimes.com/guantanamo/detainees>

31 Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeus Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L.R. 2029, 2055-2056 (2007) (discussing the detention of aliens outside the United States).

Those that find themselves in the naval base are not offered either of those options and this is, in large part, due to the location of the center: Cuba.<sup>32</sup> The purpose of the location is to place them outside of the jurisdiction of habeas corpus.<sup>33</sup> If the detainees were transferred to United States' home soil, theoretically, they would be granted the right to a fair trial.

### PATHS TO CLOSURE

The executive branch of the United States government has, for the last decade, sought to end the operation of Guantanamo Bay in light of Article 3 of the Geneva Conventions<sup>34</sup> and Article I, Section 9 of the U.S. Constitution.<sup>35</sup> Despite these efforts, the President and Congress have remained entangled in a bitter debate. Many fear that detainees are not being held accountable for their actions and may resume their fight against the United States if released. Regardless of fears or potential threats, there are two options for reconciliation with the law: it must either be enforced or altered to remedy this unfortunate situation.

Senate Majority Leader Mitch McConnell (R., Ky.) illustrated the problem at hand when he spoke about the National Defense Authorization (NDA) Act: "Each of these bills contains a clear, bipartisan prohibition on the president moving Guantanamo terrorists into the backyards of the American people."<sup>36</sup> The Senate passed the NDA act with an overwhelming majority; the final tally was 91-3. One of the bill's chief provisions bars the Obama administration from transferring Guantanamo prisoners out of the detention center.

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32 Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L.R. 2029, 2055-2056 (2007) (discussing the detention of aliens outside the United States).

33 *Id.* 2099-2108

34 Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135

35 U.S. Const. art. I, § 9

36 *Id.* 16 (<http://www.wsj.com/articles/barack-obama-faces-dilemma-over-defense-bill-1447175692>)

In response to this, White House Press Secretary Josh Earnest was quoted saying, “We have long expressed our disappointment at the repeated effort by Congress to impede the closing of the prison at Guantanamo Bay. The president believes closing that prison is a national security priority.”<sup>37</sup> The emphasis on national security increases the likelihood that President Obama will use an executive order to bypass the bill.

Mentioned above were a few reasons why there is such effort exerted to keep detainees out of the heartland and in Guantanamo. A paramount concern is that many detainees will resume fighting the United States and its allies after release.<sup>38</sup> Although there is minor evidence to support this, if the supervised transfer program continues, this is not of cardinal concern. This program ensures that host countries take responsibility for a certain number of detainees, and they are transferred there, in most cases, permanently. Detainees only return to the battlefield when released unsupervised or into areas that are experiencing duress such as Yemen. If Guantanamo Bay is closed, it is important that national security is maintained at the same time. That is very possible if the program is closely followed and procedures are set in place to keep this from happening.

A transfer program model, such as the one mentioned above, would also be a suitable solution to two significant concerns: First, that detainees housed at Guantanamo are simply too dangerous to be transferred to the United States’ mainland prisons; and Second, the claim that if the detention center is closed, the United States will lose a strategic advantage in the ability to house and interrogate suspected terrorists. This is begging the question of what is more important: national security or civil liberties? It is of supreme importance that balance is kept between the two, and it is clear that power cannot be given to one without the erosion of the other. If we must house and interrogate suspected terrorists, we must do so legally, following the rule of law.

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37 <https://www.whitehouse.gov/the-press-office/2015/11/10/press-briefing-press-secretary-josh-earnest-11102015>

38 CNN, Guantanamo Bay Naval Station Fast Facts <http://www.cnn.com/2013/09/09/world/guantanamo-bay-naval-station-fast-facts/>.

Another concern is that if the detention center is closed down immediately that the prisoners who are indeed guilty of terrorist actions will be released without penalty. If no penalty is imposed, some worry the guilty ex-prisoners will continue to repeat their offenses. When the Department of Defense releases detainees, it continues to track them.<sup>39</sup> This is a necessary outcome if we do not choose to bring detainees to American soil to be tried.

It has been said that the prisoners that reside in Guantanamo Bay are “hardened” and can withstand normal interrogation techniques. This is anecdotal and is not backed by real evidence. Enhanced interrogation techniques have proven ineffective since the United States has employed them in the war on terror. When Abu Zubaydah was first interrogated by the FBI using rapport-building interrogation methods, those methods were very successful. He was then transferred to CIA custody where he was subjected to enhanced techniques.<sup>40</sup> It was not needed and did not supply actionable intelligence.<sup>41</sup> This example highlights a major flaw in this argument. Those that make this claim do not understand who these detainees really are and what motivates them. Very few of the detainees kept at Guantanamo Bay are considered “hardened.” Even among those that might be “hardened,” these enhanced techniques do not reveal any more information than traditional techniques do.

## CONCLUSION

The discussion of Guantanamo Bay is much more than whether the United States should close the Detention Center; it is a discussion of the balance between civil liberties and national security. In post 9/11 America, policy arguments have shifted back and forth between

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39 Greg Botelho & Faith Karimi, *Guantanamo Bay: What happens when detainees held for years get out?* (2014) <http://www.cnn.com/2014/06/04/us/gitmo-detainees-history/>

40 Peter Grier “*Detainee treatment: new details*”. *Christian Science Monitor*. May 23, 2008

41 Why enhanced interrogation failed <http://thinkprogress.org/report/why-enhanced-interrogation-failed/#Ib>

going too far in restricting liberty and not going far enough to adequately protect the country. The case of Guantanamo Bay is a great embodiment of this debate. It is a question that the American Legal System has grappled with for many years.

There is currently a high probability that President Obama will seek an additional executive order to ensure the closure of the detention center before his departure from office, and this article's analysis has attempted to take that into account. However, with the United States Congress intent on blocking any attempts to transfer detainees to the United States mainland, it appears that the quickest and easiest legal option is to use a transfer program. Seeking other avenues would only cause further strain on international relations and put more pressure on the branches of government to act. If a suitable transfer program is achieved, this will help create a balance between liberty and security that the rule of law attempts to govern.

Closing Guantanamo Bay has been a stalemate between the three branches of government. Many years have passed without a resolution to the United States' problem of unconstitutionality and lack of compliance with international law. Although the solution provided in this paper is not optimal in terms of closing the prison quickly, it is a practical step toward reconciliation in the eyes of domestic and international law. Nonetheless, many questions remain to be answered, and this paper has only considered a small portion of the many arguments.