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The Legal Dilemma of Guantánamo Detainees From Bush to Obama

In the heated debate over Attorney General Eric Holder's announcement that Khalid Sheikh Mohammed would be tried at a Guantánamo military commission, Americans, whether in favor or opposed to the decision, seem to be suffering from collective amnesia as to how this decision came to pass. Mohammed's commission proceeding will take place ten years after 9/11 for two reasons. First, the Bush administration unnecessarily, immorally, and illegally engaged in 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 was committed, however narrowly and self-servingly defined, has been acknowledged by President Bush himself; 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 ten years of delay has only as justification 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 required for the detainees in the decisions of *Rasul v. Bush*, *Hamdan v. Rumsfeld*, and *Boumedienne v. Bush*, 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 to explore another legal argument for not complying. If the administration after *Hamdi* in 2004, and certainly after *Hamdan* in 2006, had declared that the commissions would utilize 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 justice for the victims.

In *Rasul v. Bush*, the Supreme Court held that the U.S. 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."

In 2006, in *Hamdan v. Rumsfeld*, the Supreme Court held these military commissions, as established by the executive branch, were invalid as not in compliance with requirements of the Uniform Code of Military Justice and the Geneva Conventions. 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. It authorized non-Department of Defense interrogators to use enhanced interrogation techniques so long as they do not "shock the conscience," and it granted immunity for those who have sanctioned or engaged in common Article 3 "outrages upon personal dignity."

The "*habeas*-stripping" provisions of the 2006 MCA reached the Supreme Court in 2008, in a 5-4 decision with the majority opinion by Justice Kennedy and dissents from Justices Alito, Scalia, Thomas, and Chief Justice Roberts. In *Boumedienne v. Bush*, five of the Justices concluded that Congress did not have the constitutional authority to suspend *habeas corpus* for detainees, rendering Section 7 of the 2006 Military Commissions Act unconstitutional because no suspension was allowed unless "in cases of rebellion or invasion the public safety may require it." 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 the majority should not have even reached the second issue but remanded to the lower court to determine if the CSRT procedures were an "adequate substitute" for *habeas* review. Justice

Scalia, writing for all dissenters, argues that *habeas* review does not extend to aliens seized and held outside the U.S.

In this landmark 2008 decision of *Boumediene*, the Supreme Court thus held that the U.S. 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 Military Commissions Act (MCA), which stripped federal courts of their jurisdiction to consider Guantánamo detainees' *habeas* petitions, "effects an unconstitutional suspension of the writ." 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*." With the extension of federal court jurisdiction of 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 § 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:

1. The statutory or constitutional validity of the CSRT procedure;
2. 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;
3. What must be demonstrated by the government or the detainee at a *habeas* proceeding; or
4. What procedures are necessary to satisfy the due process requirements for *habeas* review.

Yet another military commissions act was signed into law by President Obama on October 28, 2009. Under this current act:

1. A military judge presides over commission proceedings;
2. The President must approve executions;
3. Appeals are permitted to the Military Commissions Court of Review, the District of Columbia Circuit Court, and ultimately the Supreme Court;

4. There is jurisdiction over 32 crimes, including conspiracy, terrorism, and material support of terrorism; and
5. Defendants are guaranteed counsel.

The term alien "illegal enemy combatant" in the 2006 Act changed to "unprivileged enemy belligerents (UEBs)," which is defined as someone who either:

1. Engaged in hostilities against the U.S.;
2. Purposefully and materially supported hostilities against the U.S.; or
3. Was a part of Al Qaeda at the time of the alleged offense.

Only alien UEBs are subject to a military commission. Hearsay evidence is still admissible, but it is much more restricted than under the 2006 MCA, and there is exclusion of statements obtained by torture: "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."

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

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, 2011 ... in order to prevent any future acts of international terrorism against the United States by such ... persons" (Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a) (2001)). 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" (*Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004)).

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" (*Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010)) (emphasis added). To meet the threshold showing that a detainee was "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 (*Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010); *Hatim v. Gates*, 632 F.3d 720, 721 (D.C. Cir. 2011)). 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 (*Uthman v. Obama*, 2011 WL 1120282, *2 (D.C. Cir. 2011); *Salahi v. Obama,* 625 F.3d 745, 752 (D.C. Cir. 2010)). 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" (*Bensayah*, 610 F.3d at 725). Furthermore, the 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 U.S. military took possession of the detainee (*Salahi*, 625 F.3d at 750-51). 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 (*Awad*, 608 F.3d at 11).

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 (*Odah v. United States*, 611 F.3d 8, 13 (D.C. Cir. 2010) (calling such a standard "now well-settled law")). 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" (*Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) (emphasis added)). 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" (*Al-Bihani*, 590 F.3d at 878 (emphasis added)). 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 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" (*Al-Adahi,* 613 F.3d at 1104-05). 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 (*Id.* at 1105).

The cases decided in the D.C. Circuit to date have included detailed analyses of the evidence presented by the government on whether 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 (*Awad,* 608 F.3d at 7). 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" (*Al-Adahi*, 613 F.3d at 1111). 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 (*Salahi*, 625 F.3d at 753). 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* (*Esmail v. Obama*, 2011 WL 1327701, *3 (D.C. Cir. 2011)). The following non-exhaustive list of factors have been found, by the district courts and appellate courts on review, to be factors 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 (*see, e.g., Awad*, 608 F.3d at 10); close connections with Al Qaeda operatives (*see, e.g., Salahi*, 625 F.3d at

753; *Al-Adahi*, 613 F.3d at 1107); the location of capture (*see, e.g., Barhoumi v. Obama*, 609 F.3d 416, 432 (D.C. Cir. 2010)), especially significant if in the vicinity of Tora Bora (*see, e.g., Uthman*, 2011 WL at *3) or at a known Al Qaeda guesthouse (*see, e.g., Barhoumi*, 609 F.3d at 427); being captured along with known Taliban fighters or Al Qaeda operatives (*see, e.g., Esmail*, 2011 WL at *2; *Uthman*, 2011 WL at *3; *Al-Adahi*, 613 F.3d at 1110); providing arms training to militia members for operations against U.S. forces (*see, e.g., Barhoumi*, 609 F.3d at 427); receiving military instruction at a known Al Qaeda or associated terrorist training camp (*see, e.g., id.*; *Esmail*, 2011 WL at *1; *Odah*, 611 F.3d at 15-16; *Al-Adahi*, 613 F.3d at 1109); illogical or false explanations for presence in Afghanistan or association with Taliban or Al Qaeda fighters (*see, e.g., Esmail*, 2011 WL at *2; *Uthman*, 2011 WL at *5); attendance at religious schools known as Al Qaeda recruiting grounds (*see, e.g., Uthman*, 2011 WL at *4); traveling along known Al Qaeda routes to and from Afghanistan (*see, e.g., id.*; *Odah*, 611 F.3d at 16); presence at Al Qaeda guesthouses during travels (*see, e.g., Uthman*, 2011 WL at *5; *Al-Adahi*, 613 F.3d at 1107-08); lack of passport at capture (*see, e.g., Uthman*, 2011 WL at *5); following directions of Al Qaeda or Taliban officials (*Odah*, 611 F.3d at 15); and Al Qaeda documentation listing member names including the detainee's, when presented in conjunction with corroborative testimony from other operatives (*see, e.g., Awad*, 608 F.3d at 8-9).

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" (*Al-Bihani*, 590 F.3d at 876 (internal quotation symbols omitted)). Basing their decision off 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" (*Id.* at 876-77). Therefore, the detainees in Guantánamo *habeas* proceedings are "not subject to all the protections given to defendants in criminal prosecutions" (*Al-Adahi*, 613 F.3d at 1111 n. 6).

Recognition of this distinction between normal criminal prosecutions and the *habeas* petitions of Guantánamo detainees is especially important

in the context of 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" (*Al-Bihani*, 590 F.3d at 879). 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*" (*Awad*, 608 F.3d at 7) (emphasis added). A successful challenge to such evidence must establish, therefore, not that the evidence simply is hearsay, but that it is "unreliable hearsay" (*Barhoumi*, 609 F.3d at 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 (*Awad*, 608 F.3d at 7). 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 (*Id.*). A "permissible view" of the evidence can therefore never be clearly erroneous (*Id.*). 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" (*Barhoumi*, 609 F.3d at 424 (quoting *Al-Bihani*, 590 F.3d at 870)).

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" (*Id.).* The question of "whether a detainee's alleged conduct ... justifies his detention under the AUMF is a legal question" that is therefore reviewed *de novo*; the question of "whether the government has proven that conduct," however, is a "factual question" that is reviewed for clear error under the very difficult standard delineated above (*Id.*).

On March 7, 2011, President Obama issued Executive Order 13567, entitled "Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force" (Exec. Order No. 13,567 (2011), *available at* http://www.whitehouse.gov/sites/

default/files/Executive_Order_on_Periodic_Review.pdf), applicable to "those detainees held at Guantánamo" on March 7 who had been either "designated for continued law of war detention" or "referred for prosecution" (*Id*. § 1(a)). The Order continues to apply to such detainees even if they are transferred from Guantánamo to another United States detention facility (*Id*. § 1(c)). The Order specifically excludes "those detainees against whom charges [were] pending" and against whom "a judgment of conviction" had been entered (*Id*. § 1(a)). 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" (*Id*. § 1(b)). 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"* (*Id*.). This Order, however, stands in direct contravention to the previous command issued by Obama in January, 2009 (Exec. Order 13,492 (2009)), "Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities," *available at* http://edocket.access.gpo.gov/2009/pdf/E9-1893.pdf), which ordered the closure of Guantánamo's detention facilities by no later than January, 2010, (Exec. Order 13,567 at § 3) and also demanded an immediate "review of the status of each individual currently detained at Guantánamo" (*Id*. § 4(a)). The 2011 Order's review procedure sets a baseline standard warranting the continued detention of a detainee that hinges on whether "it is necessary to protect against a significant threat to the security of the United States" (Exec. Order No. 13,567 at § 2). 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) (*Id.* § 3(a)-(d)). 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 (*Id.* § 9(b)).

The Order requires an initial review for every detainee within one year of March 7, 2011 (*Id.* § 3(a)). 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 (*Id.* § 3(a)(1)). During these proceedings, the detainee shall have the assistance of a government-provided representative or can retain private counsel (*Id.* § 3(a)(2)); the detainee, with counsel, can present a statement, introduce any relevant information, answer questions, and call available witnesses with material information (*Id.* § 3(a)(3)). The Secretary of Defense, in opposition to the detainee's release, shall provide to both the Board and detainee's representative "all information ... relevant to the determination" on whether the detainee meets the baseline standard described above, which includes "all mitigating information" (*Id.* § 3(a)(4)-(5)). The information provided to counsel may, on determination by the Review Board, be provided in the form of a substitute or summary in order to "protect national security ... intelligence sources and methods" (*Id.* § 5). 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 and this must be provided to the detainee within thirty days (*Id.* § 3(a)(7)).

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 (*Id.* § 3(b)). 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 (*Id.* § 3(c)). 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 (*Id.*). Finally, a Review Committee conducts a "Board review" if a Committee member so seeks within thirty days, or the Board cannot reach an initial consensus (*Id.* § 3(d)).

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 of the United States" that is

"consistent with [U.S.] national security and foreign policy interests" (*Id.* § 4). 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 (*Id.* § 5(1)-(2)). 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 (*Id.* § 10(b)).

President Obama made a campaign pledge to close Guantánamo by January 2010, returning as many detainees as advisable to their states. Through U.S. 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. Congress responded by seeking to bar transfer of detainees to the U.S. 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). 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. Complicating matters even more, the attempted airplane bombing by a Yemeni on Christmas day in 2010 suspended all transfers of Guantánamo detainees to Yemen.

President Bush transferred 537 detainees. 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. President Obama has transferred 67, including more than a dozen in Europe.

Where to return, or where and how to try the remaining detainees? Approximately 72 of the 779 detainees remain as of April 2011. According to a January 22, 2010, Justice (State, Homeland Security, Dept. of Defense, Justice, CIA, and FBI officials) Task Force Report, of the 110 who might be released, 80 were Yemeni. Of those, approximately 30 were eligible for immediate release and 30 others when Yemen is sufficiently stable. According to the same report, 35 detainees were to be tried in federal court or commissions. Most problematic, there are approximately 47 to be held indefinitely due to evaluations suggesting they are too dangerous for release,

but for whom there is insufficient admissible evidence for a commission proceeding, according to Guantánamo documents leaked in April of 2011 (The Guantánamo Files).

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" 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, in their fanaticism proud to admit to them. Among many other military heroes, General Fred Haynes, a young captain with the U.S. 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 U.S. captors. 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, despite the substantial likelihood that evidence against them and others could have otherwise been 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 justice will hopefully begin for the victims of 9/11, as well as the victims of the Cole bombing in 2000, in 2011. The proceedings will take 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 U.S. 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 confession" by the Obama administration that military commissions are the "best balance of security needs and protections for liberty." 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.

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