The Gitmo Myth and the Torture Canard

The closing of a detention camp amid false accusations of abuse was the culmination of a brilliant campaign by activist lawyers.

By Arthur Herman

ON JANUARY 21, 2009, President Barack Obama issued his first executive order: He was closing the detention center at the Guantánamo Bay Naval Base in Cuba and calling a halt to the military commissions created in late 2001 to try terrorist suspects detained there. Like the startling opening chord of a Beethoven symphony, Obama's action was intended to herald a new tone in America's "war on terror" and a restoration of America's moral standing. The response was electric. The facility at Guantánamo (Gitmo for short) had become "America's most notorious prison," as Fox News put it. In the minds of many, it was the American equivalent of the Bastille or the KGB's Lubyanka prison: a dungeon used to isolate, intimidate, and torture generally hapless inmates, many of whom were innocent of any crime against the United States. Dana Priest of the *Washington Post* took to the paper's front page to proclaim joyously that "with the stroke of his pen," Obama had "effectively declared an end to the 'war on terror,' as President George W. Bush had defined it." Now Obama could begin the process of rehabilitating America's image around the world, the very image Gitmo had done so much to blacken.

Then several strange things happened. Obama's order "closing" Gitmo actually left it open for a year,

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ostensibly until new arrangements could be made for the 240 or so inmates still detained there—though Obama admitted privately it might have to stay open longer than that. Later, Attorney General Eric Holder announced that, far from being "the Bermuda Triangle of human rights" that Human Rights Watch's Wendy Patten had dubbed it, Gitmo was in full compliance with the humane-treatment provisions of the Geneva Convention. Meanwhile, the military commissions, which Human Rights Watch and others groups had denounced as a travesty of justice, were only being suspended for 120 days, pending a review—and, indeed, following that review, will be reinstated almost exactly as they were before.

If one adds to this mix:

• the twelve separate inquiries into the abuses alleged by critics and former detainees at Gitmo that found no evidence of those abuses taking place;

• the revelation during the release earlier this year of the so-called "torture memos" that waterboarding and other harsh interrogation techniques had been applied to exactly *three suspects* in the course of eight years and had never been standard operating practice at Gitmo;

• the evaluation by the Combating Terrorism Center at West Point that 73 percent of Gitmo detainees were "a demonstrated threat" to Americans;

• and, finally, the fact that the detention facility was created in the wake of a declaration by Congress in September 2001 that "all necessary and appropriate force" should be used "against those nations, organizations, or *persons*" [emphasis added] responsible for the attacks of September 11;

—one may be permitted to wonder why, exactly, the pressure to close the prison facility has been so intense and long-lasting.

The standard argument is that the public shift in attitude toward Gitmo was gradual, and reflected a growing disillusionment with the war on terror as the sordid details of how George W. Bush and his assistants chose to wage it came out, including the supposed secret use of torture. Once the detention center had become a cesspool of human-rights abuse, the evil spawned there then seeped into other facilities where prisoners in the Bush war on terror were being held, most notoriously the Iraqi prison at Abu Ghraib. In 2004, former Vice President Al Gore announced that Abu Ghraib "was not the result of random acts by a 'few bad apples': it was the natural consequence of the Bush administration policy" of retaining and interrogating inmates at Gitmo.

What this account and others like it fail to take into consideration are the aggressive and unending efforts of a cadre of lawyers, activists, left-leaning Democrats in Congress, and civil libertarians against the facility, its purpose, its goal, and its existence. These efforts began even before it was opened, in November 2001, and continue to this day. The anti-Gitmo forces worked tirelessly to shape the public perception that Gitmo was the red-hot center of an aggressive policy approach that led the leftist financier George Soros to declare: "The biggest terrorist in the world is George W. Bush."

The enemies of Bush and Gitmo have succeeded brilliantly. But in so doing, they have done grave violence to the truth about the Guantánamo Bay facility, have aided in the release of prisoners who have since committed acts of terrorism outside the United States, and may yet succeed in having Barack Obama's government release young men with terrifying ambitions for murder and mass destruction onto the soil of the United States.

Why Gitmo?

IN OCTOBER 2001, the United States invaded Afghanistan to crush the al-Qaeda terrorists who had free run of the country and the Taliban government that was housing them. Within weeks, the U.S. military found itself holding tens of thousands of prisoners, including foreign al-Qaeda fighters who had been training in terrorist camps in the Afghan hinterland.

The tale would later be told that many of these prisoners were hapless shepherds, farmers, and even tourists caught up in the fighting, and that the Northern Alliance, the Afghan guerrilla group with which the United States was allied in the fight against the Taliban, was handing over innocent men whom they falsely dubbed al-Qaeda members in order to collect a money bounty.

In point of fact, the military captured more than 70,000 men and put every one through a rigorous screening process. Ten thousand were released immediately. By the time the military had completed its work, only 800 remained in custody. These were the ones they had deemed hard-core trained terrorists who could not be released without running the risk they would rejoin the battle. The question was what to do with them.

From the beginning, the Department of Defense and its head, Donald Rumsfeld, were deeply reluctant to take on the job of detaining these prisoners who, unlike normal POWs, fought for no country, wore no uniforms, and had systematically broken the rules of

war. In a conventional war, prisoners are held to keep them from being returned to the fight. The problem here was that there was no conventional battlefield; in a war of terror, a combatant can theoretically strike anywhere in the world. It was not clear to anyone what was to be done with this new model of stateless combatant. Rumsfeld "hated the idea of being a jailer," as his aide Douglas Feith relates in his memoir, *War and Decision*, in large measure owing to the fact that they were not automatically covered under the Geneva Convention. Deciding how they were to treated or tried posed immense legal difficulties that no lawyer at the Department of Defense was eager to take on.

Finding a place to put them proved the easy part. In 1987, a prison had been set up for the United States Southern Command at Guantánamo Bay, Cuba. The site was a military location and therefore secure—so secure that eventually the CIA transferred its "high-value" al-Qaeda detainees like Khalid Sheikh Mohammed there. It was not in a Muslim country, which lessened the possibility of a prison break or other political complications. Finally, it was under United States control but not on United States soil—which, according to a 1950 Supreme Court decision in *Johnson* v. *Eisentrager*, meant that prisoners could be lawfully brought under American custody from various international locations to be detained and processed without the involvement of civil courts.

Gitmo was never meant to be a prison where inmates were to serve sentences for crimes. It was, in the words of a Defense Department document, a detention facility set up in order to prevent "enemy combatants from continuing the fight against the US. and its partners in the war on terror." Its goals were military and tactical, not juridical or penal. Still, the conditions under which these unconventional prisoners were to be held did involve questions.

The questions were especially complex because the facility became a place where military, FBI, and CIA interrogators would all become involved in questioning al-Qaeda suspects to determine who was guilty of involvement in the 9/11 plot and whether other attacks were being planned or were imminent. Since all these agencies operate under different legal strictures, sorting out who could do what was immensely difficult.

In the end, addressing all these legal questions fell to the Justice Department's Office of Legal Counsel (OLC), then led by John Yoo.

The Memos

YOO WAS TASKED with providing a set of ground rules for detention, interrogation, and trial of the detainees. The Department of Defense had wanted to treat these as three separate issues. However, Yoo and the OLC lawyers believed they had to be handled as parts of a single policy—especially since at the same time they were also setting guidelines on how the CIA would be allowed to question suspects that fell into *its* hands.

Those rules and memos were assembled over the course of many months bridging 2001 and 2002, in the immediate shadow of 9/11 with the possibility of a second massive attack looming on the horizon. Later, the press would brand them "torture memos," and the Obama administration's decision to release the full texts of those memos in April 2009 fed the frenzy. However, they could just as well be branded "anti-torture memos." Yoo and his colleagues used them to define the boundaries at which interrogation of unwilling and uncooperative prisoners would cross over into the category of torture. Once those boundaries were breached, any action would be illegal under United States law and international treaties, including the 1994 United Nations Convention Against Torture. They looked to practices by Israeli as well as British intelligence services that had undergone legal scrutiny in their own countries, and they also considered historical norms about torture since the Middle Ages.

> Yoo's work would be condemned as the "torture memos" upon their release, but they could just as well be branded "anti-torture memos."

The OLC understood as well as any of its later critics that torture—the cruel and needless infliction

of pain in order to dominate and control others or to exact confessions or information—was barbarism. *It was precisely in order to prevent such barbarism that the memos were drawn up in the first place*. It was also why then, and later, army and CIA interrogators tried to avoid even drawing close to those boundaries without explicit authorization.

Critics further assert that the OLC memos "denied" Geneva Convention status to the al-Qaeda and Taliban prisoners at Gitmo. One key lawyer, Michael Ratner, has claimed that by "ignoring" the Geneva Convention in this way, the Justice Department rules were in "violation of half a century of U.S. precedent." This is incorrect. Yoo and the OLC were not making policy in the memos. They were attempting to describe the law as it stood. As Yoo has pointed out, it was up to the president and the president alone to decide whether the Gitmo prisoners should be treated in accordance with Geneva Convention standards (which he did, in 2002). The prisoners in no way fit the standard of "lawful combatant" as defined by the Geneva Convention's Common Article 3 and therefore could not *automatically* be accorded the treatment the Convention required. Indeed, because they were not in uniform and were fighting under no flag, the rules applying specifically to that category could not apply without violating the sense of the Convention itself—although that did not mean they could be treated in any way the Gitmo guards and commandant saw fit.

The rules on Gitmo detention and on interrogation comprised a valiant attempt to deal with an unprecedented legal situation.

There were other practical reasons for refusing to treat the Gitmo prisoners like German or Italian POWs in World War II, or somewhat later, Iraqi soldiers captured in Operation Iraqi Freedom (no one, then or later, *ever* suggested that the Geneva Convention, including Common Article 3, did not apply to prisoners captured in Iraq). Al-Qaeda recruits are trained in the arts of conspiracy, assassination, and murder. A system of open barracks, as in a conventional POW camp, would allow detainees to organize plots, even rebellions, within the compounds (organizing riots in a POW camp *is* a violation of Common Article 3 of the Convention), and to take vengeance on their own number who were suspected of confessing or cooperating with American authorities. Detention in separate cells, as in a conventional prison, seemed the only way to overcome this logistical nightmare.

The rules on Gitmo detention and on interrogation constituted a valiant attempt to deal with an unprecedented legal situation. The same was true of the system of military "commissions" or tribunals for trying suspects at Gitmo. Here the Justice Department largely followed the precedent of tribunals used by the American military during World War II, and upheld by the U.S. Supreme Court in its 1942 decision *Ex Parte Quirin*.

Again, critics of the tribunals would accuse Yoo and the Bush administration of trying to make an end run around the United States criminal-justice system by establishing a separate judicial review process for terror suspects and turning Gitmo into a secret offshore detention haven outside the scrutiny of the American justice system. In fact, Yoo and his colleagues were trying to *protect* the American legal system from stepping into a political-military minefield. Imagine that the Gitmo terrorists had been put into the standard criminal-justice system, with its time-consuming rules about due process, *habeas corpus,* and countless appeals. Imagine, further, that in the course of all this there had been a second major attack like 9/11, or an al-Qaeda-inspired riot occurred in a U.S. prison that had involved the taking or murdering of hostages. There would have been immense public pressure for the administration to "do something," to bend or break normal rules in the interest of swift justice. That highly plausible scenario, made reality, would have threatened the integrity of the American justice system. The commissions were intended as a prophylactic means of protecting the American legal system from an unprecedented situation it was not designed to manage.

The plan backfired. The enemies of the Bush White House and the war on terror were working on their own political agenda, involving an attack on the Gitmo system *through* the courts.

Enter, Stage Left

WHEN PRESIDENT Bush announced in November 2001 the establishment of the detention center and plans for military commissions to try cases, Michael Ratner of the Center for Constitutional Rights was furious. "The idea that you could pick up people anywhere in the world and hold them forever without a trial is outrageous," he later told the magazine *Mother Jones*. Ratner immediately began organizing an effort to offer legal counsel to the first detainees, and organized teams of attorneys working pro bono from some of Washington's largest law firms to bring suit on behalf of the detainees.

Ratner is a veteran of the ideological wars inside the United States. The Center for Constitutional Rights was founded by the late William Kunstler, who had served as defense attorney for the Chicago Seven, the Black Panthers, and other violent radical groups. Ratner himself had been at the head of the National Lawyers Guild, once a Stalinist front group, before representing Fidel Castro, members of Hamas, and Omar Abdel Rahman, the blind sheikh who organized the original bombing of the World Trade Center back in 1993. One of Ratner's colleagues, Lynne Stewart, was eventually convicted of providing material aid to Rahman while acting as an officer of the court. Ratner publicly defended Stewart's actions, and was a dedicated foe of the war against the Taliban in Afghanistan.

Ratner's allies in the fight for the detainees included Islamist lobbying groups willing to spread the notion that the Gitmo detainees were victims of racial and religious discrimination; liberal lawyers at prestigious Washington firms who had been taught by their law professors that the law's role is to effect social and political change and who wished to do something more meaningful than work on corporate mergers; and eventually a Democratic party understandably looking for an issue it could use to undermine public support for George Bush (running in the mid-80s in early 2002) and get them back in the political game.

In February 2002 Ratner filed his first petition for habeas corpus for a British-born Gitmo detainee named Shafiq Rasul—a petition that would have fateful consequences two years later. At the time, however, the focus of Ratner and his allies was *not* torture or the interrogations at Gitmo. Instead, they worked to plant the idea in the public's mind that most, if not all, of these inmates might be innocent victims, picked up on the battlefield by mistake.

The inmates themselves were happy to oblige. Shafiq Rasul, for example, told Ratner and anyone who would listen that he was no terrorist. He was an innocent tourist whom the Taliban had abducted while he was traveling in Afghanistan, and that during the American invasion he had been forced to take up an AK-47 to use in self-defense. Rasul's story and similar ones told by two other Gitmo captives born in the English town of Tipton, Ruhal Ahmed and Afiq Iqal (later known as the Tipton Three), became the centerpiece of Ratner's campaign to open the gates at Gitmo. Their picture adorns his 2007 book, *The Trial of Donald Rumsfeld*.

Clearly, Ratner insisted, an injustice had been done to these and other foreign nationals caught in the American net after the war in Afghanistan. The fact that Bush had excluded Gitmo from normal judicial review meant that the innocent were bound to suffer, while the remote location of Gitmo ensured that they were left to the mercy of their jailers.

Ratner's portrait of Gitmo's detainees was wildly off the mark. But it did reflect the fact that, in its early months, conditions at Gitmo were chaotic. The population of the naval base had swelled from 2,000 to 10,000, among them military personnel, FBI, CIA, Army as well as Drug Enforcement Agency interrogators, doctors, Arab translators, and Muslim chaplains, and of course, the detainees themselves. One of the first structures in the prison camp was a trailer for the International Commission for the Red Cross, which had full access to the detainees and collected mail to be sent to their relatives.

New soldiers and units were constantly rotating through. No one had yet properly defined how Gitmo would function as both a detention *and* an interrogation facility. In addition, there were no rules on how to punish inmates who attacked their guards or otherwise violated camp rules. There was, and never has been, a disciplinary system for prisoners at Gitmo. To this day prisoners are not punished for their crimes or offenses, even when they attack guards or pelt them with feces.

In fact, before Major General Geoffrey Miller took charge as commandant in November 2002, Gitmo was, according to one eyewitness, "an island of divided loyalties and waning morale." The environment had grown so stale and hermetic that it became a breeding ground of rumor about unorthodox and bizarre interrogation tactics, including inmates who

claimed they were being slapped, shouted at, or subjected to loud music; interrogators pretending to defecate on the Koran; and female interrogators sitting on detainees' laps in order to humiliate them, or splashing them with red ink pretending it was menstrual blood. Every one of these was investigated and proved false, but the rumors were passed along by FBI interrogators in memos that expressed concern about Gitmo interrogation tactics being used by personnel working for other cabinet agencies. They seemed to verify the picture painted by Ratner and others that the facility was reeling out of control.

Three Categories

IN POINT OF FACT, the main problem was that Gitmo was proving an ineffective facility when it came to uncovering intelligence. Given the hardened nature of the terrorists being held there, and the urgency of getting information from them, an experienced Army interrogator named Paul Rester (who arrived at Gitmo in 2002) had assumed that the "gloves would be off" in interrogation tactics. To his shock, he found the rules were stricter even than the Army field manual's: "It was a much more restrictive environment than anywhere else I've conducted interrogations." Prisoners were allowed to defy their questioners and treat them with contempt, even as FBI and Army interrogators were often working at cross-purposes.

Perhaps the best case study was that of Muhammad el-Qahtani, a Saudi national caught by U.S. forces on the border of Pakistan and Afghanistan in December 2001. Like other al-Qaeda operatives, Qahtani claimed that he was an innocent man who had only been visiting Afghanistan to buy and sell falcons. Interest in Qahtani changed abruptly in July 2002, when the FBI learned that he was the same Qahtani who had been denied entry at Orlando Airport on a flight from Canada on August 4, 2001—and that Muhammad Atta, mastermind of the 9/11 attacks, had been waiting at Orlando Airport that same day.

Suddenly deemed a "high-value" detainee, Qahtani was moved on orders of the Navy to its brig on the base for isolation. There the FBI took charge and for 30 days carried on a desultory interrogation with its usual, buttoned-down, fully Miranda-warning-inspired style of criminal investigation—and got nowhere.

After thirty days, the Army stepped in and took charge. The FBI was furious at its removal from the case, and its investigators sent e-mails decrying the military's attempts at breaking Qahtani's will, which included yelling, calling him names, subjecting him to sleep deprivation and loud music, and duct-taping his cell shut. "It was stupid and ineffective," Paul Rester later said. "But it wasn't torture or abuse."

However, one FBI agent saw the guards bring a growling dog into the interrogation room, which he assumed was being used to intimidate Qahtani—although subsequent investigation showed that dogs at Gitmo were used to escort prisoners back and forth to their cells, not to threaten them. Since that detail was included in the FBI e-mails, and later leaked, the idea that dogs were used to abuse prisoners would become a fixture in the false portrait that was being painted of the goings-on at Gitmo.

Interrogators were still getting nowhere, so on October 11, 2002, the head of the Southern Command, General James Hill, was asked to approve an enhanced interrogation schedule, divided into three categories of coercion beyond those covered in the U.S. Army field manual:

Category I, yelling and deception.

Category II, stress positions for up to four hours, light deprivation, removal of clothing, shaving of facial hair (very shaming to a Muslim male), and exploitation of fear phobias, including fear of dogs.

Category III, "the use of scenarios" to convince the detainee that his life is in danger, including waterboarding.

On November 15, against FBI objections, Hill approved the use of Categories I and II, *but not* Category III. He also approved a plan for applying them to Qahtani by degrees on a thirty-day schedule beginning on November 23. On December 2, Rumsfeld weighed in with his own authorization, which, again, *did not include waterboarding*. Rumsfeld had his doubts in any case, and on January 15 rescinded his authorization pending further review.

Still, that proved to be enough time to break Qahtani. He was subjected to 20-hour interrogation sessions, being tied to a dog leash (no actual dogs were involved), having water poured continually on his head (but no waterboarding), while women's clothes were dropped on his face and a bra strapped across his clothed chest. These and other humiliations, including turning up the air-conditioning to uncomfortable levels, did result in Qahtani's brief hospitalization in early December with brachyocardia. However, none remotely approached the definition of torture defined by the OLC's August 2002 memo as administering physical pain equal to the intensity "accompanying serious physical injury, such as organ failure, impair-

ment of bodily function, or even death," or psychological harm "lasting for months or even years."

By then, Qahtani had confessed that he worked for al Qaeda. One by one, without hesitation, he picked out pictures of all nineteen of the 9/11 hijackers and called out their names—and admitted that he, not Zacarias Moussaoui, had been slated to be the twentieth hijacker. He also revealed that the true mastermind of the attack was Osama bin Laden's deputy Khalid Sheikh Mohammed. Qahtani also fingered another Saudi al-Qaeda operative, Adnan el-Shukrijumah, who was in the United States organizing another 9/11-style attack for the summer of 2004. Khalid Mohammed's subsequent capture in Pakistan in March 2003 revealed still more details which, we now know, enabled the Bush administration to foil a second wave of suicide attacks directed at Los Angeles.

Whether Qahtani's interrogation constituted "torture" might be a matter of debate, but not, it seems, to the new Obama administration. For according to an argument advanced by Obama's Justice Department in May regarding the possibility that the concentration-camp guard John Demjanjuk would be tortured were he to be deported to Germany, the Qahtani interrogation could not be judged to have risen to the standard of torture because meeting that standard would have required "his prospective torturer [to] have the motive or purpose" of inflicting extreme pain and suffering. That was certainly not the case with Qahtani.

By any standard, his interrogation had also yielded valuable, actionable intelligence that saved American lives. It also established two unquestionable facts about Gitmo. The first was that coerced interrogations were the extreme exception, not standard practice, at the facility. The other was that Rumsfeld and the Bush administration were extremely reluctant to endorse any of these techniques, to the point of overriding the wishes of their own officers in the field, and that the administration was prepared to withdraw permission for enhanced techniques, up to and including waterboarding, almost as soon as they were granted.

However, the leaked FBI memos allowed critics to obfuscate both these points. They felt free to claim that the extraordinary measures taken against Qahtani were standard practice at Gitmo for *all detainees*; and that far from being reluctant to use these techniques even within the guidelines set out by the OLC, the Defense Department couldn't wait to use them. Still, those counterclaims gained little traction until the revelations about Abu Ghraib broke in the spring of 2004.

Abu Ghraib

IT IS IMPORTANT to remember that the exposure of the abuses at Abu Ghraib came not from a reporter or human-rights advocate or international agency, but from within the Department of Defense itself. It was the classic case of a government agency learning about abuses and violations of specific guidelines, thoroughly investigating the abuse, alerting higher-ups of the problem, and then dismissing and punishing those responsible—while developing additional guidelines to prevent it from happening again. The Abu Ghraib investigation, in short, was government at its most responsive and effective.

Coerced interrogations were the extreme exception, not the standard practice, and the administration was prepared to withdraw permission for them almost immediately.

All the same, it was a propaganda gold mine for Ratner and his allies. Now they could attach a series of disturbing visual images to their stories about treatment of Gitmo detainees—in fact, in *The Trial of Donald Rumsfeld,* Ratner has exterior pictures of prisoners at Gitmo's Camp X-Ray followed immediately by interior snapshots from Abu Ghraib, as if they were in actual sequence. The implication was that what happened at Abu Ghraib was normal procedure in Gitmo.

By that spring, also, Democrats were looking for a campaign issue to derail President Bush's reelection chances. The Bush administration's "culpability" for Abu Ghraib was made to order. "Shamefully," Senator Edward Kennedy said on the floor of the Senate,

"we now learn that Saddam's torture chambers [are] reopened under new management: U.S. management." Reading the FBI memos in light of the Abu Ghraib pictures, Senator Dick Durbin compared the Gitmo jailors to Nazis and the Soviets in the gulag, henchmen of some "mad regime—Pol Pot and others—who have no concern for human beings."

So Democrats were quick to embrace the thesis put forward by Seymour Hersh in his book *Chain of Command*: Even if Bush and Rumsfeld hadn't actually ordered the abuses at Abu Ghraib, still, their "hard" approach to the war on terror, denying Gitmo suspects American-style civil rights and allowing coercive interrogations, had created an atmosphere in which torture was condoned and even common. Hersh attempted to make this explicit by pointing out that Gitmo's former commandant, Geoffrey Miller, had been sent to Iraq to advise on interrogations in August 2003. Here was clear evidence, Hersh and others claimed, that the Bush administration had wanted to extend Gitmo's "reign of terror" into occupied Iraq. *But the opposite was true.* Miller had been sent to Iraq precisely to make sure that American prisoner detention facilities there lived up to the rigorous standards applied at Gitmo under Miller's tenure.

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And what was the Bush administration's response to these attacks on its own integrity and humanity, and that of the men and women working at Gitmo?

Nothing.

Not for the first time, the Bush White House chose not to deign to respond directly to its critics but to stand on what it believed was the dignity of the presidency by ignoring them. This proved to be a major tactical mistake. Moreover, when the administration softened the language in the original OLC definitions of torture and created a series of independent boards to review every detainee's case annually, critics crowed in triumph. If there were no problems at Gitmo, they said, and the United States didn't torture terror suspects, then why make these adjustments at all?

It was left to Gitmo officials to respond as best they could. They pointed out that it was precisely to avoid abuses like Abu Ghraib that Gitmo had been set up, and rules for detainee treatment and interrogation had been codified in the first place. They pointed out that unlike Abu Ghraib, the Gitmo facilities had no hidden basements or secret dungeons. Every aspect of prison life and handling of inmates happened in the open, with a senior commissioned officer on duty on every block, and a senior non-commissioned officer on every floor of every block around the clock. Gitmo's resident "staff judge advocate was constantly on the lookout for torture or abuse," Steve Rodriguez, the civilian head of intelligence at Gitmo, pointed out. Every allegation of abuse by a detainee had to be checked, and then checked again.

Officials opened Guantánamo Bay to regular tours by the media and members of Congress. "Guantánamo is the most transparent detention facility in the world," said Admiral Harry Harris, who had helped to draft the rules for Gitmo. It is also the most inspected and investigated. The staff could show visitors the new facilities for prisoners' recreation and prayer and point out that the inmates had Qur'ans in seventeen different languages, complete access to Red Cross officials, regular mail delivery, and a daily menu that many Americans would consider lavish. The biggest health danger at Gitmo to the inmates' health was their steady weight gain on more than 4,000 calories a day. Some inmates nearly doubled their weight after arriving at the base. An internal Defense Department document completed in 2005 that came to be called the Church Report (because it was overseen by an admiral named Albert Church) pointed out that inmates were more likely to be injured in their intramural games than in handling by the jailers.

As Captain Kyndra Miller Rotunda, a JAG lawyer who served at Gitmo from August 2002 to March 2003, explained, in terms of accommodation to religious belief and case review boards, Gitmo actually *exceeds*

Geneva Convention rules. At the end of Ramadan in 2002, the staff actually considered sacrificing a goat for the detainees, but decided not to for fear of earning the wrath of animal-rights groups.

Designated areas for prayer and religious practice are the one place in Gitmo where inmates are left unsupervised. That is a concession never contemplated by Geneva Convention rules and one that officials admit is fraught with danger.* Most detainees see their incarceration as one more way to carry out jihad by other means: attacks on guards are common, including spitting and throwing urine and feces. They regularly threaten revenge on the families of guards back in the United States (one reason why officials are so careful not to allow any documents with the names of service personnel to leave the base). Guards who retaliate are strictly disciplined; the inmates are not.

Gitmo detainees may also attempt suicide in order to achieve martyrdom, and bring adverse publicity to the prison. Cells have to be regularly searched for weapons, drugs, and other contraband that could be used in order to injure staff or other prisoners suspected of cooperating with interrogators. In June 2006, three inmates managed to achieve their objective by hanging themselves in their cells. The international outcry was intense. The men were rebelling against their abusive conditions, human-rights groups said, and had taken their lives in despair.

Head jailer David Baumgarten knew better. He remembered an inmate, Shakir Ami, once telling him that he had had a vision that "if we can get three martyrs here then we will win" and be released. That did not happen. Still, Gitmo inmates clearly know how to work the adverse publicity surrounding Gitmo to their advantage, just as they know that any complaints about torture will receive maximum visibility from the International Committee of the Red Cross and human-rights groups.

The Reports

AS FOR the issue of abuse, a total of twelve separate investigations over fifteen months have left no lingering doubt: Gitmo is safer and less abusive than any detention facility anywhere in the United States, military or civilian. The conclusion by Lieutenant General Randall Schmidt and Brigadier General John Furlow in a 2005 report commissioned by the Defense Department was incontrovertible: "No torture occurred."†

The most extensive look at Gitmo practices, the Church report, found exactly *three* cases of prisoner abuse, two of which involved female interrogators who "touched and spoke to detainees in a sexually suggestive manner." In one case, an interrogator sat briefly on a detainee's lap and put her arm on his neck. The tales of inmates being forced to lap dance with female interrogators, or being splashed with red ink as if it were menstrual blood, faded into urban legend. It was, however, far too little too late. The political Left had by now seized the moral high ground on the issue, thanks to the visual images from Abu Ghraib. The media were prepared to believe that any inmate complaint of abuse was automatically valid, while any official denial (or when it was pointed out that al-Qaeda training manuals instructed captured agents to complain about torture and abuse) was deemed part of a cover-up.

At the same time, any official admission of abuse or the use of harsh interrogation techniques—as when details of Muhammed Qahtani's interrogation were released or when the CIA admitted in 2005 that it had waterboarded three subjects in its custody, and not at Gitmo—was assumed to be the bare minimum of what inmates might have suffered. Michael Ratner, for example, wrote that Qahtani's treatment had been far more severe than officials had admitted, including "many other methods used against him that Mr. al Qa[h]tani cannot yet discuss—and perhaps may choose never to discuss," because they were so offensive to his personal dignity.

This was indeed a new twist: that an inmate's *silence* about abuse was itself proof of how severe that abuse had been! Once the Bush administration found all its actions on prisoner detention and interrogation viewed through this lens, nothing could halt the advance of the war on Gitmo.

The International Committee of the Red Cross leaked testimony from inmates claiming abusive treatment, and the claim that inmates were being tortured or being treated in ways that were "tantamount to torture," a startling but ultimately meaningless phrase,

* This was demonstrated by the case of Camp Bucca in southern Iraq, where inmates used their mosque (deemed off limits to U.S. personnel) to dig an escape tunnel and build a cache of homemade weapons, including concrete shards and bombs built from feces, socks, and flammable hand sanitizer. When the tunnel was discovered in March 2005, prisoners rioted for four days, injuring several U.S. soldiers; ultimately infantry units and a Black Hawk helicopter had to be used to restore order. As Kyndra Rotunda relates in her book, *Honor Bound*, the Camp Bucca incident, almost completely ignored by the American press, weighed heavily on the minds of Gitmo staff.

† Meanwhile, the 2004 commission headed by former Defense Secretary James Schlesinger cleared the Defense Department and Bush administration of any responsibility for what had happened at Abu Ghraib.

became common coin. (That which is "tantamount to torture" is, by definition, not torture.) The ICRC even asserted that attempting "to break the will of prisoners" or "making them wholly dependent on their interrogators" crossed the line.

As all this was going on, the legal actions Michael Ratner had initiated were coming to fruition in the nation's highest court. In its first ruling on these matters, which came in the case of *Hamdi* v. *Rumsfeld* in 2004, the Supreme Court said that habeas corpus (the right of a prisoner to seek relief in a court) only applied to detainees who were United States citizens and conceded that the administration could hold detainees indefinitely in an overseas facility. But it was a ruling issued the very next day, *Rasul* v. *Bush*, that had more serious consequences. In *Rasul*, the court asserted that the American judicial system had final jurisdiction over the question of whether detainees were being wrongfully held.

Ratner had brought the Rasul case to the court, and he scored a major victory. The flood of applications for legal representation of Gitmo detainees soon became overwhelming; some 400 lawyers connected with Ratner's Center for Constitutional Rights were filing sixty motions at a time in favor of their clients.[19] Lawyer visits were to become a regular feature of life at Gitmo; outlandish tales of abuse and torture steadily found new public relations platforms.

Yet even as the Left tried to mobilize the Gitmo issue in the election, and John Kerry called for Donald Rumsfeld to resign over Abu Ghraib and promised that he would close Gitmo if elected president, the American public in 2004 re-elected George W. Bush by a comfortable margin. Once the election was over, over the next two years, the White House and Congress managed to craft a new approach to the military commissions and rules of detention. Some thought that a turning point had been reached in achieving a new domestic consensus on the war on terror.

A Change of Power

GITMO and the torture issue remained on low boil in the run-up to the 2006 election, when Democrats were able to get back control of Congress. The American Civil Liberties Union, which had largely sat on the sidelines, decided to jump on board the Gitmo bandwagon and began representing detainees. A stream of books appeared by authors, including Michael Ratner, denouncing Gitmo as part of a Bush "torture state" and "terror presidency."

One of the first was Erik Saar's *Inside the Wire: Daily Life at Guantánamo*, which decried the supposed abuses that took place in the camp while Saar had been a guard there for six months in 2002 and 2003. Interviewers for CBS *and Mother Jones* were delighted to speak to someone who claimed to be an eyewitness to atrocities there. However, Saar himself told Bill O'Reilly's TV audience that the worst thing he ever saw personally was "female interrogators who acted seductively around Muslim men and such"—and admitted that this was not some official questioning technique, but one that had been suggested by a low-level employee with an Arab background.

Otherwise, Saar's book was a rehashing of already-published prisoner complaints dressed up as an eyewitness account. Those who had served with him at Gitmo never recalled him expressing unhappiness with any alleged misbehavior at interrogations, at least not until his book deal was signed. Other readers, hoping for lurid tales from America's gulag, admitted on Amazon.com that they were disappointed by Saar's rather tame stories, and had to turn elsewhere for stronger stuff.

They had many places to turn. There was Ratner's *The Trial of Donald Rumsfeld,* which compared the former Secretary of Defense to a defendant at the Nuremberg Trials and John Yoo to Nazi general Wilhelm Keitel, who had been hanged at Nuremberg in 1946. There was Philippe Sands's *The Torture Team,* arguing that Bush officials from Rumsfeld and Cheney to John Yoo and Douglas Feith ought to be tried as war criminals.

Then, in the fall of 2008, *New Yorker* reporter Jane Mayer published *The Dark Side,* offering a supposed insider account of how certain Pentagon lawyers and interrogators, fearful of being accused of condoning torture, had balked at approving certain interrogation techniques at Gitmo. However, what Mayer's book makes clear is that what spooked military officials like Alberto Mora was not the conduct at Gitmo but fear that they might be held legally liable for authorizing anything that stepped outside the bounds of the U.S. Uniform Code of Justice or the Army field manual. The stories in *The Dark Side* are accounts not of courageous revolt against evil, but rather revelations of the understandable concern of officials that they might get into trouble of the sort that John Yoo and General Geoffrey Miller found themselves in.

The psychic rewards for joining the campaign against Gitmo were substantial. Navy lawyer Charles Swift, who represented detainee Salim Hamdan in the Supreme Court case *Hamdan* v. *Rumsfeld*, said in a 2007 interview with *Vanity Fair* that "the whole purpose of setting up Guantánamo Bay is for torture."

For his willingness to say something so outrageous, something contradicted by every piece of documentary evidence we have, Swift was saluted for his bravery and courage. "Why is it," Swift asked, "when we see photos of Abu Ghraib we think that it is 'exporting Guantánamo'?" The answer to his own rhetorical question was that Swift and his allies had deliberately drawn that connection, when the record showed that none existed, in order to press their cases in the courts.

In the minds of many, Ratner and others had successfully created a new image of the United States, in which Gitmo had merged with Abu Ghraib and the CIA's "secret prisons" into what Amnesty International was calling "the American gulag," a network of facilities where supposedly unspeakable atrocities had been committed and innocent prisoners tortured or made to disappear. The dark popular image of the Bush war on terror included a *Law and Order: Special Victims Unit* episode in which a psychiatrist contracted to help torture prisoners at Gitmo returns to New York to practice the same coercive techniques on her patients, and the film *Rendition*, in which a character played by Reese Witherspoon attempts to locate her Muslim husband, innocently caught up in the American Gulag, while the evil bureaucrat portrayed by Meryl Streep does everything to prevent it.

Virtually no one bothered to point out that "rendition" had been invented as an interrogation ploy during the Clinton presidency in 1995 by one of Bush's most vociferous critics, former CIA operative Michael Scheuer. Indeed, Scheuer remains unashamed of his role in pioneering a way to deal with dangerous terrorists who fall outside the normal jurisdiction of the U.S. court system but who may have vital actionable intelligence requiring harsh interrogations that Americans would prefer not to do themselves or even witness. No one asked, Scheuer remarked recently in a *Washington Times* article, but everyone knew the suspects who had been subjected to "rendition" were being tortured and in far more horrific ways than waterboarding. However, the Clinton White House, including legal counsel Leon Panetta, preferred to look the other way.*

It was precisely to avoid the kind of moral dilemma posed by rendition that Gitmo had been created in the first place, and why the so-called "torture memos" had been drafted. Far from looking for a way to unleash the CIA and other interrogators, Bush officials and lawyers had focused on reining them in even as they recognized that an unprecedented global conflict like the war on terror required some rethinking of old rules.

All this was ignored as the Gitmo myth took hold. That myth had crystallized around two assertions: First, that Bush administration rules had made torture routine at Gitmo and elsewhere; and second, that the very existence of Gitmo was counterproductive to the war on terror and undermined our image abroad. Even the Republican candidate for president in 2008, John McCain, promised to close Gitmo if elected president. But, he said, he could not do so until he had found a place to house the remaining 250 dedicated terrorists still there. McCain lost to a candidate who professed to have no such worries about closing Gitmo.

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The time had apparently passed for the paramount consideration of national and homeland security. In June 2008, the Supreme Court ruled, in the 5-4 decision in *Boumediene* v. *Bush,* that that the congressional compromise on military commissions worked out in 2006 was in violation of fundamental protections of habeas corpus. The ruling was especially shocking since only two years earlier the Court had basically directed the executive branch to pursue a deal with Congress that would, in the Court's eyes, make the military commissions fully legal and constitutional.

* According to Richard Clarke's memoirs, *Against All Enemies,* Vice President Al Gore cheered them on. Clarke tells the story of Gore coming to a 1993 NSC meeting where the idea of "extraordinary rendition" was proposed. While White House Counsel Lloyd Cutler had his doubts, Gore had none. "That's a no brainer," Clarke says Gore declared, "of course it's a violation of international law. The guy is a terrorist. Go grab his ass."

No matter. It was two years later, and Justice Anthony Kennedy didn't like what he was seeing, and he changed the rules. The door was now wide open for considering Gitmo detainee cases in the U.S. courts. In November, shortly after Obama's election, a federal judge ruled that five of the six defendants named in *Boumediene* were being held unlawfully and would have to be either moved from Gitmo or set free.

"Liberty and security can be reconciled," declared Kennedy in his majority decision in *Boumediene*—thus inaugurating a grand and reckless experiment. How that reconciliation was going to work in practice will be the fundamental issue in the post-Gitmo era.

Now What?

SO WHAT will happen if detainees enter the criminal justice system inside the United States and end up being released? The record of those who have been released from Gitmo is not an encouraging one for anyone who claims they want to protect America from terrorists.

By February 2006, 240 detainees had been let go from Gitmo, following the work of the Combatant Status Review Tribunals established in 2004. By March 2007, the total number had risen to 390. Some were released outright; more were transferred to their home countries for incarceration (although that does not mean that they remained in prison for very long).

> Eighteen former detainees have returned to the battlefield, and another 43 are listed as "suspected" of going back to the fight. One killed a judge in Afghanistan.

The Pentagon has confirmed that 18 former detainees have returned to the battlefield, with another 43 listed as "suspected" of going back to the fight, meaning final confirmation is all but impossible. One released detainee killed a judge in Afghanistan; another took over leadership of an al-Qaeda-linked radical group in Pakistan. Al-Shihiri, formerly Prisoner 732, was released from Gitmo in November 2007 after being in the compound nearly six years. He returned to Yemen, and today is the number-two man in al Qaeda's branch there. Abdullah Salih al-Ajmi was transferred to Kuwait in 2005, then vanished into Syria, and was killed with two accomplices in a 2008 suicide bombing in Mosul, Iraq that also claimed the lives of 13 Iraqi policemen.

Another former Afghani detainee, Abdullah Muhammad, was fitted with a modern prosthesis for his missing leg during his stay at Gitmo. He convinced his annual review board that he wasn't a terrorist fanatic, and it turned him loose. Abdullah Muhammad is now being sought for involvement in the bombing of the Islamabad Marriott in 2006, and is still walking around on the artificial leg he was given by his Gitmo captors.

It is unprecedented for a nation unilaterally to release enemy combatants during wartime, as the United States has done at Gitmo, and for obvious reasons. Nearly all the remaining Gitmo detainees are trained in the use of heavy weapons, mortars, bomb making, hostage taking, and psy-ops against their captors. They will pose a serious risk wherever they finally end up.

Yet the question of where to put them drags on, while the equally dangerous detainees at Bagram Air Force Base in Afghanistan may end up getting the same rights of habeas corpus if the Supreme Court's ruling in *Boumediene* is applied across the board.

This has led the Obama administration to ponder the question of what to do with detainees who *do* get released by the courts. In a recent trip to Germany, Attorney General Eric Holder tried to convince European law authorities to take charge of some of the thirty the president intends to release from Gitmo. The response was less than encouraging.

In the end, at least some may end up being set free here. Obama's new National Intelligence Director, Admiral Dennis Blair, has speculated that they might have to receive civilian housing, job training, and even government checks while living here.

And what of Michael Ratner's original clients, the so-called Tipton Three? They are now free in Britain. Two of them, Shafiq Rasul and Ruhal Ahmed, appeared on the BBC television program *Lie Lab*. Rasul refused

to take a lie detector test on whether his stories about abuse at Gitmo were true, and Ahmed allowed that his earlier story of being an innocent tourist in Afghanistan before the American invasion was false. He admitted to having attended an al-Qaeda training camp, and being trained to use an AK-47 and other heavier weapons. However, Ahmed suffered no embarrassment for his belated disclosure. He is currently a spokesman for Amnesty International in the United Kingdom.

The Unwanted Orphan

RATNER and his colleagues have done their job magnificently. Who, living in the weeks after 9/11 when the Center for Constitutional Rights began its campaign against Gitmo, could have predicted that in less than eight years, an American administration would be contemplating turning unrepentant terrorists loose on the street or contemplating putting those who incarcerated them on trial?

The final verdict on Gitmo rests on whether one believes the claims of the terrorists and their allies, or the evidence presented by the Pentagon and other official investigators. Where President Obama stands on this question is still unclear. At times, he has shown pragmatism in conducting "the war on terror" (although he has banished the term from the official lexicon). At other times, he has been willing to use anti-American sentiment to his own advantage. By feeding the media with selective leaks of interrogation memos and by publicly contemplating legal action against former Bush officials, he is able to devalue George Bush's accomplishment in making us safe after 9/11. This helps burnish Obama's own reputation—while implicitly paying obeisance to Ratner, Soros, and others who have distorted American public perception of why and how the Bush administration fought the war on terror in the way it did.

Meanwhile, Gitmo remains open, the unwanted orphan of the war on terror. Attacks on guards at Gitmo continue as before, sometimes as many as ten per week. However, human-rights groups and lawyers are just getting warmed up. They are now laying the ground for a similar legal assault on the American detention center at Bagram Air Force Base in Afghanistan, which they call Gitmo with a different zip code.

On April 15, detainee Muhammad al-Qahtani told al-Jazeera that he had been quietly sitting in his cell when soldiers burst into his room with a thick rubber or plastic baton. "They beat me with it. They emptied two canisters of tear gas on me," he said, and claimed that after all this, they beat him again.

It is, of course, a lie. But it is of a piece with the entire Gitmo myth, which was constructed to ruin the Bush administration and blacken the reputation of the United States. The careful construction of this myth caused America to turn on itself in the midst of a still desperate struggle against Islamist terrorism. The consequences of this sea change in opinion may turn out to be measured not in political gains and losses by our major parties but in a revival of the fortunes of America's foes.