

NO ROOM LEFT FOR DOUBT: NEW REVELATION ABOUT GUANTÁNAMO

Marc Falkoff
Assistant Professor

Recent release orders, statements by some military lawyers and judges, and the military's own admission of detention mistakes all confirm that the only way for the Obama administration to restore our legal system's legitimacy in the eyes of the world will be to close down Guantánamo, scrap the ill-conceived military commissions, and charge in federal court those prisoners we think committed crimes....

More revelations about the illegitimacy of the Bush administration's war-on-terror detention system have cascaded into the public consciousness this week. This new round of disclosures and court decisions should give pause to those who have joined the fashionable call for creation of new "national security courts." We now have a critical mass of information from military insiders about detainee abuse and procedural irregularities at Guantánamo, removing all doubt about our need to treat our detainee population in the civilian justice system.

The news from Guantánamo has been relentless. A military official, for the first time, confirmed on the record that we have straight-up "tortured" prisoners at Guantánamo. A federal judge, infamous in some circles for his hostility to the Guantánamo prisoners' legal arguments, ordered the release of his sixth habeas petitioner in a month. After nearly seven years in detention, another Guantánamo prisoner was determined by the military itself to have been wrongly labeled an enemy combatant. And, most stunningly, a military prosecutor detailed in court papers the utter disarray that grips the office of the military commissions, and declared there was no way for the system to provide fair trials to Guantánamo prisoners.

By far, the splashiest news of the week was made by Judge Susan J. Crawford, "convening authority" of the military commissions, who told the Washington Post's Bob Woodward that she refused to allow the prosecution of at least one Guantánamo prisoner because "we tortured him." [1] The Post noted that the prisoner, Mohammed al-Qahtani, was threatened with a military working dog, forced to wear women's underclothing, led around on a leash and made to perform dog tricks, told that his mother and sisters were whores, and subjected to 18-to-20 hour interrogations for 48 of 54 consecutive days, sometimes while standing naked in front of a female agent. Once during this period, Qahtani's heart rate dropped to 35 beats per minute, and he was taken to the camp hospital to prevent total heart failure. [2]

While we have known about Qahtani's treatment since the Spring of 2006, what is new is an administration official conceding that this treatment "met the legal definition of torture," and candidly acknowledging that testimony coerced out of a prisoner in this manner cannot, consistent with the rule of law, be allowed into evidence against him. Unremarked by the Post article, however, is that Judge Crawford's observations about

this one prisoner go a long way toward undermining the legality of detentions far beyond Qahtani's. Statements made by Qahtani, after all, have been used to justify the detentions of perhaps scores of men at Guantánamo. Indeed, in a press release issued by the Pentagon in June 2005, authorities bragged that Qahtani was the primary source for the military's conclusion that another 30 prisoners at Guantánamo were affiliated with al Qaeda.[3]

We habeas lawyers have been saying for years that the evidence - including, for example, coerced statements from Guantánamo prisoners like Qahtani - against our clients is tainted and unreliable. But it is only in the past few weeks that federal judges have overwhelmingly confirmed our assertions. Judge Richard J. Leon, of the federal district court in D.C., for example, ordered the release of petitioner Mohammed el Gharani, a Chadian national who was only 14 when he was taken into custody. This decision may strike some as remarkable, since Judge Leon's history with the Guantánamo cases suggests he would be hostile to the claims of the petitioners before him. In January 2005, he had held that the Guantánamo prisoners had no constitutional rights and that they were therefore not entitled to habeas hearings at all.

Nonetheless, since June 2008, when the Supreme Court ruled in *Boumediene v. Bush* that the prisoners could pursue their habeas claims,[4] Judge Leon has granted the writ and ordered the release of prisoners in six out of seven cases before him. In *Gharani*, Judge Leon was particularly scathing in his analysis of the government's evidence against the petitioner, noting that most of the allegations were made up of statements by fellow prisoners whose credibility the government itself had called into question. The government case, according to the judge, was "a mosaic of tiles bearing images" that were so "murky" as to reveal "nothing about the petitioner with sufficient clarity, either individually or collectively, that can be relied upon by this Court." [5]

Just a few months earlier, in October 2008, Judge Ricardo M. Urbina had ordered the release of 17 Uighur prisoners into the United States after the government conceded that they were not enemy combatants.[6] So, for those keeping track, Judge Leon's decision this week makes the habeas litigation scorecard 23 to 3, in favor of the Guantánamo prisoners. If you add in the military's own admission last week that Haji Bismullah has been wrongly detained as an "enemy combatant" since 2003 [7], then the Guantánamo prisoners are up 24 to 3, or three touchdowns over the government.

The most remarkable news of the week, however, has so far gotten the least attention in the press. Lieutenant Colonel Darrel Vandeveld, a military lawyer who was detailed to prosecute Guantánamo prisoner Mohammed Jawad, filed a declaration in support of Jawad's habeas corpus petition. All of the alleged evidence against Jawad, Vandeveld told the court, was either unreliable, coerced, nonexistent, or missing. In addition, Vandeveld told the court that he was certain Jawad had been abused while in U.S. custody.

Vandeveld's turnaround is as remarkable as last year's principled resignation of Colonel Morris Davis, who had served as the chief prosecutor - and de facto Bush administration

spokesman - for the military commissions at Guantánamo. Colonel Davis, an unlikely critic of commissions system, resigned his position after citing political interference with the independence of his office. “As things stand right now,” he said at the time, “I think it's a disgrace to call it a military commission – it's a political commission.”

Vandeveld now joins Davis and a growing number of military lawyers who have gone public about abuses in the Guantánamo system. Lieutenant Colonel V. Stuart Couch, for instance, resigned as a prosecutor in May 2004 after concluding that Mohamedou Ould Slahi, the man he was supposed to put on trial, had indisputably been tortured. Lieutenant Colonel Stephen Abraham, who served on the military's “Combatant Status Review Tribunals,” filed an affidavit in the summer of 2007 in the Supreme Court in the Boumediene case, describing the manner in which these administrative proceedings were rigged against the prisoners. And Lieutenant Colonel Colby Vokey, the Marine Corps' chief of all defense lawyers for the western U.S., announced his resignation last year because military staff had harassed him and interfered with his defense work for a juvenile prisoner at the camp. Vokey called the legal system at Guantánamo “disgraceful” and a “sham,” warning that “anytime you want to subvert the rule of law to the power of a government, you've got a very bad thing brewing.”

But the Vandeveld defection, and particularly his declaration in the Jawad habeas case, are unique because of the detailed description he provides of the chaos that rules within the Guantánamo prosecutors' office, and the corresponding impossibility of providing detainees with a fair hearing in a military commission.

In his declaration, Vandeveld describes himself as, initially, a true believer in the military commissions process, convinced that the man he was tasked to prosecute was a war criminal who had confessed to attacking two U.S. soldiers with a hand grenade.[8] What he learned as he tried to put together his case, however, was that any presumption of regularity in the gathering of evidence against Jawad was unmerited. After a fact-finding trip to Afghanistan, for example, Vandeveld began to suspect that Jawad's alleged confession to Pakistani police was coerced. His suspicions were confirmed when he learned that Jawad's “confession” (which the U.S. military has relied on to justify his detention) was written in a language he did not speak, that Jawad was functionally illiterate at any rate, and that the thumb print which supposedly verified the confession as his own was not even his own thumbprint.

Vandeveld, who had been informed there was a videotape of the grenade attack, was also stunned to learn that the tape had disappeared, and that no one in the Criminal Investigative Task Force (CITF) could locate it. He learned, moreover, that neither CITF nor the Office of Military Commissions (OMC) maintained a central repository for case files, and that the evidence, “such as it was,” was “scattered throughout an incomprehensible labyrinth of databases,” or “strewn throughout the prosecution offices in desk drawers, bookcases . . . , or even simply piled on the tops of desks vacated by prosecutors who had departed the Commissions for other assignments.” At one point, after many months of searching, Vandeveld was able to locate some of his case

documents - including discovery information to which Jawad's defense was entitled - in a locker whose contents had been forgotten at Guantánamo.

His declaration also describes Vandeveld's initial dismissal, in open court, of Jawad's allegations of abuse as exaggerations - along with his gradual realization that Jawad had indeed been abused while in U.S. custody. Vandeveld came across documents proving that, while at Bagram, Jawad was shoved down a stairwell while hooded and shackled. He learned that a Behavioral Science Consultation Team psychologist had prepared a psychological assessment of Jawad's mental condition in order to assist interrogators in extracting information from him. He uncovered documents proving that the military had carried out a systematic program of sleep deprivation on Jawad, moving him from cell to cell 112 times during a two week period. These same documents revealed that Jawad attempted suicide at least once by banging his head repeatedly against his cell wall.

In the end, Vandeveld says he became "utterly convinced," because of the chaotic state of the evidence maintained by CITF and OMC, that he could not comply with his professional obligations to turn over discovery materials to the defense. He also concluded that no Commissions prosecutor could do so consistent with professional obligations. Coupled with "unnecessary restrictions imposed under the guise of national security," it is "impossible for anyone involved (the prosecutors) or caught up (the detainees) in the Commissions to harbor even the remotest hope that justice is an achievable goal."

Lieutenant Colonel Vandeveld's declaration, Judge Leon's release orders, Judge Crawford's plain talk about torture, and the military's own admission of detention mistakes, all confirm that the only way for the Obama administration to restore our legal system's legitimacy in the eyes of the world will be to close down Guantánamo, scrap the ill-conceived military commissions, and charge in federal court those prisoners we think committed crimes. Our experiment with new courts and untested procedures has been a failure, and it is not an experiment that we as a nation can afford to repeat.

Notes

1. Bob Woodward, "Detainee Tortured, Says U.S. Official," Washington Post A1, Jan. 14, 2009.
2. The full interrogation logs for this time period were published by TIME magazine and are available at <http://www.time.com/time/2006/log/log.pdf> (last visited Jan. 16, 2009).
3. See Department of Defense Press Release, "Guantanamo Provides Valuable Intelligence Information," June 12, 2005, available at <http://www.fas.org/irp/news/2005/06/dod061205.html> (last visited Jan. 16, 2009).
4. 553 U.S. ___, 128 S. Ct. 2229 (June 12, 2008).
5. Mem. Order at 7, 10, *Gharani v. Bush*, Civ. No. 05-0429 (RJL) (D.D.C. Jan. 14, 2009).

6. See Tr. of Status Hearing, *Kiyemba v. Bush*, Civ. No. 05-1509 (RMU) (D.D.C. Oct. 7, 2008), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/10/urbina-transcript-10-7-08.pdf> (last visited Jan. 16, 2009). Judge Urbina's order is on appeal to the U.S. Court of Appeals for the District of Columbia.

7. See Notice of New CSRT Determination, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Jan. 13, 2009).

8. The declaration can be found at <http://gsmcneal.com/wp-content/uploads/2008/10/ltc-vandeveld-declaration-in-jawad1.pdf> (last visited Jan. 16, 2009).

Marc Falkoff teaches criminal law and criminal procedure at Northern Illinois University College of Law. Prior to joining the NIU faculty, he was an associate at Covington & Burling, where he was the principal lawyer in the habeas representation of seventeen Yemeni men detained by the U.S. military at Guantánamo Bay. He is the editor of *Poems From Guantánamo: The Detainees Speak* (University of Iowa Press, 2007).