

February 5, 2013

The Forgotten Men of Guantánamo – A Brief Overview & Document Index

Today there are 166 men imprisoned at Guantánamo Bay Naval Base. Over half of them – 86 – were cleared for transfer to their home or other countries more than three years ago, by unanimous agreement of the Departments of Justice, Defense, State, and Homeland Security, as well as the Central Intelligence Agency, the Federal Bureau of Investigation, the Joint Chiefs of Staff, and the Director of National Intelligence (Ex. C at 3-5) In addition to the obvious human cost of detaining these 86 men without reason or charge, American taxpayers continue to pay approximately \$812,000 *per detainee per year* to imprison men whom all agree should not be detained. (Exs. E, F) This program explores the circumstances that led to this anomalous state of affairs, and examines the stories of a few of these men.

In late 2001, the United States began detaining Muslim men suspected of anti-Western animus. Only a small fraction of these men were actual fighters or terrorists. Many more were simply refugees fleeing the war in Afghanistan, turned over to U.S. forces in exchange for extravagant bounties offered by the United States. President Bush chose to imprison these Muslims at Guantánamo Bay Naval Base because he hoped that would place them beyond the reach of the courts, Constitution, and laws of the United States. The men began arriving at Guantánamo in January 2002, and they were held incommunicado, with no access to lawyers or family members. The International Committee of the Red Cross was eventually allowed limited access to the prisoners. The Bush Administration claimed the right to detain the men under the Authorization for Use of Military Force, a joint resolution of Congress passed on September 18, 2001 (Ex. A), which gave the President authority:

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

In June 2004, the Supreme Court held in *Rasul v. Bush* that federal courts had jurisdiction under the *habeas corpus* statute to decide the legality of the Guantánamo prisoners' detention. 542 U.S. 466, 485 (2004). The Bush Administration responded by convening military tribunals to determine whether individual prisoners were "enemy combatants." These Combatant Status Review Tribunals based their decisions on documents not shown to the prisoners and on evidence derived from torture and coercion. On the few occasions when a Combatant Status Review Tribunal determined that a prisoner was not an "enemy combatant," other tribunals were convened until the "right" result was reached.

The Bush Administration also conducted annual Administrative Review Board proceedings to determine whether the “enemy combatants” should be released, transferred to another country, or continue to be detained at Guantánamo. President Bush released 532 men to their home countries or, in the case of those fearing abuse by their home governments, to other countries willing to accept them.

In 2005, Congress enacted the Detainee Treatment Act, which stated that the Guantánamo prisoners could not seek *habeas corpus* relief in the federal courts. Instead, the Act permitted prisoners to appeal their “enemy combatant” determinations to the Court of Appeals. In June 2008, the Supreme Court held in *Boumediene v. Bush* that the Detainee Treatment Act violated the constitutional right of Guantánamo prisoners to challenge the legality of their detention by seeking a writ of *habeas corpus*. 553 U.S. 723, 792 (2008). After being on hold for several years, the Guantánamo *habeas* cases began moving forward, and the prisoners won about 75 percent of the cases in the district court.

As soon as he took office in January 2009, President Obama signed an executive order calling for “the detention facilities at Guantánamo” to be “closed as soon as practicable, and no later than 1 year from” January 22, 2009. (Ex. B at 2) The executive order also established an interagency task force to compile and review all information relating to each Guantánamo prisoner, and to determine based on that information whether each prisoner should be released, transferred, prosecuted, or disposed of by other means. (Ex. B at 2-3) Pursuant to the executive order, Daniel Fried was appointed as Special Envoy for the Closure of Guantánamo Bay, responsible for diplomatic efforts related to the repatriation and resettlement of Guantánamo prisoners.

Yielding to Republican opposition, President Obama did not fulfill his pledge to close Guantánamo by January 22, 2010. Indeed, President Obama responded to the “underwear bomber” incident – in which a Nigerian man with alleged ties to Yemen attempted to detonate explosives hidden in his underwear on a Christmas Day flight to Detroit – by announcing on January 5, 2010 a moratorium on transferring Guantánamo prisoners to Yemen. (Ex. C at 11) The moratorium remains in effect today, and as a result, about two-thirds of the Guantánamo prisoners are citizens of Yemen.

Starting in 2010, Congress began attaching to the annual defense appropriations bill severe restrictions on the release or transfer of Guantánamo prisoners. In 2011 and 2012, President Obama objected to these restrictions and threatened to veto them – but he signed each of the bills. (Exs. G, J) Like the bill in effect in 2012, the National Defense Authorization Act for Fiscal Year 2013 requires the Secretary of Defense to certify a number of things to Congress at least 30 days prior to the transfer of any Guantánamo prisoner, including certifications that the receiving country has agreed to take adequate steps “to ensure that the individual cannot take action to threaten the United States, its citizens, or its allies in the future” or “engage or reengage in any terrorist activity.” (Ex. I at 5) The Act prohibits the

Secretary of Defense from transferring any prisoner to a country with prior confirmed cases of recidivism. These restrictions may be waived if the Secretary of Defense, the Secretary of State, and the Director of National Intelligence concur that the relevant circumstances provide adequate assurances of national security and “the transfer is in the national security interests of the United States.” (Ex. I at 6) No Guantánamo prisoner has ever been released under the transfer restrictions of these defense appropriations bills.

The Guantánamo Review Task Force issued its final report on January 22, 2010. (Ex C) The Task Force was staffed by over 60 professionals from the Departments of Justice, Defense, State, and Homeland Security and the Federal Bureau of Investigation, the Central Intelligence Agency, and the National Counterterrorism Center, who worked full-time to develop detailed assessments and recommendations regarding each detainee. (Ex. C at 3-4) The Guantánamo Review Panel, composed of senior officials from each agency, then reviewed these assessments and recommendations and arrived at a unanimous decision on the fate of each detainee. (Ex. C at 4-5)

Based on this “comprehensive interagency review,” “rigorous examination of information,” and “unanimous decision-making by senior officials” in the defense, intelligence, national security, diplomatic, and law enforcement agencies, the Guantánamo Review Panel determined that, of 240 detainees at Guantánamo:

- 126 should be transferred to other countries, including 29 Yemeni men;
- 30 Yemenis could be transferred to Yemen or third countries if certain security conditions are met;
- 36 men should be referred for prosecution; and
- 48 men are “too dangerous to transfer but not feasible for prosecution,” and therefore should be detained indefinitely.

(Ex. C at ii, 9-10) On March 7, 2011, President Obama ordered periodic reviews within one year of each detainee slated for prosecution or indefinite detention. (Ex. D) To date, no such reviews have occurred.

The government refused to disclose publicly the identities of the men cleared for transfer to other countries, whether conditionally or unconditionally, until September 21, 2012 – shortly after one of those men, Adnan Latif, was found dead in his cell. Even then, the government disclosed only the names of those unconditionally approved for transfer. (Ex. H) The government has never disclosed the identities of the 30 Yemeni men approved for transfer if security conditions are met.

Despite the findings of the Review Panel, more than half of the men currently being held at Guantánamo have been cleared for transfer. On January 25, 2013, the

Obama Administration quietly announced it was reassigning Daniel Fried and closing the Office of the Special Envoy for the Closure of Guantánamo Bay.

Patricia A. Bronte

(See below for Document Index and Information on a Guantánamo forum held in Chicago on February 5, 2013)

Index of Exhibits

Ex.	Description	Date
A	Authorization for Use of Military Force	9/18/01
B	Executive Order – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities	1/22/09
C	Final Report – Guantánamo Review Task Force	1/22/10
D	Executive Order – Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force	3/7/11
E	Letters of Eric H. Holder, Jr., Leon E. Panetta, James R. Clapper, and Janet A. Napolitano to Senators Richard G. Lugar, John McCain, and Mitch McConnell	7/25/11
F	<i>Guantánamo: the most expensive prison on earth</i> , Carol Rosenberg, THE MIAMI HERALD	11/25/11
G	President’s Signing Statement regarding National Defense Authorization Act for Fiscal Year 2012	12/31/11
H	Current Guantánamo Bay Detainee-Petitioners Approved for Transfer	9/21/12
I	Detainee provisions of National Defense Authorization Act for Fiscal Year 2013	1/2/13
J	President’s Signing Statement regarding National Defense Authorization Act for Fiscal Year 2013	1/2/13
K	D.C. Circuit opinion in <i>Ameziane v. Obama</i> (reissued Oct. 5, 2012)	1/8/10
L	D.C. Circuit opinion in <i>Latif v. Obama</i> , 677 F.3d 1175 (reissued Apr. 27, 2012)	10/14/11
M	Supreme Court’s denial of certiorari in <i>Latif v. Obama</i>	6/11/12

Speaker Information and Event Flier:

Forum & Film Screening on the Forgotten Men Unjustly Detained in Guantánamo

February 5, 2013

Co-Sponsored by:

**Center for Constitutional Rights, Chicago Council of Lawyers,
Chicago Appleseed Fund for Justice, American Constitution Society,
Chicago Bar Association, and Union League Club of Chicago**

Omar Farah is Staff Attorney at the Center for Constitutional Rights. Since 2008, he has represented several men detained at Guantánamo Bay in habeas corpus litigation in federal court. Omar is co-counsel in *Ameziane v. United States*, the first case about a Guantánamo detainee heard by the Inter-American Commission on Human Rights. Djamel Ameziane is an Algerian man who was cleared in 2008 and who has been detained since 2002 without charge. Ameziane is also the subject of CCR's new documentary film, *ISN 310: Djamel Ameziane's Decade in Guantánamo*. Omar is also counsel in *Al-Hamiri v. Obama*, the case of a Yemeni man wrongfully arrested in Pakistan while seeking medical treatment, but who remains at Guantánamo despite being cleared for transfer. Omar is counsel in *Ba Odah v. Obama*, the case of another uncharged Yemeni man who has been on a hunger-strike since February 2007 to protest his indefinite detention. Omar comments regularly on Guantanamo and related national security matters. Beyond his Guantánamo work, Omar is co-counsel in *Hassan v. City of New York*, a case challenging the NYPD's expansive program to target and surveil Muslim Americans in New Jersey, and he focuses on a range of CCR's other litigation and advocacy in response to abusive counterterrorism practices.

Marc Falkoff is a professor at Northern Illinois University College of Law, and since 2004, he has represented seventeen men detained by the U.S. military at Guantánamo. Marc was one of the attorneys for Adnan Latif, the young Yemeni man who in September 2013 became the ninth prisoner to die at Guantánamo, and the fourth man to die there since President Obama came into office. Adnan was repeatedly cleared for release by both the Bush and Obama administrations, but remained imprisoned until his death because the President has imposed a moratorium on all transfers to Yemen. Marc is also editor of the book *Poems from Guantánamo: The Detainees Speak*, and published one of Adnan's poems there. For his work, Marc was named the Charles F.C. Ruff Pro Bono Lawyer of the Year in 2005 by Covington & Burling, LLP. Along with other habeas counsel, he received the Frederick Douglass Human Rights Award in 2007 from the Southern Center for Human Rights, and the Bill of Rights in Action Award in 2008 from the Constitutional Rights Foundation in Chicago.

Patricia Bronte is a sole practitioner in Chicago who represents employees in discrimination cases. She has represented several men detained at Guantánamo Bay since 2005, when she was a partner of Jenner & Block LLP. Patricia also co-authored an *amicus* brief submitted to the federal appellate court in *Boumediene v. Bush* on behalf of seven retired federal judges. Patricia received

the Albert E. Jenner Pro Bono Award in 2005, and she was the first recipient of the Excellence in Pro Bono Service Award from the U.S. District Court for the Northern District of Illinois. She is a member of the Civil Liberties Committee of the Chicago Council of Lawyers

PROGRAM: The program will sketch a broad overview of Guantánamo today, and focus on the plight of the 86 men who remain trapped there despite having been cleared for release by the unanimous agreement of the nation's top intelligence, national security, law enforcement, and military officials. These 86 cleared men make up more than half the population imprisoned at Guantánamo, and taxpayers continue to spend \$70 million per year to keep them imprisoned. The program will also address the detained men's efforts to obtain *habeas corpus* relief in federal courts and examine the congressional restrictions on their release. The discussion will be followed by a Q&A session.

ISN 310: Djamel Ameziane's Decade in Guantánamo—a brand new short documentary—will also be screened for the very first time. It tells the story of Djamel Ameziane, a client of the Center for Constitutional Rights, and an Algerian man who was cleared in 2008 and who has been detained since 2002 without charge.

