

23 January 2018

**VIA USPS & EMAIL**

Hon. James Mattis  
Secretary, U.S. Department of Defense  
c/o U.S. Department of Justice  
Civil Division  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Rear Admiral Edward B. Cashman  
Commander, Joint Task Force-GTMO  
c/o U.S. Department of Justice  
Civil Division  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

**RE: The Review of Guantánamo Bay Detainee Art Policy**

Dear Secretary Mattis and Rear Admiral Cashman:

In light of the recent announcement from the detention facility at the U.S. Naval Station at Guantánamo Bay, Cuba that “transfers of detainee made artwork have been suspended pending a policy review,”<sup>1</sup> the undersigned counsel write in support of the long-established policy—which allowed for the release of art to detainees’ counsel, their families, and the public—as one that demonstrably benefits our detainee-clients, the detention authority, and the public at large.

Over the last decade, the detention camp administration itself has been the strongest proponent of the detainee art program’s positive impact. Camp commanders and staff have extolled the facility’s most popular program as “beneficial to everyone,”<sup>2</sup> explaining that it “provides a creative outlet,” “keeps [the detainees’] minds occupied”<sup>3</sup> and is also “good for the guard force [, making] everyone’s life better while we’re all operating here together.”<sup>4</sup> Guantánamo prison authorities have further acknowledged that art “provides intellectual stimulation”<sup>5</sup> for the benefit of the individual, and contributes to the overall maintenance of “a peaceful environment.”<sup>6</sup> The

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<sup>1</sup> “Navy Cmdr. Anne Leanos said in a statement that ‘transfers of detainee made artwork have been suspended pending a policy review.’” Available at <http://www.miamiherald.com/news/nation-world/world/americas/Guantánamo/article185088673.html>.

<sup>2</sup> Former Detainee Program OIC characterizing the program as “beneficial to everyone, because the detainees benefit from it. Keeping their minds stimulated is good for them, and it’s also good for the guard force. It makes everyone’s life better while we’re all operating here together.” Available at <https://assets.documentcloud.org/documents/4251220/May-8-2015-edition-of-the-prison-newsletter-the.pdf>.

<sup>3</sup> “‘It provides a creative outlet,’ said one officer, who refused to give his name. ‘It’s important to keep their minds occupied.’” Available at <http://www.dailymail.co.uk/news/article-2684941/Life-inside-worlds-notorious-prison-Remarkable-scenes-pictures-reveal-inner-workings-Guantánamo-Bay.html>.

<sup>4</sup> *Supra* note 2.

<sup>5</sup> Former Detainee Program OIC, Army Capt. Jose Izquierdo explaining that “[t]he art program provides intellectual stimulation for the detainees, and allows them to express their creativity,” the Department of Defense caption said at the time. Available <https://www.dvidshub.net/image/193031/Guantanamo-officer-charge-views-detainee-art-work>.

<sup>6</sup> Col. Stephen Gabavics, current Joint Detention Group Commander, commenting that “[w]e have some phenomenal artistic capabilities here in some of our detainees,” and noting that a guard helped a prisoner with his model of a ship, cutting up pieces of cardboard used for the ship’s hull and T-shirts to create sails. Available at <http://triblive.com/usworld/nation/11057422-74/detainees-camp-Guantanamo>.

detention camp administration has itself staged prisoner art shows at Guantánamo for visiting delegations of dignitaries, observers, and reporters.

Moreover, the U.S. government's own Periodic Review Board has repeatedly recognized that detainees' development of artistic skills, and the prison administration's recognition and appreciation of those skills, have a positive impact on detainees and are a positive indicator of personal growth. In one case, a detainee's Personal Representative from the Periodic Review Secretariat expressly stated that "the change in [the detainee] came from taking art classes."<sup>7</sup> In its final determination, the Periodic Review Board cited this detainee's participation in art classes as a factor in its decision to clear him for transfer.<sup>8</sup>

The benefits of art classes for prison populations, and for detaining authorities, have been widely researched and documented. For example, a literature review of studies on the topic found such benefits as greater emotional self-regulation and self-discipline.<sup>9</sup> The validating effect of being seen through one's own artwork can hardly be overstated. Thus, art programming has been positively correlated with improved inmate behavior.<sup>10</sup>

The Federal Bureau of Prisons fully agrees with the utility of maintaining both prison-based art programming and a well-monitored system of releasing this art to the world. Indeed, the Bureau's internal guidelines actually *require* detainees to either give away or sell their artwork.<sup>11</sup> It is important to add that Guantánamo prison authorities operate a well-established system for vetting the art,<sup>12</sup> such that there is no reasonable security justification for preventing the art's transmission.

A decision to forbid any detainee art from being transferred out of Guantánamo would not reflect well on the Defense Department's operations there. In fact, news of the policy review has already added fuel to criticisms regarding the lack of transparency of operations and lack of access to the detainees. Instead, the Defense Department should continue to embrace its art program at Guantánamo and the resulting detainee artwork shared outside the prison, and avoid any appearance of stifling it.

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<sup>7</sup> Periodic Review Secretariat's Personal Representative attributing one detainee's compliance to his having turned to art classes—"the change in Yassin came from taking art classes"—where he "found an area he was passionate about and one that he excelled in" (adding that "opening his mind to education and art has brought him joy and actually changed him for the better").

<sup>8</sup> The Periodic Review Board stated: "The Board also noted the detainee's extensive efforts to take advantage of opportunities in detention to better himself, to include multiple academic and art classes." Available at [http://www.prs.mil/Portals/60/Documents/ISN522/FullReview/161101\\_U\\_ISN522\\_PR\\_STATEMENT\\_PUBLIC\\_v1.pdf](http://www.prs.mil/Portals/60/Documents/ISN522/FullReview/161101_U_ISN522_PR_STATEMENT_PUBLIC_v1.pdf).

<sup>9</sup> Brewster, Larry. "The Impact of Prison Arts Programs on Inmate Attitudes and Behavior: A Quantitative Evaluation." *Justice Policy Journal*. Vol. 11 No. 2; Fall 2014. P. 4.

<sup>10</sup> *Ibid.*

<sup>11</sup> Federal Bureau of Prisons regulations require inmates "to mail completed hobbycraft articles out of the institution at the inmate's expense, or to give them to an authorized visitor within 30 days of completion, or to dispose of them through approved sales." Available at <https://www.documentcloud.org/documents/4252893-Federal-Bureau-of-Prison-Arts-and-Hobbycraft.html>.

<sup>12</sup> Available at <http://www.miamiherald.com/news/nation-world/world/americas/Guantánamo/article185088673.html>.

Finally, the sequestration or (as has been reported) destruction of detainee art would run afoul of U.S. copyright law. The U.S. Constitution's Copyright Clause recognizes that copyright protection is designed "to promote the Progress of Science and the useful Arts,"<sup>13</sup> which the Founders acknowledged serve an important public good.<sup>14</sup> Under the U.S. Copyright Act (17 U.S.C. § 101 *et seq.*), this protection includes the artist's exclusive right to publicly display, reproduce, prepare derivative works from, and distribute copies of his art work (17 U.S.C. § 106). As citizens of countries belonging to the leading international copyright law treaty,<sup>15</sup> the detainees are entitled to all of the benefits under U.S. copyright law accorded to American citizens. The detention facility's sequestration of detainee art would prevent the detainees, without good cause, from exercising their lawful exclusive rights under the Copyright Act.

In addition, the Copyright Act expressly gives artists the right to prevent the destruction of their work. *See* 17 U.S.C. § 106A(a)(3)(B) ("the author of a work shall have the right [] to prevent any destruction of a work of recognized stature."). This right is a part of the Visual Artist Rights Act ("VARA"), which amended the Copyright Act in 1990 to furnish artists with certain protections previously established under the Berne Treaty. The purpose of this right is to protect the sanctity of the personality that the artist injects into his work and to preserve the artwork's integrity, for the benefit to the public. The forced destruction of detainee art would directly violate this statute.<sup>16</sup>

We urge you to consider these points as part of your review and to reinstate the policy as it previously stood.

Sincerely,

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<sup>13</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>14</sup> *See* The Federalist No. 43, at 243 (James Madison) (arguing that art will serve the "public good" if it is protected as intellectual property).

<sup>15</sup> The Berne Convention for the Protection of Literary and Artistic Works (the "Berne Treaty").

<sup>16</sup> The forced sequestration or destruction of detainee art would also raise issues of jurisdictional authority. Under 28 U.S.C. § 1498(b), the Court of Federal Claims possesses exclusive jurisdiction to entertain copyright claims against the federal government. However, the Military Commissions Act of 2006, 10 U.S.C. § 948 *et seq.* ("MCA"), purports to strip federal courts of their jurisdiction to hear any claims brought by a Guantánamo prisoner other than those sounding in habeas corpus. The MCA therefore conflicts with and undermines the rights conferred by Congress to copyright owners, including those Berne Treaty-based rights codified in VARA, thus raising questions regarding the MCA provision's validity.

*Ahmed Rabbani*

cc: Admiral Kurt Tidd, Commander, U.S. Southern Command  
Colonel Stephen Gabavics, Commander, Joint Detention Group, JTF-GTMO