

REGAINING THE MORAL HIGH GROUND ON GITMO. . . . IS THERE A BASIS  
FOR RELEASED GUANTANAMO DETAINEES TO RECEIVE REPARATIONS?

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by

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The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other governmental agency. (References to this study should include the foregoing statement.)

## ABSTRACT

REGAINING THE MORAL HIGH GROUND ON GITMO. . . . IS THERE A BASIS FOR RELEASED GUANTANAMO DETAINEES TO RECEIVE REPARATIONS? by MAJ Whitney O. Fees, 150 pages.

In an attempt to protect the U.S. following the horrific events of September 11th and to conduct the Global War on Terrorism, the detention facility at Guantanamo Bay Naval Base was established. Yet the continued operation of the facility, implementation of legislative and executive policies, and the denial of universal human rights for these detainees are in conflict with U.S. ideals and international law. Furthermore, this facility and its policies question U.S. commitment to human rights, American principles and democratic values. To protect the U.S. during a similar time of national emergency (World War II), the U.S. implemented Japanese Internment. Forty years later reparations were given to those subjected to this policy. Is there a basis for released Guantanamo detainees to receive reparations, also? The U.S. is the standard bearer for democracy and individual rights in the world. The mainstream debates surrounding Guantanamo Bay neglect examination of a basis for released detainees to receive conciliation. This thesis explores aspects of this debate.

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## ACRONYMS

9/11	11 September 2001 terrorist attacks
AR	Army Regulation
ARB	Annual Review Board
CIA	Central Intelligence Agency
CSRT	Combatant Status Review Tribunals
CWRIC	Commission on Wartime Relocation and Internment of Civilians
DoD	Department of Defense
DTA	Detainee Treatment Act
EPW	Enemy Prisoner of War
FBI	Federal Bureau of Investigation
FM	[Army] Field Manual
GEN	General
GITMO	Guantanamo Bay Naval Station
GWOT	Global War on Terrorism
ICESCR	International Covenant on Economic, Social, and Political Rights
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
JCS	Joint Chiefs of Staff
JPRA	Joint Personnel Recovery Agency
JTFGTMO	Joint Task Force Guantanamo
LTG	Lieutenant General
MAJ	Major
MCA	Military Commissions Act

NGO	Non-Government Organization
MG	Major General
OLC	Office of the Legal Counsel
POW	Prisoner of War
SERE	Survival Evasion Resistance and Escape
UN	United Nations
U.S.	United States
WRA	War Relocation Authority

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## CHAPTER 1

### CLOSING GITMO

I don't want to be ambiguous about this: We are going to close Guantanamo, and we are going to make sure that the procedures we set up are ones that abide by our Constitution. That is not only the right thing to do, but it actually has to be part of our broader national security strategy, because we will send a message to the world that we are serious about our values.<sup>1</sup>

— President Barack H. Obama,

#### Receiving the Mission

On 22 January 2009, President Barack H. Obama signed Executive Order 13492 which directed the closure of the Guantanamo Bay Naval Base (GITMO) detention facilities within 12 months. President Obama stated that the closure “would further the national security and foreign policy interests of the United States and the interests of justice.”<sup>2</sup>

Most detainees interned at GITMO have been there for more than four years without formal charges or judicial proceedings. Historically, the United States (U.S.) government has acknowledged or compensated citizens for policy decisions that are later determined imprudent or injudicious. This usually occurs several decades after the fact. There are recently released federal documents, which confirm “enhanced interrogation techniques” were used in connection with detention operations for the Global War on Terrorism (GWOT). Additionally, there are several dozen detainees not considered a threat but still interned while hundreds of others were released without charges or convictions. In light of these facts, does the U.S. owe Guantanamo Bay detainees anything?

Since the Obama Administration is determined to plot a new course for detention operations and the GWOT with his executive order and the renunciation of torture, should compensation or conciliation also be considered? Did the conception and continued operation of the facility over the last seven years affect international perception negatively enough, or violate established law in a manner which demands action other than that already proposed by the Obama Administration? What are the psychological, physical, emotional, and financial affect on GITMO detainees who are denied due process? How has the stigma of detention at GITMO affected the lives of those released in their quest to move forward in life?

It is doubtful there are agreeable answers, measurements, or adequate compensation for these questions. However, these philosophical and ethically based questions help to frame the purpose of this thesis, which aims to open the debate: Is there a basis for reparation for released detainees?

### Making a Tentative Plan

In the months that followed 11 September 2001 and the subsequent invasion of Afghanistan, the Bush Administration encountered a pressing challenge to the War on Terror[ism]: detention of enemy combatants, who were believed to not meet the criteria for classification as enemy prisoners of war in the traditional sense. As a result, (in December 2001) Secretary of Defense, Donald Rumsfeld began considering Guantanamo Bay as the “least worst place”<sup>3</sup> to host a prison for ongoing combat operations in connection with the GWOT. Guantanamo Bay was favored because President [George W.] Bush and Attorney General John Ashcroft believed it provided the best protection to U.S. secrets while allowing the prospect of military tribunals.<sup>4</sup> In breach of established

international and U.S. law, and contrary to the Geneva Conventions, the internment facility at Guantanamo Bay was established.

Within weeks, planning and legal reviews led to orders that allowed the detention facility to become operational in support of the GWOT. The first enemy combatants or “detainees” of the war on terrorism arrived on 11 January 2002. Detainees were designated as “enemy aliens” pursuant to a 1950 ruling: *Johnson v. Eisentrager*.<sup>5</sup> This meant that they did not have a right to petition the U.S. Federal courts and challenge their detention.

Marine Corps Brigadier General Michael Lehnert was the first Joint Task Force 160 Commander for Guantanamo Bay. His task force was charged with construction and operation of the facility. In an interview with Karen Greenberg of the Washington Post, Brigadier General Lehnert said the Joint Chiefs of Staff informed him “the Geneva Conventions would not technically apply to his mission, but he was to act in a manner ‘consistent with’ the conventions. . . . not to feel bound by them.”<sup>6</sup> Further, he told her he operated with the understanding that he was to detain and wait for a legal process to begin.<sup>7</sup>

No legal process began, however. Instead, the U.S. sent enemy combatants captured throughout the world in the GWOT to GITMO for indefinite internment. Although cared for in a manner ‘consistent with’ the Geneva Conventions, no due process or arraignment on formal charges resulted from removal of enemy combatants from their point of capture and placement into detention at GITMO.

Moreover, four years into the GWOT and the detention facility’s operation, the most general guidance remained the basis for operation of the facility and treatment of

prisoners: act in a manner ‘consistent with’ the Geneva Conventions with no further explanation of what that actually meant. In April 2005, the overall commander of the military’s joint task force at Guantanamo (JTFGTMO), Major General (MG) Jay W. Hood instructed Colonel (COL) Mike Bumgarner, Military Police (MP) Commander [warden] to “study the Third Geneva Convention, on the treatment of prisoners of war and begin thinking about how to move Guantanamo more into line with its rules.”<sup>8</sup> In an interview with Tim Golden of *Time Magazine*, Major (MAJ) Joseph M. Angelo, COL Bumgarner’s former operations officer, expressed his bewilderment and dismay of policy guidance, stating, “We’re the guys on the ground. . . . so why was I making recommendations on what portions of the Geneva Conventions we should implement?”<sup>9</sup> Considering hindsight, it is highly possible the ambiguity surrounding operations and preservation of the detention facility continues to weigh heavily on the minds of most military personnel challenged with executing all facets of the GITMO mission.

Additionally, the U.S. Government used the detainee designation of “enemy aliens” or “enemy combatants” to justify questionable or “enhanced interrogation techniques” for intelligence collection. Confirmation of these techniques are found in recent declassified Office of Legal Counsel (OLC) memoranda released by the Obama Administration in April 2009 and a report by the Senate Armed Services Committee entitled *Inquiry into the Treatment of Detainees in U.S. Custody* completed in November 2008. Many of these techniques violated international, military, or U.S. law and most are no longer in use. Some are akin to torture as defined by United Nations (UN) Human Rights Council, The War Crimes Act, The Convention against Torture, and the Geneva Conventions.



From 2004 to present, the U.S. executive policy has shifted to include Combatant Status Review Tribunals, Administrative Review Boards, military tribunals for detainees, guided media tours and interviews, and increased access and implementation of recreation and intellectual stimulation for detainees depending on their compliancy status. In November 2002, Joint Task Force 160, the element in charge of the facility's operations and care of the detainees and Joint Task Force 170, the element in charge of the intelligence collection mission, combined to form a consolidated Joint Task Force called Joint Task Force Guantanamo. Consolidating the Task Force under one command and control element promoted unity of command and consistency between the two missions.

On 22 January 2009, the executive order *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and the Closure of Detention Facilities*, halted military tribunals and called for a complete review of U.S. detention operations. Most notably, it also directed the closure of the Guantanamo Bay detention facility within the next 12 months. In his own words, newly elected President Obama announced this policy change to “restore the standards of due process and the core constitutional values that have made this country great even in the midst of war, even in dealing with terrorism.”<sup>10</sup>

As of June 2009, there are approximately 230 detainees interned at GITMO; some since 2002 and most without a legal process or judicial prosecution for the offenses for which they were sent to GITMO. Over the course of the facility's existence, there have been four Supreme Court cases related to the facility and its operation, half a dozen United Nations reports, countless media and legislative opinions, as well as acts of U.S.

legislation including the *Detainee Treatment Act of 2005* and the *Military Commissions Act of 2006*. As of this writing, a fifth Supreme Court hearing pertaining to whom can grant Guantanamo detainees release is underway. All of these measures have contributed in shaping the current climate surrounding the detention facility and the debate of closure.

### Initiate Movement

#### Primary Research Question

Is there a basis for released Guantanamo detainees to receive reparations?

#### Secondary Research Questions

Secondary Question 1: What basic human rights do all persons captured receive according to established law? Does Guantanamo or GWOT policy afford GITMO detainees with these rights?

Secondary Question 2: How do American core values, principles, and ethics correspond to U.S. policy for establishment and operation of the Guantanamo Bay Naval Base detention facility? What executive, legislative or judicial acts have shaped this policy and to what extent?

Secondary Question 3: How were exclusion orders and forced internment policies during the Second World War for Japanese Americans and resident aliens similar to the GITMO facility and debate? Can this historical precedent assist future reparation policy for released GITMO detainees?

Secondary Question 4: What reparation solutions are available to remedy any negative effects of the Guantanamo policy?

## Definitions

A complete glossary of terms used throughout this thesis is located at the end. However, there are several terms used throughout this paper that require basic understanding and context in this thesis. They are listed below.

Alien: Refers to any person who is not a U.S. citizen

Common Article 3: An identical Article 3 found in each of the four Geneva Conventions extending general minimum coverage to all personnel in non-international conflicts.

Enemy Combatant: a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States including a person who is part of the Taliban, al Qaeda, or associated forces.

Enhanced Interrogation Techniques or Program: Those techniques adopted by the Bush administration with the assistance of the JPRA and legally authorized by the Office of Legal Council (OLC) memoranda (published between 11 September 2001 and 20 January 2009) and are not included in the Army Field Manual 2-2.23, *Intelligence Collector Operations*, dated 6 September 2006 or its processor, Army Field Manual 34-52, *Intelligence Interrogation*, dated 8 May, 1987.

Evacuee: Persons of Japanese descent who were forcibly evacuated from their homes and relocated to internment camps during World War II.

Guantanamo or GITMO Detainee: Any person captured during the GWOT and detained at the Guantanamo Naval Base Internment Facility.

Japanese Internment: The policy of evacuation and relocations of any person of Japanese descent, including resident aliens and U.S. citizens through the policies of military necessity during World War II from 1942-1946.

Reparations: Compensation (given or received) for an insult or injury or an act of repair in expiation of a wrong.

### Significance

The thesis topic's significance links America's core values and the issue of morality to policy decisions specific to our objective to win the Global War on Terrorism. This thesis also addresses a popular topic in the mainstream media and the international community from a unique perspective. The study of ethical decision-making and values is embedded in military professional education, the laws of the United States, and is the basis of civilized societies. Therefore, the debate of correcting a wrong, real or perceived, is very much in line with this thought process. This thesis aims to address some of these topics. Furthermore it will determine if there are grounds or a basis for ethical compensation to released GITMO detainees and the issue the U.S. created with its policy decisions.

### Assumptions

This thesis is limited in scope and depends on several assumptions. The main assumption is that Guantanamo Bay is a point of contention influencing U.S. public opinion as well as policymaker decisions and will continue to do so. Secondly, these issues may not be resolved with the closure of the facility. Third, the facility's existence and operation has great potential to affect future generations, detention policy, and

continue to consume time and resources requiring an ultimate resolution. This thesis assumes that most of the ideas it will introduce are those not yet considered in the mainstream debate and serve as third and fourth order effects of the policy decisions relating to the Guantanamo Bay detention facility.

In addition, this research recognizes and puts into context the symbol the Guantanamo Bay detention facility has become in the eyes of at least some Americans and many in the international community either as an example of America hypocrisy or the 'Evil Empire's' deeds. Similarly, this thesis assumes there are real and perceived human rights violations or failure to follow established laws (U.S. and international) and treaties which have at least in part created this perception. Moreover, there is an assumption that vast interpretations of international law, humanitarian rights, international treaties, and the founding values and principles of the United States of America, further complicate the issue.

#### Limitations and Delimitations

This thesis is also limited in scope because it will mostly focus on those detainees that have no evidence against them, or [perceived to] no longer pose a threat at the GITMO facility or those already released from internment. It will not discuss detainees located in other detention facilities such as Bagram, Afghanistan or Camp Bucca, Iraq. This thesis will not engage in a legal debate to re-try or challenge any of the Supreme Court opinions pertaining to GITMO. It will use these as fact. This thesis will also use established international law, accepted treaties, and both the Bush and Obama Administration's policy changes for further understanding this complicated subject.

Additionally, there will also be no attempt to justify questionable or “enhanced interrogation techniques.” Instead, since most of these techniques are no longer used, their use is evidence for an ethical debate to support a case for reparations. Available unclassified data on released GITMO detainee recidivism rates vary greatly depending on the source. The author therefore decided not to address possible recidivism rates as they relate to the consequences of reparations. Moreover, this thesis will not make conclusions on where specifically the GITMO detainees will go once GITMO closes.

Although there is creditable psychological material and research on the effects of captivity, detention, and emotionally significant events, to date there is little research specific to the implications of detention with respect to Guantanamo Bay or other GWOT detainees. Literature in this region is expanding yearly but it remains underdeveloped as of this writing. As a result, this subject will be addressed in general terms to give the reader basic understanding of implications, which can arise from confinement and present examples of reparation activities to remedy negative effects. Finally, in the interest of simplicity, this thesis will use only one historical example to compare and contrast the issues of reparations; that is the Japanese Internment during World War II.

### Chapter Summary

In summary, this thesis aims to research the ethical underpinnings of the Guantanamo Bay Detention Facility and the policies surrounding detention of enemy combatants at the facility. The purpose of this thesis is to determine how and in what way the U.S. policy for Guantanamo is in conflict with international and U.S. law or American values or all three. It is to examine these conflicts and determine whether there is value in compensating those detainees, released or are perceived to no longer pose a

threat in an attempt to regain a moral high ground on the subject of human rights and international law. Additionally, the brief analysis of Japanese Internment during World War II seeks to show a U.S. precedent for correcting poor policy decision in order to learn from the past and show atonement. Lastly, this thesis approaches the research questions through the idea of responsibility. The reader should be mindful that the present situation in Guantanamo Bay is an inherent consequence of the policy decisions and actions in the aftermath of the 9/11 terrorist attacks and eight years of fighting the GWOT.

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<sup>1</sup>All Things Considered, “Where Do Detainees Go When Guantanamo Closes,” NPR, 13 January 2009.

<sup>2</sup>“Executive Order 13492, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and the Closure of Detention Facilities*, 22 January 2009, [http://www.whitehouse.gov/the\\_press\\_office/closureofguantanamo detentionfacilities](http://www.whitehouse.gov/the_press_office/closureofguantanamo detentionfacilities) (accessed 20 February 2009).

<sup>3</sup>Secretary Donald Rumsfeld, DoD News Briefing-Secretary Rumsfeld and Gen. Myers, 27 December 2001, transcript, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2696> (accessed 19 November 2009).

<sup>4</sup>Associate Press, “Brief History of Guantanamo Bay,” *Fox News*, [www.foxnews.com/printerfriendly\\_story/0,3566,41744,00.html](http://www.foxnews.com/printerfriendly_story/0,3566,41744,00.html) (assessed 23 March 2009).

<sup>5</sup>*Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>6</sup>Karen J. Greenberg, “When GITMO was (Relatively) Good,” *The Washington Post*, [http://www.washingtonpost.com/wp-dyn/content/article/2009/01/23/AR200912302313\\_p](http://www.washingtonpost.com/wp-dyn/content/article/2009/01/23/AR200912302313_p) (assessed 24 March 2009).

<sup>7</sup>*Ibid.*

<sup>8</sup>Tim Golden, “The Battle for Guantanamo,” *New York Times Magazine*, 17 September 2006, 1.

<sup>9</sup>*Ibid.*, 5.

<sup>10</sup>CNN, “Obama signs order to close Guantanamo Bay facility,” CNN.com, <http://www.cnn.com/2009/POLITICS/01/22/guantanamo.order/index.html> (assessed 9 March 2004).



## CHAPTER 2

### CONDUCT RECONNAISSANCE

The literature for this thesis is vast and diverse. Therefore it is organized into four sections with several sub sections within each. Each of the four sections are explained in a little more detail in this chapter for the reader to understand better the literature categories used to conduct the research for this thesis. Section one includes the laws, doctrine, and international regulations in existence prior to the September 11th attacks. The second section contain those laws, regulations, pieces of legislation, court documents and reports which came into effect after the September 11th attacks. Section three is literature pertaining to Japanese internment during the Second World War and its reparations campaign. Additionally, a general background of literature on other reparation activity in the world is included in this section to provide broad and general understanding of readdress. Finally, section four encompasses the media influence from western and Arab standpoints.

#### Prior to 11 September 2001

The United States is a signatory of multiple international treaties, which outline the care and treatment of persons in custody to include the denouncement of torture and specific techniques categorized as inhumane or cruel treatment. The most commonly referred to international document covering these topics is the Geneva Conventions. Common Article 3 of the Geneva Conventions (12 August 1949) is the same for all four conventions and outline the minimum humanitarian rights afforded all persons in detention. Common Article 3 reads:

To this end the following acts are and shall remain prohibited at any time and any place whatsoever with respect to the above mentioned persons [those who have laid down their arms by sickness, wounds, detention or any other cause]: (a) violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.<sup>1</sup>

Aside from Common Article 3, equally important to this thesis is the understanding of established U.S. law, international law, applicable treaties, and military doctrine, which specifically define Enemy Prisoners of War (EPW) operations and humanitarian rights prior to and following the September 11th attacks. This is accomplished through the use of the Geneva Conventions and its protocols; Army Field Manuals (FM) such as 19-4, *Military Police Operations*, 27-10, *Rules of Land Warfare*, 34-52, *Intelligence Interrogation*; and founding documents of the United States such as the Declaration of Independence, Federalist Papers and the U.S. Constitution. Additionally, *The Handbook on the Law of War for Armed Forces*, published by the International Committee of the Red Cross (ICRC) served as an excellent reference guide for all the various humanitarian treaties in which most civilized states in the world are a party. The *Treatment of Prisoners Under International Law* by Nigel Rodley, the *Dictionary of International Human Rights Law* by John S. Gibson, and *The Universal Declaration of Human Rights, a Commentary*, published by the Scandinavian University Press are the specific sources the author relied on. They are but a few of a variety of other sources, which describe both the strategic level policy and decisions through to the tactical ‘boots on the ground’ decisions influencing the protection and promotion of humanitarian rights and international law.

### September 11th and Beyond

The changes made by the U.S. Government after the September 11th attacks with respect to detention operations are included in this literature section. The focus is on executive orders, OLC memoranda, Congressional reports, key legislation (the DTA and MCA), and Supreme Court decisions. FMs such as 3.0, *Operations* and 2-22.3, *Human Intelligence Collector Operations*; 3.19-4, *The Military Police Handbook* and Army Regulation (AR) 350-1, *Army Training and Leader Development* are used to highlight how these changes were adopted into military practice. Finally, UN and private organization data underscores and validate these changes. It also serves to indicate the meaning and implications of the changes, both positive and negative.

More specifically, OLC memoranda published since September 11th, the Senate Armed Service Committee's inquiry into the treatment of detainees, and three Supreme Court decisions highlight the metamorphosis of policy with persons in U.S. control since the GWOT began. These documents show both the ambiguity of U.S. detention policy (especially during the first four years of the GWOT) and provide a timeline of events leading to the current debates involving the Guantanamo detention facility and its detainees. Thorough analysis of these documents provides a more complete understanding of the ethical dilemma, the consequences of policy change, and the possible violations of law.

### Japanese Internment, Readdress, and Other Reparation Efforts

On 19 February 1942, ten weeks after the Pearl Harbor attack, President Franklin D. Roosevelt signed Executive Order 9066. This order gave to the Secretary of War and

the military commanders to whom he delegated authority, the power to exclude all persons, citizens, and aliens, from designated areas in order to provide security against sabotage, espionage, and fifth column activity.<sup>2</sup> In 1982, Congress appointed a federal panel to investigate the evacuation and relocation programs conducted in the United States during the Second World War. The Commission on Wartime Relocation and Internment of Civilians produced *Personal Justice Denied* as a final report. The commission examined the military necessity of Executive Order 9066, and interviewed hundreds of evacuees, government officials, historians, and other key personnel in order to review the directives, facts and circumstances involved in the decision making and execution process of this policy. This document serves as the primary source of literature along with the Civil Liberties Act of 1988, which established reparations for these individuals or their surviving kin.

In addition, Laurel Fletcher, a clinical professor of law at UC Berkeley School of Law and Eric Stover, an adjunct professor of law and public health at UC Berkeley wrote a book, *The Guantanamo Effect: Exposing the Consequences of U.S. Detention and Interrogation Practices*. Unfortunately, the book was published in September 2009 and is too late for inclusion in this thesis. However, Ms. Fletcher recommended *The Handbook of Reparations*, edited by Pablo De Greiff of the International Center for Transitional Justice to the author, as a guide. *The Handbook of Reparations* was able to serve as a primary source of expert knowledge in the psychological and reparation area.

Moreover, there are hundreds of books also available for illustration of reparations used throughout the world in general and specific instances. The author chose two others to highlight other international reparation efforts in order to link common

themes, in broad and general terms. In addition to *The Handbook of Reparations*, edited by Pablo De Greiff, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* by Eric Stover and Harvey M. Weinstein, and *War Crimes and Collective Wrongdoing, A Reader*, edited by Aleksandar Jokić were chosen.

Finally, Retired MG Antonia Taguba, who led the official U.S. Army investigation into the Abu Ghraib scandal, wrote the preface for a report by Physicians for Human Rights (PHR) in June 2008 called *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact*. This organization is renowned for its more than 20 years of torture documentation throughout the world. Although this thesis does not center on most of the subjects introduced in this study, it does assist the author in demonstrating the likely psychological trauma of detainees in U.S. Custody at Guantanamo Bay detention facility. Two additional reports published by in November 2008 and March 2009 by the International Human Rights Law Center at University of California Berkeley, School of Law provide limited analysis of similar detainee issues with respect to those who were released.

### The Media

According to United States Southern Command's JTFGTMO website (last updated on 19 June 2009), there is a current detainee population at GITMO of approximately 230 persons who represent about 30 countries and range in age from 21 to 61, with an average age of 35. The number of released or transferred detainees is more than 520.<sup>3</sup>

The fourth and final section of this literature review uses documentation from the current debate shaped by the media in terms of western and Arab media outlets as well as

those released from the Public Affairs Office (PAO) at Guantanamo Bay Naval Base itself. This section aims to expose the reader to broad international perceptions of the facility to emphasize the greater international issue of making amends. This section's literature also draws attention to the link between perception and policy and includes the use of surveys and opinion polls. The author chose the Pew Research Center whose data is found at <http://pewresearch.org/> because it is nonpartisan, non-profit association. The center does not take positions on policy issues and produces reputable data from surveys conducted throughout the world on a variety of topics including public opinion of the U.S. in the world community.

Finally, it is also important to note the relationship between U.S. strategy for winning the GWOT, fostering international cooperation, and the consequences of the perception Guantanamo Bay created. COL Gerard P. Fogarty of the Australian Army describes this linkage in his United States Army War College Strategy Research Project entitled *Guantanamo Bay—Undermining the Global War on Terror*. Although written in March 2005, his point is no less relevant today. COL Fogarty explains there are significant challenges in “creating a shared understanding of the terrorist threat [and the essential task of] extending cooperation in international counterterrorism efforts.”<sup>4</sup> He maintains the treatment of detainees at Guantanamo has a significant impact on the [Bush] administration's ability to undertake this task.<sup>5</sup> This position serves to highlight further the consequence U.S. detention operations and policy has on world perception of the U.S. in terms of military cooperation as well as civilian opinion.

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<sup>1</sup>*Geneva Conventions (III) relative to the Treatment of Prisoners of War* (12 August 1949), <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68> (assessed 20 April 2009).

<sup>2</sup>U.S. Congress, “Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians,” [http://www.nps.gov/history/history/online\\_books/personal\\_justice\\_denied/chap2.htm](http://www.nps.gov/history/history/online_books/personal_justice_denied/chap2.htm) (accessed 16 July 2009).

<sup>3</sup>Joint Task Force Guantanamo, “Detainees,” *Joint Task Force Guantanamo Brochure* (June 2009), <http://www.jtftgmo.southcom.mil> (assessed 10 July 2009).

<sup>4</sup>Gerard P. Fogarty, “Guantanamo Bay—Undermining the Global War on Terror” (USAWC Strategy Research Project, U.S. Army War College, Carlisle Barracks, PA, 18 March 2005).

<sup>5</sup>*Ibid.*

## CHAPTER 3

### COMPLETE THE PLAN

That's what's hard about being a democracy . . . The enemy has no moral dilemma.<sup>1</sup>

— Senator Lindsey Graham  
Republican Senator from South Carolina

You do what you have to do. But, you take responsibility for it.<sup>2</sup>

— Senator John McCain  
Republican Senator from Arizona

To adopt and apply a policy of cruelty anywhere within this world is to say that our forefathers were wrong about their belief in the rights of man, because there is not more a fundamental right than to be safe from cruel and inhumane treatment. Where cruelty exists, law does not.<sup>3</sup>

— Alberto Mora  
Former General Counsel of U.S. Navy

#### Crossing the Line of Departure

The purpose of this chapter is to provide the reader with the methodology used to organize this thesis. It is also to summarize the presentation of research in subsequent chapters. It is necessary to note here, the context of September 11th and its aftermath which, must be taken into account when examining the research questions of this thesis. Therefore, this thesis did not aim to solved the Guantanamo Bay problem in its entirety or provide the perfect solution for a compensation campaign. Rather, its objective was to simply begin an ethical discourse for recompense to released Guantanamo detainees and possibly suggest solutions that have yet to be discussed in an open conventional forum. This chapter discusses how these topics are approached and discussed in subsequent chapters.



## Prepping the Objective

It first worthy to note, how the GWOT fundamentally changed the way the United States conducts and thinks about EPW or detention operations. For simplicity's sake, the detainees at GITMO can be categorized principally into one of three groups.<sup>4</sup> Group number one are those detainees whom U.S. officials know are *bad* and whom they possess evidence on which support this assessment. Group number two are those detainees whom U.S. officials *suspect* are bad but which evidence to support these accusations is lacking, missing, or acquired under questionable circumstances. Group number three are detainees, which there is no evidence against or *no longer pose* a significant threat to the United States and are slated for release or have been released. It is group number three, which this thesis focused on primarily. It is significant to note however, that this category of detainee still remains very broad. It encompasses those that were legitimately in the wrong place at the wrong time and those who no longer pose a significant threat, but may have actively participated in attacks against the U.S. or its coalition partners. Therefore any recommendation for a single template of reparations would not be well advised. Instead, an individual system of petition on a case by case basis would be more appropriate.

This thesis used qualitative research to identify factors that may be important to generate ideas on the topic of ethical responsibility and reconciliation for detainees held at Guantanamo Bay detention facility. The analysis of literature is captured in three parts beginning with chapter 4 through 7. The author made every attempt to take into account both the historical context of the prison and the overall emotional state of the nation following September 11th when conducting research and analysis. The author also

approached each topic with a sense of responsibility for what the U.S. stands for as the leader of liberty and democracy in the world. Finally yet importantly, the author used media influences to put world opinion into context and used organizational documentation from the full political spectrum to capture arguments and interpret the literature used in this thesis.

### Occupy the Assembly Area

Chapter 4 analyzes and presents the foundational documents covering humanitarian rights including the Universal Declaration of Human Rights, the Geneva Conventions and other key UN conventions. It examines American values, the U.S. Constitution, and customary law influencing U.S. founding documents and concepts. Chapter 4 also discusses applicable U.S. federal law and military doctrine relating to ethics and humanitarian rights for detainees. The purpose of this chapter is to give the reader a basic understanding of applicable international and U.S. law, as well as the values and ethics understood to represent U.S. democratic ideals. This research was able to establish whether rights were violated, applicable laws were followed, and American principles applied.

Chapter 5 examines the history of the Guantanamo Bay Naval Base and the detention facility itself. It also discusses the policies, which allowed the detention facility's operation in support of the GWOT and the influence of "enhanced interrogation techniques" on U.S. credibility. Lastly, this chapter studies the three landmark Supreme Court decisions and the corresponding U.S. legislation impacting Guantanamo Bay operations, detention policy and world opinion. The key take away of this chapter is to provide the reader with a timeline of events shaping the current debate. It also provides

background information from all three branches of the U.S. government, to outline the relationship between branches and the transformation of American and humanitarian ideals or principals over the last eight years.

For compare and contrast purposes, chapter 6 made use of a similar situation in which the U.S. Government took action in time of national emergency and later renounced its actions (Japanese Internment in World War II). The brief historical analysis of the policy that lead to internment, the readdress campaign and reparation results function to reveal examples of reparations and U.S. precedent for correcting policy mistakes. In general terms, the study is helpful to understand options that may be available to the current situation to rectify poor Guantanamo detention policy. Although Guantanamo Bay detainees are not American citizens, elements of the Japanese internment during World War II are presented in this chapter to compare and contrast similar threads and issues with Guantanamo detainees. Likewise, chapter 7 also introduces the readers to other reparation campaigns in order to give general information about redress. The overall objective of this case study and reparations discussion was to examine possible government courses of action using general reparation program ideas and a historical example of a similar time of national emergency.

The final chapter of this thesis gives conclusions and recommendations. More specifically, it addresses the internment of Guantanamo Bay detainees as it relates to American values, ethics, international and U.S. law, and humanitarian rights. It also determines what issues the United States has inherited with its policy decisions involving Guantanamo and finally, what solutions may be available to the United States to remedy the negative effects. The solutions presented in this chapter are meant to introduce

options that in the opinion of the author should be a part of the Guantanamo discussion given the analysis of literature presented in this thesis. .

### Chapter Summary

In summary, this chapter discussed the methodology for this thesis. American values and basic human rights are highlighted in this research to answer secondary questions one, two, and four. The U.S. Constitution, Federalist Papers, quotes from influential current and previous U.S. leaders, military doctrine, treaties and conventions, and International law pertaining to treatment of prisoners, habeas corpus, and humanitarian rights laid a ground work for this endeavor. Background information on Cuba, the OLC memoranda, key U.S. legislation and inquiries, and court documents further serve to augment understanding of the ethical issues. Secondly, the research reviewed the background, circumstances, and outcome of the Japanese relocation and internment program during World War II permitting identification of parallels and gaps for use in the conclusion and recommendation chapter of this thesis for released GITMO detainees. Analysis also answers the third secondary research question. Finally, a review of applicable mainstream media in the U.S. and abroad strove to give international context, consequence, and understanding of this issue from a unique perspective while contributing to enhance the answers for each research question.

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<sup>1</sup>Lindsey Graham, Newsweek Web Exclusive interview with Michael Isikoff, “What Americans Stand For,” *Newsweek.com*, 18 September 2006, <http://www.newsweek.com/id/45778> (accessed 22 September 2009).

<sup>2</sup>John McCain, interview with Newsweek reporters Evan Thomas and Michael Hirsh, “The Debate over Torture,” *Newsweek*, 21 September 2005, <http://www.newsweek.com/id/51198> (accessed 22 September 2009).

<sup>3</sup>Alberto J. Mora, former U.S. Navy Gen. Counsel, Acceptance Speech by Alberto Mora (22 May 2006), <http://www.jfklibrary.org/Education+and+Public+Programs/Profile+in+Courage+Award/Award+Recipients/Alberto+Mora/Acceptance+Speech+by+Alberto+Mora.htm> (accessed 21 September 2009).

<sup>4</sup>*All Things Considered*, “Where Do Detainees Go When Guantanamo Closes,” NPR, 13 January 2009.

## CHAPTER 4

### THE ETHICAL BASE

William Roper: So, now you give the Devil the benefit of law!

Sir Thomas More: Yes! What would you do? Cut a great road through the law to get after the Devil?

William Roper: Yes, I'd cut down every law in England to do that!

Sir Thomas More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? <sup>1</sup>

— A Man for All Seasons  
Highland Films, 1966

#### Chapter Introduction

This chapter aims to provide the reader with basic knowledge of international and U.S. law as it pertains to the Guantanamo detainees and all persons in detention. UN conventions are examined to determine a basis for international law, while the U.S. founding documents and principles lay the groundwork for federal law. Military doctrine is also examined as it relates to detention operations, establish law (international and U.S.) in order to understand what values and ideals should be present regardless of a conflict's circumstances. At the conclusion of this chapter, the reader should have a better understanding of the basics of humanitarian, international, and federal law as well as the rights afforded all persons in detention. This information will initiate the author's process to answer the primary research question and lay the ground work in consideration for answering secondary research questions. Finally, the information provided in this chapter will aid the reader in subsequent chapters to determine whether the policies of Guantanamo Bay interment are compliant or in conflict with the principles, standards, and regulations presented in this chapter.

## Humanitarian Law and Human Rights

What is international humanitarian law? According to the ICRC it is part of international law, which is “the body of rules governing relations between States. . . . contained in agreements between States—treaties or conventions,—in customary rules, which consist of State practice(s) considered by them as legally binding . . . and in general principles.”<sup>2</sup>

Prior to the conception of the UN following the Second World War, international humanitarian law was virtually non-existent. The Hague (1899 and 1907), the Convention relative to the Treatment of Prisoners of War (1929), the League of Nations, and a few other treaties or organizations only served as a basic guideline for the law regulating the process of war (*jus in bello*) or the law regulating the commencement of war (*jus ad bellum*). So, it was not until the world came together in the aftermath of the Second World War to found the UN, did international human rights and international humanitarian law become what it is known as today. The preamble to the Charter of the United Nations, shown in figure 1 outlines the humanitarian aims of the UN.

It is important to note that because of the post-war efforts to establish human rights and protect populaces against abuses by their own government, two broad aspects developed, the promotion of human rights (standard-setting) and the protection of human rights (giving effect to).<sup>3</sup> According to Nigel Rodley, author of *The Treatment of Prisoners under International Law*, the UN initially focused principally on the promotion of human rights resulting in its first document, the Universal Declaration of Human Rights, adopted on 10 December 1948. Rodley goes on to state that these basic rights afforded all prisoners apply regardless of the legitimacy of their detention. “They are the

rights of all prisoners, whether entirely innocent of any offense or guilty of the most heinous.”<sup>4</sup>

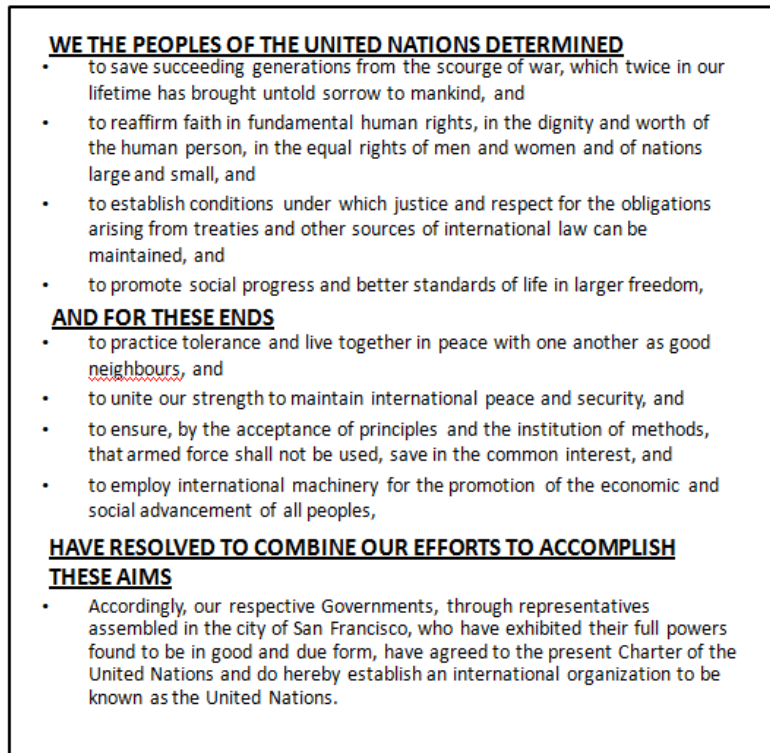


Figure 1. UN preamble

Source: Created by author, adapted from information obtained at <http://www.un.org/en/documents/charter/preamble.shtml> (accessed 22 October 2009).

In 1975, the UN begins in earnest to investigate human rights when it formed a working group to investigate human rights in Chile.<sup>5</sup> Soon thereafter the inclusions of elements which both promote and protect humanitarian rights were produced by the UN. They are the International Covenant on Economic, Social, and Political Rights (ICESCR), in force from 3 January 1976; the International Covenant on Civil and Political Rights (ICCPR), entered into force on 23 March 1976; and the Convention



against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), ratified in 1984. All three serve to augment the Universal Declaration of Human Rights. The U.S. is a signatory of the latter two documents. It is important to note that although a state may not be party or a signatory on a UN document or convention, it is still international law. Since 1975, the UN has conducted multiple investigations, commissions, and tribunals into humanitarian rights throughout the world. Some examples include the truth commissions in El Salvador and Guatemala,<sup>6</sup> the South Africa Truth and Reconciliation Commission to investigate apartheid,<sup>7</sup> and the UN authorized U.S. tribunals to try war criminals in Sierra Leone and East Timor,<sup>8</sup> just to name a few.

#### Declaration of Human Rights

While the Declaration of Human Rights in its entirety applies to the all detainees held at GITMO according to international law, it is articles 3, 5, 8, 9, and 10, which are most applicable to this study and are available in figure 2. Chapter 5 of this thesis specifically discusses the Guantanamo Bay detention facility, U.S. policy and U.S. case law in detail. It is during this discussion that it should become clear whether the U.S. is compliant with these and the subsequent documentation discussed further in this chapter.

<p><b>Article 3.</b> Everyone has the right to life, liberty and security of person.</p> <p><b>Article 5.</b> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.</p> <p><b>Article 8.</b> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.</p> <p><b>Article 9.</b> No one shall be subjected to arbitrary arrest, detention or exile.</p> <p><b>Article 10.</b> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.</p>
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Figure 2. Declaration of Human Rights Articles

*Source:* Created by author, adapted from information obtained at <http://www.un.org/en/documents/udhr/> (accessed 22 October 2009).

### International Covenant on Civil and Political Rights (ICCPR)

There are three conventions mentioned above that serve to augment the Universal Declaration of Human Rights. The ICCPR, in particular has 53 articles, including article 4 explicitly allowing an exemption to most articles in the convention. In a time of public emergency, which threatens the life of a nation, states party to the convention may request exemption through the Secretary-General of the United Nations.<sup>9</sup> Even so, Article 4 paragraph 2 does not allow derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18. Figure 3, features article 4. Figure 4, features those articles in which no derogation is permitted.

**Article 4**

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Figure 3. Article 4 of the ICCPR

Source: Created by author, adapted from information obtained at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm> (accessed 27 August 2009).

Following the September 11th attacks on the U.S., the Bush Administration failed to request an exemption for the ICCPR. However, normal exemptions intend to be short term in nature. Therefore, an exemption lasting eight years would probably be inconsistent with the terms of the ICCPR as well. Nonetheless, from the UN prospective, the ICCPR is legitimate international law, so the U.S. was obligated to comply with all aspects of the convention, including in the capture and detention of enemy combatants in the GWOT.

Other ICCPR recommendations and violations in addition to the articles listed in figures 3 and 4, Article 14 of the ICCPR is important to note. This article establishes the right to a “fair public hearing by a competent, independent, and impartial tribunal

established by the law.”<sup>10</sup> This article also includes specific rights if criminally charged including the right to be informed of charges, prepare a defense and be tried without delay.<sup>11</sup> Article 14 is mentioned here to preface the discussion in chapter 5 regarding legislation and the implications of military tribunals and review boards for Guantanamo detainees. Another article of the ICCPR, of significance in this area is article 9. This article has five paragraphs. Paragraph 1 ensures the right to liberty, security, and protection against arbitrary arrest.<sup>12</sup> Paragraph 2 requires the right to be informed of the reason for arrest and any charges.<sup>13</sup> Paragraph 3 requires those charged with a criminal offense to be brought before a judge in a reasonable amount of time or be released.<sup>14</sup> Paragraph 4 allows habeas corpus relief and paragraph 5 requires compensation for person wrongfully imprisoned.<sup>15</sup>

Figure 4 depicts those articles stated in paragraph 2 of Article 4 in which an exemption cannot be granted. These articles should be viewed as the minimum protection rights permitted by the ICCPR convention. In particular, those highlighted in red font, along with articles 9 and 14 cited above, correlate explicitly to the analysis of GITMO policy and U.S. legislation scrutinized in chapter 5.

<p><u>Article</u> <u>6</u></p>	<p>1. Every human being has the inherent right to life. This right shall be protected by law. <b>No one shall be arbitrarily deprived of his life.</b></p> <p>2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.</p> <p>3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.</p> <p>4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.</p> <p>5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.</p>
<p><u>Article</u> <u>7</u></p>	<p><b>No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.</b> In particular, no one shall be subjected without his free consent to medical or scientific experimentation.</p>
<p><u>Article</u> <u>8</u></p>	<p>1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude.</p>
<p><u>Article 11</u></p>	<p>No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation</p>
<p><u>Article</u> <u>15</u></p>	<p>1. <b>No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.</b> Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.</p> <p>2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.</p>
<p><u>Article 16</u></p>	<p><b>Everyone shall have the right to recognition everywhere as a person before the law.</b></p>
<p><u>Article</u> <u>18</u></p>	<p>1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.</p> <p>2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.</p> <p>3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.</p> <p>4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.</p>

Figure 4. Non-Derogation Selected Articles of ICCPR

Source: Created by author, adapted from information obtained at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm> (accessed 27 August 2009).

## The Convention against Torture

Next, it is also necessary to discuss briefly the Convention against Torture, which like the ICCPR serves to augment the Universal Declaration of Human Rights. The U.S. agreed to this resolution with amendments on 27 October 1990. One of the amendments to the resolution is that the U.S. considers itself bound by Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term means that which is prohibited by the Fifth, Eighth, and, or Fourteenth Amendments to the Constitution of the United States.<sup>16</sup> Examination of these and other constitutional amendments are in the next section of this chapter. Still, this amendment to the Convention against Torture is critically important, because post September 11th executive branch policy, OLC documents, and U.S. legislation sought to further narrow the definition of torture and ‘cruel, inhuman or degrading treatment or punishment.’ This was done to justify the “enhanced interrogation program” and prevent possible future prosecution of those who used these techniques under the War Crimes Act or in violation of international law.<sup>17</sup> This evidence would further suggest the U.S. policy of detention at GITMO is in conflict with established international law. Moreover, article 3 of the convention bars deporting or extradition of people where there are substantial grounds for believing they will be tortured.<sup>18</sup> The U.S. did engage in extraordinary rendition for persons detained in accordance with GWOT. However the government remains silent on the actual treatment of these detainees while in custody of foreign countries.

## The Geneva Conventions

Last but not least, the Geneva Convention is examined. As the UN endeavors to regulate war (*jus as bellum*), the ICRC efforts rest with the process of war (*jus in bello*).<sup>19</sup>

The ICRC gives further insight into the other primary documents of humanitarian law, all four of The Geneva Conventions and their additional Protocols. The ICRC asserts The Geneva Conventions are at the “core of international humanitarian law, the body of international law that regulates the conduct of armed conflict and seeks to limit its effects.”<sup>20</sup>

The Geneva Conventions were written in 1949 and consist of four Conventions and three Protocols. There are 194 high contracting states party to the conventions to date. The conventions consist of: The First Geneva Convention (*Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*); The Second Geneva Convention, (*Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*); The Third Geneva Convention, (*Relative to the Treatment of Prisoners of War*); and The Fourth Geneva Convention, (*Relative to the Protection of Civilian Persons in Time of War*). The 1977 Protocols that are additional to the Geneva Conventions of 1949 are: Protocol I (102 Articles) (*Relating to the Protection of Victims of International Armed Conflicts*); and Protocol II (28 Articles), (*Relating to the Protection of Victims of Non-International Armed Conflicts*). Finally Protocol III from 2005: (17 Articles) (*Relating to the Adoption of an Additional Distinctive Emblem*). The U.S. is a signatory for Protocols I and II and party to Protocol III. A signature is not binding on a State unless it has been endorsed by ratification.<sup>21</sup> Therefore, the U.S. is party to all four of the conventions and the third protocol only. Although the U.S. remains a mere signatory for the first two protocols, all of the conventions and protocols remain international law.

The Geneva Conventions were ratified by the United States and came into force on 2 February 1956.<sup>22</sup> Chapter 2, pages 25-26 of this thesis outlines Common Article 3 of the Geneva Conventions, which are the minimum rules of war, applied to armed conflicts that are not of an international character. That is those conflicts that are internal or involve non high contracting parties of the conventions. This would include civil wars, revolutions, and insurgent activity. Common Article 3 is common to all four of the Geneva Conventions and derogation is prohibited. Unlike aspects of the ICCPR, a party subject to The Geneva Conventions cannot request exemption. Common Article 3 guarantees humane treatment for all persons, the caring of wounded and sick, and provides the right to ICRC services. Therefore, like the ICCPR and the Convention against Torture, Common Article 3 applies to the treatment of detainees at Guantanamo Bay Detention Facility according to international law. Confirmation of this analysis occurred in 2006 when the U.S. Supreme Court held that Common Article 3 applies to the Guantanamo detainees in *Hamdan v. Rumsfeld*. This and additional U.S. case law will be discussed in more detail in chapter 5.

Aside from Common Article 3, it is the Third Geneva Convention, which has created the most debate regarding Guantanamo detainees. This is because detainees in the GWOT do not conform to Article 4 of the convention, which defines a prisoner of war (POW). A POW must have an organizational command structure, have a fixed distinctive sign recognizable at a distance, carry their arms openly, and conduct operations in accordance with the law and customs of war.<sup>23</sup> However, Protocol I to the Geneva Conventions in force from 8 June 1977, outlines an exception to the distinction from civilians. It states in situations where an armed combatant cannot distinguish himself, he



keeps his status as a combatant if he carried his arms openly during every military engagement and as long as he is visible to the enemy while he is moving to a place from where combat action is to take place.<sup>24</sup> It appears this definition could be applied to insurgent activity and is meant to extend combatant status to those organized military organization that due to revolution or civil war, it is not practical to have distinguishing mark.

It is now necessary to discuss the US Constitution and its founding principles and examine further the ethical debate.

### What America Stands For

While, it is only in the last 60 years, that international humanitarian law has acquired the rules and regulations in which to regulate international society through the UN, the concept of humanitarian law and human rights manifests itself as early as the Magna Carta in 1215.

No freeman is to be taken or imprisoned disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land. To no-one will we sell or deny of delay right or justice.<sup>25</sup>

This legacy is most clearly noticeable in our Bill of Rights. The Fifth Amendment guarantees no person shall be deprived of life, liberty, or property, without due process of law; the Six Amendment guarantees the right to fair and speedy trial and the right to defense; and, the Eight Amendment prohibits the use of cruel and unusual punishment<sup>26</sup> Additionally, the Fourteenth amendment of the U.S. Constitution protects rights against state infringements, defines citizenship, requires due process and equal protection, and punishes states for denying the right to vote.<sup>27</sup>

## Declaration of Independence and U.S. Constitution

The United States was also founded on core values, rights, and ideals, which have endured over 233 years. The familiar lines of the Declaration of Independence embody these principles. “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>28</sup> Benjamin Franklin cautioned however, “they that can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.”<sup>29</sup> Is this a foreshadowing of internment policies during World War II and post 9/11 Perhaps? Nevertheless, these values, individual rights, and the ideals of liberty also served as a model for established and emerging democracies around the world. Thomas Jefferson wrote: “rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others.”<sup>30</sup> These principles are at the forefront of challenges the U.S. has assumed and overcome in its history. From the American Revolution to gain independence from Britain, to the abolishment of slavery and the Civil War, from women’s suffrage through two world wars and the civil rights movement, the U.S. has maintained its founding principles. It has done this by adhering to the Constitution and the foundations of U.S. democracy or by reversing policies or actions later considered being in conflict with these ideals. The assumption is that leaders and policy makers throughout the history of the U.S. have understood the central theme of liberty presented so eloquently by Thomas Paine: “he that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.”<sup>31</sup>

In continuing the discussion of the Magna Carte and its influence in the U.S. Constitution, it is significant to note another important humanitarian principal called habeas corpus. habeas corpus is the right of all persons detained to challenge their detention in a court of law. Its importance as common law in the American colonies and due to the [English] Habeas Corpus Act of 1679, were grounds for its inclusion in the U.S. Constitution. According to the Constitution Society, the Habeas Corpus Act of 1679 was in response to abusive detention of persons without legal authority and public pressure on the English Parliament.<sup>32</sup> The protection of habeas corpus is in Article 1, section 9 of the Constitution and states, “the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”<sup>33</sup> In addition, Federal Code Title 28 allows those detained by the U.S. to challenge their detention on the basis that their detention violates U.S. law, the Constitution or a treaty.<sup>34</sup> In *Boumediene v. Bush*, (discussed in more detail in chapter 5) the Supreme Court ruled that habeas corpus applies to detainees at Guantanamo in part because the Bush administration never requested a suspension.<sup>35</sup>

Habeas corpus and other U.S values are represented in the Federalist Papers. After state representatives met in the summer of 1787 at the Philadelphia Convention (now known as the Constitutional Convention), *The Independent Journal* published 85 essays in support of the constitution’s ratification. Among these is “Federalist Paper Number 84,” in which Alexander Hamilton (1788) writes of the importance of habeas corpus as well as the dangers of arbitrary imprisonment:

The establishment of habeas corpus, the prohibition of ex post facto laws and of titles of nobility, are perhaps greater securities to liberty and republicanism than any it [the US Constitution] contains . . .and the practice of arbitrary

imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone, are well worthy of recital: 'to bereave a man of life, says he, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is less public, a less striking, and therefore a more dangerous engine of arbitrary government.'<sup>36</sup>

The suspension of habeas corpus however, occurred four times in U.S. history. President Abraham Lincoln requested a writ to suspended habeas corpus in Maryland and parts of Midwestern states, including southern Indiana during the civil war in order to suppress the insurrection existing in the United States at that time.<sup>37</sup> In the early 1870s, President Ulysses S. Grant requested a writ to suspend the right in nine counties of South Carolina as part of the federal civil rights action against the Ku Klux Klan under the 1870 Force Act and the 1871 Ku Klux Klan Act.<sup>38</sup> In the early 1900s, during an armed rebellion in the Philippines, President McKinley requested a writ of suspension.<sup>39</sup> Finally, in 1941 following immediately after Pearl Harbor, President Franklin D. Roosevelt requested a writ of suspension in Hawaii that lasted until 1945.<sup>40</sup> Interestingly, although the legislation passed by Congress in 2005 and 2006 address the right of habeas corpus for Guantanamo detainees, the Bush administration never requested a writ to suspend the right. Further discussion and analysis of habeas corpus and its specific relationship to Guantanamo Bay detentions is in chapter 5.

#### Federal Law

While international law promotes humanitarian rights, it provided only limited protection. It is the Uniform Code of Military Justice (UCMJ), applicable to U.S. service members and U.S. Federal Code Title 18, Part 1, Chapter 113C, *Torture*; applicable to

U.S. nationals, both provides punitive articles for violating humanitarian rights.<sup>41</sup> The UCMJ was signed into law on 10 August 1956, and has undergone several revisions to date. It was under UCMJ punitive articles that U.S. service members were charged, tried, and sentenced for crimes committed at My Lai<sup>42</sup> and Abu Ghraib.<sup>43</sup>

On 29 July 1996, the War Crimes Act passed by overwhelming majorities in the U.S. Congress. It is applicable to service members and U.S. Nationals alike. Its purpose was to amend title 18, of the United States Code, “to carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes.”<sup>44</sup> In fact, according to Gary D. Solis, author of *Son Thang: An American War Crime*, the War Crimes Act was prompted by the experience of a former Air Force pilot and POW who “was concerned about the seeming absence of statutory authorization for the punishment of persons who mistreat prisoners of war.”<sup>45</sup> The War Crimes Act thus was passed to prosecute those who commit or committed mistreatment against U.S. service members in detention. When passed into law it defined “war crime” as stated below.

(c) Definition.-As used in this section the term "war crime" means any conduct - (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party; (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907; (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.<sup>46</sup>

In 2006, the Military Commissions Act amended the War Crimes Act to redefine “war crimes” as being only those that were defined as a “grave breach” of any of the Geneva Conventions.<sup>47</sup> Grave breaches include but are not limited to willful killing, torture, or inhumane treatment; great suffering or serious injury; taking of hostages; depriving of the rights of fair and regular trial; compelling to serve in the forces of an enemy party; attack on the civilian population; unlawful attack of clearly-recognized cultural objects; and the fraudulent use of distinctive signals used for identification of medical service.<sup>48</sup> The definition of war crime in the Military Commissions Act, however, not only narrows the definition from violations of Common Article 3 to grave breaches only, it is retroactive. This lead opponents to assume the amendment will prevent possible prosecution of those who sanctioned, developed, and participated in the “enhanced interrogation program.” Furthermore, the redefinition was part of a greater debate in the U.S. government to redefine Common Article 3 itself. The MCA and these provisions are discussed in more detail in chapter 5

### Military Doctrine

Military doctrine has always insisted on upholding values, standards, and ethical behavior throughout its operations. These ideals and the doctrine that guides and directs service members remain virtually constant since September 2001. According to FM 27-10, *The Law of Land Warfare*, published 1956 and still in use today, the law of war is derived from two sources: lawmaking treaties and custom.<sup>49</sup> Moreover, it states:

Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law. Lawmaking treaties may be compared

with legislative enactments in the national law of the United States and the customary law of war with the unwritten Anglo-American common law.<sup>50</sup>

Furthermore, Department of Defense Directive 5100.77, published on 9 December 1998, reminded all military components to “comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.”<sup>51</sup> The preface to FM 34-52, *Intelligence Interrogation*, published in May 1987 reads: “These principles and techniques of interrogation are to be used within the constraints established by FM 27-10, the Hague and Geneva Conventions, and the Uniform Code of Military Justice (UCMJ).”<sup>52</sup> Military Police doctrine is also in keeping with these principals and directives. In the introduction to FM 19-40, *Enemy Prisoners of War, Civilian Internees, and Detained Persons*, published 1976, the manual stresses the first objective of the Enemy PW/Detainee Program is “provide for the implementation of the Geneva Conventions.”<sup>53</sup> The point here is that the military seems to have always understood the importance of treating captured personnel humanely and with dignity. This is emphasized in doctrine, training, and professional education. The reason is simple. Applications of these provisions serve to protect American services members if they are captured during an armed conflict.

Changes and updates are reflective of policy decisions, influencing certain documents and manuals. These include: Department of Defense (DoD) Directive 2310.01E, *The Department of Defense Detainee Program* and the DoD Directive 2311.01E, *DoD Law of War Program*; Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms*; FM 2-22.3, *Human Intelligence Collector Operations*; FM 3-0, *Operations*; and FM 3-19.40, *Internment/Resettlement Operations*. Most recently, the DoD issued implementing requirements to prevent violations of the

law of war by contractor employees accompanying the U.S. Armed Forces overseas in DoD FAR Supplement (DFARS) 252.225-7040(a) published in the federal register on 15 January 2009.<sup>54</sup> Nevertheless, these are dozens of other military publications, like their predecessors that insist on humane treatment of those detained in accordance with established laws, the Geneva Conventions and the law of war.

The Soldier's Rules found in AR 350-1, *Army Training and Leader Development* have not changed over the years and capture these ideals. Figure 5 below depicts table 1-4 (The Soldier's Rules) located in the *Operations* field manual.

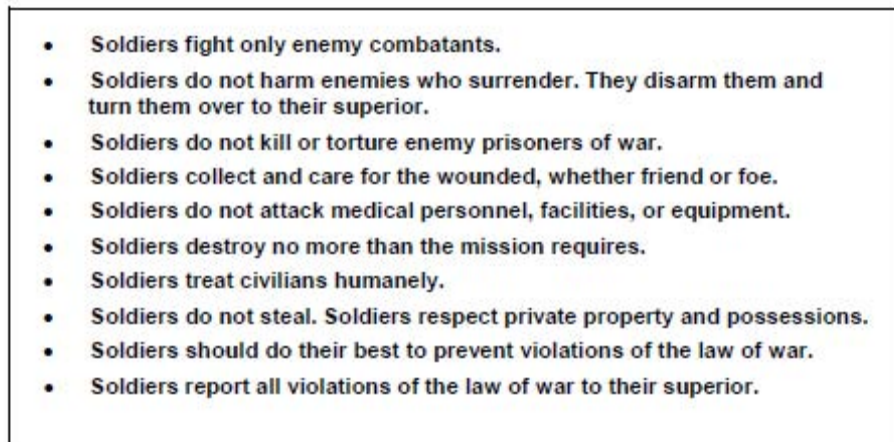
- 
- **Soldiers fight only enemy combatants.**
  - **Soldiers do not harm enemies who surrender. They disarm them and turn them over to their superior.**
  - **Soldiers do not kill or torture enemy prisoners of war.**
  - **Soldiers collect and care for the wounded, whether friend or foe.**
  - **Soldiers do not attack medical personnel, facilities, or equipment.**
  - **Soldiers destroy no more than the mission requires.**
  - **Soldiers treat civilians humanely.**
  - **Soldiers do not steal. Soldiers respect private property and possessions.**
  - **Soldiers should do their best to prevent violations of the law of war.**
  - **Soldiers report all violations of the law of war to their superior.**

Figure 5. The Soldier's Rules

*Source:* Department of the Army, Field Manual 3-0, *Operations* (Washington, DC: Government Printing Office, August 2007), 1-20.

AR 350-1 also serves to mandate the teaching of these principles in initial entry training programs for enlisted Soldiers and Officers. Additionally, ethics training is in all professional education course curriculums and law of war training is mandated annually.<sup>55</sup> FM 3-0, *Operations* outlines the ethical challenges leaders face to maintain



discipline and the moral conduct of their troops. Specifically, paragraph 1-86 speaks about the humane treatment of detainees to encourage surrender, reduce friendly losses and to reduce enemy antagonism toward U.S. forces. First and foremost however the paragraph emphasizes “nothing emboldens enemy resistance like the belief that U.S. forces will kill or torture prisoners.”<sup>56</sup>

### Chapter Summary

The purpose of this chapter was to inform the reader of basic humanitarian rights and law. At this point it should be apparent what basic human rights are afforded to all persons in detention regardless of their classification or status according to established international law. The Universal Declaration of Human Rights, the augmentation conventions to the declaration, and the 1949 Geneva Conventions including its protocols outline the international humanitarian rights afforded all persons regardless of nationality, sex, religion, or status. Although the U.S. is not a signatory for or has ratified all of these documents, the documents still serve as international and customary law for humanitarian rights. Moreover, the documents which the U.S. is party as well as applicable federal law, military doctrine and founding U.S. documents and principals are more than enough to determine what right looks like.

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<sup>1</sup>A Man for All Seasons, Highland Films, 1966, text at <http://www.imdb.com/title/tt0060665/quotes> (accessed 20 September 2009).

<sup>2</sup>International Committee for the Red Cross, “What is International Humanitarian Law?,” <http://www.icrc.org/web/eng/siteeng0.nsf/html/humanitarian-law-factsheet> (accessed 22 October 2009).

<sup>3</sup>Nigel Rodley, *The Treatment of Prisoners under International Law* (New York: Oxford University Press, 1987), 4.

<sup>4</sup>Ibid., 6.

<sup>5</sup>Ibid., 4; and Naomi Roht-Arriaza. “Reparations in the Aftermath of Repression and Mass Violence,” in *My Neighbor, My Enemy—Justice and Community in the Aftermath of Mass Atrocity*, Edited Eric Stover and Harvey M. Weinstein (Cambridge, Cambridge University Press, 2004), 124-125.

<sup>6</sup>Roht-Arriaza, 124-127.

<sup>7</sup>Ibid.

<sup>8</sup>Fogerty

<sup>9</sup>“International Covenant on Civil and Political Rights,” 23 March 1976, *United Nations Documents*, Article 4, <http://www1.umn.edu/humanrts/instreet/b3ccpr.htm> (accessed 27 August 2009).

<sup>10</sup>Ibid., Article 14, para 1.

<sup>11</sup>Ibid., Article 14, paras 3a-3g.

<sup>12</sup>Ibid., Article 9, para 1.

<sup>13</sup>Ibid., para 2.

<sup>14</sup>Ibid., para 3.

<sup>15</sup>Ibid., para 4-5.

<sup>16</sup>“The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture),” 27 October 1990, *United States Treaties and Other International Agreements*, <http://thomas.loc.gov/cgi-bin/ntquery/D?trty:8:/temp/~trty:UCISmW::> (accessed 27 September 2009).

<sup>17</sup>Senate Armed Services Committee, *Inquiry into the Treatment of Detainees in U.S. Custody*, 110th Cong., 2nd sess., 2008, 32.

<sup>18</sup>Convention against Torture, Part 1, Article 3.

<sup>19</sup>David P. Forsythe, *Humanitarian Politics, The International Committee of the Red Cross* (Baltimore, MD: The John Hopkins University Press, 1977), 121-122.

<sup>20</sup>International Committee for the Red Cross, “1949 Conventions and Additional Protocols,” <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (accessed 10 April 2009).

- <sup>21</sup>Ibid., see notes under signatory links.
- <sup>22</sup>Department of the Army, FM 27-10, *Law of Land Warfare* (Washington, DC: Government Printing Office, July 1956).
- <sup>23</sup>ICRC, Convention (III).
- <sup>24</sup>International Committee of the Red Cross, *Handbook on the Law of War for Armed Forces* (Geneva: International Committee of the Red Cross, 1987), 12.
- <sup>25</sup>The United States Federal Government, “The Magna Carte,” *The National Archives*, [http://www.archives.gov/exhibits/featured\\_documents/magna\\_carta/translation.html](http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html) (accessed 27 August 2009).
- <sup>26</sup>U.S. Constitution, Bill of Rights, <http://www.archives.gov/exhibits/charters/constitution.html> (accessed 1 October 2009).
- <sup>27</sup>Ibid., amendment 14.
- <sup>28</sup>*The unanimous Declaration of the thirteen united States of America* (4 July 1776), <http://www.ushistory.org/Declaration/document/index.htm> (assessed 4 July 2009).
- <sup>29</sup>Benjamin Franklin, “Forefathers Quotes,” American Revival, <http://americanrevival.org/quotes/forefathers.htm> (accessed 25 October 2009).
- <sup>30</sup>Thomas Jefferson, “Forefathers Quotes,” American Revival, <http://americanrevival.org/quotes/forefathers.htm> (accessed 25 October 2009).
- <sup>31</sup>Thomas Paine, “Forefathers Quotes,” American Revival, <http://americanrevival.org/quotes/forefathers.htm> (accessed 25 October 2009).
- <sup>32</sup>The Constitution Society, <http://www.constitution.org/eng/habcorpa.htm> (accessed 22 October 2009).
- <sup>33</sup>U.S. Constitution, article 1, section 9.
- <sup>34</sup>United States Government, “Power to Grant Writ,” *U.S. Code 28, Chapter 153, Sec. 2241*, 25 June 1948.
- <sup>35</sup>*Boumediene v. Bush*, 553 U.S. (2008).
- <sup>36</sup>Alexander Hamilton, The Federalist No. 84-Certain General and Miscellaneous Objections to the Constitution Concerned and Answered, *Independent Journal* (July and August 1788), <http://www.constitution.org/fed/federa84.html> (assessed 12 July 2009).

<sup>37</sup>Robert Longley, “Lincoln Issues Proclamation Suspending Habeas Corpus Rights,” <http://usgovinfo.about.com/od/historicdocuments/a/lincolnhabeas.htm> (accessed 22 October 2009).

<sup>38</sup>William F. Duker, *A Constitutional History of Habeas Corpus* (Westport, Connecticut: Greenwood Press, 1980) n.7,149,178,n.190.

<sup>39</sup>*Ibid.*

<sup>40</sup>*Ibid.*

<sup>41</sup>United States Government, “War Crimes Act,” *U.S. Code 18 , Chapter 118, Sec. 2441*, 29 July 1996, <http://ftp.fas.org/sgp/crs/intel/RL33662.pdf> (accessed 22 September 2009); and “UCMJ,” *U.S. Code 22, Title 10*, 10 August 1956.

<sup>42</sup>University of Missouri-Kansas City, “The My Lai Courts martial 1970,” Famous American Trials, <http://www.law.umkc.edu/faculty/projects/ftrials/mylai/mylai.htm> (accessed 29 October 2009).

<sup>43</sup>Susan Candiotti, “Abu Ghraib Soldiers Plead Guilty,” *CNN.com*, 2 February 2005, <http://www.cnn.com/2005/LAW/02/01/abughraib.plea.deal/index.html> (accessed 22 August 2009).

<sup>44</sup>War Crimes Act, <http://codes.lp.findlaw.com/uscode/18/I/118/2441> (accessed 23 September 2009).

<sup>45</sup>Center on Law, Ethics and National Security, “Did Military Justice Fail or Prevail?,” Duke University of Law, book review of Son Thang: An American War Crime,” By Gary D. Solice, 1997, <http://www.law.duke.edu/lens/publications/050698> (accessed 20 August 2009).

<sup>46</sup>*Ibid.*

<sup>47</sup>Michael J. Garcia, “The War Crimes Act: Current Issues,” *Congressional Research Service* (2009): 5-6, <http://ftp.fas.org/sgp/crs/intel/RL33662.pdf> (accessed 28 September 2009).

<sup>48</sup>ICRC, *Handbook on the Law of War for Armed Forces*, 169-170. All grave breaches are outlined between pages 168-170 of this book with the applicable Convention and article listed in the left column.

<sup>49</sup>*The Law of Land Warfare*, 4.

<sup>50</sup>*Ibid.*

<sup>51</sup>Department of Defense, Directive Number 5100.77, *DoD Law of War Program* (Washington, DC: U.S. Government Printing Office, 1998), 4.

<sup>52</sup>Department of the Army, FM 34-52, *Intelligence Interrogation* (Washington, DC: Government Printing Office, May 1987), iii.

<sup>53</sup>Department of the Army, FM 19-40, *Enemy Prisoners of War, Civilian Internees, and Detained Persons* (Washington, DC: Government Printing Office, February 1976), 1-2.

<sup>54</sup>Kara M. Sacilotto, "DoD Issues Final Rule on Law of War Training And Disclosure Obligations," Wileyrein.com, 16 January 2009, <http://www.wileyrein.com/publications.cfm?sp=articles&id=4878> (accessed 31 October 2009).

<sup>55</sup>Department of the Army, AR 350-1, *Army Training and Leader Development* (Washington, DC: Government Printing Office, August 2007), 4-18.

<sup>56</sup>Department of the Army, FM 3-0, *Operations* (Washington, DC: Government Printing Office, February 2008), 1-19.

## CHAPTER 5

### GUANTANAMO BAY and THE POLICIES OF GWOT

#### Chapter Introduction

This chapter serves to introduce federal law, U.S. Policy, and judicial action following September 11th to present. The history of GITMO, the development of “enhanced interrogation techniques,” OLC memoranda, key legislation, and Supreme Court cases are discussed in detail. The objective of this chapter is to further understand the policy of Guantanamo to determine whether they are in conflict with the basic rights and law described in chapter 4. If this is the case, a basis for reparations may exist. At the conclusion of this chapter the reader will have a broad understanding of the policies, legislation, and judicial aspects of Guantanamo internment.

#### We Have a U.S. Base-Where?

The Treaty of Paris of 1898 ended the war between the U.S. and Spain. It produced a treaty that placed the islands of Puerto Rico and Guam under American control.<sup>1</sup> It also allowed the U.S. to purchase the Philippines for 20 million dollars.<sup>2</sup> Finally, the treaty required Spain to release control of Cuba.<sup>3</sup> The U.S. took control of Cuba under the Teller Amendment that stipulated it would leave in 1902 to restore Cuba’s autonomy.<sup>4</sup> In 1901, the Platt Amendment was incorporated into the Cuban Constitution, which granted the U.S. the “the right to intervene for the preservation of Cuban independence” and the ability to “sell or lease to the United States lands necessary for coaling or naval stations” in perpetuity.<sup>5</sup> The Cuban government acquiesced because the U.S. threatened it would not leave as planned in 1902 unless they accepted the terms

of this amendment. The current government (Fidel Castro's regime) does not recognize this constitution and has not accepted U.S. money for the lease of the Naval Base located at Guantanamo Bay, but the U.S. position has never changed. Therefore, the Naval Base at Guantanamo Bay belongs to the U.S. as stated in the Cuban constitution, for which the U.S. still pays for the lease each month.<sup>6</sup> In *Rasul v. Bush* and *Boumediene v. Bush*, the Supreme Court opined that the U.S. has plenary (complete) control over the Naval Base at Guantanamo, but not *de jure* (lawful) control<sup>7</sup> because the U.S. operates the base without the Cuban government and has complete control over everything that occurs within it. Furthermore, the U.S. has no intention after over 100 years of occupation to resign this land to Cuba. In other words, it found the "complete jurisdiction and control" the U.S. exercises under its lease with Cuba would suffice to bring detainees "within the territorial and historical scope" of habeas corpus.<sup>8</sup> Therefore, for all intents and purposes, the Naval Base is an extension of the U.S. and laws are applicable to it just as they are to other sovereign territories of the U.S.

Since the early 1990s, the Guantanamo Bay Naval Facility has operated a facility to house non U.S. citizens for a variety of reasons including Haitian and Cuban refugees in 1992, 40,000 migrants awaiting repatriation or parole to the U.S. in 1994, and the establishment of Camp X-Ray from 1994-1996 to segregate migrants who had committed crimes.<sup>9</sup> In accordance with these operations and for command and control purposes, Task Force 160 was established in 1994. It was deactivated in 1996 once operations were complete.<sup>10</sup>

One week after the September 11th attacks, Congress gave authorization to President Bush for use of military force. In a joint resolution, Congress stated the President could use:

All necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States.<sup>11</sup>

This authorization led to President Bush's military order for *Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism*, dated 13 November 2001.

Section 3 of the order granted detention authority to the Secretary of Defense for any individual subject to the order and detention "at an appropriate location...outside or within the United States."<sup>12</sup> The Secretary of Defense, Donald Rumsfeld chose Guantanamo Bay Naval Station. According to interpretation by the Bush Administration, the base was not sovereign U.S. territory, as American forces administer it under a lease agreement with Cuba. The location coupled with the detainee designation as 'unlawful enemy combatant' or 'nonresident alien' prevented detainee access to habeas corpus; based on the assumption that the 1950 Supreme Court precedent of *Johnson v. Eisentrager* applied to the Naval Base. The ruling held that the protections of the U.S. Constitution had no extraterritorial application to German nationals convicted of war crimes as unlawful enemy combatants because they were physically in Germany, although in American control on an American base.<sup>13</sup> In other words, as nonresident aliens captured and detained outside the U.S. the denial of habeas corpus for unlawful enemy combatants was legal.

On 7 February 2002, President Bush signed a memorandum stating the Third Geneva Convention and Common Article 3 did not apply to the conflict with al Qaeda or



the Taliban.<sup>14</sup> This action and the opening of Guantanamo Bay Naval Base detention facility served to mark the beginning for a new genre of detention operations for the U.S. government and the U.S. military. According to the Senate Armed Services Committee, this decision to “replace a well established military doctrine, i.e., legal compliance with the Geneva Conventions, with a policy subject to interpretation, impacted the treatment of detainees in custody.”<sup>15</sup> Furthermore, the establishment of GITMO and the non-application of the Geneva Convention set the stage for all that followed with respect to both detention operations and detention abuses throughout the GWOT to date.

#### JPRA Involvement and OLC Memos

What sets us apart from our enemies in this fight. . . is how we behave. In everything we do, we must observe the standards and values that dictate that we treat noncombatants and detainees with dignity and respect. While we are warriors, we are also all human beings.<sup>16</sup>

— General David Petraeus  
Commander, Multi National Forces-Iraq

We have to work the dark side, if you will.<sup>17</sup>

— Dick Cheney  
Vice President of the United States

After 9/11, the gloves came off.<sup>18</sup>

— Cofer Black  
Counterintelligence Chief of the CIA

Beginning in the spring of 2002 and extending for two years, the Joint Personnel Recovery Agency (JPRA) supported U.S. government efforts to interrogate detainees.<sup>19</sup> This use of the JPRA and the OLC memoranda produced by Bush administration lawyers laid the groundwork for interrogation operations to date. Any compensation program for released Guantanamo detainees has to take into account the impact of these two aspects

of detention operation for the GWOT, in order to appreciate the affect of policy on both U.S. perception around the world and the conduct of military operations in the future.

First, the JPRA is the DoD agency that oversees military Survival Evasion Resistance and Escape (SERE) training. Its expertise lies in training American service members to withstand interrogation techniques considered illegal under the Geneva Conventions based on illegal exploitation of prisoners over the last 50 years.<sup>20</sup> In further detail, service members who are students of SERE school are subjected by the JPRA to tactics used by our enemies that were based on coercive methods used by the Chinese Communist dictatorship to extract false confessions from U.S. POWs during the Korean and Vietnam wars.<sup>21</sup> The JPRA trains personnel “how to respond and resist interrogations—not how to conduct interrogations.”<sup>22</sup> Therefore, the purpose of SERE school is to increase the ability of U.S. service members to resist abusive interrogation techniques considered illegal according to rules of war and the Geneva Conventions.

The JPRA was solicited by the federal government following September 11th to gain information on detainee exploitation. As a result, several members of the JPRA spearheaded the adoption of what would become “enhanced interrogation techniques.” Some of these techniques remained classified but included the use of water boarding, sleep deprivation, stripping of clothes, slaps, stress positions, hooding, temperature change and meal regulation.<sup>23</sup> On 2 December 2002, Secretary of Defense Donald Rumsfeld authorized these techniques, with legal sanction from the Office of Legal Council, for implementation at GITMO.<sup>24</sup> These techniques and policies then bleed over to Afghanistan and Iraq as interrogators trained in the techniques by JPRA personnel moved from GITMO to other theaters throughout the GWOT.<sup>25</sup> The Senate Armed

Service Committee concluded in its investigation into the treatment of detainees in U.S. Custody, that the “interrogation policies endorsed by senior military and civilian officials authorizing the use of harsh interrogation techniques were a major cause of the abuse of detainees in U.S. custody”<sup>26</sup> not just in Guantanamo but in Afghanistan and Iraq as well. It is also worthy to note that several agencies including the Joint Chiefs of Staff for the Armed forces and the Federal Bureau of Investigation (FBI) opposed the use of these techniques.<sup>27</sup> Their oppositions however, were never included in official documentation outlining the policy for operations. In fact, even members of the JPRA including the Operational Support Office and Psychological Services expressed concerns about the operational role of the JPRA and the operational risk of techniques that could produce doubtful information, possibly be used against our own troops, and result in psychological damage.<sup>28</sup> Instead, supporters of the program seemed to cherry pick information from expert sources involved in the research of the techniques and their application in order to present constructive backing of the program for integration into interrogation and detention policy.

Secondly, the Office of Legal Council drafted several OLC memoranda outlining the application of interrogation techniques with respect to unlawful enemy combatants. It was Judge Alberto Gonzales, the legal counsel to the President, for example, who sent a memo to President Bush stating the war on terror has “render[ed] obsolete the Geneva’s strict limitations on questioning of enemy prisoners and render[ed] quaint some of its provisions.”<sup>29</sup> He recommended that President Bush stand by his order that the Geneva Conventions did not apply. All of the memoranda have since been rescinded by either the Bush administration in the aftermath of Abu Ghraib or by the Obama administration

when it took office. However, the impact of this legal advice is unprecedented in U.S. history. Rather than relying on established federal and international law, the Bush administration used the OLC memoranda to guide the policy decisions and intent of interrogations and treatment of detainees. For over fifty years, the military and international community relied on the Geneva Conventions and the Laws of War to conduct detention operations and interrogations. As described earlier in this thesis, these rules were set, understood, trained on and in black and white for reference. The OLC memoranda replaced these long-standing and established rules with questionable interpretations resulting in ambiguous policy guidance issued from the President and the Secretary of Defense to the operators. Therefore, without clear and concise laws and rules in which to operate, guidance was easily misinterpreted. This was especially true as certain techniques authorized for all detainees became applicable for only certain detainees in certain circumstances with the consent of the Secretary of Defense.<sup>30</sup> In fact, a staff judge advocate for Joint Forces Command at the time (early 2002) commented to the Senate Armed Service Committee that he thought the orders were a tough standard for the DoD to follow in the field because it replaced well established military doctrine with a policy subject to interpretation.<sup>31</sup>

Obviously, in practice it was difficult to understand what was truly authorized and what was not. In addition, the Senate Armed Service Committee report indicates that overzealous interrogators also took to heart those comments made by members of the Bush administration “to get tougher,” possibly promulgating further violations of established law. As military and civilian contractors put these policies into practice, confusion and misinterpretation became wide spread. According to Senator McCain,

The Bush administration made understandable decisions to permit the use of harsh interrogation techniques against a few individuals. But, decisions were made in such an atmosphere of secrecy and confusion that the whole process spun out of control and produced atrocities that American may never live down.<sup>32</sup>

Perhaps most controversial, were the so-called torture memoranda issued in August of 2002 by Assistant Attorney General Jay Bybee to Judge Gonzales. The first memorandum presented the OLC's narrow interpretation of what constituted torture under U.S. law. According to the memorandum, only physical pain equivalent to organ failure, impairment of bodily functions or even death, constituted torture.<sup>33</sup> Obviously, this differs greatly from the cruel, inhuman, or degrading punishment outlined in the Geneva Conventions, the U.S. Constitution, and United States Code, Title XVIII. In questioning the OLC memorandum, an article in the Harvard International Law Journal posed the following hypothetical, "so a beating that leaves only some minor cuts and bruises or a minor cigarette burn on the thigh would be acceptable?"<sup>34</sup> The second memorandum provided guidance to the CIA to implement lawfully certain activities on detainees for their detention and interrogation program.<sup>35</sup> The specifics of this memorandum remain classified. The first memorandum was quickly rescinded soon after implementation, but serves as a striking example of GWOT policies which were against established law but implemented nevertheless. Also of concern, the inquiry discovered the reference of GITMO as a "battle lab" for the GWOT, implying the known and accepted use of experimental techniques and procedures in use in the facility. The Criminal Investigative Task Force openly objected to the use of this concept because the "perceptions that detainees were used for some 'experimentation' of new unproven techniques had negative connotations."<sup>36</sup> Nonetheless, the interrogation community generally accepted this concept for Guantanamo Bay.

Thorough research conducted on the subject of “enhanced interrogation techniques” and the subject of torture for the purpose of this thesis revealed a common supposition by American and international experts alike. Judgments rendered from psychologists to senior military advisors, interrogators to judicial authorities, law enforcement agents to human rights specialists, hold that better and more reliable intelligence can be gained through techniques that are not in violation of any treaty or law because once you hurt someone badly enough, they are going to tell you whatever you want to hear in order to make the pain stop.

However, the most common counter to this argument is the “ticking bomb” scenario where information must be gained immediately to prevent an imminent killing or attack. In these rare and isolated incidents, supporters of enhanced interrogation or torture justify its use. Even the Obama administration has not completely ruled out its use in extreme circumstances. Most often, supporters point to the 1994 case of captured Israeli Corporal Nachshon Waxman in which Israeli security forces reportedly used tough interrogation methods on a Palestinian suspect to find the captured Soldier.<sup>37</sup> According to Charles Krauthammer of *The Washington Post*, the man was interrogated with methods “so brutal that they violated Israel's existing 1987 interrogation guidelines, which themselves were revoked in 1999 by the Israeli Supreme Court as unconscionably harsh.”<sup>38</sup> Krauthammer, a supporter of the “ticking bomb” scenario quotes Israeli Prime Minister, Yitzhak Rabin who explained without apology: “If we'd been so careful to follow the [1987] Landau Commission [guidelines], we would never have found out where Waxman was being held.”<sup>39</sup> Waxman was killed by his captures during the rescue attempt.<sup>40</sup> Still in 1999, the Israeli High Court formally outlawed torture after 10

Palestinians died in custody. In “ticking bomb” situations, however, they can still seek special permission to use force with a suspect but would be subjected to prosecution if the suspect was not concealing urgent information.<sup>41</sup> The threat of prosecution is not present in post 9/11 legislation, which is a distinct difference between the Israeli use of force by interrogators and how the U.S. could apply a similar special permission respite for use of force in “ticking bomb” situations.

In all cases however, it is clear that “enhanced interrogation techniques” and torture are against established law. If they were not, justification for use would not be debated, require special permission, or result in the passage of new laws and interpretations. In his Command and General Staff College Master of Military Arts and Science thesis, MAJ Douglas Pryer conducted a historical analysis of interrogation policy and techniques used during Operation Iraqi Freedom I. In chapters 3 and 8, he outlined the influence of strategic level policy on interrogations and how it bled over from GITMO, to Afghanistan, and then Iraq. Although he stops short of accusing the Bush administration of violating established law, he does say the granting of harsh interrogation techniques was certainly, at a very minimum “unwise.” Furthermore, he concludes “the twin symbols of GITMO and Abu Ghraib and all that these symbols have done to fuel the insurgencies in Iraq and Afghanistan and to incur international condemnation of the U.S., should serve as a cautionary tale for any other senior U.S. leader who might someday consider a similarly unwise course of action.”<sup>42</sup>

Finally, a brief discussion of extraordinary rendition is appropriate here. Although not created by Guantanamo policies, the JPRA or the OLC, this policy is and was used by the U.S. government and can be construed as unlawful according to international law,

which prevents the change of custody of a person to a state where they could be subjected to abuse. Extraordinary rendition is the process of sending a suspect in U.S. custody to the custody of a foreign government for interrogation or detention or both. The U.S. has engaged in extraordinary rendition since the mid 1990s. Although, this policy remains virtually unknown to most Americans, the UN, ICRC, and other NGO's around the world have chastised the U.S. for engaging in this activity since its inception. It should be no surprise that the U.S. engaged in this activity for many enemy combatants detained during GWOT operations. The UN Human Rights Council takes the position that the practice of extraordinary rendition constituted a violation of article 3 of the Convention against Torture and article 7 of the ICCPR.<sup>43</sup>

In summary, the Senate Armed Service Committee's inquiry into the treatment of detainees in U.S. custody outlines in detail the linkages between the JPRA techniques and the OLC memoranda resulting in detention and interrogation policies that did not conform to either established international or federal laws. It started with Guantanamo detainees in mind and quickly spread throughout operations in the support of the GWOT. Furthermore, it implied a philosophy that an "interrogator should experiment with untested methods, particularly those in which they were not trained."<sup>44</sup>

#### Linking Supreme Court Decisions to Legislation

Now that awareness exists for both the JPRA and OLC influences in detention operations and Guantanamo policy, it is essential to understand how the judicial and legislative branches shaped the policy debate further. This section will discuss three Supreme Court decisions, Guantanamo tribunals, and two key pieces of legislation, which



are critical in Guantanamo policy. If detainee rights were violated, these cases and legislation would almost certainly play a role in defense or opposition of any conciliation program for Guantanamo detainees.

*Rasul v. Bush,*  
the McCain Amendment,  
and the DTA

The first Supreme Court decision issued on Guantanamo Bay was in 2004 in *Rasul v. Bush*, brought by two Australians and twelve Kuwaitis challenging their detention. This case held *Johnson v. Eisentrager* did not apply to these detainees because they were not afforded access to any tribunals or charged with and convicted of any wrongdoing at any time during their two years of confinement, unlike in *Johnson v. Eisentrager* where the detainees were tried and convicted in military court and serving their sentence.<sup>45</sup> Therefore, detainees were allowed to petition for habeas corpus in the U.S. court system. The Supreme Court, however, left it to lower courts whether Congress authorized detentions, the Geneva Conventions applies, who can be detained, and how evidence might be used to determine whether someone was an enemy combatant.<sup>46</sup>

In response to the Supreme Court decision, the military established procedures for Combatant Status Review Tribunal (CSRT) and Administrative Review Boards (ARB) at the direction of the Secretary of Defense. The purpose was to determine whether a person is an enemy combatant. Implementation of ARBs also determined if a detainee still poses a threat. An enemy combatant is defined by the CSRT as “an individual who was part of or supporting Taliban or Al Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners including any person who has

committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”<sup>47</sup> Obviously, this vague definition could apply and label anyone as an enemy combatant for committing extreme terrorist activities, such as plotting to blow up an embassy, to more traditional Soldier activities, such as throwing a grenade in a vehicle. The UN (Commission on Human Rights) holds that the CSRTs do not conform to article 14 of the ICCPR. This is because they do not provide detainees with defense counsel, a detainee designation as a non- enemy combatant does not guarantee release, detainees are not required to be present for the hearing, and detainees do not have access to classified materials even in preparation of their defense.<sup>48</sup>

Aside from the execution of CSRT, which were notably absent in *Rasul v. Bush*, the U.S. legislative branch passed the McCain Amendment and the Detainee Treatment Act at the end of 2005. By this time, the Abu Ghraib scandal was a year old and reports of “enhanced interrogation techniques” were leaking out of the Bush administration. Senator McCain proposed an amendment to the DoD Appropriations Act effectively banning U.S. officials from using torture.<sup>49</sup> This amendment was adopted into the Detainee Treatment Act (DTA) of 2005 signed into law on 30 December 2005. The DTA was touted as a victory for securing humanitarian rights of detainees in custody, made the Army’s interrogation manual the only authorized document for interrogations, and protected detainees against cruel, inhuman or degrading treatment as defined by the fifth, eighth and fourteenth amendments of the U.S. Constitution. However, the DTA also did three additional things. First, section 1004 protects those who carried out interrogations under other means than those outlined in the military interrogation manual from prosecution under the War Crimes Act of 1996 and the Geneva Convention.<sup>50</sup> Secondly,

section 1005 stripped Guantanamo detainees of the habeas corpus rights guaranteed to them in *Rasul v. Bush*.<sup>51</sup> Third, section 1005 outlines the CSRT and ARB as the means to determine the further detention of enemy combatants and their status. It also requires reporting to Congress and authorizes the use of coercive statements, if there is probable value.<sup>52</sup> Furthermore, it designated the U.S. Court of Appeals for the District of Columbia as the exclusive jurisdictional authority for CSRTs.<sup>53</sup> This is very important because, the scope of review for the court was limited. It can only determine whether the procedures of the CSRT were followed and that they adhere to the Constitution and laws of the U.S., not whether the CSRT made the right decision designating a person as enemy combatant.<sup>54</sup> Lastly the DTA amended Title 28, section 2241 allowing Guantanamo detainee habeas corpus relief only as outlined in the DTA. Recall, that previously anyone could challenge their detention if it was in violation of federal law, the Constitution or a treaty. Now GITMO detainees did not have this option according to law. According to the Center for Constitutional Rights, the DTA made it clear that the U.S. Government and Bush administration intended to create a “lawless zone, to which the American administration will be able to send any person it chooses, to disappear, without trial, and without remedy.”<sup>55</sup> Without a means to petition for habeas corpus, Guantanamo detainees were indeed left without remedy for their indefinite internment, which still did not include prosecution for any wrongdoing in a court of law. What’s more, without POW status, detention until the end of hostilities and then turning them over to their country of origin as outlined in the Geneva Conventions was also not possible. Within days of the passage of the DTA, the federal government dismissed some 160 lower-court cases involving detainees at Guantanamo.<sup>56</sup>

*Hamdan v. Rumsfeld*  
and the MCA

In 2006, a second Supreme Court decision challenged the Guantanamo detention policy. *Hamdan v. Rumsfeld* challenged the legality of subjecting individuals to trials and sentences including the death penalty as well as application of the Geneva Conventions.<sup>57</sup> The U.S. government tried to apply the DTA to this case so that the Supreme Court would dismiss it, alleging that it had no jurisdiction to hear habeas corpus. However, this case was already in the court system prior to the passing of the DTA, so the Supreme Court granted review.<sup>58</sup> The Supreme Court ruled 5-3 on 29 June 2006, suspending the use of military tribunals at Guantanamo because the CSRTs did not conform to international law and were not authorized by Congress.<sup>59</sup> The Supreme Court decision applied Common Article 3 of the Geneva Conventions to all detainees at Guantanamo and stated the protection was the minimum baseline of protections including the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.”<sup>60</sup> While this case ruled the CSRTs illegal in its current form, it left open the possibility that changes could bring them in conformity with the laws of war and Common Article 3.<sup>61</sup> Above all, the case was important because it stated that Common Article 3 applies to terrorists and the executive branch does not have the power to hold and try detainees without Congressional approval and oversight.

In response to *Hamdan v. Rumsfeld*, the Bush administration proposed legislation to authorize the trial of certain detainees by military commission and prescribed rules to govern the process.<sup>62</sup> Initial proposals by the Bush administration called for a redefinition

of Common Article 3. When General (GEN) Colin Powell (Ret.) learned about the redefinition attempts, he wrote a letter to Senator McCain in opposition. His letter stated pointedly, “the world is beginning to doubt the moral basis of our fight against terrorism. To redefine Common Article 3 would add to those doubts. Furthermore, it would put our own troops at risk.”<sup>63</sup> Powell was not alone in his opinion. A letter written to the Senate Armed Service Committee by 43 retired flag officers representing all branches of the Armed Forces, three judges, and others, including GEN Shalikashvili (Ret.), GEN Hoar (Ret.), Admiral Gregory G. Johnson, and GEN McPeak, expressed similar concerns. “Our enemies would be encouraged to interpret the Conventions in their own way as well, placing our troops in jeopardy in future conflicts. And American moral authority in the war would be further damaged.”<sup>64</sup> Congress rejected this change and did not include it in the Military Commissions Act (MCA) of 2006, enacted on 17 October 2006.

The purpose of the MCA was to “authorize trial by military commission for violations of the law of war, and for other purposes.”<sup>65</sup> The MCA authorizes the president to establish military commissions for detainees, applies parts of the UCMJ, chapter 47 for Military Commissions and trial by general court-martial, and applies Common Article 3 to detainees but prevents the use of the Geneva Convention as a source of rights.<sup>66</sup> Section 948b of the MCA also prevents the application of Section Articles 10, 31a, b, d, and 32 of the UCMJ.<sup>67</sup> These are the right to know charges and to a speedy trial; right of self-incrimination, reading of rights before interrogation, and preventative use of coerced statements; and pretrial investigation, to know charges and evidence, and right to representation.<sup>68</sup> In addition, the treatment and rulings of the Military Commissions cannot set precedent for other cases.<sup>69</sup> There are three additional

provisions that are also very important. First, the MCA allows any person designated as an alien unlawful enemy combatant before, on, or after 11 September 2001 to be tried by any offense made punishable by this act.<sup>70</sup> Essentially a person can be tried for an offense that was not a crime at the time he committed it but is now so designated by this act. Secondly, it amends the DTA and Title 28 of the United States Code by suspending the writ of habeas corpus for all detainees in custody who are detained as an enemy combatant or awaiting such determination retroactive to 11 September 2001.<sup>71</sup> Third, as stated in the previous chapter, it modifies Title 18 of the United States Code to include only the prohibition of grave breaches in association with war crimes and does not include violations of Common Article 3.<sup>72</sup> This provision would further protect those from prosecution through the War Crimes Act that engaged in violations of Common Article 3 prior to the *Hamdan v. Rumsfeld* case extending Common Article 3 to Guantanamo detainees.

*Boumediene v. Bush*  
and Beyond

This landmark case is the last of the three Supreme Court cases, which is discussed in this section and thesis. The court ruled in favor of Boumediene by a 5-4 decision with 1 concurrence and 2 dissents on 12 June 2008. The petitioners in this case also challenged their detention at Guantanamo Bay using their habeas corpus rights. However, they did it on the basis that the MCA unconstitutionally stripped their rights to habeas corpus. Recall from chapter 5 that the right to suspend habeas corpus is allowed only “when in cases of rebellion or invasion the public safety may require it.”<sup>73</sup> The court therefore held that while there is no precedent to extend U.S. constitutional rights to non-

citizens, the detainees have been held for the duration of a conflict that is one of the longest in U.S. history and in a territory that is subject to complete U.S. control.<sup>74</sup> Based on these factors, the Court concluded the Suspension Clause has full effect in Guantanamo<sup>75</sup> and that Congress did not formally suspend habeas corpus according to the U.S. constitution rendering section 7 of the MCA unconstitutional. Furthermore, it ruled that the habeas court (the CSRT in this case) “must have the power to order the conditional release of an individual unlawfully detainees,”<sup>76</sup> which the MCA does not authorize. Only the President can detain or release a detainee from GITMO. Therefore the court determined the “procedural protection afforded to detainees in the CSRT fell well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus.”<sup>77</sup>

The impact of this ruling is that detainees may petition a federal district court for habeas review of their status determination made by the CSRT.<sup>78</sup> To date over 150 habeas corpus petitions since *Boumediene v. Bush* are filed in the federal court system with 35 complete.<sup>79</sup> Of those 35, 29 detainees were ruled to be unlawfully detained.<sup>80</sup> In the remaining months of 2009 the following actions are in progress. Proposed amendments to both the DTA and MCA are underway in Congress and remain in committee as of this writing. President Obama formed an Interrogation Task Force headed by the FBI, in October 2009. Critics and supporters alike believe this may bring interrogation reform more in line with law enforcement standards and has the potential for a rippling effect on future detention operations. Finally, a new case (*Kiyemba v. Obama*) under review by the Supreme Court involving the release authority for 13 Uigars held at Guantanamo since 2002. According, to *The New York Times*, the

case presents the next logical question in the legal debate involving GITMO detainees. The case concerns 13 men who continue to be held although the government has determined that they pose no threat to the U.S. and a federal judge ordered them to be released in the care of supporters in the U.S.<sup>81</sup> The federal appeal reversed the decision holding that judges do not have the power to override immigration laws.<sup>82</sup> The point is that although the evolution of detention and detainee policy is ongoing and much remains unresolved, an appreciation for the complexity of this process is well developed by this analysis.

Table 1. Chronology–9/11 to Present

11 Sept 2001	Terrorist Attacks on the U.S.
1 week later	<ul style="list-style-type: none"> <li>• 2001 Authorization for Use of Military Force</li> <li>• Military Order # 1</li> </ul>
DEC 2001	<ul style="list-style-type: none"> <li>• GITMO considered “least worse place”</li> <li>• Secretary of Defense authorized these techniques, with legal sanction from OLC, for implementation at GITMO</li> </ul>
11 JAN 2002	<ul style="list-style-type: none"> <li>• First Detainees arrive</li> </ul>
2004	<ul style="list-style-type: none"> <li>• <i>Rasul V. Bush</i></li> </ul>
30 DEC 2005	<ul style="list-style-type: none"> <li>• Detainee Treatment Act Passed</li> </ul>
29 JUN 2006	<ul style="list-style-type: none"> <li>• <i>Hamdan V. Rumsfeld</i></li> </ul>
17 OCT 2006	<ul style="list-style-type: none"> <li>• Military Commissions Act Passed</li> </ul>
12 JUN 2008	<ul style="list-style-type: none"> <li>• <i>Boumediene V. Bush</i></li> </ul>
NOV 2008	<ul style="list-style-type: none"> <li>• President Obama Elected</li> </ul>
JAN 2009	<ul style="list-style-type: none"> <li>• President Obama Inaugurated</li> <li>• Executive order -<i>Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and the Closure of Detention Facilities</i></li> </ul>
APR 2009	<ul style="list-style-type: none"> <li>• OLC Memos released</li> </ul>
24 AUG 2009	<ul style="list-style-type: none"> <li>• New Interrogation Task Force formed</li> </ul>
24 OCT 2009	<ul style="list-style-type: none"> <li>• Supreme Court reviews <i>Kiyemba v. Obama</i></li> </ul>



Source: Created by Author.

### Chapter Summary

In summary, this chapter outlined the evolution of Guantanamo detention policy in all three branches of the federal government. This analysis concludes that the executive and legislative branches of the U.S. government continually relied on OLC memoranda and questionable interpretation of law from different agencies to make policy.

Additionally, changes in legislation justified the continued detention of designated enemy combatants and the continual operation of the facility outside the basic interpretation of international and formal federal law. Furthermore, legislation retroactively amended current law (Title 18 and Title 28) to fit the definitions and policy outlined in the DTA and MCA. It is clear that provisions in U.S. policy, the DTA and the MCA as well as the rules of CSRTs and ARBs could have been implemented to prevent the repression of basic humanitarian rights rather than promote them, if indeed it was desired for these measures to meet the former objective rather than the latter.

These actions appear to be contrary to international law and the U.S. constitution for those in detention at Guantanamo Bay. Most importantly, this chapter's analysis and that of the previous chapter provide a strong basis for compensation to released detainees since they were detained for a period of time but were never convicted or formally charged with a crime.

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<sup>1</sup>Library of Congress Hispanic Division, "Treat of Paris 1898," Library of Congress, <http://www.loc.gov/rr/hispanic/1898/treaty.html> (accessed 28 October 2009).

<sup>2</sup>Ibid.

<sup>3</sup>Ibid.

<sup>4</sup>Ibid.

<sup>5</sup>Ibid.; and J.A. Sierra, "The Platt Amendment," *Historyofcuba.com*, <http://www.historyofcuba.com/history/platt.htm> (accessed 28 October 2009).

<sup>6</sup>J. A. Sierra.

<sup>7</sup>Jennifer K. Elsea, Michael J. Garcia, and Kenneth R. Thomas, "Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court," *Congressional Research Service*, 7 April 2009, 5, 32-33.

<sup>8</sup>Ibid.

<sup>9</sup>Joint Task Force Guantanamo, "Timeline," *Joint Task Force Guantanamo Brochure* (June 2009), <http://www.jtfgtmo.southcom.mil> (assessed 10 July 2009).

<sup>10</sup>Ibid.

<sup>11</sup>U.S. Congress, *Authorization for Use of Military Force*, 107th Cong., 1st sess., 2001, S.J.Res. 2., <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:s.j.res.00023>: (accessed 30 March 2009).

<sup>12</sup>Military Order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, Federal Register (13 November 2001): 1665-1668. <http://www.gpoaccess.gov/wcomp/v37no46.html> (accessed 30 March 2009).

<sup>13</sup>*Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>14</sup>Inquiry into the Treatment of Detainees, xiii.

<sup>15</sup>Ibid., xiii.

<sup>16</sup>David H. Petraeus, "Letter to Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen serving in Multi-National Force-Iraq," 10 May 2007, [http://www.mnf-iraq.com/images/stories/CGs\\_Corner/values\\_message\\_%2810\\_may\\_07%29.pdf](http://www.mnf-iraq.com/images/stories/CGs_Corner/values_message_%2810_may_07%29.pdf) (accessed 29 April 2009).

<sup>17</sup>Evan Thomas and Michael Hirsh, "the Debate Over Torture," *Newsweek.com*, 21 November 2005, <http://www.newsweek.com/id/51198/> (accessed 22 September 2009).

<sup>18</sup>Ibid.

<sup>19</sup>Inquiry into the Treatment of Detainees, x.

<sup>20</sup>Ibid., xiii.

<sup>21</sup>Ibid., xix-xx.

<sup>22</sup>Ibid., xiii.

<sup>23</sup>Ibid., xix-xx.

<sup>24</sup>Ibid., xix.

<sup>25</sup>Ibid., xxii-xxv.

<sup>26</sup>Ibid., xxv.

<sup>27</sup>Ibid., xviii, 19.

<sup>28</sup>Ibid., 28-30, 48.

<sup>29</sup>Ibid., 2.

<sup>30</sup>See *Inquiry into the Treatment of Detainees* pages 1-50. These pages describe the relationship of the JPRA and the OLC memo; as well as the conflicting and changing guidance from 2002-2004.

<sup>31</sup>*Inquiry into the Treatment of Detainees*, 3.

<sup>32</sup>Thomas and Hirsh.

<sup>33</sup>*Inquiry into the Treatment of Detainees*, 32.

<sup>34</sup>Jenny S. Martinez, “The Military Commissions Act and “Torture light”:  
Something for a Great Nation to be Proud of?” *Harvard International Law Journal* 48,  
(23 March 2007): 59.

<sup>35</sup>*Inquiry into the Treatment of Detainees*, 33.

<sup>36</sup>Ibid., 43.

<sup>37</sup>Joel Greenberg, “Israel Is Permitting Harsher Interrogation of Muslim Militants,” *The New York Times*, 17 November 1994, <http://www.nytimes.com/1994/11/17/world/israel-is-permitting-harsher-interrogation-of-muslim-militants.html?scp=1&sq=interrogation%20to%20find%20cpl%20waxman&st=cse> (accessed 19 October 2009).

<sup>38</sup>Charles Krauthammer, “The Torture Debate, Continued,” *The Washington Post*, 15 May 2009, [http://www.washingtonpost.com/wp-dyn/content/article/2009/05/14/AR2009051403603\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/05/14/AR2009051403603_pf.html) (assessed 19 October 2009).

<sup>39</sup>*Ibid.*

<sup>40</sup>Greenberg.

<sup>41</sup>Evans Thomas and Michael Hirsh, “The Debate Over Torture,” *Newsweek*, 21 November 2005, <http://www.newsweek.com/id/51198> (accessed 22 September 2009).

<sup>42</sup>Douglas A. Pryer, “The Fight for the High Ground: The U.S. Army and Interrogation during Operation Iraqi Freedom I, May 2003-April 2004” (Master’s Thesis, Command and General Staff College, 2009), 55-56.

<sup>43</sup>UN, *Economic, Social and Cultural Rights Civil and Political Rights, Situation at Guantanamo Bay*, Commission on Human Rights, Economic and Social Council, 62 sess., 27 February 2006, 18, <http://www.ohchr.org/EN/countries/ENACARRegion/Pages/USIndex.aspx> (accessed 1 July 2009).

<sup>44</sup>Inquiry into the Treatment of Detainees, 43.

<sup>45</sup>*Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>46</sup>Elsea, Garcia, Thomas, 6.

<sup>47</sup>Memorandum from Deputy Secretary of Defense to the Secretary of the Navy, *Order Establishing Combatant Status Review Tribunals*, <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (accessed 5 May 2009).

<sup>48</sup>UN, *Economic, Social and Cultural Rights*, 11-14.

<sup>49</sup>H.R. 2863, 5 October, 2005

<sup>50</sup>Detainee Treatment Act (DTA), 109th Cong. 1st sess., 2005.sec.1004.

<sup>51</sup>*Ibid.*, sec. 1005.

<sup>52</sup>*Ibid.*

<sup>53</sup>*Ibid.*

<sup>54</sup>*Ibid.*

<sup>55</sup>The International Federation of Human Rights, “USA: The Detainee Treatment Act, strips Federal Courts of jurisdiction over the fate of detainees at Guantanamo,”

*FIDH.org*, 24 January 2006, <http://www.fidh.org/The-Detainee-Treatment-Act-strips> (accessed 22 September 2009).

<sup>56</sup>Judith Resnik, “Opening the Door, Court Stripping: unconscionable or unconstitutional?,” *Slate.com*, 1 February 2006, <http://www.slate.com/id/2135240/> (accessed 22 September 2009).

<sup>57</sup>*Hamdan v. Rumsfeld*, 548 U.S. 557.

<sup>58</sup>Elsea, Garcia, and Thomas, 12.

<sup>59</sup>Center for Defense Information, “Supreme Court Rejects Guantanamo Bay Military Tribunals,” *cdi.org*, 29 June 2006, <http://www.cbi.org/program.document.cfm?documentID=3569> (accessed 12 July 2009).

<sup>60</sup>Geneva Conventions, Common Article 3; and *Hamdan v. Rumsfeld*.

<sup>61</sup>Elsea, Garcia, and Thomas, 14.

<sup>62</sup>*Ibid.*, 21.

<sup>63</sup>Colin L. Powell, “Letter from General Colin Powell (U.S., Retired) to U.S. Senator John McCain Re: Geneva Conventions,” dated 13 September 2006, <http://news.findlaw.com/hdocs/docs/terrorism/powellmccain91406ltr.html> (accessed 1 October 2009).

<sup>64</sup>John Shalikashvili et al., eds., “Letter to The Honorable John Warner, Chairman; The Honorable Carl Levin, Ranking Member; Senate Armed Services Committee,” <http://www.globalsecurity.org/military/library/news/2006/09/mil-060912-sasc01.htm> (accessed 1 October 2009).

<sup>65</sup>Military Commissions Act (MCA), 109th Cong. 2nd sess., 2006.

<sup>66</sup>MCA, Sec 3, chapter 47A, sec. 948b. paragraph a, b, c, f, and g.

<sup>67</sup>MCA, Sec. 3, chapter 47A Sec 948b. paragraph d.

<sup>68</sup>U.S. Government, “Uniform Code of Military Justice,” *Federal Code Title 10*, Subtitle A, Chapter 47. Sections 810, 831 and 832.

<sup>69</sup>*Ibid.*, Sec 3, chapter 47A Section 948b. paragraph e.

<sup>70</sup>*Ibid.*, Sec 3, chapter 47A Sec. 948d. paragraph a.

<sup>71</sup>*Ibid.*, Sec 7.

<sup>72</sup>Ibid., Sec 6, paragraph a-b.

<sup>73</sup>U.S. Constitution, Art 1, section 9, clause 2.

<sup>74</sup>Elsea, Garcia, and Thomas, 34.

<sup>75</sup>Ibid., and *Boumediene v. Bush*.

<sup>76</sup>Lexisnexis headnotes, HN 19, <http://www.lexis.com/research/retrieve> (accessed 27 August 2009).

<sup>77</sup>Ibid., HN 13.

<sup>78</sup>Elsea, Garcia, and Thomas, 35.

<sup>79</sup>William Fisher, "Growing Number of Guantanamo Detainees Cleared for Release," *The Public Record*, 6 September 2009, <http://pubrecord.org/world/4759/growing-number-guantanamo-detainees/> (accessed 10 October 2009).

<sup>80</sup>Ibid.

<sup>81</sup>Adam Liptak, "Justice to Decide on U.S. Release of Detainees," *New York Times*, 20 October, 2009, <http://www.nytimes.com/2009/10/21/us/21scotus.html> (accessed 29 October 2009).

<sup>82</sup>Ibid.

## CHAPTER 6

### JAPANESE INTERMENT DURING WORLD WAR II

#### Chapter Introduction

Detention policy, post 9/11 legislation, and the controversy surrounding the GWOT detention facilities at Guantanamo Bay are not the first time that the U.S. experienced widespread injustice during wartime. This chapter uses Japanese American and Japanese resident alien internment during World War II as a case study to understand the primary research question. Although the two situations differ considerably, there are many parallels between the two situations. These include a race component to internment, the passing of laws to justify military necessity or national security, judicial policy challenges and reintegration hardships. The main discriminator of course, is that Guantanamo detainees are not American citizens. Unlike Japanese aliens who could not qualify for citizenship because they were Asian, Guantanamo detainees neither are legal residents of the U.S. nor discriminated against for a right to citizenship. The second discriminator is that most of those interned during World War II did not violate laws or actually conduct criminal or illegal activity.

The basis of internment for Guantanamo detainees, on the other hand is on actual illegal or terrorist activity even if detainees no longer pose a threat or if there is no evidence to prove their involvement. This chapter however, gives a brief history including evacuation policy, legislation, court decisions, and reintegration for persons of Japanese descent who were interned during the Second World War. It also discusses the redress process, which serves as a historical precedent of the U.S. correcting injudicious policy. Even though the Guantanamo situation is unique, this case study provides insight

into a past U.S. reparation program, aspects of which can be used in a future reconciliation program for released detainees. Lastly, Table 2 visually demonstrates the relevance of this case study to Guantanamo detainees compares the common themes.

### Brief History

On May 16, 1942, my mother, two sisters, niece, nephew, and I left by train. Father joined us later. Brother left earlier by bus. We took whatever we could carry. So much we left behind, but the most valuable thing was my freedom.<sup>1</sup>

— John Armor and Peter Wright  
*Manzanar*

History cannot be undone; anything we do now must inevitably be an expression of regret and an affirmation of our better values as a nation, not an accounting which balances or erases the events of the war. That is now beyond anyone's power. It is well within our power, however to provide remedies for violations of our laws and principles. . . our nation's ability to honor democratic values even in times of stress depends largely upon our collective memory of lapses from our constitutional commitment to liberty and due process. Nations that forget or ignore injustices are more likely to repeat them.<sup>2</sup>

— *Personal Justice Denied*  
Part 2: Recommendations,

From the perspective of the victims and survivors, reparations are an attempt to neutralize the consequences of the violations they have suffered.<sup>3</sup>

— Pablo de Greiff  
“Justice and Reparations” in *The Handbook of Reparations*

On the eve of World War II, there were about 285,000 persons of Japanese descent living in the U.S.<sup>4</sup> Most were legal residents of the U.S., immigrating as laborers, religious figures, or educators, but were not American citizens unless they were born in the country. In addition to the prejudices of the time, the Naturalization Act of 1790 and its subsequent amendments only extended citizenship access to those who were either “free, white, [of] African descent, [or] American Indians.”<sup>5</sup> Asians were not included and could not qualify for citizenship. Therefore, at the onset of World War II, thousands of



legal Japanese “aliens” were without constitutional rights but were, for all intents and purposes, American. Most of these aliens not only resided in the U.S. legally and for many years, even decades, but also had children or grandchildren who were legal American citizens. This is not the case for detainees at GITMO, who were not American citizens or resident aliens, although some were citizens of coalition partner countries such as Canada and the United Kingdom.

On 19 February 1942, President Franklin D. Roosevelt signed Executive Order 9066, authorizing the Secretary of War (Henry L. Stimson) and military commanders the power to “exclude any and all persons, citizens, and aliens, from designated areas in order to provide security against sabotage, espionage and fifth column activity.”<sup>6</sup> Over the next three years, exclusion zones and Civilian Exclusion Orders for “wartime military necessity” caused the removal and exclusion of Japanese Americans, Japanese aliens, and persons of Japanese descent from their homes and into internment at relocation camps. No mass exclusions or detentions in any part of the country were conducted against persons of German or Italian descent, however. Relocation and exclusion against enemy aliens of those nationalities occurred only after individual review. In fact, two-thirds of Japanese aliens but less than half of German and Italian aliens were detained in Internment camps.<sup>7</sup> The military and exclusion orders eventually led to the mass internment of 120,000 persons of Japanese descent, 70,000 of which were American citizens.<sup>8</sup> An executive order issued at the end 1944 effectively ended the mass exclusions orders. Similarly the policy of Guantanamo detention for detainees captured throughout the GWOT began with a Military Order issued by the President shortly after 9/11. It was also an executive order that directed the closure of the facility seven later.

According to Eric Yamamoto and Liann Esbesugawa, authors of the article “The Japanese American Internment,” found in *The Handbook of Reparations*, Japanese internment consisted of three phases: curfew, exclusion and continued detention<sup>9</sup> following the attack on Pearl Harbor in December 1941. However, even as early as the 1930s, the Justice department compiled a list of 2,000 potentially dangerous resident Japanese aliens (businessmen, Buddhist priests, language teachers, and martial arts instructors, for example) and immediately arrested them on the day after the attack on Pearl Harbor.<sup>10</sup> Over the course of the rest of the month in 1941, the U.S. also declared war on Japan, closed all Japanese language schools, seized all Japanese banks and businesses, ordered the turn in of cameras and short wave radios, revoke liquor licenses held by Japanese aliens in California.<sup>11</sup> Likewise the U.S. Government arrested and detained several hundred suspicious U.S. citizens and alien residents of the U.S. following 9/11, froze bank assets of suspected terrorist and terrorist affiliated groups, and issued authorization for military force. Most significant in 2001 was the issuance of Military Order 1, which granted detention authority to the Secretary of Defense for any individual (not a U.S. Citizen) and establishment of a location for detention.<sup>12</sup> Most significant in 1941, was the issuance of Presidential Proclamation 2525, which allowed the U.S. government to restrain, detain, and remove any non-naturalized person of a “hostile country” who is over the age of 14 as “alien enemies.”<sup>13</sup> What came next in 1941 was the mass exclusion and relocation of over one hundred thousand persons of Japanese descent living on the West Coast for over three years. In 2001, Military Order 1 was followed by the establishment of the Guantanamo Bay detention facility and the

subsequent detention of enemy combatants captured throughout the GWOT for more than eight years.

### Curfew, Exclusion and Detention

By the first week of February 1942, the U.S Attorney General (Francis Biddle) issued the first order establishing “strategic military areas” on the Pacific coast requiring the removal of all suspected enemy aliens from those areas and established curfew zones in California. On 19 February, Executive Order 9066 was signed. This order did not however, exclusively specify the exclusion and relocation of persons of Japanese descent. What it did was give the military authorization to establish exclusionary zones for “military necessity” and relocate persons affected by these exclusion zones. Nonetheless, applications of order on the West coast took on the anti-Japanese agitation and prejudice which was prevalent especially in California at the time. Therefore, simply being of Japanese descent made one a suspected “enemy alien.” In 2001, a similar stream of anti-Muslim sentiment was felt throughout the country. Accounts of discrimination and singling out persons perceived to be of Middle Eastern descent in public or through new airport and federal regulations occurred more often than the U.S. would like to admit.<sup>14</sup> Also, the emergence of the “enemy combatant” designation, (similar to the “enemy alien” designation in 1941), applied to anyone detained. The problem with this in 1941 was that there were American citizen designated as enemy aliens. The problem in 2001 was that according to international law, only a competent tribunal can designate someone a combatant.<sup>15</sup>

Regardless, there was real fear of additional Japanese attacks; even though intelligence did not support this conclusion according the FBI and military intelligence.<sup>16</sup> Their data suggested a careful watch of suspicious individuals or reviews of individual loyalty were all that was necessary.<sup>17</sup> However, the largely racists and anti-Japanese factions on the West coast including the military, legislative representatives and local citizens promulgated the fear of further attack and used rumors to attribute the attack on Pearl Harbor to sabotage and fifth column activity. On 2 January 1942, for example, the Joint Immigration Committee of the California legislator sent a manifesto to a California newspaper claiming that ethnic Japanese are totally “inassimilable” and wherever born or residing maintains his loyalty to Japan and the emperor.<sup>18</sup>

The fear of additional attacks on the U.S. following 9/11 was also extreme. In both cases, policies were developed to secure the U.S. from further attack. This seemed to be accepted by the majority. It is worthy to note a striking correlation between the uses of faulty intelligence to substantiate Japanese internment policy and the faulty intelligence which lead the U.S. to engage in military force with Iraq in the years that followed September 11th. Fear of the same kind of activity said to have occurred at Pearl Harbor would lead to an attack on the West coast. Japanese Internment then was justified in the minds of most citizens, military leaders, and national officials in 1941. Following the evidence presented to the UN and the American population in 2003, justification for war with Iraq seemed equally legitimate.

It must be noted though, that Lieutenant General (LTG) John L. Dewitt, head of the Western Defense Command in 1941, was well known for stating publically that a “Jap is a Jap.”<sup>19</sup> He also testified in support of Public Law 503, that the “Japanese race is

an enemy race . . . we must worry about the Japanese all the time until he is wiped of the map.”<sup>20</sup> It was LTG Dewitt to whom Secretary Stimson delegated authority to implement the Executive Order on the West coast. Secretary Stimson gave LTG Dewitt the following instructions:

American citizens of Japanese descent, Japanese and German aliens, and any persons suspected of being potentially dangerous were to be excluded from designated military areas; everyone of Italian descent was to be omitted from any plan of exclusion, at least for the time being, because they were potentially less dangerous, as a whole.<sup>21</sup>

LTG Dewitt, who relied heavily on civilian politicians rather than informed military intelligence or judgment,<sup>22</sup> made his own conclusion on what was required. As a result, all Japanese aliens and persons of Japanese descent became suspects. A first attempt for “voluntary” evacuation met with negative results. Soon after LTG DeWitt designated Military Zones 1 and 2, (Western portions of California, Washington and Oregon and the southern area of Arizona) as Proclamation Number 1. In March 1942, at the suggestion of LTG DeWitt and others who relied on rumor and innuendo, Congress passed Public Law 503 which authorized “Civilian Exclusion Orders.”<sup>23</sup> These required the relocation of all Japanese aliens and persons of Japanese descent based on “wartime military necessity.” Prior to this law, only Public Proclamations pursuant to all aliens in exclusionary zones regardless of ethnicity applied. Civilian exclusion orders were exclusive to Japanese ethnicity whether a U.S. citizen or alien. During the active Congressional debate of Public Law 503, Attorney General Biddle, who was the first to authorize military exclusion zones called the mass exclusions “ill-advised and unnecessary.”<sup>24</sup> Moreover, FBI director J. Edgar Hoover also refuted LTG DeWitt's reports of disloyalty on the part of Japanese Americans. He sent a memo to Attorney

General Francis Biddle expressing his concern that investigation of complaints produced no information to substantiate the allegation of a mass sabotage or espionage threat.<sup>25</sup>

Both men were in the minority, and the policy met with little to no debate. There was similar debate in the U.S. Congress for the authorizing of military force after 9/11 and the war with Iraq. Legislation passed in the last eight years has also met with debate. For example Senator Patrick Leahy states this about the MCA:

Passing laws that remove the few checks against mistreatment of prisoners will not help us win the battle for the hearts and minds of the generation of young people recruited by Osama bin Laden and al Qaeda. Authorizing indefinite detention of anybody the government designated without any proceeding and without any recourse—is what our worst critics claim the United States would do, not what American values, traditions and our rule of law would have us do. This is not just a bad bill, this is a dangerous bill.<sup>26</sup>

Again, this opposition was in the minority. On 24 March 1942, another proclamation added a curfew regulation<sup>27</sup> to the law requiring all enemy aliens and persons of Japanese descent to be in their homes between 8 p.m. and 6 a.m. On 17 October 2006, the MCA was passed into law making the crimes outlined in the law retroactive and illegal whether they were committed on, before or after 11 September 2001.

Posters for Civilian Exclusion Orders read, “Instructions to all persons of JAPANESE ancestry,” and applied to “All Japanese persons, both alien and non-alien.”<sup>28</sup> Once posted, persons affected had seven days to comply.<sup>29</sup> In this short amount of time, they had to leave their homes, jobs, and businesses; hand carrying only what they could of their livelihood. Many left behind property and most of their belongings or received a fraction of what items were worth if they were able to find a buyer. Transportation of evacuees to one of 16 different assembly centers operated by the Army and movement to one of 13 permanent internment camps operated by a civilian agency called the War

Relocation Authority (WRA)<sup>30</sup> occurred next. Eventually, the entire West coast was designating as an exclusionary zone. Additionally, violations of the exclusion orders or curfews were a criminal federal offense due to Public Law 503.<sup>31</sup> In all, LTG Dewitt issued 108 Civilian Exclusion Orders. Nearly all were exclusive to Japanese aliens and those of Japanese descent.

*Personal Justice Denied*, the final report issued in 1983 by the Commission on Wartime Relocation and Internment of Civilians (CWRIC), depicts the conditions in which evacuees lived their lives. Families lived in one room (20 by 24 feet) tar-papered barracks, bathed and ate in mass facilities, and received \$12 to \$19 per month for roles that ranged from unskilled labor to professional employment.<sup>32</sup> Evacuees were guarded in their camps, which were surrounded by barbed wire and could only be released with government approval. The WRA maintained the camps were for their protection.<sup>33</sup> By mid 1943, the War Department and Secretary Stimson doubted the exclusion of loyal ethnic Japanese had further merit, but addressing this issue did not occur until after the November 1944 elections. “By the participants own accounts, there is no rational explanation for maintaining the exclusion of loyal ethnic Japanese from the West Coast for the eighteen months after May 1943—except political pressure and fear.”<sup>34</sup> Moreover, despite all of the fear and military pronouncements of Japanese American disloyalty and possible espionage, not a single act of espionage or sabotage was ever found to be committed.<sup>35</sup>

Likewise, by 2004, one could argue the U.S. no longer operated under the fear of imminent attack and the need to move forward with Guantanamo policy in the form of legal tribunals was the next logical step. Indeed, the U.S. instituted CRSTs and ARBs

during this time for this purpose. However in this case, politics also played a role. For it was legislation (the DTA and the MCA) to enforce these procedures which perpetuated the violation of international law by denying habeas corpus, right to a speedy trial, defense, etc. Even the UN acknowledged there was a need to ensure those who commit war crimes (i.e. terrorist) receive justice, but they maintain, the chance of ensuring a fair trial diminishes overtime.<sup>36</sup> Furthermore, the UN considers the detention of persons for a period of several years without charge fundamentally undermines the right to fair trial.<sup>37</sup>

Those that support(ed) Japanese internment policy used the absence of espionage or sabotage as evidence to justify the exclusion orders. In much the same way, supporters of Guantanamo policies use the fact that there has not been another terrorist attack on America since 9/11 to justify the use of “enhanced interrogation techniques” or the indefinite internment of detainees. One can argue that if the Japanese attacked Portland, Oregon, then the U.S. does not remember Japanese Internment.<sup>38</sup> However, does justification mean that laws were not violated or ill-advised? With respect to Japanese Internments this was not the case, as described in the section on redress. With respect to Guantanamo, the debate continues.

Throughout 1944, Certificates of Exemption for personnel to move back to the West coast were awarded to internees who passed the requisite loyalty and personnel checks. By December 1944, the government relocated and evacuated about 35,000 internees throughout the country (outside the West coast) and on 17 December 1944, Public Proclamation 21 rescinded LTG DeWitt’s mass exclusion<sup>39</sup> order leaving only selective individuals excluded from sensitive areas. In March 1946, the last internment



camp closed. Following the end to mass exclusions and relocation, Japanese Americans and aliens encountered a difficult reintegration into American society.

### Court Decisions

Like the Guantanamo Bay detention facility, the internment of Japanese aliens and American citizens of Japanese descent were challenged in the U.S. court system. Recall again, that pursuant to Presidential Proclamation 2525, enemy aliens do not have a right to habeas corpus. However, non-aliens were American citizens of Japanese decent and should have been protected by their constitutional rights from mass exclusion and internment. “Military necessity” overrode their rights. Moreover, the courts focused on the legality of whether the government could establish curfews and exclusion zones in a time of war instead of whether the laws were discriminatory in nature, violated the Constitution, or American principals.

There were several key cases of interest brought before different levels of the Federal court system. *Shiramizu v. Bonesteel* and *Ochikubo v. Bonesteel*, both challenged the exclusion orders for loyal Japanese with no evidence of disloyalty or criminal activity<sup>40</sup> (like themselves). Shiramizu was a widow of a Sergeant who had died of his combat wounds and Ochikubo was a professional dentist. Additionally, several cases went to the Supreme Court, but for simplicity’s sake two are mentioned here: *Korematsu v. United States* and *Ex parte Endo*. The Supreme Court ruled against Korematsu and for Endo on the same day. Both these cases were vital to reopening the issue of redress for internees, forty years later. Endo involved a loyal American citizen who was granted leave by the WRA but was not permitted to reenter the Western Defense Command. The Supreme Court unanimously ruled that the U.S. government could not keep a loyal U.S.

citizen interned.<sup>41</sup> This was a landmark case and was key in commencing the revocation of mass exclusion orders. On the other hand, Korematsu, a college student and American citizen, refused to report to the internment camp because he believed the exclusion orders were unconstitutional. Although a loyal American citizen at the time, the passing of Public Law 503 made this a criminal offense. Therefore, the Supreme Court, ignoring the fact that the exclusionary orders were executed in a discriminatory manner that excluded all Japanese Americans and aliens, upheld the government's rationale of wartime "military necessity" for Executive Order 9066<sup>42</sup> and found that Korematsu violated the law. Bear in mind, Executive Order 9066 did not explicitly exclude only Japanese Americans and aliens. The Supreme Court ruled against Korematsu (6-3).

### Redress

In 1948 Congress passed the Japanese-American Evacuation Claims Act which gave persons of Japanese ancestry who were affected by the war's internment policy, the means to seek compensation from the government for real and personal property loss. Unfortunately, the Act did not address lost income during internment nor the account for any pain and suffering endured. In fact, although \$37 million was paid in claims, the CWRIC acknowledges the amount was far below fair compensation for the actual losses suffered.<sup>43</sup> Some accounts of compensation were as little 10 cents on the dollar. Moreover, the bureaucracy involved extensive proof of ownership requirements to submit claims and were too difficult for many seeking compensation. Acquiring proper documentation when the item was left behind or sold was simply not possible due to the short amount of time to react to exclusion orders. The report, *Personal Justice Denied*, also states that claim amounts were low because incentives for settling claims below their

actual value were built into the Act.<sup>44</sup> If similar policy compensation was developed today for released Guantanamo detainees, it is likely that similar biases could be present. On the other hand, a petition process on case by case basis, could provide the U.S. with best course of action considering the controversial nature of such a plan. Regardless, like Japanese Internment, the U.S. will likely have to face the issue again, at a later date.

For Japanese Internment policy, that time first came in the 1960s, when Japanese Americans began to petition their congressional representatives to consider redress.<sup>45</sup> Japanese Americans, who were children at the time of their internment, were now grown adults, professionals, and even legislators by this time. In the 1970s two Acts were amended so that those Japanese Americans over the age of 18 who were interned could get credit for both civil service retirement and Social Security contributions during the time they were detained.<sup>46</sup> In 1980, Congress established the CWRIC to investigate the circumstances of Japanese internment. More precisely they were directed to:

1. Review the facts and circumstances surrounding Executive Order Number 9066, issued February 19, 1942, and the impact of such Executive Order on American citizens and permanent resident aliens;
2. Review directives of United States military forces requiring the relocation and, in some cases, detention in internment camps of American citizens, including Aleut civilians, and permanent resident aliens of the Aleutian and Pribilof Islands; and
3. Recommend appropriate remedies.

In order to complete this mandate, the CWRIC held hearings for 20 days in cities across the country and gathered testimony from 750 witnesses, evacuees, former government officials, public figures and historians.<sup>47</sup> In 1983, the CWRIC submitted its report, *Personal Justice Denied*. This report made several recommendations in Part II. The Civil Liberties Act of 1988 enacted the recommendations. Before leaving office,

President Ronald Regan signed the Act into law, but the 41st President of the U.S., (George Bush Sr.) signed the apology letters. The Civil Liberties Act provided \$20,000 redress payments to about 60,000 individuals of Japanese ancestry and a public apology on behalf of the U.S. government.<sup>48</sup> The apology read:

A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II.

In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideals of freedom, equality, and justice. You and your family have our best wishes for the future.

Sincerely, George Bush, President of the United States

Additionally the law provided a fund to educate the public and facilitate general public understanding about redress and the legislation to curb further abuses of power and racism.<sup>49</sup> According to Robert Bratt, the Administrator of the Office of the Redress Administration, charged with the identification, registration, verification, and administration of reparation payments to eligible individuals, it was the government that had to prove each individual's eligibility rather than the opposite, which made the redress program truly unprecedented.<sup>50</sup> Finally, transcripts of hearings conducted by the CWRIC, along with the full congressional report are filed in the National Archives and are public record. These are available online to the public at <http://www.archives.gov/research/japanese-americans/>.

Although it would be ill advised to implement a single template reparation program similar to this for detainees once held at GITMO for the reasons stated in chapter 3 because of the wide range of acts they may or may not have committed. It may

however, suit the U.S. well in the years to come, to conduct a similar type of inquiry in order to recommend possible reparatory solutions for those that may qualify.

Table 2. Chorology of Japanese Internment Policy

07 DEC 1941	Attack on Pearl Harbor
Rest of DEC 1941	<ul style="list-style-type: none"> <li>• Presidential Proclamation No. 2525 designates persons as enemy aliens if from a hostile nation and subject to detention.</li> <li>• Dept of Treasury seizes all Japanese bank accounts and business</li> <li>• Japanese language schools closed</li> <li>• AG orders all suspected "enemy aliens" in Western U.S. to surrender</li> <li>• California revokes liquor licenses</li> </ul>
JAN 1942	<ul style="list-style-type: none"> <li>• freezes travel suspected "enemy aliens"</li> <li>• AG Biddle issues first orders establishing limited strategic areas along the West Coast and requiring the removal of all suspected "enemy aliens" from these areas.</li> </ul>
FEB 1942	<ul style="list-style-type: none"> <li>• AG Biddle establishes curfew zones in California</li> <li>• LTG DeWitt sends a memorandum to the Secretary of War recommending the removal of "Japanese and other subversive persons" from the West Coast.</li> <li>• FEB 19 - FDR signs Executive Order 9066</li> </ul>
MAR 1942	<ul style="list-style-type: none"> <li>• Congress passes and FDR signs Public Law 503.</li> <li>• LTG DeWitt issues Proclamation No. 1.</li> <li>• LTG DeWitt issues Civilian Exclusion Order No. 1</li> </ul>
JUN 1942	<ul style="list-style-type: none"> <li>• LTG DeWitt issues Public Proclamation No. 6 – mass exclusion order for the eastern half of California.</li> </ul>
AUG 1942	<ul style="list-style-type: none"> <li>• Removal of over 120,000 Japanese Americans and Japanese aliens from their homes, complete.</li> </ul>
1943	<ul style="list-style-type: none"> <li>• Loyalty questionnaire required for 17 and older persons</li> <li>• <i>Hirabayashi v U.S.</i>, <i>Yasui v U.S.</i> - both Supreme Court cases protesting curfews and exclusion orders brought by convicted violators.</li> </ul>
May 1943- Nov 1944	<ul style="list-style-type: none"> <li>• AG Biddle advises the end of mass exclusions and advocates return of citizens to their homes.</li> </ul>
07 NOV 1944	<ul style="list-style-type: none"> <li>• FDR Reelected</li> </ul>
17 DEC 1944	<ul style="list-style-type: none"> <li>• Public Proclamation 21- the revocation of the West Coast mass exclusion orders.</li> </ul>

18 DEC 1944	<ul style="list-style-type: none"> <li>• <i>Korematsu v U.S.</i></li> <li>• <i>In ex parte Endo</i></li> </ul>
1945	<ul style="list-style-type: none"> <li>• 02 JAN – Public Proclamation 21 goes into effect.</li> <li>• 08 MAY - VE DAY</li> <li>• 02 SEP - VJ DAY</li> </ul>
MAR 1946	<ul style="list-style-type: none"> <li>• Last internment facility closed.</li> </ul>
JUL 1948	<ul style="list-style-type: none"> <li>• Evacuation Claims Act passed.</li> </ul>
19 FEB 1976	<ul style="list-style-type: none"> <li>• President Ford signs "An American Promise" formally rescinding Executive Order 9066.</li> </ul>
1980	<ul style="list-style-type: none"> <li>• Congress establishes Commission on Wartime Relocation and Internment of Civilians. (CWRIC)</li> </ul>
FEB 1983	<ul style="list-style-type: none"> <li>• CWRIC report entitled <i>Personal Justice Denied</i> published.</li> </ul>
1983-1988	<ul style="list-style-type: none"> <li>• <i>Coram Nobis</i> cases vacate several convictions including Korematsu and Hirabayashi</li> </ul>
1988	<ul style="list-style-type: none"> <li>• Civil Liberties Act passed.</li> </ul>
NOV 1989	<ul style="list-style-type: none"> <li>• President George Bush signs Public Law 101-162 guaranteeing funds for reparation payments.</li> </ul>
05 FEB 1999	<ul style="list-style-type: none"> <li>• Office of Redress Administration officially closes.</li> </ul>

Source: Created by Author.

### Chapter Summary

In summary, this chapter used the forced internment of persons of Japanese descent during World War II as a historical precedent for extensive injustice during a time of war based on military necessity or national security. The study of this case is relevant to this thesis topic because it demonstrates a similar time in U.S. wartime history, where policy decisions affected a small population of people resulting in abuses of power, basic rights, and American principles. Furthermore, the policies discussed in this case study led to redress and reconciliation activities by the U.S. government in the decades that followed whether they were justified or not. Due to similar inference of wrongdoing, real and perceived at Guantanamo, the likelihood of conciliation activities

initiated by the U.S. government or demanded by the international community is highly possible.

In addition, even as the closing of internment camps and end of mass exclusion was not the end for Japanese internees, release for Guantanamo is not the end for detainees. According to *Personal Justice Denied*, former World War II internees relocated to other parts of the U.S. or returned home to rebuild their lives met many challenges and hardship. These included, the restarting of businesses without capital means; theft of property in storage; hostility and racism preventing home and property purchases; a general lack of self esteem by younger internees; and depression, suicides or suicide attempts by the elderly who were often unable to re-assimilate into American society completely.<sup>51</sup> Although limited in scope, studies published in November 2008 and March 2009 by the International Human Rights Center at the University of California at Berkeley, found similar challenges and difficulties for released Guantanamo detainees. For example, only six of the 62 former detainees interviewed have regular jobs, many have lost homes, businesses, and assets, and experience prejudice by neighbors, and suspected as American spies.<sup>52</sup> Interestingly however, although the study found that most detainees harbored some resentment towards the U.S., the majority of those interviewed were not vengeful, but simply expressed a desire for justice and an opportunity to clear their names.<sup>53</sup> This sentiment was a little different for the World War II internees of Japanese descent who continued to harbor silent yet intense memories of internment while they sought to rebuild their lives and encouraged their children to assimilate into American culture.<sup>54</sup>

Is it possible to conclude then, that without satisfaction for wrongdoing in a timely manner, the issue of reconciliation continues to linger, eventually requiring reparations in some form? Chapter 7 discusses the subject of reparations and provides a general background to understand why reparations are important and how they can assist a government to correct ill-advised policies such as Japanese internment and Guantanamo detention. Table 3 shows some similar themes between the two situations.

Table 3. Japanese Internment and GITMO Detention Comparison

<b>Topic</b>	<b>Japanese Internment</b>	<b>Guantanamo Detainees</b>
<b>What caused it?</b>	<ul style="list-style-type: none"> <li>• Attack on Pearl Harbor</li> </ul>	<ul style="list-style-type: none"> <li>• September 11, 2001 Terrorist Attacks</li> </ul>
<b>How was the policy enforced?</b>	<ul style="list-style-type: none"> <li>• Executive Order 9066</li> <li>• Public Law 503</li> </ul>	<ul style="list-style-type: none"> <li>• Military Order 1</li> <li>• DTA</li> <li>• MCA</li> </ul>
<b>What was the justification?</b>	<ul style="list-style-type: none"> <li>• Wartime Military Necessity</li> <li>• Preventing further Japanese attacks</li> </ul>	<ul style="list-style-type: none"> <li>• National Security</li> <li>• Preventing further terrorist attacks</li> </ul>
<b>Intelligence to support further attacks?</b>	<ul style="list-style-type: none"> <li>• Exaggerated, unsubstantiated or ignored</li> </ul>	<ul style="list-style-type: none"> <li>•</li> </ul>
<b>Legal debate?</b>	<ul style="list-style-type: none"> <li>• Non-adherence to constitutional rights of American citizens. AG Biddle and FBI director Hoover were against mass exclusions and thought them imprudent and unnecessary.</li> </ul>	<ul style="list-style-type: none"> <li>• Non-adherence to Geneva Convention. JCS had serious concerns about proposed interrogation techniques and the non application of the Geneva conventions.</li> </ul>
<b>Court Cases</b>	<ul style="list-style-type: none"> <li>• Yes – challenged constitutional rights, legality of executive order, and curfews.</li> <li>• For the most part the courts sided with the government’s justification of military necessity</li> <li>•</li> </ul>	<ul style="list-style-type: none"> <li>• Yes – challenge habeas corpus, application of the Geneva Convention, and legality of tribunals.</li> <li>• For the most part, the courts have sided with detainees.</li> </ul>



<b>Cases of detention for longer than required?</b>	<ul style="list-style-type: none"> <li>• Yes – the CWRIC discovered no military necessity for mass exclusion after spring of 1943, but rescinding of order did not occur until JAN 1945.</li> </ul>	<ul style="list-style-type: none"> <li>• Yes – some detainees are slated for release but are unable to relocate to other countries. Uigars were released by federal court but remain at GITMO because there is nowhere for them to go.</li> <li>•</li> </ul>
<b>Availability to recreation, labor, and education while interned?</b>	<ul style="list-style-type: none"> <li>• Yes, camps were mini-cities and provided jobs, education for children, and recreational activities for all with no restrictions. Wages were well below market value and children were Americanized in the classroom</li> </ul>	<ul style="list-style-type: none"> <li>• Yes, detainees have access to intellectual stimulation, vocational and basic education, and some recreation. There are many restrictions based on level of cooperation and obedience.</li> </ul>
<b>Laws passed to criminalize actions?</b>	<ul style="list-style-type: none"> <li>• Public Law 503</li> </ul>	<ul style="list-style-type: none"> <li>• DTA and MCA</li> </ul>
<b>Difficulty reintegrating once released</b>	<ul style="list-style-type: none"> <li>• Yes, this is well documented in <i>Personal Justice Denied</i>.</li> </ul>	<ul style="list-style-type: none"> <li>• Yes, documentation however is limited at this time.</li> </ul>
<b>Reparations and redress?</b>	<ul style="list-style-type: none"> <li>• The Evacuations Claims Act (1948), the CWRIC recommendations (1983) and the Civil Liberties Act (1988)</li> </ul>	<ul style="list-style-type: none"> <li>• No. To date, detainees leave GITMO with their clothes, any personal belongings and their mail.</li> </ul>

Source: Created by the Author.

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<sup>1</sup>John Armor and Peter Wright, *Manzanar, A Mistake of Terrifically Horrible Proportions* (New York: Times Books, 1988), 9.

<sup>2</sup>United States Government, “Personal Justice Denied,” *Report of the Commission on Wartime Relocation and Internment of Civilians* (National Archives Library: Washington, DC, June 1983), Part 2: Recommendation, 6. <http://www.archives.gov/research/japanese-americans/justice-denied/> (accessed 16 July 2009).

<sup>3</sup>Pablo De Greiff, *Justice and Reparations*, in *The Handbook of Reparations* (New York: Oxford University Press, 2006), 456.

<sup>4</sup>Wendy Ng, *Japanese American Internment During World War II—A History and Reference Guide* (Westport, CT: Greenwood Press, 2002), 3.

<sup>5</sup>Ng, 9.

<sup>6</sup>Personal Justice Denied, Summary, 2.

<sup>7</sup>Eric Yamamoto and Liann Ebesugawa, “The Japanese American Internment,” in *The Handbook of Reparations* (New York: Oxford University Press, 2006), 259.

<sup>8</sup>Ibid., 262.

<sup>9</sup>Ibid., 258-59.

<sup>10</sup>Ibid.

<sup>11</sup>Ng, xviii–xix.

<sup>12</sup>Military Order 1, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, Federal Register (13 November 2001): 1665-1668. [http://www.gpoaccess.gov/wcomp/v37no\\_46.html](http://www.gpoaccess.gov/wcomp/v37no_46.html) (accessed 30 March 2009).

<sup>13</sup>Presidential Proclamation No. 2525, 7 December 1941.

<sup>14</sup>The Islamic Workplace, “Workplace Discrimination Against Muslims after 9/11,” <http://makkah.wordpress.com/2007/05/06/workplace-discrimination-against-muslims-after-911/> (accessed 19 November 2009).

<sup>15</sup>Geneva Conventions; and ICCPR.

<sup>16</sup>“Personal Justice Denied,” Summary, 8.

<sup>17</sup>Ibid.

<sup>18</sup>Yamamoto and Ebesugawa, 260.

<sup>19</sup>“Person Justice Denied,” Part 1, Chapter 2: Executive Order 9066.

<sup>20</sup>Yamamoto and Ebesugawa, 261.

<sup>21</sup>“Person Justice Denied,” Part 1, Chapter 3: Exclusion and Evacuation.

<sup>22</sup>Ibid., Summary, 8.

<sup>23</sup>Ibid.

<sup>24</sup>Ibid., 18.

<sup>25</sup>Memo, Hoover to Attorney General Biddle, February 1, 1942. DOJ 146-42-012 (CWRIC 10447-56).

<sup>26</sup>Patrick Leahy, Statement on Military Commissions Act on the Senate Floor, 28 September 2006.

<sup>27</sup>“Personal Justice Denied, Summary Ibid.,8.

<sup>28</sup>Ng, 117.

<sup>29</sup>Ibid., 263.

<sup>30</sup>Ibid.

<sup>31</sup>Yamamota and Ebesugawa, 262.

<sup>32</sup>“Personal Justice Denied,” Summary, 11.

<sup>33</sup>Ibid., 10.

<sup>34</sup>Ibid., 16.

<sup>35</sup>Armor and Wright, 20; and Yamamoto and Ebesugawa, 262.

<sup>36</sup>UN, Promotion and Protection of all Human Rights.

<sup>37</sup>Ibid.

<sup>38</sup>Donald Stephenson, Statement made to author, Fort Leavenworth, Kansas, 19 November 2009.

<sup>39</sup>“Personal Justice Denied,” Part I, Chapter 8: Ending the Exclusion, 235.

<sup>40</sup>*Shiramizu v. Bonesteel*, No. 494474 (Sup. Ct. L.A. County, CA); and *Ochikubo v. Bonesteel*, No. 3834-PH (S.D. Cal.).

<sup>41</sup>*Ex parte Endo*, 323 U.S. 283 (1944).

<sup>42</sup>*Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>43</sup>“Personal Justice Denied,” Part II, Recommendations, 7.

<sup>44</sup>Ibid.

<sup>45</sup>Ng, 107.

<sup>46</sup>“Personal Justice Denied,” Part II, Recommendations, 7.

<sup>47</sup>*Ibid.*, Summary 1.

<sup>48</sup>Ng, 109.

<sup>49</sup>Yamamoto and Esbesugawa, 275.

<sup>50</sup>*Ibid.*, 272.

<sup>51</sup>“Personal Justice Denied,” Part I, Chapter 8.

<sup>52</sup>Laura Fletcher et al., eds., *Guantánamo and Its Aftermath, U.S. Detention and Interrogation Practices and Their Impact on Former Detainees*, University of California, Berkeley International Human Rights Law Clinic, vii-viii, <http://hrc.berkeley.edu/pdfs/Gtmo-Aftermath.pdf> (accessed 10 October 2009).

<sup>53</sup>*Guantanamo and Its Aftermath*, viii.

<sup>54</sup>Ng, 104.

## CHAPTER 7

### REPARATION PROGRAMS

#### Chapter Introduction

What ensues in this chapter is the subject of reparations, following the theme of Japanese redress. The purpose is to give generic background information and open up the discussion of its application to released Guantanamo detainees. Entire books and doctoral thesis' are dedicated to the topic of reparation and reconciliation programs. For the purposes of Guantanamo detainees and their rights as human beings in relation to this thesis topic, however, the section will focus on a general background of reparations and compensation. Brief discussions of what reparations consist of, the types or categories, and examples of application follow. The final part of this section discusses the vast challenges of reparations and their effects.

#### Purpose of Reparations

The purpose for reparations is to make public society or governments or both responsible for their action and liable for the wrongs committed against a group or individuals. This objective should be obvious now with the background provided in chapter 6 on U.S. policy and redress from Japanese American and resident alien internment during World War II. Furthermore, it is a basic maxim of law that harms should be remedied and every legal system actually insists on it in some form or another.<sup>1</sup> The UN views remedies for violations of human rights as a distinct state obligation.<sup>2</sup> They can consist of monetary payments for loss of livelihood, property, and pain and suffering. They can also be symbolic in nature consisting of public statements

and apologies, official acknowledgements, actions that denounce or condemn publicly the violations committed, or provide education and understanding so to prevent duplication in the future.

Moreover, there are four basic forms of reparations under international law. They are restitution, compensation, rehabilitation, and satisfaction and guarantees of non-reoccurrence.<sup>3</sup> Pablo De Greiff, a native of Colombia, and Research Director at the International Center for Transitional Justice edited *The Handbook of Reparations* and authored an article within entitled, “Justice and Reparations.” This article defines the terms outlined above. Restitution reestablishes the victims *status quo ante* (i.e. citizenship, liberty, job, benefits, and property). Compensation makes up for the harms suffered beyond mere economic loss including physical, mental, and moral injury. Rehabilitation provides social, medical, and psychological care and legal services to the victim(s). The last category is very broad consisting of those actions stopping the activity, verifying the facts, issuing apologies and statements, allowing public disclosure, reestablishing the dignity and reputation of the victim(s), searching for and turning over remains, judicial sanctions, and institutional reform.<sup>4</sup> Keep in mind, these are forms of reparations and examples not a checklist that must be accomplished in totality.

Additionally, most experts distinguish between collective reconciliation and individual. In the most basic terms, collective programs are those like the Civil Liberties Act which applies broadly to a large group of people, therefore the compensation may actually be less than that which would be given on a case by case basis. Individual reconciliation is usually specific to a small group and includes individualized awards, perhaps through the judicial system and psychological or physical treatment, for example.

Other experts such as Brandon Hamber, author of another article in *The Handbook of Reparations*, entitled “Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition,” define reparations more narrowly. Although this article does focus on societies in transition rather than nations such as the U.S., which have a stable governments, Hamber’s opinion should remains valid in the larger sense of reparations programs. He maintains that the general aim of a program of reparations is the understanding of the psychological process at work for the victims (individual level) verses the broader aim of institutional reform and, or both symbolic reparations, which is much more of a political project (collective).<sup>5</sup> Hamber draws a distinction between collective and individual programs to bring attention to the fact that victims have an extremely deep rooted sense of the relationship between what is granted to them and what it is they desire for reparations to achieve and this may be at odds with what can be accomplished at the collective level.<sup>6</sup>

The meaning here is that reparations are difficult to measure and implement as well as to achieve intended goals because they can be interpreted so many different ways at both the collective and individual levels. Moreover, this is just from the prospective of the victim, not the implementer. More pointedly, even Pablo de Greiff cautions, there is no transitional or post conflict reparations program that has managed to compensate victims proportionally “to the harm they suffered [and that] the very quantification of these harm is problematic [because] even the idea . . . might generate unfulfilled expectations.”<sup>7</sup>

## Taking Responsibility

Why then are reparation and reconciliation important? Despite the limitation and obstacles, responsible state cannot simply ignore the claims of victims with arguments that it is too difficult to make everyone satisfied or there are no resources to cover the cost. De Greiff argues this would be “tantamount to acknowledging that the [state] is in no position to sustain a fair regime.”<sup>8</sup> Similarly, David A. Crocker, a senior research scholar at the Institute for Philosophy and Public Policy and the School of Public Policy at the University of Maryland who specializes in development ethics and transitional justice, contends that a democratic society must realize that “consensus may not and probably will not happen.”<sup>9</sup> However, adherence to the best package of tools available should be used to achieve goals.<sup>10</sup> Crocker is explaining reparations here with respect to non-democratic regimes transitioning to democratic ones. It seems reasonable then, if new democratic regimes should try to make reconciliation the best way they can for past wrongs, then stable democratic regimes such as the U.S. should as well; and in fact it does—sort of.

Aside from the reparation program enacted with the 1988 Civil Liberties Act, the U.S. government does have compensation programs for some wrongfully imprisoned citizens through state statutes. According to the Innocence Project, a national litigation and public policy organization dedicated to exoneration of wrongfully convicted people, the federal government, the District of Columbia, and 27 states have compensation statutes of some form for the wrongfully convicted and exonerated.<sup>11</sup> It is noteworthy that the average length of imprisonment is 12 years for these people. At any rate, the Innocence Project justifies compensation programs by stating,



Despite their proven innocence, the difficulty of reentering society is profound for the wrongfully convicted; the failure to compensate them adds insult to injury. Society had an obligation to promptly provide compassionate assistance to the wrongfully convicted in the following ways: 1. monetary compensation based on the amount of time served; financial support for basic necessities such as subsistence funds, food, and transportation; 2. help secure affordable housing; provisional medical, dental, psychological services; 3. assistances with development of workforce skills; legal services to obtain public benefits, expunge criminal records and regain custody of children; and 4. official acknowledgement of wrongful conviction.<sup>12</sup>

Still, there is no federal standard for the compensation of the wrongly convicted and 23 States in the U.S. remain without compensation statutes. These wrongfully convicted persons have no recourse to seek compensation for their loss of life and liberty once released. It should be of no surprise then, that there is also no compensation program for Guantanamo detainees who were not even charged, let alone convicted, once they are released from detention. It is important to note though, that while interned, GITMO detainees have the same access to medical and psychological care as the U.S. Soldiers guarding them,<sup>13</sup> which in almost all cases is far more advance and improved from that received prior to internment. Also, since 2004, although not rehabilitative in nature, detainees enjoy access to intellectual stimulation such as library material, art classes, language training, and Sudoku puzzles.<sup>14</sup> Unfortunately, once released this care and stimulation are also terminated, leaving detainees alone to struggle with the physical and psychological ramification of reentering society. This was also the case for released evacuees from Japanese Internment camps at the end of World War II and is one of the primary justifications for redress forty years later. Since the inception of the Guantanamo Bay internment facility, released detainees have received nothing upon release. After years, some released after as much as seven, are without charges, conviction, or apology

let alone a conciliation package of support. Instead, detainees leave with their personal belongings, a Koran, and their personal mail.<sup>15</sup>

### The Linkage to Human Rights and GITMO

It is now necessary to develop the linkage between programs and humanitarian rights in order to understand further if there is a basis for released GITMO detainees to receive reparations. First, understand that human rights and humanitarian right violations are just a part of reparations. Reparations are about righting a wrong, which may not include human rights violation. However, in recent years, human rights and humanitarian violations are becoming a central theme in reparation programs. Take for example previous regime mass atrocities in the emerging democracies of South America over the last 30 years. In Latin America, several countries have implemented significant reparations programs and others have made more token efforts. Chili, Argentina, and Brazil instituted programs for victims of human right abuses due to dictatorships in the 1970s and 1980s. They consisted of lump sum pension payments, scholarships for children of victims, and the creation of a legal figure (“absent due to forced disappearance”) allowing families to collect inheritance and spouses to remarry without admitting death.<sup>16</sup> Token efforts include releases of official statements and memorials.<sup>17</sup>

According to Richard Falk, author of the article, “Reparations, International Law and Global Justice,” found in *The Handbook of Reparations*, the emergence of a linkage between human rights and reparations is actually new to our society, but it is essential to answering the research question presented in this thesis. Nevertheless, it is only with the evolution of the Universal Declaration of Human Rights and subsequent UN documents, that it was first politically feasible to implement remedies for victims seeking reparations.

Even now, the authoritative and sovereign natures of the majority of governments oppose defined legal international structure to implement reparations associated with respect to individual rights.<sup>18</sup> This is because in customary international law, only states themselves are subjects within the international legal order, meaning that claims are viewed as harms against the state not against an individual.<sup>19</sup> However, this interpretation has been questioned in recent years with the emergence non-state actors and stateless individuals due to war, natural disaster, or refugee activity. Still, every sovereign nation has varying access to resources to compensate victims. This is in part why the UN issued General Comment 31 in 2004 mandating a nation's obligation to remedy human rights violations without further defining what that actually means.

Moreover, reparation programs cost money and poor or emerging nations likely would not possess the means to carry out specified programs and would rely more on the token efforts mentioned earlier. Falk's main point is that moral and political pressures rather than actual law drive the very process of reparations and compensation. A central theme in this thesis also focuses on this point. Domestic political pressure and moral guilt for the treatment of Japanese American during World War II lead to redress. Although there is ample international pressure with respect to GITMO and detention policies, domestic political pressure eludes the mainstream debate, for the most part. However, the purpose of this thesis is to determine whether there is a basis for reparations. There certainly seems to be a moral and ethical basis, but the political basis is centered on international perception. The author argues that as a world leader and example of democracy, international pressure should play an equal role as domestic pressure.

Regardless, Falk also admits that although reparation efforts receive less attention than efforts to criminalize the perpetrators, they still are “a significant aspect of attempts for rectification.”<sup>20</sup> It makes sense then that with the negative fallout that Guantanamo Bay and its policies have brought against the U.S., reparations of some type for released detainees follows as a natural consequence. However, all abuses including those of power and liberty as well as human rights in a more traditional view of reparations would likely be warranted.

As stated in chapter 5, since *Boumediene v. Bush* in June 2008, 150 habeas corpus lawsuits have been filed in federal court.<sup>21</sup> Thirty-five have been litigated and of those, 29 detainees were adjudged to be unlawfully detained.<sup>22</sup> To date the U.S. Government has not initiated any type of reparation program directed towards Guantanamo detainees. However, as recent as 2 November 2009, the federal government settled a lawsuit involving five Muslim aliens (immigrants) for \$1.2 million.<sup>23</sup> These men, who were never detainees at GITMO, were deported and now reside outside the U.S., were held in U.S. custody without charges for up to seven months following the 9/11 attacks and subjected to some physical abuse. The government admits no liability or fault under the terms of the settlement, but according to the article in the *New York Times* reporting the settlement, a lawyer of one detainee says, “the amount the government is willing to pay speaks volumes.”<sup>24</sup> This particular case filed in Brooklyn, took seven years of judicial hearings, rulings and appeals before a settlement was reached. Other cases, including those heard by the Supreme Court (see chapter 5) have also endured years of legal scrutiny. There are still over 100 of the previously mentioned habeas corpus cases pending. Moreover, dismissals of similar cases (as the one settled for \$1.2 million) due to

dismissals are prevalent. Furthermore, a federal appeals court in New York just rejected a suit by a Canadian man sent to Syria in 2002 through extraordinary rendition, alleging he was tortured. The court declined to create a new precedent to sue for damages in connection with rendition because Congress has not authorized such suits and the court felt it would affect diplomacy and the security of the nation.<sup>25</sup> These two cases are only two of several similar examples of right violations in connection with U.S. policy and detention operations aside from those specific to Guantanamo. This highlights the possibility of a much larger issue at hand with respect to rights violations, in which Guantanamo policy is just faction.

With respect to Guantanamo specifically, the fore mentioned November 2008 and March 2009 documents published by the International Human Rights Center at the University of California at Berkeley provides further insight into the topic of released Guantanamo detainees. *Guantánamo and Its Aftermath* is based on a two-year study of the cumulative effect of Guantanamo policies on the lives of 62 released detainees. The study maintains there is a stigma associated with Guantanamo much like there is in the U.S. with ex-cons. Furthermore, the study claims two-thirds of the former detainees report residual psychological and emotional trauma and aside from a program in Saudi Arabia, no meaningful help from public or private sources to reintegrate former detainees into their communities has occurred.<sup>26</sup> Although JTFGTMO reports only 12 percent of the current population of Guantanamo is diagnosed with a mental illness compared to 30-40 percent of the federal prison population,<sup>27</sup> this does not take into account the status of the 520 detainees released or account for problems that surface only after detainees begin the reintegration process.

The second document published by International Human Rights Law Center at Berkeley was published in March 2009 and is entitled: *Returning Home*. This article gives basic recommendation to the U.S. to remedy the ongoing hardships and violation of human rights on released detainees. As stated in the methodology portion of this thesis, the author found data pertaining to Guantanamo detainees lacking the specificity required for total understanding of the implications of Guantanamo detention on detainees. This article also freely admits that there is simply not enough information about released detainees as a group to make specific recommendations. However, the Human Rights Law Center does give evidence citing government as well as independent data to the effect that there are known problems requiring intervention. The study first mentioned above is heavily relied on. Additionally, it is the author's opinion that books and reports similar to this study and Laura Fletcher and Eric Stover's book on the *Guantanamo Effect* released in September 2009, will assist experts in filling in these gaps.

Regardless, with over 500 released detainees spread across 30 countries in the world, the Humans Rights Law Center concludes the U.S. has a "strategic and moral imperative to facilitate [Guantanamo detainee] resettlement and reintegration."<sup>28</sup> The Center also recommends the four courses of action listed in figure 6 as a good first step for intervention. These recommendations fall in line with the previously established background on reparation programs given at the beginning of this chapter.

1. Develop a case by case process to enable detainees to clear their name and encourage community members to assist detainees returning to their communities.
2. Provide immediate short-term financial assistance and support for sustainable livelihoods.
3. Provide a comprehensive program of services for those that need mental and physical health services as well as job training and family support.
4. Implement reintegration programs in partnership with local communities such as local religious or civic organizations with a high level State department official in oversight.

Figure 6. Recommendation for Resettlement and Reintegration

Source: Created by author from information obtained the article “Returning Home,” *International Human rights Law Center*, University of California at Berkeley, School of Law, 13, <http://hrc.berkeley.edu/pdfs/Gtmo-ReturningHome.pdf> (accessed 10 October 2009).

### Chapter Summary

In summary, it is the generally accepted practice of civilized societies and mandated by international law to provide compensation of some kind to the wrongly accused or convicted. For as those who feel wronged by the U.S. due to detention in connection with the GWOT, there is no recourse except the court system. However, even the court system rejects cases for both Guantanamo detainees or other persons affected by GWOT policies due to legislation enacted because of 9/11 or the absence of precedent. Furthermore, one can only assume that even more cases involving past detainees are making their way through or are awaiting introduction into the U.S. judicial system soon.

De Greiff believes a well-designed [compensation] program can be more beneficial than associated litigation and judicial procedures. Although the program may distribute awards that are lower in absolute terms, they give faster results at lower cost with relaxed standards of evidence and non-adversarial procedures.<sup>29</sup> With the increasing demand on the federal court system both from GITMO detainees and others detained by the U.S. following 9/11, any federal policy for compensation would seem alleviate the new burden put on the court system.

It is important to articulate however, the measures of reparations, what the program looks like and appropriate applications are indefinite; there are also no easy answers. In fact, it is just about impossible to reach a consensus on what they are. However, the purpose of this chapter is to demonstrate that these difficulties should not stop responsibly parties from trying to build programs. The point is that reparation programs must possess integrity or coherence both internally and externally. That is, each element should support the other whether intrinsic, symbolic, or material (internal) while bearing close relationship with other mechanisms such as institutional reform (external).<sup>30</sup> De Greiff, emphasizes this central point, which is prevalent among experts in the reparation field. He says there should not be anything in a reparations program “that invites either their designers or their beneficiaries to put a price on the life of victims or on the experiences of horror.”<sup>31</sup> Any reparation program for released detainees would be well served to head this advice.

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<sup>1</sup>Naomi Roht-Arriaza, *Reparations in the Aftermath of Repression and Mass Violence*, in “My Neighbor, My Enemy—Justice and Community in the Aftermath of Mass Atrocity (Cambridge University Press: 2004), 121.



<sup>2</sup>Ibid.; and ICCPR, General Comment 31, <http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument> (accessed 21 September 2009).

<sup>3</sup>De Greiff, 452.

<sup>4</sup>Ibid.

<sup>5</sup>Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition*, in *The Handbook of Reparations* (New York: Oxford University Press, 2006), 564-565.

<sup>6</sup>Hamber, 565.

<sup>7</sup>De Greiff, 457-459.

<sup>8</sup>Ibid., 459.

<sup>9</sup>David A. Croker, *Transitional Justice and International Society, Transition to Democratic Regime from Prior Non-democratic Regime*, in “War Crimes and Collective Wrongdoing (a Reader) (Maldan, MA: Blackwell Publishers Inc, 2001), 276.

<sup>10</sup>Ibid.

<sup>11</sup>Fact Sheet, “Compensating the Wrongly Convicted,” The Innocence Project, <http://www.innocenceproject.org/content/309PRINT.php> (accessed 21 October 2009).

<sup>12</sup>Ibid.

<sup>13</sup>MAJ Diana R. Haynie, Deputy Director Public Affairs for Joint Task Force Guantanamo, email interview with author, 20 October 2009.

<sup>14</sup>Ibid.

<sup>15</sup>Ibid.

<sup>16</sup>Roht-Arriaza, 124-5.

<sup>17</sup>Ibid.

<sup>18</sup>Richard Falk, *Reparations, International Law, and Global Justice*, in *The Handbook of Reparations* (New York: Oxford University Press, 2006), 489.

<sup>19</sup>Falk, 482 and 488.

<sup>20</sup>Ibid., 495.

<sup>21</sup>William Fisher, "Growing Number of Guantanamo Detainees Cleared for Release," *The Public Record*, 6 September 2009, <http://pubrecord.org/world/4759/growing-number-guantanamo-detainees/> (accessed 10 October 2009).

<sup>22</sup>*Ibid.*

<sup>23</sup>Nina Bernstein, "US to Pay \$1.2 Million to 5 Detained Muslims," *New York Times*, 3 November 2009, A22.

<sup>24</sup>*Ibid.*

<sup>25</sup>Benjamin Weiser, "Appeals Court Rejects Suit by Canadian Man over Detention and Torture Claim," *New York Times*, 3 November 2009, A18.

<sup>26</sup>Laura Fletcher et al., eds., *Guantánamo and Its Aftermath, U.S. Detention and Interrogation Practices and Their Impact on Former Detainees*, University of California, Berkeley International Human Rights Law Clinic, vii-viii, at <http://hrc.berkeley.edu/pdfs/Gtmo-Aftermath.pdf> (accessed 10 October 2009).

<sup>27</sup>Email interview with MAJ Haynie.

<sup>28</sup>International Human Rights Law Clinic, *Returning Home: Resettlement and Reintegration of Detainees released from the U.S. Naval Base in Guantanamo Bay, Cuba*, University of California at Berkeley, School of Law, <http://hrc.berkeley.edu/pdfs/Gtmo-ReturningHome.pdf> (accessed 10 October 2009).

<sup>29</sup>De Greiff, 459.

<sup>30</sup>Pablo De Greiff, 467.

<sup>31</sup>*Ibid.*, 466.

## CHAPTER 8

### CONCLUSIONS AND RECOMMENDATIONS

We can't go immediately from getting off a plane from Cuba to living in society. Everything has changed.<sup>1</sup>

— Former Guantanamo Detainee

Among our strengths as a nation is our willingness to acknowledge imperfection as well as to struggle for a more just society<sup>2</sup>.

— Personal Justice Denied

#### Conclusions

In late 2001, the 43rd President of the United States by military order allowed the detention facility at Guantanamo Bay to open, and operate in support of the U.S. efforts to win the GWOT. On 22 January 2009 the newly elected 44th U.S. President signed an executive order to close the detention facility within the next 12 months. This prison is a hotly contested issue among the international community and American public especially the aftermath of the Abu Ghraib scandal of 2003-4 and the discovery that the U.S. Government participated in questionable interrogation techniques, such as water boarding and sleep deprivation.

Furthermore, several Supreme Court verdicts issued over the last seven years have defined, refined or shaped detainee rights pursuant to internment at GITMO and the right to due process. In addition, the DTA and MCA are key U.S. legislation contributing significantly to this complicated topic. Likewise, several UN reports and renowned NGOs, such as the International Helsinki Federation for Human Rights, Amnesty International, ICRC and many others elucidate the ambiguity of Guantanamo Bay, its policies, and operations. They use established law, treaties, ethics, and U.S. actions post

9/11 as the centerline of reasoning to do this. Many of these criticisms were presented or examined in this thesis.

Besides the legal and ethical opinions presented above, there is creditable psychological material and research on the general effects of captivity, detention, and emotionally significant events. However, to date there is little research specific to the implications of detention with respect to Guantanamo Bay or other GWOT detainees. In the coming years, as more studies and interviews are conducted, the psychological part of the Guantanamo debate should become more clear.

Finally, public sentiment in the U.S. and abroad significantly influences both policy decisions with respect to Guantanamo and the success of future operations in support of the GWOT. Media reports and surveys of public opinion can easily establish linkage. “The U.S. does not speak clearly about human rights.”<sup>3</sup> The “U.S. and its allies have stopped playing the human rights card.”<sup>4</sup> “A government which resorts to such tactics facilitates impunity and denies justice to the victims of crime, including terrorism.”<sup>5</sup> “The process was a perfect storm of ignorance and enthusiasm.”<sup>6</sup> [Guantanamo] “remains one of the most controversial aspects of the Bush administration’s so called war on terror.”<sup>7</sup> “There is another variable in the intelligence equation: the help you lose because you friends start keeping their distance.”<sup>8</sup> These are only a handful of quotes from a variety of news reports around the world used to describe the U.S. and its policies.

Therefore, the reputation of the U.S. with respect to human rights and basic human dignity is in jeopardy considering the abuse allegation surrounding detention operations, especially the indefinite internment of detainees at GITMO without

prosecution, and the recent release of declassified OLC memos outlining the use of “enhanced interrogation techniques.” The announced closure of the facility at GITMO writes another chapter in this book. However, the debate fails to consider future ethical implications pertaining to possible deserved restitution. This thesis attempted to determine if there is an ethical, moral and legal basis for reparation for released detainees. It is likely, based on U.S. history that the issue of reparations will resurface in the years and decades to come. It stands to reason then, and based on the information provided in this thesis that a basis does exist.

What is more, the Obama Administration now has a window of opportunity with the international community to act on perceived wrongs committed by the U.S. detention policy at Guantanamo Bay Naval Base. Therefore, the conversation of the detention facility’s closure ought to include whether compensation for wrongfully interned persons or those denied their basic human rights according to established law should be considered; perhaps as an act of good faith. The conversation should consider past restitution awarded by the U.S., and the advantages and disadvantages to national security objectives then and now.

Currently the Guantanamo Bay closure is focused solely on the physical requirements, legal implications, and final confinement location for those interned. However, an aspect this policy change, overlooked by the mainstream debate, is the question of ethical responsibility. This thesis aimed to research the laws, policy implications and value based fundamentals of the United States to determine if a basis exists for the U.S. to provide reparations to released GITMO detainees. Additionally, it used an historical example from a similar time of national emergency to compare and

contrast similarities and recommend possible courses of action with respect to restitution (Japanese Internment).

The two tables below provide a visual rendering of the research conducted in this thesis. The Y axis is the main documents, policy, court cases and laws which were analyzed in this thesis. The X axis gives the rights provided or results of those documents. An “x” denotes the correlation.

Table 4. Conclusion Table 1

Rights	Habeas Corpus	Life	Against cruel, inhumane punishment	against torture	Common Article 3	know charges, speedy trial, defense	against grave breaches of Geneva Conv.	U.S. constitution	Against rendition	Allows possible internment of U.S. Citizens	Compensation
	<b>Research</b>										
<i>Boumediene v. Bush</i>	X							X			
<i>Ex Parte Endo</i>	X	X						X			
<i>Hamad v. Rumsfeld</i>	X				X					X	
<i>Korematsu v. US</i>											
<i>Rasul v. Bush</i>	X										
Civil Lib. Act	X	X						X			X
Compens. State laws								X			X
DTA			X	X			X				
MCA			X	X	X		X			X	
Public Law 503	X									X	
Title 10	X	X	X	X	X	X	X	X			
Title 18	X	X	X	X		X		X			
Title 28	X	X	X	X		X		X			
War Crimes Act (pre 2006)			X	X			X				
War Crimes Act (post 2006)			X	X	X		X				

Source: Created By Author.

Table 5. Conclusion Table 2

Rights	Habeas Corpus	Life	Against cruel, inhumane punishment	against torture	Common Article 3	know charges, speedy trial, defense	against grave breaches of Geneva Conv.	U.S. constitution	Against rendition	Allows possible internment of U.S. Citizens	Compensation
	Conv. against Torture	X	X	X	X	X	X	X	X		
Dec. of Human Rights	X	X	X	X		X		X			
Geneva Conv.	X	X	X	X	X	X	X	X			
ICCPR	X	X	X	X	X	X	X	X			X
Dec. of Indepen.	X	X				X					
Magna Carta	X	X	X			X					
U.S. Constit. and Amend.	X	X	X	X		X		X			
Enhanced Interr. Prog.											
EO 9066				X					X		
GITMO Policy (2002-2006)			X	X			X		X		
GITMO Policy (2006-present)			X	X	X		X		X		
Military Doctrine		X	X	X	X	X	X	X	X		
Military Order #1			X	X					X		

Source: Created by Author.



### Overall Impact of GITMO Policy

The Senate Armed Service Committee concluded in its inquiry into the treatment of detainees that Abu Ghraib and Guantanamo have a lot to do with the perception around the world that America is seen in a negative light by so many. Furthermore, the Committee expresses its concern that this “complicates our ability to attract allies to our side, strengthens the hand of our enemies, and reduces our ability to collect intelligence that can save lives.”<sup>9</sup> This is a similar conclusion made by COL Gerard P. Fogarty of the Australian Army in his 2005 United States Army War College Strategy Research Project cited in the summary of chapter 2 of this thesis. On an international front, the fact that the two biggest recruiting tools for al Qaeda and their supporters is Guantanamo and Abu Ghraib, which is recorded in several interviews with detainees at Guantanamo should not be taken lightly. Furthermore, the International Helsinki Federation for Human Rights summarized the perception of the U.S. around the world with respect to human rights and Guantanamo Bay in June 2007 in a report to the U.S. Commission on Security and Cooperation in Europe. The federation is a community of 46 human rights NGOs in the European region that work together at the international level to promote compliance of human rights to international rights standards. In this report it found that Guantanamo has become a symbol for “the willingness of the U.S. to sacrifice basic human rights principles and circumvent international standards on detention, due process, trial, and torture in the [GWOT]. . . . Thus, it has become emblematic of how human rights can be trampled in the name of enhancing security.”<sup>10</sup>

The following two figures are polls from the Pew Research, a non- profit, non-partisan research center. The center has tracked the U.S. favorability rating since

1999/2000 to 2009 of 25 countries throughout the world. The research indicates that the image of the U.S. has improved remarkably since President Obama's election but remains overwhelmingly negative in Muslim countries. More importantly, however, this evidence suggests the Obama administration and the President have a window of opportunity to improve the world image of and confidence in the U.S., especially in Western countries, with respect to its plans for Guantanamo and detention operations.

U.S. Favorability Rating								
	1999/ 2000 2002 2003 2005 2006 2007 2008 2009							
	%	%	%	%	%	%	%	%
U.S.	--	--	--	83	76	80	84	88
Canada	71	72	63	59	--	55	--	68
Britain	83	75	70	55	56	51	53	69
France	62	62	42	43	39	39	42	75
Germany	78	60	45	42	37	30	31	64
Spain	50	--	38	41	23	34	33	58
Poland	86	79	--	62	--	61	68	67
Russia	37	61	37	52	43	41	46	44
Turkey	52	30	15	23	12	9	12	14
Egypt	--	--	--	--	30	21	22	27
Jordan	--	25	1	21	15	20	19	25
Lebanon	--	36	27	42	--	47	51	55
Palest. ter.	--	--	*	--	--	13	--	15
Israel	--	--	78	--	--	78	--	71
China	--	--	--	42	47	34	41	47
India	--	66	--	71	56	59	66	76
Indonesia	75	61	15	38	30	29	37	63
Japan	77	72	--	--	63	61	50	59
Pakistan	23	10	13	23	27	15	19	16
S. Korea	58	52	46	--	--	58	70	78
Argentina	50	34	--	--	--	16	22	38
Brazil	56	51	35	--	--	44	47	61
Mexico	68	64	--	--	--	56	47	69
Kenya	94	80	--	--	--	87	--	90
Nigeria	46	76	61	--	62	70	64	79

1999/2000 survey trends provided by the Office of Research, U.S. Department of State  
Question 11a.

Figure 7. U.S. Favorability Rates

Source: Pew Research Center, "Confidence in Obama Lifts U.S. Image Around the World," 23 July 2009, <http://www.pewglobal.org/reports/print.php?ReportID=264> (accessed 2 October 2009).

Will Do Right Thing in World Affairs			
	Bush 2008	Obama 2009	Diff
% confident	%	%	
U.S.	37	74	+37
Canada*	28	88	+60
Britain	16	86	+70
France	13	91	+78
Germany	14	93	+79
Spain	8	72	+64
Poland	41	62	+21
Russia	22	37	+15
Turkey	2	33	+31
Egypt	11	42	+31
Jordan	7	31	+24
Lebanon	33	46	+13
Palest. ter.*	8	23	+15
Israel*	57	56	-1
China	30	62	+32
India	55	77	+22
Indonesia	23	71	+48
Japan	25	85	+60
Pakistan	7	13	+6
S. Korea	30	81	+51
Argentina	7	61	+54
Brazil	17	76	+59
Mexico	16	55	+39
Kenya*	72	94	+22
Nigeria	55	88	+33

\*Bush confidence from 2007.

Samples in Brazil, China, India and Pakistan are disproportionately urban. See the *Methods* section for more information.

Question 21a.

Figure 8. Confidence in U.S. Bush versus Obama  
 Source: Pew Research Center, "Confidence in Obama Lifts U.S. Image Around the World," 23 July 2009, <http://www.pewglobal.org/reports/print.php?ReportID=264>. (accessed 2 October 2009).

Finally, the case study of Japanese internment in this thesis examines another time in U.S. history where national security and fear also served to justify violations or questionable interpretations of established law and human rights. Although separated by over 50 years, the internment and mass exclusion of Japanese Americans and resident aliens serves as a historical precedent for understanding how infringement on rights can occur in a time of national emergency and war. Furthermore, this unfortunate incident in the nation's history demonstrates the willingness of the U.S. to stand up for what is right and rectify past mistakes. It is striking, the similarities that exist between Japanese internment and that of the Guantanamo policy. These similarities are highlighted in Table 3 found in chapter 6. Although these two incidents are also very different, at the least, the reader can take away the parallels presented in this thesis and look to the redress process as one example of restitution.

#### Further Research Recommendations

This thesis aimed to open the debate of to consider whether there is a basis to provide reparations to released GITMO detainees. Throughout this research emerged several topics that the author would like to recommend for further research. The most obvious questions are those associated with the future residence of the detainees still interned at GITMO and whether their detention would count as time served for any future trial or tribunal. Secondly, what would the process to provide reparations to GITMO detainees who have been released look like? Would it include reparations for those wrongfully imprisoned by the U.S. in conjunction with the GWOT who were not sent to GITMO, for example? Would it be run by the U.S. or funded by the U.S. through the UN perhaps? Third, did the location and designation of detainees as enemy combatants lead

to “enhanced interrogation techniques” being used on them? If they were detained in the U.S. from the beginning, would we have authorized the use of these techniques at all? The next topic of interest is almost a nature progression from the closure of GIMTO; whether internment facilities still in use for the GWOT in Iraq and Afghanistan will become the new GITMO? Will we have actually solved anything by closing GITMO if we just move our operations and detention to Bagram for example? Are the DTA and MCA consistent with the U.S. Constitution and American principles? Alternatively, are CRSTs and ARBs compatible with international law? Finally, what is the real psychological, physical and emotion impact of prolonged detention at GITMO after release without charges and convictions? There are over 500 released detainees throughout the world that have either returned to the battlefield or are attempting to rebuild their lives. It would be interesting to study these individuals in depth in order to determine whether the treatment at GITMO caused prolong effects that we should understand or avoid in future detention operations. In conclusion, these are but a sampling of the further research that can be conducted from this thesis. Next follows some recommendations based on the research examined in this thesis.

### Recommendations

Although it may be impractical or too idealistic to compensate released Guantanamo detainees with the same provisions recommended by the Innocence Project, especially when 23 states in the U.S. have yet to implement programs for U.S. citizens wrongly convicted, it is not premature, eight years into the GWOT, to consider developing possible conciliation for released detainees that remain without conviction. If the Obama Administration is serious about restoring the values and U.S. standing in the

world with respect to democratic ideals, then it would not be inappropriate to initiate a program. However, more research needs to be conducted on the population of released detainees. Small samplings of interviews and stories are not enough to understand the entire issue and make recommendations for a program. Additionally the role of the media and public opinion needs further research in order to determine if there would be domestic and international support for a reparation program of any type.

One option is to form a committee to research and investigate whether the policies of Guantanamo and the GWOT are inconsistent with U.S. law and democratic values. Like the CWRIC, interviews from former detainees, psychologist, military officials and the like should reveal whether the U.S. indeed owes released detainees anything. The struggles and problems encountered by released detainees are not uncommon for anyone released from imprisonment and some issues are remarkably similar to those suffered by American service members returning from deployment. In all cases of reintegration, researchers have found that “lengthy exposure to the harsh, impersonal conditions, affects an individual’s ability to readjust to life outside.”<sup>11</sup>

Another option is to establish a fund with in the UN human rights council to allow release detainees to petition for assistance with reintegration, job assistance, medical, and psychological treatment. Similar programs exist in the U.S. with released prisoners and felons in order reestablish their lives as productive members of society. Finally, government acknowledgement of the ill-advised policies following 9/11 is also an option. This could be in the form of an apology or report to the UN. The U.S. could structure it in a way to admit hindsight has provided reason for other courses of action that were not considered in the aftermath of the horrific events of September 11th. In the interest of

American principals and values, however the U.S. strives to overcome these shortfalls and continue to heed by those values, which have made our country great.

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<sup>1</sup>International Human Rights Law Clinic, *Returning Home: Resettlement and Reintegration of Detainees released from the U.S. Naval Base in Guantanamo Bay, Cuba*, University of California at Berkeley, School of Law, <http://hrc.berkeley.edu/pdfs/Gtmo-ReturningHome.pdf> (accessed 10 October 2009).

<sup>2</sup>“Personal Justice Denied,” Recommendations, 7.

<sup>3</sup>International Helsinki Federation for Human Rights, *US Human Rights Advocacy: the Guantanamo Effect, written testimony by the International Helsinki Federation for Human Rights to the United States Commission on Security and Cooperation in Europe*, June 2007, <http://www.icj.org/IMG/IHF.pdf> (accessed 1 October 2009).

<sup>4</sup>Ibid.

<sup>5</sup>Mukulsharma, “Guantanamo and Illegal U.S. Detention: Time for Real Change,” *Kafila*, 11 January 2009, <http://www.kafila.org/2009/01/11/guantanamo-illegal-us-detentions-ti> (accessed 12 July 2009).

<sup>6</sup>Scott Shane and Mark Mazzetti, “In Adopting Harsh Tactics, No Inquiry Into their Past Use,” *New York Times*, 22 April 2009, <http://www.ebird.osd.mil/efiles/e20090422671981.html> (accessed 23 April 2009).

<sup>7</sup>Aljazeera.net, “Judge Orders Guantanamo Releases,” 21 November 2008, <http://www.english.aljazeera.net/news/americans/2008/11/2008112017273323533.html> (accessed 10 April 2009).

<sup>8</sup>Philip Zelikow, “A Dubious C.I.A. Shortcut,” *New York Times*, 24 April 2009, <http://www.ebird.osd.mil/efiles/e20090424672511.html> (accessed 27 April 2009).

<sup>9</sup>Inquiry into the Treatment of Detainees, xxv.

<sup>10</sup>Helsinki Federation, US Human Rights Advocacy.

<sup>11</sup>Jeremy Travis, Amy L. Solomon, and Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, <http://www.urban.org/publications/410098.html> (accessed 7 November, 2009).



## GLOSSARY

**Alien.** Refers to any person who is not a U.S. citizen.

**Combatant.** As defined by the ICRC. Any member of the Armed forces except medical and religious personnel.<sup>1</sup>

**Competent Tribunal.** The term used in Article 5 paragraph 2 of the Third Geneva Convention.<sup>2</sup> A competent tribunal must remain impartial to hear and pass judgment upon applications alleging non-observance to law and regulations or to determine whether an individual is a combatant. CRSTs failed to meet this requirement (as determined by the Supreme Court in *Boumediene v. Bush*) because they did not have the power to pass judgment (i.e. release a detainee).

**Common Article 3.** An identical Article 3 found in each of the four Geneva Conventions extending general minimum coverage to all personnel in non-international conflicts.

**De jure.** Legal term meaning “by right or legal establishment.”<sup>3</sup>

**Detainee or Prisoner.** Individuals held in custody including combatants, POW, or EPWs, or suspects in criminal cases. It is used to refer to any person captured or otherwise detained by an armed force.

**Detention or Internment.** The holding of a person in a designated area or physical location by a state or government agency for interrogation, punishment or as a precautionary measure while that person is suspected of posing a potential threat.

**Enemy Alien.** A non-U.S. citizen of a country which is in a state of conflict or war with the U.S.

**Enemy Prisoner of War/ Prisoner of War.** A lawful combatant who is captured during recognized armed conflict and is afforded rights under the Third Geneva Convention and the laws of War.

**Enhanced interrogation Techniques or Program.** Those techniques adopted by the Bush administration with the assistance of the JPRA and legally authorized by the Office of Legal Council memoranda (published between 11 September 2001 and 20 January 2009) and are not included in the Army Field Manual 2-2.23, *Intelligence Collector Operations*, dated 6 September 2006 or its processor, Army Field Manual 34-52, *Intelligence Interrogation*, dated 8 May, 1987.

**Evacuees.** Persons of Japanese descent (including U.S. citizens and resident aliens) who were forcibly evacuated from their homes and relocated to internment camps during World War II.

Extraordinary Rendition. The process of sending a suspect in U.S. custody to the custody of a foreign government for interrogation or detention or both. The UN considers this practice against international law because the practice can subject personal to cruel, or inhumane punishment or torture.

Flag officers. Officers in the United States military who reach any of the four ranks associated with a General Officer.

Geneva Conventions. The four Conventions written in 1949 and three Protocols enacted in 1977 and 2005 respectively. They are: The First Geneva Convention (*Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*); The Second Geneva Convention, (*Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*); The Third Geneva Convention, (*Relative to the Treatment of Prisoners of War*); and The Fourth Geneva Convention, (*Relative to the Protection of Civilian Persons in Time of War*); Protocol I (102 Articles) (*Relating to the Protection of Victims of International Armed Conflicts*); Protocol II (28 Articles), (*Relating to the Protection of Victims of Non-International Armed Conflicts*); Protocol III from 2005: (17 Articles) (*Relating to the Adoption of an Additional Distinctive Emblem*).

Guantanamo or GITMO Detainee. Any person captured during the GWOT and detained at the Guantanamo Naval Base Internment Facility.

Grave Breach. As defined in the Geneva conventions:<sup>4</sup>

*GC 1 Art. 50.*

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

*GC 2 Art 51.*

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

*GC 3 Art 130.*

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological

experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

*GC 4 Art. 147.*

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

**Habeas Corpus.** Writ (court order) for due process in order to determine whether a prisoner is lawfully detained. It is a protection against illegal confinement, such as holding a person without charges or when due process obviously has been denied. Historically called “the great writ,” the renowned scholar of the Common Law, William Blackstone, called it the “most celebrated writ in English law.” It can also be employed procedurally in federal district courts to challenge the constitutionality of a conviction.<sup>5</sup>

**International Humanitarian Law.** The body of rules governing relations between States, contained in agreements between States such as treaties or conventions. Also, customary rules, which State consider as legally binding as they are practiced and in general principles.<sup>6</sup>

**Japanese Internment.** The policy of evacuation and relocations of any person of Japanese descent, including resident aliens and U.S. citizens through the policies of military necessity during World War II from 1942-1946.

**Jus ad Bellum.** Law regulating the conduct of war.

**Jus in Bello.** Law regulating the commencement of war.

**Lawful Enemy Combatant.** As defined in the MCA: a person who is--

- A member of the regular forces of a State party engaged in hostilities against the United States;
- A member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

- A member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

Non resident alien. A Non-U.S. citizen who does not reside legally in the U.S.

Plenary. Full, complete, covering all matters, usually referring to an order, hearing or trial.<sup>7</sup>

Reparations. Compensation (given or received) for an insult or injury or an act of repair in expiation of a wrong.

Resident alien. A Non-U.S. citizen who resides legally in the U.S.

September 11th and 9/11. Refers to 11 September 2001, the day of the terrorist attacks on the World Trade Center, Pentagon, and the field in Pennsylvania, in which four airliners were hijacked and used to facilitate the attacks.

Status quo ante. The situation as it existed before.

Torture defined by the UN. According to Article 1 of the Convention against Torture. "Torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Torture defined by the U.S. According to Federal Code Title 18. "Torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.<sup>8</sup>

Unlawful Enemy Combatant. As defined in the MCA: a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or a person who, before, on, or after the date of the enactment of the MCA of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

War Crime. War crimes are acts prohibited in either international or internal armed conflict for which a person may be held individually criminally responsible. The

term includes both “grave breaches” of the Geneva Conventions of 1949 and of Protocol I of 1977 and other serious violations of the laws and customs of war, committed in either international or non-international armed conflict. Consist of (but it not limited to) the following according to the ICRC, Geneva Conventions and International law:

- Murder, mutilation, cruel treatment and torture;
- Taking of hostages;
- Denial of fair trial rights;
- Intentionally directing attacks against the civilian population or against individual civilians not taking a direct part in the hostilities;
- Pillaging a town or place;
- Committing rape and other acts of sexual violence;
- Ordering the displacement of the civilian population unless their security or imperative military reasons so demand, etc.<sup>9</sup>

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<sup>1</sup>ICRC, *Handbook on the Law of War*, 12.

<sup>2</sup>UN, (III) *Convention*.

<sup>3</sup>Your Dictionary.com, s.v. “de jure,” <http://www.yourdictionary.com/de-jure> (accessed 10 November 2009).

<sup>4</sup>ICRC, “How “grave breaches” are defined in the Geneva Conventions and Additional Protocols,” *ICRC.org*, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5ZMGF9> (accessed 10 November 2009).

<sup>5</sup>Law.com Dictionary, s.v “habeas corpus,” <http://dictionary.law.com/Default.aspx?selected=1545> (accessed 10 November 2009).

<sup>6</sup>ICRC, “What is International Humanitarian Law?”

<sup>7</sup>Law.com Dictionary, s.v “plenary,” <http://dictionary.law.com/Default.aspx?selected=1545> (accessed 10 November 2009).

<sup>8</sup>Findlaw.com, “Search 18 U.S.C. § 2340: US Code-Section 2340: Definitions,” <http://codes.lp.findlaw.com/uscode/18/I/113C/2340> (accessed 10 November 2009).

<sup>9</sup>ICRC, “Frequently Asked Questions on International Humanitarian, Human Rights and Refugee Law in the context of armed conflict,” <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/637k8g?opendocument> (accessed 10 November 2009).

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