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"The Least Worst Place": Guantánamo in the US "War on Terror"

Prelude

Since President Abraham Lincoln suspended the privilege of the writ of habeas corpus in the area between Philadelphia and the District of Columbia on 27 April 1861, during the civil war (Carwardine 164; Stahr 283-84), national emergencies have seemed to offer the federal government justifications to discontinue compliance with due process rights. Yet, Lincoln's decision was successfully challenged in Ex parte Merryman in 1861, although the president did not hesitate to ignore the verdict that such authority lay exclusively with Congress. Lincoln fared no better when the US Supreme Court ruled in Ex parte Milligan in 1866 that the chief executive was not entitled to have citizens tried before military tribunals where civil courts were operational.

The subsequent rise of a US empire in the late nineteenth century encouraged American jurisprudence to side with the president and to legitimize states of exception during emergencies for national security. This process reached an early climax with Justice Oliver Wendell Holmes Jr.'s doctrine of "clear and present danger" in Schenck v. United States (48, 52), a 1919 landmark decision made within the context of World War I that, in order to allow the suppression of anti-draft dissent, determined when an individual's right to free speech under the First Amendment could be constitutionally limited (Linfield 50-54).

Yet, though as part of the much broader consideration of the violation of civil liberties in wartime, it was only during World War II that US courts started specifically to restrict due process as regards habeas corpus. In 1942 Ex parte Quirin concluded that a writ for such a privilege did not apply to eight German plain-clothes saboteurs who had been captured on US soil and that a military court established by President Franklin D. Roosevelt could sentence them to death because they did not wear

uniforms and were, therefore, "unlawful combatants" (3-4, 31, 35). The latter was a third legal status, other than a civilian and a member of the military, that the Supreme Court devised so as to exempt the detainees from the rules and privileges protecting prisoners of war. Similarly, in Johnson v. Eisentrager the justices held in a six to three decision in 1950 that German war criminals who had been apprehended in China while aiding Japanese troops and were confined in a US-managed prison outside American territory had no right to a writ of habeas corpus on the grounds that US courts had no jurisdiction over individuals who had never set foot in the United States. A subsequent decision, however, undermined the ruling in part. In 1973 the Supreme Court judged in Braden v. 30th Judicial Circuit Court that a prisoner's physical presence within a court's jurisdiction was not "an invariable prerequisite" for petitioning, providing that the tribunal could reach the detainee's custodians (495). The specific case involved interstate litigation, as the petitioner, Charles D. Braden, was serving a sentence in a jail in Alabama and had applied to the District Court for the Western District of Kentucky. Still, the ratio of the verdict could potentially affect prospective detainees of the American government outside the United States, too, since a US court could always get to the federal authorities responsible for that imprisonment ("Habeas Corpus").

These rulings set precedents when US jurisprudence addressed habeas corpus issues related to alleged operatives of al-Qaeda. In the wake of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, which caused 168 victims on 19 April 1995, one year later Congress enacted Public Law 132, which – among its provisions – limited in part resort to writs of habeas corpus in cases of terrorism (see Kochan). Nonetheless, against the backdrop of the previous legal controversies surrounding the federal handling of combatants in prior armed conflicts, the US government endeavored to play on safer juridical ground when it came to the treatment of prisoners in its so-called "war on terror" in response to al-Qaeda's attacks against the World Trade Center and the Pentagon on 11 September 2001.

This article examines the reasons for the selection of a military camp within the US naval base at Guantánamo Bay in Cuba (GITMO) as the main detention facility for American prisoners in the "war on terror." It also outlines the initial support of the jurisprudence for Washington's unilateral approach in crushing the inmates' most basic rights as well as

the ensuing interference of political expediency with the slow inroads of due process and habeas corpus into Guantánamo. The article further argues that the Bush administration turned GITMO into the materialization of a state of exception à la Giorgio Agamben (22) resulting from the emergence of Washington's backlash against al-Qaeda, within the context of the securitization of counter-terrorism policies, and that the failure of the succeeding presidencies to close Guantánamo as a place of confinement have allowed such an exception to become the rule, contradicting and well-nigh obliterating the subsequent transformations of the normative aspects of US jurisprudence concerning inmates' rights in the "war on terror."

The Aftermath of al-Qaeda's 2001 Attacks

On 13 November 2001 President George W. Bush issued a comprehensive order authorizing the capture, trial by military commissions, and punishment of noncitizens involved in acts of terrorism against the United States. His measure also ensured that the aliens subject to it could be detained for an indefinite period of time without being accused of specific crimes and without the right to seek redress in court for their imprisonment (Bush, "Detention" n. pag.). The president subsequently maintained that "the system was based closely on the one created by FDR in 1942" (Bush, *Decision Points* 167). Nonetheless, while the defendants in Ex parte Quirin did not dispute the fact that they were German military agents, this was not necessarily the case with the detained suspects in Bush's "war on terror," who often denied current and even past relations with al-Qaeda (Eisgruber and Sager 173). Actually, most of GITMO inmates were not dangerous terrorists but – to quote a Congressional hearing – the "unluckiest of the unlucky" (US House of Representatives, Committee on Foreign Affairs 49). Major General Michael E. Dunlavey, the commandant at Guantánamo until October 2002, even complained that he was receiving "Mickey Mouse" prisoners (qtd. in Mayer 184). Indeed, the US military captured as few as 5 percent of the detainees on the actual battlefield. Afghan individuals, members of the Northern Alliance (the main local anti-Taliban military coalition), and Pakistani border guards sold 86 percent of the inmates into captivity for bounties promised by American authorities and ranging

from $5,000 to $25,000. As the annual per capita income was roughly $300 in Afghanistan, it is likely that greed and false allegations rather than concrete proofs led to the turning in of many supposed al-Qaeda and Taliban combatants (Khan 66-67). The munificent – by Afghan standards – reward system resulted in "a perverse incentive" (Holmes 336). After all, in a nation with about six million adults and roughly eight million Kalashnikovs, possessing an AK-47 rifle was regarded in itself as an act of hostility against the US troops (Willett 7-8). As Fiona de Londras, a scholar of global legal studies has concluded, "individuals have been captured and handed over to the US as al-Qaeda fighters [...] in return for enormous financial rewards" without the necessity "to present rigorous evidence that the captured individuals are in fact 'combatants' within the 'war on terror'" (96).

Bush started his military counteroffensive against terrorism by specifically launching Operation Enduring Freedom to topple the Taliban regime in Afghanistan and to bring to justice the al-Qaeda operatives who had found sanctuary in that country, conflating two groups that were not the same movement and thereby "creating the very conditions for a long-term, open-ended commitment" to fight in that area (Malkasian 215). Consequently, his administration needed a place where it could enforce the president's order, namely a location where the US government could detain, interrogate, and possibly try legally the individuals it was planning to apprehend without causing the judicial controversies that had previously characterized the confinement and treatment of foreign fighters during past national emergencies such as World War II. Indeed, new disputes could not be ruled out. Human-rights advocates had already objected to the living conditions in temporary internment camps in Afghanistan in late 2001 and interrogation of fighters in military operations was questionable under the Geneva Conventions (Greenberg 1-7). Additional criticism was likely to result from Bush's problematic resort to the term "war." The president used this word to define the asymmetric conflict against such a fluid and transnational phenomenon as global terrorism,[1] but his administration did not consider the supposed alien terrorists as "prisoners of war." Indeed, the US government refused to apply the 1949 Third Geneva Convention on Prisoners of War to al-Qaeda and Taliban detainees on the grounds that they were "unlawful combatants" and, therefore, according to Secretary of

Defense Donald Rumsfeld, did "not have any rights" under such a covenant (Secretary of Defense n. pag.). White House Counsel Alberto R. Gonzales later pointed out that the military campaign against global terrorism had made those rules obsolete, in particular as regards their "strict limitations on questioning of enemy prisoners" (2).

Bush's decision was an act of legal unilateralism because article 5 of the Third Geneva Convention mandates that captured combatants whose status is in doubt be considered prisoners of war until a competent tribunal determines otherwise. But the Department of Justice concluded from the statement of Assistant Attorney General Jay S. Bybee that the White House did not have to comply with such agreements since "customary international law, whatever its source and content, does not bind the president, or restrict the actions of the United States military, because it does not constitute federal law recognized under the Supremacy Clause of the Constitution" (2). Washington's stand also replicated other demonstrations of Bush's go-it-alone style in the legal sphere. The most notable precedents, occurring prior to al-Qaeda's attacks on 11 September 2001, were the successful efforts to prevent the United States from joining the International Criminal Court and the parallel campaign to limit any potential action by this institution against US citizens charged with war crimes and crimes against humanity (Daalder and Lindsay 65-66, 192-93; see also Galbraith). Consequently, both the alleged terrorists' internment, despite the fact that no formal charges were brought against them, and their undetermined confinement, so as to pry intelligence out of the inmates by means that William J. Haynes II, the general counsel of the Department of Defense, called "counter-resistance techniques" (which included twenty-four hour interrogations, stress positions, removal of clothing and other humiliations, sensory deprivation, and use of individual phobias), required a place that was not only hidden from the eyes of human rights activists but that was also outside the jurisdiction of US courts in order to avoid possible legal challenges. This meant that the Bush administration had to extend its powers and to introduce a state of exception concerning the status of its detainees – who were subject neither to the Geneva Conventions nor to federal courts – and their treatment. In other words, the US government resorted to practices that were "illegal" by the standards of international

laws but, at the same time, "juridical and constitutional," according to Washington's interpretation (Agamben 28).

As of 11 December 2001, two months into the beginning of Operation Enduring Freedom, according to Rumsfeld, the alternatives for the detention of prisoners were Afghanistan itself, American ships at sea, the captives' countries of origins or even locations within the United States (Department of Defense). Later on in that month, however, while the US government was temporarily holding forty-five fighters from al-Qaeda and the Taliban – including American citizen John Walker Lindh – in part at the Kandahar airport in Afghanistan, in part on an assault ship in the Arabian Sea, the choice fell to Guantánamo. The latter location was, in Rumsfeld's eyes, "the least worst place we could have selected" (qtd. in Schrader n. pag.). Eventually, ships were ruled out because they were too small for a prospective large number of prisoners; detention aboard would be too costly for American taxpayers; internment facilities on US territory – including Guam – met the opposition of residents and voters (Seelye n. pag).

The US military compound at Guantánamo had housed thousands of Cuban refugees and Haitian expatriates in the 1990s (Hansen 265-302). Thus, once turned into a detention camp, it would be large enough for the prisoners of the "war on terror." Yet GITMO had another reason for the location of a detention camp to confine al-Qaeda operatives and Taliban fighters, since, as Pentagon spokesperson Victoria Clarke admitted, "we want to talk to them pretty thoroughly" (qtd. in Schrader n. pag.). Though a key facility in what Chalmers Johnson has called the US "empire of bases" spanning the globe (8), Guantánamo was situated on the sovereign soil of Cuba and was not a property of Washington. Indeed, it was part of a worldwide network of overseas and extraterritorial military sites, officially numbering 686 in 2015 but probably many more at the height of the "war on terror," which began to be built when President Franklin D. Roosevelt signed the destroyers for bases agreement with the United Kingdom in 1940, paving the way for the strengthening of the US global empire and the enforcement of a forward strategy that implies the immediate engagement of hostile threats emerging abroad (see Vine). Although GITMO had been on a permanent lease to the United States since 1903, it had not been formally sold to the US government. Consequently, it could easily fall within the category of an "unincorporated territory," according to the

so-called Insular Cases settled by the Supreme Court between 1901 and 1922 in order to let Washington acquire foreign regions without granting them the prospect of future statehood within the turn-of-the-twentieth-century consolidation of the American empire (Hopkins 513-15). That status defined a sort of legal borderland where the US Constitution could not be enforced. Characterizing Guantánamo as a zone of anomie provided some legal – albeit vague – justification for torture as well as for cruel, inhumane and degrading treatment of prisoners (Kaplan 841-42). Since its "empire of bases" enabled Washington to preserve "formal fictions of nation-state sovereignty" over such installations (Kramer 1371), the lack of US official dominion over GITMO voided the accountability of the Bush administration as to the prisoners' plight. Furthermore, in the opinion of Deputy Assistant Attorneys General Patrick F. Philbin and John C. Yoo, "a district court cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained at Guantánamo Bay Naval Base" (9). Indeed, to explain the selection of GITMO as a place of confinement for alleged al-Qaeda and Taliban members, Department of State lawyer David Bowker acknowledged that the Bush administration intended to "find the legal equivalent of outer space" (qtd. in Isikoff and Taylor 23). Likewise, US navy advocate general Donald J. Guter later pointed out that "what they were looking for was the minimum due process that we could get away with" (qtd. in Lasseter n. pag.). Bush confirmed Guter's suspicion for the choice of Guantánamo because the president wrote in his memoirs that "the Justice Department advised me that prisoners brought there had no right of access to the US criminal justice system" (Bush, *Decision Points* 166). After all, the main reason why the Clinton administration had placed Cuban and Haitian "boat people" in GITMO in the 1990s was to prevent them from claiming political asylum on US soil (Smith 282).

The Courts' Initial Response

The secretary of Defense, who had approved Haynes's memorandum about "counter-resistance techniques" on 2 December 2002,[2] rescinded his consent for some of such methods a few weeks later, on 15 January 2003, and allowed harsh tactics in the future only "if warranted in an individual

case" and with his specific permission (Rumsfeld 1). Such authorizations were by no means few. Since the first inmates landed at GITMO on 11 January 2002, the detention camp has held 780 prisoners of the "war on terror" ("The Guantánamo Docket" n. pag.). Mistreatment of detainees continued even after Rumsfeld's change of instructions and his public – albeit ambivalent and qualified – statement that "we do plan to, for the most part, treat them in a manner that is reasonably consistent with the Geneva conventions to the extent they are appropriate" (qtd. in Jeffery n. pag.). Indeed, according to national security scholar Karen J. Greenberg in *The Least Worst Place*, abuses were fewer in the first three and a half months of the internment structure's operations than in the following years. The most outrageous case was that of Mohamedou Ould Slahi. A Mauritanian arrested in his home country on 20 November 2001 on allegations of having ties to al-Qaeda, Slahi was moved to GITMO on 2 August 2002. He spent fourteen years in the detention camp, without any formal charge, while enduring physical and psychological coercion, extended periods of solitary confinement, death threats to himself and his relatives, and sexual harassment before he was released in October 2016 (see Slahi).

Yoo argued that the US Constitution allowed some flexibility "in America's national security posture" (x-xi). But his and Philbin's conclusion about habeas corpus in GITMO was tentative and drew upon their own interpretation of Johnson v. Eisentrager among other rulings. They, consequently, warned Haynes that "the issue has not yet been definitely resolved by courts" and, as a result, "there is some possibility that a district court would entertain such an application" (Philbin and Yoo 9). Actually, their stand was soon challenged within the Bush administration itself. Most notably, the legal adviser to the Department of State remarked that "although the writ of habeas corpus historically has not been available to enemy aliens captured and imprisoned outside US territory, [...] even those enemy prisoners without a right to habeas corpus historically have had their applications considered by the US federal courts, including the Supreme Court" (Taft 37). This was the course that American jurisprudence followed in the end, though not immediately.

On 30 July 2002, in Odah v. United States, Judge Colleen Kollar-Cotelly of the US District Court for the District of Columbia sided with the Bush administration in dismissing a petition for habeas corpus that the

Center for Constitutional Rights had filed on behalf of Fawzi Al Odah and another eleven Kuwaiti citizens jailed at GITMO. Kollar-Cotelly referred to Johnson v. Eisentrager and followed Philbin's and Yoo's argument in order to conclude that her court lacked jurisdiction because the Cuban government retained "ultimate sovereignty" over the Guantánamo base. The following year, on 11 March 2003, the Circuit Court of Appeals for the District of Columbia upheld Kollar-Kotelly's decision and confirmed that foreigners detained abroad, which obviously comprised GITMO, could not claim the protection of the US justice system regardless of their guilt or innocence (Tucker n. pag.).

One week after this second verdict the United States invaded Iraq to topple Saddam Hussein in a further step of Bush's "war on terror." By accepting it at face value the thesis of the Justice Department lawyers that Guantánamo was a place without rules in the Caribbean or at least a legal limbo, outside the reach of both domestic and international laws, the judges assented to the same unilateralism that Washington was about to display in foreign policy in eight days. The president contended that the fall of the Baghdad regime would pave the way for the democratization of the greater Middle East in a sort of virtuous domino theory (Bush, "President Discusses" n. pag.). Therefore, agreeing with the petitioners' counselors that the US government had violated the American Constitution would have caused serious embarrassment to the country at the time of another forthcoming national emergency when patriots were supposed to rally to Bush and his redefinition of national security "in terms of the promotion of freedom around the world" (Leffler and Legro 3). Specifically, the denial of a writ of habeas corpus in Odah v. United States barred the plaintiffs from the legal means to argue that Washington infringed the very human rights that it intended to restore in Iraq. Acknowledging illegal detentions in Guantánamo would have been tantamount to admitting what Harold Hongju Koh has called "the double standard" of the United States underlying the Bush Doctrine as regards the global spread of civil liberties and the ensuing due process: "one for itself and another for the rest of the world" (1500). Ironically enough, in an address timed to coincide with Cuba's Independence Day, on 20 May 2002, Bush, using a metaphor, contended that Fidel Castro's dictatorial regime did not respect "the rule of law" and had transformed "this beautiful island into a prison" (qtd. in Rosen and Kassab 67), but what the president

failed to mention was that it was Washington itself that had turned GITMO into an actual detention facility.

Change in the Jurisprudential Tide

Realpolitik in courts was short lived. In late April 2004 media reports began to document that US military personnel had systematically violated detainees' human rights at the Abu Ghraib prison in Iraq, not for intelligence purposes but to gratify their own sadism, which the wardens' mere lack of self-restraint by itself could hardly account for without the stimuli of an institutionalized torture program. In any case, regardless of its specific causes, the evidence for such behavior was ironclad because the perpetrators were unwise enough to have their pictures taken while they were torturing the inmates or even vilifying corpses (see Hersh).

Against this backdrop, on 28 June 2004, in Rasul v. Bush, a case that had consolidated the appeal by Odah with that brought by four British and Australian nationals, the Supreme Court ruled that federal tribunals did hold jurisdiction over GITMO to consider the legality of the inmates' confinement and, therefore, alien detainees were entitled to petition for writs of habeas corpus. As Braden v. 30th Judicial Circuit Court had previously concluded, six justices out of nine agreed that the writ of habeas corpus "does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody" (Rasul v. Bush 10). Consequently, Guantánamo finally emerged from its legal limbo, was no longer a lawless zone, and became a juridical space.

The Supreme Court subsequently stuck to its guns and rejected attempts at dodging its decision. The Bush administration established Combatant Status Review Tribunals to determine the legal status of the prisoners at GITMO and had Congress pass the Detainee Treatment Act in 2005. Although the measure set standards for interrogation and prohibited cruel, inhuman, and degrading conduct towards individuals in custody of the US government, it also denied prisoners accused of engaging in the "war on terror" the right to challenge the legitimacy of their detention in Guantánamo in federal courts. Yet, in 2006, the Supreme Court held, on

the one hand, that the 2005 legislation was inapplicable to habeas corpus cases filed before the enactment of the provision and, on the other, that the Combatant Status Review Tribunals violated the Geneva Conventions as incorporated in the US Uniform Code of Military Justice (see Hamdan v. Rumsfeld). Likewise, after Congress had supplemented Bush's military order of 13 November 2001 by both explicitly authorizing the president to create military commissions in order to try unlawful alien combatants and even retrospectively depriving GITMO detainees of access to habeas corpus review, in 2008 the Supreme Court reinstated the inmates' right to petition federal tribunals to evaluate the legality of their confinement. It was the Constitution which granted the privilege of habeas corpus – a majority of five justices held – and, thereby, Congress could not repeal that right (see Boumediene v. Bush).

The Failure to Shut Down Guantánamo

The emergence of GITMO from a legal vacuum could also have resulted in its demise as a place of detention. Bush contended in his autobiography that "closing the prison at Guantánamo in a responsible way" had been "a goal" of his second term (*Decision Points* 179-80). As soon as he was confirmed in 2006, Secretary of Defense Robert Gates reportedly remarked that "the detention facility [...] had become so tainted abroad that legal proceedings at Guantanamo would be viewed as illegitimate" and, therefore, "should be shut down as quickly as possible" (US House of Representatives, Committee on Armed Services 36).

The US government eventually transferred 532 out of the 780 inmates in custody under Bush to other countries before the president left the White House. But the awareness that about one in five of these former GITMO detainees who were later released or managed to escape ended up reengaging in terrorism-related activities and another 13.9 percent was suspected of doing so curbed further transfers (Office of the Director of National Intelligence 2).

In his successful 2008 campaign for president, Barack Obama referred to Guantánamo as "a sad chapter in American history" and committed

himself to closing it (qtd. in Goldenberg n. pag.). Therefore, two days after entering the White House, he signed an executive order to that effect applicable within one year (Obama 233). The measure, however, was never carried out during his two terms. When Obama left the Oval Office in 2017, although he had managed to relocate 185 inmates during his presidency, 41 prisoners were still detained at GITMO (Rosenberg, "Final Obama Transfer" n. pag.). In May 2009, the Senate refused to appropriate funds for 80 million dollars to shut down the internment camp by an overwhelming bipartisan majority of 90 votes to 6 on the grounds that the Obama administration had not provided a plan detailing where the detainees would be transferred. In fact, under pressure from their constituents, the legislators intended to prevent the government from moving the inmates to facilities in the United States. Indeed, Congress blocked a project to purchase Thompson Correctional Center from the State of Illinois and to use it for GITMO prisoners (Köhler 201-04). After the Republican party secured a majority in both the House and the Senate in the 2010 mid-term elections, the following year Public Law 112-81 barred resorting to taxpayers' money to relocate inmates to US soil and to build facilities to accommodate them (US Congress 1566-67). This stand mirrored the prevailing orientation of public opinion. Indeed, only 35 percent of Americans favored closing Guantánamo in January 2009 (Morales 22). Opponents were 56 percent as late as 2016 (Hensch n. pag.).

Republican opposition to Obama's blueprint was also an indirect means to attack the president himself and to accuse Democratic policies of being soft on terrorism. The strategy of discrediting the Democratic party in the field of national security by exploiting the plan to shut down GITMO gained momentum as the 2016 elections drew closer. For instance, Senate Majority Leader Mitch McConnell (R-KY) called Guantánamo "the perfect place for terrorists" (qtd. in Koren n. pag.). Likewise, Devin Nunes (R-CA), the chairperson of the House Intelligence Committee, stated that Obama's "determination to move some of the world's most dangerous terrorists to U.S. soil is inexplicable and unacceptable" (qtd. in Ryan and Goldman n. pag.). Risks of re-radicalization in case of repatriation and Washington's troubles in persuading its allies to accept the detainees further interfered primarily with the relocation of the Yemeni prisoners, the largest

nationality group of GITMO's inmates during the Obama administration (Finn n. pag.). Other hurdles arose because Washington could not deport its prisoners to their native countries if there were reasons to believe that they would be persecuted or subject to torture there. For instance, in the case of the Uyghurs, who could not be repatriated to the People's Republic of China, the US government had to undertake gruelling negotiations to persuade a few third nations to receive these inmates (Obama 582).

The outcome of legal procedures, too, discouraged additional transfers out of Guantánamo. The experience of the first GITMO prisoner to stand trial before a federal court on US soil provided a case in point. In 2010 Ahmed Khalfan Ghailani was moved to New York City for prosecution. A former bodyguard of Osama bin-Laden and an al-Qaeda operative, Ghailani had participated in the 1998 bombing of the US embassies at Nairobi in Kenya and Dar al-Salaam in Tanzania. Eventually, however, he was found guilty of only one of the 285 charges, including multiple murders, levied against him (McGreal n. pag.). Chances that other judges might dismiss the indictments on the grounds that proofs against the defendants had been obtained by means of torture at Guantánamo encouraged the US government to keep the supposed terrorists at GITMO to lessen the risk of their acquittal before tribunals in the United States if they were prosecuted through the criminal justice system. After all, even the military commissions system turned out to be less punitive than expected. Most notably, Washington was eventually forced to release Slahi, even though after almost fifteen years of internment, because a military prosecutor, Lieutenant Colonel Stuart Couch, refused to press charges against him after learning that the most incriminating evidence had resulted from resort to torture (Bravin n. pag.). As legal scholar Jennifer Daskal observed as early as 2007, "taking someone out from under the rule of law is much easier than returning them back to a legal regime" (29).

That approach did not change in the following years. Donald Trump vowed to keep Guantánamo open and to "load it up with bad dudes" during the 2016 presidential campaign (Ackerman n. pag.). Actually, his administration relocated only one inmate out of GITMO. Ahmed Mohammed al-Darbi, who had pleaded guilty at a 2014 military commission, was moved to Saudi Arabia in 2018 to serve out his sentence

(Pilkington n. pag.). President Joe Biden resumed the transfers in 2021 (Ryan and Gearan n. pag.). Nonetheless, it took about eight months for his administration to authorize the repatriation of the latest detainee to be released, Afghan Assadullah Haaron Gul, who left Guantánamo in late June 2022 although his detention had been ruled illegal by a federal judge in October 2021 (Rosenberg, "US Repatriates Afghan" n. pag.). Moreover, as of 19 July 2022, thirty-six prisoners were still held at GITMO: two had been convicted of terrorist-related crimes and were serving their sentence there; ten were facing charges under the military commissions system; twenty had been designated as transferable even though that status had not resulted in their resettlement; and four were not recommended for relocation somewhere else ("The Guantánamo Docket" n. pag.).

Conclusion

A legacy of turn-of-the-twentieth-century US imperialism in the wake of the 1898 military conflict against Spain, GITMO started its role in the "war on terror" as a place to detain and interrogate American prisoners that purposely did not exist on the map of Washington's legal system and criminal justice. Yet, far from being a *non-lieu a là* Marc Augé, namely a space of transience and temporality for people, Guantánamo has turned out to be a location where suspects can be compelled to stay for good. In the beginning, inmates were even prohibited from challenging the legitimacy of their indefinite confinement. For some of them, however, their conditions have not changed, although the Supreme Court eventually recognized the captives' access to habeas corpus review. Actually, political maneuvering in Congress and the probable failure to secure the convictions of defendants based on evidence obtained by means of torture have prevented the resettlement of a few prisoners. Against this backdrop, the public discourse has continued to identify GITMO with a liminal legal space where the US government could violate human rights and due process with impunity (see Greiner), though to a lesser extent than in the wake of al-Qaeda's attacks against the World Trade Center and the Pentagon, and "a stain on America's reputation for years to come" ("No Easy Escape" 30).

Guantánamo has also stood out as the epitome of a state of exception, with reference to criminal justice and international laws, shaping not only the "war on terror" in particular but Washington's approach to national security in general. Moreover, the failure to discontinue confinement operations at the GITMO detention camp has until now resulted from a permanent sense of emergency and insecurity, causing a *de facto* never-ending state of exception where threats, though somehow increasingly undefined, are perceived as always imminent. While the "war on terror" is still pervasive in US society and the American worldview (see Lubin), so too is the ensuing state of exception. In other words, as Agamben has suggested, the high level of the fear-driven behavior that was reached in the wake of al-Qaeda's 9/11 attacks has given no sign of being in significant decline.

Notes

[1] "Our war on terror begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated" (Bush, "Address" n. pag.).

[2] Rumsfeld's signature and the date are handwritten on the memorandum itself (see Haynes II).

Works Cited

Ackerman, Spencer. "Guantánamo Detention Facility in Limbo despite Trump's Vow to 'Load It Up.'" *The Guardian*. 22 Feb. 2017: n. pag. <https://www.theguardian.com/us-news/2017/feb/22/guantanamo-bay-trump-expansion-detainees-isis>.

Agamben, Giorgio. *State of Exception*. Chicago: U of Chicago P, 2005.

Augé, Marc. *Non-places: Introduction to an Anthropology of Supermodernity*. London: Verso, 1995.

Boumediene v. Bush 553 US 723. 2008.

Braden v. 30th Judicial Circuit Court 410 US 484. 1973.

Bravin, Jess. "The Conscience of the Colonel." *Wall Street Journal*. 31 Mar. 2007: n. pag. <https://www.wsj.com/articles/SB117529704337355155>.

Bush, George W. "Address to a Joint Session of Congress and the Nation." 20 Sept. 2001: n.

pag. <https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html>.

Bush, George W. *Decision Points*. New York: Crown, 2010.

Bush, George W. "Detention, Treatment, and Trial of Certain Noncitizens in the War against Terrorism." 13 Nov. 2001: n. pag. <https://www.legislationline.org/documents/id/6054>.

Bush, George W. "President Discusses the Future of Iraq." 26 Feb. 2003: n. pag. <https://georgewbush-whitehouse.archives.gov/news/releases/2003/02/20030226-11.html>.

Bybee, Jay S. "Memorandum for Alberto R. Gonzales and William J. Haynes II." 22 Jan. 2002: n. pag. <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf>.

Carwardine, Richard. *Lincoln: A Life of Purpose and Power*. New York: Knopf, 2006.

Daalder, Ivo H., and James M. Lindsay. *America Unbound: The Bush Revolution in Foreign Policy.* Washington: Brookings Institution P, 2003.

Daskal, Jennifer. "How to Close Guantánamo." *World Policy Journal* 24 (2007): 29-37.

de Londras, Fiona. *Detention in the "War on Terror": Can Human Rights Fight Back?* New York: Cambridge UP, 2011.

Department of Defense. "News Briefing: Secretary Rumsfeld and Gen. Myers." 11 Dec. 2002: n. pag. <https://avalon.law.yale.edu/sept11/dod_brief118.asp>.

Eisgruber, Christopher L., and Lawrence G. Sager. "Civil Liberties in the Dragons' Domain: Negotiating the Blurred Boundary between Domestic Law and Foreign Affairs after 9/11." *September 11 in History: A Watershed Moment?* Ed. Mary L. Dudziak. Durham, NC: Duke UP, 2003. 163-79.

Ex parte Merryman 17 F. Cas. 144. 1861.

Ex parte Milligan 71 US 2. 1866.

Ex parte Quirin 317 US 1. 1942.

Finn, Tom. "Thirteen Years on, Yemeni Prisoners Await Release from Guantánamo." *Middle East Eye*. 16 June 2015: n. pag. <https://www.middleeasteye.net/news/thirteen-years-yemeni-prisoners-await-release-guantanamo>.

Galbraith, Jean. "The Bush Administration's Response to the International Criminal Court." *Berkeley Journal of International Law* 21 (2003): 683-702.

Goldenberg, Suzanne. "Obama Legal Advisers Draft Plans for Guantánamo." *The Guardian*. 10 Nov. 2008: n. pag. <https://www.theguardian.com/world/2008/nov/10/obama-guantanamo-bay-prison>.

Gonzales, Alberto R. "Memorandum for the President: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al-Qaeda and the Taliban."

25 Jan. 2002: n. pag. <http://hrlibrary.umn.edu/OathBetrayed/Gonzales%201-25-02.pdf>.

Greenberg, Karen J. *The Least Worst Place: Guantanamo's First 100 Days*. New York: Oxford UP, 2009.

Greiner, Bernd "'Nine Eleven,' Afghanistan, Irak: Das Ende des amerikanischen Jahrhunderts." *Blätter für Deutsche und Internationale Politik* 66 (2021): 43-52.

"The Guantánamo Docket." *New York Times*. 19 July 2022: n. pag. <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html>.

"Habeas Corpus: Interstate Detainers and *in Personam* Jurisdiction." *University of Pennsylvania Law Review* 125 (1976): 215-33.

Hamdan v. Rumsfeld 548 US 557. 2006.

Hansen, Jonathan M. *Guantánamo: An American History.* New York: Hill and Wang, 2011.

Haynes, William J., II. "Memorandum for the Secretary of Defense." 27 Nov. 2002. The National Security Archive, George Washington University: n. pag. <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.12.02.pdf>.

Hensch, Mark. "Poll: Over Half of Americans Oppose Closing GITMO." *The Hill.* 4 Mar. 2016. <https://thehill.com/blogs/blog-briefing-room/news/271817-poll-over-half-oppose-closing-gitmo/>.

Hersh, Seymour M. *Chain of Command*. New York: Penguin, 2004.

Holmes, Stephen. "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror." *California Law Review* 97 (2009): 301-55.

Hopkins, A.G. *American Empire: A Global History*. Princeton: Princeton UP, 2018.

Isikoff Michael, and Stuart Taylor, Jr. "The GITMO Fallout." *Newsweek*. 17 July 2006. 22-25.

Jeffery, Simon. "The Geneva Convention." *The Guardian*. 17 Jan. 2002: n. pag. <https://www.theguardian.com/world/2002/jan/17/afghanistan.comment>.

Johnson v. Eisentrager 339 US 763. 1950.

Johnson, Chalmers. *The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic*. London: Verso, 2004.

Kaplan, Amy. "Where Is Guantánamo?" *American Quarterly* 57 (2005): 831-58.

Khan, Mahvish Rukhsana. *My Guantánamo Diary: The Detainees and the Stories They Told Me*. New York: Public Affairs, 2008.

Kochan, Andrea A. "The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?" *Journal of Urban and Contemporary Law* 52 (1997): 399-417.

Koh, Harold Hongju. "On American Exceptionalism." *Stanford Law Review* 55 (2003): 1479-1527.

Köhler, Imre. *Framing the Threat: How Politicians Justify Their Choices*. Berlin: de Gruyter, 2019.

Koren, Marina. "Obama's Last Guantánamo Pitch to Congress." *The Atlantic*. 23 Feb. 2016: n. pag. <https://www.theatlantic.com/politics/archive/2016/02/obama-guantanamo-congress/470535/>.

Kramer, Paul A. "Power and Connections: Imperial Histories of the United States in the World." *American Historical Review* 116 (2011): 1348-91.

Lasseter, Tom. "Day 4: Easing of Laws That Led to Detainee Abuse Hatched in Secret." *McClatchy*. 18 June 2008: n. pag. <https://www.mcclatchydc.com/news/special-reports/article24485059.html>.

Leffler, Melvyn P., and Jeffrey W. Legro. "Introduction." In *To Lead the World: American Strategy After the Bush Doctrine*. Eds. Melvyn P. Leffler and Jeffrey W. Legro. New York: Oxford UP, 2008. 1-10.

Linfield, Michael. *Freedom Under Fire: US Civil Liberties in Times of War*. Boston: South P, 1990.

Lubin, Alex. *Never-Ending War on Terror*. Oakland: U of California P, 2021.

Malkasian, Carter. *The American War in Afghanistan: A History*. New York: Oxford UP, 2021.

Mayer, Jane. *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*. New York: Doubleday, 2008.

McGreal, Chris. "Guantánamo Detainee Ahmed Khalfan Ghailani Cleared of 284 Terror Charges." *The Guardian*. 18 Nov. 2010: n. pag. <https://www.theguardian.com/world/2010/nov/18/guantanamo-detainee-ahmed-khalfan-ghailani>.

Morales, Lymari. "Americans Send No Clear Mandate on Guantánamo Bay." *The Gallup Poll: Public Opinion, 2009*. Eds. Alec M. Gallup and Frank Newport. Lanham: Rowman & Littlefield, 2010. 22-23.

"No Easy Escape." *The Economist*. 21 Aug. 2021. 30.

Obama, Barack. *A Promised Land*. New York: Crown, 2020.

Odah v. United States 321 F.3d 1134 DC Cir. 2003.

Office of the Director of National Intelligence. "Summary of the Reengagement of Detainees Formerly Held at Guantánamo Bay, Cuba." 2016: n. pag. <https://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_GITMO_Ma%204_2016.pdf>.

Philbin, Patrick F., and John C. Yoo. "Memorandum for William J. Haynes II Re Possible Habeas Jurisdition over Aliens Held in Guantánamo Bay, Cuba." 28 Dec. 2001. The National Security Archive, George Washington University: n. pag. <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20011228.pdf>.

Pilkington, Ed. "Guantánamo Prisoner Released in Surprise Move by Trump Administration." *The Guardian*. 3 May 2018: n. pag. <https://www.theguardian.

com/us-news/2018/may/02/guantanamo-prison-ahmed-al-darbi-release-trump-administration>.

Rasul v. Bush 542 US 466. 2004.

Rosen, Jonathan D., and Hanna S. Kassab. *US-Cuban Relations: Charting a New Path*. Lanham: Lexington, 2016.

Rosenberg, Carol. "Final Obama Transfer Leaves 41 Prisoners at Guantánamo Bay." *Miami Herald*. 19 Jan. 2017: n. pag. <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article127537514.html>.

Rosenberg, Carol. "US Repatriates Afghan Whose Guantánamo Detention Was Unlawful." *New York Times*. 24 June 2022: n. pag. <https://www.nytimes.com/2022/06/24/us/politics/guantanamo-afghan-prisoner-released.html>.

Rumsfeld, Donald. "Memorandum for Commander USSOUTHCOM." 15 Jan. 2003. The National Security Archive, George Washington University: n. pag. <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/03.01.15.pdf>.

Ryan, Missy, and Anne Gearan. "Biden Administration Repatriates Guantánamo Bay Inmate to Morocco." *Washington Post*. 19 July 2021: n. pag. <https://www.washingtonpost.com/national-security/guantanamo-biden-abdul-latif-nasir/2021/07/19/3f523f2e-e885-11eb-84a2-d93bc0b50294_story.html>.

Ryan, Missy, and Adam Goldman. "Obama Asks Lawmakers to Lift Obstacles to Closing Prison at Guantánamo Bay." *Washington Post*. 23 Feb. 2016: n. pag. <https://www.washingtonpost.com/world/national-security/white-house-unveils-plan-for-closing-military-prison-at-guantanamo-bay/2016/02/23/3860f408-da35-11e5-81ae-7491b9b9e7df_story.html>.

Schenck v. United States, 249 US 47. 1919.

Schrader, Esther. "POWs Will Go to Base in Cuba." *Los Angeles Times*. 28 Dec. 2002: n. pag. <https://www.latimes.com/archives/la-xpm-2001-dec-28-mn-18408-story.html>.

Secretary of Defense. "News Briefing." 11 Jan. 2002: n. pag. <http://www.defenselink.mil/news/jan2002/briefings.html>.

Seelye, Katharine Q. "A Nation Challenged: The Detention Camp." *New York Times*. 28 Dec. 2001: n. pag. <https://www.nytimes.com/2001/12/28/us/nation-challenged-detention-camp-us-hold-taliban-detainees-least-worst-place.html>.

Slahi, Mohamedou Ould. *The Mauritanian*. Edinburgh: Canongate, 2017.

Smith, Jean Eward. *Bush*. New York: Simon and Schuster, 2016.

Stahr, Walter. *Seward: Lincoln's Indispensable Man*. New York: Simon and Schuster, 2012.

Taft, William H., IV. "Memorandum to John C. Yoo." 11 Jan. 2002. The National Security Archive, George Washington University: n. pag. <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020111.pdf>.

Tucker, Neeley. "Detainees Are Denied Access to US Courts." *Washington Post*. 12 Mar.

2002: n. pag. <https://www.washingtonpost.com/archive/politics/2003/03/12/detainees-are-denied-access-to-us-courts/a9af63f5-f630-4a36-a298-15ce02f6a848/>.

US Congress. "Public Law 112-81." *United States Statutes at Large*. Washington: GPO, 2011. vol. 125, 1298-862.

US House of Representatives, Committee on Armed Services, 110th Congress, 1st Session. *Military Commissions Act and the Continued Use of Guantánamo Bay as a Detention Center.* Washington: GPO, 2008.

US House of Representatives, Committee on Foreign Affairs, 110th Congress, 2nd Session. *City on the Hill or Prison on the Bay? The Mistakes of Guantánamo and the Decline of America's Image.* Washington: GPO, 2008.

Vine, David. *Base Nation: How US Military Bases Abroad Harm America and the World.* New York: Holt, 2015.

Willett, P. Sabin. "Prelude: Who's at Guantánamo Anyway?" *The Guantánamo Lawyers: Inside a Prison Outside the Law*. Eds. Mark P. Denbeaux and Jonathan Hafetz. New York: New York UP, 2009. 7-12.

Yoo, John C. *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*. Chicago: U of Chicago P, 2005.