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## USA: Digging a deeper hole

### Administration and Congress entrenching human rights failure on Guantánamo detentions

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*For over two hundred years, our nation has relied on a faithful adherence to the rule of law to bring criminals to justice and provide accountability to victims*  
US Attorney General, 13 November 2009<sup>1</sup>

*The United States is very proud of its human rights record*  
Legal advisor to the US Department of State, 9 November 2010<sup>2</sup>

It is now almost 3,000 days since Khalid Sheikh Mohammed was arrested in Pakistan and handed over to US custody. From day one the USA had a fully functioning criminal justice system, with independent federal courts, well-resourced, competent and experienced in conducting complex trials, including in terrorism cases.

In the years since the attacks of 11 September 2001, said US Attorney General Eric Holder in November 2009, the USA has had “no higher priority than bringing those who planned and plotted the attacks to justice”.<sup>3</sup>

For the US government, however, this has clearly not been the case, either under the previous administration or the current one.

Three days after Khalid Sheikh Mohammed was arrested on 1 March 2003, then US Attorney General John Ashcroft described him as “the al-Qa’ida mastermind of the September 11<sup>th</sup> attacks”.<sup>4</sup> Yet he was not brought to a prompt and public trial, but hidden away in secret detention at undisclosed locations for the next three and a half years. According to Attorney General Ashcroft, the arrest of Khalid Sheikh Mohammed was “first and foremost an intelligence opportunity”. This explanation, however, merely masked the reality that the Bush administration consciously chose to torture and subject to enforced disappearance this and other detainees accused of involvement in the 11 September or other attacks rather than to bring them to justice for the grave crimes of which they were accused. In so doing, it violated its obligations under international law, and betrayed the principles of human rights and rule of law it had previously professed to the world.

What about the current administration, which has now been in office for over two years? In November 2009 Attorney General Holder announced that Khalid Sheikh Mohammed and four other “alleged 9/11 conspirators” being held in the US Naval Base at Guantánamo Bay in Cuba after being transferred there from secret CIA custody in 2006 would be brought to the mainland to stand trial in ordinary federal court “before an impartial jury under long-established rules and procedures.”<sup>5</sup> The following week, he told the Senate Judiciary Committee that “for eight years, justice has been delayed for the victims of the 9/11 attacks”. “No more delays”, he added. “It is time, it is past time, to act.”<sup>6</sup>

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Yet, nearly 500 days later, the Obama administration has failed to initiate any trial proceedings against these detainees. Nor is it clear that real justice is any closer after 7 March 2011 when the White House issued an executive order and “fact sheet” relating to its Guantánamo detention policies.<sup>7</sup>

On the positive side, the administration restated its commitment to seeking trials in ordinary federal courts for at least some of those detainees held in Guantánamo. On the negative side, it announced that the moratorium on new military commission prosecutions in force since January 2009 was at an end, and formally endorsed a long-term regime of indefinite detention without trial.

It is not clear whether the administration will backtrack on its decision to try the 9/11 defendants in federal court and instead move to prosecute them in front of military tribunals convened under the Military Commissions Act (MCA), or whether it will continue their indefinite detention until it achieves, if it ever does, its stated aim of repealing the ban, passed by Congress in December 2010, on transfers of Guantánamo detainees to the USA for trial in federal court. The federal courts are a “more appropriate forum for trying particular individuals”, the White House states in its 7 March fact sheet, and once the congressional ban has been repealed “we can move forward in the forum that is, in our judgment, most in line with our national security interests and the interests of justice”.

The Obama administration is right about one thing: Congress must immediately remove the obstacles it has put in the way of ordinary criminal trials, and in the way of prompt implementation of judicial findings that individuals at Guantánamo are being unlawfully held. Its continuing refusal to do so is exacerbating US violations of international human rights and the rule of law.

Congress and the administration must work together to ensure fair trials for any detainee it intends to prosecute. International human rights law, including the International Covenant on Civil and Political Rights, demands no less. Under international law, internal divisions cannot legitimately be invoked as justification for a state’s failure to meet its international treaty obligations.

Military commissions fail to comply with international fair trial standards – even with the revisions signed into law by President Obama in 2009 – and remain a forum incapable of being seen to do justice. Among other flaws, they lack independence, whether in substance or appearance, from the political branches of government that have authorized, condoned, and blocked accountability and remedy for, human rights violations committed against the very category of detainees that would appear before them. The commissions are creations of political choice, not tribunals of demonstrably legitimate necessity, and turning to them in this context against these detainees contravenes international standards. Ordinary criminal courts in the USA do not suffer from this fundamental flaw.

Moreover, the commissions are discriminatory. If any Guantánamo detainee slated for prosecution, including those accused of involvement in the 9/11 attacks, was a US national, he could not be tried by military commission under the MCA. He would face trial in an ordinary federal court, “before an impartial jury under long-established rules and procedures”, not before a panel of US military officers operating under less stringent and essentially untested rules and procedures. The same standard of fair trial should be applied to all, regardless of national origin: that is a fundamental principle of human rights and the rule of law. Using ordinary criminal courts would address this concern.

The signs are not good that the US government will recognize its international human rights obligations in this context any time soon. Senior US Senators, for example, are seeking to have Congress pass legislation that would cement rather than undo the damaging path taken by the USA. In a news release issued on 10 March 2011 to announce the introduction of such a bill, for example, Senator Lindsey Graham said: “The administration has badly managed the trial of Khalid Sheikh Mohammed (KSM) and

the 9/11 conspirators. KSM should face trial by military commission, not federal district court. Under the Laws of War, he is not entitled to the same constitutional rights as an American citizen.”<sup>8</sup>

Even if a defendant is acquitted by military commission, the Obama administration, like its predecessor, has reserved the right to continue to hold him indefinitely under the laws of war. In his executive order of 7 March 2011, President Obama reiterates that “continued law of war detention is warranted for a detainee... if it is necessary to protect against a significant threat to the security of the United States”.

Again the signs are not good that Congress will work to ensure that the USA abolishes its system of indefinite detention without trial; to the contrary, the above-mentioned Senators seek to further solidify this policy in legislation. In the 10 March news release, Senator Joe Lieberman said: “The President’s decisions to hold Guantánamo detainees who are still at war with the United States until the end of hostilities and his decision to refer new charges to military commissions are moves in the right direction. However, there is still much more work to do. The *Military Detainee Procedures Improvements Act* will make it clear that the President has the authority to detain future detainees, not just those held at Guantánamo today”.

President Obama’s order of 7 March 2011 establishes the Periodic Review Board – an executive review process to determine whether the detainee’s continued detention is warranted. Under the terms of the executive order, this periodic review applies only to those detainees held in Guantánamo as of 7 March 2011 (whether they are held at Guantánamo or transferred to another US detention facility) and whom an earlier interagency review designated for continued “law of war detention” or referred for prosecution (except those against whom charges are pending or who have been convicted). This interagency review concluded that there were 48 detainees who should neither be released nor tried by the USA. The review referred for prosecution 36 other detainees.<sup>9</sup>

Regardless of whether the review process outlined in the executive order will prove in practice to operate any better, or indeed to be different in any substantial respect, from similar boards operated by the Bush administration, its establishment can only have yet further corrosive effect on the fundamental role the fairness protections of the criminal justice system play in upholding the right to liberty. Congress and the administration should be collaborating to take the USA off this slippery slope not working together to clear the path for swifter and steeper descent.

Indefinite detention without criminal trial was a policy developed after the 9/11 attacks as part of the USA’s global war paradigm under which human rights principles have been relegated or disregarded. Nearly a decade later, these practices have been retained as a part of a continued sweeping invocation and application of a body of international law designed only for the exceptional context of international armed conflicts, to situations where it is the ordinary systems of criminal justice in a framework of international human rights that should apply.

President Obama’s executive order on the Guantánamo detentions establishes “as a discretionary matter, a process to review on a periodic basis the executive branch’s continued, discretionary exercise of existing detention authority in individual cases”. Almost exactly seven years earlier, as part of the Bush administration’s efforts to keep the Guantánamo detentions out of the reach of the courts, the Pentagon released its proposed administrative review procedures. The “global war on terror is ongoing”, the Pentagon asserted, and the “law of war permits the detention of enemy combatants for the duration of the conflict”. The Guantánamo detainees, it continued, were legally owed no review whatsoever, judicial or administrative, but as “a matter of policy” the Bush administration had decided to provide them an annual executive review of their detentions.<sup>10</sup>

The Bush administration eventually lost its pursuit of unfettered executive detentions at Guantánamo in June 2008 when the US Supreme Court ruled in *Boumediene v. Bush* that the detainees had the right to challenge the lawfulness of their detention in US federal court, for which executive review is no substitute. President Obama's executive order of 7 March 2011 recognizes this "constitutional privilege" granted to the Guantánamo detainees, and emphasizes that nothing in the order is meant to affect the jurisdiction of the federal courts to determine the legality of any Guantánamo detainee's detention. But the habeas courts have themselves essentially adopted and applied the "global war" theory as a matter of US domestic law, relying on the vague language in a brief Congressional resolution (Authorization for Use of Military Force – AUMF) passed with little substantive debate on 14 September 2001; the courts have themselves undermined their own authority to compel the government to give effect to judicial rulings that detentions are unlawful and to orders that detainees unlawfully held be immediately released.<sup>11</sup> Nothing in the 7 March 2011 executive order and accompanying policy fact sheet begins to redress that continuing violation of the right to liberty and prohibition of arbitrary detention.

The essence of habeas corpus proceedings has for centuries been that government authorities are required to bring an individual physically before the court and demonstrate that a clear legal basis exists for their detention. Normally, if the government is unable to do so promptly (i.e. within a matter of days), the court is to order the individual released. This is the bedrock guarantee against arbitrary detention; if it is not fully respected by the government and courts in every case, the right to liberty and the rule of law is more generally gravely undermined. Nearly three years after the *Boumediene* ruling, which itself came more than six years after detentions began at Guantánamo, a majority of those detainees who have challenged their detention in habeas corpus petitions have not yet had a decision on the merits of their challenge.

Even when courts have ruled a Guantánamo detainee's detention unlawful (under the broad detention authority being claimed by the administration), release has neither been prompt nor guaranteed. Indeed, President Obama's executive order of 7 March envisages the possibility of continued detention for months if not years after such a ruling. The "Annual Review Committee", it states, "shall conduct an annual review of sufficiency and efficacy of transfer efforts", including "the status of transfer efforts for any detainee whose petition for a writ of habeas corpus has been granted by a US Federal court with no pending appeal and who has not been transferred".

To date, at the request of US authorities for assistance, a number of other countries have agreed to accept some 32 men released from Guantánamo who could not be returned to their countries of origin because of the risk of human rights violations or other persecution they would face there. The countries stepping forward to accept such men have included Albania, Bermuda, Bulgaria, Cape Verde, Georgia, Hungary, Ireland, Latvia, Palau, Portugal, Slovakia and Switzerland. One might expect that the USA, being the state responsible for bringing detainees to Guantánamo in the first place, would itself contribute in similar fashion to the effort to see such people released. To the contrary, the White House fact sheet of 7 March 2011 reiterates the US government's position that "no Guantánamo detainee will be released into the United States". At the same time, the administration thanks those countries that have taken released detainees and seeks "their continued assistance". It is to the continuing shame of the USA that it is unwilling itself to do what it asks of others – including those far smaller and poorer than itself – in resolving unlawful detentions for which it is responsible.

Sadly, too, the executive order appears to endorse reliance on "diplomatic assurances" as a supposed means of addressing the risks of torture or other similarly serious human rights violations detainees would face in some other countries to which the USA might wish to transfer them. Amnesty International and many others have documented how such practices are not consistent with full respect for human rights.<sup>12</sup>

Unfortunately, the few positive aspects of the announcement on 7 March 2011 – for instance, the administration’s call on the Senate to ratify the 1977 Geneva Protocol II, and the re-affirmation, after years of ambiguity, of US recognition of article 75 of the 1977 Protocol I as a “legal obligation” applicable to all states, including those (such as the USA) that are not parties -- are vastly overshadowed by the grave and long-term implications of the President’s substantive decisions.<sup>13</sup>

In its fact sheet, the administration restates its commitment to closing the Guantánamo detention facility. The fact is, however, this stated goal will remain elusive – or achieved only at the cost of relocating the violations – unless the US government – all three branches of it – properly address the detentions as an issue of respect for international human rights and the rule of law.

On 18 November 2009, explaining to the Senate Judiciary Committee the administration’s decision to bring the 9/11 defendants to trial in federal court on the US mainland, Attorney General Holder said that he was confident that the decision would “withstand the judgment of history”. Sixteen months have passed since then. History will not look kindly on the USA’s continuing failure to fully recognise and respect its international human rights obligations in relation to the Guantánamo detentions.

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- <sup>1</sup> Attorney General announces forum decisions for Guantánamo detainees, US Department of Justice, 13 November 2009, <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>
- <sup>2</sup> Response of the United States of America to recommendations of the United Nations Human Rights Council, 9 November 2010, <http://www.state.gov/s/l/releases/remarks/150677.htm>
- <sup>3</sup> *Ibid.*
- <sup>4</sup> Prepared remarks of Attorney General John Ashcroft, Senate Judiciary Committee Hearing: 'The Terrorist Threat: Working Together to Protect America', 4 March 2003 <http://www.usdoj.gov/archive/ag/testimony/2003/030403senatejudiciaryhearing.htm>.
- <sup>5</sup> Attorney General announces forum decisions for Guantánamo detainees, *op. cit.*
- <sup>6</sup> Attorney General Eric Holder in Senate Judiciary Committee, 18 November 2009 <http://www.justice.gov/ag/testimony/2009/ag-testimony-091118.html>
- <sup>7</sup> Executive Order – Periodic review of individuals detained at Guantánamo Bay Naval Station pursuant to the Authorization for Use of Military Force, 7 March 2011, <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava> ; Fact Sheet: New Actions on Guantánamo and Detainee Policy, 7 March 2011, <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>
- <sup>8</sup> Senators introduce the Military Detainee Procedures Improvement Act of 2011, 10 March 2011, [http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord\\_id=a13898e1-a127-1aec-99b2-56b51f4ca4b9](http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=a13898e1-a127-1aec-99b2-56b51f4ca4b9)
- <sup>9</sup> Guantánamo Review Task Force, 22 January 2010, <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>
- <sup>10</sup> DoD announces draft detainee review policy, 3 March 2004, <http://www.defense.gov/releases/release.aspx?releaseid=7103>
- <sup>11</sup> E.g., *Kiyemba v. Obama*, US Court of Appeals for the District of Columbia Circuit, 28 May 2010 (“It is for the political branches, not the courts, to determine whether a foreign country is appropriate for resettlement”; it is “within the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms”).
- <sup>12</sup> See, for example, Dangerous Deals: Europe’s reliance on ‘diplomatic Assurances’ against torture, April 2010, <http://www.amnesty.org/en/library/info/EUR01/012/2010/en>
- <sup>13</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.