

No Unlawful Enemy Combatants at Guantánamo

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In 2002, Donald Rumsfeld famously called the detainees at Guantánamo “the worst of the worst.” General Richard B. Myers, former chairman of the Joint Chiefs of Staff, warned they were “very dangerous people who would gnaw hydraulic lines in the back of a C-17 to bring it down.” These claims were designed to justify locking up hundreds of men and boys for years in small cages like animals.

George W. Bush lost no time establishing military commissions to try the very “worst of the worst” for war crimes. But four and a half years later, the Supreme Court decided in *Hamdan v. Rumsfeld* that those commissions violated the Uniform Code of Military Justice and the Geneva Conventions. So Bush dusted them off, made a few changes, and rammed his new improved military commissions through the Republican Congress last fall.

Only three detainees have been brought before the new commissions. One would expect the people Bush & Co. singled out for war crimes prosecutions would be high-level al-Qaeda leaders. But they weren’t. The first was David Hicks, who was evidently not so dangerous. The U.S. military made a deal that garnered Hicks a misdemeanor sentence and sent him back to Australia .

Salem Ahmed Hamdan, a Yemeni who used to be Osama bin Laden’s chauffeur, was the second. Hamdan, whose case had been overturned by the Supreme Court, was finally brought before a military commission Monday for arraignment on charges of conspiracy and material support for terrorism.

The third defendant was Omar Khadr, a Canadian citizen, who appeared for arraignment the same day as Hamdan. Khadr was 15 years old when he arrived at Guantánamo. He faced charges of conspiracy, murder, attempted murder, spying, and supporting terrorism.

On Monday, much to Bush’s dismay, two different military judges dismissed both Hamdan’s and Khadr’s cases on procedural grounds.

The Military Commissions Act that Congress passed last year says the military commissions have jurisdiction to try offenses committed by alien unlawful enemy combatants. Unlawful enemy combatants are defined as (1) people who have engaged in hostilities or purposefully and materially supported hostilities against the United States or its allies; or (2) people who have been determined to be unlawful enemy combatants by a Combatant Status Review Tribunal (CSRT) or another competent tribunal. The Act says that a determination of unlawful enemy combatant status by a CSRT or another competent tribunal is dispositive.

But there are no “unlawful” enemy combatants at Guantánamo. There are only men who have been determined to be “enemy combatants” by the CSRTs. The Act declares that military commissions “shall not have jurisdiction over lawful enemy combatants.” In its haste to launch post-*Hamdan* military commissions, Bush’s legal eagles didn’t notice this discrepancy. That is why the charges were dismissed.

The Bush administration may try to fix the procedural problem and retry Khadr and Hamdan. But regardless of whether Guantánamo detainees are lawful or unlawful enemy combatants, the Bush administration’s treatment of them violates the Geneva Conventions. Lawful enemy combatants are protected against inhumane treatment by the Third Geneva Convention on prisoners of war. Unlawful enemy combatants are protected against inhumane treatment by Common Article Three.

Omar Khadr was captured in Afghanistan and brought to Guantánamo when he was 15 years old. In both places, he has been repeatedly tortured and subjected to inhumane treatment. At Bagram Air Base, Khadr was denied pain medication for his serious head and eye shrapnel wounds. At Guantánamo, his hands and feet were shackled together, he was bolted to the floor and left there for hours at a time. After he urinated on himself and on the floor, U.S. military guards mopped the floor with his skinny little body. Khadr was beaten in the head, dogs lunged at him, and he was threatened with rape and the removal of his body parts.

Khadr cried frequently. He has nightmares, sweats and hyperventilates, and is hypervigilant, hearing sounds that he can’t identify. When Khadr’s lawyer saw him for the first time in 2004, he thought, “He’s just a little kid.”

Why was Khadr treated this way? He comes from a family allegedly active in al-Qaeda. His charges stem from an incident where the U.S. sent Afghans into a compound where Khadr and others were located. The people inside the compound killed the Afghans and began firing at the U.S. soldiers. The Americans dropped two 500-pound bombs on the compound, killing everyone inside except Khadr. After Khadr threw a hand grenade which killed an American, the soldiers shot Khadr, blinding and seriously wounding him. Khadr begged them in English to finish him off. He was then taken to Baghram and later to Guantánamo.

According to Donald Rehkopf, Jr., co-chair of the National Association of Criminal Defense Lawyers Military Law Committee, “The government has steadfastly refused to allow hearings on this alleged [unlawful enemy combatant] status because there are so many prisoners at GTMO that were not even combatants, much less ‘unlawful’ ones. Khadr is in an unusual situation because he has a viable ‘self-defense’ claim – we attacked the compound that he and his family were living in, and the fact that he was only 15 at the time.”

If Khadr were a U.S. citizen, he would not even be subject to trial by court-martial because of his age. When the Supreme Court ruled in 2005 that children under 18 at the time of their crimes could not be executed, it said that youths display a “lack of maturity and an underdeveloped sense of responsibility” that “often results in impetuous and ill-considered actions and decisions.” A juvenile, the Court found, is more vulnerable or susceptible to negative influences and his character is not as well-formed as that of an adult. “From a moral standpoint,” Justice Kennedy wrote for the majority, “it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” The Bush administration’s treatment of Omar Khadr flies in the face of the Court’s reasoning.

The United States may be able to retry Khadr and Hamdan. They have a few days to file an appeal. But the Court of Military Commissions Review hasn't even been established yet, so it's unclear where the appeals would be brought.

The Military Commissions Act, which denies basic due process protections, including the right to habeas corpus, is a disgrace. But an even bigger disgrace is the concentration camp the United States maintains at Guantánamo Bay , Cuba . The Act should be repealed and the Guantánamo prison should be shut down immediately.

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