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Torture, Preventive Detention and the Terror Trials at Guantánamo **by Andy Worthington**

In the real world outside the U.S. Naval Base at Guantánamo Bay, Cuba, Barack Obama's [pledge](#) to close Guantánamo and scrap the military commissions (the system of trials for "terror suspects" that was established in the wake of the 9/11 attacks) has provoked a rare outburst of frenzied media coverage.

With no concrete plans announced by the President-elect's transition team, pundits and off-the-record officials of all political hues have stepped in to fill the void with [speculation](#) about the significance of the remaining 255 prisoners, some shrill demands for legislation endorsing "preventive detention," some equally shrill warnings that robust techniques will be needed in the future to deal with captured terrorists, and a range of opinions about whether the Guantánamo prisoners regarded as a genuine threat to the United States ([estimates](#) range from several dozen prisoners to around 80) should be transferred to the U.S. mainland to face trials in federal courts or in another brand-new system.

Some of these opinions are genuinely troubling, and reveal the extent to which the government's fear-filled "war on terror" rhetoric of the last seven years has permeated the U.S. psyche. Proposals to create new legislation authorizing "preventive detention," for example, actually seek to justify much of what the Bush administration has been doing at Guantánamo, and it beggars belief that citizens in a civilized society founded on the rule of law could attempt to justify imprisoning people not for what they have done, but to prevent what they could conceivably do in future.

The proposal is doubly disturbing because the government's assertions that some of the prisoners may be dangerous comes not from evidence that can be tested in a court of law, but from intelligence reports that may or may not be reliable, and from hearsay and confessions — made by other prisoners, or by the prisoners themselves — that may have been produced through the use of torture or other forms of coercion, or through bribery (a well-chronicled "rewards" system for prisoners regarded as "cooperative").

In addition, calls for robust techniques to deal with terror suspects captured in the future are clearly influenced by the Bush administration's arguments that prisoners seized in the "war on terror" constitute a threat of a kind never encountered before, and that this threat justifies its attempts to redefine torture, and its endorsement of the use of torture by U.S. forces. For the record, torture, as defined in the [UN Convention Against Torture](#) (to which the U.S. is a signatory) is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person," and not, as the U.S. administration claimed in its notorious "[Torture Memo](#)" of August 2002, an act producing pain which is "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."

Those endorsing greater latitude to deal with terror suspects in the future have presumably forgotten the extent to which the administration has belittled the intelligence agencies' skilled interrogators, who contributed to [107 successful terrorist prosecutions](#) in U.S. federal courts without resorting to the use of torture, and its disdain for the psychological techniques enshrined in the Army Field Manual, which not only prohibits the use of torture, but of any kind of physical violence. Both, however, have a proven track record of success, unlike the torturers, whose activities constitute war crimes, however much the Bush administration has attempted to disguise them, and are also morally corrosive and counter-productive, producing, at best, ripples of truth in a sea of false confessions, with no practical way of separating fact from fiction.

Much of this has been confirmed by Dan Coleman, a senior FBI interrogator who worked on several high-profile terrorism cases before the 9/11 attacks. Coleman is on record as stating that "people don't do anything unless they're rewarded." In an interview in 2006 with the [New Yorker](#)'s Jane Mayer, he acknowledged that brutality may "yield a timely scrap of information," but is "completely insufficient" in the longer fight against terrorism. "You need to talk to people for weeks. Years," he explained.

When it comes to proposals to establish a new trial system for terror suspects, those putting forward such ideas have obviously failed to scrutinize the failures of the system conceived by [Dick Cheney](#) and his close advisers in November 2001. Thrown out by the Supreme Court in June 2006, the commissions were revived by Congress later that year, but have struggled to establish their legitimacy, primarily because the government-appointed military judges are empowered to accept evidence obtained through coercion, to prevent all mention of evidence obtained through torture, and to blur the distinction between the two, and also because, as I reported at length in a [previous article](#), a growing body of evidence indicates that the entire system is rigged, with Pentagon representatives who are supposed to be impartial actually taking their orders from the heavily biased Office of the Vice President.

It remains to be seen how this chain of command — which pivots on the role played by retired judge Susan Crawford, the Commission's "Convening Authority," and a close friend of

both Dick Cheney and his chief of staff David Addington — will survive the transition to the Obama administration, but enthusiasts for the creation of another brand-new system should really take on board the sustained opposition to the commissions that has been mounted from within.

Those who have become implacably opposed to the system are not only the military defense lawyers, who have been prepared to [sacrifice their careers](#) in defense of justice, but also Col. Morris Davis, the former chief prosecutor, and several former prosecutors, including, most recently, Lt. Col. Darrel Vandeveld, who turned from being a “true believer to someone who felt truly deceived” by the system, when he discovered that evidence vital to the defense was being routinely withheld in the case of [Mohamed Jawad](#), an Afghan teenager accused of a grenade attack on U.S. forces in December 2002.

In the meantime, while enthusiasts for a new trial system indulge their largely abstract musings, the reality of the commissions themselves continues to confound reality, as those in charge of the process persist in behaving as though it is business as usual.

On the eve of the presidential election, the failure of the commissions to deliver anything approaching justice was demonstrated when Ali Hamza al-Bahlul, a self-confessed member of al-Qaeda, received a [life sentence](#) for conspiracy and providing material support for terrorism, which is supposed to be served in total isolation at Guantánamo. Al-Bahlul was convicted after a disgraceful one-sided show trial in which, because of the ill-defined rules governing the commissions, he was allowed to score what was effectively a propaganda victory for al-Qaeda by refusing to mount a defense.

Since then, the commissions have stumbled on as though nothing changed with the elections on November 5. On November 17, the chief judge, Marine Col. Ralph Kohlmann, who had been overseeing the meandering pre-trial proceedings for [Khalid Sheikh Mohammed](#) and four other men accused of involvement in the 9/11 attacks, announced his [immediate retirement](#), scuppering any possibility that the commissions’ flagship trial would take place before the Bush administration leaves office.

At a [hearing in September](#), Kohlmann had admitted that he was due to retire in April 2009, prompting Mohammed to ask him to disqualify himself from the case, on the basis that he “might inappropriately rush the proceedings.” Any kind of “rush” is now completely out of the question, of course, and instead, as Lt. Cmdr. James Hatcher (the lawyer for one of the accused, Walid bin Attash) explained, Kohlmann’s departure means that “a new round of pretrial hearings [will] be required and the new judge [will] be forced to reexamine earlier rulings,” which will “make an already complex case even more complex.”

The departure of Kohlmann, a no-nonsense operator who has been involved in the commissions since December 2005, will certainly not make the trial system’s work any easier, especially as his chosen successor, Army Col. Stephen Henley, has “shown more patience” with defense attorneys than his predecessor (as the [Miami Herald](#) described it), and was, at the time of

his appointment, the only judge to have ruled that a major part of the prosecution's evidence in one case — that of Mohamed Jawad — was [inadmissible](#), because it had been extracted through the use of torture.

Jawad's trial is scheduled to begin on January 5, 2009, but the day after Henley's appointment to the trial of Khalid Sheikh Mohammed and his alleged co-conspirators, he struck another blow to the prosecution in Jawad's case by ruling that a second confession, made in U.S. custody the day after his Afghan confession, was also inadmissible, partly because, as the [Associated Press](#) described it, "the U.S. interrogator used techniques to maintain 'the shock and fearful state' associated with his arrest by Afghan police, including blindfolding him and placing a hood over his head." As Henley explained in his ruling,

"The military commission concludes the effect of the death threats which produced the accused's first confession to the Afghan police had not dissipated by the second confession to the U.S. In other words, the subsequent confession was itself the product of the preceding death threats."

Elsewhere in the commissions, developments in two other cases also failed to advance the trial system's legitimacy. In the case of [Ibrahim al-Qosi](#), a Sudanese prisoner arraigned on November 19, the major claim against him — that he was responsible for al-Qaeda's payroll in Khartoum, before Osama bin Laden and his entourage moved back to Afghanistan in 1996 — has been dropped by the government, and all that remains are claims that he worked at an al-Qaeda compound from 1996 to 1998, that he fought "as an al-Qaeda mortar man near Kabul from 1998 to 2001," and that he sometimes worked as a driver and bodyguard for bin Laden.

Moreover, al-Qosi's civilian lawyer, Lawrence Martin, has a take on his client's role, which, for the government, must sound uncomfortably similar to that of Salim Hamdan. A Yemeni, and one of seven drivers for bin Laden, Hamdan has just been [repatriated](#) to serve out the last month of the [meager sentence](#) he received in August, after his military jury [threw out](#) the conspiracy charge against him, accepting that he knew nothing about the workings of al-Qaeda. At al-Qosi's arraignment, Martin declared, "Mr. al-Qosi, far from being a war criminal, was a cook," adding, "He was not even a cook for bin Laden, but a cook for a compound where bin Laden was sometimes a visitor."

The other arraignment on November 19 — that of Mohammed Hashim, another Afghan prisoner — was even less justifiable. Hashim was [charged](#) in June with spying for al-Qaeda in Afghanistan and conducting a rocket attack on U.S. forces, even though he was, at best, a minor Afghan insurgent. As in the cases of [two other](#) Afghans (in addition to Mohamed Jawad), it is difficult to work out how the administration construes these charges as "war crimes." His case is complicated by the fact that his publicly available testimony — which is sprinkled with implausible references to his knowledge of the 9/11 attacks (via a member of the Northern Alliance, the implacable enemies of both al-Qaeda and the Taliban), his supposed relationship

with Osama bin Laden and purported links between al-Qaeda and Saddam Hussein — suggests that he either has mental health problems, or has dreamt up the biggest lies possible to secure more favorable treatment.

Despite all these dubious developments, the most worrying sign that the commissions continue to operate in a parallel reality also came on November 19, when Col. Lawrence Morris, the chief prosecutor, announced that charges against Mohammed al-Qahtani, which were dropped without explanation in May, were to be filed again, and that charges against five other prisoners, which were dropped last month, would also be filed again in the near future.

The case of Mohammed al-Qahtani is one of the most shocking in the whole of Guantánamo's long and ignoble history. Regarded as the proposed 20th hijacker for the 9/11 attacks, until he was turned away by immigration officials in Orlando, Florida, al-Qahtani was apparently being questioned by the FBI with some success (through the old-school techniques favored by Dan Coleman), when the Pentagon, in the fall of 2002, grew impatient with the FBI's results.

After securing approval from Defense Secretary Donald Rumsfeld for a range of “enhanced interrogations techniques,” al-Qahtani was interrogated for 20 hours a day over a 50-day period in late 2002 and early 2003, as Time magazine revealed in an interrogation log ([PDF](#)) made available in 2005. The techniques used — beyond the persistent sleep deprivation — included extreme sexual humiliation and “forced grooming” (shaving his hair and beard), and he was also threatened by dogs, strip-searched and made to stand naked, and made to bark like a dog and growl at pictures of terrorists. On one occasion he was subjected to a “fake rendition,” in which he was tranquilized, flown off the island, revived, flown back to Guantánamo, and told that he was in a country that allowed torture.

In addition, as I explained in my book [The Guantánamo Files](#), “The sessions were so intense that the interrogators worried that the cumulative lack of sleep and constant interrogation posed a risk to his health. Medical staff checked his health frequently — sometimes as often as three times a day — and on one occasion, in early December, the punishing routine was suspended for a day when, as a result of refusing to drink, he became seriously dehydrated and his heart rate dropped to 35 beats a minute. While a doctor came to see him in the booth, however, loud music was played to prevent him from sleeping.”

Until Col. Morris made his announcement, it had been widely presumed that the charges against al-Qahtani had been dropped because — unlike the interrogations in the secret CIA prisons in which Khalid Sheikh Mohammed and other “high-value detainees” were held, which can be excluded from their trials — the details of al-Qahtani's interrogations are not only publicly available, but were declared to be “degrading and abusive” by a Pentagon inquiry in 2005 ([PDF](#)).

However, in the parallel world of the military commissions, where the Bush administration's attempts to redefine torture are clearly still embraced with enthusiasm, none of

this seems to matter. Announcing his intention to charge al-Qahtani again, Col. Morris declared, as the [New York Times](#) explained, that “prosecutors had decided there was ‘independent and reliable’ evidence that Mr. Qahtani had been plotting with the Sept. 11 hijackers.”

Col. Morris also declared his intention to file new charges against the five prisoners whose [charges were dropped](#) in October, which is almost as bewildering. When the charges against Noor Uthman Muhammed, Ghassan al-Sharbi, Jabran al-Qahtani, Sufyian Barhoumi and [Binyam Mohamed](#) were dropped, it was widely assumed that this was because their prosecutor, Lt. Col. Vandeveld, who had just testified for the defense in Jawad’s case after turning against the government, had more revelations about the machinations of the prosecutors that would undermine their cases. This may well be true, especially in relation to Binyam Mohamed, a British resident who was sent to Morocco in 2002 so that proxy torturers could spend 18 months extracting a false confession from him regarding his role in a non-existent “dirty bomb” plot.

Mohamed is currently involved in [legal wrangling](#) over evidence of his rendition and torture in courts on both sides of the Atlantic, and it is, therefore, yet another sign of the commissions’ detachment from reality that Col. Morris is planning to file new charges against him. What it demonstrates above all, however, as with the case of Mohammed al-Qahtani, is that Barack Obama will need to act swiftly and decisively after January 20 if he is to demonstrate that, under his administration, the use of torture — and of confessions obtained through torture — will no longer be tolerated.

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This article was originally published in December 2008.