



OCGG Law Section

Advice Program  
US Justice Policy

Governance Area  
Guantanamo Bay

# Guantanamo Bay - out of the legal black hole

Advice to the Government of  
the United States of America

edited by Barbara Mollin

“A state of war is not a blank cheque for the president when it comes to the rights of the nation’s citizens”

Justice Sandra Day O’Connor

## MAIN POINTS

The US need to re-establish rule of law at Guantanamo Bay, and either try or release the detainees. It should affirm the applicability of constitutional and international law: both offer sufficient means of dealing with the threats to the US, and are more effective and legitimate than current policy.

## ABOUT THE EDITOR

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## ABOUT THE OCGG

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## KEY RECOMMENDATIONS

The Oxford Council on Good Governance presents the following advice to the Government of the United States of America in order to bring Guantanamo Bay back within the realm of law and fundamental rights:

- The USA should show a full and unreserved commitment to international law, including to international humanitarian law.
- The USA should grant constitutional protection under the law of its land to all people coming within its control and jurisdiction.
- The USA should restore the rule of law on Guantanamo Bay immediately.
- Clarification of the legal status and prospect of release or further detention should not be conditional upon detainees bringing a challenge through the federal courts, as this may subject them to further unjustifiable detention.
- The US administration should use the Supreme Court rulings<sup>1</sup> as an opportunity to admit the unlawful detention and aim to release, repatriate or to put on trial all detainees to gain legitimacy and display to the international community that the USA is fully behind rule of law.
- The USA should act multilaterally in combating terrorism and responding to new challenges in cooperation with the international community.

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<sup>1</sup> Supreme Court Rulings in 'Rumsfeld v. Padilla' 28 June 2004, 'Rasul v. Bush' 28 June 2004, and 'Hamdi v Rumsfeld' 28 June 2004. 'Rulings of the Supreme Courts' in this document shall be interpreted as referring to the cases mentioned here.

## INTRODUCTION

Guantanamo Bay camp opened two years ago. Its purpose is to hold people seized in 'the war on terror'. Over 600 people are held at the camp. By blanket presidential decree, prisoners have been denied 'prisoner of war' status. Until now they have been placed beyond the rule of law and beyond the protection of any courts.

The US administration has maintained that for the past two years the base in Guantanamo Bay was beyond the reach of US Courts. The Supreme Court judgment allows Guantanamo Bay detainees to challenge their detention in US courts. In so finding, the Supreme Court rejected the contention that the jurisdiction of the US courts does not apply to Guantanamo Bay, thus challenging the assertion of the US administration that those captured in the 'war on terrorism' as enemy combatants have no rights under the Third Geneva Convention nor rights to petition US Courts.

The Supreme Court ruling is a fundamental step in showing that the Executive will be unable to detain citizens or noncitizens according to Presidential decree alone. The decision thus offers great cause for optimism that detainees will now be able to have their cases heard through US courts. However, it remains to be seen whether this important opportunity will be fully seized, and how the US Executive will respond to the Supreme Court's decision.

The shortcomings of the decision of the Supreme Court as well as lack of critical look into the detentions of prisoners mean that Guantanamo Bay is still in need of a solution that is not only legally sound, but also politically feasible. The OCGG Law Section is presenting such a solution.

Our aim is to combine different key perspectives. We have analyzed US constitutional law. We have also looked at the provisions of international law, in particular the Geneva Conventions. Lastly, we have considered the situation in the light of international relations theories.

This unique combination of perspectives has so far given a fresh focus to our advice, which combines long term and short term practical recommendations. By looking at the underlying institutions and policies which led to the establishment of Guantanamo Bay, we are showing that the policy of keeping over 600 prisoners in indefinite detention is illegitimate, illegal, and ineffective, and remains so despite the latest court rulings.

The OCGG Law Section would like to extend it thanks to Clifford Chance for their financial support of this project.

## RECOMMENDATIONS

The OCGG presents recommendations in light of international law, international relations and the domestic legal framework of the United States.

### INTERNATIONAL LAW

1. The rulings of the Supreme Court should be read interpreted as granting protection which is equal to or above that offered by the Geneva Conventions.
2. All prisoners captured in war or war-like circumstances should prima facie be treated as prisoners of war and according to the 1949 Geneva Convention relative to the treatment of prisoners of war (the Third Geneva Convention). This means that they ought to be treated as the soldiers of the state that has captured them, and to be released when war or war-like activities have ended.
3. The US should clearly define when war like activities begin and end.
4. We propose a generous definition of regular forces, to include all forces that the enemy government has been claimed to have control over and responsibility for by the start of the war.
5. The term 'Enemy combatant' creates a further classification that should not be used to restrict the protection under the Geneva Conventions.
6. We believe that the focus on whether courts are civil or military is to some extent mistaken. The central issue instead seems to be whether sufficient protection of the legitimate interests of the defendants is in place, which we believe is presently not the case.

7. The US should allow full inspections of Guantanamo Bay by the Red Cross in the case of POWs, or by other authorities such as (in the case of Diego Garcia) the Council of Europe's Inspectors of Prisons.

8. Article 103 of the Third Geneva Convention should be followed for all prisoners detained in Guantanamo Bay. The US administration should have no right to detain anyone for a long period of time without proper judicial investigations of their status. Any investigation should be conducted as rapidly as circumstances permit, in order that a trial takes place as soon as possible. A prisoner may be confined subject to certain circumstances, but no longer than three months.

9. Under Article 5 of the Geneva Conventions where any doubt arises as to the status of the detainees the US should respect that such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

10. Where Article 5 and Article 103 of the Third Geneva Convention do not apply, prisoners are entitled to the protection under the Common Article 3 of the Geneva Conventions. It follows that no sentences should be passed without previous judgment by regularly constituted courts, affording all judicial guarantees which are recognised as indispensable by civilised people.

11. Ultimately the USA should accept responsibility for any breaches of law, including a breach of Geneva Conventions, by waiving any claim to immunity.

## INTERNATIONAL RELATIONS

1. Detaining prisoners in Guantanamo Bay under the current circumstances is an ineffective policy and is contrary to its objective of increasing security.

2. The US should display full commitment to judicial process. Lack of regard for justice exposes US soldiers and American citizens to more risks by increasing hostility towards the USA. One obvious problem is that American soldiers in captivity may be treated in a similar fashion –World War II showed that suspension of basic rules leads to a lowering of standards or ‘race to the bottom’ as in Russia, which the Germans called Rattenkrieg.

3. The US should foster a better image of itself in the world by showing goodwill, and willingness to respect basic rights. The images of Guantanamo Bay have been disruptive for the US’s image as a benign power in the Arab world. The US is creating for the Arab world the next generation of folk heroes.

4. Only a true respect for international rules can lead to a more peaceful and safe world. A short term policy of containing prisoners will produce adverse effects in the long term.

5. The USA is losing international capital by holding other states’ residents in a legal vacuum.

## U S D O M E S T I C L A W

1. The USA should provide the protection of the US Constitution for every human being, whether a national or not, of any country that comes within the control of the US. Accordingly, the Supreme Court ruling of 28th June should be interpreted broadly to include any place over which the USA exercises control.

2. No protection should be refused on the basis that no such protection can apply outside the USA and in non-sovereign territory of the USA.

3. The US Constitution guarantees equal rights for all persons to give evidence, to receive equal benefit of all laws and proceedings for the security of persons, and to receive like punishment. The onus of proving that the detention has been unlawful should not lay with the detainees.

4. Protection should be automatic without prior long and tortuous battle in court - especially given that those who are detained are often in no position to protect them by bringing an action.

5. The US Supreme Court should actively pursue enforcement of human rights and the rule of law at Guantanamo Bay, applicable to every national and in any jurisdiction if apprehended by the US. The Supreme Court did not address the human rights issues surrounding the men's capture and detention without trial.

6. Detainees should not be detained indefinitely. The Supreme Court should not allow the 'war on terrorism' to be a justification for indefinite detention without charge in any circumstances. In cases of war, acts of terrorism and national emergency, protection must resume as soon as the conflict is over.

7. Any arrest or confinement of an accused must be terminated unless charges are promptly brought and made known to the accused and speedy trial afforded for determination of guilt on such charges. The lengthy pre trial confinement without charge, without a process to determine guilt amounts to arbitrary and illegally imposed sentence that is incompatible with fundamental guarantees of due process.

8. The legislative powers may only be exercised by the Congress. Unlawful conduct shall be defined in advance by positive legislation, or by reference to a recognised body of international law, and the Executive should not create bodies which deny jurisdiction of the courts of the land.

9. The Military Commissions cannot offer procedural and substantive justice. They are an unlawful exercise of justice when no war has been declared by the American Congress. The Military Commissions should be declared unlawful and illegitimate, and shall not be a defence to any challenge in court by a detainee.

10. Existence of the Military Commission process should not serve as defence to an action for unlawful detention.

11. If detainees should challenge their detention or cases are brought against the, full access to lawyers should be granted.

12. Clear guidelines should be set what rights have been granted and possible defences available to the US administration on any such challenge.

13. Guantanamo Bay detainees should be informed immediately of their right to challenge their detention.

14. Release or clarification of the legal position of the detainees should not depend on bringing a separate action through the federal courts. Challenge in the courts could take up to two years and any further delay may subject the individuals to further unjustifiable and unlawful detention.

15. The US Government should seek to clarify the position of the detainees immediately to avoid any further embarrassment of legal challenge.

16. The US administration should use the ruling as an opportunity to admit the unlawful detention and seek aim to release, repatriate or to put on trial all detainees to gain legitimacy and show the international community that the USA is fully behind rule of law and justice.

## CONCLUSION

### THE UNITED STATES SHOULD RETURN TO MULTILATERALISM

The threat of terrorism is a challenge to any government, which must balance a concern for security with a concern for human rights and rule of law. No government may pursue its need for security at all expense.

A body of international law exists to deal with some of these challenges by weighing competing interests. Where no settled state practice or no set of rules exists, governments should respond to new challenges by engaging in an international dialogue. International law emerges through treaty making or by a steady development of uniform state practice and custom. This process must not be hijacked by the unilateralism of one country.

Changes to international law should only be made in the spirit of multilateralism and according to the principles of cooperation. There is no other legitimate or effective way of achieving a lasting peace and welfare for citizens.

International law should in turn transcend domestic norms which reinforce and actively support respect for internationally set standards.

It is therefore disappointing that a country which has been at a forefront of the fight for democracy, peace and human rights in the world throughout in the 20th Century and beyond has created a legal black hole for over 600 individuals at Guantanamo Bay during the past two years.

In pursuit of its own domestic policies the United States seeks to weaken and undermine international institutions such as the United Nations



which it has helped to build in the past. However, it is in the US interest to continue to support these institutions and strengthen them with the help of the international community.

The USA and the international community should jointly pursue the fight against terrorism. They may find that the threat of terrorism may be significantly reduced as a result of multilateral cooperation and mutual respect.

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