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Guantánamo: Ten Years and Counting

David Cole | January 4, 2012

On January 11 it will have been a decade since the first of the men we once called “the worst of the worst” were brought to Guantánamo Bay, a location handpicked by the Bush administration so that it could detain and interrogate terror suspects far from the prying eyes of the law. In the intervening years much has improved at this remote US-controlled enclave in Cuba. Allegations of ongoing torture have ceased; the detainees have access to lawyers and court review; and more than 600 of the 779 men once held there have been released.

But in another way, Guantánamo is a deeper problem today than it ever was. No longer a temporary exception, it has become a permanent fixture in our national firmament. And although at one time we could blame President George W. Bush’s unilateral assertions of unchecked executive power for the abuses there, the continuing problem that is Guantánamo today is shared by all three government branches, and ultimately by all Americans. With President Obama’s signing of the National Defense Authorization Act (NDAA) on New Year’s Eve, the prison is sure to be with us—and its prisoners sure to continue in their legal limbo—for the indefinite future.

President Bush undoubtedly committed the original sin. Had he followed the rules governing wartime detention from the outset, Guantánamo would not be an international embarrassment. It has long been established that in an ongoing war a country may detain the enemy for the conflict’s duration. But the laws of war require that we afford hearings to those whose status is in doubt, that we release them when the conflict ends and that we treat them humanely throughout. Bush refused to provide hearings, asserted the prerogative to hold people during a never-ending “war on terror” and authorized systematic cruel and inhuman treatment. For years, Guantánamo was synonymous with Bush’s defiantly lawless approach to the “war on terror.”

But we can no longer point the finger only at Bush. He’s been out of office for three years, and Guantánamo is still very much with us. Congress, with the support of many Democrats, has adopted a shortsighted “not in my backyard” attitude, making it impossible for President Obama to deliver on his promise to close Guantánamo. In provisions recently renewed in the NDAA, Congress has barred any transfer of Guantánamo detainees to a US prison, even for criminal trial, and radically restricted the president’s authority to transfer detainees to foreign countries, essentially requiring impossible guarantees that they won’t ever pose a threat to the United States. As a result, even though more than half of the remaining detainees—eighty-nine of 171—have been fully cleared for release by a joint review conducted by the military, CIA, FBI and the Department of Homeland Security, they remain stuck there. Locking up people we concede need not be held is the very definition of arbitrary detention, but that has become the norm at Guantánamo.

The courts are also implicated. The Supreme Court twice sought to ensure that Guantánamo would be

subject to law. In 2004, in a case brought by the Center for Constitutional Rights, which almost no one thought could be won, the Court ruled that the detainees had a statutory right to challenge the legality of their detentions by filing writs of habeas corpus. When Congress repealed the statutory basis for that decision, the Court in 2008 held that the detainees had a constitutional right to seek judicial review—the first time the Court had extended constitutional rights to foreign nationals outside our borders.

But the Court left the details to be worked out by the lower courts, and because all habeas cases must be filed in the District of Columbia, the Court of Appeals for the DC Circuit—the very court the Supreme Court overturned in its habeas rulings—must hear all appeals in the Guantánamo cases. In a series of decisions that come close to echoing the South's resistance to the 1954 *Brown v. Board of Education* ruling, the DC Circuit has rendered virtually meaningless the judicial review the Supreme Court says the Constitution guarantees. The DC Circuit allows indefinite detention based on notoriously unreliable intelligence reports, to which it accords a "presumption of regularity," while denying the detainee an opportunity to confront or rebut them. It upholds indefinite detention based on a mere "preponderance of evidence," and several judges have said they would not even require that minimal showing. As Judge Laurence Silberman candidly stated, "I doubt any of my colleagues will vote to grant [release] if he or she believes that it is somewhat likely that the petitioner is an Al Qaeda adherent or an active supporter."

DC district courts have granted habeas in more than thirty cases, but the DC Circuit court has vacated or reversed every order the government has appealed. The Supreme Court, once celebrated for reintroducing the rule of law to Guantánamo, has now rendered judicial review a charade by repeatedly declining to intervene.

What seems to drive Congress and the courts is the desire to eliminate any risk, no matter how remote, that a detainee might harm us in the future. Neither Congress nor the courts, however, seem to have any problem with the countervailing risk, namely that we may be needlessly and arbitrarily locking up human beings for years who pose no threat whatsoever.

Meanwhile, despite his assessment that "the existence of Guantánamo likely created more terrorists around the world than it ever detained," Obama appears to have abandoned his promise to close the prison. He vowed to veto the NDAA because of its restrictions on his authority vis-à-vis detention and trial of Al Qaeda suspects, but he reversed course and signed the bill after a House-Senate conference committee watered down some of its worst provisions. The bill is better because of his veto threat, but it still assures Guantánamo's continued existence.

At the same time, Obama has blocked all efforts at accountability for the abuses committed there. Even though the vast majority of detainees have been released, suggesting they were not "the worst of the worst" after all, and even though it is widely acknowledged that detainees held there were abused and in some instances tortured, the executive has issued no apologies. Guantánamo apparently means never having to say we're sorry.

We used to be able to blame the Bush administration for Guantánamo. No more. And although the executive, legislative and judicial branches are all deeply implicated in the ongoing injustice, we can't really lay the blame on the government. Guantánamo is our problem as citizens. No doubt because only foreigners are held and tried there, Americans have consistently looked the other way, even as the world calls for it to be closed. A 2010 CNN poll found that 60 percent of Americans favor keeping the prison there. Guantánamo will not close until we insist that our government heed the calls for justice that the world has rightly made.

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