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Hajjar, Lisa

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Guantánamo's Legacy

Lisa Hajjar

Department of Sociology, University of California, Santa Barbara, California, USA; email: lhajjar@soc.ucsb.edu

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Abstract

The military detention facility at the Guantánamo Bay naval base is the most enduring manifestation of the US "war on terror." It is also materially and symbolically central to US torture, war crimes, and other egregious violations of law in the post-9/11 era. Since the first detainees arrived in 2002, Guantánamo has been the subject of controversy and debate, as well as a key setting for legal challenges to government policies. This article traces the legacy of the prison and the military commissions across four administrations. It demonstrates that the lack of a common understanding or shared narrative about what Guantánamo means or has meant is a product of entrenched partisanship that characterizes contemporary US politics more broadly. Guantánamo's confounding legacy reflects the lack of a national consensus about the role of laws and courts as guarantors of even the most basic rights.

GUANTÁNAMO'S LEGACY

When Americans encounter the word Guantánamo, or the shorthand Gitmo, they are likely to think not of the US naval base on the south side of Cuba but rather and specifically of the prison located on it (*Pew Research Center* 2015). Those with historical recall will know that Guantánamo-the-prison was opened in January 2002[1] by the George W. Bush administration to detain people—exclusively Muslim males—captured abroad in the "war on terror." Some may remember that the total detainee population was 780 men and boys, the last one arriving in 2007.

But these days, many people are unaware that the prison is still open, or that the military commissions created and recreated to prosecute detainees are still malfunctioning (Farley 2021, Finkelstein & Rishikof 2022, Glazer 2014, Hajjar 2022, Tayler & Epstein 2022, Vladeck 2019). Only those with an active interest know that 30 men remain imprisoned (as of May 2023); 9 are awaiting trial, 1 is awaiting sentencing, 1 is serving a life sentence, 16 have been approved for transfer, and 3 are held in law-of-war detention with no prospect of trial or release (*New York Times* 2023).

Not even the cost commands public attention, although the price tag exceeds $7 billion and continues growing at a rate of $13 million a year for each detainee (Rosenberg 2022a). There is no broad public knowledge, let alone acknowledgment, that everyone ever detained at Guantánamo was subjected to physical and psychological abuse of various forms and degrees (Fallon 2017, Fletcher & Stover 2009, Hartwig & Fallon 2022, Sands 2008, Senate Comm. Armed Serv. 2008). Such nonknowingness, which Cohen (2001) analyzed as "states of denial," calls to mind a saying permanently etched in American pop culture: "You can't handle the truth!" This line from the 1992 film *A Few Good Men*, which is set at Guantánamo, is shouted by Jack Nicholson's character when he is pressed to admit responsibility for trying to cover up the crime at the center of the plot.

The public's lack of up-to-date knowledge is understandable because media coverage of Guantánamo has become a rarity, with the stark exception of Carol Rosenberg of the *New York Times* (formerly of the *Miami Herald*), who has provided a steady stream of reporting since 2002 and continues to attend every military commission hearing. According to a Pentagon spokesperson, "In the early years of the commissions until around 2013, media groups of 30 or more traveled to Guantánamo Bay to cover the hearings. Today commissions hearings are covered at Guantánamo by an average of about four media per trip" (email to author, Oct. 6, 2022). That average obscures the fact that Rosenberg is sometimes the lone reporter.

In August 2021, one month ahead of the twentieth anniversary of the 9/11 terrorist attacks, the Biden administration ended the war in Afghanistan under terms negotiated between the Trump administration and the Taliban (the original enemy, along with al-Qaeda), which had regained its position as the dominant force in the country. Although US troops were withdrawn from that first and last hot-war theater of the "war on terror,"[2] until Guantánamo is closed, the war is not over (Ackerman 2022, Lubin 2021). Yet that truism has shallow roots. Wolosky (2022), who served as President Barack Obama's special envoy for Guantánamo closure, opined on the prison's twentieth anniversary: "The world has moved on from the 9/11 era. . .Guantánamo feels today like a relic of another time." Joseph Margulies (2022), the lead attorney in *Rasul v. Bush* (2004), the Supreme

[1]The naval base was used as a detention site from 1991 to 1994 by the administrations of George H.W. Bush and Bill Clinton to hold Haitian refugees interdicted at sea (Hajjar 2022, pp. 26–30; Ratner 1998; Ratner & Ray 2004).

[2]The US government continues to wage undeclared wars in at least 16 other countries (Ebright 2022).

Court case that opened the prison to lawyers, and habeas counsel for Abu Zubaydah, who is one of the three "forever prisoners," writes,

> 9/11 has largely faded from national consciousness. It's not that 9/11 is irrelevant; on the contrary, it has radically altered the legal, cultural, and geopolitical landscape and will shape our present for the indefinite future. But those changes have now been thoroughly normalized, and talk about 9/11 no longer stirs the national blood. Once a year, we in the United States insist we will never forget 9/11 because we suspect in our hearts that we already have. In this amnesic cultural context, American torture is so 2002. It's been eight years since Jack Bauer tortured a terrorist a week on national TV,[3] and pollsters, those indefatigable takers of the American pulse, have not asked Americans for their views on torture since late 2016, the surest sign of its political and cultural irrelevance to domestic life.

Although many assume Guantánamo is a relic of a bygone era, the more consequential reason this clear signifier lacks a coherent legacy is the absence of a common understanding or a shared narrative about what it means or has meant. For some on the right, Guantánamo retains symbolic force for expressing their political views. For example, in 2016, candidate Donald Trump criticized President Obama for trying to close the prison, and he vowed to keep it open and "load it up with some bad dudes." After the 2020 election that President Trump lost to Joe Biden, Virginia Thomas (wife of Justice Clarence Thomas) sent dozens of texts to Trump's chief of staff, Mark Meadows, urging him and the president to fight this imagined injustice. In a November 5 text, Thomas quoted a message circulating on right-wing websites: "Biden crime family & ballot fraud coconspirators. . .are being arrested & detained for ballot fraud right now & over coming days, & will be living in barges off GITMO to face military tribunals for sedition."

Guantánamo's legacy is composed of contested meanings and controversies that reflect and are related to entrenched partisanship and the lack of a national consensus that characterize contemporary US politics. Gitmo Я US.

WHY GUANTÁNAMO?

The Bush administration's decision to establish a prison on the US naval base at Guantánamo Bay was one outcome of a larger plan advanced by Vice President Dick Cheney (Gellman 2008, Suskind 2006); his counsel David Addington (Mayer 2006); and a tight-knit group of lawyers from the White House, Justice Department, and Pentagon, who referred to themselves as the "war council" (Mayer 2008, Yoo 2006). They used the terrorist attacks of September 11, 2001, that killed 2,976 people and the start of a "war on terror"[4] to expand—or, in their view, restore—presidential power (Goldsmith 2007, Huq 2009, Pfiffner 2009).

The grand plan was actually a scheme with two overarching objectives. One was to liberate White House decisions and executive branch policies from oversight (Becker & Gellman 2007, Margulies 2006, Savage 2007). The rationalization for this was the official-sounding "unitary executive thesis," an interpretation of Article II of the US Constitution that started gaining traction in right-wing legal circles in the 1980s (Millhiser 2020). Cheney and the war council pressed the claim that the president's powers cannot be fettered by laws, courts, or Congress when he is acting in the interest of national security or foreign affairs (Calabresi & Yoo 2012, Crouch et al. 2020, Shugerman 2020). They were confident that any policies the administration chose to

[3]Jack Bauer was a character played by Kiefer Sutherland on the Fox show *24*, which aired its first episode on November 1, 2001.

[4]On September 18, Congress passed a joint resolution, the Authorization for Use of Military Force. On September 20, Bush declared, "Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated" (White House 2001).

institute could be framed as necessary responses to terrorist threats, and this would guarantee public acceptance, or at least acquiescence, and marginalize critics (Davenport 2007, Gramlich 2018, Huddy et al. 2005, Huq 2013).

The other objective was to liberate US warfare from legal rules and treaty obligations (Hajjar 2019). Six days after the 9/11 attacks, President Bush secretly authorized the CIA (Central Intelligence Agency), a civilian agency not bound by the laws of war, to embark on a kill-or-capture mission. On October 7, US and coalition forces invaded Afghanistan.

The schemers regarded the confluence of these two objectives—unfettered executive power and unrestricted war-making—a "new paradigm." The "new" is misleading, however, because executive excess in the context of war and national emergency is not without precedent. President Franklin Roosevelt's order to forcibly relocate and detain 120,000 people of Japanese descent and President Harry Truman's decision to drop atomic bombs on Japanese cities during World War II are obvious examples. So, too, is the Nixon administration's 1969 secret bombing of Cambodia and Laos in attempt to turn the tide of the Vietnam War. The new paradigm's novelty was the impetus to reverse the clock to an era before the promulgation of the 1949 Geneva Conventions, and to demonstrate opprobrium for advances in the enforcement of international law since the 1980s (Sikkink 2011).

The groundwork for the offshore enactments of the new paradigm[5] was laid between November 2001 and February 2002. On November 1, President Bush issued Executive Order (EO) 13233 invoking the prerogative to assert privilege over executive branch communications and the work product of government attorneys (Rozell & Sollenberger 2020). This would shield the war council, which already was busy reinterpreting US laws and treaty commitments in regard to the treatment of future prisoners.

On November 13, President Bush issued a military order decreeing that anyone taken into US custody overseas "whom I determine" is "involved in international terrorism" will have no right to challenge his detention or treatment in any court anywhere, and those the US government decides to prosecute will be tried by new military commissions run by the Pentagon, which will be authorized to apply penalties including life imprisonment or death (Greenberg & Dratel 2005, pp. 25–28). Not coincidentally, November 13 was the day the Northern Alliance, which had been warring with the Taliban regime for years and now was allied with US forces, took control of Kabul, and capture and detention operations began escalating.

Bush's November 13 order, which Addington drafted, reflected the schemers' disdain for interagency processes and policy-making consultations.[6] It also reflected either ignorance or callous disregard of the fact that the Geneva Conventions have status as federal law because they are incorporated in the Uniform Code of Military Justice, which governs all branches of the military. They believed that the president has the power to decide which laws to follow and which can be ignored (Abel 2018a).

John Yoo, deputy assistant attorney general in the Office of Legal Counsel (OLC) from 2001 to 2003, was a prolific producer of memos supporting positions advocated by Cheney and Addington. His memos advising the president to declare the Geneva Conventions inapplicable to the "war on

[5] Domestically, the groundwork was laid between September and October 2001, when Bush created the Office of Homeland Security and Congress passed the USA PATRIOT Act that sanctioned vast new emergency powers, which led to the racial profiling and roundup of Muslim immigrants (Cole 2004) and warrantless wiretapping (Risen & Lichtblau 2005).

[6] The order was kept secret from top officials outside the close circle around Cheney, including Secretary of State Colin Powell and National Security Advisor Condoleezza Rice. "Fuck the interagency process," Addington is reported to have said (Mayer 2008, p. 80).

terror" (Greenberg & Dratel 2005, pp. 38–79, 81–117) set off an interagency contestation over treaty law. White House counsel Alberto Gonzales, in a January 25, 2002, memo (ghostwritten by Addington), encouraged Bush to endorse the OLC position: "The war against terrorism is a new kind of war. . .In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions" (pp. 118–21). Secretary of State Colin Powell and his chief legal advisor, William H. Taft IV, challenged the OLC's misperceptions with their own memos arguing that US compliance with the Geneva Conventions was obligatory (pp. 122–25, 129–33).

On February 7, 2002, Bush issued a memo to his top security advisors decreeing that "members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war" (Greenberg & Dratel 2005, pp. 134–35). A line intended as an assurance of good intentions instead conveyed the legitimacy of dehumanization: "Of course, our values as a Nation. . .call for us to treat detainees humanely, including those who are not legally entitled to such treatment." The unitary executive enthusiasts, victorious in their battle with the State Department, saw no need to devise a rollback plan because, in their worldview, the nation's security eternally requires a metaphorically muscular and literally unfettered president (Ackerman 2021, Posner & Vermeule 2007).

Guantánamo-the-prison was all-important to the operationalization of the new paradigm. On December 26, 2001, the naval base was selected as the ideal site for long-term detention because it was a secure facility fully under US control; it was far from the hot-war zone of Afghanistan and close to the continental United States; and, most importantly, the war council assumed it was a place where detainees would be beyond the reach of federal courts (Kaplan 2005, Margulies 2004, Michaelsen & Shershow 2004). According to David Bowker, a State Department lawyer who was part of the interagency group working on detainee affairs, the schemers wanted a place that was "the legal equivalent of outer space" (Isikoff 2006).

At the start of the "war on terror," the government was desperate for information, and military interrogators in Afghanistan were severely challenged in determining, if not entirely incapable of knowing, who had landed in US custody (Mackey & Miller 2004). Decisions were made in Washington to transfer every non-Afghan to Guantánamo on the assumption that terrorism was the only reason foreigners were in that country, although many Afghans were sent there, too.

Guantánamo's first 20 prisoners were airlifted onto the base on January 11, 2002. The Pentagon published photos of them in a barbed wire enclosure bound in contorted positions kneeling on the ground (i.e., stress positions), wearing blackout goggles, sound-blocking headphones, and padded mittens to achieve full sensory deprivation (Rosenberg 2022b). In response to criticisms that this constituted prisoner abuse, officials asserted that these were "the worst of the worst,"[7] thus implying that they were responsible for 9/11, and therefore, whatever would be done to them was justified.

Those 20 detainees and the hundreds who joined them were held largely incommunicado, except for visits from representatives of the International Committee of the Red Cross and a limited number of diplomatic missions if their home countries were US allies (Wilson 2003). Information about detainees was classified, including their names, nationalities, and ages. Their first accommodation, Camp X-Ray, was composed of open-air pens (Greenberg 2009). In March 2002, they were moved to crude cells made from welded shipping containers, and the following month they were moved into a fixed structure named Camp Delta, which contained four subcamps:

[7]Brigadier General Michael Lehnert was the first to use this expression when he spoke to the press on the base hours before the first prisoners arrived (Rosenberg 2022b).

Camps 1, 2, and 3 were maximum security with individual cells, and Camp 4 was medium security with communal dormitories.

Guantánamo's original purpose was as a "battle lab," according to the first commander of intelligence operations, Major General Michael Dunleavy (Denbeaux et al. 2015). The plan was to use interrogations to produce "actionable intelligence" that could be deployed to wage and win the "war on terror." Bush ordered Dunleavy to report weekly and in person to Secretary of Defense Donald Rumsfeld about any intelligence gathered from detainees, and to leave no paper trail. It would take almost a year for the first bits of information about the treatment of people in US custody to become public (Priest & Gellman 2002).

WHAT GUANTÁNAMO MEANS, TAKE ONE

The secrecy shrouding Guantánamo inspired critics to characterize it as a "legal black hole" (Neuman 2004, Ratner 2005, Ratner & Ray 2004, Rose 2004, Steyn 2004). There was a surge of academic interest in this place, where imprisoned residents were housed in "camps" and appeared to be "beyond the law" (Amann 2004; Butler 2004, pp. 50–111; Hajjar 2003; Kaplan 2005; Klemens et al. 2003; Minca 2004).

Two theorists became especially prominent points of reference in scholarship on the "war on terror" and the meaning of Guantánamo. Schmitt's (1986, 1996) theories of sovereignty, emergency, and enemies, and especially his conception of the sovereign as "he who decides on the exception" (Schmitt 1986, p. 5), seemed well-tailored to understand the Bush administration's attachments to uncheckable executive power in the post-9/11 era (Dyzenhaus 2006, Scheuerman 2006a). Agamben's writings on sovereign power and "bare life" (Agamben 1998), camps as paradigmatic spaces of exception (Agamben 1999), and states of exception that result from the suspension of juridical law (Agamben 2005) seemed to speak to the conditions at Guantánamo. Hussain (2007, p. 739) observed that scholarly interventions to discern the meaning of Guantánamo resulted in "the ascendancy if not near monopoly of a single theoretical paradigm, that of the state of exception."

Scholars were attracted to the state of exception paradigm because what they could see—or, rather, not see—looked like a space where juridical law had been suspended by the sovereign (Aradau 2007, Reid-Henry 2007). Johns (2005, p. 614, emphasis in original) was an early dissenter to this interpretation: "The detention camps of Guantánamo Bay are above all works of legal representation and classification. They are spaces where law and liberal proceduralism speak and operate *in excess*." Gregory (2006, p. 412) cites this quote approvingly, and then asks,

> What demands such an involuted legalism through which the law is contorted into ever more baroque distinctions? The answer is, in part, a matter of indeterminacy: the Bush administration did not speak with a single voice. . .Legal advisors and political principles constantly invoked legal precedents and advanced legal interpretations to support their rival claims.

Hussain (2007, pp. 734–35) advised readers that "the emergency regime that has operated since September 11, in general, and the role of the detention camps at Guantánamo Bay, Cuba, in particular" exemplifies not lawlessness but "hyperlegality."

Legal scholars speculated about Guantánamo's meaning, sometimes indirectly, through their prescriptive writings on the post-9/11 exercise of executive power (Barron & Lederman 2008, Koh 2003, Margulies 2004, Scheuerman 2006b, Waldron 2005). For example, Gross (2003, p. 1097) proposed that serious emergencies may require deviations from the Constitution and other laws "to preserve enduring fidelity to the law." Ackerman (2004, p. 1044) cautioned, "Lawlessness, once publicly embraced, may escalate uncontrollably." He proposed "an emergency Constitution" to

contain and temporally limit the government's responses to urgent threats. "Rather than indulge in melodramatic invocations of existential threats, liberal constitutionalists should view the state of emergency as a crucial tool enabling public reassurance in the short run without creating long-run damage to foundational commitments to freedom and the rule of law" (Ackerman 2004, p. 1044).

THE ROAD TO *RASUL*

The road to *Rasul* begins with the arrest in early December 2001 of an Australian named David Hicks, who was captured by the Northern Alliance and sold to US forces for bounty. Unlike almost every other detainee except US citizen John Walker Lindh, Hicks's name was publicized when officials touted the capture of an "Australian Taliban."

Michael Ratner, president of the Center for Constitutional Rights (CCR), contacted the Australian attorney that Hicks's father had hired and volunteered to file a habeas petition. Offer accepted. Then Hicks was shipped to Guantánamo. Soon thereafter, Ratner learned the names of three British citizens from the town of Tipton because the US government notified the British Foreign Office that Shafiq Rasul, Asif Iqbal, and Ruhal Ahmed were at Guantánamo. Ratner contacted their relatives, who accepted his offer to file habeas petitions. Two death penalty lawyers, Joseph Margulies and Clive Stafford-Smith; a human rights lawyer, Steven Watt; and a law professor with expertise in habeas corpus, Eric Freedman, joined forces with CCR to challenge the president's authority to secretly detain people at Guantánamo (Freedman 2003, Margulies 2004, Ratner 2021). They filed *Rasul v. Bush* in the DC District Court on February 19, 2002. Around that time, Tom Wilner, a senior partner at Shearman & Sterling, was contacted by the Kuwaiti government seeking help for 12 Kuwaitis at Guantánamo. Wilner agreed to represent them and filed *Al Odah v. United States* (2004) on May 1.

These two cases were the first efforts to litigate how the "war on terror" was being waged abroad. They launched what developed into a multifront "war in court" (Hajjar 2022).

Rasul and *Al Odah* raised a legally monumental question: Does the president have the authority to detain people indefinitely without hearings or charges? But the litigation turned on a more basic question: Do US courts have jurisdiction at Guantánamo? Of course, federal courts have jurisdiction because US laws are enforced on the base. But do they have jurisdiction over foreigners held by the military on the president's order? The court accepted the government's position that it lacked jurisdiction and dismissed the cases, and on appeal, the DC Circuit Court upheld the dismissals, thereby validating Bush's November 13 order that detainees had no enforceable rights (Abel 2018b, Hafetz 2010, Margulies 2006, Resnik 2010).

Rasul and *Al Odah* were appealed to the Supreme Court. The writ of certiorari was supported with eight amicus briefs, including from former American prisoners of war; former diplomats; retired high-ranking military officers; and Fred Korematsu, who had sued the government over the Japanese-American internment. In November 2003, the court agreed to hear the cases, and they were merged as *Rasul*.

The road to *Rasul* runs through Abu Ghraib. On April 28, 2004, CBS's *60 Minutes II* broadcast horrific photos of prisoners being tortured by US soldiers in the Abu Ghraib prison in Iraq (Hersh 2004), which the United States had invaded in March 2003. In addition to igniting a scandal of global proportions, these images had three sequential political effects: They demolished the official line that all detainees are treated humanely; this revelation motivated Congress to hold hearings in May to question officials about US prisoner policies; and the political pressure induced the administration to release some legal memos and policy documents in early June, while others were leaked to the press. These documents revealed gross manipulations and incompetent

interpretations of law (Cole 2009, Jaffer & Singh 2007, Lederman 2007, Luban 2014, Roberts 2007). They were instantly branded "torture memos" because they exposed that top officials had authorized a torture policy (Danner 2004, Greenberg & Dratel 2005).

The Supreme Court issued its *Rasul* decision on June 28, 2004. In a six-to-three ruling, the court decided that Guantánamo detainees have habeas corpus rights to challenge their detention (Neuman 2005). In his dissent, Justice Antonin Scalia wrote, "Today, the Court springs a trap on the Executive, subjecting Guantánamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees."

Scalia's minority opinion would gain traction the following year, when Senator Lindsey Graham introduced legislation to strip federal courts of habeas jurisdiction over detainees. Graham's amendment was included in the 2005 Detainee Treatment Act (DTA). Paradoxically, the DTA also included Senator John McCain's amendment prohibiting military interrogators from using cruel, inhumane, and degrading treatment. The original version of McCain's amendment applied to all US personnel, but Bush threatened to veto the entire defense appropriations bill unless it was revised to incorporate a "CIA exception." Following months of pressure from the White House, McCain yielded to that demand (Pearlstein 2006, Swazo 2007, Taylor & Wittes 2009).

GUANTÁNAMO AFTER *RASUL*

The *Rasul* decision provided an opening for lawyers who were exorcised about revelations of prisoner abuse at Abu Ghraib and the "legalization" of torture. First dozens, then hundreds of lawyers from all walks of the profession volunteered to serve as habeas counsel for detainees. At its peak, more than 500 lawyers and 100 law firms were involved in Guantánamo habeas litigation. CCR became a de facto headquarters for the "Guantánamo Bay Bar Association," or "Gitmo Bar" (Fletcher et al. 2012, Hafetz & Denbeaux 2009, Sullivan 2006).

Despite *Rasul*, the Bush administration refused to provide an accounting of who was detained at Guantánamo.[8] Journalists, human rights organizations, and local reporters aided the push to find the names of men and boys who had been disappeared (Ratner 2005). CCR created a database and assigned identified detainees to volunteer lawyers, who then had to reach out to their clients' families to obtain "next friend" permission to file habeas petitions (Belk 2004).

The Bush administration was not chastened by its Supreme Court loss. Five days after the *Rasul* decision, the Pentagon established Combatant Status Review Tribunals (CSRTs) as an attempt to satisfy the court's requirement for "hearings" while maintaining the block on detainees' access to lawyers or federal courts. According to the establishing order, "The Tribunal is not bound by the rules of evidence such as would apply in a court of law." The evidence the CSRTs reviewed to decide whether detainees met the criteria for continued detention included coerced and hearsay statements individuals had made about themselves and/or others, as well as unverified information from captors or unnamed witnesses (Amnesty Int. 2005, Gray 2009).

The CSRT hearings began on August 25, 2004. When they concluded six months later, all but 38 of more than 500 had been determined to be legitimately detained. The Justice Department submitted CSRT transcripts as government responses to habeas petitions.

Gitanjali Gutierrez was the first habeas counsel to travel to the base on August 31, 2004 (Hajjar 2022, pp. 96–98). She and the lawyers who followed were required to sign a protective order

[8]The administration was finally forced to publicize the names of detainees after the Associated Press won a FOIA (Freedom of Information Act) lawsuit on April 19, 2006.

barring them from revealing anything their clients said, including information about coercive interrogation techniques and inhumane treatment. Additionally, lawyers could not discuss the CSRT transcripts with clients because they were classified. What lawyers could—and did—do was become witnesses to the vast gap between official rhetoric and reality (Stafford Smith 2007, Wax 2008).

Bush administration officials had a controlling advantage over the public narrative through enforcement of secrecy. This enabled deployment of propaganda and false claims about humane treatment, indisputable guilt, and the efficacy of interrogations. In the 2005 National Defense Strategy, the administration asserted that "our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism." This demonization of lawyers who challenged the government's "war on terror" policies (Frakt 2010) was amplified by right-wing officials, scholars, and pundits (Lewis 2007, Rivkin & Casey 2007, Yoo 2008).

But *Rasul* did create a negative incentive for the administration to accelerate the repatriation of those deemed no longer valuable to the intelligence-gathering mission. Between 2004 and 2005, 22 citizens or residents of countries in Western Europe, including the Tipton 3, were among those repatriated. By the time Bush left office in 2009, 534 had been transferred out.

A new narrative emerged based on firsthand accounts as some former detainees gave interviews to journalists, human rights investigators, and documentarians (Columbia Cent. Oral Hist. 2008, Fletcher & Stover 2009, Honigsburg 2019, UC Davis Cent. Stud. Hum. Rights Am. 2005, Worthington 2007). In 2006, Winterbottom & Whitecross (2006) directed *The Road to Guantánamo*, which was based on the experiences of the Tipton 3 and included reenactments of their interrogations in Afghanistan and Guantánamo. Moazzam Begg, a British citizen repatriated in 2005, cowrote the first detainee autobiography (Begg & Brittain 2006), and over the years others followed (Adayfi 2021, Boumediene & Ait Idir 2017, Habib 2009, Hicks 2010, Kurnaz 2008, Slahi 2015). Falkoff (2007), habeas counsel for a dozen Yemenis, got a collection of detainees' poems cleared through censors and published it.

The Bush administration attempted to counter criticisms and first-person accounts of abuse and innocence by asserting that 22.7% of people released from Guantánamo between 2002 and 2009 "returned to the fight" or "reengaged in terrorist activities" (Const. Proj. 2013, pp. 295–310). Those who made "anti-American" public statements were lumped into the recidivism statistics. A team at Seton Hall University led by Mark Denbeaux inaugurated a counternarrative using the Pentagon's CSRT records, which were made public through a Freedom of Information Act (FOIA) request. They showed that 55% of detainees classified as enemy combatants had committed no hostile acts against the United States or its allies, 40% had no connection to al-Qaeda, and another 18% had connections to neither al-Qaeda nor the Taliban; only 5% had been captured by US forces, whereas 86% were sold for bounty by Pakistan or the Northern Alliance (Denbeaux & Denbeaux 2006, Denbeaux et al. 2011).

Although detainees were tortured in Afghanistan, Iraq, and CIA black sites, Guantánamo became materially and symbolically central to critiques of US interrogation and detention policies (Cent. Const. Rights 2006, Phillips 2010, Rejali 2007, Saar & Novak 2005, Senate Comm. Armed Serv. 2008, Zimbardo 2007). As more information became public, the official line evolved from literal denial—we do not torture—to interpretative denial—what we do is not "torture" but "enhanced interrogation techniques" (Del Rosso 2014). The American Civil Liberties Union spearheaded a FOIA campaign to obtain official documentation, which was posted on a dedicated website (**https://thetorturedatabase.org**). Rather than inspiring condemnation, however, the revelations increased US public approval for torture (Gronke et al. 2010).

TRYING THE MILITARY COMMISSIONS

The Pentagon selected the first several detainees for prosecution in 2003. The plan was to get quick convictions through plea bargains to demonstrate that the military commissions were an effective tool in the "war on terror." A consequential miscalculation was the assumption that judge advocates general (JAGs) assigned to defend detainees would obey orders to plead their clients guilty. Instead, the first five JAGs prioritized their ethical duties as lawyers, and as soldiers, they were offended by the intention to use the military for political purposes. Their resistance to this sham institution seeded a military–civilian alliance in defense of the rule of law (Frakt 2011; Hajjar 2005, 2022; Luban 2008; Mori 2014).

Lieutenant Commander Charles Swift, whose client was a Yemeni named Salim Hamdan, joined forces with Georgetown University law professor Neal Katyal to sue the secretary of defense over the legality of the commissions. In April 2004, Swift filed *Hamdan v. Rumsfeld*, and he retained Katyal as his attorney in case the government retaliated against him. On November 9, 2004, the DC District Court ruled that Hamdan could not be prosecuted until his status had been determined by an impartial tribunal. The Bush administration appealed. On July 15, 2005, the three-judge panel of the DC Circuit Court (which included John Roberts, who was appointed Chief Justice the following year) reversed the lower court decision and affirmed the administration's position that the judicial branch has no jurisdiction and US treaty obligations confer no right or remedies on accused terrorists. Hamdan's attorneys appealed to the Supreme Court, which granted certiorari (Mahler 2008, Swift 2007).

On June 29, 2006, the court issued its ruling in *Hamdan v. Rumsfeld* (2006). The majority found that the military commissions created by Bush's November 2001 order violated the Constitution and, therefore, were canceled. Even more devastating for the administration was the determination that everyone detained by the United States was covered by Common Article 3 of the Geneva Conventions, which proscribes torture, cruel treatment, and outrages on human dignity as war crimes. The decision further polarized discourse about Guantánamo. Vladeck (2008, p. 934) writes, "Depending on whom you ask, [*Hamdan*] was either a decisive, landmark, and unprecedented victory for civil libertarians, a disturbing example of both judicial activism and of marked disrespect for the proper deference owed to the President during wartime, or, in some cases, both."

Hamdan had two major and entwined effects on the legal and political landscape. The administration was forced to empty the CIA black sites because of the court's finding on Common Article 3. At a press conference on September 6, 2006, Bush announced that 14 people who had been in CIA custody for years were about to be transferred to Guantánamo. He praised the CIA's rendition, detention, and interrogation (RDI) program, and his own decisions to authorize "an alternative set of procedures," which, he claimed, "were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations" (White House 2006). The second effect flowed from Bush's announcement that the White House was sending legislation to Congress to restore the military commissions. The following month, the Military Commission Act (MCA) was passed and signed into law. The MCA preserved the prerogative of prosecutors to use coerced statements as evidence, gave statutory credence to invented war crimes to enable non-soldiers to be charged for violations of the laws of war, and expanded on the DTA by stripping federal courts of jurisdiction over all matters relating to any noncitizen held as an enemy combatant (Vladeck 2010, pp. 325–28). The MCA also granted ex post facto immunity for war crimes perpetrated by any US official or state agent, thereby undermining the 1996 federal War Crimes Act (Dorf 2007). The MCA effectively enshrined the new paradigm in law.

The administration intended to prosecute people who had been tortured, and the presumption was that the MCA made their ill treatment irrelevant. This was another consequential

miscalculation. Military and civilian defense lawyers used the trials to expose long-hidden facts about the abuse of their clients. Seven military prosecutors, including two chief prosecutors, quit, and two testified as defense witnesses about the government's dependence on dubious evidence and political pressures dictating how cases should be handled (Ahmad 2009; Bravin 2013; Frakt 2009, 2011; Hajjar 2022).

The Bush administration had planned to prosecute approximately 80 detainees, including so-called high-value detainees who had been in the CIA black sites until 2006. By the time Bush left office, they had achieved three convictions. Hicks agreed to an Alford plea in a deal politically negotiated by Cheney. Hamdan was tried and found guilty of material support for terrorism but was acquitted of all other charges and given sentencing credit for time served. Finally, Ali al-Bahlul, who boycotted his trial, was found guilty of material support and conspiracy and given a life sentence.

In 2007, a high-security courtroom was built specifically for the trial of six people accused of responsibility for the 9/11 attacks. Five of them, including alleged mastermind Khalid Sheikh Mohammed, whom the government refers to as KSM, had spent years in CIA black sites. The sixth, Mohammed al-Qahtani, had been sent directly from Afghanistan to Guantánamo in 2002. When the government came to suspect that al-Qahtani was implicated in the 9/11 plot as "the 20th hijacker," Rumsfeld authorized military interrogators to utilize tactics the White House had approved for the CIA, and they quickly became standard operating procedures for Guantánamo interrogations (Fallon 2017, Sands 2008, Zagorin & Duffy 2005). But in 2008, Susan Crawford, the convening authority for the military commissions, dropped the charges against al-Qahtani because he had been tortured by soldiers (rather than CIA agents and contractors). When Crawford told Bob Woodward (2009) "we tortured Qahtani," she became the first and last Bush administration official to admit the use of torture at Guantánamo.

The 9/11 case moved forward with five defendants. The Bush administration was confident that an expeditious trial would result in unanimous guilty verdicts and death sentences, and ideally the five would be executed before the president left office. Instead, this case was derailed in December 2008, when the defendants offered to plead guilty on the condition that they go directly to execution. As politically appealing as that offer might have been, the system was not built for executions without trial.

OBAMA'S GUANTÁNAMO

Senator Barack Obama was critical of the Bush administration's prisoner policies, and he voted against the MCA in 2006. During the 2008 presidential campaign, unlike Republican candidate McCain, Obama praised the Supreme Court's decision in *Boumediene v. Bush* (2008), which held that Guantánamo detainees have a constitutional right to habeas (Azmy 2010, Neuman 2009, Reynolds et al. 2012). On Obama's first full day as president, he signed three EOs: One ended the torture policy and canceled the legal opinions on which it was based, another pledged to close Guantánamo within a year, and the third established an interagency task force to review detainee policy and provide recommendations for how to deal with the 240 who remained. The military commissions were suspended for 120 days.

Although Bush, by the end of his time in office, had come to accept that Guantánamo should close (*CBS News* 2006), Obama's actions and plans became a focal point for fast-rising partisan (and racist) animus to his presidency. Cheney came out of retirement to give press interviews berating the new president for relinquishing interrogation techniques that he falsely claimed "work" (Hajjar 2009). Cheney's pique climaxed in a speech at the American Enterprise Institute on May 21 in which he extolled the Bush administration's bold security policies and condemned Obama as soft on terrorism (Cheney 2009).

The same day, Obama gave a speech at the National Archives. He criticized people—clearly implying Cheney—who defend torture and the falsehoods of efficacy to which it is lathed, and he derided the "series of hasty decisions" to establish Guantánamo. "Rather than keeping us safer, the prison at Guantánamo has weakened American national security" (Obama 2009). But, he explained, "we don't have the luxury of starting from scratch. We're cleaning up something that is, quite simply, a mess—a misguided experiment that has left in its wake a flood of legal challenges that my administration is forced to deal with on a constant, almost daily basis." Then Obama outlined his administration's plans: Some detainees would be prosecuted in federal court. Some would be prosecuted in the military commissions he pledged to reform (Congress passed a modified MCA in October 2009). Those who won their habeas cases and those whom the government decided no longer posed a threat to national security would be transferred out. And finally, those "who cannot be prosecuted yet who pose a clear danger to the American people" would remain in indefinite detention. The only difference from Bush administration policies was the prospect of federal prosecutions.

In June 2009, Ahmed Ghailani was transferred for trial in the Southern District of New York and charged with involvement in the 1998 al-Qaeda bombings of two US embassies in Africa (Hirsch 2006). Because Ghailani was one of the former CIA detainees, the administration regarded this as a test run for the 9/11 case. Attorney General Eric Holder confirmed this in a press conference on November 13, when he announced plans to transfer the five defendants to New York.[9]

But the Ghailani case produced political blowback that proved fatal to the closure of Guantánamo. The judge excluded a key prosecution witness because his incriminating statements had been made while he was in a black site, and the jury convicted Ghailani of one count of conspiracy while acquitting him of 284 other charges, including murder. Although Ghailani received a life sentence, opponents of federal trials (Goldsmith 2010, Wittes & Goldsmith 2010) perceived the "failure" of a civilian judge and jury as evidence to support their positions (Kuhn 2011). In the 2011 National Defense Authorization Act, Congress banned the transfer of any detainee to the United States for any reason, including trial or detention (Frakt 2012).

The first detainee the Obama administration chose to prosecute in the military commissions was Omar Khadr, who was 15 when he was captured in Afghanistan in 2002 and 16 when he arrived at Guantánamo (Shephard 2008). The main charge was "murder in violation of the laws of war" for allegedly throwing a grenade that killed a US soldier during a battle. Since the end of World War II, no government had prosecuted a child soldier for war crimes. Although the 2009 MCA barred prosecutors from using coerced statements, it fell to military judges to decide the standard. The judge in Khadr's case ruled that none of the abusive treatment he endured during his interrogations merited the exclusion of his self-incriminating statements. His military lawyer decided that the best option was to negotiate a plea bargain. In October 2010, Khadr was sentenced to eight years with no credit for time served. During Obama's presidency, four other detainees also were convicted through plea bargains.

The MCA authorized the Court of Military Commission Review (CMCR) to hear appeals and provided a further option to appeal CMCR decisions to the DC Circuit Court. In 2009, lawyers appealed the convictions of Hamdan, who completed his sentence and was repatriated to Yemen in 2009, and al-Bahlul; they were challenging the legality of war crimes invented by the US government. In 2011, the CMCR validated Hamdan's conviction for material support.

[9]According to a December 2009 opinion poll on "the best way to handle" Guantánamo detainees, 57% favored commission trials, 21% favored civilian trials, and 10% favored detention without trial (Przybyla & Johnston 2009).

On October 16, 2012, the DC Circuit Court overturned that ruling on the grounds that material support was not an internationally recognized war crime at the time of Hamdan's actions (between 1996 and 2001). Hamdan's conviction was vacated, as were other appealed cases with a conviction for this charge, including al-Bahlul's. Moreover, prosecutors could no longer charge anyone at Guantánamo with material support. However, al-Bahlul also had been convicted for conspiracy. The CMCR validated that charge, and the DC Circuit Court invalidated it for the same reason: It was not a war crime at the time of his action. The Obama administration appealed for an en banc reconsideration. On October 20, 2016, in a deeply divided ruling, a slim majority affirmed al-Bahlul's conspiracy conviction. Vladeck (2016) described the panoply of opinions as "surprisingly sloppy." He added, "Until and unless that question is conclusively resolved by the courts, the commissions will continue to operate under a long (and ever-lengthening) shadow of illegitimacy."

Despite Obama's pre-presidential praise for *Boumediene*, when habeas cases began being litigated in 2009, his administration appealed every detainee win. The DC Circuit Court overturned every victory and instructed lower-court judges to accept the reliability and accuracy of government evidence unless a detainee could prove flaws. On April 29, 2011, Wikileaks released 759 classified "detainee assessment briefs" dated between 2002 and 2009, which were the basis on which the government justified continued detention. The briefs revealed that 8 detainees, including al-Qahtani, were the sources of "evidence" against 255 others (Kadidal 2012, Lasseter & Rosenberg 2013).

With a few exceptions, habeas litigation ground to a halt. Lawyers representing seven detainees petitioned the Supreme Court to decide whether the appeal court's decisions and guidance complied with *Boumediene*. On June 11, 2012, the court announced that it would not review any of them, offering no reasoning. Thus, the habeas rights that detainees had won at the end of Bush's presidency were smothered to death during Obama's (Hafetz 2016, Huq 2017, Kadidal 2022). And the denial of due process was validated by US courts.

Obama signed an EO on May 7, 2011, creating a Periodic Review Board, a successor to the CSRTs, to assess whether individuals' detentions were still necessary. However, a majority of Board-cleared detainees remained stuck because, in 2010, Obama imposed a ban on repatriations to Yemen. The ban was lifted in 2013, but it was reinstated in 2015, which affected 47 of the remaining 54 who had been cleared. By the end of Obama's second term, his administration had released 144 detainees, leaving 41, including 5 who had been cleared.

GUANTÁNAMO FOREVER?

A week into Donald Trump's presidency, he signed an EO to keep Guantánamo open. Although his fantasies of restocking the cells came to naught, he refused to transfer cleared detainees. The only person to leave Guantánamo during Trump's single term was Ahmed al-Darbi, who pled guilty in 2014 and was repatriated to Saudi Arabia in 2018 to serve the remainder of his sentence. On every other level, the Trump administration's policies and actions on Guantánamo were a continuation of his predecessor's.

When Biden took office, he emulated Obama's aspirations to close the prison, albeit without making sweeping promises. Of the 40 detainees at the start of the Biden administration, to date, 10 have been released. These include al-Qahtani, who was repatriated to Saudi Arabia in March 2022, where he will remain in detention but will receive treatment for his severe mental illness. On February 2, 2023, Majid Khan, who pled guilty in 2012 and completed his sentence in 2022, was transferred to Belize; he is the first former CIA detainee to be released.

After Guantánamo art was featured in an exhibition at the John Jay College of Criminal Justice in 2017, the Trump administration declared that all art produced by detainees was government

property that could be kept or destroyed at the military's discretion. In October 2022, eight current and former detainees petitioned the Biden administration to free the art. Moath al-Alwi "told his lawyer that he would rather his artwork be released than himself, 'because as far as I am concerned, I'm done, my life and my dreams are shattered. But if my artwork is released, it will be the sole witness for posterity'" (Liu 2022). In February 2023, the Biden administration lifted the ban, but the art's release is tied to the artists' release.

THE LEGACY IS TORTURE

The most important reason Guantánamo cannot be closed is because the United States is politically and legally incapable of coming to terms with the legacy of post-9/11 torture and associated practices of kidnapping, forced disappearance, and protracted incommunicado detention. Across four administrations, there has been no accountability for these gross crimes that violate US and international law and neither justice nor official apologies for any victims (Hajjar 2022).

Many Americans think torture is wrong, but many others, including more than 70% of Republicans, do not (Tyson 2017). Like the deep bench of American susceptibility to wild conspiracy theories, there is pervasive hostility to hard evidence that torture is ineffective. Drawing on public opinion research, Rejali (2017) found that "when it comes to torture, people appear to be driven more by social cues, superstition, resentment and indecision than by philosophy, morality or rational outcomes. . .[R]espondents who favor torture don't care whether it produces a positive or negative security outcome."

The fullest official account of the CIA's RDI program was produced by the Senate Select Committee on Intelligence, which contains extensively documented failures and concludes with harsh criticisms (Senate Sel. Comm. Intell. 2014). But only a heavily redacted executive summary of the full 6,300-page report was made public.[10] When Republicans won control of the Senate in 2014, they attempted to have every copy of the report destroyed. Two copies survived: One is locked in a Pentagon safe by order of a Guantánamo military commission judge, and Obama put his copy in the presidential archive but ordered it not to be accessible for the longest time permitted by law. Consequently, the truth about torture is both secret and politically controversial.

Guantánamo is the most enduring manifestation of the legacy of US torture. Although the military reformed its interrogation manual to bar cruel, inhumane, and degrading treatment, and the CIA black sites were emptied in 2006, every detainee who remains at Guantánamo and everyone transferred out embodies this legacy because "whoever is tortured, stays tortured" (Amery 1980, p. 34).

Three military commission cases remain alive because no administration has been willing to pull the plug on this failed experiment. The heart of this failure is the irreconcilability of torture and justice. The 9/11 case spent a decade in pretrial litigation as defense lawyers fought prosecutors over access to classified evidence of the defendants' torture (Hajjar 2022, Ryan 2016). In December 2021, former chief military defense counsel General John Baker (2021) testified before the Senate Judiciary Committee: "It is too late in the process for the current military commissions to do justice for anyone. The best that can be hoped for at this point. . .is to bring this sordid chapter of American history to an end."

Finally, in March 2022, prosecutors in the 9/11 case conceded that unanimous guilty verdicts and death sentences were unlikely and initiated plea negotiations (Hafetz 2022). But there has

[10]The Rendition Project and the Bureau of Investigative Journalism teamed up and produced the most detailed account of the CIA's torture program by exposing information redacted in the Senate report (Raphael et al. 2019).

been no progress in the negotiations (as of May 2023) because the Biden administration has failed to respond to prosecutors' request for guidance. In the death penalty case against Abd al-Rahim al-Nashiri, who is accused of orchestrating the 2000 bombing of the USS *Cole* that killed 17 sailors, prosecutors are still attempting to use tortured evidence against him (Roehm 2022).

CONCLUSION: THE GUANTÁNAMO PHENOMENON

Guantánamo is a sui generis phenomenon because its creation revealed a preexisting but unacknowledged weakness in the rule of law, and its continued existence—especially detention without trial or charges—actively degrades the rule of law. The prison was established on the Guantánamo Bay naval base for the explicit purpose of gaming the rule of law. Twenty-two years later, it remains open, the most enduring and iconic manifestation of a war that most people—at least those in the United States—have come to imagine is over.

How is Guantánamo sui generis? After all, the United States accurately can be described as a prison nation because it has the largest prisoner population in the world and the highest per capita rate of imprisonment. But Guantánamo is not like other prisons that existed at the time of its creation because the people imprisoned there were deprived of even the most basic legal rights. It was not that they did not enjoy the rights they deserved. Rather, they were assigned a rightless status by executive fiat, an explicit repudiation of the rule of law and the hard-won principle of universal humanity. An official policy of secret detention was a sui generis phenomenon for the United States, and Guantánamo was its primary address.

The decision to secretly imprison people without charges while claiming that every detainee was guilty of terrorism was a political project varnished with legal rationales. The Guantánamo phenomenon in its first phase was fortified by a claim of executive power that the US president has the inherent authority do to whatever he deems necessary to protect national security. That radical interpretation of executive power has not been undone.

The CIA's torture program originated separately from military interrogations. But it became part of the Guantánamo phenomenon when the Bush White House passed the menu of torture techniques and the accompanying legal rationales to the Pentagon, which adopted them as standard operating procedure for military interrogators at Guantánamo.

The US torture policy was a deniable official secret until the Abu Ghraib scandal broke in April 2004. Although the photos and then the "torture memos" made it harder to sell the line that all detainees were treated humanely as a matter of policy, the failure to fully renounce torture or to provide even minimal redress for victims and the high degree of secrecy that still surrounds it are the brick and mortar of the Guantánamo phenomenon. Across four administrations, one of the few examples of bipartisan consistency is the attempt to convict people who were tortured by making their abuses irrelevant. The Guantánamo phenomenon evinces the powerful grip of American exceptionalism, which cannot be broken despite a string of prosecutorial failures, let alone indisputable evidence of crimes of state.

The rule of law means legal laws lawfully enforced. History and context matter to the meaning of legal laws because the standards of legality change. Over the second half of the twentieth century, as a result of changes and developments in international law, being "human" was imbued with new rights, and state prerogatives to perpetrate violence were regulated in new ways. By the turn of the twenty-first century, there was a near-universal consensus—in principle, if not practice—that fighting wars legally required adherence to the 1949 Geneva Conventions.

After 9/11, decisions by US officials to buck the global consensus were motivated by desires to do things to enemies that were proscribed and criminalized by law. What made these decisions unique and unprecedented in this temporal context was not the things themselves, for there is

nothing new under the sun about torture and forced disappearance. Rather, what was sui generis was the rationalization that whatever the president chooses to authorize is legal, or at least not illegal, and rule-of-law norms regarding sovereign power and individual rights are irrelevant. This executive power grab illuminated a preexisting but unacknowledged and previously unexploited weakness in the rule of law.

The United States has not recovered—or even attempted a recovery—from self-imposed degradations in the rule of law. The government has enforced impunity for US perpetrators of torture, forced disappearance, and other gross crimes by refusing to punish criminal violations of international laws in domestic courts, and US courts have accepted government arguments that such cases are nonjusticiable. When no one responsible for US torture has been held to account, can we say with any confidence that the absolute prohibition (as a jus cogens norm), which is foundational to the modern rule of law, has survived? That depressing uncertainty is Guantánamo's legacy.

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LITERATURE CITED

Abel RL. 2018a. *Law's Wars: The Fate of the Rule of Law in the US "War on Terror."* Cambridge, UK: Cambridge Univ. Press

Abel RL. 2018b. *Law's Trials: The Performance of Legal Institutions in the US "War on Terror."* Cambridge, UK: Cambridge Univ. Press

Ackerman B. 2004. The emergency constitution. *Yale Law J.* 113:1029–90

Ackerman S. 2021. *Reign of Terror: How the 9/11 Era Destabilized America and Produced Trump*. New York: Viking

Ackerman S. 2022. The war on terror isn't over, according to Biden's Justice Dept. *Forever Wars*, Aug. 25. **https://foreverwars.ghost.io/biden-doj-prisoners-of-the-forever-war/**

Adayfi M. 2021. *Don't Forget Us Here: Lost and Found at Guantánamo*. New York: Hachette Books

Agamben G. 1998. *Homo Sacer: Sovereign Power and Bare Life*, transl. D Heller-Roazen. Stanford, CA: Stanford Univ. Press (from Italian)

Agamben G. 1999. *Remnants of Auschwitz: The Witness and the Archive*, transl. D Heller-Roazen. New York: Zone Books

Agamben G. 2005. *State of Exception*, transl. K Attell. Chicago: Univ. Chicago Press

Ahmad MI. 2009. Resisting Guantánamo: rights at the brink of dehumanization. *Northwest. Univ. Law Rev.* 103(4):1683–763

Al Odah v. United States, Civ. Act. 02-828 (2004)

Amann DM. 2004. Guantánamo. *Columbia J. Transnatl. Law* 42:263–348

Amery J. 1980. *At the Mind's Limit: Contemplations by a Survivor on Auschwitz and Its Realities*, transl. SP Rosenfeld, S Rosenfeld. Bloomington: Indiana Univ. Press

Amnesty Int. 2005. *Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power*. London: Int. Secr.

Aradau C. 2007. Law transformed: Guantánamo and the "other" exception. *Third World Q.* 28(3):489–501

Azmy B. 2010. Executive detention, *Boumediene*, and the new common law of habeas. *Iowa Law Rev.* 95:445–539

Baker JG. 2021. *Testimony of United States Brigadier General John G. Baker, Chief Defense Counsel*. Testimony, Senate Judic. Comm., Dec. 7. **https://www.judiciary.senate.gov/imo/media/doc/Baker%20Testimony2.pdf**

Barron DJ, Lederman MS. 2008. The commander in chief at the lowest ebb—framing the problem, doctrine, and original understanding. *Harvard Law Rev.* 121(3):689–804

Becker J, Gellman B. 2007. Leaving no tracks. *Washington Post*, June 27, pp. A1, 7

Begg M, Brittain V. 2006. *Enemy Combatant: My Imprisonment at Guantánamo, Bagram, and Kandahar*. New York: New
Belk CN. 2004. Next friend standing and the war on terror. *Duke Law J.* 53(6):1747–78
Boumediene v. Bush, 553 US 723 (2008)
Boumediene L, Ait Idir M. 2017. *Witnesses of the Unseen: Seven Years in Guantánamo*. Stanford, CA: Redwood
Bravin J. 2013. *The Terror Courts: Rough Justice at Guantánamo*. New Haven, CT: Yale Univ. Press
Butler J. 2004. *Precarious Life: The Powers of Mourning and Violence*. New York: Verso
Calabresi SG, Yoo CS. 2012. *The Unitary Executive: Presidential Power from Washington to Bush*. New Haven, CT: Yale Univ. Press
CBS News. 2006. Bush says he wants to close Guantánamo. *CBS News*, May 8. **https://www.cbsnews.com/news/bush-says-he-wants-to-close-guantanamo/**
Cent. Const. Rights. 2006. *Report on torture and cruel, inhuman, and degrading treatment of prisoners at Guantánamo Bay, Cuba*. Rep., Cent. Const. Rights, New York
Cheney RB. 2009. *Remarks by Richard B. Cheney*. Speech, Am. Enterp. Inst., Washington, DC, May 21. **https://www.aei.org/research-products/speech/remarks-by-richard-b-cheney/**
Cohen S. 2001. *States of Denial: Knowing about Atrocities and Suffering*. Cambridge, UK: Polity
Cole D. 2004. *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*. New York: New
Cole D. 2009. *Torture Memos: Rationalizing the Unthinkable*. New York: New
Columbia Cent. Oral Hist. 2008. *The Rule of Law Oral History Project*. **https://library.columbia.edu/libraries/ccoh/digital/rule_of_law.html**
Const. Proj. 2013. *Report of the Constitution Project's Task Force on Detainee Treatment*. Rep., Const. Prog., Washington, DC
Crouch J, Rozell MJ, Sollenberger MA. 2020. *The Unitary Executive Theory: A Danger to Constitutional Government*. Lawrence: Univ. Press Kans.
Danner M. 2004. *Torture and Truth: America, Abu Ghraib, and the War on Terror*. New York: New York Rev. Books
Davenport C. 2007. Licensing repression: dissent, threats, and state repression in the United States. *Minn. J. Int. Law* 16:311–33
Del Rosso J. 2014. Textuality and the social organization of denial: Abu Ghraib, Guantánamo, and the meanings of U.S. interrogation policies. *Sociol. Forum* 29(1):52–74
Denbeaux MP, Denbeaux J. 2006. Report on Guantánamo detainees: a profile of 517 detainees through analysis of Department of Defense data. *Seton Hall Law Rev.* 41:1211–29
Denbeaux MP, Denbeaux J, Gratz D, Gregorek J, Darby M, et al. 2011. No-hearing hearings: an analysis of the proceedings of the Combatant Status Review Tribunals at Guantánamo. *Seton Hall Law Rev*. 41:1231–67
Denbeaux MP, Hafetz J, Denbeaux J, Hickman J. 2015. *Guantánamo: America's battle lab*. Doc., Law Sch. Cent. Policy Res., Seton Hall Univ., New York. **https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548747**
Dorf MC. 2007. The Orwellian Military Commissions Act of 2006. *J. Int. Crim. Justice* 5:10–18
Dyzenhaus D. 2006. *The Constitution of Law: Legality in a Time of Emergency*. Cambridge, UK: Cambridge Univ. Press
Ebright KA. 2022. *Secret war: how the US uses partnerships and proxy forces to wage war under the radar*. Rep., Brennan Cent. Justice, New York. **https://www.brennancenter.org/our-work/research-reports/secret-war**
Falkoff M, ed. 2007. *Poems from Guantánamo: The Prisoners Speak*. Iowa City: Univ. Iowa Press
Fallon M. 2017. *Unjustifiable Means: The Inside Story of How the CIA, Pentagon, and US Government Conspired to Torture*. New York: Regan Arts
Farley BR. 2021. The fairy tale America likes to tell itself. *The Atlantic*, June 29. **https://www.theatlantic.com/ideas/archive/2021/06/what-biden-must-do-right-wrongs-guantanamo/619309/**
Finkelstein C, Rishikof H, eds. 2022. *Beyond Guantánamo: restoring the rule of law to the law of war, a report recommending closing the Guantánamo Bay Detention Facility*. Rep., Cent. Ethics Rule Law, Univ. Pa., Philadelphia

Fletcher LE, Kelly A, Aziz Z. 2012. Defending the rule of law: reconceptualizing Guantánamo habeas attorneys. *Conn. Law Rev.* 44(3):617–73
Fletcher LE, Stover E. 2009. *The Guantánamo Effect: Exposing the Consequences of US Interrogation and Detention Practices*. Berkeley: Univ. Calif. Press
Frakt DJR. 2009. Closing argument at Guantánamo: the torture of Mohammed Jawad. *Harvard Hum. Rights J.* 22:401–23
Frakt DJR. 2010. Lawfare and counterlawfare: the demonization of the Gitmo Bar and other legal strategies in the war on terror. *Case West. J. Int. Law* 43(1):335–56
Frakt DJR. 2011. The myth of divided loyalties: defending detainees and the Constitution in the Guantánamo military commissions. *Case West. J. Int. Law* 43:545–64
Frakt DJR. 2012. Prisoners of Congress: the constitutional and political clash over detainees and the closure of Guantánamo. *Univ. Pittsburgh Law Rev.* 74(2):179–262
Freedman EM. 2003. *Habeas Corpus: Rethinking the Great Writ of Liberty*. New York: NYU Press
Gellman B. 2008. *Angler: The Cheney Vice Presidency*. New York: Penguin
Glazer D. 2014. The misuse of history: conspiracy and the Guantánamo military commissions. *Baylor Law Rev.* 66:315–55
Goldsmith J. 2007. *The Terror Presidency: Law and Judgment inside the Bush Administration*. New York: W.W. Norton
Goldsmith J. 2010. The inevitability of military detention. *Lawfare*, Oct. 7. **https://www.lawfareblog.com/inevitability-military-detention**
Gramlich J. 2018. Defending against terrorism has remained a top policy priority for Americans since 9/11. *Pew Research Center*, Sept. 11. **https://www.pewresearch.org/fact-tank/2018/09/11/defending-against-terrorism-has-remained-a-top-policy-priority-for-americans-since-9-11/**
Gray J. 2009. The charade of Combatant Status Review Tribunals. In *Terrorism and Global Insecurity: A Multidisciplinary Perspective*, ed. K Alexander, pp. 291–321. Urbana, IL: Linton Atl. Books
Greenberg KJ. 2009. *The Least Worst Place: Guantánamo's First 100 Days*. Oxford, UK: Oxford Univ. Press
Greenberg KJ, Dratel JL, eds. 2005. *The Torture Papers: The Road to Abu Ghraib*. New York: Cambridge Univ. Press
Gregory D. 2006. The black flag: Guantánamo Bay and the space of exception. *Geogr. Ann.* 88(4):405–27
Gronke P, Rejali D, Drenguis D, Hicks J, Miller P, Nakayama B. 2010. US public opinion on torture, 2001–2009. *PS* 43:437–44
Gross O. 2003. Chaos and rules: Should responses to violent crises always be constitutional? *Yale Law J.* 112:1011–134
Habib M. 2009. *My Story: The Tale of a Terrorist Who Wasn't*. London: Scr. Publ.
Hafetz J. 2010. *Habeas Corpus After 9/11: Confronting America's New Global Detention System*. New York: NYU Press
Hafetz J. 2016. *Obama's Guantánamo: Stories from an Enduring Prison*. New York: NYU Press
Hafetz J. 2022. The last, best chance for accountability at Guantánamo? A negotiated plea for the 9/11 defendants. *Just Security*, Novemb. 15. **https://www.justsecurity.org/84108/the-last-best-chance-for-accountability-at-guantanamo-a-negotiated-plea-for-the-9-11-defendants/**
Hafetz J, Denbeaux MP, eds. 2009. *The Guantánamo Lawyers: Inside a Prison Outside the Law*. New York: NYU Press
Hajjar L. 2003. From Nuremberg to Guantánamo: international law and American power politics. *Middle East Rep.* 229. **https://merip.org/2003/12/from-nuremberg-to-Guantanamo/**
Hajjar L. 2005. An army of lawyers. *The Nation*, Dec. 8. **https://www.thenation.com/article/archive/army-lawyers/**
Hajjar L. 2009. Does torture work? A sociolegal assessment of the practice in historical and global perspective. *Annu. Rev. Law Soc. Sci.* 5:311–45
Hajjar L. 2019. The counterterrorism war paradigm versus international humanitarian law: the legal contradictions and global consequences of the US war on terror. *Law Soc. Inq.* 44(4):922–56
Hajjar L. 2022. *The War in Court: Inside the Long Fight against Torture*. Berkeley: Univ. Calif. Press
Hartwig M, Fallon M. 2022. The manipulation of minds: reckoning with the legacy of the American post 9/11 torture program. *Torture* 32(3):71–83

Hamdan v. Rumsfeld, 548 US 557 (2006)
Hersh SM. 2004. Torture at Abu Ghraib. *New Yorker*, May 10. **https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib**
Hicks D. 2010. *Guantánamo: My Journey*. London: William Heinemann
Hirsch S. 2006. In a *Moment of Greatest Calamity: Terrorism, Grief and a Victim's Quest for Justice*. Princeton, NJ: Princeton Univ. Press
Honigsburg PJ. 2019. *A Place Outside the Law: Forgotten Voices from Guantánamo*. Boston: Beacon
Huddy L, Feldman S, Taber C, Lahav G. 2005. Threat, anxiety, and support of antiterrorism policies. *Am. J. Political Sci.* 49(3):593–608
Huq AZ. 2009. The commander-in-chief after 9/11. In *The Impact of 9/11 and the New Legal Landscape*, ed. MJ Morgan, pp. 145–56. New York: Palgrave Macmillan
Huq AZ. 2013. The political psychology of counterterrorism. *Annu. Rev. Law Soc. Sci.* 9:71–94
Huq AZ. 2017. The president and the detainees. *Univ. Pa. Law Rev.* 165(3):499–593
Hussain N. 2007. Beyond norm and exception: Guantánamo. *Crit. Inq.* 33(4):734–53
Isikoff M. 2006. The Gitmo fallout. *Newsweek*, July 16. **https://www.newsweek.com/gitmo-fallout-112933**
Jaffer J, Singh A. 2007. *Administration of Torture: From Washington to Abu Ghraib and Beyond*. New York: Columbia Univ. Press
Johns F. 2005. Guantánamo Bay and the annihilation of the exception. *Eur. J. Int. Law* 16(4):613–35
Kadidal S. 2012. What's left of the Guantánamo litigation? Nothing. *HuffPost*, June 11. **https://www.huffpost.com/entry/supreme-court-guantanamo_b_1587581**
Kadidal S. 2022. Cutting edge issues in year 20 of the Guantánamo habeas litigation. *Just Security*, Jan. 11. **https://www.justsecurity.org/79803/cutting-edge-issues-in-year-20-of-the-guantanamo-habeas-litigation/**
Kaplan A. 2005. Where is Guantánamo? *Am. Q.* 57(3):831–58
Klemens O, Fezer J, Forster K, Horlitz S. 2003. Extra-territorial spaces and camps: judicial and political spaces in the "war on terrorism." In *Territories: Islands, Camps, and Other States of Utopia*, ed. A Franke, R Segal, E Weizman, pp. 22–28. Berlin: KW Inst. Contemp. Art
Koh HH. 2003. On American exceptionalism. *Stanford Law Rev.* 55(5):1479–527
Kuhn WE. 2011. Speedy trial rights of military detainees. *Syracuse Law Rev.* 62:209–53
Kurnaz M. 2008. *Five Years of My Life: An Innocent Man in Guantánamo*. New York: St. Martin's
Lasseter T, Rosenberg C. 2013. WikiLeaks: Just 8 at Gitmo gave evidence against 255 others. *McClatchy*, Sept. 25. **https://www.mcclatchydc.com/news/special-reports/article24626137.html**
Lederman M, ed. 2007. The anti-torture memos: Balkinization posts on torture, interrogation, detention, war powers, executive authority, DOJ and OLC. *Balkinization*, July 8. **http://balkin.blogspot.com/2005/09/anti-torture-memos-balkinization-posts.html**
Lewis NA. 2007. Official attacks top law firms over detainees. *New York Times*, Jan. 13. **https://www.nytimes.com/2007/01/13/washington/13gitmo.html**
Liu J. 2022. Guantánamo detainees ask Biden to free their art. *Hyperallergic*, Oct. 13. **https://hyperallergic.com/769470/guantanamo-bay-detainees-ask-biden-to-free-their-art/**
Luban D. 2008. Lawfare and legal ethics at Guantánamo. *Stanford Law Rev.* 60:1981–2086
Luban D. 2014. *Torture, Power and Law*. New York: Cambridge Univ. Press
Lubin A. 2021. *Never-Ending War on Terror*. Berkeley: Univ. Calif. Press
Mackey C, Miller G. 2004. *The Interrogators: Inside the Secret War against Al Qaeda*. New York: Little, Brown
Mahler J. 2008. *The Challenge:* Hamdan v. Rumsfeld *and the Fight over Presidential Power*. New York: Farrar, Straus & Giroux
Margulies J. 2004. A prison beyond the law. *Va. Q. Rev.* 80(4):37–55
Margulies J. 2006. *Guantánamo and the Abuse of Presidential Power*. New York: Simon & Schuster
Margulies J. 2022. Russian torture and American (selective) memory. *Just Security*, Oct. 13. **https://www.justsecurity.org/83529/russian-torture-and-american-selective-memory/**
Mayer J. 2006. The hidden power: the legal mind behind the White House's war on terror. *New Yorker*, June 26. **https://www.newyorker.com/magazine/2006/07/03/the-hidden-power**
Mayer J. 2008. *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*. New York: Doubleday

Michaelsen S, Shershow SC. 2004. The Guantánamo "black hole": the law of war and the sovereign exception. *Middle East Report*, Jan. 11. **https://merip.org/2004/01/the-guantanamo-black-hole/**

Millhiser I. 2020. How Justice Scalia paved the way for Trump's assault on the rule of law. *Vox*, Febr. 14. **https://www.vox.com/2020/2/14/21135083/justice-scalia-bill-barr-trump-unitary-executive-no-rule-of-law-morrison-olson**

Minca C. 2004. The return of the camp. *Prog. Hum. Geogr.* 29:405–12

Mori M. 2014. *In the Company of Cowards: Bush, Howard, and Injustice at Guantánamo*. New York: Viking

Neuman GL. 2004. Closing the Guantánamo loophole. *Loyola Law Rev*. 50:1–66

Neuman GL. 2005. Extraterritorial rights and constitutional methodology after *Rasul v. Bush*. *Univ. Pa. Law Rev*. 153:2073–83

Neuman GL. 2009. The extraterritorial Constitution after *Boumediene v. Bush*. *South. Calif. Law Rev*. 82:259–90

New York Times. 2023. The Guantánamo docket. *New York Times*, updated May 8. **https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html**

Obama BH. 2009. Text: Obama's speech on national security. *New York Times*, May 21. **https://www.nytimes.com/2009/05/21/us/politics/21obama.text.html**

Pearlstein DN. 2006. Finding effective constraints on executive power: interrogation, detention and torture. *Indiana Law J.* 81:1255–95

Pew Research Center. 2015. Guantánamo's location. *Pew Research Center*, April 28. **https://www.pewresearch.org/pp_15-04-28_gitmocard/**

Pfiffner JP. 2009. The contemporary presidency: decision making in the Bush White House. *Pres. Stud. Q.* 39(2):363–84

Phillips JES. 2010. *None of Us Were Like This Before: American Soldiers and Torture*. New York: Verso

Posner EA, Vermeule A. 2007. *Terror in the Balance: Security, Liberty, and the Courts*. New York: Oxford Univ. Press

Priest D, Gellman B. 2002. U.S. decries abuse but defends interrogations. *Washington Post*, Dec. 26. **https://www.washingtonpost.com/archive/politics/2002/12/26/us-decries-abuse-but-defends-interrogations/737a4096-2cf0-40b9-8a9f-7b22099d733d/**

Przybyla H, Johnston N. 2009. Obama's war plan gains amid doubts on domestic policy. *Bloomberg*, Dec. 8

Raphael S, Black C, Blakeley R. 2019. *CIA torture unredacted*. Rep., Rendition Proj., London. **https://www.therenditionproject.org.uk/unredacted/index.html**

Rasul v. Bush, 542 US 466 (2004)

Ratner M. 1998. How we closed the Guantánamo HIV camp: the intersection of politics and litigation. *Harvard Hum. Rights J.* 11:187–220

Ratner M. 2005. The Guantánamo prisoners. In *America's Disappeared: Secret Imprisonment, Detainees, and the "War on Terror,"* ed. R Meeropol, pp. 31–59. New York: Seven Stories

Ratner M. 2021. *Moving the Bar: My Life as a Radical Lawyer*. New York: OR Books

Ratner M, Ray E. 2004. *Guantánamo: What the World Should Know*. New York: Chelsea Green Publ.

Reid-Henry S. 2007. Exceptional sovereignty? Guantánamo Bay and the re-colonial present. *Antipode* 39(4):627–48

Rejali D. 2007. *Torture and Democracy*. Princeton, NJ: Princeton Univ. Press

Rejali D. 2017. Op-ed: Donald Trump's pro-torture rhetoric could help bring abuse to a neighborhood near you. *LA Times*, Febr. 19. **https://www.latimes.com/opinion/op-ed/la-oe-rejali-trump-torture-20170219-story.html**

Resnik J. 2010. Detention, the war on terror, and the federal courts. *Columbia Law Rev*. 110(2):579–686

Reynolds L, Wittes B, Chesney RM. 2012. *The emerging law of detention 2.0: the Guantánamo habeas cases as lawmaking*. Rep., Natl. Secur. Res. Comm., Harvard Law Sch., Cambridge, MA. **https://www.brookings.edu/wp-content/uploads/2016/06/Chesney-Full-Text-Update32913.pdf**

Risen J, Lichtblau E. 2005. Bush lets U.S. spy on callers without courts. *New York Times*, Dec. 16. **https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html?smid=url-share**

Rivkin DB Jr., Casey LA. 2007. Lawfare. *Wall Street Journal*, Febr. 23. **https://www.wsj.com/articles/SB117220137149816987**

Roberts A. 2007. Torture and incompetence in the "war on terror." *Survival* 49(1):199–212
Roehm S. 2022. In *U.S. v. Al-Nashiri* the government is rewarding torture and incentivizing torturers. *Lawfare*, Aug. 10. **https://www.lawfareblog.com/us-v-al-nashiri-government-rewarding-torture-and-incentivizing-torturers**
Rose D. 2004. *Guantánamo: America's War on Human Rights*. London: Faber
Rosenberg C. 2022a. At millions per detainee, Guantánamo stuck in a cycle of costly delays. *New York Times*, Sept. 16. **https://www.nytimes.com/2022/09/16/us/politics/guantanamo-bay-prison-cost.html?smid=url-share**
Rosenberg C. 2022b. 20 years later, the story behind the Guantánamo photo that won't go away. *New York Times*, Jan. 10. **https://www.nytimes.com/2022/01/10/us/politics/guantanamo-photos-prisoners.html?smid=url-share**
Rozell M, Sollenberger M. 2020. *Executive Privilege: Presidential Power, Secrecy, and Accountability*. Lawrence: Univ. Press Kans. 4th ed.
Ryan J. 2016. Pretrial of the century: the Sept. 11 case at Guantánamo Bay. *Lawdragon*, Sept. 21. **https://www.lawdragon.com/news-features/2016-09-21-pretrial-century-sept-11-case-guantanamo-bay**
Saar E, Novak V. 2005. *Inside the Wire: A Military Intelligence Soldier's Eyewitness Account of Life at Guantánamo*. New York: Penguin
Sands P. 2008. *Torture Team: Rumsfeld's Memo and the Betrayal of American Values*. Hampshire, UK: Palgrave Macmillan
Savage C. 2007. *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*. New York: Little, Brown
Scheuerman W. 2006a. Carl Schmitt and the road to Abu Ghraib. *Constellations* 13(1):108–24
Scheuerman W. 2006b. Emergency powers. *Annu. Rev. Law Soc. Sci.* 2:257–77
Schmitt C. 1986. *Political Theology: Four Chapters on the Concept of Sovereignty*, transl. G Schwab. Cambridge: MIT Press
Schmitt C. 1996. *The Concept of the Political*, transl. G Schwab. Chicago: Univ. Chicago Press
Senate Comm. Armed Serv. 2008. *Inquiry into the treatment of detainees in US custody*. Rep., Comm. Armed Serv., US Senate, Washington, DC
Senate Sel. Comm. Intell. 2014. *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*. Rep., Sel. Comm. Intell., US Senate, Washington, DC
Shephard M. 2008. *Guantánamo's Child: The Untold Story of Omar Khadr*. New York: Wiley
Shugerman JH. 2020. The imaginary unitary executive. *Lawfare*, July 6. **https://www.lawfareblog.com/imaginary-unitary-executive**
Sikkink K. 2011. *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. New York: W.W. Norton
Slahi MO. 2015. *Guantánamo Diary*. New York: Little, Brown
Stafford Smith C. 2007. *Eight O'Clock Ferry to the Windward Side: Seeking Justice in Guantánamo Bay*. New York: Nation Books
Steyn J. 2004. Guantánamo Bay: the legal black hole. *Int. Comp. Law Q.* 51(1):1–15
Sullivan S. 2006. The minutes of the Guantánamo Bay Bar Association. *New York Magazine*, June 16. **https://nymag.com/news/features/17337/**
Suskind R. 2006. *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11*. New York: Simon & Schuster
Swazo NK. 2007. Exemption from the torture ban? A moral critique of the Bush administration's policy. *Public Aff. Q.* 21(1):61–87
Swift C. 2007. The American way of justice. *Esquire*, March 1. **https://www.fedbar.org/wp-content/uploads/2019/12/The-American-Way-of-Justice-Esquire-pdf.pdf**
Tayler L, Epstein E. 2022. *Legacy of the "dark side": the costs of unlawful US detentions and interrogations post-9/11*. Rep., Costs War Proj., Watson Inst. Int. Public Aff., Brown Univ., Providence, RI
Taylor S Jr., Wittes B. 2009. *Looking forward, not backward: refining American interrogation law*. Work. Pap., Ser. Counterterrorism Am. Stat. Law, Brookings Inst., Washington, DC. **https://www.brookings.edu/wp-content/uploads/2016/06/0510_interrogation_law_wittes.pdf**

Tyson A. 2017. Americans divided in views of use of torture in US anti-terror efforts. *Pew Research Center*, Jan. 26. **https://www.pewresearch.org/fact-tank/2017/01/26/americans-divided-in-views-of-use-of-torture-in-u-s-anti-terror-efforts/**

UC Davis Cent. Stud. Hum. Rights Am. 2005. *The Guantánamo Testimonials Project*. **https://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project**

Vladeck SI. 2008. Congress, the commander-in-chief, and the separation of powers after Hamdan. *Transnatl. Law Contemp. Probl.* 16:933–64

Vladeck SI. 2010. The laws of war as a constitutional limit on military jurisdiction. *J. Natl. Law Policy* 4:295–342

Vladeck SI. 2016. *Al Bahlul* and the long shadow of illegitimacy. *Lawfare*, Oct. 22. **https://www.lawfareblog.com/al-bahlul-and-long-shadow-illegitimacy**

Vladeck SI. 2019. It's time to admit that the military commissions have failed. *Lawfare Blog*, April 16. **https://www.lawfareblog.com/its-time-admit-military-commissions-have-failed**

Waldron J. 2005. Torture and positive law: jurisprudence for the White House. *Columbia Law Rev*. 105(6):1681–750

Wax ST. 2008. *Kafka Comes to America: Fighting for Justice in the War on Terror—A Public Defender's Inside Account*. New York: Other

White House. 2001. *Address to a joint session of Congress and the American people.* Press Rel., Sept. 20. **https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html**

White House. 2006. *President discusses creation of military commissions to try suspected terrorists*. Press Rel., Sept. 6. **https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html**

Wilson RJ. 2003. United States detainees at Guantánamo Bay: the Inter-American Commission on Human Rights responds to a "legal black hole." *Hum. Rights Brief* 10(3):2–5

Winterbottom M, Whitecross M, dirs. 2006. *The Road to Guantánamo*. London: Revolut. Films

Wittes B, Goldsmith JL. 2010. The best trial option for KSM: nothing. *Washington Post*, March 19. **http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031702844.html**

Wolosky L. 2022. Opinion: what I learned when I tried to close Guantánamo. *Politico*, Jan. 11. **https://www.politico.com/news/magazine/2022/01/11/close-guantanamo-prison-wolosky-526829**

Woodward B. 2009. Guantánamo detainee was tortured, says official overseeing military trials. *Washington Post*, Jan. 14. **https://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html**

Worthington A. 2007. *The Guantánamo Files: The Stories of the 774 Detainees in America's Illegal Prison*. London: Pluto

Yoo J. 2006. *War by Other Means: An Insider's Account of the War on Terror*. New York: Atl. Mon.

Yoo J. 2008. Terror watch: terror suspects are waging "lawfare" on US. *Philadelphia Inquirer*, Jan. 18, A 15.

Zagorin A, Duffy TJ. 2005. Inside the interrogation of Detainee 063. *Time*, June 20. **https://time.com/3624326/inside-the-interrogation-of-detainee-063/**

Zimbardo P. 2007. *The Lucifer Effect: Understanding How Good People Turn Evil*. New York: Random House

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