

Presidential Authority to detain alleged terrorist in Guantanamo Bay

ABSTRACT:

Torture, inhumane treatment, forced confessions, these are some of the words that come to mind when the word Guantanamo Bay is mentioned. Any American or foreigner has most likely heard of what is going on in Guantanamo Bay, Cuba. The facts and perspective may change from person to person, the main picture is that there are detainees in Guantanamo Bay who are being mistreated and tortured. The actions in Guantanamo Bay have not gone without protest in any way.

Many civil rights organizations have advocated for change in treatment to the detainees in Guantanamo Bay. While many others have advocated that Guantanamo Bay be shut down. I will attempt to unravel the arguments on both sides of this issue and present the constitutional considerations in efforts to shut down Guantanamo Bay. Finally, I will present the proposed plan by the new administration.

National Security Law is a subject area that has been dormant for many decades in the United States. Since the bombing of Pearl Harbor in 1941, the United States has not faced attack on its own soil. For many decades our country lived with no fear of attack until the 1993 bombing of the World Trade Center in New York City. The attack of the World Trade

Centers marked the beginning of what America now calls The War on Terrorism.

On September 11, 2001(hereinafter 9/11), terrorists hijacked four U.S. planes and crashed into the Twin Towers, the Pentagon and a field in Pennsylvania. In the aftermath of 9/11, our country became fearful of the possibility of another World War. While citizens were fearful of another attack on American soil, President George W. Bush assured the country that we would respond to the attacks immediately. After 9/11 a series of legislation was passed by Congress to extend the President's authority. It is important to know that the United States never formally declared a war. Rather, "the war against terrorism" was implemented and strongly enforced throughout the country and abroad.

HISTORY OF WAR ON TERROR & AL QAEDA:

For many Americans the War on Terror did not start until September 11th, 2001 when the terrorist flew their planes into the twin towers. What many people do not know is that the United States has been under attack for decades before 9/11. Direct attack on the United States can be dated back to at 1970 around the time of the Vietnam War.

Richard Gueli describes terrorism in the most direct manner in his article on transnational terrorism.

Transnational terrorism, then, implies acts of terrorism that exhibit domestic and international consequences, and that involve citizens or the territory of one or more

countries. An important emphasis of this definition is that even when terrorism evinces other motives (such as the religious, the economic, or the social), it is always political. This particular assumption, however, is not universally accepted. But terrorism is not mindless violence, as some observers have charged. In fact, the definition emphasizes the necessity to perceive a systematic use of terror before any act of terror can be accurately labeled as 'terrorist'. In other words, there should be a clear delineation between criminal activities and terrorism since not every criminal act is terrorism.¹

In 1967, the United States began to provide Israel with weapons in the middle east. Support of Israel is the triggering event that caused many other countries to be against America.² The first direct attack on the United States was of the US embassy in Beirut in 1983.³ These attacks continued with the attack on the World Trade Center in 1993.⁴

Part of the war against terrorism includes detaining alleged terrorists in Guantanamo Bay, Cuba. The United States has leased Guantanamo Bay, a naval base, from Cuba for an indefinite duration beginning in 1903. "And under the terms of the lease between the United States and Cuba, Cuba

¹ Gueli, Richard, *Bin Laden and Al-Qaeda: challenging the assumptions of transnational terrorism.*, available at 2003 WLNR 6534639.

² *Id.*

³ *Id.*

⁴ *Id.*

retains ‘ultimate sovereignty’ over the territory while the United States exercises ‘complete jurisdiction and control’.”⁵ In the 1990s Guantanamo Bay was used as a holding base to detain Haitian refugees. Beginning in 2002, enemy combatants captured in the war on terror were sent to Guantanamo Bay.

Detainees were and are currently being held indefinitely and housed in open air cages with concrete floors. Since 2004, officials have used the Combatant Status Review Tribunals as a method of trial for detainees.

“The Combatant Status Review Tribunals (CSRT) are a set of tribunals for determining whether detainees held by the United States at the Guantanamo Bay detention camp are correctly designated as ‘enemy combatants.’ They were established July 7, 2004 by order of U.S. Deputy Secretary of Defense Paul Wolfowitz after U.S. Supreme Court rulings in *Hamdi v. Rumsfeld* and *Rasul v. Bush*. These non-public hearings are conducted as ‘a formal review of all the information related to a detainee to determine whether each person meets the criteria to be designated as an enemy combatant.’ The first CSRT hearings began in July 2004. CSRT transcripts of the hearings can be found for ‘high value detainees’ on the Department of Defense (DoD) website as PDF files and redacted mp3 format

⁵ *Boumediene v. Bush*, 128 S. Ct. 2229, 2252 (2008).

audio files. As of October 30th, 2007, fourteen CSRT transcripts are available on the DoD website.⁶

These tribunals question detainees about their role in the suspicious events leading to their detention. The tribunals then decide whether the detainee was properly classified as an “enemy combatant” or eligible for release.

A series of Controversial issues have been raised as a result of the detainment of alleged terrorist in Guantanamo Bay. Initial cases have attempted to clarify the source of the President’s authority to detain alleged terrorist in Guantanamo Bay. Later cases have attempted to answer the question of whether detainees are entitled to access federal courts through the writ of habeas corpus. This paper will present the domestic and international sources of the President’s authority. Furthermore, there will policy proposals for Congress to consider with the new President elect Barack Obama in resolving the continuous issues in Guantanamo Bay.

DOMESTIC AUTHORITY:

There is only one constitutional provision that lays out the President’s authority to act. Commonly known as the Take Care Clause, Article II, Sec. 2, clause 1 states that the President shall be Commander in Chief of the Army and Navy of the United States. As a result of the separations of power concept, the President is not allowed to make new law. The courts have generally held that the President has authority to act so long as he remains accountable to Congress.

⁶ http://en.wikipedia.org/wiki/Combatant_Status_Review_Tribunals

This accountability of Congress approach was originally followed in *Youngstown*.⁷ The models explain both the functionalist approach by Hamilton and the formalist approach by Madison. In *Youngstown*, the President made an executive order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills.⁸ The court ruled that since Congress did not act and there was no constitutional provision, the President did not have authority to act. The longstanding rule from *Youngstown* is that the President's actions must be in conformity to the Constitution or the statutory provision by Congress.⁹

The different opinions in *Youngstown* introduced four main approaches used to evaluate Inherent Presidential Authority. The first approach by the majority opinion written by Justice Black stated that the President must act pursuant to express constitutional authority. The second approach by Justice Douglas stated that the President may act without constitutional or statutory authority as long as he is not usurping the powers of another branch. The third approach by Justice Jackson states that there must be Legislative Accountability to Congress. He breaks down his approach into three zones. The first zone called High tide is when the President may act with expressed authorization from Congress. The second zone called the Twilight zone is when there is concurrent authority and Congress is silent, the President may act through his own powers but his actions are subject to reversal by Congress. The last zone, Low tide is where

⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)

⁸ *Id.*

⁹ *Id.*

the President cannot act if Congress has forbidden his actions. The fourth and last approach from *Youngstown* is where the President has broad inherent authority and may act so long as he does not violate an explicit constitutional provision.¹⁰

With the War on Terror most would agree that the President's actions fall with Justice Jackson's Legislative Accountability to Congress approach. For the most part President Bush has been acting with expressed or implied authorization from Congress. Even though he has inherent authority for War Powers, he has been acting with Congressional Authority. Congress has passed several pieces of legislation including the Authorization for the Use of Military Force in 2001, the Detainee Treatment Act of 2005, and the Military Commission Act in 2006.¹¹

Before evaluating any Congressional Authority from which the President is acting, it is necessary to acknowledge that the constitution grants the executive inherent power to conduct Foreign Affairs. That power is inherent in the sovereignty of the executive. Established case law has confirmed that the power to conduct foreign affairs is broadly defined during a state of emergency. Therefore, during times of emergency, like the aftermath of 9/11, the president has constitutional authority to conduct foreign affairs before Congress even acts.

CONGRESSIONAL AUTHORITY

¹⁰ *Id.*

¹¹ Am. Jur. 2nd Terrorism § 10 (2008)

Exactly seven days after 9/11, Congress passed the Authorization for use of Military Force Resolution (AUMF).¹² The goal of the resolution was to allow President Bush to use “all necessary and appropriate force” against those responsible for the 9/11 attacks. Congress basically stated that the country was in a “state of emergency” and therefore it was appropriate to grant the President this authority. Congress deemed it necessary to use military force as a form of self defense against those who were responsible for the 9/11 acts. An individual could be detained so long as the “alleged terrorist” could be classified as an “enemy combatant.”¹³ The term enemy combatant “was defined to mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who had committed a belligerent act or had directly supported hostilities in aid of enemy armed forces.”¹⁴

The AUMF did not place geographical limitations on where the alleged terrorist was captured. Place of capture could be near the battlefields of Afghanistan, or anywhere outside the United States. In enacting the AUMF Congress limited the actions historically taken by the President during wartime. With the vague limitations expressed or implied in the AUMF, many argue that it really places no limits at all. Could it be possible that Congress passed a resolution that granted the President broad authority to act in this War on Terror?

¹² 115 Stat 224; effective September 18, 2001

¹³ *Hambi v. Rumsfeld*, 542 U.S. 507, 515 (2004).

¹⁴ *In re Guantanamo Detainee Cases*, 2005 WL 195356 (D.D.C. 2005).

Shortly after the AUMF was enacted, Congress enacted the Patriot Act. The Patriot Act did not destroy any of the powers granted to the President in the AUMF. Rather the Patriot Act had specific language that allowed for the detention of terrorist aliens.¹⁵ Additionally, the Patriot Act only provides for short term detention and not indefinite detention of terrorists.¹⁶

In 2005, Congress passed the Detainee Treatment Act (DTA) which stated that detainees could not be tortured, established a procedure in determining whether detainees were enemy combatants and eliminated the ability of detainees to bring habeas corpus actions in any United States court.¹⁷ The purpose of the DTA was to act as a form of Congressional oversight as to what was happening to detainees in Guantanamo Bay.¹⁸ Many believe that the DTA attempted to provide some of the same constitutional protections according in the United States to aliens in Guantanamo Bay. However, the DTA merely established a standard for judicial review of decisions made by military orders.¹⁹

The Military Commissions Act (MCA) OF 2006 only applied to habeas corpus petitions filed by aliens captured and held outside the United States.²⁰ Military detention of persons who are classified as enemy combatants outside the United States is not a violation of Due Process. The military

¹⁵ 115 Stat 272 (2001)

¹⁶ *Id.*

¹⁷ Am. Jur. 2nd Terrorism § 10 (2008)

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

commissions that prosecute captured aliens are not regularly constituted courts with the same rights afforded in United States courts. It appears that the provisions of the MCA allowed for leeway when conducting trials for enemy combatants outside the United States.

INTERNATIONAL AUTHORITY:

The Geneva Conventions was part of the law of war which requires certain procedures to be used by military commissions. The Conventions require that enemy combatants be tried in a regularly constituted court.²¹The trials that are being used in Guantanamo Bay do not fit within this “regularly constituted court” requirement. However, the trials are still valid since the Geneva Convention only provides this protection to prisoners of war and its signatories when there has been a declared war.²²Al Quada and its members were not signatories to the Geneva Convention of 1949.²³On the other hand, Afghanistan is a signatory to the Geneva Convention.²⁴

CASE LAW:

Three main cases have addressed the constitutionality of alleged terrorist in Guantanamo Bay. In each case, the United States Supreme Court ruled on the Constitutionality of military tribunals and the right of detainees to habeas corpus review in federal courts. It is clear through the progression of the cases that the federal courts have become better equipped

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

to deal with cases of foreign affairs. It may be possible to even say that the federal courts are now prepared to hear habeas cases of detainees.

The first of many cases that faced the Supreme Court was *Hamdi*.²⁵ Hamdi was an American citizen who was arrested by the United States military in Afghanistan.²⁶ He was accused of fighting for the Taliban against the United States.²⁷ Later on he was declared to be an enemy combatant and was transferred to a military prison in Virginia.²⁸ Thereafter, Hamdi became one of the first prisoners to arrive in Guantanamo Bay.²⁹

This was the first time the military tribunals made a clear distinction between enemy combatants and prisoners of war. The distinction was made because enemy combatants violate the rules of war in the way they are fighting, often referred to as irregular soldiers. On the other hand, those who are classified as prisoners of war must be tried in compliance within the rules of the Geneva Convention which requires a regularly constituted court.

Hamdi argued that his detention was unlawful because he was an American citizen.³⁰ Conversely, the executive argued that that his detention was lawful because they had broad inherent authority and their actions were authorized by the AUMF.³¹ Hamdi argued that the AUMF was not specific enough to detain an American citizen. The court finally ruled in a plurality

²⁵ *Hamdi*, 542 U.S. 507 (2004).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

decision that Hamdi was an enemy combatant and that the AUMF provided sufficient authority to detain him. Interesting enough, Hamdi later agreed to a plea bargain where he renounced his citizenship and promised to never hold arms against the United States. Due to the surrounding circumstances of this case, it has not been able to serve as precedent.

Two years later in *Hamdan*, the court answered the question of whether the President has the authority to create military tribunals to try enemy combatants.³² In November of 2001, Salim Ahmed Hamdan, Osama bin Laden's former chauffeur was captured by Afghani forces. Then in June of 2002 he was brought to Guantanamo Bay where he was imprisoned by the U.S.³³ President Bush authorized his trial by military commission in 2003. Then in 2004, he filed a petition for a writ of habeas corpus in federal district court to challenge his detention. Before the district court ruled on the petition, he received a hearing from a military tribunal, which designated him as an enemy combatant.³⁴ Finally, the Supreme Court ruled that the President did not have authority to establish a military commission for Hamdan.³⁵

After the court's ruling, President Bush signed the Military Commissions Act (MCA), which established new procedures for the commissions and clarified that jurisdiction stripping would apply to all

³² *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

pending habeas petitions filed by Guantanamo detainees.³⁶ Thereafter, Hamdan's habeas corpus petition was dismissed for lack of jurisdiction due to the MCA legislation. Hamdan was convicted and sentenced to sixty-six months in prison.³⁷

Hamdan was distinguished from Hamdi because he was not a United States citizen and he had never been to the United States. Another distinction made by the courts was that all of Hamdan's acts were before the war on terror begun.

The most recent case ruled by the Supreme Court in this issue is *Boumediene*.³⁸ This case involved Lakhdar Boumediene and five other Algerian natives who were seized by Bosnian police when U.S. intelligence officer suspected their involvement in a plot to attack the U.S. embassy there.³⁹ The United States government classified the men as enemy combatants in the war on terror and detained them at Guantanamo Bay Naval Base. Boumediene then filed a petition for a writ of habeas corpus, alleging violations of the Due Process Clause of the constitution, various statutes and treaties, the common law, and international law.⁴⁰

The court went on to distinguish between the two types of habeas. One granted by the statute which is defined by Congress and the other is the constitutional habeas.⁴¹ The constitutional habeas can be made available to

³⁶ Am. Jur. 2nd Terrorism § 10 (2008).

³⁷ *Hamdan*, 548 U.S. 557 (2006).

³⁸ *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 2234.

anyone in U.S. custody so long as there are sufficient contacts with the United States. ⁴²Constitutional habeas can only be stripped if conditions in the Suspension Clause are met. ⁴³The Supreme Court finally ruled that the MCA unconstitutionally suspended the writ of habeas corpus of individuals. ⁴⁴Habeas could be limited to the detainees but in no way could the MCA is not sufficient to completely strip the detainees of habeas.

The court stated that another reason for their ruling was the doctrine of separation of powers. Their reasoning was based in part on the concept that habeas allows the judiciary to look into what the executive and the legislative branches are doing. This is a critical check that must be done. Many would agree with the popular statement that “The federal government is a huge shapeless beast.” ⁴⁵ In the context of Guantanamo Bay cases, the courts have granted habeas to detainees as an oversight on this huge shapeless beast called the executive.

PROPOSAL:

Looking back, many Americans have questioned why alleged terrorist were even brought to Guantanamo Bay. The answer to that question is convenience for the most part. President Bush may have found it practical to bring detainees to Guantanamo Bay because of its close proximity to the United States. The question remains though whether the close proximity of Guantanamo Bay has any relation to the court’s ruling in *Boumediene*.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Friedman, Leviathan, *American Law in the 20th Century* 599 (2002).

Would the court have still granted the detainees habeas if Guantanamo Bay was located somewhere else far away?

Before the recent election there have been many theories as to what will happen to the detainees in Guantanamo next. It seems like the Supreme Court have continued to grant more and more rights to the detainees with the three major cases since *Hamdi*, *Hamdan* and *Boumediene*. There has been speculation that the Supreme Court's rulings are not in the best interest of our country's national security. Perhaps the Supreme Court will one day grant habeas to detainees being held in farther more remote areas. Perhaps the Supreme Court is in favor of shutting down Guantanamo Bay altogether.

On November 4th of this year, Barack Obama was elected the next President of the United States by the citizens of the country. Besides the fact that this was a very historical election, there were been many controversial issues about how the next President would address the country's current national security issues. While campaigning each candidate made the War on Terror a significant part of their platform. For many Americans, the candidate's position on issues such as ending the War on Terrorism and Guantanamo Bay was a decision making factor in who they would vote for. Due to the continuous torture going on, many Americans are proponents of shutting down Guantanamo Bay.

While campaigning, Barack Obama continuously stated that he would push to shut down Guantanamo Bay as soon as reasonably possible. He further stated that shutting down Guantanamo Bay would be one of the

initial issues that he will discuss in the beginning days of his term. Obama has voted against sending the detainees to Fort Leavenworth in Kansas and said the detainees who are not deported home should be tried in U.S. civilian courts or by military courts on U.S. territory.⁴⁶As president elect one of the many issues that he now has to address is what will happen with the prison camps in Guantanamo Bay. Skepticism has arisen about shutting down Guantanamo Bay and its effect on our National Security. With a newly named National Security Team, plans have begun to unravel as to how exactly the new president will go about shutting down the naval base and maintaining the security of our Nation.

Before the National Security Team appointed by the new President elect decides on a plan there are a few preliminary constitutional issues that must be address. First and foremost, does the AUMF give the new President expressed authority to shut down Guantanamo Bay? Reading the AUMF resolution on its face, it is silent as to the executive's authority to shut down Guantanamo Bay. The resolution merely gives the executive authority to act where necessary to further protect and defend the United States.

Shutting Guantanamo Bay is more of a human rights issue. Those who advocate for shutting down the naval base their reasoning on the fact that many detainees are tortured and that the United States does not believe in torture. In fact, it could be argued that shutting down Guantanamo Bay would put into issue a security problem for the United States as to where to place the detainee. Therefore, the AUMF does not provide for expressed

⁴⁶ <http://www.cfr.org/publication/11025/>

authorization to shut down Guantanamo except if shutting down the naval base could be considered an act that further protects or defends our country.

If the AUMF does not provide for expressed authorization to shut down Guantanamo Bay, where can the executive get that authority from? This would place the executive in an area where there is no statutory authorization. He would then have to turn to his inherent presidential authorization in Article II of the constitution. Article II, names the executive as commander in chief of the army. Therefore, he can command the army to act when he deems it necessary or in times of national emergency without Congressional Authorization.

It is clear that our country is still in a time of national emergency. The War on Terror is still an ongoing issue since there are troops overseas still fighting in Afghanistan and Iran. The alleged terrorists that are being captured overseas are being detained in Guantanamo Bay by military officials. This simply goes to show that the President's command to shut down the naval base would be a command on the military. Hence, this would be a valid command on the military since it is relating to the War on Terror.

Perhaps another thing the new National Security Team should consider is Congress' thoughts on shutting down Guantanamo Bay. In May of 2007, Congress proposed the Guantanamo Bay Detention Facility Closure Act. The Act required the closure of the facility in no more than 120 days from the

enactment of the Act. This Act is currently pending before the 110th Congress.⁴⁷

Many politicians in Washington D.C. have expressed their opinion that they are in favor shutting down Guantanamo Bay. Secretary of Defense Gates expressed his opinion that Guantanamo Bay should be closed.⁴⁸ Although the legislation was proposed the proponents recognized that there was a great possibility that it would not get passed into law during under Bush's administration. Therefore, it seems that Congress would agree with the idea of shutting down Guantanamo Bay.

As a result the new National Security Team would not have to go to Congress. There is no need to seek legislation if there is already pending legislation in Congress. What could be done is further lobbying to get Congress to vote on the legislation. It is very well possible that Congress would vote on this legislation and require that Guantanamo Bay be shut down.

One final consideration before the National Security Team devises a plan would be to make sure that every detainee is affording habeas before shutting down. As the Supreme Court currently stands, every detainee has the right to habeas whether or not they have been classified as an enemy combatant. Removing the detainees from Guantanamo Bay to be tried in civilian courts would entitle them to not only habeas but also additional rights that should be accorded to individuals in the United States.

⁴⁷ <http://www.govtrack.us/congress/bill.xpd?bill=s110-1469>

⁴⁸ http://www.nydailynews.com/news/politics/2008/12/02/2008-12-02_defense_secretary_robert_gates_closing_g.html

In addition to the constitutional consideration there are also several practical considerations that must be addressed in light of the question of whether Guantanamo Bay can really be shut down.

First of all, of the two hundred and fifty detainees one must decide who should be released. Then, one must decide where to release the detainees. Another issue is where the remaining detainees would be kept. Then, a determination must be made as to the exact number of the remaining detainees that can actually face trial. For these individuals that do face trial, what type of trial would be necessary. Would there be a justification for further incarceration of detainees who are not tried. Should the United States create national security court? Then, we must consider the possibility of acquittals & short sentences.⁴⁹

Who should be released?

In the past, all the Guantanamo Bay cases have been heard by the military commission courts. Since the opening of Guantanamo Bay for detaining alleged terrorist, these courts have only been able to prosecute two alleged terrorist, Salim Hamdan and Ali Hamzi al-Bahlul.⁵⁰ Other than a procedure by the military commissions court, the new administration can refer to with caution recommendations made by the Bush administration. He

⁴⁹ <http://www.slate.com/id/2206229/pagenum/2>

⁵⁰ <http://www.eagleworldnews.com/2008/11/03/ali-hamza-al-bahlul-convicted-at-guantanamo/>

has identified at least fifty detainees to be transferred out of Guantanamo Bay.

There is another possibility for determining who should be released. The new administration could create a new national security court that would be far more effective in prosecuting alleged terrorist. It has already been determined by the authorities that 60 detainees should be released if they could be returned to their countries. Furthermore, there are still those detainees that cannot be released because they cannot be placed on trial but still are a threat to our country's national security. The only answer that can be provided to this question as of now is that the detainees who cannot be charged should be released. It is simply not possible to further hold detainees for the mere fact that they may be a threat to our country.

What is the exact number of remaining detainees that can actually face trial

&

where should the detainees be released?

With many countries unwilling to take back their citizens, there seems to be only one possible answer. That is to send the released detainees to some third country. President-elect Obama has recommended trials in U.S. courts of the detainees. The only possible determination is to send back those detainees whose countries are willing to take them back. Hold trials for the remaining detainees. If they are found guilty, they should serve the remaining of their sentence. If they are found innocent the United States must own up and release these detainees.

President Bush has conceded that of the 250 detainees in Guantanamo Bay only about 50 could actually face trial. Meaning there is not sufficient evidence from which to lawfully prosecute the others. The Obama administration team has not publicly declared what they plan to do with the remaining detainees.

Would there be a justification for further incarceration of detainees who are not tried?

Many proponents and opponents of shutting down Guantanamo Bay have begun to question themselves by asking what will happen to the remaining detainees that cannot face trial. Should they be held on the mere suspicion that they are inherently dangerous individuals or should they simply be released against the will of many Americans? Many legal scholars have concluded that it would be unconstitutional to indefinitely detain them.

⁵¹The justice system in the United States is based on the premise that one is innocent until proven guilty. Therefore, it would be erroneous to detain suspected terrorists on mere suspicion, without any due process.

One harsh example of an alleged terrorist being held without due process is Ali Saleh Kahlah al-Marri. Al-Marri, a native of Qatar, is accused of training with al-Qaida forces in Afghanistan and volunteering for a "martyr mission." He arrived in the United States on Sept. 10, 2001, and was later arrested in Peoria, Ill. ⁵²

⁵¹ <http://www.santafenewmexican.com/Washington/Future-full-of-questions--for-Guant-amp-aacute-namo-detainees>

⁵² <http://www.santafenewmexican.com/Washington/Future-full-of-questions--for-Guant-amp-aacute-namo-detainees>.

Some argue that even though it would be difficult to detain the alleged terrorist indefinitely the new administration could go to Congress for new legislation that would allow for this. The proposed new legislation would allow for indefinite detention. So even though the new National Security may not need to go to Congress for permission to shut down Guantanamo Bay, they will still need to go to Congress about detainees unprosecuted detainees. The reality of the situation is that shutting down Guantanamo may be easily done but the steps of what is to happen after will require plenty of authority from Congress in order to act.

Should the United States create national security court?

President-elect Obama has already suggested a national security court. Many of the Guantanamo Bay cases involve very top secret information that would need to be heard by a separate court. Although creating a new court system may come with a few disadvantages, it would be a change from the current military tribunals that are being used. These tribunals do not inform the detainees of the evidence that is being presented against them.

THE NEW NATIONAL SECURITY TEAM:

Since the election of President-elect Barack Obama, many Americans have advocated that the new administration take action as soon as possible. Many believe that the new administration should take action as soon as January 21st. At the moment the United States does not look good on the international scene because of all the torture that has been going on in

Guantanamo Bay. Despite what many think, the mistreatment of alleged terrorist in Guantanamo Bay will affect the national security of our country.

Obama's new team has starting working on a strategic plan to shut down Guantanamo Bay. The plan includes bringing the detainees to the United States where they would be prosecuted in U.S. courts. Some detainees would be released without needing to come to the United States for trial. A new court would be formed to prosecute those who come into the United States.⁵³

The group of released detainees would go back to their home countries. One problem is that some countries may not want to accept the detainees back. Another problem is that some detainees may be afraid to go back in fear of being tortured in their own countries. Although these are plans of the President-elect, a final decision has not been made about where the detainees will be tried.

CONCLUSION:

For the past eight years, the United States has been trying to deal with a continuous National Security Issue. This is a continuous War on Terrorism issue that came to the public's attention on September 11, 2001. As the world leader many other nations have looked to our country's reaction in this time of emergency. Whether for good or bad, the United States has served as a model to other nations in taking action during a time of national emergency.

⁵³ http://www.huffingtonpost.com/2008/11/10/obama-plans-guantanamo-cl_n_142593.html?page=6

It is of importance for the United States to remember the backbone on which our country is built. What makes our country different from the other world powers. We believe in due process to all even those who appear by all means to be heartless terrorists. Our justice system is distinct in all the world due to the notion of being innocent until proven guilty. The main point that I have attempted to address in this paper is that 9/11 was not the first attack on America and will probably not be the last.

In past wars our country has addressed attack on American soil in a more efficient manner. A manner that kept in mind the American notion of Due Process. At this point it is clear that the United States has made a few mistakes in addressing this War on Terror. Perhaps the method of prosecuting those alleged terrorist was not the best approach. However, in moving forward there is always room for improvement.

As a great world power, the United States must admit to its mistake, shut down Guantanamo, grant habeas to detainees and return those who should be returned back to their home countries. Despite what critics say, this would not require re inventing the whole wheel. It would only require going about the situation through a different means. This is a means that is more American and without the torture and injustice of what is currently going on in Guantanamo Bay, Cuba.

Of course, this is not the answer to all of our questions. One can still speculate as to what Guantanamo Bay may be used for in the future. In fact, what was the real reason for the United States even leasing Guantanamo Bay

indefinitely from Cuba. Did we have interior motives to use Guantanamo Bay as a naval base from the beginning? Was it supposed to be a naval base used to get away with actions that are explicitly forbidden in the United States? These are all unanswered questions that I am unable to address in this paper.

It is my hope and that of many other Americans that with this new Administration other countries will change the way they think about America for the good. Shutting down Guantanamo Bay is not the final answer but it is a means to an end. An end to the unjustified torture of unprosecuted alleged terrorists. Yes, our country has been attacked. Yes, we need to protect our national security. However, there is a proper way to do that and I hope that our country can plan and execute the proper way in a reasonable time.