

Federal Trials Needed After Presidential Betrayal

By Michael Rapkin and Scott Rapkin

George W. Bush, Dick Cheney and Donald Rumsfeld betrayed the American people. We have just learned that they knew hundreds of innocent men were sent to Guantanamo Bay prison, but covered this fact up because they feared that releasing them would harm the push for war in Iraq and the broader War on Terror.

This information was provided by a declaration under penalty of perjury signed by Colonel Lawrence Wilkerson, who was Secretary of State Colin Powell's Chief of Staff during part of the Bush Administration and attended Secretary Powell's morning briefings between August 2002 and January 2005.

These men called the Guantanamo detainees the "worst of the worst," but they knew this was not true. They used our government's lawyers to prevent the mostly-innocent prisoners from petitioning a court to ask the President why they were being indefinitely detained. For years, the highest levels of the Bush Administration knew that innocent children, as young as 12, and elderly men, as old as 93, were shackled, sleep deprived, beat up, placed in painful stress positions and kept in solitary confinement. Innocent people were tortured, threatened with death, and coerced into making incriminating statements to ease the pain.

Despite these facts, the Bush administration fought tooth and nail to prevent these detainees from having access to rights under the law. Indeed, escaping the rule of law was the primary purpose for sending the prisoners to Guantanamo Bay. As a result, for many years, there was not a scintilla of due process afforded to any of the detainees.

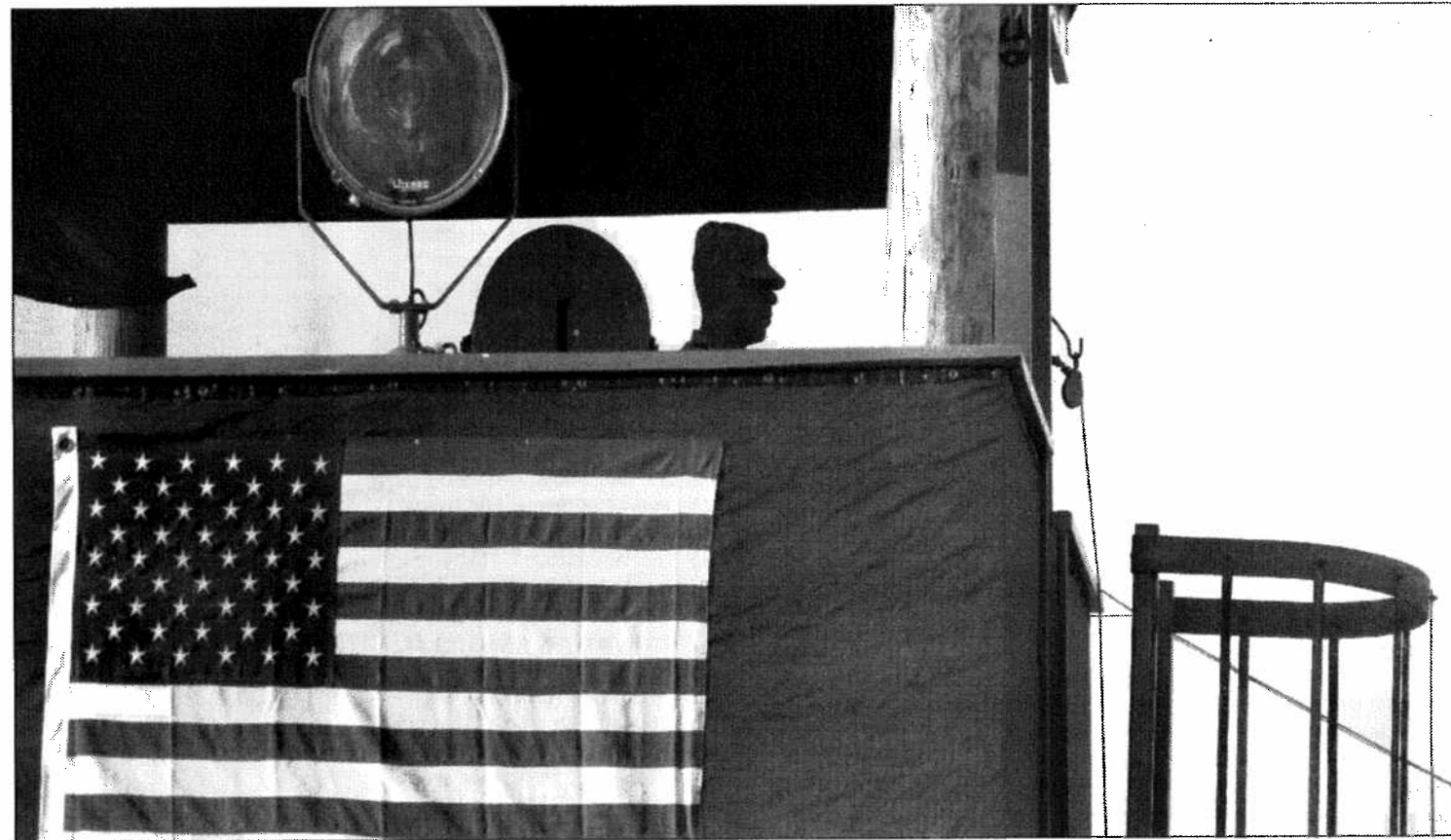
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Only after six years of litigation did the Supreme Court, in 2008, determine that the detainees had a constitutional right to habeas corpus. The writ, established in the Magna Carta in 1215, is the best protection against unlawful detention. It forces the government to provide a minimal level of evidence showing a person's guilty and why they should be detained.

With that decision, for the first time, district court judges in Washington, D.C. are having hearings to determine whether the government has enough evidence to continue holding a detainee. And the results are telling. Out of the 183 remaining detainees at Guantanamo, there have been 48 hearings. Out of these 48 cases, the judges have determined that, in 35, the government does not have enough evidence and must release the detainees. That's 73 percent! And, in these hearings the government does not need to prove its case beyond a reasonable doubt; it must

only show that it is more likely than not that a detainee is guilty.

These statistics should not be surprising as Colonel Wilkerson's recently signed declaration states that "many of the prisoners detained at Guantanamo had been taken into custody without regard to whether they were truly enemy combatants, or in fact whether many of them were enemies at all." He further states that "there was no meaningful way to determine whether they were terrorists, Taliban, or simply innocent civilians picked up on a very confused battlefield or in the territory of another state." Indeed, "of the initial 742 detainees that had arrived at Guantanamo, the majority of them had never seen a U.S. soldier in the process of their initial detention and their captivity had not been



Associated Press

Guantanamo Bay U.S. Naval Base in Cuba.

subjected to any meaningful review."

Nonetheless, the highest levels of the Bush Administration "had absolutely no concern that the vast majority of Guantanamo detainees were innocent, or that there was a lack of any useable evidence for the great majority of them." Rather, Vice President Cheney believed that "if hundreds of innocent individuals had to suffer in order to detain a handful of hardcore terrorists, so be it." He wanted to play prosecutor, judge and jury, all by himself, but without a law degree, or concern for human life, he was wholly unqualified.

Fortunately, our courts and rules of evidence help determine guilt or innocence so that we do not have to rely on the false choice presented by the former Vice President. And, with the election of President Barack Obama, many of us voted for a return to the rule of law and a belief in our Constitution. Yet, there is a serious concern that many of the unconstitutional policies of the prior administration will continue indefinitely. Despite its announcement that Khalid Sheik Mohammed and others would be tried in a real court in New York, the administration has backed down. Reportedly, the Administration is negotiating a deal with Senator Lindsey Graham, which would prohibit any detainees from having a trial in federal court. And, it is further reported that up to 50 detainees will be held indefinitely with no trial anywhere because there is insufficient evidence to convict.

Based on the results of the habeas trials, and now the declaration of Colonel Wilkerson, the remaining detainees must be tried in the forum that will most accurately determine the truth. Military Commissions allow hearsay and evidence obtained by coercion. They need not follow rules of evidence and do not provide the right to confront adverse witnesses. While they are untested, and have only resulted in three convictions, with two of the convicted already having been released, the federal courts have had hundreds of terrorism convictions pre and post-9/11.

Our adversarial system of justice, unique to the world in its ability to determine the truth, has been severely compromised over these past years by politicians trying to tinker with the Constitution. It is time for

President Obama and Congress to put aside politics, and to believe in America's system of justice. As we mark the retirement of Justice John Paul Stevens, it is past time to adhere to the words of the last Justice to retire, Sandra Day O'Connor, who, in *Hamdi v. Rumsfeld*, said "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."



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