

Allowing Independent Forensic Evaluations for Guantánamo Detainees

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President Obama has pledged to review all cases prosecuted through the Guantánamo Military Commissions established under President George N. Bush. Such commissions, however, may have limited independent psychiatric evaluations for Guantánamo defendants. This article explores the legal foundations for evaluating Guantánamo detainees, analyzes the decisions of commissions through discussions with defense attorneys involved in the cases, and considers the medicolegal consequences of the Guantánamo commissions. Recommendations are offered to safeguard the ethical soundness of future forensic consultations.

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Two days after his inauguration, President Barack Obama, issued an executive order for the immediate review of all new or pending cases through the Guantánamo military commissions established under President Bush.¹ Consequently, Secretary of Defense Robert Gates tasked Admiral Patrick Walsh, the Vice Chief of Naval Operations, to review the conditions of Guantánamo detainees with a multidisciplinary team of government officials. Released on February 23, 2009, the Walsh Report, known officially as Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement, broadly found that the conditions of confinement at Guantánamo conform to Common Article Three of the Geneva Conventions.² Common Article Three concerns the treatment of prisoners of war in conflicts "not of an international character" and emphasizes that detainees "shall in all circumstances be treated humanely" through care for the sick and prohibition of violence, hostage taking, humiliating treatment, and extrajudicial sentences.³ President Obama's order and the Walsh Report have sparked debate in political and legal circles, but their consequences for medicine have not received wide attention.

This article reviews how military commissions may have limited independent psychiatric evaluations of Guantánamo defendants. First, the legal foundation for psychiatric evaluations of Guantánamo detainees is examined. Next, court decisions of Guantánamo tribunals are analyzed through discussions with defense attorneys involved in the actual cases. Afterward, the medicolegal ramifications are considered, and recommendations are offered to protect the soundness of forensic consultations. An estimation of how the procedures governing psychiatric evaluations could be reconfigured to promote ethical practice is timely, since the Obama Administration has debated the timing and format of new proceedings against detainees.

The Legal Basis for Guantánamo Commissions and Forensic Evaluations

The Walsh Report mostly addresses the material and lifestyle conditions of detention, but final sections mention topics of medicolegal interest, such as access to health services, record confidentiality, the role of mental health professionals in interrogation, and attorney access to detainees. Of particular interest to psychiatrists is the section entitled "Health Care Services—Quality of Care and Access." Non-governmental organizations (NGOs) and detainees have asked that outside medical organizations be allowed to evaluate detainees independently as allega-

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tions have included camp neglect of mental health (Ref. 2, p 51). In response, the Walsh Report strongly recommends “input from appropriate external experts and agencies, as is currently practiced, to assess and maintain quality of health care services” (Ref. 2, p 53). The extent to which “appropriate external experts and agencies” can provide such input, as currently practiced, has been disputed and serves as the subject of this article.

Independent psychiatric evaluations follow different procedures at Guantánamo than in civilian courts. The Military Commissions Act of 2006 (also known as MCA 2006 or HR-6166) empowers commissions of military officers to try any “alien unlawful enemy combatant” for war crimes and affords defense counsel “a reasonable opportunity to obtain witnesses and other evidence.”⁴ Alien unlawful enemy combatants include members of organizations such as al Qaeda and the Taliban engaged in hostilities against the United States outside of a state military. If the accused cannot appreciate the nature or consequences of the acts in question due to mental disease or defect, the judge shall charge a military commission to find the accused “guilty,” “not guilty,” or “not guilty by reason of lack of mental responsibility.” This last charge requires a majority vote of commission members.

The Rules for Military Commissions (RMC) outline specific steps for forensic evaluations.⁵ Under Rule 504, a military commission can be convened by a convening authority such as the Secretary of Defense or an individual designated by the Secretary. Under Rule 706, a commission member, military judge, or participating counsel can apply for a mental examination if it appears that the accused “lacked mental responsibility for any offense charged or lacks capacity to stand trial.” An inquiry is then ordered from an internal board of health professionals consisting of at least one psychiatrist or clinical psychologist (706 board). The 706 board must receive the reasons for inquiry and answer four questions:

Did the accused have a severe mental disease or defect at the time of the alleged criminal conduct?

What is the clinical psychiatric diagnosis?

At the time of the alleged criminal conduct, was the accused unable to understand its nature and quality or wrongfulness?

Does the accused currently have a mental disease or defect that prevents an understanding of the proceedings or intelligent cooperation with the defense?

A statement only of the board’s conclusions is circulated to the officer ordering the examination, the accused’s confinement official, all counsel, the convening authority, and, after referral of charges, the military judge. The full report is released only to the defense and to medical personnel caring for the accused, unless further release is authorized by the convening authority or military judge. Only defense counsel, the accused, and the military judge can disclose direct or derived statements made at the 706 hearing to the prosecution. Rule 909 allows the convening authority to hospitalize or treat the accused if found incompetent and to reconvene the commission should competency be restored. The convening authority can also disagree with a conclusion of incompetence and continue the trial.

Commission Decisions on Defense Requests for Psychiatric Evaluations

Even though RMC 706 does not prevent defense teams from pursuing independent evaluations, Guantánamo commissions have denied requests for various reasons. Defense requests for a separate competency evaluation of Ramzi bin al Shibh, one of five detainees accused of the September 11 attacks, have been consistently denied on the basis that the 706 board can supply a sufficient opinion despite concerns that the board is biased.⁶ Lieutenant Richard Federico termed the denial of independent experts in a capital case “appalling” especially since the American Bar Association encourages independent experts in death penalty cases (Federico R, personal communication, February 2009).⁷

At other times, Guantánamo officials may have inconsistently approved defense experts. Lieutenant Commander Charles Swift retained a forensic psychiatrist in 2004 to assess whether statements of Salim Ahmed Hamdan, a Yemeni driver for Osama bin Laden, could be admitted as evidence, given their potential unreliability due to their being obtained during coercive interrogations in Afghanistan and Guantánamo. Swift mentioned that the defense was only able to obtain independent psychiatrists when motions to use government psychiatrists as defense experts were denied due to conflict of interest (Swift

C, personal communication, March 2009). In May 2008, the defense sought a competency hearing and postponement of trial after Hamdan acted erratically in proceedings, but the court deferred to a 706 board and declined further evaluations from the defense's forensic expert.⁸ According to Lieutenant Commander Brian Mizer, the convening authority frequently denied experts for Hamdan, since the defense "had not demonstrated need," forcing them to disclose the entire defense strategy "even when the government had been provided expert assistance" (Mizer BL, personal communication, February 2009).

The case of Binyan Mohamed, an Ethiopian accused of training with al Qaeda in Afghanistan, reveals the narrow scope for evaluation. In December 2007, the defense sought an independent evaluation when attorneys found him defecating in his cell and smeared with feces. The government would not approve independent evaluations before the swearing of charges.⁹ Lieutenant Colonel Yvonne R. Bradley emphasized that Guantánamo officials appeared to view Mohamed's coprophilia as a disciplinary infraction, not a psychiatric problem, adding that an unidentified physician saw Mohamed after his cell had been cleaned and she had not been furnished a report of that physician's findings (Bradley YR, personal communication, February 2009).

Furthermore, the 706 board has ruled without evidence from a personal examination. The defense requested an independent evaluation of Mohammed Kamin, an Afghan accused of supporting al Qaeda, on the basis that a mental disorder could not be excluded, and he may not understand legal proceedings.¹⁰ According to The National Institute of Military Justice (NIMJ), Kamin was declared competent to stand trial without meeting the board.¹¹ Notably, the NIMJ is a nonprofit organization composed mostly of former military lawyers committed to military justice, invited by The Office of Military Commissions (OMC) for impartial observation. Federico objected to the adequacy of the 706 board's initial inquiry, a point conceded by the prosecution and agreed to by the judge (Federico R, personal communication, March 2009). This motion has been stayed under President Obama's order.

For Mohammed Jawad, a detainee accused of attacking American military in Afghanistan when he was 17 years old, the commission approved defense evaluations only after the 706 board hearings. A

judge relied primarily on a 706 board to evaluate mental responsibility and only partially granted defense requests for a civilian clinical psychologist, claiming that "the defense has not shown the necessity" of an independent psychiatrist.¹² Major David Frakt's requests for a competency evaluation were denied by the convening authority until it was overruled by a judge who had written on the defense's right to expert assistance, after which the convening authority approved "less than half of the hours" needed for evaluation (Frakt D, personal communication, March 2009).

Regarding Omar Khadr, a 15-year-old apprehended in 2002, the judge allowed the prosecution to appoint the defense's expert, rejecting requests for an independent evaluation to assess whether his youth precluded the capacity for autonomous action during the alleged conduct, or whether his multiple traumas and aggressive interrogation impaired the recall of events or assistance with his defense.¹³ His defense attorney, Michel Paradis, explained that the defense wanted evaluations to consider cultural and neurodevelopmental factors as well as Khadr's understanding of the legal system (Paradis M, personal communication, March 2009). Throughout 2008, the defense underwent lengthy procedures to obtain independent experts (Paradis M, personal communication, March 2009). The judge first refused the defense's developmental psychiatrist and clinical psychologist, allowing the prosecution to choose a military psychiatrist as an "adequate substitute" and ordering a 706 board hearing. Only when defense attorneys raised ethics-related concerns about their competence to represent Khadr without expert psychiatric assistance, offering to recuse themselves from the case, did the judge allow independent experts.

Attempts were made to contact all main judicial parties of the Guantánamo commissions to avoid bias in the description of these events. Prosecutors at the OMC declined to comment. Michael Berrigan, Principal Deputy Chief Defense Counsel of the OMC, characterized the government as having "unlimited resources" and able to "pick almost any expert to testify" whereas the defense was "at the mercy of the Government for both" (Berrigan M, personal communication, February 2009). The Office of the convening authority responded that "it would not be appropriate to comment" on individual cases given their ongoing nature (Chapman M, personal communication, March 2009).

Assessing the Medicolegal Implications

These examples illustrate how Guantánamo commissions have relied on internal experts to render opinions about psychiatric conditions, calling into question the Walsh Report's claim of allowing external experts for independent evaluation. The Ethics Guidelines for the Practice of Forensic Psychiatry issued by the American Academy of Psychiatry and the Law¹⁴ encourage honesty and objectivity in forensic evaluations given the adversarial nature of legal procedures, acknowledging the potential for prejudice when evaluators forego personal examinations. Clinical examinations are particularly significant in psychiatry in that it is impossible to establish diagnoses solely from physical examination, laboratory investigation, or radiological imaging. In rebuffing requests for independent assessments, determining competency without personal examination and permitting the prosecution to choose defense experts, military commissions may have raised questions about the neutrality and objectivity of their experts. In an adversarial model, such actions could be perceived as impairing the defense's ability to obtain critical evidence and subverting protections under due process laws.

Moreover, the actions of the Guantánamo commissions could discourage defense access to experts from other medical specialties. In December 2008, the Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody headed by Senators Carl Levin and John McCain concluded that aggressive interrogation techniques led directly to abuse at Guantánamo.¹⁵ It remains to be seen how these conclusions will affect new legal arguments, but if outside defense evaluations are rejected, physicians from internal medicine, pediatrics, obstetrics/gynecology, and pathology may be unable to perform examinations to assess abuse. This prohibition could contribute to insinuations of partiality that would not be in the interest of the participating parties or the practice of medicine. It also goes against protections provided under due process laws.

Discussing More Ethical Alternatives

Two systemic reforms could be implemented simultaneously. First, the proceedings could be shifted to a civilian venue. Second, the laws pertaining to independent psychiatric evaluations could be

changed. Each point is elaborated in the following discussion.

One option is to try detainees under civilian courts instead of the secretive conditions of MCA 2006. Civilian courts have prosecuted many more suspects than commissions and administered justice without the harsh conditions endured by detainees.¹⁶ The Obama Administration could also create civilian national security courts for suspects deemed too dangerous for release but requiring classified evidence for prosecution.¹⁷ On May 21, 2009, President Obama outlined several options under review by his administration, such as trial in federal courts, maintenance of the military commissions for cases with national security risk with reforms toward due process, release of detainees who are not considered dangerous, and transfer to countries willing to accept detainees.¹⁸ Civilian national security courts are a better option than reform of extant military commissions since civilian courts would mitigate concerns that the current court system and 706 board are affiliated with the military, permitting more transparency.

Another possibility would be to examine the procedures of RMC 706. Ideally, the defense and prosecution teams could equally appoint forensic psychiatrists and other medical experts where relevant to avoid perceptions of bias. Attempts should be made to complete mental examinations for thorough, accurate opinions. If the accused cannot be examined, collateral information from family or acquaintances could be sought. In addition, a commission of experts could review previous 706 board conclusions for objectivity. If conclusions stand, then both teams could cross-examine evaluators. These reforms would demonstrate that detainees are being provided medicolegal care with due process protections.

In conclusion, President Obama's order on Guantánamo commissions takes definite action to refute the dichotomy of choosing national security over the national ideals outlined in his inaugural speech.¹⁹ The Senate voted overwhelmingly on May 20, 2009, to forbid the transfer of Guantánamo detainees to the United States,²⁰ suggesting that President Obama may need more political allies to make his goal a reality. In the meantime, forensic mental health professionals at Guantánamo can commit to objective appraisal by attending to professional values, the roles of ethnicity and disparity in the moralities of the evaluator and defendant, and the defendant's suffering.²¹ Clinical examinations should be performed

and documented when possible. By allowing independent psychiatric evaluations from defense experts, the Obama Administration can silence criticisms that psychiatrists implement the will of the state against undesirable populations and signify its true commitment to change.

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References

1. The White House, Office of the Press Secretary: Executive Order: review and disposition of individuals detained at the Guantánamo Bay Naval Base and closure of detention facilities. January 22, 2009. Available at http://media.washingtonpost.com/wp-srv/politics/documents/gitmo_012209.pdf?sid=ST2009012101583&s_pos=list. Accessed January 22, 2009
2. Review of Department compliance with President’s Executive Order on detainee conditions of confinement (the Walsh Report). February 23, 2009. Available at http://www.defenselink.mil/pubs/pdfs/review_of_department_compliance_with_presidents_executive_order_on_detainee_conditions_of_confinementa.pdf. Accessed June 1, 2009
3. Common Article III: Convention (III) relative to the treatment of prisoners of war. Third Geneva Convention, 1949. Provided online by the International Committee of the Red Cross, Geneva. Available at <http://www.icrc.org/ihl.nsf/WebART/375-590006?OpenDocument>. Accessed June 1, 2009
4. Public Law 109-366-Oct 17, 2006: Military Commissions Act of 2006. Available at http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf. Accessed January 24, 2009
5. The Department of Defense: Part II: Rules for Military Commissions. Available at [http://www.defenselink.mil/pubs/pdfs/Part%20II%20-%20RMCs%20\(FINAL\).pdf](http://www.defenselink.mil/pubs/pdfs/Part%20II%20-%20RMCs%20(FINAL).pdf). Accessed January 26, 2009
6. United States of America v. Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak bin ‘Attash, Ramzi bin al Shibh, Ali Abdul Aziz Ali, Mustafa Ahmed Adam al Hawsawi: Defense motion for appropriate relief: appointment of defense expert consultant Dr. Xavier F. Amador, MA, PhD. August 1, 2008. Available at <http://www.defenselink.mil/news/KSM%20et%20al%20-%20D%20-%20017%20Motion%20for%20Appropriate%20Relief.pdf>. Accessed January 28, 2009
7. American Bar Association: Guidelines for the appointment and performance of defense counsel in death penalty cases: revised edition. February 2003. Available at <http://www.internationaljusticeproject.org/pdfs/guidelines-ABA.pdf>. Accessed January 28, 2009
8. United States of America v. Salim Ahmed Hamdan: Order for examination under RMC 706. May 15, 2008. Available at <http://www.defenselink.mil/news/Hamdan%20AE's%20196-205.pdf>. Accessed January 30, 2009
9. Convening authority for Military Commissions. Response to request for initial evaluation and psychiatric interviews of Binyam Mohamed. January 9, 2008. Available from: Lieutenant Colonel Yvonne R. Bradley, USAFR, Detailed Military Counsel for Binyam Mohamed
10. United States of America v. Mohammed Kamin: Defense motion for order of an inquiry into the mental capacity or mental responsibility of the accused. August 29, 2008. Available from: Lieutenant Richard Federico, JAG Corps, U.S. Navy, Defense Attorney
11. The National Institute of Military Justice: Report on military commission hearings. October 22–23, 2008. Available at http://www.nimj.com/documents/Report%20on%20Military%20Commission%20Proceedings%20_Oct%20%2022-23_.pdf. Accessed February 2, 2009
12. United States of America v. Mohammed Jawad: D-023 Ruling on defense request for expert consultants. September 30, 2008. Available at <http://www.defenselink.mil/news/Jawad%20-%20D-023%20-%20Motion%20fro%20Appointment%20of%20Experts.pdf> (see pdf p 20). Accessed February 3, 2009
13. United States of America v. Omar Ahmed Khadr: Order: Defense motion for appropriate relief D064: Request for appointment of certain expert consultants and witnesses. August 14, 2008. Available at <http://www.defenselink.mil/news/Khadr%20-%20D%20-%20064%20Defense%20Motion%20for%20Appropriate%20Relief.pdf> (see pdf p 81). Accessed February 4, 2009
14. American Academy of Psychiatry and the Law: Ethics Guidelines for the Practice of Forensic Psychiatry: Adopted May, 2005. Available at <http://aapl.org/ethics.htm>. Accessed February 5, 2009
15. Senate Armed Services Committee Inquiry Into the Treatment of Detainees in US Custody. December 11, 2008. Available at <http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf>. Accessed February 5, 2009
16. Malinowski T: Restoring moral authority: ending torture, secret detention, and the prison at Guantánamo Bay. *Ann Am Acad Pol Soc Sci* 618:148–59, 2008
17. Johnston D, Lewis NA: U.S. will give Qaeda suspect a civilian trial. *New York Times*. February 27, 2009, p A1
18. President Barack Hussein Obama. Remarks by the President on national security. May 21, 2009. Available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/. Accessed June 2, 2009
19. President Barack Hussein Obama. Inaugural address. January 21, 2009. Available at <http://www.whitehouse.gov/blog/inaugural-address/>. Accessed January 22, 2009
20. U.S. Senate Roll Call Votes 111th Congress, 1st Session. May 20, 2009. http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00196. Accessed June 2, 2009
21. Griffith EEH: Personal narrative and an African-American perspective on medical ethics. *J Am Acad Psychiatry Law* 33:371–81, 2005