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How to Close Guantanamo

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On March 29, 2007, Secretary of Defense Robert Gates told the House Appropriations Committee that there was a "taint" to Guantanamo and that the prison should be closed.[1] More than six months later, several dozen prisoners have been moved out of Guantanamo, five more have been moved in, and the overall number of detainees is slightly under 300.[2] Just about everyone agrees that the indefinite detention of hundreds of men without charge in the United States's backyard is a black spot on its reputation around the world. Virtually every Western ally of the United States has publicly called for its closure, and the operation of this prison camp has earned the United States round after round of condemnation by United Nations bodies. Secretary of State Condoleezza Rice stated that "we all want to close Guantanamo."[3] Even President George W. Bush has said that he would "like" to see Guantanamo closed.[4]

But recently, Bush changed his tune—acknowledging that he will leave the problem of Guantanamo to his successor.[5] And while Secretary Gates still pushes for Guantanamo's closure, he has now conceded at least temporary defeat. "I was unable to achieve agreement within the executive branch on how to proceed in this respect," Gates told the Senate Appropriations Committee on September 26. "We are continuing to try and do that."[6]

The administration chose Guantanamo, a U.S. military base on the southeast end of Cuba, as a place that would allow—or so the administration thought—the detention and interrogation of terrorist suspects outside of any legal framework. It turns out, however, that taking someone out from under the rule of law is much easier than returning them back to a legal regime. What do you do with detainees who cannot be returned to their home countries because of fear of torture? How do you ensure that you do not just export the Guantanamo problem elsewhere? How do you protect against detainees walking out of Guantanamo and heading for the battlefield?

Closing Guantanamo will not be easy. It will require political resolve, creative diplomacy and an assumption of risk. But it must be done. In the words of President Bush's former secretary of state, Colin Powell: "Guantanamo has become a major, major problem.... [I]f it was up to me, I would close Guantanamo not tomorrow, but this afternoon."[7]

The Worst of the Worst?

On January 11, 2002, the first group of prisoners landed at the U.S. Naval Base at Guantanamo Bay, Cuba, where they were locked up in crude chain-link cages topped with barbed wire (the now-abandoned Camp X-ray). Close to 800 detainees have now been held in Guantanamo, most of whom were originally turned over to the United States in Pakistan and flown to Guantanamo in 2002. The Bush administration described the detainees as the "worst of the worst"—responsible for the attacks of 9/11 and dedicated to killing Americans.[8] Then-Defense Secretary Donald Rumsfeld called them the "most dangerous, best trained, vicious killers on the face of the earth."[9]

Counterterrorism experts and knowledgeable military leaders tell a very different story.

Despite the Bush administration's contentions, many of the detainees were no more than low-level fighters. As Lieutenant Colonel Thomas S. Berg, who served on the original legal team for military prosecutions, explained: "It became obvious to us as we reviewed the evidence that, in many cases, we had simply gotten the slowest guys on the battlefield. We literally found guys who had been shot in the butt."[10] Michael Scheuer, head of the Central Intelligence Agency's (CIA) bin Laden unit from 1999 to 2004, put it even more bluntly: "We absolutely got the wrong people."[11]

That is not surprising. In 2002, the United States was distributing bounty flyers throughout Pakistan, offering rewards of thousands of dollars per detainee. Flyers promised "enough money to take care of your family, your village, your tribe for the rest of your life"—simply for turning over al Qaeda and Taliban terrorists.[12] Available capture information suggests that the vast majority were not picked-up by U.S. forces, but turned over by the Pakistan government, Northern Alliance, and Afghan National Army—often for large sums of money.[13] Rival clan members and neighbors with vendettas had a field day.

As Mark Jacobson, assistant for detainee policy in Defense Secretary Rumsfeld's office from November 2002 to August 2003, stated quite frankly: "I think the standards for sending someone to Guantanamo in 2002 and early 2003 were not as high as they should have been."[14]

In many cases, the United States has recognized the divide between rhetoric and reality. More than 400 detainees have been returned to their home countries. Another eight—five Chinese Uighurs, an Algerian, an Egyptian, and a Saudi—have been provided third-party resettlement in Albania, due to legitimate fears that they would be tortured if they were returned home.[15]

But close to 300 prisoners remain. These include dozens who have already been cleared for release or transfer but cannot be returned home because they would likely face torture or other abuse, their home country will not accept them back, or the United States is not satisfied that their home countries will satisfactorily monitor or restrict their activities.

The United States says it plans to prosecute approximately 80 more prisoners before the reestablished military commissions for war crimes and other offenses. To date, these commissions have convicted just one person—David Hicks, who is home in Australia serving the last days of his nine-month sentence—as the result of a plea deal.

A third category of prisoners fall into the amorphous group of people the United States does not plan to try, but has not, and does not, plan to clear for release or transfer. The United States claims these people are too dangerous to release.

President Bush has thrown up his hands, recently stating in an interview that he has decided that Guantanamo is "necessary to protect the homeland" and that his successor will need to address the prison's utility—effectively dumping the problem of Guantanamo on the next administration.[16] His successor must move beyond the rhetoric and close Guantanamo for good.

Why We Must Close Guantanamo

The United States has long prided itself on its efforts to promote freedom, democracy, and human rights around the world. Yet it now finds these efforts sidetracked by easy—and often true—attacks on the United States' own integrity. "Take Guantanamo for example," exclaimed Robert Mugabe, Zimbabwe's autocratic President, in a statement before the 62nd session of the U.N. General Assembly. "Can the international community accept being lectured by this man on the provisions of the Universal Declaration of Human Rights? Definitely

not!"[17] Mugabe is not alone. A long list of leaders—including Russian president Vladimir Putin, Bashar Assad of Syria, and Iran's Mahmoud Ahmadinejad—have pointed to Guantanamo to deflect attention from human rights abuses in their own countries.[18]

U.S. diplomats in several countries have told Human Rights Watch of being unable to challenge state-authorized round-ups and detentions without trial because of Guantanamo. When Human Rights Watch raised concern about U.S. silence over arbitrary detentions in Malaysia, a senior State Department official replied, "With what we're doing in Guantanamo, we're on thin ice to push."[19] Allies that have long looked to the United States as a standard-bearer on human rights now find themselves instead issuing reports and public statements decrying the indefinite detention without charge of hundreds of men in Guantanamo.

The finger-pointing is justified. The continued detention of hundreds of detainees without charge at Guantanamo undermines U.S. moral authority, is in disregard of international human rights and humanitarian law, and is bad counterterrorism policy. It hurts—not helps—the fight against terror.

Consider the dubious legal claims behind the Guantanamo detentions. The Bush administration has defended Guantanamo by claiming that the detainees are "enemy combatants" in the "global war" against terror, and that it can hold them without trial until the war is over. Its definition of "combatant" is so broad as to encompass anyone—from anywhere around the world—whom the president deems to have supported or associated with the terrorist enemy. This theory turns the entire world into a battlefield for whom any alleged terrorist is a "combatant" who can be held until the end of terrorism under the laws of war. Of note, combatants are also legitimate military targets under the laws of war. Taken to its logical conclusion, this overbroad conception of combatant would permit U.S. forces to fire on sight at any suspected terrorist anywhere they find him.

Under this same legal theory, the Russian military could detain (or shoot at) an American aid worker in Chechnya based on the claim that she was supporting Russia's terrorist enemy and lock her up without charge—at least until Russia has rooted out all Chechen separatists. The United States would have little standing to object.

The continued detention of hundreds of men without charge in Guantanamo is also bad counterterrorism policy. As the U.S. Army's new field manual on counterinsurgency operations warns, fighting a nontraditional enemy like al Qaeda requires counterintuitive approaches. It is simply not possible to kill and capture every enemy in such a battle. Nor is it necessarily a good idea. "Dynamic insurgencies can replace losses quickly," warns the manual. The only way to win, therefore, is to "cut off the sources of that recuperative power" by diminishing the enemy's legitimacy and appeal while increasing one's own. The manual cautions that the United States loses its legitimacy, and therefore its ability to win the fight against al Qaeda, if it engages in illegitimate actions. "Unlawful detention, torture and punishment without trial" are all cited as illegitimate actions to be avoided.[20]

The lesson derived from the counterinsurgency field manual is clear. Locking up a few hundred detainees without charge in a U.S. Navy base in Cuba does little to diminish al Qaeda's threat. To the contrary, it fuels animosity toward the United States and becomes a talking point and recruiting tool for future terrorists. While such a policy may take a few would-be suicide bombers out of circulation, it aids al Qaeda's ability to recruit others.

A smart counterterrorism policy would instead focus on arresting, detaining, and trying the high-value al Qaeda members—the planners, financiers, masterminds, and technological experts who, if let loose,

would add the kind of value to al Qaeda and other terrorist networks offered by few others.

Some such detainees are already at Guantanamo, and they should be tried and held publicly accountable for their crimes. In contrast, the detainees for whom the United States lacks any evidence to convict should be released from Guantanamo's system of indefinite detention without charge, where they are likely of more value to the al Qaeda terrorist network than they would be if they were back home in Kabul or Lahore.

Stating that Guantanamo should be closed, the high-value detainees tried, and the low-value ones released is the simple part. Figuring out how to do so is much harder. Each of the categories of detainees—those eligible for release or transfer; those slated for trial; and those currently deemed too dangerous for release or transfer—pose different problems that require new strategies.

Three basic principles underlie this approach: First, a sensible counterterrorism strategy should focus on arresting, detaining, and trying the high-value al Qaeda members—the planners, the financiers, and the technological experts—rather than attempting to detain every terrorist associate who might someday end up on the battlefield. Second, it does more damage than good to the United States efforts to curb terrorism to continue to hold men without charge, even if they are potentially dangerous. And third, the benefits from closing Guantanamo will all be squandered if the United States simply ships detainees to prolonged detention without charge, where torture or other abuse awaits elsewhere.

Detainee Transfers

While most of these detainees want little more than to be returned home, several cannot—and should not—be sent home because of credible fears of torture or other abuse upon return.

This group includes 17 Chinese Uighurs. By all accounts, more than a dozen of these men were living together in a Uighur compound in Afghanistan when the coalition bombing started in late 2001. The Uighurs fled to escape the bombings and made their way to Pakistan, where they were sold to the United States by bounty hunters. While the United States has long ago determined that the Uighars pose no risk to the United States or its allies, it has also recognized—to its credit—that it cannot return these men to China because they would be at serious risk of persecution and abuse. The Chinese government has accused them of being part of a separatist movement from the Xiajing province of China. Although the United States has been actively pressing other countries for help with resettlement of these men, it refuses to grant the Uighurs asylum in the United States; has not yet found any other third-party takers (five others from this group were resettled in Albania in 2006); and continues to hold them in prison cells in Guantanamo.

Other detainees—including several from Tunisia, Algeria, and Libya, all countries with known records of torture—have expressed similar fears of persecution and torture if returned to their home countries. In some cases, the United States has accepted these fears as legitimate and declined to transfer detainees whom it otherwise would have returned home. But in other cases, it has either ignored, failed to solicit information suggesting that the detainee might face a risk of torture or abuse, or relied on what are known as "diplomatic assurances"—promises of humane treatment from the receiving government—as sufficient protections against torture.[21] We now know that several Russians and at least one Tunisian detainee have been abused upon return, and there very well may be others.[22]

The United States should set up a system by which detainees are provided advance notice of a transfer and an opportunity to object to the transfer before either a fed-

eral court or independent, internationally-appointed adjudicator. Such a process likely would slow the pace of closure and increase the pool of difficult-to-place detainees who cannot be returned home. But it is far better to close Guantanamo painstakingly and responsibly than rush into a solution that earns the United States another round of global recrimination when it should instead be rebuilding its reputation.

What should happen to the detainees who cannot be sent home? The United States complains that no other country will accept them, yet refuses to allow them into the United States. With the exception of Albania, none of the many allies that have long called on the United States to close Guantanamo have been willing to accept third-party nationals themselves. After all, why should another country help out Washington by resettling detainees that the United States refuses to accept?

The United States should break this impasse by agreeing to accept at least some of these detainees in the United States. (Uighur communities in the United States, for example, have already committed to providing housing, language, and job training to any Uighur who is provided asylum.) Then—and only then—will the United States be able to convince the rest of the world that it is serious about closing Guantanamo, and that while it needs international help to do so, it will not shift the entire burden of closing Guantanamo onto others.

Once that happens, the many nations that have long condemned the detentions at Guantanamo would no longer be able to point to Washington's inaction as an excuse for their own. With some pushing and prodding the United Nations or another international body might even be willing to take on the role of intermediary—screening the detainees and helping to find third-party placements around the world. Such international cooperation would also be useful in dealing with a number of other areas that have slowed down the returns from Guantanamo. International pressure is needed to convince reluctant countries that it is time to take responsibility for any of their citizens and legal residents still held in Guantanamo. International cooperation could also facilitate coordinated information sharing about returned detainees that could be used to track the detainees and mitigate any future threat they might pose.

Detainee Prosecutions

Detainees who have committed, planned, aided, abetted, or conspired to commit acts of terrorism should be charged, tried, and held accountable for their crimes. By trying these detainees the United States diminishes their status to the level of common criminal, legitimizes their detention, and brings some sense of closure for their victims. But any such trial must meet basic criteria of fundamental fairness and due process. Otherwise, the verdict lacks legitimacy and the court system itself is put on trial, rather than the detainees it is designed to try.

The military commissions designed to bring the Guantanamo Bay detainees to swift justice fail this test. Six years have passed since the administration first announced the creation of these commissions. To date, they have had just one success: the April 2007 conviction of David Hicks by guilty plea.

By comparison, the Department of Justice has successfully prosecuted dozens of terrorism cases, including several international ones in these same six years. Some are well-known: Richard Reid, the shoe bomber arrested in Logan airport, and Zacarias Moussaoui, convicted of conspiring in the 9/11 attacks, are now behind bars for the rest of their lives. Others are less familiar but significant nonetheless: Ahmed Omar Abu Ali, sentenced to 30 years for training with and supporting al Qaeda; Mohammad Ali Hasan al-Moayad and Mohammed Zayed, given 75 years and 45 years, respectively, for channeling money to al Qaeda

and Hamas. The list goes on. These men are now incarcerated in the United States and serving out their sentences, having been convicted by an established and reputable federal court system.

The administration asserts that, despite this record, it cannot try most of the Guantanamo Bay detainees in federal court because of stringent evidentiary rules and because it will be required to make public classified information. To a large extent, these claims appear to be little more than an attempt to get around the problem that much of the evidence has been derived from torture and abuse. In September 2006, President Bush announced the transfer of 14 so-called "high-level" detainees—including Khalid Sheikh Mohammad, the alleged mastermind of 9/11—from Central Intelligence Custody custody to Guantanamo. All of these detainees presumably fall within the list of the 80 the United States wishes to try. Yet all had been held in incommunicado CIA detention, where they had reportedly been subjected to a range of abusive interrogation techniques, including "waterboarding" (simulated drowning), extended exposure to extreme cold, and prolonged sleep deprivation.

The case of Mohammad al Qahtani—alleged to be the so-called twentieth 9/11 hijacker and presumably someone that the administration would also want to try—highlights the problem. His interrogation log shows that for a period of six weeks between 2002 and 2003 he was intentionally deprived of sleep, forced into painful physical positions (known as stress positions) and subjected to forced exercises, forced standing, and sexual and other psychological humiliation while in Guantanamo.[23] Al Qahtani reportedly accused some 30 other Guantanamo detainees of associations with bin Laden. He has since recanted these statements, explaining that he lied to stop the torture.

The military commissions—authorized by Congress with this background in mind—allow the introduction of evidence obtained through cruel and inhumane interrogations so long as it was obtained prior to 2006 (when Congress passed the McCain amendment prohibiting cruel and inhumane treatment of detainees) and deemed by a military judge to be "reliable" and "probative."[24] Coupled with the lax rules on hearsay, military commission prosecutions could go forward based entirely on affidavit summaries of evidence obtained through abuse, without any opportunity for the defendant to confront either the interrogator or the accuser. In contrast, the federal courts categorically prohibit the use of evidence obtained through such abusive interrogations and place limits on the use of hearsay, thereby making these prosecutions more difficult.

But evidence obtained through abusive interrogations should never be admitted into a court of law—particularly if the United States expects the verdict to carry any sort of legitimacy. Nor should anyone be put behind bars for life based on a single affidavit summary of a statement, without any opportunity to confront either the person who made or took the statement.

Moreover, the claim that federal court rules require the government to turn over classified evidence is simply wrong. To the contrary, the Classified Information Procedures Act, which controls the use of classified evidence in federal court, provides broad protections for such evidence. While the government must ensure that anything presented as evidence is also presented to the defendant, substitute summaries of evidence can be used in place of classified materials the government wishes to protect. Notably, the military commissions include the same requirement.

Consider the case of American citizen Jose Padilla. Declared an "enemy combatant" in 2002, he was locked up, largely incommunicado, for three-and-a-half years in a military brig before being transferred to federal court for trial. The government

agreed it would not use any of his statements made during the years in the brig—presumably given the credible allegations of severe mistreatment. Instead, it relied almost exclusively on intelligence information collected prior to his military detention. One of its star witnesses—a CIA agent—was permitted to testify in disguise in order to protect his identity. The jury convicted Padilla on all counts.

It is hard to imagine that an American jury would not convict Khalid Sheikh Mohammad or any other Guantanamo detainee, so long as the government presents credible evidence (not obtained through abuse) showing he engaged in, planned, conspired, or aided a terrorist attack. The trial might be messy; it very well may raise complicated evidentiary issues; and it would almost certainly garner lots of media attention. But at the end of the trial, the United States could say that it put the detainees through a fair process and that the verdict was legitimate.

Detainee Limbo

According to the administration, there are an estimated 70 to 150 detainees deemed too "dangerous" for release, but who cannot be tried.[25] The aggressive use of fairly expansive federal criminal laws to prosecute more of these detainees could whittle down these numbers. Anyone who has planned, conspired, aided, or abetted a criminal act can be charged and convicted—even if he did not carry out the act himself.

Yet no matter how aggressively the United States prosecutes these men, there will still be some group of detainees that are considered to be a future threat yet cannot be tried. These are men that the United States fears may one day strap a suicide bomb to their backs and return to the battlefield. Many argue that these men should be detained based on a prediction of future dangerousness, even if they cannot be tried. Some detainees who have been released from Guantanamo have reportedly appeared on battlefields in Afghanistan—and others no doubt will as well.[26] The United States, some argue, is better off keeping them behind bars. But take this argument to its logical conclusion. Under this theory, the United States military could march through the streets of Kandahar, Riyadh, or Islamabad, arrest and detain any dangerous looking male between the ages of 20 and 35. After all, at least some portion of them might one day join forces with al Qaeda or the Taliban, or want to. But no prison is large enough to hold all of the angry young men in the world.

This argument also assumes a fixed supply of low-level fighters and suicide bombers. If these men are kept out of circulation, then there will be fewer attacks on the United States or coalition partners. Or so the thinking goes.

But remember the counterinsurgency field manual. An insurgency like al Qaeda is not static, but fluid and dynamic. If the particular detainees in Guantanamo are kept out of circulation, others can—and will—fight in their place. The supply outstrips demand. The high-profile detentions of a few dozen potentially men in Guantanamo do little to make the United States safer. To the contrary, it delegitimizes U.S. moral authority, helps to fuel the "recuperative power" of the enemy, and undercuts critical efforts to win hearts and minds.

The United States should do everything it can to mitigate the risks posed by the release of these men. It should press their home countries to lawfully monitor returned detainees' activities and to charge and detain anyone who commits a criminal act. But some countries are unable or unwilling to take on that role. Nearly 100 of the remaining Guantanamo detainees are Yemeni. It is unlikely that the United States will ever be adequately satisfied that Yemen is taking sufficient steps to monitor and respond to acts of terrorism within its borders. Does that mean that these Yemenis should be locked up without charge—possibly until the ends of their lives—based on an

assessment that they might pose a future risk? No. They should be released. Doing so will require an assumption of risk. It will require the United States to accept that at least some of these men may cross the border and join the battlefield to fight U.S. soldiers and our allies another day.

General Barry McCaffrey, former U.S. drug czar, following an academic mission to Guantanamo Bay, advised the Pentagon: World opinion is so united against the detention facility that "there is now no possible political support for Guantanamo going forward." It "may be cheaper and cleaner to kill them in combat then sit on them the next 15 years."[27]

General McCaffrey makes a point. Those detained at Guantanamo present a greater threat to the United States than they would if they returned to the battlefield, where—under the laws of war—they can be shot and killed on sight.

Future Detainees

Despite its misgivings about Guantanamo, the United States continues to transfer detainees there, arguing that it needs the facility as a holding place for "enemy combatants" in the global war against al Qaeda. But even if the legal theory justifying detention were sound—which it is not—it is bad policy.

Consider what is known about the five men transferred to Guantanamo over the last year. According to Department of Defense press releases, one was involved in a 2002 attack in Kenya that killed 13 people; two served as couriers for high-level al Qaeda operatives; a fourth planned and directed al Qaeda operations; and a fifth was described as "one of al Qaeda's highest-ranking and experienced senior operatives."[28] These men should not be labeled combatants and elevated to the level of warrior. They should be tried for committing and supporting terrorism.

To reiterate, those who planned, supported, or carried out terrorist acts should be tried and held publicly accountable for their crimes. Those who cannot be tried, but are being held based solely because they may pose future risks should be let go. Detaining them without charge in the United States undermines the very values and institutions Washington should be fighting for in the struggle against terrorism—and does far more harm than good.

Closing Guantanamo will not be easy. Convincing the American public to accept on U.S. soil detainees that have been described for the past six years as the worst of the worst will require strong leadership, an admission of past mistakes, and much persuasion. Securing the type of international cooperation to help resettle others who cannot be returned home or whose countries will not take them back will require patience, time, and resolve. Trying detainees in federal court will be messy and challenging—particularly given all the attention that the trials will likely generate. And conceding that some of the detainees may pose a threat, but should be released just the same is one of the hardest decisions that a government leader could make.

But it must be done. It is time for Guantanamo to become a relic of the past. ●

Notes

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4. President George W. Bush, "Press Conference of the President," June 26, 2006, Washington, D.C.

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16. Sammon, "Bush Quietly Advising Hillary.".

17. Robert Mugabe, President of Zimbabwe, "Statement before the 62nd Session of the United Nations General Assembly," September 26, 2007.

18. Vladimir Putin, "Interview with Newspaper Journalists from G8 Member Countries," June 4, 2007; "Spiegel Interview with Syrian President Assad," *Der Spiegel*, August 29, 2005.

19. Human Rights Watch interview with U.S. State Department official, December 2003. Cited in Human Rights Watch, *In the Name of Security: Counterterrorism and Human Rights Abuses Under Malaysia's Internal Security Act*, vol. 16, no. 7(C), May 2004, p. 43.

20. U.S. Army, Counterinsurgency Field Manual, FM-3.24, December 2006, para. 1-130 to 1-132.

21. Human Rights Watch, *Questions and Answers: 'Diplomatic Assurances' against Torture*, November 2006.

22. Human Rights Watch, *The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States*, vol. 19, no. 2(D), March 2007; Human Rights Watch, *Ill-Fated Homecomings: A Tunisian Case Study of Guantanamo Repatriations*, vol. 19, no. 4(E), September 2007.

23. "U.S. Potentially Liable for Torture," Human Rights Watch news release, April 14, 2006.

24. The Military Commissions Act (MCA) of 2006, P.L. 109-366; 10 U.S.C. §. 948r (c).

25. "Detainee Transfer Announced," U.S. Department of Defense news release, no. 1166-07, September 29, 2007; Richard Willing, "Lawmakers to Work on Closing Gitmo," *USA Today*, July 8, 2007.

26. "Ex-Guantanamo Detainees who have returned to the fight," U.S. Department of Defense Special Report, July 12, 2007. DoD claims that at least 30 have returned to the fight, but has provided information about just six of these detainees. Some have suggested that DoD may be defining returning to the fight quite broadly—to include those who engage in "propaganda warfare" by speaking or writing about their negative experiences in Guantanamo, even if they do not actually engage in any terrorist act.

27. Barry R. McCaffrey, "Academic Report-Trip to JTF Guantanamo, Sunday 18 June–Monday 19 June 2006," United States Military Academy, June 28, 2006.

28. "Defense Department Takes Custody of a High-Value Detainee," U.S. Department of Defense news release, no. 494-07, April 27, 2007. See also "Terror Suspect Transferred to Guantanamo," DoD news release, no. 343-07, March 26, 2007; "Terror Suspect Transferred to Guantanamo," DoD news release, no. 703-07, June 6, 2007; "Terror Suspect Transferred to Guantanamo," DoD news release, no. 779-07, June 22, 2007.