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Fanon, Guantánamo, and We the People

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Abstract: In its “war on terror,” the United States government has ignored fundamental legal principles and human rights protections, making the detainees at Guantanamo Bay, Cuba, the new “wretched of the earth.” This essay argues that the detainees serve as the means for politicians and lawmakers to both keep the public in a constant state of fear and display strength in the area of national security. For their part, the people of the United States are complacent about the legal violations at Guantanamo because the detainees have been emphatically constructed as the alien incomprehensible “Other” and outside the boundaries of the recognizably human.

“The worst of the worst”—this is how Donald Rumsfeld, Secretary of Defense until December 2006, described the men who are being held at Guantánamo Bay. General Richard Myers, Chairman of the Joint Chiefs of Staff until October 2005, said of them that they are “so vicious, if given a chance they would gnaw through the hydraulic lines of a C-17 while they were being flown to Cuba” (William Schulz, www.securitypeace.org/pdf/schulz.pdf). The suicides by hanging in June 2006 by three prisoners at Guantánamo Bay were seen by one government official as “a marketing

ploy” and “public relations act.”

The 380+ men at Guantánamo Bay are “the wretched” of our national earth; their bodies are at the mercy of an overwhelmingly determined and arbitrary machinery of legal power: in September 2006, the men and women of the United States Congress gave the Bush administration license to do with these men whatever it wished when, through the passage of the Military Commissions Act, it stripped them of a fundamental protection of a modern judicial system—the right to habeas corpus, i.e., the right to appear in court and challenge the

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validity of one's imprisonment.

Habeas corpus is a Latin phrase that translates literally, according to the *Oxford English Dictionary*, as "thou (shalt) have the body (in court)." In the realm of law, the right to habeas corpus is deemed fundamental and inviolable to a society recognizing the sacredness of the individual. It is a protection that dates back to 1231, but our elected officials have denied the detainees access to this basic guarantee of their humanity. The irony is that in the congressional debate spotlighting torture and the appropriate and acceptable techniques of interrogation (a debate that was being held in the summer of 2006), the nation's attention was diverted away from the equally important issue of habeas corpus. Torture is sensational, torture is headline material; but habeas corpus is a Latin phrase, seemingly arcane, deceptively obscure. And we the people did not notice, or we chose not to notice. Habeas corpus rights, though fundamental to the framework of a democracy and the bedrock principle of the U. S. legal system, does not carry with it the same emotional charge, and so its resonance with the common man or woman is not as powerful. The differing emotional valence of torture and habeas corpus gave the Bush administration a compelling advantage in the discussions that resulted in the passage of the Military Commissions Act (MCA) that the President signed into law on October 17, 2006.

For several weeks prior to the passage of this bill, Congress and the people were riveted on the question of torture—what constitutes it and whether and to what extent it behooves us as a nation to abide by Article 3 of the Geneva Convention. Three Republican senators—John McCain, Lindsey Graham, and John Warner—formed a formidable phalanx of resistance to any language that watered down the nation's commitment to Article 3 of the Geneva Convention that specifically outlawed torture and stipulated the humane treatment

of prisoners. They were opposed by their more hawkish Republican fellow congressmen, but the three stood firm in the initial phases of the debate, insisting on the strategic value of our commitment to Article 3. The media carried the debate, and Op Ed pages ran submissions on the wisdom of abiding by the Geneva Convention. It appeared that the nation could congratulate itself on having participated in a morally bracing discussion of what interrogation techniques were acceptable in the interest of protecting people. Despite these discussions, however, the final language of the bill is highly unspecific on what exactly can be defined as torture and grants the military enormous latitude in determining whether an interrogation technique has been inhumane.

In addition, I submit, the question of torture served ultimately as an expedient distraction for the more egregious violation that ultimately became part of the Military Commissions Act, namely, the withholding of habeas rights from any non-citizen captured on suspicion of terrorist activity. So focused were the senators and congressmen on the issue of torture, so determined were they to ensure that the Executive would not have blanket power to employ questionable interrogation techniques (nonetheless, they did give the Executive considerable power in this area) that they were less willing to engage the equally urgent challenge to habeas that became part of the language of the legislation. Their and the nation's energy appears to have been spent over torture with little left to spare for debating habeas.

Whether through deliberate tactical maneuvering or inadvertently, the Bush administration brought to passage a bill that essentially erased close to 800 years of the sacred right of an individual to appear in court to challenge the validity of his/her incarceration. The nation has been largely silent on the abrogation of habeas. The gross disadvantage is only to non-citizens (in-

cluding permanent residents), so perhaps it should not be surprising that there has been no public outrage at what has transpired. But the abrogation of habeas marks a disastrous low-point in the United States' approach to the threat of terrorists. And its effects have been swift and sweeping: on Wednesday, December 13, 2006, just short of two months after the passage of the Military Commissions Act, Judge James Robertson of the Federal District Court in Washington, D.C., ruled that Salim Ahmed Hamdan, Osama Bin-Laden's driver and a prisoner at Guantanamo, "could no longer contest his detention before a federal court because [...] Congress this fall explicitly eliminated his right to file a habeas corpus challenge" (Lewis A32). The irony of this ruling is that the same judge, in 2004, had granted Hamdan a habeas victory by stopping a military war crimes trial at Guantánamo Bay on the basis that the process was flawed. But in his latest ruling, Judge Robertson declared that the Congress's passage of the Military Commissions Act of October 2006 made it impossible for him to entertain habeas corpus petitions by detainees because, under the new law, they did not have that right and could not invoke the U.S. Constitution to call forth that right. The judge said the Military Commissions Act, passed by Congress in September, 2006 and signed into law by President Bush the following month, was unambiguous in denying Guantanamo detainees the use of a habeas corpus statute. The United States Supreme Court further complicated the situation for the Guantánamo Bay detainees by refusing (on April 30, 2007) to hear the challenge filed by Hamdan and Omar Khadr on the legality of the military commissions.¹

The principal violations of the Military Commissions Act, as pointed out by the Center for Constitutional Rights are:

- denying "non-citizens any meaningful opportunity to challenge the legality of their detention" [brought about by stripping the courts of jurisdiction to hear habeas petitions by the detainees]
- violating "the 6th Amendment by allowing classified evidence which the accused can only see in summary"
- violating "the 4th Amendment by allowing evidence obtained by coercion or without a warrant or probable cause"
- violating "the Geneva Conventions by watering down humanitarian law protections of Common Article 3 and by effectively granting a retroactive amnesty to U. S. officials who have tortured detainees."²

In the *Wretched of the Earth*, Fanon observes that the colonizer dehumanizes the natives by describing them in zoological terms that strip them of their humanity. The colonizer speaks of the native's "reptilian motions, of the stink of the native quarter, ... of foulness, ... of gesticulations" (42). The colonist, notes Fanon, derives his validity from the colonial system (2).

The United States, in this historical moment, feels at once profoundly vulnerable and profoundly powerful. Confronted by an enemy that it cannot locate and pin down to one spot, it has unleashed its fury like a rabid animal, lashing out indiscriminately at those who it perceives as threatening its impregnability. Asserting absolute power over the bodies of suspected terrorists is one way that the United States seeks to confirm for itself its capacity to contain and control its enemies. Italian philosopher Giorgio Agamben calls our attention to "the vulnerable image of a biological life laying itself bare before the authoritative structures of sovereign power" (qtd. in Nikolopoulou 126); Agamben contends that "the ultimate criterion of sovereign power consists in the decision over the protection or destruction of a human body" (qtd. in

Nikolopoulou 126). The government has essentially appropriated to itself complete power over the bodies of the detainees at Guantánamo Bay. Through this power, the administration has simultaneously both abused these bodies (through excessively harsh interrogation practices) and rendered them ciphers, i.e., virtually nonexistent, by systematically stalling any attempt to bring these bodies into public view (in the federal courts).

Guantánamo Bay, Cuba, can best be understood as a “non-place” or “anomalous zone.” The former term was first coined by Marc Augé to describe spaces in the “supermodern” world, such as supermarkets and airports, which erase the connection of people to identity, relations, and history. In a non-place, the individual feels no anchoring sense of self-knowledge, recognizes no connection of him/herself to the history of the space, and can establish no meaningful relations with other individuals. “Anomalous zone,” as defined by Gerald Neuman, is a “a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended” (1201). Guantánamo Bay, Cuba (GBC) is an anomalous zone; the United States exercises complete control over it and is accountable to no one (1230). Robert Davidson, who updates Augé’s conception of non-place and applies it to spaces through which the state regulates the entry of refugee and immigrant populations, offers a compelling discussion that provides insight into the United States’ willing concession of sovereignty to Cuba in the matter of Guantánamo Bay. He observes,

At first glance, a state’s outright excision of its own national space, the declaration of particular parts of its sovereign territory to be ostensibly “international,” or an apparent watering-down of its sovereignty over satellite territories

would appear to undermine the very elements of national sovereignty that immigration controls ultimately seek to bulwark. In practice, however, these measures are taken more in an attempt either to create a nebulous legal zone in which the state can avoid the responsibilities that international conventions place upon it the moment a refugee claimant enters international space or *to circumvent its own stipulated obligations concerning foreigners within its domestic purview*. (6; emphasis added)

The process of partially “excising” Guantánamo Bay from the United States began with the legal maneuverings in December 2001 by the administration, who sought to describe GBC as anything they wished it to be; it became a floating signifier that could be invested with whatever meaning suited their purpose at any given time, a piece of the world that they could toy with. Neuman, too, notes the advantage that the administration has taken of Guantánamo Bay’s indeterminate territorial status. Writing in 1996, and therefore before the use of GBC to imprison those apprehended in the “war on terror,” Neuman describes the suspension of basic guarantees to Haitian refugees in 1992 when they were confined at GBC and refused access to legal counsel in filing for asylum. In 1995, Guantánamo Bay became the site for holding Cuban refugees.

Another anomalous zone that Neuman spotlights is the District of Columbia, which contrary to all other states in the union does not have representation in Congress although it is subject to the same tax laws as the rest of the nation. He notes, “In a nation dedicated to the republican principle of self-government, the Framers of the Constitution created a national capital subject to the plenary legislative power of Congress but without its own representation in

Congress” (1214). This situation, explains Neuman, benefits the senators and representatives who comprise Congress: “By legislating for the District, members of Congress can take a highly visible stand without actually restricting the activities of any voters in their home districts. In particular, they can win the approval of their conservative constituents without incurring as much wrath from their liberal constituents as they would attract if those constituents were themselves being regulated” (1227).

The parallel to Guantánamo Bay is evident: the President and Congress can suspend the most revered principles of democratic government in that space and in the process show themselves to the voting citizenry as being tough on terror. The people of the nation don’t protest, because these suspensions have little or no evident impact on their lives. However, as the examples of Jose Padilla and Brandon Mayfield from Oregon show, the anomalies of GBC can seep into the rest of the nation. Anomalous zones may be used as experimental laboratories where unconventional rules and restrictions can be floated and tried; yet one must remember that like all laboratories the fallout from these experiments is sometimes hard to contain within narrow confines. Lethal practices have a way of traveling where they are not welcome.³

Non-places and anomalous zones provide the state with enormous latitude in the application of power. Individuals caught within these spaces are at the mercy of the state’s whimsy, because the state can arbitrarily accept and reject these locations as falling under its jurisdiction. While the majority of the nation is willing to let Guantánamo Bay reside at the periphery of its consciousness, a few hundred lawyers are making it the battlefield for the national soul. They are wresting GBC from its status as “the excised space of the state” and are laboring to ensure that the detainees confined there do not linger indefinitely in a

netherworld of abandonment. Amy Kaplan asks whether it is possible to see Guantánamo Bay as an “uncanny space [...], a kind of ground zero, a new foundation on which the American homeland is being rebuilt” (92). It is the kind of space that Agamben describes as that which has been “banned as delivered over to its own separateness and, at the same time, consigned to the mercy of the one who abandons it—at once excluded and included, removed at the same time captured” (qtd. in Davidson 6). The lawyers who travel there in behalf of the detainees are, through their efforts, attempting to rescue it from its illegitimate status and recast it as legitimately *of* the nation and, therefore, worthy of our deepest attention and concern.

At the hub of the legal activity in behalf of the detainees at Guantánamo Bay is the Center for Constitutional Rights (CCR) and its Guantánamo Global Justice Initiative. The CCR coordinates the activities of several hundred lawyers (a handful of whom are staff attorneys at CCR, and the rest who are from private law firms), organizing the myriad activities that are comprised in the complicated task of representing the detainees. CCR was founded in 1966 as “a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights” (CCR Annual Report 1). The offices of CCR are extremely basic, painfully Spartan, even, belying the earth-shaking work that its attorneys do. CCR’s mission statement promises that it “is committed to the creative use of law as a positive force for social change.” It has taken on the Bush administration with a ferocity that is all the more noticeable in the near absence of checks and balances exerted by Congress on the Executive. Recently, the center published the book *Articles of Impeachment Against George W. Bush* (Melville House, 2006), and mounted a vigorous campaign to initiate public discussion on

the need to challenge and unseat the President for his flouting of the Constitution.

My first contact with CCR was in February 2006, when staff Attorney Gitanjali Gutierrez visited the University of Massachusetts Boston, where I teach, to speak about her work in behalf of the detainees. Gutierrez's presentation was profoundly moving, eloquent, and inspirational. She spoke as a lawyer and a citizen. She spoke as someone with hope and someone without. She spoke of faith, she spoke of despair. And through these words she evoked for us the situation of the men at Guantánamo Bay, the enemy combatants who have been held since late 2001/early 2002 with no formal charges, tortured, interrogated, and concealed from the world (repeated delegations from international human rights organizations have been denied unimpeded access to the detainees). I visited the offices of CCR on November 9, 2006, and interviewed three attorneys there. On September 14, 2006, the Center released a report titled *Faces of Guantánamo* that features the many innocent men at the base who have been held there for several years despite overwhelming evidence of their innocence. I met with and interviewed three lawyers at CCR on November 9, 2006. I reproduce here excerpts from my hour-long conversation with Gutierrez.

Gutierrez says with resignation and despair, "If someone had told me when I went down in September 2004 that I would be planning a visit to see clients in December 2006, I would not have been able to comprehend that. ... I underestimated the U. S. government, I guess. ... I really underestimated how entrenched the administration was in maintaining this kind of detention policy. And I've learned a lot about my capacity to continue working under these circumstances. ... I've learned to persist. I've learned how to find hope in a situation that can seem hopeless to other people. I've learned to appreciate the capacity of the human spirit. I've been most surprised and

most humbled by the generosity of my clients. We all make mistakes, lawyers make mistakes all the time, we try to go down in March, but whatever happens to our schedules and we don't show up until June, or a month goes by or three weeks go by and we don't get the letter out that we should, all kinds of things like that. Or a specific request for food, or something like that, that I'm unable to do or forget to do, and these are such monumental things in a prisoner's life. And when that's happened, my clients have always forgiven me for it. And to think that someone in their position has a capacity for forgiveness has just really touched me in a very personal way.

"And then doing the work professionally has required me at times to step back and take a historical view of Guantánamo to be able to tell myself that 25 years from now history will tell the story of the stain that Guantánamo is, and hopefully that will happen in five or ten years and it won't take the generation it took to realize that the internment of Japanese Americans was wrong. I hope that it's a shorter process with this. And I also feel privileged to do this work. To have families give me, give the Center, and give the lawyers that I work with—that we are given the privilege of their trust—that we have a chance to walk into a room and witness someone who has been treated so horribly and is in such bleak detention, and to sit with them and recognize their humanity and honor their humanity for the 2 hours that we're together. It is a privilege."

Sabin Willett is a bankruptcy lawyer from the private law firm of Bingham McCutchen in Boston. He is one of the hundreds of lawyers from the private bar who have committed themselves to representing the detainees in the face of harsh criticism from the Justice Department and endless roadblocks erected by the Bush administration.⁴ I ask Willett, "What has most surprised you about or been the most unexpected aspect of your work with the

detainees?" He responds: "What has most affected me is that these people become human when you meet them. They are no longer just a theoretical concept within the context of what's legal and what isn't; they're not an unfamiliar, strange, remote name. You realize that he's a person—someone who tells jokes; he's a guy who has two daughters and has a father with a heart condition."

Then, suddenly, Willett remembers something that has affected him profoundly. "On our last visit, on August 31, 2006, I met with a guy that we had never seen before: Abdulnasir. He had been trying to meet us for a year. He has been in prison for more than four years. Remember, no one ever explains to these people why no lawyer has come to see them, why no one has tried to contact them. So when we finally show up, he doesn't know if we're lawyers. For all he knows, we could be interrogators trying to trick him. We had just had some very tough meetings with other clients, detainees who had lost hope, had become frustrated—they were tough meetings.

"Abdulnasir is soft spoken, smart; he has learned a lot of English, because he answers us before the translator has finished translating what we've said. He accepts the tea we've brought. It's coming up toward noon, towards the end of the meeting, we have 15 minutes to go, and he says, 'I want you tell me the downside of the lawsuit.' We tell him that there's no downside. He then lets us know that the conditions in camp have gotten much worse in the last six months, and his bed sheet has been taken away. He wants to know if that's because of the lawsuit. I assure him that it's not, but he's not convinced. 'It's tough without the bed sheet.' Trying to sleep on the steel bulkhead is really difficult, you have to imagine.

"Suddenly the translator's face falls. And he [Abdulnasir] begins 'shouting' at her, completely uncharacteristic, the first

time that he has been anything but polite. The translator is silent, and she doesn't translate what he's saying. It looks like he's insisting that she tell us what he's saying. So, she says that he's telling her that he wants her to tell the lawyers to drop the suit. 'You must translate that,' he says to her roughly.

"It occurred to me that he had drawn the best inference that he could, given what he had gone through and given the realities of what he endured. He had come to a rational conclusion that the American justice system is truly meaningless. But that it might have cost him his bed sheet. It really shook me, it really made me think, 'I'm part of this totally ridiculous worthless system that isn't even worth a bed sheet.'"

It seems fitting to close this discussion with the words of Susan Hu, the paralegal at the Center for Constitutional Rights who recently graduated (in June 2006) as a Math and Neuroscience major. Her work as a paralegal at CCR has confirmed for her the decision to go to law school. She is part of the future, the generation that will shape the culture of the nation and determine its image in the world community. "I think before I started working at CCR, when I was a Math and Science major, I really did not think that politics, the politics of this administration, had really any impact on my life. Especially on issues that I felt very isolated from. And I think certainly a lot of people in this country feel that this Guantánamo issue has no impact on their life whatsoever. So they don't have to care about it, and they don't have to register their discontent with the Bush administration, because this is a non-issue for them, it does not impact their life. But I think working here, and especially seeing the Guantánamo project in relation to everything else that the Center has been doing, in terms of litigating against Bush for wiretapping and other state secrets, you start to see that there's an entire web, you know everything is connected. Everything the Bush

administration is doing is all connected in this plan or this agenda to push Executive power and expand Executive power, and that big agenda does impact all of us in some way. What I would take away from it and what I do tell my friends is that this issue may not be important to you in your everyday life, but it represents a much bigger problem that does impact all of us.”

NOTES

1. See Associated Press Online, April 30, 2007, “Supreme Court Refuses Detainees’ Case.” Last accessed through Lexis Nexis, May 13, 2007.

2. See the website of the Center for Constitutional Rights—<http://www.ccr-ny.org/v2/reports/report.asp?ObjID=ZjQ6uNAGGI&Content=850>

3. Padilla, who was born in Brooklyn and converted to Islam, was seized in Chicago’s O’Hare airport in May 2002 on suspicion of plotting to explode a dirty bomb. In a recently released (December 2006) videotape of his being taken for dental work at the brig at the Naval Weapons Station in Charleston, South Carolina, where he was held until earlier this year, Padilla appears to be docile, disoriented, and seemingly unable to focus after having spent three years in confinement. Andrew Patel, one of the lawyers representing Padilla, indicated that the circumstances of Padilla’s confinement have been cruel and inhumane. Another noteworthy case of a U.S. citizen caught in the snare of terrorism sweeps is that of Brandon Mayfield, a lawyer from Portland, Oregon, and a convert to Islam. He was the subject of government surveillance, wrongly arrested, and jailed for two weeks in May 2004 in connection with the train bombings in Madrid. The evidence that prompted the government’s actions was a questionable fingerprint match. Though the Spanish officials working on the bombing cautioned the U. S. government of the tenuousness of the identification, the United States authorities did not heed their caveats. Mayfield, in an historic set-

tlement (in December 2006), won an apology from the government and \$2 million.

4. I first met Sabin Willett on October 5, 2006 at Tufts University. At the time, we had a brief and informal conversation. My phone interview of him was conducted on November 3, 2006.

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