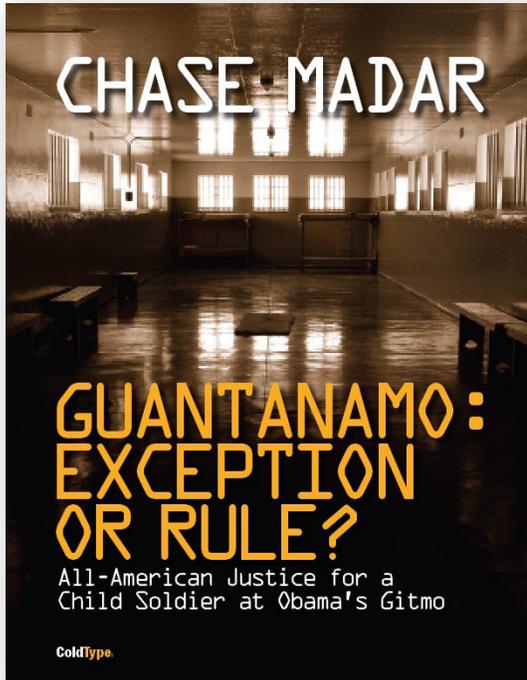


CHASE MADAR

GUANTANAMO : EXCEPTION OR RULE?

All-American Justice for a
Child Soldier at Obama's Gitmo



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INTRODUCTION

TOM ENGELHARDT

On his second day in the Oval Office, Barack Obama pledged to close the notorious prison at Guantánamo within a year, but as the *Wall Street Journal* recently put it, he “quickly retreated after opposition from Republicans and some Democratic lawmakers.” And those were the good times!

In the new post-election political landscape, which will undoubtedly involve a blizzard of Republican investigations of the Obama administration, don’t for a second think Guantánamo could be shut down. In addition, the election results will probably ensure that the often derided military commissions at that prison will take the day and any plans to try suspected terrorists in the civilian court system will simply fade away.

In terms of guilty verdicts, it probably doesn’t matter a whit. In terms of reinforcing the Gitmo system, it certainly does. But let’s face it, Guantánamo – that jewel in the crown and Bermuda Triangle of the Bush administration’s offshore system of injustice – is lodged in our world as surely as the Department of Homeland Security, the Patriot Act, and the Global War on Terror (whatever it may or may not be called). President Obama has repeatedly urged us to “look forward and not backwards,” and to “turn the page” on much of Bush-era history. But let’s face it, when you look ahead, much of the Bush legacy is still in sight. Think, then, of Guantánamo as an eerie living monument to what Bush & Co. embedded in our world.

As with all aspects of American exceptionalism, however, Guantánamo is not quite as exceptional as either those who love it or loathe it might think, as lawyer (and journalist) Chase Madar makes clear in this essay.

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When I was down in Guantánamo a few months ago, a veteran German journalist let it slip that she didn't much care for the place. "This," she confided in me, and many of the other journalists there as well, "is the worst place I have ever visited in my *entire* career."

It's not hard to see why my superlative-loving friend felt this way: we were covering the case of Omar Khadr, a 15-year-old Canadian captured after a firefight with US forces outside Kabul in July 2002, tortured and interrogated for a few months at Bagram Air Base in Afghanistan, then transported to Guantánamo. He just reached a plea agreement that will avoid a trial before a military commission at Gitmo for five "war crimes." Four of them, freshly invented for the occasion, are not recognized as war crimes in any other court on the planet. (Khadr

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Aside from Khadr and about 130 other prisoners who may one day see a trial, Guantánamo also holds 47 more War on Terror prisoners who are expected to be “detained” indefinitely without being tried at all

pled guilty to all charges and will get at least one year more at Gitmo – in solitary – then perhaps be transferred to Canada for a remaining seven years.)

Aside from Khadr and about 130 other prisoners who may one day see a trial, Guantánamo also holds 47 more War on Terror prisoners who are expected to be “detained” indefinitely without being tried at all. This was one of the radical policies of George W. Bush and Dick Cheney that is now cheerfully defended by the human rights grandees in Barack Obama's State Department.

Gitmo and all other places without *habeas corpus* rights are indeed dismal places – and there is certainly something disgusting about the first conviction of a child soldier since World War II. All the same, I couldn't help but wonder if my vehement *Kollegin* had ever visited a homegrown federal prison like the one in

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Terre Haute, Indiana (whose maximum security wing was copied down to the smallest detail at Gitmo's Camp 5), or even your run-of-the-mill overcrowded state lock-up, the kind you pass on the highway without even noticing that you've done so, or one of the crumbling youth detention facilities in New York State which, as we lawyers who have represented youth offenders know, are hellish.

Such prisons may lack the exotic setting of Gitmo's Camp Delta, but they should not be forgotten. At the risk of sounding boosterish, it so happens that a great many of America's unsung domestic prisons also routinely abuse inmates, Guantánamo-style, are unable or unwilling to prevent inmate rape, employ long-term, sustained solitary confinement (which gives waterboarding a run for its money), and in actual practice are often beyond the rule of law. Confessions, true or false, obtained through violence and threats, aren't restricted to Guantánamo either. They are not all that hard to find in our contiguous 48 states. And for the rest of our prison system, where are the outraged German journalists? Why are no British "law lords" calling the federal supermax in Florence, Colorado, a "legal black hole" as law lord Johan Steyn termed Guantánamo?

Alas, in so many ways Guantánamo is not the exception but far closer to the rule of our criminal justice system, and the case of Omar Khadr, rather than being an anomaly of the War on Terror, is in all too many ways positively all-American. To be sure, taking a child soldier you've captured in a foreign land, whose interrogation entailed stringing him up half-naked in a five-foot-square cell with wrists chained to the bars at eye level and a hood clamped tightly over his



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face, then prosecuting him for "murder" because he allegedly tossed a grenade on a foreign battlefield, does present some legal issues that don't ordinarily come up in Spokane or Chillicothe.

But Gitmo, a "betrayal of American values"? Would that it were! Alas, for nearly every grisly tabloid feature of the Khadr case, you can find an easy analog in our everyday criminal justice system. In a sense, much of our War on Terror has proven a slightly spicier version of our "normal" way of doing criminal justice. Using the case of Omar Khadr, let's take this step by step.

CHILD SOLDIERS AND JUVENILE OFFENDERS

The Khadr case should have been a bit queasy-making for us *Americanos*. Hasn't there been a surge of concern for child soldiers in book clubs and church groups across the land? Turns out, however, that this long-distance compassion goes up in smoke at closer range. The second a child soldier points his gun at an American, not another African, it's *adiós* victimized child, hello hardened terrorist.

The hypocrisy in all this is less flaming than it may appear. After all, clemency for youth offenders, be they child soldiers or just local kids, runs against the American grain these days. If we routinely prosecute children even younger than 15 as adults – and we do – why should a foreign child soldier be any different?

In fact the US even has a few dozen inmates doing life without parole for acts committed when they were 13 or 14, and most of these sentences were mandatory rather than the prerogative of a particularly nasty judge. (Some small progress: last May in *Graham v. Florida* the Supreme Court decided that juveniles can

get life without parole only if there's homicide involved.) Overall, the US has in recent years had precious little mercy for its children, or anyone else's.

COERCIVE INTERROGATION OF MINORS

Back in May, the Gitmo press corps gasped when Khadr's "Interrogator Number One," Joshua Claus, described the veiled threats of rape he wielded at Bagram Prison to try to break the young prisoner. If Khadr should fail to cooperate, Claus told him, he would meet the same fate as another young (and imaginary) Afghan detainee who was supposedly sent to a US penitentiary and raped to death in a shower room by "neo-Nazis, and four big black guys." Claus, a court-martialed detainee abuser, had been the leader of the final interrogation of a mistakenly imprisoned Afghan taxi driver who was beaten to death by American guards at Bagram in 2002. Before receiving a rather light sentence in the case, Claus pledged his full cooperation with the Khadr prosecution, and he kept his part of the bargain with visible enthusiasm.

As it happens, Claus's veiled threats of rape and violence to a minor would not have been that uncommon in domestic interrogation rooms. "From the stories I'm familiar with, threats like that are a pretty garden-variety police interrogation tactic," says Locke Bowman, legal director of the MacArthur Justice Center at Northwestern University.

With youths, it's not that much of a challenge to get a false confession, even without the threat of or actual physical violence being brought to bear, as the case of Marty Tankleff in Long Island shows, not to mention the seven and



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eight year-old boys from the Englewood neighborhood of Chicago who, in the summer of 1998, "confessed" to murdering a girl for her bicycle. Even after DNA evidence from semen found on the corpse was matched to an adult serial sex offender, the Chicago Police Superintendent at first refused to exonerate them. The State's Attorney might well have prosecuted the boys, too, if the entire South Side of Chicago hadn't threatened to explode.

TORTURE

Okay, but what about torture? We bemoan with great feeling that America has "become" a state that uses torture. Alas, this, too, is not so new, nor has it ever been limited to foreign insurgents (be they Comanche, Filipino, or Vietnamese) or suspected terrorists. Take, for example, the former high-ranking Chicago police detective Jon Burge who, over a 20-year career, enhanced his interrogations with mock executions, suffocation, electroshocks, pistol-whipping, and yes, a form of waterboarding. All this was uncovered in 2002 in an epic special investigation which led to the reexamination of more than 100 cases, several overturned convictions, multiple Governor's pardons and the usual massive lawsuits against the Chicago Police Department. Because the statute of limitations for Burge's crimes had run out, the disgraced police officer was convicted this past June for perjury and obstruction of justice. He currently awaits sentencing.

ROUTINIZED PRISON ABUSE

As for routinized prison abuse, Bagram and Abu Ghraib have regularly been described as one-off aberrations, but the origins of such brutality are not hard to spot in our treatment of prisoners at

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home. This continuity is personified by Charles Graner, the ringleader of the Abu Ghraib torture. He had fittingly been a guard at maximum-security State Correctional Institute-Greene in southwestern Pennsylvania, itself subject to a major prisoner-abuse scandal in the late 1990s which got several guards fired, though not Graner.

Fact is, the abuse and/or torture of prisoners, though far from systematic, is not all that uncommon in many American prisons. What came out in the Abu Ghraib photos is, according to the (increasingly busy) United States program of Human Rights Watch, not so different from the abuse and brutality of many of our own stateside lock-ups.

In New York, for instance, a state task force convened by Governor David Paterson in 2008 deemed the entire youth detention system “broken.” The official report found that guards throughout the system regularly used “excessive force” on youth inmates, sometimes breaking bones and shattering teeth.

Prison abuse here at home can be just as fatal as at Bagram. In New York, an emotionally disturbed 15-year-old died in 2006 after corrections officers pinned him face down on the ground. (Remember, at Bagram the interrogators tried to make young Khadr talk by threatening to send him to *an American prison*, which they apparently considered at least as threatening as anything Afghanistan had to offer.)

This is not lost on lawyers representing Gitmo detainees. “I might well advise a client to take ten years in the communal wing of Guantánamo over three years in solitary at the supermax in Florence,” says Shayana Kadidal, senior managing attorney at the Guantánamo Global Justice Initiative at the Center for Constitutional Rights. Attorney Joshua



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Dratel, who took part in the very successful defense of Gitmo detainee David Hicks, told me recently that he thought the worst American-run prison is not Guantánamo’s Camp Delta, but rather the Metropolitan Correctional Center in lower Manhattan. And yet, somewhat mysteriously, New Yorkers are more likely to know about the brutality of Gitmo and Abu Ghraib than the fatal abuse and abysmal prison conditions in their own state.

To be sure, in significant ways Gitmo and the CIA’s various global “black sites” were significantly worse. First, the use of torture has been far more widespread at Bagram, Abu Ghraib, Guantánamo, and the other secret prisons established in the Bush years than at home. In addition, the government has also made the decision to imprison some detainees without trial for the duration of what has often been described as a “multigenerational” global war on terror. Even those prisoners with habeas rights have had trouble getting release orders granted by the judiciary enforced. Half a dozen Guantánamo prosecutors – prosecutors, mind you, not defense lawyers – have quit in disgust with the whole process, offering harsh words about the structural flaws which tilt the system towards securing convictions at the expense of impartial justice.

In important ways, however, our domestic justice system is no better. Darrell Vandeveld is a former Guantánamo prosecutor. He resigned in a crisis of conscience in 2009. He was also once a public defender in San Diego where he found that many defendants were able to get only a semblance of justice. “Most of the defendants’ rights were honored only in the breach. It’s an overburdened system that has only become worse. Comparable

to Gitmo? No doubt.” Vandeveld, who now heads the public defender office in Erie, Pennsylvania, stresses that, while the outrages are not identical, they are comparable.

LEGAL BLACK HOLES, AT HOME AND ABROAD

Gazing into Gitmo’s black hole can also easily provoke disturbing reflections on the rule of law in wartime America. As another lawyer remarked 2,000 years ago while his republic was degenerating into empire, “*Inter armis silent leges*” (in time of war, the laws fall silent).

Keep in mind that the Global War on Terror – a name the Obama administration has demurely dropped without dropping the war that went with it – is by no means the only war deforming our justice system. For the past three decades, the War on Crime and the War on Drugs have been in full fury, becoming ever less metaphorical as budgets for police and prisons skyrocket, and then skyrocket some more. These domestic crackdowns have come with much martial rhetoric and political manipulation of fear and anger, clearing a wide path for the excesses of that Global War on Terror. By overburdening the criminal courts and prison system to a hitherto unimaginable degree, these “wars” also created legal black holes where the rule of law is notional at best.

Take the Prison Litigation Reform Act of 1995, which made it nearly impossible for inmates to sue prison authorities, and has put thousands of Americans beyond the reach of any kind of juridical authority. According to Bryan Stevenson, a peerless capital-defense litigator and executive director of the Equal Justice Initiative in Montgomery, Alabama:



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“US prison officials have obtained greater and greater discretion to send someone to solitary confinement for years; to force people into their cells naked, without meals; to inflict punitive measures without any possibility of outside intervention. It’s often a closed system whose managers have all the authority, especially at our supermax facilities. They function in many ways like Guantánamo.”

Gitmo and Bagram were well within our capabilities before 9/11. Yes, it’s true that Bush administration officials and pundits told us with excitement about how, in our counterattack on al-Qaeda, “the gloves were coming off.” For a great many Americans already in US prisons, however, those gloves had never gone on to begin with. This raises some vexing questions about how we budget our indignation. It is not at all clear why violent interrogations, abuse, and torture should be more scandalous when they happen overseas than in Chicago.

What explains this collective Jellybyism? Is it because so many of our domestic inmates, especially in the regions where national opinion is produced, are African American and Latino, whereas most of our professional social reformers in the nonprofit sector are white and Asian? Is it because most of our elite public-interest lawyers and white-shoe pro bono advocates come out of a top half-dozen law schools where they most likely got a nice taste of well-tended federal courts, but little if any exposure to our overburdened state criminal courts? Is it just too depressing to think about our crumbling, overstrained criminal justice system in Guantánamo-like terms? Does compassion fatigue for those atrocities closest at hand always set in first, and hardest? Whatever the reasons, the gaping legal

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black holes in our domestic justice and penal system have acquired the seamless invisibility of an open secret.

It is no coincidence that most of the American intellectuals who have pointed out these domestic precursors to the Global War on Terror – journalists like Margaret Kimberley and Bob Herbert, and law professor James Forman, Jr. – are African American. Black Americans, whose overall incarceration rate today is probably higher than that of Soviet citizens at the peak of the gulag, have had ample reasons over the centuries, and now as much as ever, to doubt the fundamental fairness of American justice. When advocates compare the military tribunals unfavorably to “the Cadillac version of justice” that US citizens supposedly get (which was how one Gitmo defense attorney described America’s domestic courts),



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it is simply baffling to those aware of how our system actually works.

In fact, the ho-hum familiarity of much of the War on Terror’s nastiness may help explain why so many Americans view what’s gone on at Gitmo with a shrug, and often respond to the liberal shock and horror with exasperation. *This has been going on right here for decades, where have you been?*

Prosecuting a 15-year-old for “murder” with the help of a little torture and some threats of rape may not be the kind of thing we want show German journalists. They’ll just get upset. They lack the *context*. But we Americans really have no right to claim that we’re shocked, shocked. We got used to this kind of thing a long time ago. The prosecution of former child soldier Omar Khadr has been nothing, in other words, if not all-American.

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