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Scott Horton

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**THE TRUTH BEHIND GITMO<sup>†</sup>**

**By Scott Horton<sup>†</sup>**

On his second day as president, Barack Obama acted on a promise to close the detention facility that his predecessor opened in Guantánamo. He created an inter-agency task force to advise him on the specifics of this process and to create future guidelines for the detention of terrorism suspects captured abroad. He set a deadline on the accomplishment of this objective: one year. Today we are two weeks away from the issuance of the inter-agency task force's report, and media commentators tell us that almost no one expects that his goal of closing the facility in one year can be met. Not meeting this self-imposed deadline will be portrayed by some, especially the superficial commentators who populate the Beltway world, as a failure by the Obama Administration. But in fact, as we meet here today Attorney General Holder is announcing a se-

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<sup>†</sup> Scott Horton is a Contributing Editor of Harper's Magazine where he writes the No Comment column on legal and national security issues. A New York attorney known for his work in emerging markets and international law, especially human rights law and the law of armed conflict, Horton lectures at Columbia Law School. A life-long human rights advocate, Scott served as counsel to Andrei Sakharov and Elena Bonner, among other activists in the former Soviet Union. He is a co-founder of the American University in Central Asia, and has been involved in some of the most significant foreign investment projects in the Central Eurasian region. Scott recently led a number of studies of abuse issues associated with the conduct of the war on terror for the New York City Bar Association, where he has chaired several committees, including, most recently, the Committee on International Law. He recently completed a study of the accountability of private security contractors in the war on terror, published as *Private Security Contractors at War*, and appeared and testified five times before Congress on this and related subjects. He is also a member of the board of the National Institute of Military Justice, the Andrei Sakharov Foundation, the Eurasia Group and the American Branch of the International Law Association.

<sup>†</sup> Prepared remarks delivered as the Twenty-Second Blain Sloan Lecture on International Law at Pace Law School, White Plains, New York, on November 13, 2009.

ries of prosecutions that will go forward quickly, one group in federal court in New York and another before a military commission. The framework of the Obama effort is quickly coming into shape.

Today, I would like to invite a new look at Guantánamo. And I'll start by asking a simple question: can we really bring the Guantánamo debacle to a close without focusing careful attention on how it was set up, what went on there, and drawing some conclusions about the past? I think the answer to that question is clearly "no." Yet Barack Obama tells us we need to "look forwards, not backwards." This has been a regular response to calls for accountability stemming from the excesses of the Bush Administration's war on terror namely, torture and the mistreatment of prisoners, the operation of black sites and warrantless domestic surveillance. This posture has been advised by his political counselors Rahm Emanuel and David Axelrod. They believe that the President has an affirmative agenda to push through Washington, starting with management of the most severe economic crisis since the Great Depression, reform of a catastrophically inefficient healthcare system and so forth. The questions surrounding how the war on terror was managed in the past will, in the Emanuel-Axelrod view, only take attention away from the job at hand. In the eyes of the school of practical politics, this is a perfectly reasonable perspective. But it will not help us bring Guantánamo to closure.

At present, the loudest voice opposing the President's call to "look forwards" is the same one which opposes the plan to close Guantánamo. It comes from Vice President Dick Cheney, supplemented by his daughter Liz, and a number of figures from the last administration associated with them. The Cheneys have even organized a lobbying entity called Keep America Safe, raised money from a Florida real estate mogul (who also, probably not coincidentally, chairs the Scooter Libby Defense Committee), and plan to run television commercials attacking the Obama Administration as weak on national defense because of its commitment to close Guantánamo.

Significantly, the Cheneys call on us to look back at the last seven years, and they are very proud of the accomplishments during this period of time. They are proud of the use of "enhanced interrogation techniques," which they argue saved thousands of American lives. They are proud of Guantánamo, because it put an emphasis on intelligence gathering rather than weak justice ideas and kept Americans safe from the "worst of the worst." They are also proud of the conduct of the wars in Iraq and Afghanistan, which they believe achieved U.S. objectives. They have also turned to a series of tactical steps to try to frustrate the President's plans and have indeed succeeded.

This crew disagreed throughout the Bush Administration that it would be unpatriotic to obstruct the President's conduct of the war on terror by arguing against the strategies and plans that he formulated. Once the baton has passed, however, they have attempted to obstruct even the slightest deviation from their own calamitous course. If Guan-

tánamo is not closed by February 2010, and I consider that likely, then the number one reason for this is the relentless campaign of obstruction the Cheneys and their allies have launched. At its center is fear-mongering designed to convince Americans that putting Guantánamo detainees in a supermax prison (from which no one has ever escaped) and having them stand trial in a federal court would result in Americans being killed in their beds at night as they sleep. This notion is so completely absurd that it should have provoked ridicule and laughter, but it did not. And that is a testament to the capacity of our broadcast media to absorb and disseminate utter absurdities. Legislation to bar the transfer of Guantánamo prisoners to the continental United States was introduced, and more recently Senators Graham, Lieberman and McCain have put forward measures to stop the prosecution of Guantánamo detainees in federal courts or the paroling or release of prisoners to the United States. Only in the last week was the Obama Administration able to secure sufficient authority to transfer prisoners to the United States to stand trial.

Still, I agree with Vice President Cheney and disagree with President Obama on this point: it is essential that we carefully consider what was done at Guantánamo and form some judgments about it. In fact, we will not move forward without doing this. Attempting a historical judgment is a duty - in fact, an imperative. We need to muster the tools of the historian to look at them. We need to attempt, as best we can, to be detached in our judgments. Our military colleagues call this process "lessons learned." Indeed, there is a great deal to be learned from our experience with Guantánamo.

This process is particularly important for another reason: historical falsification is a powerful weapon that has been wielded repeatedly in the last hundred years to drive political discourse and shape destinies. In an article published in the *New York Times Magazine* in 2004, Pulitzer Prize-winning journalist Ron Suskind quoted a high-ranking advisor to President Bush in these terms: "We're an empire now, and when we act, we create our own reality." These remarks are widely credited to President Bush's senior political advisor, the man dubbed his "brain," Karl Rove. What does it mean for a democratic society when a government seeks to "create its own reality?"

What does it mean to say a powerful government can "create its own reality?" At the end of World War II, a number of the epoch's most profound chroniclers, such as George Orwell, Hannah Arendt, Theodor W. Adorno and Victor Klemperer, looked back at the tumultuous period that had just ended. They found it had been marked by an extraordinary effort by great powers to "create their own reality," an effort not really matched in prior human history. This was done not only by domination of the sources of information, but also by a systematic rewriting of history. It was of course the hallmark of the totalitarian states of the left and right: Hitler's Germany, Mussolini's Italy, Tojo's Japan, and Stalin's Soviet Union. We should not, however, suppose that the noble Allies were

entirely immune from the temptation either. To be sure, the essence of the Orwellian nightmare lies in the fear that this process of creating an independent reality would, propelled by the soaring technologies of the information age, come to dominate even the democracies of the West.

Hannah Arendt wrote first about this phenomenon in her study, "On Totalitarianism." Later, in the age of the Pentagon Papers and Vietnam War, she realized that the political process of creating a pliant reality was gaining a hold in America's own culture. It was, she noted, a "crisis of the republic," though one, she thought, America's institutions were strong enough to cope with. That is a core observation of her vital essay, "Lying and Politics." Political lies, she reminds us, have been around as long as there have been politicians. Indeed, the art of lying is an accepted part of politics and is viewed as matter of tradecraft, which begs the following question: what is so menacing about political lying in the world that emerged from World War II?

Arendt makes a number of observations that seem very well suited to the world we find ourselves in now, the world of Rupert Murdoch and cable news. The modern political liar will start with a claim that there is no objective truth, but only subjective truth: liberal truth or conservative truth, red truth or blue truth, Democratic truth or Republican truth. This is the first step that leads to the destruction of historical objectivity. The second step is the development of an at least somewhat paradoxical relationship to history. In fact the modern political liar is history-obsessed. He needs to remake it to vindicate himself and to move things in the direction he seeks; he recognizes the power of historical memory. To use Orwell's simple, powerful formulation: "He who controls the present, controls the past. He who controls the past controls the future." Why does Stalin have to airbrush Trotsky from Soviet history? Or to take the example of the superlative Oscar-winning film, "The Lives of Others," why was it essential for East Germany to suppress statistical data about suicides or to deny the existence of unemployment? These facts are inconsistent with the state's official historical narrative. Hence they cannot be. The third step that Arendt envisions is that the modern political liar will inevitably use his power to try to turn his lies into reality. Arendt considers this potentially the most horrifying of her theses about political lying. She asks us to consider whether this may not literally fuel murders. These are all aspects of modern political lies, the new, far more virulent form of political lying that challenges our world.

For Arendt, this sort of lie is nothing less than a challenge to the promise of democratic government. There are many examples, but one can suffice here. As the Great War ended and a real democracy was introduced in Germany, the nation's powerful and fundamentally anti-democratic conservative elements struck back, and they wielded history as their essential weapon. Around the world, World War I was seen as the consequence of German acts of provocation, starting with the invasion of Belgium. For the German right, anyone even asking a ques-

tion about the invasion of Belgium was a traitor. Moreover, Germany's defeat in World War I, they argued, resulted from a betrayal by the nation's liberals, who sought to topple the Kaiser and introduce democracy.

Today, historians of modern Germany agree that this narrative was nonsensical. In fact in the waning days of World War I, Germany had become a de facto military dictatorship. Its democratic institutions were in shambles with no meaningful consequence for the conduct of the war. Why did Germany lose? The defeat may be ascribed to the entry of the United States into the war, decisively tilting the balance. It may be linked to technological innovations and access to critical resources. It may persuasively be linked to tactical errors by the German General Staff. Max Weber made a very convincing argument that a culture of crippling secrecy that enveloped the General Staff and the war cabinet had led to the entrenchment of mistakes and brought the country to defeat. One thing that cannot be credibly argued is that Germany's democrats - a paltry group to start with - had anything meaningful to do with it. Yet, the conservative counter-narrative, the "Stabbed-in-the-Back" argument (or, the *Dolchstoßlegende* in German) was politically potent and came to dominate the political discourse of the twenties, leading to the ultimate triumph of the German far-right and collapse of the Weimar Republic in 1933. And in the years that followed, the political potency of the "Stabbed-in-the-Back" narrative was recognized and used around the world. We can find it in the political discourse in France following the fiasco in Algeria, and in the United States after the Vietnam War, to cite just two instances. Fake history can be very potent politics.

So let us turn to the Guantánamo dilemma. There are a number of competing narratives about Guantánamo. One was advanced by the Bush Administration and is still put forward by Vice President Cheney. In this narrative, the country was sunk into a wholly unanticipated war as a result of the attack on the World Trade Center and Pentagon on 9/11, which claimed nearly 3000 lives. Adapting quickly to a new kind of warfare, the Administration saw the need to create a detention facility where the worst of the worst of the 9/11 terrorists could be held indefinitely and used for intelligence gathering so that future attacks like 9/11 could be thwarted. As General Richard Myers, chairman of the Joint Chiefs of Staff, said in a 2002 press conference, these individuals are the types of people who would "chew through the hydraulic brake cables of a jet to try to bring it down if not restrained in transportation." The people held at Guantánamo would be dyed-in-the-wool terrorists determined to kill Americans, and all the arrangements there would turn on one key consideration - i.e., the safety and security of American citizens. These special arrangements were necessary because of the weakness of our court system and criminal justice system, which allow the guilty to escape. These same arrangements were also justified by our overriding need for intelligence, which would efficiently be collected from these terrorists in the Guantánamo setting. Guantánamo was innovative, and it was essential to American security. Likewise, new tribunals

would be set up that would deal swiftly and efficiently with those charged. They would not get the same benefits as legitimate prisoners of war or even defendants in an American courtroom. Rather, they would get effective justice. Remember, they are all terrorists and no one doubts their guilt.

There is also an emerging alternative narrative. The decision to create Guantánamo focused from the outset on the evasion of international and U.S. law the Constitution and the criminal code books, and even the Uniform Code of Military Justice. Certainly some of the prisoners held there were serious terrorists, but a far larger number, maybe 80 percent of the inmate population, was not. They were individuals caught up in a very loose dragnet that the Americans laid, or they were pure innocents, often sold by tribal chieftains and by Pakistan's notorious Inter-Services Intelligence (ISI) for payments that the Americans offered. The system operated with complete indifference to the guilt or innocence of those held there. Moreover, the vilification of the prisoners in Guantánamo served the Administration's domestic political objectives of spiking public fear from terrorism. Guantánamo would also be an experimentation chamber for new techniques designed to gather information by "breaking" the subject, with a focus on the importation of techniques formerly used by U.S. enemies including the Soviet Union, Communist China, North Korea and North Vietnam. These included water boarding, long-time standing, hypothermia, sleep deprivation, sensory deprivation followed by sensory overload and prolonged isolation. The government argued that these techniques would help it secure vital intelligence, but in fact when torture techniques were applied, prisoners said whatever they suspected their interrogators wanted them to say. The military commissions were designed from the outset with two major objectives: the first was to insure convictions, and the second was to keep secret the manner in which the prisoners were treated, and particularly the use of torture techniques.

So which of these narratives is more faithful to the truth? That will be a judgment for historians to make, but we will never get to a reasoned assessment without some serious engagement with unpleasant facts. At this point, the case for the official narrative looks very weak. Let us just look at the most fundamental issue: who were the prisoners? Were they really the "worst of the worst?" Today, it is reasonably clear that from the early days of the facility, certainly from mid-2002, the Administration was told by intelligence experts that the prisoners held at Guantánamo were by and large not the ringleaders of Al Qaeda and the Taliban. A handful were high-ranking members of the Al Qaeda or the Taliban, others were probably third or fourth-tier actors, and a much larger number, (probably a majority of the prisoners) were innocent people who never should have been incarcerated and who had only tangential relations with the targeted terrorist groups.

How do we know this? Not from human rights attorneys or defense counsel. We know this from America's most senior intelligence profes-

sionals. Crack CIA counterterrorism experts had extensive opportunities to interrogate any Guantánamo prisoner they wanted to interrogate. They availed themselves of this. Jane Mayer, in her book *The Dark Side*, recounts that in the summer of 2002, a CIA study based on careful review of the Guantánamo detainees had concluded that fully one-third of the prison population had no connection to terrorism whatsoever and that a majority of the balance had only a very tenuous connection. The study's authors called for a careful review and the release of a large number of prisoners. In the fall, a meeting was arranged between National Security Council staffers who had reviewed the CIA report and Alberto Gonzales, the President's personal lawyer. Gonzales was flanked by David Addington, Dick Cheney's confidant, and another White House lawyer, Tim Flanigan. Addington delivered the following response: "No, there will be no review. The president has determined that they are all enemy combatants. We are not going to revisit it." That was the end of the matter.

But that was not all. We now know through Freedom of Information Act disclosures that the Federal Bureau of Investigation (FBI) also attempted a review and reconciliation of its interview notes in roughly the same period and reached conclusions identical to the CIA's. The FBI also raised very serious concerns about the use of torture techniques at Guantánamo and sought confirmation of guidance given preliminarily from senior FBI agents at Guantánamo not to participate in sessions at which torture techniques were used. These conclusions and a description of the torture techniques observed were passed to Director Robert Mueller, and then to the Assistant Attorney General responsible for the Criminal Division at the Justice Department, Michael Chertoff. It got the same reaction, and it appears that Chertoff, in subsequent Congressional testimony, falsified the essence of the briefing he got from the FBI, apparently to avoid any conflict with the position staked out by the White House.

If the interrogation experts from the CIA and the FBI were saying that most of the prisoners were either innocent or at least not the serious figures America was trying to capture, why would political figures in the White House take a different position? John Yoo often wields that argument. "Why," he asks with a perverse sort of logic that reverses the proof burden, "would the Administration hold people who are innocent?" I think there is one feasible answer to that question: a partisan political calculus. The White House wanted to avoid the embarrassment of acknowledging a mistake in the apprehension of terrorists, but it also saw valuable political benefit from the climate of fear that the terrorists, whose unshaven and menacing faces regularly flashed on American TV screens (especially Fox News), offered the President and his party. In fact in the fall 2002 elections, just as Addington was saying no to the idea of a review of who was held at Guantánamo, the GOP scored impressive gains in Congress and in statehouses around the country. The war on terror and support for the President's handling of the war made

up almost the entire GOP campaign platform. It was, in fact, very effective politics. And in 2004, as Bush sought re-election, the GOP pursued the same angle, even as the force of arguments about the conduct of the war began to wear off. A proper assessment of what happened cannot ignore the fact that in an electoral democracy, political actors measure their conduct to the perceived effect it will have on elections. Sometimes that helps assure obedience to the popular will. Other times, though, it leads to crass and demagogic conduct, as was the case with the Guantánamo prisoners.

Nevertheless, there is more essential evidence for the view that a majority of the prisoners were innocent and that the mistakes made in the process can be traced right to the top. First we have information collected from Pakistan by intrepid journalists like Ahmed Rashid. As he summarized in *Descent into Chaos*, Rashid learned from senior Pakistani sources, including some in the ISI, that by early 2002, the Pakistani generals who had built the Taliban and equivocally supported its alliance with Al Qaeda were focused on how to deal with American anger and resolve. The generals believed that they needed to play a waiting game, offering just enough to the Americans to appease them and hold them at bay. They would then be able to reenter Afghanistan and reestablish a government managed by their Taliban proxies. They quickly concluded that they could identify a “mark” in the Bush Administration - a key decision-maker who was influential enough to shape policy and yet gullible enough to buy their very dubious bill of goods. Their mark was Vice President Dick Cheney.

Pakistan’s generals first tested this thesis in the early days of the Afghan war, in mid-November 2001. U.S. forces and their allies on the ground had forced the Taliban and their Al Qaeda allies in the north to withdraw to the city of Kunduz, their last redoubt, where they were surrounded and under siege. ISI concluded that unless it acted quickly, the entire leadership of the Taliban and many of the leaders of Al Qaeda would be wiped out. General Pervez Musharraf relayed an urgent appeal to the White House: “Give us a moratorium on bombing Kunduz and let us open an air corridor so we can get some military transports in to withdraw our Pakistani military attachés who are with the Taliban, so they won’t be killed.” Cheney listened patiently to the request and gave the green light. The bombardment of Kunduz ceased and Pakistan was able to land military transports there to evacuate key personnel. The key personnel evacuated did include some Pakistani advisors but also key leaders of the Taliban and Al Qaeda. Rashid puts the number of evacuated terrorist leaders at certainly hundreds, and perhaps as many as a thousand. A flabbergasted American commander witnessing the whole scene dubbed it “Operation Evil Airlift.” Cheney insisted on top secret classification for the whole operation. Even other cabinet members were not briefed about it.

The Al Qaeda and Taliban leaders whose capture was a top priority, the people for whom Guantánamo was being built, were evacuated away

to safety right under the nose of the U.S. forces, courtesy of Dick Cheney. (pp. 91-93, a similar account by Seymour Hersh appeared in *The New Yorker*). The ISI squirreled them away quickly in a number of different locations in Pakistan's Northwest Frontier Province and in Baluchistan.

ISI leadership also appreciated the Bush Administration's need to claim it had captured key players, and indeed this was the price of continued good relations with the United States. Payment came not just in the form of bounty fees paid over to the Pakistani military, but also in roughly \$10 billion in aid, most of which went to the Pakistani military in an untraceable form. The ISI decided, Rashid notes, to be sure that the Americans got bodies, but it insured that they would be nobodies. While Al Qaeda and Taliban leaders were being sheltered, the Pakistanis turned over to the Americans stray Arab tourists, taxi drivers, shepherds and others who got in their way. They bragged about helping Americans snag key players, but in fact they were doing just the opposite, comfortable all along that the Americans were simply too gullible to know the difference.

In the key period of 2002-03, when the U.S. should have been capturing Osama bin Laden, Ayman Al-Zawahiri, Mullah Omar and other Al Qaeda and Taliban leaders, instead it was collecting innocents and people with marginal connections and proclaiming them the "worst of the worst." The intensive rhetoric was necessary in fact to cover for the failure of U.S. efforts to get its targets, a failure that resulted from gross incompetence in the White House.

The real disclosure of these wretched facts, however, had to wait for at least three more years. Notably, it came neither through the investigative work of a congressional committee (congressional oversight failed almost totally during this period) nor through the work of some exposé journalists. Instead, it came through the work of law students and their professors, people just like you in the audience today, just across the Hudson River at Seton Hall University in New Jersey. They issued a series of impressive reports, with the first and most significant being "A Profile of 517 Detainees through Analysis of Department of Defense Data" published on February 8, 2006. The report established that very few of the Guantánamo prisoners had been captured by Americans; most had been turned over by bounty hunters out for a fee or by Pakistani authorities. A second report followed in March, noting that prisoners were being classified as terrorists based on their affiliations with organizations which were not, in fact, scheduled terrorist organizations. This second report suggested either that members of terrorist organizations were being let into the country without control (because of the absence of these organizations from the No Fly List) or that the prisoners were not in fact members of terrorist organizations. That final conclusion is the clearly more compelling one. A third report from July 2006, followed by another in August 2006, looked at suicide and self-harm incidents, providing another grim look at conditions at the camp, and prompting some

of the most absurd rebuttals from the Rumsfeld Pentagon. Subsequent reports looked at the Combat Status Review Tribunals and demonstrated conclusively that they had been used abusively to reverse determinations by Military Commissions that prisoners were not enemy combatants; at the “urban legend” propagated by the Pentagon and by figures like Justice Scalia about recidivism from released Guantánamo prisoners. It follows from these studies that for roughly 80 percent of the prisoners there is little evidence to support Government claims that the individual is a terrorist or a member of Al Qaeda or the Taliban.

The Seton Hall reports were harshly attacked by the Rumsfeld Pentagon and by its associated media, particularly Fox News. However, we are now close to the point of being able to say definitively that the reports are not only accurate on their face, but also offer a solid indicator of how a fair court would resolve these cases.

We can say this on the basis of habeas corpus cases processed to date. A total of thirty eight cases have now gone through the federal district court level with final determinations. All cases went to district court judges in the District of Columbia, which may be the single most conservative trial bench in the United States. All of the judges hearing these cases were Republican nominees and several of them were appointed by George W. Bush. In thirty cases, the court concluded that the government did not have an adequate basis to justify the prisoner’s detention, even on the sharply reduced standard of habeas corpus. In just eight cases was the government able to make out a sufficient case to justify continued detention. The prisoner’s habeas corpus success rate matches the Seton Hall study. Notably, this followed three years of steady wind-down of the population at Guantánamo and involved cases where the government was convinced it has a solid case. In other words, even accepting the Seton Hall numbers, we could have expected a better performance for the government.

I want to dig a bit into one case, which seems to exemplify what we have learned through the habeas process. It involves a Kuwaiti national named Fouad al-Rabiah. It was decided at the end of September by Judge Colleen Kollar-Kotelly, a no-nonsense conservative Reagan appointee. The prosecutors called al-Rabiah a terrorist, but for the defense he was a Kuwaiti Airlines manager stuck at the wrong place and the wrong time. Judge Kollar-Kotelly reviewed the evidence and had no difficulty making the ruling. Al-Rabiah was to be released “forthwith.” There was no basis for his detention. The judge was disturbed by the way he was treated in Guantánamo, even though she is precluded by security classifications from describing it in public documents.

Al-Rabiah had been examined with care by a CIA agent shortly after his arrival in Guantánamo. The conclusion: this is an innocent man who should not be held.

Government officials, lacking any evidence to justify the detention of a man who was almost certainly innocent, decided they needed something to justify his detention. The government insists that no torture was

involved. What was done to al-Rabiah remains super-secret, and the interests of national security preclude its disclosure. Nevertheless, prolonged sleep deprivation, and isolation, the use of extreme heat and cold, short-shackling in painful stress positions, forced nudity, forced grooming, religious and sexual humiliation, and the use of loud music and noise were all part of the standard operating procedure at Guantánamo. Admittedly, they would have been applied in combination on a prisoner like al-Rabiah with the objective of “breaking” him and securing false testimony.

Under such treatment, al-Rabiah proceeded to confess to every act the prosecutors needed for their case. The judge concluded that the confessions were “entirely incredible” and that the government’s case against al-Rabiah rested on a series of almost absurd contentions that had no basis other than the torture-induced confessions (The judge avoids use of the word “torture.” She focuses only on credibility.) Although “al-Rabiah’s interrogators ultimately extracted confessions from him,” she writes, they themselves “never believed his confessions based on the comments they included in their interrogation reports.” The judge pulled this piece from the transcript of one of al-Rabiah’s interrogations. The interrogator states: There is nothing against you. But there is no innocent person here. So, you should confess to something so you can be charged and sentenced and serve your sentence and then go back to your family and country, because you will not leave this place innocent.

As Hannah Arendt said, the modern political liar will use all the power he has to make his lies into the truth. Here, we see a clear demonstration of that principle. Al-Rabiah was tortured to extract confessions that would make him out to be a terrorist, even though he was not one. The same sure and nauseating logic that drove the show trials of the thirties and early fifties was in charge in Guantánamo. The difference was the integrity of the military, FBI and CIA interrogators, who clearly and repeatedly noted that they did not believe the confessions, and the integrity of the courts, which have been able to ferret out and reject torture-tainted evidence.

This long review of how we got to Guantánamo is important for several reasons. It helps us understand why the Bush White House before, and Dick Cheney today, have been so vehement in their rhetoric about Guantánamo. They made gross mistakes and they have a lot to cover up. The essence of the Guantánamo story is that the Administration failed in its principal objective of seizing and holding the “worst of the worst” Al Qaeda terrorists who remain at large. Rather than accept that fact and release the innocent, they resolved to use all the tools at their disposal to make the prisoners at Guantánamo into the “worst of the worst.”

This review also helps us understand why a perfectly reasonable solution will entail releasing a very large part of the prisoners.

We are now down to the last two weeks before release of the task force report. What is going to come?

First, the Obama Administration is putting a stress on identifying the major cases in which solid evidence exists of serious criminal wrongdoing. These cases will be brought in federal courts, probably most of them in the Southern District of New York. This will include cases which previously were being prepared in the Military Commissions with charges like material support and attempted homicide on a member of the U.S. armed forces. The death penalty will be sought in the most serious of these cases.

Second, the Military Commissions will continue, and cases based on straightforward violations of the laws of armed conflict will be referred to them. That is theoretical. As best I can see from reviewing the cases about which something is known, I have not identified a single one which is appropriate for trial before a military commission. The AP is reporting this morning that there will be five such cases, including Abd al-Rahim al-Nashiri, the alleged bomber of the USS Cole, but let us wait to see what charges result before judging this effort. Some civil libertarians will reflexively object to any use of the military commissions and will call them kangaroo courts. The evidence now shows that the Bush Administration did attempt to turn the commissions into kangaroo courts. It also shows that the military judges, prosecutors and defense counsel who drive the system resisted this effort, often valiantly and at the expense of their own careers. There is no reason why commissions, properly constituted, cannot produce results every bit as fair as the federal courts. A recent study by NYU Law School's Center on Law and Security shows that they are actually a more favorable forum for defendants than federal criminal courts, which is another reason why a prosecutor would want to steer the more serious cases into court.

Third, the process of returning Guantánamo prisoners to their home countries or another suitable location will continue. This effort will focus on prisoners who are either innocent or at least “not so guilty.” In other words, there may be some information suggesting a connection to terrorist groups that are not considered major risks or are of no particular concern to the United States. The biggest group in this batch consists of the Yemenis, and I expect an arrangement will be made to return them to Yemen notwithstanding U.S. queasiness about the intentions of the Yemeni government. Notwithstanding the rhetorical differences between the Obama and Bush Administrations, this actually presents a point of strong continuity. The process of returning Yemeni detainees to their native land commenced under Bush in 2006. Obama is simply carrying it forward.

Fourth, the habeas corpus process will continue, and the government will implement the decisions of the courts, taking appeals when appropriate.

Much discussion has focused on a so-called fifth case, consisting of individuals who “we know are guilty” but we feel we cannot charge for paucity of evidence or concern about exposure of intelligence sources and methods in the process. Elaborate efforts were prepared to create a

regime of preventive detention to cover this group. I am pleased to note that the Obama Administration appears to have now rejected the preventive detention approach. What are the alternatives?

I am skeptical about this “fifth category.” In particular, if we “know they are guilty,” I believe a way can be found to charge and try them. The NYU Law School study I just mentioned shows that the Bush Administration actually amassed a strong track record in charging counterterrorism cases and obtaining convictions in cases in which there was only scant evidence of connection to terrorist organizations. Moreover, James Benjamin’s study, which he discussed this morning, has completely demolished the Bush Administration’s arguments to the effect that federal criminal proceedings cannot serve the needs of prosecutors. Over the course of the last four years, I have repeatedly been taken aside by government figures and told “if you knew what we knew about Mr. X, you wouldn’t be raising questions about this case. He’s guilty, even though we have some problems with this case.” Well, one of those cases was Fouad al-Rabiah. I am convinced at this point that many of those tough cases, where they’re sure of guilt but the evidence just doesn’t work, actually involve people who are innocent, and often enough people who were tortured, and where evidence of torture will complicate the trial. Moreover, a system which guarantees that the government wins every case has nothing to do with justice. Consequently, I doubt that this “fifth category” actually exists. Even without a special proposal by the Obama Administration for preventive detention measures, it has some options to continue to hold persons who are not tried, and even persons who are tried and acquitted. If it has evidence that they are enemy combatants, it can, for instance, hold them under the laws of armed conflict until the hostilities have ceased.

The loudest voice on the national stage right now on the Guantánamo issue is Dick Cheney’s. The wisest voices, however, have been roughly two dozen retired generals and admirals who assembled in Washington a month ago where General Harry Soyster, the longtime head of the Defense Intelligence Agency, said that “Barack Obama should make good on his promise,” Guantánamo has been a recruiting poster for terrorist organizations, and it has been a stain on the good reputation of the American military. It was established by violently subverting two centuries of American military doctrine. The best course now is to wipe it away as quickly as possible. My friend Admiral John Hutson offered another vital comment. No one doubts that there are a few dozen serious terrorists at Guantánamo. It serves the interests of the United States and the interests of justice for these individuals to be quickly charged for the crimes they committed, if possible in federal courts and, if not, before military commissions, for convincing evidence to be brought forward and for their guilt to be swiftly established. Nothing is more important right now than for the Obama Administration to renew America’s commitment to justice. That means releasing the innocent, but it also means securing the conviction and sentencing of the

guilty through a process that embraces our fundamental values.