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USA: One year with the Military Commissions Act; four years without a lawyer; six years without justice

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On 16 October 2007, the Pentagon announced that it was granting access for a lawyer to meet with Majid Khan, a Pakistani national held in the US Naval Base in Guantánamo Bay, Cuba. Its press release attempted to portray the move as part of the "unprecedented protection" the US government has provided to those it has labelled as "enemy combatants" in the "war on terror". In fact, the announcement serves as a reminder of how far the USA has flouted international law in its treatment of such detainees.

Majid Khan has been in custody for more than four and a half years. He was seized in his brother's home in Karachi in March 2003. Held in Pakistan, Majid Khan was reportedly subjected to torture by US agents, including by being bound tightly in awkward positions in a small chair, hooding, beatings, slapping in the face, sleep deprivation, and confinement to a dark cell that was so small he could not lie down.

Majid Khan became the victim of enforced disappearance in secret CIA custody at unknown locations, his fate and whereabouts concealed for more than three years, his family not knowing if he was alive or dead, until he was transferred in September 2006 to Guantánamo. President George W. Bush explained that his transfer, along with 13 other "high-value" detainees who the US has accused of involvement in the attacks of 11 September 2001 and other serious crimes, was for the purpose of prosecution. Because "we have largely completed our questioning of the men", President Bush said, they were being brought "into the open" and transferred to Guantánamo in order "to start the process for bringing them to trial". Emphasizing the approaching fifth anniversary of the 9/11 attacks, President Bush said that "the families of those murdered that day have waited patiently for justice… they should have to wait no longer." Over a year later, neither Majid Khan nor the other 13 "high-value" detainees transferred with him have yet been charged with any crime.

This should come as no surprise. President Bush had exploited the cases of the 14 detainees to seek to obtain Congressional support for the Military Commissions Act (MCA). Although he claimed that "as soon as Congress acts", the detainees "can face justice", when he signed the MCA into law on 17 October 2007 he said that he in fact had "one test" for the legislation: "Will it allow the CIA program to continue?" The MCA, according to President Bush, "meets that test". Since then he has issued an Executive Order giving the green light for the CIA secret interrogation and detention program to continue, as well as perpetuating the lack of accountability for this program which clearly violates international law.

When he confirmed the existence of the CIA program in September of last year, President Bush was in effect admitting to having authorized enforced disappearance, a crime under international law. His Executive Order of 20 July 2007 has compounded the wrongdoing, and if the program holds detainees as before – with their fate and whereabouts concealed, President Bush will have re-authorized the practice of enforced disappearance. Amnesty International has written to President Bush to point this out. It has not yet received a response.

Meanwhile, the government continues to undermine the presumption of innocence of the 14 detainees whom it claimed it would bring to trial. In his announcement of their transfers,

President Bush had called them "terrorists". In its recent statement that Majid Khan was being granted access to legal counsel, the Pentagon said that "Khan exemplifies the significant and genuine threat that the United States and other countries face throughout the world."

Rather than being promptly charged and brought to trial, Majid Khan and the other 13 detainees transferred from secret CIA custody have been "processed" by Combatant Status Review Tribunals (CSRTs) – executive bodies set up in 2004 to determine whether Guantánamo detainees are "properly" detained as "enemy combatants". The CSRT consists of panels of three military officers who can consider any information, including classified, hearsay and coerced information, in making their determinations. The detainee, held thousands of miles from home (or any battlefield) and virtually cut off from the outside world, does not have a lawyer or access to any classified evidence used against him. There is a presumption in favour of the government's information presented to the tribunal.

On 9 August 2007, the Pentagon announced that the CSRTs (conducted in closed session so that no details of the CIA detention and interrogation program would see the light of day) had determined that all 14 detainees transferred to Guantánamo in September 2006 met the criteria for designation as "enemy combatants". The announcement made no reference to the various torture allegations made by the detainees – the details of which have been censored from the CSRT transcripts – or what investigation, if any, had been ordered or carried out into the allegations, or whether the CSRT had relied upon allegedly coerced testimony in making its determinations.

The MCA has stripped the US courts of jurisdiction to consider *habeas corpus* petitions from foreign nationals held as "enemy combatants" in US custody. Under the MCA and the earlier Detainee Treatment Act of 2005, judicial oversight is limited to the Court of Appeals for the District of Columbia Circuit which is authorized to review CSRT findings that detainees are "enemy combatants". In its 16 October 2007 announcement that Majid Khan was being provided access to a lawyer, the Pentagon asserted that "providing review of such determination in a nation's own domestic courts is an unprecedented protection for captured enemy fighters in the history of warfare." The administration said the same thing in a brief filed earlier this month in the US Supreme Court, seeking to persuade the Court that the MCA is lawful. Even if the detainees "could show a historical precedent for *habeas corpus* in the extraordinary circumstances here", the brief asserts, "Congress has afforded them a constitutionally adequate substitute for challenging their detention". The Supreme Court is due to hear oral argument on the issue on 5 December, and to release its ruling next year.

The situation cries out for full judicial scrutiny. With detainees removed from the protective mechanism of *habeas corpus* for the six years of the "war on terror", the human rights results have been predictable. Detainees have been subjected to enforced disappearance, torture or other ill-treatment, secret detentions and transfers, as well as arbitrary detentions at the hands of US forces.

The CSRT scheme has provided the administration with a convenient façade of process. It provides the detainees and their families with nothing but more injustice. All detainees should be able to challenge the lawfulness of their detention directly in a court of law, not be limited to narrow judicial review of administrative determinations of their status. Anyone against whom there is evidence of criminal wrongdoing should promptly be charged with recognizable criminal offences and brought to a full and fair trial in accordance with international standards – this rules out trials by military commissions under the MCA. Otherwise the detainees should be released. The Guantánamo detention facility should be shut down, without transferring the human rights violations elsewhere.

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