

PLRC *Pacific Life Research Center*

631 Kiely Boulevard * Santa Clara, CA 95051 * Phone & FAX by appointment 408/248-1815 * <http://www.plrc.org>

PLRC-070316

Last Updated 16 March 2007

UNDERSTANDING THE “WAR ON TERRORISM”¹

MILITARY COMMISSIONS: WAR CRIMES TRIALS OR KANGAROO COURTS?

Compiled by Bob Aldridge

We must be ever-vigilant against those who would strong-arm the judiciary into adopting their preferred policies. It takes a lot of degeneration before a country falls into dictatorship, but we should avoid these ends by avoiding these beginnings.

– Justice Sandra Day O’Connor²
Georgetown University, 9 March 2006

Sandra Day O’Connor’s quotation shortly after her retirement from the US Supreme Court, which is especially significant coming from her, warns of the dangers when the executive branch arrogates the power to bypass the courts and minimize the checks and balances of the judicial branch of our government. Appointment of judges and Supreme Court justices sympathetic to the neoconservative agenda is an important move in eliciting desired judicial rulings, but that practice is not new and has been going on since the ratification of our Constitution. More threatening is the underhanded manner in which the Bush administration has circumvented our Constitutionally-protected right of due process when it comes to arrest and incarceration. Nowhere has this become more noticeable than at the Guantanamo Bay Naval Base.

¹This paper is part of a series on understanding the “War on Terrorism.” Its purpose is to compile pertinent information so a pattern can be seen – to connect the dots between all the snippets of news we read everyday.

²Quotation cited by Nina Totenberg, National Public Radio legal correspondent, on 10 March 2006 program. Exact transcription of Totenberg episode published in Raban, 13 March 2006. No transcript available of O’Connor speech. Totenberg was the only reporter present.

The US lease on Guantanamo Bay Naval Base – America’s first overseas naval base – was established in 1903, shortly after the Spanish-American War, by a treaty with the new Cuban government that can only be terminated by mutual consent. The token rent for this 45 square miles of land and water, located on the southernmost shore of Cuba, is \$5,000 per year. The base was used as a haven for Cuban and Haitian refugees during the 1994-95 crisis. About 50,000 people rescued from makeshift rafts were housed at Guantanamo.

After the invasion of Afghanistan, the US started accumulating hundreds of alleged enemy prisoners. This was partly due to offering the Northern Alliance a bounty for every enemy they turned over to the US. In order to collect the reward, this insurgent militia, legitimized by the US as an ally, rounded up many refugees trying to flee the war zone. In his book, *Inside the Wire*, Erik Saar relates the story on one prisoner at Guantanamo. This detainee, who Saar calls Wael, was living in Kandahar when the Northern Alliance moved in and rounded up all the Arabs and Afghan men of fighting age. They were taken to a prison and tortured. Then Wael was turned over to the Americans and interrogated. Finally he ended up at Guantanamo.³

Starting in January 2002, the prisoners captured in the Afghanistan war started arriving at Guantanamo. At its peak there were about 775 detainees at the base. Guantanamo was envisioned as an off-shore prison beyond the jurisdiction of US courts. Currently there are about 385 detainees left at Guantanamo.

MILITARY COMMISSIONS BY PRESIDENTIAL DECREE

Some actual terrorists were apprehended in the aftermath of 9/11. French citizen of Moroccan ancestry Zacarias Moussaoui was one. I explained in a previous paper on 9/11 how he was suspected of terrorism by the Minneapolis FBI prior to 9/11 and picked up on an immigration violation. After 9/11, he was charged and convicted as a terrorist conspirator. There was also British citizen Richard Colvin Reid – the notorious shoe bomber. On 22 December 2001 he tried to blow up American Airlines Flight 63 enroute from Paris to Miami. He was also convicted on terrorism charges. Both of them are serving a life sentences in Federal ADX Supermax prison in Florence, Colorado.

American citizen John Walker Lindh was first captured in Afghanistan on 25 November 2001, while fighting for the Taliban. He escaped during a makeshift prison uprising but was recaptured on December 2nd. In a plea bargain he admitted serving in the Taliban army and carrying a weapon. He is serving his 20-year sentence at the same federal prison in Florence, Colorado.

Those were a few cases tried in US courts. But with hundreds of alleged terrorists captured in Afghanistan, the Bush administration wanted a quicker and less troublesome way of convicting them. Bush considered military commissions, sometimes referred to as military tribunals, to be more flexible for terrorist cases. He issued a military order, rather than an executive order, to get the process rolling.

³See Saar and Novak, pages 80-82.

Bush's Military Order.

Bush's military order to prepare for military commissions was issued on 13 November 2001, and it was not specific. It was what one congressman termed "disturbingly vague and procedurally dubious," with "no prior consultation with Congress."⁴ It stated that he, alone, would decide who is subject to this order for prosecution in the tribunals. There followed a list of offenses that would be tried by military commissions – a member of Al Qaida, a terrorist, one who conspires with or aids or shelters a terrorist, etc. But at the end of the list was the catch-all phrase: if "it is in the interest of the United States that such individual be subject to this order."⁵ That interest need not even be related to terrorism. Harvard law professor Philip Heymann, a former deputy US attorney general, pointed out that there are 18 million aliens living in this country, most of them legally. "Under the order, Heymann said, 'whenever the President suspects that one of them may have been a terrorist in the past, or is a terrorist, or has aided a terrorist, or has harbored a terrorist,' even decades ago, the President has the power to send that person to a trial 'before three colonels' who could convict and sentence on a two-thirds vote."⁶ That catch-all phrase covers a lot.

Treatment of detainees was also spelled out. It went through the whole list of human rights requirements such as an appropriate location; humane treatment with no racial, color, gender, religious, birth, wealth, or any other prejudice; afforded adequate food, water, clothing, shelter, and medical treatment; and allowed free exercise of religion as conditions permit. But there was also a catch-all phrase here which opened the door to anything. The last item on the list was that the prisoners shall be "detained in accordance with such *other* conditions as the Secretary of Defense may prescribe."⁷ (Emphasis added.)

The military order gave broad directions such as the commission being made up of military officers who will decide both fact and law (act as both jury and judge). The commission can exclude people or close proceedings to protect unauthorized disclosure of classified or sensitive information. Defendants would not have the access to evidence as in civil trials, and the military order allows "admission of such evidence as would ... have probative value to a reasonable person."⁸

To justify Bush's military order, the administration cited former use of military tribunals. Washington used them during the Revolutionary War before the Constitution was drafted. Lincoln used them during and after the Civil War. Roosevelt used them during World War II to prosecute eight German saboteurs that landed from submarines on the beaches of Long Island and Florida. The administration didn't bother to mention that the Civil War and World War II military commissions had congressional approval.

⁴Quotation cited in Conyers, 20 March 2002.

⁵Military Order, 13 November 2001, Sec 2(a)(2).

⁶Lardner, 3 December 2001.

⁷Military Order, 13 November 2001, Sec 3(e).

⁸Military Order, 13 November 2001, Sec 4(c)(3).

There is also a legal technicality on the treatment and rights of detainees being held and tried by military commissions. If they are called enemy soldiers, or even if they are considered enemy civilians, they are entitled to the prisoner of war (POW) protection of the Geneva Conventions.⁹ The term carefully chosen by the Bush administration was “unlawful combatant,” or “unlawful enemy combatant.”¹⁰

That term “unlawful combatant” was conjured up during World War II. It was coined by the US Supreme Court in its 1942 decision upholding the trial by military tribunal of the eight World War II spies mentioned above.¹¹ They were in civilian clothes and apprehended by the FBI before they completed their plan of sabotage. Seven of the eight were in the German army and they contended they should be treated as prisoners of war and not tried. The one civilian claimed he should be tried in a civil court with all its protections and a jury. But the Supreme Court ruled that they had penetrated our homeland for a belligerent mission in civilian clothes, which was a violation of the laws of war. Thus they were “unlawful combatants.” They were prosecuted as spies by a military commission and six were executed.

Civil rights groups and legislators rose in opposition to Bush’s military order. They cited numerous cases of international law which were binding on the US, such as the International Covenant on Civil and Political Rights (ratified by the US in 1992) and the 1949 Geneva Conventions (ratified by the US in 1955). They accused the administration of offering a lower standard of justice to foreign citizens. They abhorred giving such unfettered and unchallenged power to the executive branch and said it was inconsistent with our system of checks and balances. Critics claimed Bush’s military commissions created a parallel judicial system which violates fundamental principles of justice, even in wartime.

Human Rights Watch gets right to the heart of the question of lawful vs. unlawful combatant, prisoner of war vs. war criminal:

Detained Taliban soldiers (members of the regular armed forces of the then-government of Afghanistan) and perhaps other detained combatants should have been designated by the United States as POWs under the Third Geneva Convention [1949]. Moreover, all captured belligerents should have been treated as POWs unless a “competent tribunal” individually determines otherwise [Third Geneva Convention, Article 5]. The Bush administration instead violated its clear obligations under the Third Geneva Convention and made a blanket ruling that no captured combatants in Afghanistan were entitled to POW status.¹²

⁹The Third Geneva Convention (adopted in 1929 and revised in 1949) pertains to the treatment of enemy soldiers as prisoners of war. The Fourth Geneva Convention (adopted in 1949) pertains to the treatment of civilians in time of war.

¹⁰Under the laws of war, only a “lawful combatant” enjoys “combat immunity” or the “belligerent privilege” for the lawful conduct of hostilities during armed conflict. For instance, a soldier cannot be tried for murder if he kills the enemy according to the laws of war. For examples of crimes under the laws of war see Military Commission Instruction No. 2, 30 April 2003, Section 6(A).

¹¹*Ex parte Quirin*, 317 U.S. 1 (1942).

¹²Human Rights Watch Briefing Paper, November 2005.

The Bush administration then, through some twisted logic that is difficult to understand, started calling the detainees “enemy combatants” and claimed they are not eligible for POW privileges, although Bush said he’d abide by the Geneva Conventions anyway. This was supposed to justify detainment until the end of the war on terror. If any of them were later deemed “unlawful enemy combatants” and charged with a crime, they would be tried before a military commission. Because the war on terrorism may last indefinitely, there can be indefinite detention, even after a trial. As Heymann said, there is “no law of war, at the moment, on terrorism.”¹³

Other governments raised similar objections. Legal experts and European Union (EU) officials said “the EU’s desire to show solidarity with the United States in the war against terrorism could be restricted by treaty obligations on human rights.”¹⁴ Extradition of captives to the US could also become a problem if the death penalty is possible because all EU countries have banned capital punishment. The Spanish government had already refused to extradite eight Al Qaida suspects unless the US guarantees they won’t face execution. In the case of a flight instructor held in London on charges of training some of the 9/11 hijackers, the British Home Office said it didn’t have a policy regarding military tribunals but each case will be decided on its merits. Any EU extradition order can be appealed to the European Court of Human Rights in Strasbourg, France, which is the final and binding authority.

All of these objections must have made an impression on the Pentagon because a draft of military commission guidelines released in late December showed some improvements. The final guidelines, called Military Commission Order No.1, was released on 21 March 2002 by the Pentagon. These outlined the procedures to be followed for military commissions.

Rumsfeld’s Military Commission Order No. 1.

In compliance with Bush’s military order, the Secretary of Defense on 21 March 2002 issued Military Commission Order No. 1. In a news release that day, Rumsfeld touted some of the main provisions of the new procedures.¹⁵

- Defendants will be presumed innocent.
- They will not be required to incriminate themselves or testify against themselves.
- Through legal counsel they will be able to discover information and to obtain witnesses and evidence.
- Trials will be public, proceedings will be open, and defendants will be present to the maximum extent possible (with exceptions for disclosure of classified or sensitive information, or to ensure the safety of the trial participants).

¹³Heymann quotation cited in Lardner, 3 December 2001.

¹⁴Geitner, 27 November 2001.

¹⁵Denny, 21 March 2002.

- Defendants cannot be tried twice for the same offense.
- Defendants will receive military legal counsel at US expense and will also be able to hire (at their own expense) their own defense counsel.
- The standard for conviction must be “beyond reasonable doubt” and will require a two-thirds vote of the military commission.
- Imposition of the death penalty would require a unanimous vote of a seven-member commission.
- There will be an automatic post-trial process for appeal and review.

That all sounds like a big improvement and more specific. There are, however, no real safeguards for a fair and impartial trial. The ACLU has made a very exhaustive analysis of Military commission Order No. 1 and I will rely heavily on it for the following discussion.¹⁶

1. Defendants will be presumed innocent until proven guilty. This presumption depends heavily on impartiality being guaranteed at a trial. Everything connected with military commissions is controlled by the executive branch. It decides who to prosecute and on what charges. It chooses the members of the military commission which will try the defendant. The way Rumsfeld’s order is worded, the commission members are appointed “from time to time,” which allows for certain ones to be picked for a specific case. The executive branch picks the chief prosecuting attorney and the chief defense attorney. Everyone connected to the military commission, that has any decision making power, is a military officer with their code of obedience and deference to higher authority – an authority which could directly interfere with the conduct of the commission. The defendant cannot even challenge – peremptory or for cause – any commissioner, as can be done in military courts marshal. There is absolutely no guarantee of impartiality or presumption of innocence in this procedure for a military commission.

2. Trials will be public, proceedings will be open, and defendants will be present to the maximum extent possible. A fact sheet published by the Pentagon gives four things that a trial may be closed to protect: a) classified or sensitive information; b) the physical safety of participants; c) intelligence or law enforcement sources, methods and activities; d) national security interests.¹⁷ That last one is a catch-all that can be rationalized to pertain to almost anything. Essentially at the government’s convenience, trials may be closed and the defendant can be excluded. A civilian lawyer engaged by the defendant may also be excluded if not possessing a security clearance high enough for the material presented during closed session, or if the evidence is of a sensitive category that even a security clearance doesn’t work. Furthermore, there is a gag order that a civilian lawyer must agree to that prevents telling about the proceedings while they are taking place *and even after the trial is finished.*

3. Defendants will receive military legal counsel at US expense and will also be able to hire (at their own expense) their own defense counsel. They will be assigned lawyers from the Judge Advocate General

¹⁶See Edgar, 16 April 2002.

¹⁷DOD Fact Sheet, 21 March 2002.

(JAG) corps. who will have access to all evidence. Again, this is a closed loop with even the defense being represented by the executive branch which is accusing and also prosecuting the defendant. Defendant may engage a civilian lawyer but the government will not pay the bill. The civilian lawyer must meet certain standards as set by the government and, as mentioned above, cannot discuss the proceedings publicly, even after the trial. If civilian attorneys obtain a security clearance, which requires a background check by the FBI for which they must pay, civilian lawyers may have access to material up to the classification of their security level.

4. Through legal counsel they will be able to discover information and to obtain witnesses and evidence. If civilian defense lawyers have a security clearance of “secret” they may be allowed to see evidence up to that classification, but not top secret material, and even then they cannot discuss classified evidence with their client. No matter how high the clearance is, some types of sensitive evidence will still be withheld. Government appointed JAG lawyers are the only defense lawyers that will see all the evidence. Since they can’t discuss classified evidence with their client, they must prepare a defense strategy independent of the defendant. Use of secret evidence can be used even if the defendant faces the death penalty.

Classified information may be introduced without revealing the source or the method by which it was obtained. This allows hearsay evidence, or evidence obtained through torture. On 24 March 2006, just four days before the US Supreme Court heard arguments in the *Hamdan* case (to be discussed below), the Pentagon issued Military Commission Instruction No. 10 which states: “The prosecution shall not offer any statement determined by the prosecution to have been made as a result of torture. The commission shall not admit statements established to have been made as the result of torture as evidence against the accused, ...” It then defines torture “as an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanction) upon another person within his custody or physical control.”¹⁸

It should be noted that human rights standards ban use of any evidence obtained through 1) torture, or 2) cruel, inhuman, or degrading treatment.¹⁹ Military Commission Instruction No. 10 does not ban evidence gained through cruel, inhuman, or degrading treatment. Under Instruction No. 10 “the prosecution could introduce statements acquired by forcing chained detainees to sit in their own excrement, subjecting them to blaring music, leaving them in painful contorted positions for hours on end, or depriving them of sleep for days. Allowing evidence obtained by such prohibited [by international law] treatment to be used in a trial implicitly condones such conduct, and provides a prosecutorial incentive for its use.”²⁰

Watch the wording of that definition of torture as “an act specifically intended to inflict ...” White House lawyers, in their convoluted thinking, say interrogations are “specifically intended” to obtain

¹⁸Quotations from Military Commission Instruction No. 10, 24 March 2006.

¹⁹See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 1, 15, and 16. The United States ratified this Convention on 21 October 1994,

²⁰Q&A on Military Instruction Number 10, 31 March 2006.

intelligence. Pain and suffering are a byproduct, not the specific intent. By this twisted thinking, evidence derived through extreme mental and physical coercion can be used as evidence as long as the specific intent for inflicting it was to obtain intelligence, not to torture. In addition, the Bush administration insists the President has the power to interpret international law. It considers some universally recognized forms of torture to be in the category of cruel, inhuman and degrading treatment. Waterboarding – simulated drowning – is one.²¹ Other forms allegedly authorized for use by the CIA are forced standing, sleep deprivation and exposure to cold.

Furthermore, defining the borderline between “torture” and “cruel, inhuman and degrading treatment” is not realistically possible, and a prosecutor or presiding officer of a commission would be hard pressed to make a germane decision. Also, information derived from torture can be used to find other evidence which would be admissible at trial. Yet another avenue around Instruction No. 10 is to admit hearsay evidence which is 2nd or 3rd hand, or a written statement by someone who does not appear in court. How would a prosecutor or presiding officer be able to determine if the information was derived by torture? And if the evidence was “protected information” the defendant and his civilian counsel would never be able to see it to contest it.

Rumsfeld’s Military Commission Order No. 1 takes precedence over Military Commission Instruction No. 10 which was issued to implement that order. The subsection pertaining to the accused not being required to testify ends with this sentence: “This subsection shall not preclude admission of evidence of prior statements or conduct of the accused.”²² Any previous statement, likely obtained through coercion, would be admissible as evidence. Three Britons who had been detained at Guantanamo – Shafiq Rasul, Asif Iqbal, and Ruhel Ahmed – said that after three months of solitary confinement they confessed to meeting with Osama bin Laden. British intelligence MI5 showed that on the date of that alleged meeting the three were in the United Kingdom. “This experience does not appear to have been unique. Reporters reviewing thousands of pages of newly declassified Combat Status Review Tribunal files [to be discussed below] in March 2006 found them ‘replete’ with such retractions. ‘Detainees who had confessed to having ties to Al Qaida or the Taliban or terrorism frequently told the tribunals that they had only made those admissions to stop beatings or torture by their captors.’”²³

5. The standard for conviction must be “beyond reasonable doubt” and will require a two-thirds vote of the military commission. Here again we encounter the same situation where the members of the military commission are appointed by the Secretary of Defense or his designate. All of the members are military officers subject to discipline and overseen by higher ranks in the Pentagon. It sounds nice to say “beyond a reasonable doubt,” but there is no way of insuring that degree of conviction will be respected.

²¹Waterboarding is described as “a devastating mock execution ... in which interrogators immerse detainees face in water or pour water over it until he believes he will suffocate or drown.” [Q&A on Military Instruction Number 10, 31 March 2006.]

²²Military Commission Order No. 1, 31 August 2005, Section 5(F).

²³Human Rights First Briefing Paper, May 2006.

Military Commission Instruction No. 2 establishes that wrongfulness is an element of all crimes prosecuted before a military commission: “Conduct must be wrongful to constitute one of the offenses enumerated herein or any other offense triable by military commission. ... As provided in Section 5(C) of [Military Commission Order No.1], the prosecution bears the burden of establishing the Accused’s guilt beyond a reasonable doubt in all cases tried by a military commission. Each element of an offense enumerated herein must be proven beyond a reasonable doubt.”²⁴ Can it be guaranteed that a court entirely under the executive branch and controlled by the Pentagon will reach an impartial decision?

6. Imposition of the death penalty requires a unanimous vote of a seven-member commission. Rumsfeld’s order was more specific on requiring that the unanimous vote must be of a seven-member commission – for both a guilty verdict and to pronounce the sentence.

7. There will be an automatic post-trial process for appeal and review. Rumsfeld’s military commission procedures provides for a 3-member review panel. All of them must be military officers or civilians commissioned according to the Uniform Code of Military Justice.²⁵ At least one of them must have experience as a judge. Again, this review panel is chosen by the executive branch and is composed of members subject to military discipline. Even their decision is merely a recommendation. The final decision on whether or not to accept their recommendation lies with the President or, if designated, the Secretary of Defense. About the only restriction on that final decision is that a “not guilty” verdict cannot be changed to “guilty.” Such an appeal process is meaningless since the final decision lies with the person who accused the defendant in the first place. There is no recourse to independent civilian courts as provided for in courts martial.

- - - - -

Bush’s military order and Rumsfeld’s Military Commission Order No. 1 are not limited to charges for violations of laws of war. Rumsfeld’s order specifically states that military commissions “shall have jurisdiction over violations of laws of war *and all other offenses triable by military commission.*”²⁶ (Emphasis added.) To find what these “other offenses” are, we can turn to Bush’s November 2001 military order. It defines the term “individual subject to this order” as “any individual who is not a United States citizen with respect to whom I determine from time to time in writing that it is in the interest of the United States that such individual be subject to this order.”²⁷ Simply stated, the “other offense” is what that person might do that causes Bush to declare him or her subject to a military commission.²⁸ The field is wide.

²⁴Military Commission Instruction No. 2, 30 April 2003, Section 4(B).

²⁵The first ones chosen for the review panel were, in fact, retired civilian judges and legislators. They were given a 2-year commission as captain in the US Army for their intermittent participation.

²⁶Military Commission Order No. 1, Section 3(B).

²⁷Military Order, 13 November 2001, Section 2(a)(2).

²⁸Military Commission Instruction No. 2, 30 April 2003, Section 6(B) gives examples of these “other offenses.” These examples cannot be considered exclusive, however. This Instruction No.2 merely elaborates on

The Military Justice System and the JAG Corps.

To understand military commissions it is helpful to have some knowledge of the judicial arm of the armed forces and the Judge Advocate General (JAG) Corps. The Uniform Code of Military Justice (UCMJ) was created by Congress to standardize the legal system for all branches of the service. It was signed into law on 5 May 1950. The JAG of each branch of the service, who must be a lawyer, is charged with defense and prosecution under the UCMJ. On 8 December 1967, President Lyndon B. Johnson signed into law a bill making the JAG of each branch autonomous, perhaps similar to the medical corps. and the chaplains corps. Each JAG is set up by Congress as a two-star officer (major general or rear admiral). He oversees a separate corps. of lawyers who report only up the chain of command to the JAG – in matters of law they are not subject to orders from the normal Pentagon chain of command.²⁹

Courts martial are presided over by a military judge and the equivalent of a jury is a panel of officers – five for a general court martial and three for a special court martial. If the defendant is an enlisted man and requests it, one-third of the panel must be enlisted men. The only exception is a summary court martial in which a single officer decides the verdict. These can be called only for very minor offenses resulting in no more than a month's confinement. However, the defendant may request a special court martial instead. In all these courts martial, JAG lawyers act as defense counsel and prosecutor.

There are several tiers of appeal under the UCMJ. The commander convening the court reviews all cases but cannot increase the sentence or change an acquittal to guilty. Next is the Court of Criminal Appeals composed of a panel of three military appellate judges. It reviews cases involving capital punishment or punitive discharge. If the Court of Criminal Appeals approves the death penalty, the case must go before the Court of Appeals for the Armed Forces. This court is composed of five civilian judges appointed by the President and affirmed by the Senate for 15-year terms. The Court of Appeals for the Armed Forces also hears cases ordered by the JAG. The final appeal is a writ of certiorari for review by the US Supreme Court.

The Pentagon has been antagonized with the legal autonomy of JAG officers. As far back as 1991, when Dick Cheney was defense secretary under George H.W. Bush, he asked Congress to put a politically-appointed lawyer in charge of the JAG corps, to whom all the JAG generals and admirals would report. Congress refused that request and a year later Cheney tried again to take over the JAG corps with an internal Pentagon order. Congressional backlash caused that order to be rescinded.

When the George W, Bush administration took control of government in 2001, with Cheney as Vice President, there were more attempts to subdue the autonomy of the JAG corps. In May 2003 the

Rumsfeld's Military Commission Order No. 1, which in turn subordinate to Bush's military order. My discussion on how broadly the term "other offenses" can be interpreted is valid.

²⁹As I will mention later, under the military commission rules JAG lawyers, both prosecution and defense, report up the regular military chain of command to the Defense Department General Counsel (a politically-appointed lawyer), as the Pentagon has been trying to establish for the entire JAG corps.

Air Force tried to replay the 1992 scheme by issuing an order that Air Force JAGS will report to the Air Force general counsel (a politically-appointed civilian lawyer). Congress forced that order to be rescinded. Then in February 2005 Pentagon General Counsel William Haynes III (now general counsel for the military commissions) floated the idea of politically appointing the top JAG for each military branch. But the secretaries of each branch didn't buy that.

In October 2004, Congress "passed a law prohibiting Pentagon officials from interfering with the JAGs' ability to 'give independent legal advice.'" When Bush signed the law he issued one of his famous, or infamous, signing statements "saying that the legal opinion reached by his political appointees would still 'bind all ... military attorneys.'"³⁰

Bush administration practice has been to marginalize the JAG corps. This was exemplified in August 2001 when Bush was drawing up his November 13th military order. Before it was released "they allowed the JAGs to send one representative to look at the draft and then refused to let them take notes. The final order included none of the suggestions offered by the uniformed lawyers."³¹ Later in 2003 the Pentagon prepared a report advocating certain harsh interrogation techniques for detained prisoners. The two-star JAGs from various branches warned that such a position would undermine the Geneva conventions and put interrogators at risk of prosecution for war crimes, but the civilian lawyers ignored the warning. I will show later in this paper how the JAG corps was similarly ignored when the White House and Justice Department lawyers were preparing proposed legislation for military commissions in 2006.

Most military lawyers, however, cherish the independence and autonomy of the JAG corps. Retired military lawyers, who feel less constrained to speak publicly, emphasize that the independence of the JAG corps is an important check and balance to the military chain of command and what it can order done. In particular, JAG autonomy is an essential offset to the administrations inexorable effort to expand executive power.

Revisions to the Military Commissions.

On 31 August 2005, Rumsfeld revised his Military Commission Order No. 1.³² There were two main changes. The first was to give the proceedings more of the appearance of a civilian jury trial. The presiding officer, still a military judge, was separated from the other members to take on the role of judge. He or she interprets the law and rules on the proceedings. The remaining members act as a jury to interpret the facts of the case and determine the verdict or, in the case of a sentencing hearing, make sentencing decisions. The presiding officer is not present when the other members are deliberating.

The other change allows the defendant to be present at trial at all times except when classified information needs to be discussed that the presiding officer determines will not prejudice a fair trial if

³⁰Savage, 27 August 2006.

³¹Savage, 27 August 2006.

³²See Military Commission Order No. 1, 31 August 2005.

introduced. If the defendant not having access to the classified information will jeopardize a full and fair trial, the presiding officer must exclude that information from the trial. Once more, the Pentagon will be making all the decisions and this may be a mere cosmetic change without judicial review in a civilian court.

The Lawyer Backlash.

Initially many civilian lawyers in the US hesitated to take part in the military commissions planned for Guantanamo. First of all they thought, given the restrictions placed upon them, that they could not mount an effective defense for a client. Secondly, they were afraid if they cooperated it would lend credibility to a system they deemed corrupt. Lawrence Goldman, then president of the 11,000-member National Association of Criminal Defense Lawyers, said in 2003 that in “view of the extraordinary restrictions on counsel, however, with considerable regret, we cannot advise any of our members to act as civilian counsel at Guantanamo.” He explained his reservations: “The rules regulating counsel’s behavior are just too restrictive to give us any confidence that counsel will be able to act zealously and professionally.” He added that lawyers could be “lending their legitimacy to what would otherwise be a sham proceeding.”³³

Neal R. Sonnett, chairman of the American Bar Association’s task force on treatment of enemy combatants, added: “The participation of civilian lawyers is very important to the credibility of these tribunals around the world. If lawyers participate in the process and lends it an air of legitimacy without being able to contribute effectively, then we would fall into a trap that lawyers shouldn’t fall into.”³⁴

Nor is it just American lawyers that are criticizing. One of Britain’s most senior judges, Johan Steyn, made a scathing statement on 25 November 2003: “The question is whether the quality of justice envisioned for the prisoners at Guantanamo Bay complies with the minimum international standards for the conduct of trials. The answer can be given quite shortly. It is a resounding ‘NO.’”³⁵

A big issue that troubled civilian lawyers was that, if they defended a detainee, they must agree to having conversations with their clients monitored. This is ostensibly for national security reasons and the information gained is not supposed to be used in a trial. They would not necessarily know when they were being monitored.

Another requirement civilian lawyers must agree to, which also broaches confidentiality, is to inform military officials if their clients divulge information about a future crime or act of terrorism. That doesn’t exhaust the list of complaints. Civilian lawyers must be a US citizens and admitted to the bar in one of the states, and they must qualify for a security clearance. They would have to pay for the background check which could run as high as \$2,800 for a top secret clearance. They would have to provide for their own transportation to and from Guantanamo. There is no provision for their fees and it would be hard to donate

³³Goldman quotations cited in Lewis, 13 July 2003.

³⁴Sonnett quotations cited in Lewis, 13 July 2003.

³⁵Steyn quotation cited in Lewis, 1 December 2003.

all the time needed without compensation. Of course these requirements and constraints are all justified by the “ongoing war on terrorism.”

Even if a civilian counsel has a security clearance, he or she may still be excluded from proceedings where certain types of “protected” information is presented. Of course, the detainee is always excluded from classified or protected information, and even the civilian lawyer cannot discuss such information with him. The type of evidence admissible – such as hearsay and derived under coercion – remains a stumbling block for defense attorneys.

Another major complaint is having no provisions to speak to their clients by telephone. To discuss anything, a trip must be made to Guantanamo.

Some rules were later relaxed somewhat. Civilian defense lawyers were allowed to bring other civilian lawyers onto the defense team. Civilian lawyers may also consult with others on a confidential basis although public announcements have to first be cleared with the military. Rules for eavesdropping on lawyer-client conference now to require stronger justification, prior approval, and notification to the civilian lawyer ahead of time. These small alterations are welcome and were probably necessary to entice civilian lawyers to participate.

It is not just the civilian lawyers who are complaining. JAG lawyers and military judges also have their gripes. One source of turmoil surfaced during the first military commission hearing convened on 24 August 2004. Salim Achmed Hamdan was the defendant. He is a citizen of Yemen who had been confined at Guantanamo for over two years. His JAG attorney, Navy Lieutenant Commander Charles Swift, had already challenged military tribunals with a *habeas corpus* petition to a federal civilian court. At this hearing Swift challenged four members of the commission panel on their impartiality. Two had served in the 2001 invasion of Afghanistan. The third had a member of his reserve regiment, a firefighter, killed in the World Trade Center collapse. Prosecuting JAG attorneys eventually joined Swift on the challenges and those three were eventually dismissed from the panel. The fourth panel member challenged was the presiding officer but he had political connections and stayed on. Swift said removal of the three without removing the presiding officer made little difference in the fairness of the panel.

Lieutenant Colonel Sharon Shaffer is also dissatisfied. She is the deputy chief judge for the Air Force and delayed her assignment to represent a detainee at Guantanamo. She filed a motion in September 2004 that the Pentagon drop the military commissions altogether. She called them a relic of World War II and suggested that they be replaced with modern courts martial that have evolved under the Uniform Code of Military Justice since the 1950s.

Military defense lawyer, Air Force Major Yvonne Bradley, declined to participate in proceedings on 6 April 2006. She said the structure of military commissions would force her to violate legal ethics. In addition she reiterated the same objection made by almost all defense lawyers that the commissions are operating outside established laws and without clear and fair standards. Marine Colonel Ralph Kohlmann, the presiding officer on that commission, rejected her pleas. He ordered her to “zealously” represent her

client and told her “you will disobey at your peril.”³⁶

Two e-mails written in March 2004 by JAG prosecuting attorneys at Guantanamo, to their supervisors, were leaked to ABC-News in August 2005. The first from Major Robert Preston said; “I consider the insistence on pressing ahead with cases that would be marginal even if properly prepared to be a severe threat to the reputation of the military justice system and even a fraud on the American people. Surely they don’t expect that this fairly half-arsed effort is all that we have been able to put together after all this time.”³⁷ Preston says he “cannot continue to work on a process he considers morally, ethically and professionally intolerable.”³⁸ He was transferred less than a month later.

The second e-mail was from another JAG prosecutor, Captain John Carr. He wrote: “When I volunteered to assist with this process ... I expected there would at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged.” Then he elaborated on the “rigged” accusation: “You have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees and that we only needed to worry about building a record for the review panel.”³⁹ Carr has also departed from Guantanamo.

All JAG lawyers, both prosecution and defense, don’t like being taken out of their separate chain of command in the JAG corps. Under military commission rules, military lawyers report up the regular Pentagon chain of command to the Defense Department General Counsel. The DOD General Counsel is a politically-appointed position that reports directly to the Secretary of Defense. It is a chain of command that weakens confidentiality and decreases confidence in fairness and impartiality. This would especially have a significant effect on the functioning of a military defense counsel – it is required that a military defense lawyer who is under the same chain of command and institutional influence as the prosecution, represent the defendant.

“The Great Writ” vs. U.S. Courts.

The writ of *habeas corpus*, commonly known as The Great Writ, dates back for centuries. It predates the US Constitution and even the Magna Carta in 1215. “It appears to be predominately of Anglo-Saxon common law origin. ... Although the precise origin of *Habeas Corpus* is uncertain in light of it’s antiquity, ...” Its most common use today is as a court order that a prisoner be brought before the court to determine the reason for imprisonment. It can also be used to produce evidence of a charge so that the one charged can know why he or she was judged and contest it. The right to petition for *habeas*

³⁶Kohlmann quotation cited in Bravin, 7 April 2006.

³⁷Preston quotation cited in ABC News, 1 August 2005.

³⁸ABC News, 1 August 2005.

³⁹Carr quotation cited in ABC News, 1 August 2005.

corpus has always been recognized as the most efficient safeguard of liberty. A.V. Dicey wrote: “The *Habeas Corpus* Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty.”⁴⁰

With respect to *habeas corpus*, the US Constitution reads: “The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”⁴¹ The International Covenant on Civil and Political Rights spells it out in more detail:⁴²

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

That covenant was ratified by the United States on 8 June 1992, and which, according to the US Constitution, “shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”⁴³

That covenant does not say just Americans are subject to it. It says every person is guaranteed those rights. Yet Rumsfeld’s Military Commission Order No. 1 is not only interpreted to mean, but is actually implemented to permit holding prisoners at Guantanamo indefinitely without charge. There is not provision for a writ of *habeas corpus*, or any other procedure to challenge unlawful incarceration or even to find out why they are held. In addition, according to that order, detainees can be kept in prison even

⁴⁰Dicey.

⁴¹Constitution of the United States, Article I, Section 9.,

⁴²International Covenant on Civil and Political Rights, Article 9.

⁴³Constitution of the United States, Article VI.

after they have been acquitted by a military tribunal. This renders the military commission procedure and its claim to “full and fair” trials a total sham.

To top that off, the Attorney General of the United States – Alberto Gonzales – had the audacity to tell a US Senate Judiciary Committee that “the Constitution doesn’t say every individual in the United States or every citizen is hereby granted or assured the right to *habeas*, it doesn’t say that. It simply says the right of *habeas corpus* shall not be suspended except by ...”⁴⁴ What he is saying is you don’t necessarily have the right to it, but if it is granted it can’t be taken away. This very literal and extremely expansive interpretation of the Constitution coming as an official justification for Bush policies regarding Guantanamo Bay and elsewhere is very frightening. I will proceed with a description of the legal trail and ramifications of this policy on Bush’s detainees.

Rasul v. Bush, – 542 U.S. 466 (2004). This is a very important Supreme Court decision, combining two similar cases, which was made on 28 June 2004. It held that: “United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay.”⁴⁵ The lower courts had dismissed the case claiming they did not have jurisdiction over a base in Cuba. But in its 6-3 ruling the majority opinion of the Supreme Court said the federal district court’s jurisdiction “extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ultimate sovereignty.”⁴⁶ Twelve of the petitioners were Kuwaitis who claimed they were giving humanitarian aid in Afghanistan and Pakistan when they were captured by bounty-hunting villagers. Two others said they were captives of the Taliban when caught by US troops.

The Supreme Court ruling was that, under statute 28 U.S.C. §2241 passed by Congress, the district court had jurisdiction to hear *habeas corpus* petitions from foreign nationals being held at Guantanamo. It was not a ruling based on the Constitution – it was based on a law that Congress has the power to change.

Executive Branch Responses to the Rasul Decision.

Hoping to head off a flurry of lawsuits following the Supreme Court’s ruling that “United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay,”⁴⁷ and to ostensibly meet the Geneva Conventions requirement for a “competent tribunal” to determine prisoner protections, the Bush

⁴⁴Gorman, 24 January 2007.

⁴⁵*Rasul v. Bush*, Syllabus, pages 1-2.

⁴⁶*Rasul v. Bush*, Syllabus, page 2.

⁴⁷*Rasul v. Bush*, Syllabus, page 1.

administration tried another tactic to keep proceedings at Guantanamo and out of civilian courts. That was to establish Combat Status Review Tribunals.

Combat Status Review Tribunals. On 7 July 2004, Combat Status Review Tribunals were commenced. Rather than having a lawyer, each detainee was assigned a personal representative to help him understand his legal options. Having gained that knowledge, the detainees were supposedly able to challenge their detention before a panel of three military officers who, with all their institutional loyalty, would decide if they were an enemy combatant. The personal representative is also a military officer with access to the necessary files and the authority to share all but classified information with the detainee. The detainee would be present for all the proceedings except when the tribunal is deliberating. Interpreters would be provided as needed. The entire show is orchestrated by the military with the JAG corps excluded.

Lawyer Rachel Meeropol of the Center for Constitutional Rights decried these tribunals: “The Supreme Court upheld the rule of law over unchecked executive authority. The review procedures for the detainees set up by the Department of Defense are inadequate and illegal, and they fail to satisfy the court’s ruling.”⁴⁸ Jeffrey E. Fogel, legal director at the Center wrote to Rumsfeld saying: “Without access to a lawyer the Supreme Court’s decision in *Rasul* would be meaningless. The right to *habeas corpus* has always included the right to legal assistance.”⁴⁹

“The detainees will not be provided a lawyer for this process, the entirety of which will be conducted within the military,” says Amnesty International. “All forms of evidence will be admissible, including from anonymous witnesses and testimony that may have been coerced. We are convinced that what the administration is planning is to have the courts restrict their review to the narrow record that emerged from this Combat Status Review Tribunal scheme.”⁵⁰

One senior defense official described the tribunals as “an entirely new process that would grant the detainees *most of the legal rights* enjoyed by American citizens ... The detainees would not, however, receive Fifth Amendment protections”⁵¹ regarding testifying against themselves. (Emphasis added.)

Transcripts of the Combat Status Review Tribunal hearings for 393 detainees were subpoenaed by two defense lawyers. Aided by 29 law students from Seton Hall University in Newark, NY, they determined that:

- “The government did not produce any witness in any hearing.
- “The military denied all detainee requests to inspect the classified evidence against them.

⁴⁸Meeropol quotation cited in Marquis, 8 July 2004.

⁴⁹Fogel quotation cited in Marquis, 8 July 2004.

⁵⁰Amnesty International Press Release; 8 July 2004.

⁵¹Marquis, 8 July 2004.

- “The military denied all requests for defense witnesses who were not detained at Guantanamo.”⁵²

Just before the Combat Status Review Tribunals were completed for all the detainees at Guantanamo, a federal district court ruled against them. US District Judge Joyce Hens Green refused to dismiss the claims of 50 detainees challenging their confinement. In her 31 January 2005 decision she said using the status review tribunals to keep men in prison is illegal because they are stacked against the detainee, and that the men are entitled to constitutional rights requiring a lawful hearing of the evidence against them. She said that Combat Status Reviews “violate long-standing principles of due process by permitting detention of individuals based solely on their membership in anti-American organizations rather than on actual activities supporting the use of violence or harm against the United States.”⁵³ She called the administration’s broad definition of “enemy combatant” illogical because classified evidence she reviewed showed no evidence of any combat activity for many of them. In addition, she said, those who fought in Afghanistan’s Taliban army are entitled to all of the Geneva Conventions protection provided POWs.

Green also pointed to widespread allegations and some evidence of torture and abuse during interrogation, which makes any confession suspect. In addition, detainees are entitled to a lawyer and should be able to confront the evidence used against them.

Two weeks before Green’s ruling, US District Judge Richard J. Leon gave an opposite opinion. He upheld the government’s position and said the handful of claims he was ruling on should be dismissed.

Feeling undeterred because the lower court rulings seemed to cancel each other out, the Combat Status Review Tribunals continued at Guantanamo. On 29 March 2005, the last one was held for the Pentagon’s detainees. A total of 558 went through the process and 38 were judged to no longer be enemy combatants.⁵⁴

On 30 December 2005 the Detainee Treatment Act of 2005 went into effect. It seemed to legalize the Combat Status Review Tribunals instituted at Guantanamo. Now, apparently, the Bush administration felt Combat Status Review Tribunals to be a safe forum for starting proceedings against some real terrorist suspects.

Fourteen “high value” CIA prisoners were transferred from secret “black site” detention camps to Guantanamo in September 2006. Some of them had already been held by the CIA for as long as four years. Bush admits they were subjected to “enhanced interrogation techniques” – a euphemism for torture. Most notorious among the 14 was Khalid Sheikh Mohammed, born in Pakistan and raised in Kuwait, who is thought to be the organizer behind the 9/11 attacks. He later became Al Qaida’s operational commander but was captured in Pakistan in March 2003. Others in this batch of 14 were Abu Faraj al-Libbi (a Libyan believed to have succeeded Mohammed as operational commander and who planned two December 2003

⁵²Associated Press, 17 November 2006.

⁵³Leonig, 31 January 2005.

⁵⁴The term “no longer an enemy combatant” was coined to avoid future civil suits on false imprisonment. The “no longer” implies that an enemy combatant was arrested but is such no longer.

bombing-assassination attempts on Pakistani President Musharraf) and Ramzi bin al Shibh (also spelled Binalshibh – captured in Pakistan in September 2002, he allegedly helped Mohammed plan the 9/11 attacks and another foiled plot at London Heathrow Airport).

Ethnic makeup of these 14 prisoners are 3 Pakistanis, 2 Yemenis, 2 Saudis, 2 Malaysians, a Palestinian, a Libyan, a Somali, an Indonesian, and a Tanzanian.

Combat Status Review Tribunals for who are considered the 14 most important taken into custody since 9/11 began on 9 March 2007. First were Abu Faraj al-Libbi and Ramzi bin al-Shibh. Another tribunal was held the next day for Khalid Sheikh Mohammed, age 41. Others would follow.

Although the previous 558 status review tribunals for Pentagon prisoners had all been open, these recent ones were closed to the public and media as well as lawyers. The detainees are present, if they choose to be. That eliminates the closure being for national security reasons. Legal critics say the Bush administration just doesn't want it in the papers how these prisoners were treated under "enhanced interrogation techniques" by the CIA, or where those interrogations took place. Lawyer Wells Dixon who represents Majid Kahn (one of the 14) said: "This is a system designed to obtain a predetermined result."⁵⁵

Sensational stories about the tribunal for the "9/11 mastermind" rolled off the presses on 15 March 2007. *The New York Times* and other papers across the nation told about released but redacted transcripts carrying the confession of Khalid Sheikh Mohammed. Al-Libbi and bin al-Shibh refused to take part in their proceedings, calling the tribunals a lose-lose situation. But according to the transcripts, and generously reported in the newspapers, Mohammed confessed in a rambling statement to planning the 9/11 attacks. He also confessed to 30 other plots, most of which failed or never happened. He said some of his earlier statements were made under torture but not at Guantanamo. Redacted parts of the testimony are believed to be references to his treatment by the CIA after he was captured. At the end he said his testimony to the tribunal was not coerced.

Admittedly, this tribunal is only to determine if he was an enemy combatant, not to prove guilt, but confessions will carry much weight in a later military tribunal. Confessions made under duress are inherently unreliable. In the case of Mohammed, he was speaking through an interpreter. Someone else had to have been reading his statements, and they could have been from previous confessions he had made. When he referred to previous confessions being extracted under torture he may have been referring to what was being read into the record.

Even if Mohammed did confess to those 31 plots during the tribunal proceedings, that confession may still have been made under duress. If he was the #3 man in Al Qaida he must have gone through some pretty horrible treatment by the CIA. It is hard for us to understand how torture can affect a person. But I can imagine someone being so broken down as to become completely compliant. Or it could be the threat of being returned to a CIA prison that elicited a confession at the tribunal. We don't know all these details and that is exactly why confessions associated with torture in any way are highly unreliable, and why these status review tribunals are unfair. I personally suspect that Mohammed is guilty of some pretty mean things, but suspicions don't square with "beyond a reasonable doubt." Due process and a fair trial are

⁵⁵Dixon quotation cited in Buncombe, 8 March 2007.

basic American principles. For them to mean anything to us, we should make sure they apply for all human beings, no matter how evil they may seem.

We can be certain of one thing, however. Those headlines depicting key Al Qaida operatives being hauled before a tribunal and confessing like mad certainly garnered a lot of public relations points for an administration struggling for credibility.

POW Protections Under the Geneva Conventions. Another decision the Supreme Court handed down that same day as *Rasul* was on a case called *Hamdi v. Rumsfeld* – 542 U.S. 507 (2004). Hamdi is a Saudi Arabian who was picked up in Afghanistan as an enemy combatant in 2001 and transferred to Guantanamo. Then it was discovered that he was born in America, and thus an American citizen. He was transferred to a naval brig in Norfolk, Virginia and held without charges. He was allowed to meet with his lawyer for the first time on 3 February 2004. A *habeas corpus appeal* then worked its way up the court hierarchy. The Supreme Court ruled that a US citizen detained as an enemy combatant must be provided a lawyer and given an opportunity to challenge his detention.

The Supreme Court made no such decision for foreigners detained without charge at Guantanamo and not having access to a lawyer. I would like to delve into that aspect of detention here. The third Geneva Convention states: “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the [prisoner of war] categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”⁵⁶ In the case of the Guantanamo detainees determined to be enemy combatants by the Combat Status Review Tribunal, that is not a “competent tribunal.” There are no judges and no lawyers. Hearsay evidence can be admitted. Evidence derived from torture can be admitted. Proceedings can be closed for national security or sensitive-information reasons. The US is signatory to the Geneva Conventions but the US is not observing them.

The 1977 Protocol 1 addition to the Geneva Conventions goes even further to cover any conceivable circumstance. Article 75 starts out: “... persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article ...”⁵⁷ The article first lists personal protections including protection from murder, torture of all kinds (physical or mental), corporal punishment, mutilation, outrages upon personal dignity (humiliating and degrading treatment, enforced prostitution and any other form of indecent assault), or threatening to do any of these things. There is also an ample list of legal protections regarding incarceration. Princeton University International Law Professor Emeritus, Richard Falk, points out: “The USA has signed but not ratified Protocol 1, and is thus bound not to disturb the treaty provisions while seeking in good faith to have the

⁵⁶Geneva Convention III, Article 5.

⁵⁷Protocol 1, Article 75(1).

agreement ratified.”⁵⁸

Administrative Review Boards. Another bit of window dressing conjured up by the Bush administration to mitigate complaints about Guantanamo is a system which has been likened to a parole board. It was started in November 2004, shortly after the Combat Status Review Tribunals were underway. Called Administrative Review Boards, they consist of three military officers. A detainee can make his case annually for release. To do so he must show that he does not threaten the US.

The detainee will have a military officer to help him prepare his statement, which he can deliver personally right to the review board. An interpreter is provided as needed. This review is scheduled to take place once a year for each detainee. A second military officer will present all the information – pro and con – relevant to the board’s decision. The detainees home-country government and his family can present written information to the board, as can any relevant US agency, such as CIA, Homeland Security, etc.

Pentagon officials emphasize that these review procedures are all out of the goodness of their hearts. They are not legally required. It is just a matter of government consideration that no enemy combatant who is no longer a threat to the US be detained. It makes nice public relations.

Bush’s Military Order Struck Down.

The flurry of appeals to federal courts continued. One that reached the Supreme Court was the knockout blow to Bush’s military order establishing military commissions. That was the *Hamden* case which I mentioned earlier.

Hamdan v. Rumsfeld – 548 U.S. ___, 126 S.Ct. 2749 (2006). Salim Achmed Hamdan, a Yemeni was captured by a militia in Afghanistan in 2001, and turned over to US forces. He was transferred to Guantanamo in 2002. Over two years later the Pentagon charged him with “conspiracy to commit ... offenses triable by military commission.” In his petition for *habeas corpus*, Hamdan asserted that the military commission lacks authority to try him because 1) conspiracy is not a crime of war and 2) the commission violates the requirements of military and international law, including having the right to see the evidence against him.

Just as military commission hearings were commencing for Hamdan, the D. C. District Court granted *habeas*. It ruled that Hamdan was protected by the third Geneva Convention until he was found, under that convention, to be an “unlawful” combatant. In addition, the court ruled, military commissions as set up by the Bush order violate both the Uniform Code of Military Justice (UCMJ) and the third Geneva Convention because they allow conviction based on secret evidence unavailable to the accused.

Military commission trials again came to a halt. All trials were shut down pending appeal of the district court’s ruling.

⁵⁸Falk, 24 January 2005.

The D.C. Circuit Court of Appeals, in a 2-1 decision, reversed the district court's ruling on 15 July 2005, saying the Geneva Conventions were not judicially enforceable. It also ruled that *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld Roosevelt's World War II military commission, nullified any separation-of-powers objections to military commission's jurisdiction. Finally, the appeals court found that Hamden's trial before a commission violated neither the UCMJ nor the Geneva Conventions. Judge John G. Roberts, Jr., soon to become chief justice of the Supreme Court, was one of the two judges voting for reversal.

Military commissions got the green light to start up again. Trials of "unlawful enemy combatants" were again put back on track.

I mentioned above that Congress could pass legislation to override the law cited by the Supreme Court in the *Hamdi* decision. Congress did indeed pass legislation to override 28 U.S.C. §2241. To the Defense Appropriations Act of 2006 (passed in 2005) was attached Section 1005(e) entitled "Procedures for Status Review of Detainees Outside the United States," which amended the Detainee Treatment Act. It provided that no court, justice, or judge has the jurisdiction to consider a writ of *habeas corpus* filed by or for any alien detained at Guantanamo. This was obviously an attempt to coerce the Supreme Court to refuse certiorari for *Hamdan*. It didn't work. The Supreme Court accepted the case on 7 November 2005. Then the government lobbied the Supreme Court to dismiss the case. That didn't work either.

The US Supreme Court soundly reversed the appeals court in a 5-3 decision.⁵⁹ In its 29 June 2006 decisions, the court went to great lengths to explain each ruling. Itemized simply, they are:

1. The government's motion to dismiss based on the Detainee Treatment Act of 2005 (the amendment to the Defense Appropriations Act of 2006) is denied. The language in the amendment does not adequately prevent the Supreme Court from reviewing a detainee's case.
2. The government argues unpersuasively that federal courts should abstain from intervening, as they can in courts-martial of US service members, because Hamdan is not a US service member.
3. The military commission at issue is not expressly authorized by any congressional act.
4. The military commission at issue lacks the power to proceed because its structures and procedures violate both the UCMJ and the Geneva Conventions.

Whoa! Military commissions were again put on hold. Trials at Guantanamo again came to a halt.

Here I would like to add the peril JAG lawyers face if they buck the administration's insistence on trying suspects without *habeas corpus* and due process. Navy Lieutenant Commander Charles Swift was Hamdan's lawyer and he successfully challenged the legitimacy of Bush's military order. Two weeks after the Supreme Court ruling, Swift was passed over for a promotion to full commander. The Navy has an up-or-out rule that if you can't keep advancing they don't want you. He may be forced to retire by summer of 2007. At least ten other JAG lawyers representing detainees at Guantanamo have been passed over for promotion.

⁵⁹Newly-appointed Chief justice John G. Roberts recused himself from the decision because as an appeals court judge he had backed the administration in the *Hamdan* case.

When asked if he thought challenging the administration's policy was the reason he wasn't promoted, Swift said: "As a defense attorney, I don't like allegations without evidence." Then he added: "What you sought in any career was an opportunity to make a difference. I got that opportunity and for that I will be forever grateful."⁶⁰

Nevertheless, the eagerness of JAG defense lawyers to zealously represent their clients at Guantanamo was severely dampened after they saw how it would threaten their own careers.

CONGRESS GIVES BUSH WHAT HE WANTS

After the Supreme Court setback in *Hamdan*, and in order to once again put military commissions back on track, the Bush administration began drawing up proposed legislation that would lawfully authorize the commissions.

The Military Commission Act of 2006.

A draft proposal of a new bill was circulated by the attorney general in late July. It began: "In a time of ongoing armed conflict, it is not practicable nor appropriate for enemy combatants like Al Qaida terrorists to be tried like American citizens in federal courts or courts-martial." The draft allowed detaining enemy combatants until hostilities ceased, and defined "unlawful enemy combatants" as anyone "engaged in hostilities against the United States or its coalition partners who has committed an act that violates the law of war and this statute." Legal experts decried such broad language because, they claimed, it would allow indefinite detention of even US citizens with only marginal contact with terrorists.⁶¹ "Scott L. Silliman, a retired Air Force Judge Advocate General, said the broad definition of enemy combatants is alarming because a US citizen loosely suspected of terrorist ties would lose access to a civilian court – and all the rights that come with it."⁶² The draft still allowed hearsay evidence and permitted defendants to be excluded from their own trial for national security reasons.

Some legislators had insisted that military lawyers take part in drafting the proposed legislation. On 2 August 2006, Attorney General Gonzales assured Congress that "our deliberations have included detailed discussion" with military lawyers whose "multiple rounds of comments ... will be reflected in the legislative package."⁶³ That was a stretch. Allowing secret evidence was mentioned only once when Gonzales met with the top military lawyers from the JAG corps. The bill was actually being drafted by politically-appointed civilian attorneys in the justice department. They met only once with a working group of JAG lawyers on July 28th. That was followed up with some e-mail exchanges which stopped in a couple weeks, and those exchanges involved mostly language and procedures.

⁶⁰Swift quotation cited in Williams, 15 October 2006.

⁶¹Draft legislation quotations cited in Flaherty, 28 July 2006.

⁶²Silliman quotation cited in Flaherty, 28 July 2006.

⁶³Gonzales quotation cited in Savage, 27 August 2006.

Retired JAG attorneys expressed anger at the lack of consultation and said such dismissal of JAG's experience has been a chief cause of troubles like Abu Ghraib. Former Air Force JAG, retired Major General Nolan Sklute, said of the proposed legislation: "The [Justice Department] should have learned that a failure to involve the JAG community can lead to problems. If they are talking to the JAGs only about superficial matters ... that indicates that this is about form instead of substance, and nobody has learned any lessons out of this."⁶⁴

Top JAGs testified before a Senate hearing on August 2nd and strongly criticized the proposed legislation which the justice department's civilian lawyers drew up and dumped review copies on them just a week previously. Permission to use hearsay evidence, evidence derived from coercion, and excluding defendants and their civilian lawyers from trials sparked what was described as "rare, open disagreement with civilian officials at the Pentagon, the Justice Department, and the White House" by the active-duty two-star JAGs.⁶⁵

Army JAG, Major General Scott C. Black, said: "Sir, I don't believe that a statement that is obtained under coercive – torture, certainly, and under coercive measures should be admissible."⁶⁶ The other JAGs, in separate testimony, agreed, although they would accept a military judge deciding if the evidence was derived by coercion.

Regarding allowing secret evidence to be admitted at trials when only the military defense lawyer could see it, Air Force JAG, Major General Jack Rives, said: "It does not comport with my idea of due process for ... defense counsel to have information he cannot share with his client."⁶⁷ The other JAGs agreed.

What will happen to US soldiers in the future was also a concern. "The United States should be an example to the world, sir," said Black. "Reciprocity is something that weighs heavily in all the discussion that we are undertaking as we develop the process and rules for the commissions, ... The treatment of [US] soldiers who will be captured on future battlefields is of paramount concern."⁶⁸

Nevertheless, the final bill was passed by the House and Senate of the republican-controlled Congress on 29 September 2006, and was signed by the President on 16 October 2006.⁶⁹ The new Act contains most of the administration's desires and even gives the President more authority in some cases than his previous military order did. The Act:

⁶⁴Sklute quotation cited in Savage, 27 August 2006.

⁶⁵Smith, 3 August 2006.

⁶⁶Black quotation cited in Smith, 3 August 2006.

⁶⁷Rives quotation cited in Smith, 3 August 2006.

⁶⁸Black quotation cited in Smith, 3 August 2006.

⁶⁹Now designated as 10 U.S.C. 948a *et. seq.*

1. Amends the UCMJ to provide for military commissions to try alien unlawful enemy combatants engaged in hostilities against the US for violating the laws of war and any other offenses specifically identified in the Act. Authorizes the President to establish such commissions.

[Note that offenses other than war crimes are made triable by military commissions. It also makes aliens in the US subject to military commissions, not just those at Guantanamo.]

2. Broadens the definition of “unlawful enemy combatant” to a person who has: (1) engaged in or supported hostilities against the US or its allies in the war, or (2) been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or other tribunal established under the authority of the President or the Secretary of Defense.

[Bush has already declared some US citizens unlawful enemy combatants, although they haven’t been subject to military tribunals.⁷⁰ This new law doesn’t essentially change that but it could be amended to do so. It also makes any status review tribunal the administration designates a “competent tribunal” under the Third Geneva Convention, which could make up its own rules on who is an unlawful enemy combatant. Presumably past practice will continue that once unlawful enemy combatant status is determined, even for US citizens held in naval brigs, they can be held indefinitely without *habeas corpus* rights or access to a lawyer.]

3. Prohibits a combatant subject to trial by military commission from invoking the Geneva Conventions for relief or *habeas corpus*. It also denies any court or judge the jurisdiction to hear a request for *habeas corpus* from such a detainee.

[This presumably applies to all prisoners at Guantanamo even though they haven’t yet been classed as an unlawful combatant that would face trial. It also applies to any alien in the US.]

4. Prohibits, with limited exception, a statement made under torture from being admissible against the accused.

[This still leaves hanging the technical definition of torture and if the evidence can be shown to have been obtained by torture.]

5. Conviction requires a two-thirds vote of commission members except: (1) a three-quarters vote is required for sentences exceeding ten years, and (2) a unanimous vote of a 12-member commission for a death sentence.

6. The final two steps of appeal are to the US Court of Appeals for the District of Columbia and then the US Supreme Court. The latter two are an accused’s right if the sentence exceeds ten years or it is a capital case.

7. Lists 30 offenses triable by military commissions, including such universal things as perjury, obstructing justice, and contempt. It also lists such vague offenses as “using treachery or perfidy,” and the old standby, “conspiracy.”

[This would certainly criminalize any innocent prisoners at Guantanamo.]

⁷⁰John Walker Lindh was the first one. Yassar Esam Hamdi has also been discussed in this paper. Jose Padilla, charged with planning to explode a “dirty bomb” in the US, spent 32 days in Manhattan Jail before being declared an enemy combatant and transferred to a naval brig in Charleston, SC.

8. UCMJ provisions concerning contempt, speedy trial, self-incrimination warnings, and pretrial investigations are not applicable to military commissions.

9. Authorizes the President to interpret the meaning and application of the Geneva Conventions.

10. Prohibits using cruel, inhuman, or degrading treatment on any person in US custody or control, regardless of geographical location.

[Since this legislation pertains to military commissions, and activity of the US military, it is generally interpreted as not having any effect on CIA “renditions” and “enhanced interrogation techniques” in CIA secret prisons.]

11. The Act “immunizes US officials from prosecution for cruel, inhuman or degrading treatment of detainees who the military and CIA captured before the end of [2005].”⁷¹

[Achieving this immunity has been a long-time goal of Attorney General Gonzales to avoid prosecution for war crimes when, as White House counsel, he advised Bush to attempt suspending the 3rd Geneva Convention for many detainees. It also provides protection from civil suits filed by former detainees who were innocent. If it ever reaches a point of contention, it will undoubtedly be a landmark decision of which takes precedence under Article VI of the US Constitution – a federal statute or international law.]

Although some of these provisions are an improvement over Bush’s original military order, it seems more like the administration has given a little and gained a lot. Bush has obtained congressional blessing for his detainee treatment and trial procedures through solid statutory footing. Furthermore, the Act “does not just allow the President to determine the meaning and application of the Geneva Conventions; it also strips the courts of jurisdiction to hear challenges to his interpretation.”⁷²

Yale Law School Dean Harold Koh said that “the image of Congress rushing to strip jurisdiction from the courts in response to a politically created emergency is really quite shocking, and it is not clear that most of the members understand what they’ve done.”⁷³ Another Yale law professor, Bruce Ackerman, added: “And its not only about these prisoners. If Congress can strip the courts of jurisdiction over cases because it fears their outcome, judicial independence is threatened.”⁷⁴

George Washington University Constitutional Law Professor Jonathan Turley, on the day Bush signed the Act, described the new law as “a huge sea change for our democracy. The framers created a system where we did not have to rely on the good graces or good mood of the President. ... People have no idea how significant this is. What, really a time of shame this is for the American system. What the Congress did

⁷¹Smith, 29 September 2006.

⁷²Shane and Liptak, 30 September 2006.

⁷³Koh quotation cited in Smith, 29 September 2006.

⁷⁴Ackerman quotation cited in Shane and Liptak, 30 September 2006.

and what the President signed today essentially revokes over 200 years of American principles and values.”⁷⁵

Military Commissions Again Instituted. On 18 January 2007 the Pentagon issued a 238-page manual outlining the new rules for military commission trials. It was in effect the guidance document for the Military Commission Act of 2006, which contained most of the same old rules. A detainee’s lawyer still could not share classified information with his client. However, after review and approval by the military commission judge, the detainee could view a summary of the classified information but not the actual document.

Hearsay or other disputable testimony may be introduced if it is determined to have probative value to a reasonable person. Even evidence obtained without a search warrant may be admissible. Furthermore, the new rules still allow evidence obtained by coercive treatment. The new manual says:

Statements obtained by torture are not admissible, but statements in which a degree of coercion is disputed may be admitted if reliable, probative, and the admission would best serve the interests of justice. In addition, for such statements obtained after December 30, 2005, the methods used to obtain those statements must comply with the Detainee Treatment Act of 2005, enacted on that date.⁷⁶

The Detainee Treatment Act of 2005 invokes the United Nations Convention Against Torture and Other Forms of Cruel or Degrading Treatment or Punishment, which was passed by the UN General Assembly on 10 December 1984, and entered into force on 26 June 1987. It is binding on the US as a signatory. This convention defines torture as:

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁷⁷

It is from this definition that the language of US law is derived. Yet this definition does not precisely define the dividing line between torture and other forms of coercion. And it also leaves a large margin in what can be claimed as “lawful sanctions.” Bush has always been adamant that he would decide what is torture and what equates to other types of coercion. So evidence “in which a degree of coercion is disputed,” according to the wording of the new manual as quoted above, could involve quite a bit of pain and suffering.

Furthermore, according to the new manual and also the Military Commissions Act of 2006, evidence derived from any means of coercion prior to 30 December 2005 seems to be admissible. It appears that all

⁷⁵Turley quotation cited Binion, 21 October 2006.

⁷⁶The Manual for Military Commissions, 18 January 2007, Pages I-1 and I-2. Also see 10 U.S.C. 948r.

⁷⁷United Nations Convention Against Torture and Other Forms of Cruel or Degrading Treatment or Punishment (1984), Part I, Article 1, Paragraph 1.

the court cases, legislation, and publication of a new manual did not change evidence already derived by torture.

On Wednesday, 14 February 2007, to fulfill a technical step specified in the Military Commissions Act of 2006 and to replace his military order of 13 November 2001, President Bush signed an executive order authorizing the establishment of military commissions at Guantanamo. The trials are again back on track.

Court Challenges to the Military Commissions Act.

This Military Commissions Act affected dozens of cases already filed in federal court on behalf of Guantanamo prisoners. Their lawyers requested time to present arguments that the Military Commissions Act of 2006 is unconstitutional. But what does the new law do for approximately 385 detainees at Guantanamo who are not charged or even declared “unlawful enemy combatants?” Nothing. They have been decreed by Combat Status Review Tribunals as “enemy combatants,” and thus remain in custody for the duration of the war on terrorism. In other words, they remain in legal limbo indefinitely, with no right to *habeas corpus*.

By December 2006, the constitutionality of the Military Commissions Act was being heard before two courts of appeal. The US Court of Appeals for the District of Columbia was reviewing a case involving almost three dozen detainees at Guantanamo – *Boumediene v. Bush*. The US Court of Appeals for the 4th Circuit (located in Richmond, Virginia) was hearing the case of *Al-Marri v. Wright*.

Boumediene v. Bush. Lakhdar Boumediene and five other men from Algeria worked for charities in Bosnia. They were accused of plotting to blow up the US embassy in Sarajevo in November 2001. They were all acquitted by a Bosnian court in January 2002 but were arrested by the US as they left the courthouse. This case, consolidated with almost three dozen others, was before the appeals court when the Military Commissions Act became law. The central issue boiled down to whether the Act stripped the courts of hearing *habeas corpus* appeals or if the Act itself is unconstitutional.

The US District Court for the District of Columbia ruled 13 December 2006 upheld the Military Commissions Act and ruled that detainees at Guantanamo Bay do not have the right to a *habeas corpus* appeal. However, the federal district judge also ruled the new Act unconstitutional in denying *habeas corpus* appeals to over 12 million legal immigrants in the US. With that split decision the case, now consolidated with almost three dozen others, went to the US Court of Appeals for the District of Columbia Circuit.

On 20 February 2007, a three-judge panel in the D.C. Circuit Court, for the third time regarding military commissions and detention, ruled 2-1 in favor of the administration by upholding the constitutionality of the Military Commissions Act. It said simply: “Federal courts have no jurisdiction in these cases.”⁷⁸

The D.C. Circuit Court was also asked to review the merits of detainees designated enemy combatants by a Combat Status Review Tribunal and being detained indefinitely under the Detainee

⁷⁸*Boumediene v. Bush*, page 24.

Treatment Act of 2005, without the right to a *habeas corpus* appeal. In that regard the appeals court ruled: “Our only recourse is to ... dismiss the cases for lack of jurisdiction.”⁷⁹

Any information on a further appeal to the US Supreme Court is not available at the time of this writing. The Supreme Court now, however, has two new conservative justices appointed by George W. Bush. It’s decision may not be as objective regarding *habeas corpus* as previous decisions have been.

Al-Marri v. Wright. Ali Saleh Kahlah al-Marri is 37 years old and a citizen of Qatar. He came to the US with his wife and five children to obtain a masters degree at Bradley University in Peoria, Illinois. He was detained in December 2001 during the post-9/11 sweep. Later he was charged with credit card fraud and other criminal offenses. Those charge were later dropped but in January 2003 he was charged with making false statements to the FBI along with making false statements and using fake identification for a bank loan. He also pleaded innocent of those charges and his trial was set for 21 July 2003. But a month before the trial, in June 2003, Bush designated him an enemy combatant and he was transferred to a naval brig in Charleston, South Carolina.

Al-Marri is the only “enemy combatant” arrested in the US and has been detained since December 2001. He has been subject to cruel and inhuman treatment, kept in solitary confinement, and held incommunicado with the outside world. He has not spoken with his family since his arrest. In 2004 his lawyer petitioned for *habeas corpus* in a brief against S.L. Wright, consolidated naval brig commander. The federal district court in Spartanburg, South Carolina refused *habeas corpus* on 8 August 2006. The case was appealed to the US Court of Appeals for the 4th Circuit. Regardless of the detainee’s guilt or innocence, this case will, along with *Boumediene*, test the constitutionality of the Military Commissions Act.

At the time of this writing a decision from the appeals court has not been issued.

- - - - -

Senator Christopher Dodd introduced the “Restore the Constitution Act of 2007 (S. 576) on 13 February 2007. This act will restore *habeas corpus*, due process, and enforce the Geneva Conventions. It will block evidence obtained by coercion and restrict the President’s ability to interpret and avoid international treaty obligations.

- - - - -

In the case of *Boumediene v. Bush*, the one dissenting judge in the appellate court decision was Judge Judith W. Rogers. On the evening of the decision she commented: “The combined actions of the Bush administration, the previous Congress, and two of the three judges today have taken us back 900 years and granted the right of kings to the president.”⁸⁰

Those are sober words to ponder but there is an even more incredible reality that surfaced early in 2006. New Jersey’s Seton Hall University made a study of government documents on Guantanamo. Only

⁷⁹*Boumediene v. Bush*, page 25.

⁸⁰Rogers quotation cited in Rosenberg, 21 February 2007.

10 of the approximately 490 detainees there at the time had been charged with a crime. More statistics from the same government documents: 55% of the detainees had not even been accused of a crime, 40% were not alleged to have any connection with Al Qaida, and only 8% were shown to have fought with a terrorist group. Then comes the most shocking figure of all. The documents suggest that “86% were captured by the Northern Alliance or Pakistani authorities ‘at a time when the US offered large bounties for the capture of suspected terrorists.’”⁸¹

Is the full significance of that percentage apparent? 666 of those 775 human beings that have been caged for years under atrocious and inhuman conditions at Guantanamo were innocent people. They were just in the wrong place at the wrong time, with the ethnic and religious qualifications to lure greedy bounty hunters. Yet we Americans pride ourselves with a heritage that started over 200 years ago with a document that expounds: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —”

#####

References.

10 U.S.C. 948a *et. seq.*; “Military Commission Act of 2006.”

28 U.S.C. §2241, “Power to Grant Writ.”

ABC News; “Leaked E-mails Claim Guantanamo Trials Rigged,” 1 August 2005.

Al-Marri v. Wright, Case No. 06-7427, 4th Circuit.

Amnesty International Press Release; “USA: Administration Continues to Show Contempt for Guantanamo Detainees Rights,” 8 July 2004.

Associated Press; “AP Gets Shocking New Report on Guantanamo,” *Editor & Publisher*, 17 November 2006.

Binion, Carla; “Bush’s Absolute Power Grab,” *The Consortiumnews.com*, 21 October 2006.

Boumediene v. Bush, Case No. 05-5062, D.C. Circuit.

Bravin, Jess; “Defense Lawyer at Guantanamo Questions Military Commissions,” *Wall Street Journal*, 7 April 2006.

Buncombe, Andrew; “New Maximum-Security Jail to Open at Guantanamo Bay,” *The Independent* (UK), 30 July 2006.

Buncombe, Andrew; “Trials of Guantanamo Suspects Begin Without a Lawyer or Reporter in Sight,” *The Independent* (UK), 8 March 2007.

Constitution of the United States.

Convention Against Torture and Other Forms of Cruel or Degrading Treatment or Punishment, adopted by the UN General Assembly on 10 December 1984, entered into force on 26 June 1987.

Conyers, John, Jr.; “Conyers Criticizes Administration’s Approach to Military Tribunal Regulations,” Truthout Statement, 20 March 2002.

⁸¹Buncombe, 30 July 2006.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly Resolution 39/46, adopted 10 December 1984, entered into force 26 June 1987.

Denny, David A.; "Defense Department Issues Military Commission Procedures," *Washington File*, US State Department website, 21 March 2002.

Detainee Treatment Act of 2005, 31 December 2005. (Included in the Department of Defense Appropriations Act, 2006.)

Dicey, Albert Venn; *Introduction To The Study Of The Law Of The Constitution*. Available at http://www.constitution.org/cmt/avd/law_con.htm

DOD Fact Sheet – "Department of Defense Order On Military Commissions," issued by the Department of Defense, 21 March 2002.

Edgar, Timothy H. (ACLU Legislative Counsel); "Military Commissions Order No. 1, March 21, 2002," ACLU website, 16 April 2002.

Ex Parte Quirin, 317 U.S. 1 (1942).

Falk, Richard A.; "Re: Guantanamo and Geneva Conventions," private e-mail to Bob Aldridge, 24 January 2005.

Flaherty, Anne Plummer (Associated Press); "Bush Submits New Terror Bill," *The Boston Globe*, 28 July 2006.

Geitner, Paul (Associated Press); "Bush Tribunal Plan Hurts Extradition," *Los Angeles Times*, 27 November 2001.

Geneva Convention III – "Geneva Convention Relative to the Treatment of Prisoners of War," adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949. Entered into force on 21 October 1950.

Gorman, H. Candice; "An Exchange on *Habeas Corpus*," The Guantanamo Blog, 24 January 2007. Available at http://gtmoblog.blogspot.com/2007.01/exchange-on-habeas-corpus_24.html

Hamdan v. Rumsfeld – 548 U.S. ___, 126 S.Ct. 2749 (2006).

Human Rights First Briefing Paper; "Trials Under Military Order: A Guide to the Rules for Military Commissions," a report by Human Rights First, updated and revised May 2006.

Human Rights Watch Briefing Paper; "Briefing Paper on US Military Commissions," Revised November 2005.

International Covenant on Civil and Political Rights; (UN General Assembly Resolution 2200A, 16 December 1966), entry into force on 23 March 1976.

Lardner, George, Jr.; "Legal Scholars Criticize Wording of Bush Order," *Washington Post*, 3 December 2001.

Leonnig, Carol D.; "Guantanamo Bay Military Reviews Ruled Illegal," *Washington Post*, 31 January 2005.

Lewis, Neil A.; "Rules for Terror Tribunals May Deter Lawyers," *The New York Times*, 13 July 2003.

Lewis, Neil A. (*New York Times*); "US Considers Releasing Detainees," *San Jose Mercury News*, 1 December 2003.

Manual for Military Commissions, The; Issued by the Department of Defense in implementation of the Military Commissions Act of 2006 and signed by Secretary of Defense Robert M. Gates, 18 January 2007.

Marquis, Christopher; "Pentagon Will Permit Captives at Cuba Base to Appeal Status," *The New York Times*, 8 July 2004.

Military Commission Instruction No. 2, "Crimes and Elements for Trials by Military Commissions," signed by William J. Haynes II, General Counsel of the Department of Defense, dated 30 April 2003.

Military Commission Instruction No. 5; "Qualifications of Civilian Defense Counsel," signed by William J. Haynes II, General Counsel of the Department of Defense, dated 30 April 2003.

Military Commission Instruction No. 10, "Certain Evidentiary Determinations," signed by William J. Haynes II, General Counsel of the Department of Defense, dated 24 March 2006.

Military Commission Order No. 1; “Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, signed by Defense Secretary Donald Rumsfeld, 21 March 2002.

Military Commission Order No. 1; “Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, signed by Defense Secretary Donald Rumsfeld, 31 August 2005.

Military Commission Order No. 3, “Special Administrative Measures for Certain Communications Subject to Monitoring,” signed by Deputy Defense Secretary Paul D. Wolfowitz, 5 February 2004.

Military Order; “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” issued by President George W. Bush on 13 November 2001.

“Protocol 1 – “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1),” adopted 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts, entered into force on 7 December 1979.

Q&A on Military Instruction Number 10; Human Rights Watch, 31 March 2006.

Raban, Jonathan; “Dictatorship is in Danger,” *Guardian* (UK), 13 March 2006.

Rasul v. Bush, 542 U.S. 466 (2004).

Rosenberg, Carol; “Panel: Guantanamo Captives Can’t Sue in US Courts,” *The Miami Herald*, 21 February 2007.

Saar, Erik and Novak, Viveca; *Inside the Wire* (New York; The Penguin Press, 2005).

Savage, Charlie; “Military Lawyers See Limits on Trial Input,” *The Boston Globe*, 27 August 2006.

Shane, Scott and Liptak, Adam; “Detainee Bill Shifts Power to President,” *The New York Times*, 30 September 2006.

Smith, R. Jeffrey; “Top Military Lawyers Oppose Plan for Special Courts,” *Washington Post*, 3 August 2006.

Smith, R. Jeffrey; “Many Rights in US Legal System Absent in New Bill,” *Washington Post*, 29 September 2006.

United Nations Convention Against Torture and Other Forms of Cruel or Degrading Treatment or Punishment (1984)

Williams, Carol J.; “Marine Corps. Issues Gag Order in Detainee Abuse Case,” *Los Angeles Times*, 15 October 2006.