

One Small Step: The Military Commissions Act of 2006

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One Small Step: The Significance of the Military Commissions Act of 2006

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Part I

Yes, Virginia, it does apply to American Citizens!

Each step was so small, so inconsequential, so well explained or, on occasion, 'regretted,' that unless one understood what the whole thing was in principle, what all these 'little measures'... must some day lead to, one no more saw it developing from day to day than a farmer in his field sees the corn growing ... Each act ... is worse than the last, but only a little worse. You wait for the next and the next. You wait for one great shocking occasion, thinking that others, when such a shock comes, will join you in resisting somehow.

—Milton Mayer, *They Thought They Were Free. The Germans: 1938-1945.*

The quote above led off a recent article by Ernest Partridge entitled “The Dark Night Descends.” Partridge, a consultant, writer and lecturer, was writing about the Military Commissions Act of 2006, sometimes called the “detainee bill,” which was signed into law by President Bush on October 17.

Although the title of Partridge’s article and the tenor of the quote may seem melodramatic, Partridge was just one of half a dozen writers sounding the alarm about this bill in the alternative press in the week of the bill’s passage and thereafter, while the mainstream press remained, for the most part, inexplicably silent about its implications. One reason there was so little stir in the mainstream press was because it continued to perpetuate the fiction that the bill only applies to non-citizens.

However, even before the bill was signed into law, writers in the alternative press were disavowing this belief. One article, by William Rivers Pitt, published as a *Truthout Perspective* on September 29, was titled, alarmingly, “In Case I Disappear.”

What spooked these writers was their own reading of the provisions of the bill, bolstered by that of Bruce Ackerman, a Yale law professor. Ackerman’s article, published in the *Los Angeles Times* on September 28, carried the headline: “The White House Warden,” and the subheading: “Congress may give the president the power to lock up almost anyone he thinks is a terror threat.”

Ackerman’s chilling lead paragraph summarized the danger inherent in this bill this way:

“Buried in the complex Senate compromise on detainee treatment is a real shocker, reaching far beyond the legal struggles about foreign terrorist suspects in the Guantanamo Bay fortress. The compromise legislation, which is racing toward the

White House, authorizes the president to seize American citizens as enemy combatants, even if they have never left the United States. And once thrown into military prison, they cannot expect a trial by their peers or any other of the normal protections of the Bill of Rights.”

Skeptic that I am, this was enough to send me racing to the text of the bill to read it for myself. What I discovered there puzzled me at first. Yes, it is true that, under the bill, American citizens can be designated as “enemy combatants.”

Section 948a of the bill defines “enemy combatant” to include:

“... a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States ...”

This definition is broad enough to encompass American citizens in a wide range of activities. Columnist Molly Ivins reported that one person has already been charged with aiding terrorists because he sold a satellite TV package that includes the Hezbollah network. Bruce Ackerman asserted that American citizens could be designated as enemy combatants if they contributed money to a Middle Eastern charity, and William Rivers Pitt speculated:

“If you write a letter to the editor attacking Bush, you could be deemed as purposefully and materially supporting hostilities against the United States. If you organize or join a public demonstration against Iraq, or against the administration, the same designation could befall you. ...

“By writing this essay, I could be deemed an ‘enemy combatant.’ It’s that simple ...”

But, while my reading of the language of the bill persuaded me that the definition

of enemy combatant does apply to American citizens and that the language could be broadly interpreted to cover a wide range of activities, I could not, at first, find anything in the language of the bill that would allow American citizens to be thrown into military prisons, deprived of a trial of their peers and the normal protections of the Bill of Rights, as Bruce Ackerman asserted.

To be sure, all of those things and worse could befall those who were not American citizens and were subjected to the military commissions system created by the bill. But Section 948c of the bill seemed to limit jurisdiction of the military commissions to “alien” enemy combatants, and “alien” was explicitly defined to mean non-U.S. citizens.

However, since Ackerman is a Yale law professor, and an expert on the *Korematsu* case (in which the United State Supreme Court declared that Japanese American citizens could be confined to concentration camps during World War II), I decided to give the language of the bill a more careful read. That second reading unraveled the devilishly clever construction of the language: one section explicitly gives military commissions jurisdiction over alien “unlawful” enemy combatants, but—and this is the key—it doesn’t state that this is the “exclusive” jurisdiction granted to military commissions! There are in fact two other sections under the Jurisdiction heading. The second section explicitly deprives military commissions of jurisdiction over “lawful” enemy combatants—members of regular armed forces and some militias and volunteer armies of foreign countries with which the U.S. is at war. The third section states:

“A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006 by a Combatant Status Review Tribunal or another competent tri-

bunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter.”

And there it is—that word, “person,” again—establishing an independent jurisdiction broad enough to include American citizens that will subject us, at the whim of a review tribunal established by Bush or Rumsfeld, to all the strictures of the military commissions process. (Hearing procedures under the Military Commission Act will be discussed in a subsequent article.)

First and foremost among those is the explicit elimination of the right to a speedy trial, with the result that once a person’s status as an unlawful enemy combatant is determined, the person can be held indefinitely without trial.

American citizens—though not aliens—would retain the right to challenge their detention in court through a writ of *habeas corpus*, a proceeding to determine whether we are being unlawfully detained. However, passage of the Military Commissions Act of 2006 may itself supply the “small step” that is needed to satisfy the courts that the President has the lawful authority he needs to hold American citizens without trial indefinitely—or, at least, until the end of hostilities. (And who can foresee when that might be when the war is against “terror”?)

Consider the case of Jose Padilla. In 2002, Padilla, an American citizen, was

seized at Chicago’s O’Hare International Airport and held as a “material witness” in connection with the September 11, 2001 attacks on the World Trade Center. Two days before a district court judge was to issue a ruling on the validity of continuing to hold Padilla under the material witness warrant, President Bush issued an order to Secretary Rumsfeld to detain Padilla as an “enemy combatant,” and, despite his American citizenship, Padilla was transferred to a military brig in South Carolina without any notice to his attorney or family. His attorney brought a writ of *habeas corpus*.

On September 18, 2003, the Second Circuit Court of Appeals declared that the President lacked inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat, and ordered Padilla to be freed within 30 days. However, the Court of Appeal stayed its determination pending a ruling by the Supreme Court.

The Supreme Court was to consider whether the Congressional Authorization for Use of Force passed after September 11, 2001, was sufficient to overcome the Non-Detention Act, which provides that “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The Supreme Court side-stepped this issue and dismissed the writ on procedural grounds, and, in the process, set aside the ruling of the Second Court of Appeal. Padilla’s attorneys had to start all over. Meanwhile, Padilla remained in military custody.

Days before the Supreme Court would once again have heard this issue, in November 2005, the government indicted Padilla and sought to transfer him to civilian court.

On January 3, 2006, the United States Supreme Court granted the Bush Administration’s request to transfer Padilla from military to civilian custody, and dismissed the *habeas corpus* petition for the second time. More than four years after his detention, Padilla remains in custody, though no longer in military detention, and the issue as to whether the Congressional Authorization for Use of Force was sufficient to overcome the Non-Detention Act remains unresolved.

As a result of passage of the Military Commissions Act of 2006, that issue may well never have to be resolved, because passage of the Military Commissions Act is the “small step” needed to fulfill the requirement of the Non-Detention Act that citizens be detained only “pursuant to an Act of Congress.” It is the piece needed to convince a court hearing a *habeas corpus* petition that indefinite detention without trial of American citizens as unlawful enemy combatants is indeed legal.

The Supreme Court may eventually determine that the Military Commissions Act of 2006 is unconstitutional, but judging from its performance—or lack thereof—in the Padilla case, those of us who are detained pending such ruling may no longer have the physical or mental capacity to appreciate it by the time that distant day occurs!

Part II

Torture and the Military Commissions Act

Whoever fights monsters should see to it that in the process he does not become a monster. And when you look long into an abyss, the abyss also looks into you.

—Friedrich Nietzsche, Walter Kaufmann (Translator), *Beyond Good and Evil: Prelude to a Philosophy of the Future*, 1866 (Vintage Books, 1966), ISBN 0679724656 (1989 Edition)

The quote above begins the Argument section of a brief filed in November on behalf of Jose Padilla in a Motion to Dismiss an indictment brought against him by the United States government.

Padilla, you may remember from Part I of this series, is an American citizen who was detained without a hearing in military custody for three-and-a-half years as an “enemy combatant.” He was finally transferred to civilian custody earlier this year to avoid a pending United States Supreme Court decision on the legality of his military detention.

Now Padilla’s lawyers are contending the indictment against him should be dismissed

because the government tortured him for the three-and-a-half years he was in military custody.

His treatment at the hands of the government is spelled out in great detail in the brief accompanying the Motion to Dismiss. Among other things, it asserts Padilla was kept in complete isolation for two years. In addition, his captors kept him in “complete” sensory deprivation. He could not tell whether it was day or night or what time of year it was. He was “viciously” deprived of sleep through a variety of means. He was put in stress positions for hours at a time, shackled and manacled, with a belly chain, for hours in his tiny nine-by-seven-foot cell. Noxious fumes were

introduced into his environment and the temperature there was manipulated, making his cell extremely cold for long stretches of time. He was deprived of showers for weeks at a time. He was threatened with being forcibly removed from the United States to another country, including the U.S. Naval Base at Guantánamo Bay, Cuba, where, he was told, his fate would be even worse than in the Navy brig. He was forced to endure exceedingly long interrogation sessions by multiple interrogators who would scream, shake and otherwise assault him. And he was threatened with imminent execution.

As outrageous as this may sound, Padilla’s treatment was not unlike that being meted out

by the Central Intelligence Agency to detainees in its system of “extraordinary rendition” to secret prisons overseas, or to detainees at Guantánamo Bay, or to those who were held at Abu Ghraib prison in Iraq. It was part of a pattern of abuse that spread like a contagion from one detention system to another as the result of justifications in a series of legal memos formulated by government lawyers.

The Pattern of Abuse Begins

This pattern of abuse began after Alberto Gonzales, then the White House counsel, now the United States Attorney General, sent a memo to President Bush in January 2002 arguing for a “new paradigm” of interrogation.

In his memo, Gonzales declared that post-9/11 conditions “render obsolete” the “strict limitations on questioning of enemy prisoners” required by the Geneva conventions, which were ratified by the United States in 1955. To get around these limitations, Gonzales recommended that the President issue a finding that the Geneva Conventions did not apply to *al Qaeda* and the Taliban.

An alternative approach was to re-define “torture.” Several subsequent memos attempted to do this.

In August 2002, the Justice Department’s Office of Legal Counsel, which acts as in-house law firm for the executive branch, issued a memo secretly authorizing the CIA to inflict pain and suffering on detainees during interrogations, up to the level caused by “organ failure.” This document, leaked to the press in 2004, after the Abu Ghraib scandal broke, came to be known as the “Torture Memo.”

By October 2002, the demand for more freedom to torture had spread to the military. In that month, Lieutenant Colonel Diane Beaver, who was then the top legal adviser to a group run by Army intelligence, called Joint Task Force 170, responded to the demand for more “flexibility” in interrogating prisoners at the U.S. detention facility at Guantánamo Bay. It was the mission of J.T. F. 170 to uncover information that would help American authorities determine *al Qaeda’s* next move.

In her legal memo, Lieutenant Colonel Beaver acknowledged that American military personnel at Guantánamo, as everywhere else in the world, were bound by the Uniform Code of Military Justice, which characterizes “cruelty,” “maltreatment,” “threats” and “assault” as felonies. She opined, however, that U.S. soldiers preparing to violate these laws in their interrogations might be able to obtain “immunity in advance” by having permission for their actions from higher authorities.

In December 2002, not long after Lieutenant Colonel Beaver rendered her opinion, Secretary of Defense Rumsfeld gave formal approval for the use of such techniques as “hooding,” “exploitation of phobias,” “stress positions,” “deprivation of light and auditory

stimuli,” and other coercive tactics ordinarily forbidden by the Army Field Manual. Thereafter, these techniques began to be used in questioning detainees at Guantánamo.

Rumsfeld reserved judgment on other techniques, including “waterboarding,” a form of simulated drowning, and gave permission for such techniques on a case-by-case basis.

According to an Army Inspector General’s report issued in December 2005, Rumsfeld personally approved the interrogation techniques used on Mohammed al-Qahtani, a Saudi detainee identified as the “missing twentieth hijacker,” the terrorist who was supposed to have been booked on the plane that crashed in a Pennsylvania field on September 11, 2001.

Al-Qahtani was reportedly required to “stand naked in front of a female interrogator, was accused of being a homosexual, and was forced to wear women’s underwear and to perform ‘dog tricks’ on a leash.” According to interrogation logs, al-Qahtani had been subjected to 160 days of isolation in a pen perpetually flooded with artificial light. He was interrogated on 48 of 54 days, for 18 to 20 hours at a stretch. He had been stripped naked, straddled by taunting female guards, forced to wear women’s underwear on his head, and forced to put on a bra, threatened by dogs, placed on a leash, and told that his mother was a whore. He was told to bark like a dog, forced to listen to pop music at an ear-splitting volume, and kept in a painfully cold room. He was subjected to a phony kidnapping, given large quantities of intravenous liquids without access to a toilet, and deprived of sleep for three days. His heart rate dropped to 35 beats per minute, so precarious that he required cardiac monitoring. Eventually, he begged to be allowed to commit suicide.

The Fight against Torture

In the spring of 2004, the first pictures from Abu Ghraib became public.

The Detainee Treatment Act of 2005, passed after the Abu Ghraib scandal surfaced, re-established more restrained interrogation tactics by the military. This Act did not apply to the CIA, however, and the interrogation techniques continued essentially unchanged in the secret CIA prisons—until the Supreme Court issued its landmark decision in the case of *Hamdan v. Rumsfeld* in June of this year.

The *Hamdan* case had been brought by Lt. Cmdr. Charles (“Charlie”) Swift, a Navy lawyer who had been commanded by Pentagon superiors to negotiate a guilty plea by Salim Hamdan, accused of terrorism and detained at Guantánamo Bay for no other reason than that he had been Osama bin Laden’s chauffeur. Instead, Swift told his client he was going to take his case to the Supreme Court.

“I had a client,” Swift told National Public Radio on October 12 of this year, “who was

sitting in solitary confinement, going slowly insane, and every request I had made for relief (from his despair) had fallen on deaf ears.”

Ultimately, the Supreme Court ruled that the military commissions system under which Hamdan had been held as an enemy combatant was not authorized under existing law. Moreover, the Court ruled that common Article 3, which appears in the Geneva Conventions, applied to Hamdan.

Although Hamdan was detained at Guantánamo Bay under military jurisdiction, this ruling struck fear into the hearts of the CIA officers running the secret prisons to such an extent they refused to continue to carry out interrogations of terror suspects. The CIA officers realized that, in light of the *Hamdan* ruling, they, too, were vulnerable to criminal prosecution under the War Crimes Act of 1996, which implemented the Geneva Conventions in the United States.

The War Crimes Act of 1996, passed with overwhelming majorities by the United States Congress and signed into law by President Bill Clinton, applies if either the victim or the perpetrator is a national of the United States or a member of the U.S. armed forces. Thus, its jurisdiction extends to CIA officers who are U.S. citizens. The penalty for violating the War Crimes Act may be life imprisonment or death.

The Act defined a “war crime” to include conduct that constituted a violation of common Article 3 of the Geneva Conventions. Common Article 3 prohibits the following:

- Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- Taking of hostages;
- Outrages upon personal dignity, in particular, humiliating and degrading treatment; and
- The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Enter the Military Commissions Act of 2006

After the Supreme Court issued its ruling in the *Hamdan* case, President Bush was presented with the urgent task of rescuing the CIA’s secret prison program.

Clearly, the interrogation techniques employed by the CIA constituted “outrages upon personal dignity” and “humiliating and degrading treatment,” and probably “cruel treatment” and “torture” as well. Although not acknowledging the illegal character of the interrogation tactics, in September of this year, President Bush finally acknowledged the existence of these secret prisons. Without passage of the Military Commissions Act, he

warned, the interrogation program in these prisons would be shut down permanently, and the administration's fight against terror would be impeded. When Congress passed the Military Commissions Act of 2006, the President expressed satisfaction that use of what he called "alternative" interrogation techniques could now continue.

The Military Commissions Act achieves the results sought by President Bush by incorporating several provisions calculated to undercut the Supreme Court opinion in *Hamdan* by amending the War Crimes Act and the Detainee Treatment Act.

Amendments to the War Crimes Act

The Military Commissions Act of 2006 amends the War Crimes Act in the following important ways:

1. It precludes a detainee from invoking the Geneva Conventions as a source of rights in any *habeas corpus* or civil action or other proceedings. No longer may a court look to the language of common Article 3 itself or to any "foreign or international source of law" to determine what is a "grave breach" of common Article 3.
2. It provides that only certain specified acts inserted into the War Crimes Act constitute "grave breaches" of common Article 3. These specified acts, among other things, define torture, but in a restrictive, not an expansive, way. For instance, "torture" is defined as an act "specifically intended to inflict severe physical and mental pain or suffering." "Cruel or inhuman treatment is defined as "an act intended to inflict severe or serious physical or mental pain or suffering."
"Serious physical pain or suffering," in turn, is defined as:
 - i. a *substantial* risk of death;
 - ii. *extreme* physical pain;
 - iii. a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or
 - iv. *significant* loss or impairment of the function of a bodily member, organ, or mental faculty. (Emphasis added.)
"Severe mental pain or suffering," is defined by reference to another provision of law that reads as follows:
"Severe mental pain or suffering" means the *prolonged* mental harm caused by or resulting from:
 - A. the intentional infliction or threatened infliction of severe physical pain or suffering;

- B. the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt *profoundly* the senses or the personality;
- C. the threat of imminent death; or
- D. the threat that another person will *imminently* be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

It should be noted that, as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006 (October 17, 2006), the term "serious and non-transitory mental harm (which need not be prolonged)" replaces the term "prolonged mental harm."

3. The Military Commissions Act also amended the War Crimes Act to delete reference to the prohibition of "outrages against personal dignity" or "humiliating or degrading treatment." The presumptive result is that acts that constitute "outrages against personal dignity" or "humiliating or degrading treatment" would no longer be considered to be "grave breaches" of common Article 3 for purposes of defining a war crime under the War Crimes Act.

In addition, the President is given authority "for the United States" to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not "grave breaches" of the Geneva Conventions. Standing naked in front of a female interrogator, being accused of being a homosexual, being forced to wear women's underwear on one's head, or being forced to perform 'dog tricks' on a leash will be techniques subject to punishment, if at all, based on standards and administrative regulations adopted pursuant to the interpretive authority of the President.

Amendments to the Detainee Treatment Act

The Military Commissions Act inserts into the Detainee Treatment Act a retroactive defense for U.S. personnel accused of violating common Article 3. Such personnel may escape criminal conviction for "waterboarding"

and like practices committed between September 11, 2001 and December 30, 2005, the date the Detainee Treatment Act was enacted, if they believed in "good faith" that what they were doing was lawful. The relevant provision of the Detainee Treatment Act, in turn, makes reliance on legal memos of the sort produced by the Justice Department and military counsel "an important factor" in determining knowledge and good faith.

In addition, the Military Commissions Act amends the Detainee Treatment Act to make it mandatory that the United States Government provide or employ counsel and pay counsel fees, court costs, bail, and other expenses to represent U.S. personnel in civil actions, criminal prosecutions or investigations related to interrogation practices before United States Courts or agencies, foreign courts or agencies or international courts or agencies.

Opening the Door to Prosecution for War Crimes under German Law

Ironically, the provisions aimed at immunizing personnel from domestic prosecution may be just what are needed to convince German courts to prosecute them under German law.

On November 14 of this year, lawyers submitted a complaint of war crimes against outgoing Secretary of Defense Donald Rumsfeld, former White House Counsel and current Attorney General Alberto Gonzales, former CIA director George Tenet and others, to a German prosecutor. The charges, prepared by the Center for Constitutional Rights, which represents Mohammed al-Qahtani and other Guantanamo Bay detainees, relate primarily to the role of these officials in devising and implementing an international program of torture and illegal detention.

The complaint is being brought in Germany because German law allows war crimes cases to be heard in German courts regardless of where the alleged crimes were committed.

Germany dismissed a previous case brought in November 2004 on the grounds that the United States was looking into the conduct of its officials under domestic laws.

However, passage of the Military Commissions Act of 2006, which provides a defense to prosecution under the War Crimes Act, and, in addition, mandates the U.S. government to provide for the defense of officials against charges related to interrogation practices, counters any argument that prosecution is likely to take place in the United States, and strengthens the argument that trial under the German law is necessary for justice to be done.

Part III

Due Process and the Military Commissions Act

“Beyond the Judge’s failure to fully accept the Court’s ruling in the Rasul case is the very troubling notion that any judge or any legislature anywhere would ever seek to deprive a person of that most basic of human rights—the right to personal liberty—without providing them with a fair process and unbiased judge to rule on the legality of that deprivation.”

—Wells Dixon, Human Rights Attorney with the Center for Constitutional Rights

The disappointment expressed in the quote above was prompted by a December 13, 2006 ruling of Judge James Robertson of the District Court in the District of Columbia. On that date, Judge Robertson ruled that Salim Ahmed Hamdan had lost his right to bring a *habeas corpus* challenge to his detention at Guantanamo Bay, Cuba. He had, in effect, lost his right to have a court examine whether he was being detained lawfully. The right of all detainees to challenge the lawfulness of their detention is among the most fundamental principles of international law and dates back, in common law, to the Magna Carta of 1215.

Hamdan, a 34 year-old Yemeni national, has been detained at Guantanamo Bay since he was taken into custody in Afghanistan in 2001 because he worked as Osama bin Laden’s chauffeur. Hamdan was the subject of an historic United States Supreme Court ruling this past June when he successfully challenged his detention under the military commissions system then in effect. At that time, the Supreme Court ruled that Hamdan’s detention violated Common Article 3 of the Geneva Conventions.

Common Article 3 forbids, among other things:

The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

In June, Hamdan was a winner. In December, he had lost. What changed between June and December? On October 17, 2006, Congress passed, and President Bush signed into law, the Military Commissions Act of 2006 (“the MCA”).

Among other things, Section 7 of the MCA rewrote section 2241 of title 28 of the United States Code, which had previously been interpreted by the United States Supreme Court in *Rasul v. Bush*, a 2004 case, as affording *habeas corpus* rights to Guantanamo detainees. The new language under the MCA provides:

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an

application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the United States who has been determined by the United States or its agents relating *to any aspect* of the detention, transfer, treatment, trial, or condition of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant *or is awaiting such determination*. (Emphasis added.)

This “jurisdiction stripping” language applies to all cases pending on October 17, 2006 which relate to the detention, transfer, treatment, trial or conditions of detention of an alien detained by the United States since September 11, 2001. Judge Robertson ruled that this language stripped him of the right to consider Hamdan’s writ of *habeas corpus*.

Furthermore, while Judge Robertson acknowledged that Hamdan’s “lengthy detention beyond American borders but within the jurisdictional authority of the United States is historically unique,” he concluded that a foreign detainee who has never entered the USA and who is held outside its sovereign territory has no entitlement to *habeas corpus* under the U.S. Constitution. This was the “disappointing” part of Judge Robertson’s ruling, and an appellate court may disagree on appeal.

Judge Robertson noted that Salim Hamdan “has never been afforded access to a proper tribunal.” However, he stated, “Hamdan is to face a military commission, newly designed, because of his efforts, by a Congress that finally stepped up to its responsibility.”

The question left unresolved is whether these “newly designed” military commissions “afford all the judicial guarantees which are recognized as indispensable by civilized people.” Judge Robertson didn’t have the jurisdiction to answer that question, either, but an examination of the provisions of the MCA cast considerable doubt on that proposition.

Fundamental Unfairness: Procedural Due Process Denied

Procedural due process relates to the rules that govern an accused’s rights prior to trial, as well as the presentation of evi-

dence at a trial or hearing. An examination of those rules answers the basic question: can the defendant get a fair hearing? An examination of the rules established by the MCA raise alarming concerns.

Combatant Status Review Tribunals

The MCA applies to “unlawful enemy combatants.” Under the MCA, initial determination of unlawful enemy combatant status can be made by a Combatant Status Review Tribunal (CSRT). CSRTs first began operating at Guantanamo Bay in July 2004, the same year the *Rasul* court issued its decision, and before passage of the MCA.

A recent study of the review process found that detainees arguing their innocence were routinely denied witnesses they tried to call, even when the witnesses were other prisoners at Guantanamo. Lawyers for the detainees complain that the government has made almost no effort to have the panels consider information they have gathered, and has often blocked their attempts to learn the accusations against their clients.

“We have tried again and again to have a say in the process,” said Barbara Olshansky, a lawyer who has coordinated much of the work of the detainees’ lawyers for the Center for Constitutional Rights. “But we learned pretty early on that these were kangaroo courts.”

As of December 18, 2006, almost half—about 379—of the 775 detainees that have been held in Guantanamo have been released after years in prison. Who goes and who stays and why is often a mystery. Most of those released were sent home without being charged with a crime or being told why they had been detained in the first place. Many had been turned over by foreign agents in order to collect a bounty paid by the U.S. government for suspected terrorists.

Trial Proceedings under the MCA

Once a person is declared an unlawful enemy combatant, theoretically, he or she is entitled to a trial before a military commission on the specific charges brought. Although the procedures under the MCA are based upon the procedures for trial for general courts-martial, the MCA makes certain of those procedures inapplicable to military commissions hearings. These in-

clude: 1) the right relating to a speedy trial; 2) the privilege against compulsory self-incrimination; and 3) provisions relating to pretrial investigation.

Speedy Trial

By omitting the right to a speedy trial, the MCA, in effect, eliminates the right to any trial at any time. After five years, none of the 775 Guantanamo detainees has been convicted of a criminal offense because none has yet had a hearing on the merits of the charges against them. According to an American Forces Information Service News article dated October 17, 2006, military officials are estimating that only about 75 detainees will ever be subjected to military commission hearings.

Seventeen detainees were under 18 years old when they were taken to Guantanamo. The youngest were 10, 12 and 13 when they were “captured.” At the end of 2006, four of these juveniles are still being detained. They have spent one-fourth of their lives in Guantanamo, and they still have no trial date in sight.

Since there is no *habeas corpus* right, if there is no trial, under the MCA, there can be no court review of these detentions no matter how long they go on.

Compulsory Self-Incrimination

In the unlikely event that detainees were afforded a trial, the pretrial and trial process afforded to them under the MCA lacks many of the protections taken for granted in civil and criminal trials and even general courts-martial.

For example, although the MCA provides that no person shall be required to testify against himself, and that statements obtained from detainees by “torture” shall not be admissible at trial, the MCA does allow the admission of statements obtained by “coercion.”

In cases where statements were obtained by “coercion”, the MCA sets two standards. With regard to statements obtained before December 30, 2005, the date of the enactment of the Detainee Treatment Act of 2005, such statements may be admitted if the military judge finds that:

1. the totality of the circumstances renders the statement reliable and possessing sufficient probative value;
2. and the interests of justice would best be served by admission of the statement into evidence.

After that date, a third factor is added:

3. the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section

1003 of the Detainee Treatment Act of 2005.

Thus, statements obtained prior to December 30, 2005, could be admitted into evidence even if the interrogation methods used to obtain the statement did amount to cruel, inhuman or degrading treatment.

However, an evaluation of whether the interrogation methods amounted to “torture” or merely to “coercion” may be difficult to make, because the MCA incorporates a “national security privilege” that will permit trial counsel to introduce “otherwise admissible evidence”—such as the coerced statements—while protecting from disclosure the “sources, methods, or activities by which the United States acquired the evidence” if the military judge finds the sources, methods or activities to be classified and the evidence is “reliable.”

The so-called “alternative” interrogation methods being used in the detainee cases are classified as “Top Secret,” and, since the MCA became law, the government has begun arguing that detainees should not be permitted to disclose the specifics of the interrogation techniques alleged to be torture because *al-Qaeda* will find out what our interrogation techniques are and will train their operatives to withstand the techniques.

If this argument is upheld, the result would be that coerced statements will be admitted into evidence, while evidence of the interrogation methods used to elicit those statements will be barred. If the government’s interpretation of the MCA prevails, defendants will be precluded from publicly revealing any information about their torture or mistreatment, and so will their attorneys, but their coerced statements can be used as evidence to convict them of crimes they confessed to only to stop the torture.

Pretrial Investigation

In order to build a defense, an accused should have access to witnesses and evidence, both that to be used against him or her and that which could provide proof of the accused’s innocence. Theoretically, the MCA provides such rights of discovery to defense counsel representing those accused as unlawful enemy combatants.

However, under the MCA, classified information may be deleted from documents made available to the accused’s attorney and replaced by the substitution of a portion of the information only, or a summary of such information that does not reveal anything classified. These substitutions and summaries may be so general or distorted that this procedure will effectively

deprive the accused of the fundamental right to confront the evidence against him and to discover exculpatory evidence that would tend to prove innocence.

Evidence at Trial

The MCA also allows the admission of hearsay evidence, that is, statements that are not made from the personal knowledge of the witness, but from the mere repetition of what the witness has heard others say. Such statements are carefully regulated in civil and criminal trials and are almost never allowed for the purpose of proving the truth of the matter asserted. However, under the MCA, the burden is on the party opposing introduction of the evidence to show that such second-hand statements are “unreliable or lacking in probative value.”

Despite these glaring departures from established due process norms, the MCA nevertheless declares that:

“A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized people’ for purposes of common Article 3 of the Geneva Conventions.” (*Sec. 948b(f).*)

In other words, the MCA system is lawful because the law says it is! However, in order to preclude any inconvenient contrary opinion on this issue, the MCA goes on to declare: “No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.” (*Sec. 948b(g).*) Nor may a court rely on any foreign or international law for its decision or judgment.

Corrective Legislation

The new Democrat-controlled Congress will consider two bills in January that could restore procedural due process to the MCA: the Habeas Corpus Restoration Act of 2006 (S. 4081, introduced by Republican Senator Arlen Specter of Pennsylvania and Democratic Senator Patrick Leahy of Vermont), and the Effective Terrorists Prosecution Act of 2006 (S. 4060, introduced by Democratic Senator Christopher Dodd of Connecticut).

As suggested by its title, the Habeas Corpus Restoration Act of 2006 is the more limited of the two. Introduced on December 5, 2006, it would purportedly restore jurisdiction to the courts to hear the 196 *habeas corpus* applications currently pending on behalf of the detainees at Guantanamo Bay, Cuba, and would also allow *habeas corpus* challenges to military commission procedures. The actual

language of the bill, as introduced, appears extremely restricted, however, and it is not clear that the language of the bill, as introduced, would accomplish its stated goals.

The more ambitious of the two bills was originally titled the “Military Commission Civil Liberties Restoration Act,” but the use of the term “civil liberties” was thought to be too radical, and the title was changed even before the bill was introduced on November 17, 2006. Nevertheless, the Effective Terrorists Prosecution Act would:

- **Restore habeas corpus protections to detainees.** This bill is worded more carefully than the Habeas Corpus Restoration Act, with the result that this bill would restore the *habeas corpus* rights established by previous law.
- **Narrow the definition of unlawful enemy combatant to individuals who directly participate in hostilities as part of an armed conflict against the United States.** (Presumably, under this definition, Salim Ahmed Hamdan’s position as chauffeur to Osama bin Laden would no longer bring him within the definition of an unlawful enemy combatant.)
- **Bar information gained through “coercion” from being introduced as evidence in trials.** This proposed change would presumably preclude introduction of all non-voluntary admissions made by detainees, not just those resulting from “torture.”
- **Empower military judges to exclude hearsay evidence if the judge determines the evidence is unreliable or lacking in probative value.** The goal here is to shift the burden on whether hearsay is sufficiently reliable from the opponent to the proponent of the evidence.
- **Empower the military judge to dismiss the charges if the judge determines that the summary or substitute offered to the detainee in place of classified evidence is not sufficient to protect the right of the de-**

fendant to a fair trial. This outcome is more in keeping with other law.

- **Limit the authority of the President to interpret the meaning and application of the Geneva Conventions and make that authority subject to congressional and judicial oversight.** This would revise the current language, which vests this authority exclusively in the President and strips the courts of authority to utilize foreign or international law as a basis for its decisions in these cases.
- **Provide for expedited judicial review of the Military Commissions Act of 2006 to determine the constitutionality of its provisions.** Any constitutional law challenge to any provision of the MCA could be filed in the United States District Court for the District of Columbia, and that court’s judgment would be reviewable as a matter of right by direct appeal to the Supreme Court. The courts would have the duty to expedite these appeals to the “greatest possible extent.”

While it is impossible to know whether Congress will pass either of these bills, or what the wording of such bills in their final form will be, it is a safe bet that any bill passed by Congress during the two years remaining in the President’s term of office would be vetoed. Since the Democrats do not have a sufficient majority to override a veto, for all practical purposes, the current wording of the MCA will remain in effect for the foreseeable future—unless its provisions are struck down by the courts in which various constitutional challenges are being argued.

One Small Step: Hamdan’s Long March to Freedom

While all these challenges are taking place, Salim Ahmed Hamdan remains in detention. He has not seen his daughter Fatima since she was two years old. He has never seen his daughter Selma. When Hamdan first met his lawyer, Lt. Cmdr. Charles Smith in Guantanamo, Hamdan told Smith that: “The guards say there is no law here.” Smith replied, “I do not believe that. I think that there is law everywhere but we are going to have to fight for

it. We are going to have to go to the Supreme Court of the United States and win.” Hamdan then asked, “Will this make me famous?” When Smith replied that it might, Hamdan responded, “I do not want to be famous. I want to go home.”

Today, Hamdan and Smith are both famous, but Hamdan still cannot go home, and Smith has lost his military career. On December 11, 2005, Smith won a major ACLU award for his successful defense of Hamdan in the United States Supreme Court. However, two weeks after his victory, Swift was passed over for promotion by the military, and he will have to leave the Navy early in 2007. But Smith has vowed to remain Hamdan’s lawyer as long as Hamdan is in detention—with one slight difference: instead of being his military lawyer, he will be his civilian lawyer.

During this long march toward freedom, Smith likes to tell a story about one small step toward freedom. This is the story:

In July of 2004, Smith traveled to Yemen to meet with Hamdan’s family. He was accompanied by a female Judge Advocate General (“JAG”) attorney who assisted with depositions. On the next-to-last night that they were in Yemen, Hamdan’s mother-in-law, the oldest person in the household, called Hamdan’s daughters, along with all the other little girls living in the house and their friends, and seated them at her feet. According to Smith, they were dressed in blue jeans and T-shirts. They had pigtails and smiles and looked like little girls the world over.

When the grandmother had quieted them down, she pointed to the female JAG attorney, whose name was Susan, and said: “She went to school and studied very, very hard and did very well and now she is a lawyer.” And then she looked into the faces of those little girls and said, “If you go to school and study very, very hard and get good grades—you can be anything.”

Smith believes the promise of those words “is the victory we seek ... for it is the promise of a world where the law, not men, is supreme. It is the promise that the Supreme Court upheld in *Hamdan* and the vision on which America was founded and the promise that can and will lead the world to a better place.” □

