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31ST ANNUAL

PAGE KEETON

CIVIL LITIGATION CONFERENCE

OCTOBER 25 - 26, 2007

GUANTANAMO: IT IS NOT ABOUT THEM – IT IS ABOUT US

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GUANTANAMO: IT IS NOT ABOUT THEM – IT IS ABOUT US

“The whole purpose of setting up Guantánamo Bay is for torture. Why do this? Because you want to escape the rule of law. There is only one thing that you want to escape the rule of law to do, and that is to question people coercively – what some people call torture. Guantánamo and the military commissions are implements for breaking the law.”¹

Lieutenant Commander Charles Swift, is the naval officer who was appointed to represent detainee Salim Ahmed Hamdan before the United States Supreme Court.²

I. INTRODUCTION

The legal challenges to the methods and duration of the imprisonment of the detainees in Guantánamo Bay Cuba is not only about the detainees, it is about the rule of law in America. The Bush Administration has used 9-11 and the “War on Terror” to attack the rule of law. The Administration says the War on Terror allows the President to pick and choose what laws the Executive Branch will follow and what laws it will ignore. The War on Terror has been used to justify ignoring treaties the United States has signed - - treaties the United States expects other countries to obey. Because of this ill-defined and perpetual “war,” the administration claims it can, and in fact does, brush aside long-standing principles of human rights recognized by civilized nations throughout the world.

In addition to undermining the rule of law at home, Guantánamo is causing harmful consequences throughout the world. Guantánamo has become a “poster child” for global anti-Americanism that weakens our influence and effectiveness in fighting terrorism. The message we are sending to the Muslim world is that we abuse Muslims - - giving ammunition to those who spread hate of America, the “Great Satan.” Our enemies loudly proclaim that our military tribunals are sham political “show trials,” the same types of trials that we condemn in other parts of the world. We are enabling our enemies to take the moral high ground from us.

The mistreatment of detainees harms America more than its enemies. To overcome and defeat the Islamist extremist who engage in acts of terrorism, America must have the support of the international community. Taking the position that principles of international law and human rights apply to all others, but not to us, will not win the support we must have from the global community.

1 - Brenner, Marie, *Taking on Guantánamo*, Vanity Fair, March 2007

2 - After successful representing Hamdan before the United States Supreme Court, Lt. Commander Swift was forced out of the navy.

II. WHO IS AT GUANTANAMO?³

Since January 2002, over 770 detainees have been imprisoned at Guantánamo Bay. It is estimated that 390 detainees have been released, leaving approximately 385 men still detained in a state of legal limbo in Cuba. Who are these men who have been detained, or still remain at Guantánamo?

Claiming “national security,” the government has told the American public very little about the individuals detained at Guantánamo and has refused to release information about what these men have allegedly done that justifies their detention. Government officials, however, have not been hesitant to tell the media that these men are dangerous terrorists. The Bush Administration has consistently referred to the detainees as the “worst of the worst.” According to Vice President Cheney, “The people that are there are people we *picked up on the battlefield*, primarily in Afghanistan. They're terrorists. They're bomb makers. They're facilitators of terror. They're members of Al Qaeda and the Taliban...”⁴ (emphasis added). Former Secretary of Defense Donald Rumsfeld told the press, “[The detainees are] among the most dangerous, best-trained vicious killers on the face of the Earth. These are the people *all of whom were captured on a battlefield*.”⁵ (emphasis added). The Government’s own documents, however, contradict these “official” claims.

Professor Mark Denbeaux and his students at the Seton Hall School of Law have written two excellent reports comparing the actual Government data to government officials claims that all detainees are the “worst of the worst.”⁶ (Author’s Note: I highly recommend reading these reports. They provide the reader with an excellent insight into who is being detained at Guantánamo.) The Seton Hall analysis considered only Government documents and only the Government’s conclusions, assuming for purposes of the report that the Government evidence was accurate. The reports did not consider denials of wrongdoing by the defendants, nor claims of innocence made by defense attorneys. The Government’s own data strongly contradicts “official” claims being made to the media and the American public. Analysis of the Government data shows:

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- 3 - In May of 2005, the author volunteered through the Center for Constitutional Rights (CCR) to represent a detainee at Guantánamo Bay. After attending a seminar conducted by CCR, the author was assigned an Afghani client, Mohammad Akhtiar. With the assistance of CCR, a habeas corpus petition was filed for Mohammad Akhtiar in the District Court of the District of Columbia. In December of 2006, three and a half years after being imprisoned, Mohammad Akhtiar was transferred back to Afghanistan. Upon his arrival in Kabul, he was promptly set free by the government of Afghanistan. In conjunction with CCR, the author is presently representing a second Afghani detainee, Abdul Naseer.
 - 4 - Vice President Dick Cheney, (June 23, 2005) available at <http://rastaban.livejournal.com/312082.html>
 - 5 - Former Secretary of Defense Donald Rumsfeld, (January 27, 2002) available at http://www.defenselink.mil/news/Jan2002/n01272002_200201271.html
 - 6 - Denbeaux, Mark, *Report on Guantanamo Detainees, A Profile of 517 Detainees through Analysis of Department of Defense Data* (2006) (with Joshua Denbeaux, David Gratz, John Gregorek, Matthew Darby, Shana Edwards, Shane Hartman, Daniel Mann, and Helen Skinner). Available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf; and Denbeaux, Mark, *Second Report on the Guantanamo Detainees: Inter and Intra Departmental Disagreements About Who Is Our Enemy* (2006) (with Joshua Denbeaux, David Gratz, John Gregorek, Matthew Darby, Shana Edwards, Shane Hartman, Daniel Mann, and Helen Skinner). Available at http://law.shu.edu/news/second_report_guantanamo_detainees_3_20_final.pdf

- Only 8% of detainees were determined to be al Qaeda fighters;
- Only 5% of the detainees were captured by United States forces; 86% were arrested by either Pakistan or Afghanistan's Northern Alliance forces and turned over to Americans;
- The Department of Defense considered an individual's affiliation with any of 72 different alleged "terrorist" groups sufficient for a detainee to be classified as an "enemy combatant" - - however, 52 of these groups are not listed as terrorist organizations on *any* government lists maintained to protect our borders; and
- Fifty-five percent (55%) of the detainees were determined *not* to have committed hostile acts against the United States.

An alarming revelation in the Government's data is the inconsistency between the Defense Department's and State Department's lists of "terrorist" organizations. The State Department is required by statute to keep a list of terrorist organizations in order to prevent a terrorist from crossing our borders, and the State Department furnishes these lists to border patrol and customs agents. Fifty-two (52) of the 72 groups the military has classified as "terrorist" organizations are not on any lists maintained by the State Department that are furnished to the men and women responsible for keeping our borders safe. A prisoner detained because he was a member in one of these fifty-two "terrorist" organizations could have walked across the bridge at Laredo or landed at DFW, shown his "membership card" to the border patrol or customs agent, and been admitted into the United States. "This inconsistency leads to one of two equally alarming conclusions: either the State Department is allowing persons who are members of terrorist groups into the country or the Defense Department bases the continuing detention of the alleged enemy combatants on a false premise."⁷

Another disturbing revelation derived from an analysis of Government data is the questionable circumstances under which the majority of the detainees were "captured." If less than 10% of the detainees were captured by the United States, where did the other 90% come from? Unfortunately, many were captured by bounty hunters and turned over to Americans for money. The CIA paid monetary rewards for terrorists, in both Afghanistan and Pakistan - - one could get rid of a tribal enemy and make money doing it.⁸ The worse a reward-seeker could make his captive appear, the more money he could pocket. The Geneva Convention requires hearings to be held in the field as soon practical to determine the status of a captive.⁹ Since the military was not permitted to hold hearings in the field, many detainees were simply imprisoned and are being held indefinitely based on very suspect hearsay, or what the military refers to euphemistically as "not fully evaluated intelligence."

7 - *Id* at 2.

8 - Denbeaux, Mark, *Second Report on the Guantanamo Detainees: Inter and Intra Departmental Disagreements About Who Is Our Enemy* (2006) at 15.

9 - See Section IV. B. 1, *infra*

III. HISTORICAL OVERVIEW

The week after 9/11, Congress handed President Bush vast authority to wage the “war on terror.” In its *Authorization to Use Military Force*, Congress gave the President:

“Authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States,” and authorized him to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”¹⁰

In October of 2001, American and British forces invaded Afghanistan. President Bush announced that Taliban and al Qaeda captives would not be classified as prisoners of war but as “unlawful enemy combatants,” a term created by the administration.

On January 11, 2002, twenty detainees from the war in Afghanistan were flown to Cuba and imprisoned at the United States Naval Base at Guantánamo Bay. These men were imprisoned in what amounted to little more than wire mesh dog cages. The administration took the position that these men could be imprisoned indefinitely without charges being filed against them and that they had no right to legal counsel.

In a January 25, 2002, memo to the President, then White House Counsel, Alberto Gonzales, advised President Bush that the Geneva Convention need not be applied to the prisoners; further, he recommended that the treaty not be applied.¹¹ Gonzales told the President that ignoring the treaty would: (1) eliminate any argument regarding the need for a case-by-case determination of prisoner of war (POW) status; (2) render obsolete the Geneva Convention’s limitations on questioning the detainees; and (3) substantially reduce the threat of administration officials being prosecuted under the War Crimes Act. In a strongly worded opposition to Gonzales’ memo, then Secretary of State Colin Powell argued that the Geneva Conventions should be followed.¹² Powell pointed out that applying the Conventions would: (1) aid future American POWs; (2) reduce legal challenges to the treatment of detainees; (3) put America in a positive international posture; and (4) preserve America’s credibility and moral authority. Powell’s pleas, and those of military judge advocates, were ignored by the Bush Administration. The Administration relied on “hand-picked political appointees” who provided the “desired bottom line” - - the “quaint” and “obsolete” Geneva Conventions were ignored.¹³ In March of

10 - Authorization for Use of Military Force (AUMF) Pub 1 No. 107-40, Preamble and § 2a, 115 Stat. 224

11 - Alberto Gonzales, *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (Jan. 25, 2002). Available at <http://www.msnbc.msn.com/id/4999148/site/newsweek>

12 - Powell, Colin, *Memorandum to Counsel for the President: Draft Memorandum on the Applicability of the Geneva Convention to the Conflict in Afghanistan* (January 26, 2002). Available at <http://www.msnbc.msn.com/id/4999363/site/newsweek/>

13 - Richard Rosen, *America’s Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror*, *The Georgetown Journal of Law & Public Policy*, Vol5:No1 (Winter 2007) at 137. (Richard Rosen is a Colonel, U.S. Army (retired); Associate Professor and Associate Dean, Texas Tech University School of Law and Director, Texas Tech University Center for Military Law & Policy)

2002, the government decided these men would have no access to civilian courts, but would be tried by military tribunals.¹⁴

In an August 2002 memo, the Justice Department concluded that the United States government could use interrogation techniques that are commonly recognized as torture.¹⁵ In order to evade United States and international laws prohibiting torture, this “torture-lite memo” narrowed the definition of torture, allowing interrogators to inflict severe pain before it is classified as “torture.” According to the Justice Department, to constitute torture, interrogations methods “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” The memo further stated that psychological harm must last “months or even years” to rise to the level of mental torture. This “legal” opinion allowed interrogators to use tactics that under the Geneva Convention would be classified as torture. The definitions of torture approved by the Justice Department would allow abuse of detainees in violation of the *United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*,¹⁶ which the United States signed in 1988. By redefining torture, the civilian lawyers in the Justice Department ignored long established United States military doctrine strictly prohibiting “acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.”¹⁷ Not only does the United States military prohibit torture, the Army Manual notes that torture techniques are not operationally sound practices.¹⁸

“Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.”¹⁹

In February of 2002, the Center for Constitutional Rights (CCR)²⁰ filed *Rasul v. Bush*, a habeas corpus petition on behalf of three detainees. CCR took the position that detainees had the right to a fair hearing and due process. In March of 2003, the D.C. Circuit Court of Appeals

14 - Military Commission Order No. 1, March 22, 2002, “Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism.” Available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>

15 - Memorandum for Alberto R. Gonzales, Counsel for the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340 – 2340A*, (August 1, 2002). Available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html>

16 - G.A. REs. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51, *entered into force*, June 26, 1987, 1465 U.N.T.S. 85 (1987)

17 - Department of Army Field Manual No. 34-52, *Intelligence Interrogation* (1992), at 1-8.

18 - Richard Rosen, *America’s Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror*, *The Georgetown Journal of Law & Public Policy*, Vol5:No1 (Winter 2007) at 135.

19 - Department of Army Field Manual No. 34-52, *Intelligence Interrogation* (1992), at 1-8.

20 - For the last three years, CCR has been at the forefront of the fight for detainee rights. In writing this paper, the author has relied extensively on material prepared by CCR. More about CCR is available at <http://www.ccr-ny.org/v2/home.asp>

rejected *Rasul's* appeal, holding that detainees had no legal right to challenge their imprisonment. However, in November, 2003, the Supreme Court agreed to hear *Rasul*.

On June 28, 2004, the Supreme Court ruled by a vote of 6 to 3 in *Rasul v. Bush* that detainees could legally challenge their detention in federal courts.²¹ In the aftermath of the *Rasul* decision, CCR organized a network of approximately 500 attorneys, working pro bono, to represent Guantánamo detainees. The “Guantánamo Bar Association” soon filed habeas corpus petitions on behalf of many detainees.

In response to *Rasul*, Deputy Secretary of Defense Paul Wolfowitz sent a memo to the Secretary of the Navy creating “Combatant Status Review Tribunals” (CSRTs).²² The goal was to demonstrate that the CSRTs were sufficient hearings for detainees; therefore, no habeas corpus hearings by a federal court would be required. Human rights and civil rights activists took the position that the CSRTs were sham proceedings to justify the unlawful imprisonment of detainees.

Even though the Supreme Court had held that detainees had the right to access the courts, the Bush administration persuaded Congress to pass the Detainee Treatment Act of 2005 (DTA).²³ The Act was signed by President Bush on December 30, 2005. The professed purpose of the DTA was to protect detainees from abuse; however, it attempted to undo *Rasul* by eliminating detainees’ right to file habeas corpus petitions.

On June 29, 2006, the DTA, CSRTs, and other government attempts to avoid the *Rasul* decision were considered by the Supreme Court. In *Hamdan v. Rumsfeld*,²⁴ the Court held that the military commissions set up by the Pentagon violated United States and international law, and that the Geneva Conventions applied to Guantánamo detainees.

After *Hamdan*, the administration made a second attempt to skirt a Supreme Court decision favorable to detainees. Immediately prior to the mid-term elections, the administration forced the Military Commissions Act (MCA) through Congress.²⁵ The MCA, signed into law on October 17, 2006, was another attempt to deny detainees the right to a fair hearing to challenge their detention.

The MCA has been challenged by CCR in *Boumediene v. Bush*.²⁶ On February 7th of this year, two years after the case was first argued, two judges on a three-judge panel of the D.C. Circuit Court of Appeals upheld the provision of the MCA that strips the rights of all Guantánamo detainees to have their habeas corpus petitions heard by United States federal

21 - *Rasul v. Bush*, 542 U.S. 466 (2204); 124 S. Ct. 2686

22 - Paul Wolfowitz, *Order Establishing Combatant Status Review Tribunal* (Jul. 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>

23 - Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005)

24 - *Hamdan v. Rumsfeld*, 548 U.S. ____; 126 S. Ct. 2749 (2006)

25 - Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006)

26 - *Boumediene v. Bush*

courts. A petition for writ of certiorari filed in the United States Supreme Court by attorneys for the Boumediene petitioners was granted on June 29, 2007 and should be heard later this fall.

IV. CASES AND LAWS AFFECTING DETAINEES

A. RASUL v. BUSH

*Rasul v. Bush*²⁷ was argued on April 20, 2004 and decided by the United States Supreme Court on June 28, 2004.

1. Background

The various plaintiffs were captured in battle, arrested, or turned over to United States forces during the invasion of Afghanistan. They were transferred to the Guantánamo Bay Naval Station starting in January 2002.

In early 2002, the Center for Constitutional Rights filed habeas corpus petitions on behalf of several detainees challenging the government's right to hold them indefinitely, without right to counsel, without the right to a trial, and without the right to know the charges against them.

2. Rulings in the Lower Courts

The D. C. District Court dismissed the cases, holding that it did not have jurisdiction because Guantánamo Bay is not a sovereign territory of the United States. The court based its decision on the fact that the treaty with Cuba regarding Guantánamo Bay stated that Cuba has "complete sovereignty."

The United States Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision, holding that no United States court had jurisdiction over Guantánamo Bay.

3. The Supreme Court

a. Issue Before the Court

Whether United States courts lacked jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities in Afghanistan and incarcerated at the Guantánamo Bay Naval Base, Cuba.

b. Holding of the Court

In a 6-3 decision, the Supreme Court held that foreign nationals imprisoned without charges at Guantánamo were entitled to bring legal actions challenging their captivity in United States federal courts.

²⁷ - *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686 (2004)

The Court wrote that federal courts had the power to review habeas corpus petitions during wartime, and the question before it was whether such jurisdiction extended to Guantánamo. According to the treaty with Cuba, Cuba has "ultimate sovereignty" over Guantánamo, but the United States has "complete jurisdiction." Under the treaty, the United States may continue exclusive control of Guantánamo permanently.

The Government conceded in argument that the habeas statute would confer jurisdiction for a United States citizen held at Guantánamo Bay. Since the habeas statute did not distinguish between citizens and foreign nationals, the Court held that foreign nationals detained at the base had the same right to invoke the authority of the federal courts under the habeas statute as American citizens.

4. Discussion of *Rasul*

There are a number of important issues which the Supreme Court did not consider. The court made no determination as to whether the detention was legal or whether detainees are entitled to due process. The opinion made it clear that the question before it was one of jurisdiction, not an examination of the detainees' claims:

“Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners’ claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners’ claims.”²⁸

Although the Court did not consider the merits of detainees’ claims, in a footnote, Justice Stevens hinted that if the petitioners' allegations proved true, their detentions would be unlawful.

“Petitioners’ allegations — that, although they have engaged neither in combat nor in acts of terrorism against the United States they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing — unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’”²⁹

(Author’s Note: On March 9, 2004, two years after he was first imprisoned, Shafiq Rasul was returned to the United Kingdom with no charges ever having been filed. He was released by the British government. Due to his release, the Rasul litigation now bears the name of another litigant, Al Odah.)

28 - *Id.* at 17.

29 - *Id.* at 124 S. Ct. at 2698 n.15

B. COMBATANT STATUS REVIEW TRIBUNALS

1. The Geneva Convention

The Geneva Convention requires that a hearing be held in the field to determine if a captive should be classified as a prisoner of war (POW), an unprivileged combatant (not entitled to POW status), or an innocent civilian picked up by mistake³⁰. By holding hearings as close to the time and place of capture as practical, relevant witnesses and evidence are most readily available.

In World War II, the vast majority of prisoners were uniformed soldiers captured in battle and the issue of prisoner status was rare. However, in Vietnam and the First Gulf War, a large number of the captives were taken into custody dressed as civilians. In both wars, the military held “Article 5 Tribunals” in the field in accordance with the Geneva Convention. In the First Gulf War, approximately 1200 hearings were held and in 75% of the cases the captives were determined to be innocent civilians and were released.³¹ The military was prepared to hold hearings for persons captured or arrested in the Afghanistan conflict, but civilian officials in Washington vetoed having hearings in the field.

2. The Structure of the Government’s CSRT “Hearings”

In response to *Rasul*, Paul Wolfowitz sent a memo to the Secretary of the Navy creating “Combatant Status Review Tribunals” (CSRTs).³² The Department of Defense took the position that CSRTs were adequate hearings; therefore, a habeas corpus hearing by a federal court was unnecessary. Within four months over 500 CSRT hearings were conducted.

The CSRTs set up by the Department of Defense provided that: (1) the detainee had no right to have an attorney present; (2) the detainee was not allowed to see the classified evidence against him; and (3) the classified evidence was presumed to be “reliable and valid.” Although the detainee was denied counsel, CSRT procedures recommended that the Government have an attorney present at the hearing. Instead of an attorney, detainees were assigned a “personal representative” who advised each detainee that he was not the detainee’s lawyer nor his advocate, and that anything that the detainee told the personal representative could be used against him.³³

30 - Art. 5, Geneva Convention Relative to the Treatment of Prisoners of War art. 102, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135

31 - See DEP’T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 663 (1992), available at <http://www.ndu.edu/library/epubs/cpgw.pdf>. According to Department of Defense documents, nearly 1200 tribunals “were conducted to verify status” during the Persian Gulf War, 310 of which found that the detainee was entitled to conclusive POW status. *Id.*

32 - Paul Wolfowitz, *Order Establishing Combatant Status Review Tribunal* (Jul. 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>

33 - Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>

Detainees were allowed to call witnesses *if* available. Since CSRTs were conducted two years after detainees were captured and thousands of miles away from where they were captured, few witnesses with relevant knowledge were “available.” The only witnesses available were other “enemy combatants” imprisoned in Guantánamo. CSRT tribunals are not bound by the rules of evidence that would apply in a court of law. They are free to consider any information that is deemed relevant and helpful, including hearsay evidence and evidence obtained through coercion.

3. Analysis of the CSRT “Hearings”

A comprehensive analysis of how CSRTs were working in practice was done by Professor Denbeaux and his students at the Seton Hall University School of Law.³⁴ (Author’s Note: I highly recommend reading this short report as it gives an excellent overview of the CSRT system and how it works in practice.) Professor Denbeaux, who also represents two Guantánamo detainees, and his students analyzed Government records from CRST proceedings. Their Report is based on “the records that the United States government has produced for 393 of the 558 detainees” who had CSRT hearings.³⁵ The Seton Hall report “is based exclusively upon Defense Department documents.”³⁶

The Seton Hall analysis revealed some very troubling aspects of how CSRTs are actually conducted. The analysis revealed:³⁷

- The Government did not produce any witnesses at any hearing;
- All requests by detainees to inspect the classified evidence were denied (Remember, the Government’s classified evidence was always presumed to be “reliable and valid.”);
- All requests by detainees for witnesses not already detained in Guantánamo were denied; therefore, all witnesses had been previously declared enemy combatants by the Government;
- The only documentary evidence that detainees were allowed to introduce were letters from family and friends. (This was true even when the evidence requested was available and in possession of the government.); and
- In the vast majority of cases, the only evidence offered in a detainee’s behalf was his own testimony.

While the CSRT procedures formally place the burden of proof on the Government, the

34 - Mark Denbeaux, *et al*, *No-Hearings Hearings, CSRT: The Modern Habeas Corpus* Seton Hall School of Law (Oct. 2006) available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf

35 - *Id* at 4

36 - *Id* at 2

37 - *Id* at 2,3

tribunal was informed that “[e]ach detainee subject to this Order has been determined to be an enemy combatant *through multiple levels of review* by officers of the Department of Defense.” (emphasis added)³⁸ In order to hold that a detainee was not an enemy combatant, the Tribunal would have to overturn the decisions made by “multiple levels” of review. Thus, CSRTs are intended to confirm a decision that was already made.

The theoretical presumption that the detainee was innocent was, for all practical purposes, irrelevant because the Tribunal was required to presume that the Government’s evidence was valid and correct.

In all cases examined in the study, detainees were determined to be enemy combatants. Three detainees, who were initially found not to be enemy combatants, were subjected to multiple re-hearings until they were found to be enemy combatants.³⁹

C. DETAINEE TREATMENT ACT OF 2005

1. Background

The Detainee Treatment Act of 2005 (DTA) was included in the Department of Defense Appropriations Act for 2006.⁴⁰ The DTA consisted of two parts: (1) a part concerning interrogation procedures to be used by the Department of Defense, commonly known as the *McCain Amendment*; and (2) a part limiting judicial review of detainee cases, commonly referred to as the *Graham-Levin Amendment*. Signed into law by President Bush on December 30, 2005, the DTA purportedly protected detainees from abuse, but also attempted to undo the Supreme Court’s ruling in *Rasul* by eliminating the right of detainees to file habeas corpus petitions.

2. Limiting Judicial Review under the DTA - *Graham-Levin Amendment*

In §1005 (e) of the act, entitled “Judicial Review of Detention of Enemy Combatants,” it is stated that “no court, justice, or judge shall have jurisdiction to hear or consider”: (1) “an application for writ of habeas corpus filed on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba;” or (2) “any other action against the United States or its agents related to any aspect of the detention by the Department of Defense of an alien at Guantánamo Bay, Cuba.”⁴¹

In subsequent cases, the Government took the position that the DTA prohibits courts from hearing writs of habeas corpus filed by detainees. The bottom line of the Government’s position was that the DTA prevented Guantánamo detainees from presenting evidence that they are innocent in a court of law.

38 - *Id* at 18

39 - *Id* at 3

40 - Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005)

41 - *Id* at §1005(e)(1) and (2)

Another section of the DTA limits judicial review of the decisions of CSRTs. The Act gives exclusive jurisdiction to the United States Court of Appeals for the District of Columbia. Appeals are limited to detainees at Guantánamo Bay for whom a CSRT has been conducted, and the review can only consider whether the CSRT was conducted “consistent with the standards and procedures specified by the Secretary of Defense.”⁴² Judicial review may consider whether the CSRT determination is supported by a preponderance of the evidence, but must allow “a rebuttable presumption in favor of the Government’s evidence.”⁴³

The portion of the DTA dealing with the review of decisions of military commissions again gives exclusive review to the Court of Appeals for the District of Columbia. An appeal is limited to “a capital case” or a case where the sentence is a “term of imprisonment of 10 years or more.”⁴⁴ The judicial review is limited to a consideration of whether the “final decision was consistent with the standards and procedures” specified by the military and “to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.”⁴⁵ The *Graham-Levin Amendment* attempts to further limit the rights of detainees by making it clear that the DTA is not to be construed to “confer any constitutional right on an alien detained as an enemy combatant” and that the term “United States” does not include “the United States Naval Station, Guantánamo, Cuba.”⁴⁶

3. Interrogation Procedures under the DTA - *McCain Amendment*

The *McCain* portion of the act concerning interrogation techniques prohibits any techniques not “authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.”⁴⁷ After the passage of the DTA, *The New York Times* reported that the Army Field Manual, which has always been available on the internet, had been immediately rewritten by the Pentagon and now includes 10 classified pages in the interrogation technique section which are not available.⁴⁸

It has been argued that the modifications made to the DTA permit the consideration of evidence obtained through torture. Section 1005(b) entitled “Consideration of Statements Derived with Coercion” requires CSRTs “to the extent practical” to assess if any statement “from or relating to a detainee” was obtained by coercion and “the probative value (if any) of any such statement.”⁴⁹ Amnesty International has charged that the loopholes in the DTA signal that torture is now “official U. S. policy.”⁵⁰

42 - *Id* at 1005 (e) (2) (C)

43 - *Id* at 1005 (e) (2) (C)

44 - *Id* at §1005 (e)(3)(B)

45 - *Id* at §1005 (e)(3)(D)

46 - *Id* at §1005(f) and (g)

47 - *Id* at §1002(a)

48 - <http://www.nytimes.com/glogin?URI=http://gk.nytimes.com/mem/gatekeeper.html>

49 - *Id* at §1005(1)(b) and (c)

50 - http://www.amnestyusa.org/magazine/invisible_in_plain_sight.html

D. HAMDAN V. RUMSFELD

*Hamdan v. Rumsfeld*⁵¹ was argued March 28, 2006, and decided by the Supreme Court on June 29, 2006.

1. Background

Salim Ahmed Hamdan, a citizen of Yemen, admitted that he served as a personal driver for Osama bin Laden, but denied participating in any hostile acts against the United States. After the United States invasion of Afghanistan, he was captured by bounty hunters and sold to the United States military. Hamdan was transferred to the Guantánamo Bay Naval Base in Cuba and charged with conspiracy to commit terrorism. He was set to be tried before a military commission established by the Department of Defense.⁵² Hamdan's attorneys filed a writ of habeas corpus, alleging that the military commission set up to try Hamdan was illegal because it violated both the Geneva Conventions⁵³ and the Uniform Code of Military Justice.⁵⁴

2. Rulings in the Lower Courts

The District Court ruled for Hamdan, holding that the Government could not hold a military commission without showing Hamdan was a prisoner of war.⁵⁵

The Court of Appeals in a unanimous decision reversed the District Court.⁵⁶ In holding that the military commissions were legal, the court wrote:

- Congress had authorized the President to establish commissions when it passed the Authorization for the Use of Military Force in September 2001;
- The Geneva Convention is a treaty between nations and does not confer rights to individuals;
- The Geneva Convention does not cover the conflict with al Qaeda because the conflict is not a war between two nations; and
- Courts cannot enforce the Geneva Convention.

51 - 548 U.S. ____; 126 S. Ct. 2749 (2006)

52 - Military Commission Order No. 1, March 22, 2002, "*Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism.*" Available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>

53 - Geneva Convention relative to the Treatment of Prisoners of War, Aug 12, 1946, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Geneva Convention, 1949)

54 - Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*

55 - 344 F. Supp. 2d 152 (D.C. 2004)

56 - 415 F.3d 33 (D.C. Cir., 2005)

Writ of certiorari was granted⁵⁷ and the case was argued on March 29, 2006. Chief Justice Roberts took no part in the deliberations or the decision because he had been on the Court of Appeals panel that heard the case.

3. The Supreme Court

a. Issues before the Court

The issues considered by the Court were:

- whether Congress can pass legislation preventing the Supreme Court from hearing detainees' cases;
- whether the military commissions set up by the administration violated federal law (the Uniform Code of Military Justice and the Geneva Convention); and
- whether courts can enforce the articles of the 1949 Geneva Convention.

b. Holding of the Court

The Supreme Court issued a 5-3 decision holding: (1) it had jurisdiction because the administration did not have authority to set up these particular military commissions; (2) the military commissions set up by the Bush administration are illegal in that they "violate both the Uniform Code of Military Justice (UCMJ) and the four Geneva Conventions;" and (3) the Geneva Conventions apply in to the conflict with al Qaeda.

4. Discussion of *Hamdan*

a. Justice Stevens' Opinion for the Court

Writing for the majority, Justice Stevens held that the Detainee Treatment Act of 2005 (DTA), which gave "exclusive" jurisdiction to the D.C. Circuit Court of Appeals to review decisions of the military commissions, did not preclude Supreme Court jurisdiction. He then wrote that since the DTA did not bar the Supreme Court from considering Hamdan's petition, it was not necessary to decide whether laws barring habeas corpus would be unconstitutional.

The Court did not decide whether the President possessed the Constitutional power to convene military commissions, but held that such powers would either have to be sanctioned by the Uniform Code of Military Justice (UCMJ) or by statute. The majority held that neither condition had been met.

The majority went on to hold that the military commissions were illegal because

57 - 126 S. Ct. 622 (2006)

they made “substantial deviations” from both the UCMJ and the Geneva Conventions. Examples of “substantial deviations” pointed out by the Court were that the defendant could be forbidden from seeing certain evidence, his attorney could be forbidden from discussing certain evidence with the defendant, evidentiary procedures allowed hearsay evidence and statements obtained by torture, and, in almost all situations, appeals were to be heard by the executive branch and not the courts.

The majority also held that the procedures in question violate the Geneva Conventions because, at a minimum, the Treaty requires being tried by a "regularly constituted court," which the military commissions are not. Because the military commissions do not meet the requirements of the UCMJ or of the Geneva Conventions, they cannot be used to try Hamdan.

b. Dissenting Opinions

Justice Scalia dissented, arguing that Hamdan did not have the right to file a writ of habeas corpus because he is a non-citizen being held outside the territorial jurisdiction of the United States.

Justice Thomas agreed with Scalia that the courts had no jurisdiction. Thomas further wrote that, as an illegal combatant, Hamdan was not afforded the protections of the Geneva Conventions.

Justice Alito concurred with Thomas and Scalia that the courts had no jurisdiction for this case. Alito further stated that the military commissions were “a regularly constituted court” and therefore, not prohibited by the Geneva Convention. Justice Alito writes that the evidentiary rules that allow hearsay and evidence obtained by coercion do not violate international standards because "rules of evidence differ from country to country" and "much of the world does not follow aspects of our evidence rules, such as the general prohibition against the admission of hearsay."⁵⁸

c. Justice Breyer’s Concurring Opinion

Justice Breyer wrote a concurring opinion, joined by Justices Kennedy, Souter, and Ginsburg. Breyer argued that the commissions are not categorically prohibited, as long as Congress approves them:

“...Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary ...”⁵⁹

58 - *Hamdan*, 548 U.S. ____; 126 S. Ct. at 2933

59 - *Hamdan*, 548 U.S. ____; 126 S. Ct. 2830 (2006)

The President took Justice Breyer's advice and returned to Congress. The Military Commission Act of 2006 was the result.

E. MILITARY COMMISSIONS ACT OF 2006⁶⁰

1. Background

The Military Commissions Act of 2006⁶¹ (MCA) was the Bush Administration's response to the Supreme Court's ruling in *Hamdan* that pending detainee habeas cases could continue. The MCA was pushed hurriedly through Congress immediately before the mid-term elections and signed into law on October 17, 2006.

2. Provisions of the MCA

In addition to attempting to deny judicial review to detainees, the MCA also addressed concerns of the CIA that their interrogators could be subjected to prosecution for war crimes. In part, the MCA does the following:

- retroactively abolishes the right of Guantánamo detainees to challenge their detention;
- provides for military tribunals very similar to those that were rejected by the Supreme Court as unconstitutional in *Hamdan*;
- gives retroactive immunity to U. S. personnel for war crimes; and
- prevents persons harmed by violations of the Geneva Conventions from filing claims in United States courts.

3. Analysis of the MCA

The MCA creates an extremely broad definition of "unlawful enemy combatant." Unlawful enemy combatant is defined as any person who (1) "has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents," or (2) has been deemed an enemy combatant by a CSRT or "another competent tribunal" under the authority of the President or Defense Secretary.⁶²

The definition is overbroad. The Geneva Conventions require that an individual be classified appropriately and receive all the protections and rights afforded that designation. The MCA's definition of enemy combatant includes detainees who, under the terms of the Geneva Conventions, would be classified as prisoners of war. It includes persons who have not been

60 - In discussing the Military Commission Act of 2006, the author has relied heavily on publications of the Center of Constitutional Rights (available at <http://www.ccr-ny.org/v2/gac/learnmore/Docs/MCA%20Summary.pdf>)

61 - Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600

62 - *Id* at §948a(1)(A)(i) and (ii)

engaged in combat, but who have provided what the MCA vaguely refers to as “material support.” The second part of the definition gives the executive branch relatively unrestricted power to declare anyone an unlawful enemy combatant. It approves determinations made by the CSRT.

The MCA eliminates judicial review for non-citizen detainees determined to be “enemy combatants,” or “awaiting such determination.”⁶³ The review mechanism under the MCA is only applicable once a decision of the CSRT has been rendered, and the court is only authorized to consider: (1) whether the military complied with its own procedures; and (2) whether those procedures comply with the Constitution and laws of the United States.⁶⁴

While the MCA prohibits the introduction of evidence obtained by torture, the Act defines torture so narrowly that evidence obtained under techniques that amount to torture can be considered admissible. “Torture” and “cruel or inhuman treatment” are defined by the MCA much more narrowly than in the Geneva Convention or in international law. To be punishable as a war crime under the MCA, interrogation techniques must involve a “substantial risk of death,” “extreme physical pain,” a “serious” burn or physical disfigurement, or “significant loss or impairment of the function of a bodily member, organ, or mental faculty.”⁶⁵

By prohibiting the defendant from challenging classified “sources, methods, or activities”, the MCA prohibits any meaningful inquiry into whether evidence was obtained through torture or coercion.⁶⁶ The defendant simply has no means of obtaining information that would demonstrate that the evidence used against him was obtained under torture or cruel, inhuman or degrading treatment. How a prisoner was treated is apparently considered a state secret and cannot be revealed because of reasons of national security.

Under this act, a defendant can be convicted on the basis of secret evidence. The MCA requires that classified evidence be protected. Unclassified summaries are to be provided to a detainee only “to the extent practicable.”⁶⁷ The MCA denies the accused full access to exculpatory evidence known to the Government. Hearsay evidence, “not otherwise allowable under the rules of evidence applicable in a general courts-marshal,” is admissible if a judge considers it reliable and probative.⁶⁸

Provisions of the MCA confer retroactive immunity to officials who have engaged in abusive interrogations and treatment of detainees by precluding civil suits “relating to any aspect of the detention, transfer, treatment, trial or conditions of confinement” of non-citizens who have been “determined to be an enemy combatant” or are “awaiting such determination.”⁶⁹

63 - *Id* at Sec. 7(e)(1)

64 - *Id* at Sec. 7(e)(2)

65 - *Id* at Sec. 6(b)(2)(D)

66 - *Id* at §949d(f)(2)(B)

67 - *Id* at §949c(b)(4)

68 - *Id* at §949a(b)(E)

69 - *Id* at Sec. 7(b)

4. CCR's Challenge to the MCA

CCR is challenging the jurisdiction-stripping provision of the MCA through pending and new habeas petitions. On behalf of the petitioners, CCR has invoked: (1) a statutory challenge asserting that the MCA did not successfully deprive the courts of jurisdiction to consider pending habeas corpus petitions; (2) a constitutional challenge asserting that any reading of the MCA that successfully stripped the courts of jurisdiction would be an unconstitutional suspension of the writ of habeas corpus; (3) that the limited review mechanism provided by the DTA is not an adequate substitute for the writ; and (4) an international law challenge invoking the Geneva Conventions.

The Government has consistently taken the position that the laws and Constitution of the United States do not apply to the detainees. If the MCA is not held to be unconstitutional, it will permit indefinite detention and abusive interrogation of non-citizens detained at Guantánamo and other in prisons outside the United States. The President has asserted that “the war on terror” is a war without end, and that international law permits indefinite detention of those captured in this war. While the MCA and other laws allegedly prohibit torture, the lack of meaningful judicial review would make this a right without a remedy.

F. BOUMEDIENE V. BUSH

*Boumediene v. Bush*⁷⁰ decided by the D.C. Circuit Court of Appeals on February 7, 2007.

1. Background⁷¹

As discussed above, in *Rasul*, the Supreme Court upheld the right of detainees to have their habeas corpus petitions heard by federal courts. In December 31, 2005, Congress passed the Detainee Treatment Act (DTA) which stripped habeas corpus rights from detainees who had not already filed petitions. In June of 2006, the Supreme Court decided *Hamdan v. Rumsfeld* which declared the administration's military commissions to be illegal.

In response to *Hamdan* and immediately before the November mid-term elections, the administration pushed the Military Commission Act of 2006 (MCA) through Congress. Among other things, the MCA strips habeas corpus rights from all Guantánamo detainees, even those whose petitions were pending on December 31, 2005, the date the DTA was passed.

After the passage of the MCA, two district courts in D. C. made conflicting rulings on whether the MCA abolished the detainees' right to habeas corpus. *Boumediene* was the consolidated appeal of those cases.

70 - *Boumediene v. Bush*, No. 05-5062, 2007 WL 506581 (D.C. Cir. Feb. 20, 2007)

71 - Five of the petitioners are citizens of Bosnia who have never been to Afghanistan. Under pressure from the CIA, the Bosnian police arrested these petitioners in Bosnia on suspicion of plotting to attack the U. S. Embassy in Sarajevo. After a three month investigation, petitioners were ordered released by the Bosnian Supreme Court with concurrence of the prosecutor. The day of their release, they were arrested and delivered to the U. S. military who transported them to Guantánamo.

2. Ruling of the D.C. Circuit Court of Appeals

In a 2-1 decision the D.C. Circuit Court of Appeals upheld the provision of the Military Commissions Act of 2006 that strips Guantánamo detainees of their right to have habeas corpus petitions heard by U.S. federal courts.

The majority in *Boumediene* held: (1) in the absence of a statutory habeas right, which Congress eliminated in the MCA, the Constitution only protects the right of habeas corpus that was recognized at common law in 1789; (2) the law in 1789 did not provide the right of habeas corpus to aliens held by the Government outside of the sovereign's territory; and (3) Guantánamo is outside United States territory for constitutional purposes.

Although asked by the Government to review the Combatant Status Review Tribunals, the Court declined, stating it had an inadequate record before it.

3. Discussion of Circuit Court's Decision

The majority held that the United States does not have sovereignty over Guantánamo. This appears to be in direct contradiction to the Supreme Court's holding in *Rasul*. As discussed above, the Supreme Court held in *Rasul* that since the United States has "complete jurisdiction" over Guantánamo, the detainees were entitled to bring habeas corpus actions contesting their detention.

Another factor that the majority in *Boumediene* seems to ignore is the Suspension Clause of the Constitution. It states:

“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.”⁷²

In other words, Congress can suspend the right of habeas corpus *only* in times of rebellion or invasion when the public safety may require it. The dissenting opinion pointed out that Congress has only suspended habeas corpus four previous times, and each time it made findings of rebellion or invasion. Congress did not make such a finding when passing the MCA.

4. Supreme Court Denial of Petitioners' Writ of Certiorari

On April 2, 2007, the Supreme Court denied petitioners petition for writ of certiorari with two separate opinions accompanying the one-sentence order denying the petitions.⁷³

Justice Breyer wrote a dissenting opinion joined by Justices Souter and Ginsburg stating that the questions petitioners raised (whether the MCA deprived detainees access to the courts

72 - Article 1, Section 9, Clause 2, United States Constitution

73 - *Boumediene v. Bush*, Nos. 06-1196 and 06-1196 (Supreme Court, April 2, 2007)

and, if it did so, was this deprivation constitutional) deserve immediate attention.”⁷⁴ Pointing out that the Great Writ was to be an “effective and *speedy* instrument,” Justice Breyer noted that the petitioners had been held for more than five years without judicial review of their claims and, if their position is correct, they may avoid an additional year or more of imprisonment. If the petitioners are wrong, a review by the Court would diminish the legal uncertainty surrounding the detainees.⁷⁵

Secondly, Breyer's opinion stated that it is plausible that the lower courts reasoning is contrary to precedent set in prior detainee cases. First, the lower court's reasoning arguably disregards the Courts holding in *Rasul*⁷⁶ that the right of habeas corpus extends to the detainees at Guantánamo. Secondly, it is possible that the lower court differs from the Supreme Court's holding in *Hamdi*.⁷⁷ The *Hamdi* majority relied heavily on the fact that the Hamdi was captured on the battlefield and several of the petitioners in *Boumediene* were not captured in the “zone of combat.”⁷⁸

In a separate opinion concurring with decision to deny the writ, Justices Stevens and Kennedy jointly stated that they voted against hearing the cases because the court should follow its customary practice for ordinary prison inmates and require “the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus.”⁷⁹ However, the opinion went on to say that the Court does not require the exhaustion of inadequate remedies and if “the Government has unreasonably delayed proceedings” or subjects the detainees to “some other and ongoing injury,” the Supreme Court “should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised.”⁸⁰

5. Supreme Court Grants Petitioners' Writ of Certiorari

On June 29, 2007, the Supreme Court reconsidered and granted petitioners petition for writ of certiorari. The case should be heard later this fall.

V. CURRENT LEGAL STATUS OF DETAINEES

The fate of detainees awaits the Supreme Court's decision in *Boumediene* or a change of heart by Congress. Some of the detainees, many who are innocent and have been “awaiting” their chance for a fair and impartial hearing for over five years, may never get that hearing. Ironically, the “high level” detainees brought to Guantánamo last fall from secret prisons in foreign countries will have their cases heard before a military tribunal.

74 - *Id* at page 1 of Justice Bryer's opinion

75 - *Id* at page 2 of Justice Bryer's opinion

76 - *Rasul v. Bush*, 542 U.S. (2004)

77 - *Hamdi v. Rumsfeld*, 542 U.S. 507

78 - *Boumediene*, *supra.*, at page 2 of Justice Bryer's opinion

79 - *Id* at page 1 of Justice Stevens and Justice Kennedy's joint opinion

80 - *Id* at page 2 of Justice Stevens and Justice Kennedy's joint opinion

VI. CONCLUSION

What is the current status of detainees in Guantánamo? If the Military Commission Act is left to stand, the men imprisoned at Guantánamo, many who are innocent, can be held there for the rest of their lives without ever having a fair hearing to determine the legality of their detention. If detainees are tried under principles that respect the rule of law, many of the cases will be thrown out because they are based on illegal detention, and evidence obtained by torture and abuse. “The Bush administration has so badly subverted American norms of justice in handling these cases that they would not stand up to scrutiny in a real court of law. It is a clear case of justice denied.”⁸¹

Guantánamo is an embarrassment to the United States and a source of outrage to the world. According to the *New York Times*, Secretary of Defense Robert Gates recently told President Bush that the world would never consider trials at Guantánamo to be legitimate.⁸² Mr. Gates is right. Although not a single detainee has yet been tried, Guantánamo itself has been tried and found guilty in the court of world opinion.

Benjamin Franklin said, “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.” The rule of law that has been the foundation of American jurisprudence for over two hundred years can afford the detainees a fair forum to contest the factual and legal basis for their detention and still protect our country. Trying detainees under the rules of a military court-martial would meet standards of fundamental rights and fairness, while protecting national security. This Administration’s “distorted interpretation” of the law has forced the nation to, “expend enormous energy and good will in defending its motives and practices, rather than focusing on those who have caused so much real harm.”⁸³

This paper ends as it begins, with a quote from Lieutenant Commander Charles Swift, “The question is not, will we survive Guantánamo, because of course we will survive Guantánamo. The question is: Will we survive Guantánamo as a great nation?”⁸⁴

81 - Editorial, *The President's Prison*, The New York Times, (March 25, 2006)

82 - Thom Shanker and David Sanger, *New to Job, Gates Argued for Closing Guantánamo*, The New York Times, (March 25, 2006)

83 - Richard Rosen, *America's Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror*, The Georgetown Journal of Law & Public Policy, Vol5:No1 (Winter 2007) at 137.

84 - Brenner, Marie, *Taking on Guantánamo*, Vanity Fair, March 2007

APPENDIX A

DETAINEE TIMELINE

Sept. 18, 2001	Congress approved a resolution giving President Bush authority to use “all necessary and appropriate force” against al Qaeda forces.
Oct., 2001	American and British troops invades Afghanistan.
Nov. 13, 2001	President Bush issues an executive order authorizing detention of “enemy combatant” non-US citizens.
Jan. 11, 2002	20 prisoners sent to Guantánamo Bay from Afghanistan and housed outdoors in wire cages.
Jan. 25, 2002	White House Counsel, Alberto Gonzales, sends a memo advising President not to apply the Geneva Convention to detainees.
Jan. 26, 2002	Sect of State, Colin Powell, writes a memo urging the Geneva Convention be followed.
Feb. 19, 2002	CCR files <i>Rasul v. Bush</i> , a habeas petition, in D.C. District Court on behalf three detainees.
Mar. 22, 2002	Government makes decision to try detainees by Military Commissions – Military Commission Order No. 1.
Aug. 1, 2002	Justice Department Memo concludes that Government could use interrogation techniques that are commonly recognized as torture.
Mar. 11, 2003	Court of Appeals rules in <i>Rasul v. Bush</i> that detainees have no legal rights in the United States.
Nov. 10, 2003	Supreme Court agrees to hear <i>Rasul v. Bush</i> , the first legal challenge to the Bush administration’s detention policies to reach the Supreme Court.
June 28, 2004	Supreme Court rules 6-3 in <i>Rasul v. Bush</i> that detainees can challenge their detention in federal courts.
July 7, 2004	Pentagon creates Combat Status Review Tribunals (CSRTs) to review detainees’ “enemy combatant” status.
Dec. 30, 2005	President Bush signs the Detainee Treatment Act into law.
June 29, 2006	Supreme Court rules in that military commissions violate U.S. and international law, and that Geneva Conventions apply to the detainees – <i>Hamdan v. Rumsfeld</i> .
Oct. 17, 2006	President Bush signs Military Commissions Act (MCA), which attempts to make possible the permanent detention and torture of even legal U.S. residents, as long as they are classified as enemy combatants.
Feb. 7, 2007	D.C. Court of Appeals upholds provision of the MCA that strips detainees of their right to have their habeas corpus petitions heard in U.S. courts

APPENDIX B

TOP 10 MYTHS ABOUT GUANTÁNAMO BAY, CUBA⁸⁵		
	Myth	Fact
1	Detainees are the “worst of the worst” terrorist members of al Qaeda.	A February 2006 report by Seton Hall professor Mark Denbeaux and attorney Joshua Denbeaux found that 55 percent of the detainees were determined by the government to have committed no hostile acts against the United States or its coalition allies. The report also stated that only 8 percent of the detainees were classified by the government as al Qaeda fighters.
2	They have given the government valuable intelligence.	Guantánamo officials have admitted that less than one in four detainees has any intelligence value.
3	Their detainment contributes to national security.	Anger abroad over treatment of detainees is high and has led to heightened anti-American sentiment and fewer intelligence contacts.
4	They’re not tortured or abused and are treated humanely.	Numerous reports have found that U.S. government officials at Guantánamo use interrogation tactics that are tantamount to torture. These include methods such as physical beatings; extreme temperature changes; prolonged stress positions; sleep deprivation; withholding medical care; sexual abuse; and religious and cultural abuse. ⁷
5	The rule of law exists at Guantánamo. Combatant Status Review Tribunals and Annual Review Boards ensure that detainees are imprisoned only if they are security threats.	CSRT’s in essence are a sham—detainees cannot have lawyers present and do not have access to the evidence being used against them, evidence which may have been obtained by torture.
6	The military commissions at Guantánamo would provide more fairness than is required under the Geneva Conventions.	Common Article 3 of the Geneva Conventions prohibits “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.”
7	Living conditions at Guantánamo are humane	This is true for only a handful of men, while the vast majority of detainees live in stark, mind-numbing conditions.
8	Detainees receive good medical care at Guantánamo.	Serious medical conditions often go untreated, and detainees who have been physically abused sometimes go days without treatment. In addition, the mental health of many detainees is precarious.
9	The U.S. honors the detainees’ rights to practice their religion.	There has been no imam at prayer since the removal of Chaplin James Yee. The detainees are also frequently provoked during prayer times. In addition, religious abuse is an express interrogation tactic approved by the Defense Secretary.
10	The U.S wants to transfer detainees to other countries, but no country will take them.	Countries are willing to accept detainees but many are not willing to unlawfully detain them, as the U.S. is requesting they do.

⁸⁵ - Center for Constitutional Rights, *Justice Delayed is Justice Denied: Guantánamo Bay Five Years Later* (2006); Available at <http://www.ccr-ny.org/v2/gac/learnmore/Docs/JusticeDelayedJusticeDenied.pdf>