

MILITARY COMMISSIONS IN GUANTÁNAMO BAY:
GIVING “FULL AND FAIR TRIAL” A BAD NAME

*Richard J. Wilson**

I want to take a moment, as others have before me, to briefly acknowledge the memory and the palpable presence of Professor Joan Fitzpatrick. Joan and I taught together in the Oxford-George Washington University Summer Human Rights course for several years, and she is missed.

Our topic today is the status of fair trial norms. I’m going to focus on the U.S. government’s use of military commissions at Guantánamo Bay. There are a couple of documents in the CLE materials that you might find useful as additional background. One is my article entitled “War Stories,” which is about representing Omar Khadr in habeas corpus proceedings in the federal courts of the United States. The other is a submission to the Inter-American Commission on Human Rights on Omar’s behalf, seeking precautionary measures to protect him as a child charged with war crimes before a military commission. Two students from the International Human Rights Law Clinic, which I direct at American University, will argue that case on March 13, 2006, in the Inter-American Commission.

When I was a boy of about ten or eleven in Ohio, my friends introduced me to a game they called “TEGWAR.” We played it with a deck of cards. One of the boys explained the rules as we started and I played hard and I tried to follow the rules, but each time I thought I was beginning to gain any kind of an advantage, the rules changed to favor all the other players. After one hand in which I was trounced, the rules became apparent, and I said, “What the heck is TEGWAR?” And they rolled on the floor and they laughed, and they said, “TEGWAR is an acronym for The Exciting Game Without Any Rules.” I had been duped.

Military commissions are this administration’s version of TEGWAR.

Today, I’m going to discuss three aspects of administration policy in its use of military commissions at Guantánamo Bay. As Joe Margulies explained, a trial by commission was one of the explicit purposes set out in

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the President's military order of November 13th, 2001. This administration saw the potential for use of Guantánamo as a place of detention and the use of military commission trials as a way for justice to be carried out for Taliban and Al Qaeda soldiers captured in Afghanistan. And yet today, four years later, only ten of approximately 500 detainees have been charged. None of these cases are even close to going to trial.

With another faculty member at American University, Professor Muneer Ahmad, and two newly-assigned military defense counsel, I represent Omar Khadr, a detainee at Guantánamo Bay. We represent Omar in both habeas corpus proceedings in federal court and in military commission proceedings at Guantanamo. Omar is the only Canadian citizen at Guantánamo, and he speaks English fluently. He was a boy of 15 when he was captured in Afghanistan near the town of Khost in July of 2002. After detention, severe mistreatment, and prolonged interrogation at Bagram Air Force Base in Afghanistan, he was transferred to Guantánamo in October of 2002, and has been there ever since. My faculty colleague and I began our representation as "habeas counsel" in July 2004, just after the Supreme Court's late June decision in *Rasul v. Bush*, and partly because the Court had said that venue lay in the Federal District Court in Washington, D.C. just down the street. We thought, when we took the case, that it would be a case we could assign to students as part of our routine work in the clinic, where students provide representation to real clients in a wide range of human rights claims. It took us about five days to discover that Omar's was far from a routine case. The other professor and I have obtained security clearances from the FBI and visited with Omar several times at Guantánamo Bay, and we continue to represent him with significant help from student teams in the clinic. However, for all of us, it's been one of the most challenging and exciting cases that we've handled, whether in the clinic or otherwise.

In November of 2005, twenty-eight months after his capture, Omar was formally charged with what are now said by the government to be war crimes. The process of his military commission proceedings is just beginning. His first hearing was in January of 2006, so our exposure to the actual operation of military commissions is just beginning. The most serious of the charges against him, and this is the most serious charge against any of the ten, is murder by an unprivileged combatant. It involves the death of one American soldier during battle. While the death of any American soldier is a tragedy, it's hardly within the range of the heinous and historic crimes against humanity tried at Nuremburg or elsewhere that we've been discussing today, but it is a serious charge. Arguably, the death of the soldier during combat is one for which Omar should be protected for having acted as a child, whether he was a combatant or civilian.

I should also note that as “detailed civilian defense counsel,” our official title before the military commission, I asked for and received permission from the Appointing Authority, the chief military lawyer in charge of commissions, to speak publicly about these issues. Such permission is required before a defense lawyer can speak on any issues regarding the Commission. I filed my letter under protest and was granted plenary ability to discuss it with the press and publicly with all of you today.

There is a good deal to discuss about this administration’s corrupt and shameless treatment of the detainees at Guantánamo, and there are terrific reports which Amnesty and Human Rights Watch have done on the specific failings of military commissions with regard to due process and fair trial norms of international law. I don’t want to focus on those specific aspects of that topic today. I recommend those reports to you if you want to look at the specific concerns with regard to the denial of fair trial rights. Instead, I want to offer three brief reflections on administration actions in Guantánamo. They focus on the purposes of administration policy, and in many ways they reflect, I think, a kind of corollary of Joe Margulies’ earlier remarks.

First, what is the purpose of administration policy regarding Guantánamo? Second, what is the reason for the choice of military commissions as the vehicle for trial? And third, what is the content and the goal of what is referred to in relevant documents as “commission law”? The true purpose of administration policy regarding Guantánamo is to define non-citizens detained there as beyond the law in order to gain intelligence, by means of a pretextual justification that the government is preventing these individuals from returning to combat. The true reason for the choice of military commissions is the administration’s misguided belief and a historical reading of the use of these tribunals as a shortcut; a quick and dirty way to curtail and eliminate due process and fair trial norms that have been carefully crafted for use in courts-martial and criminal trials. And the sole true purpose of commission law is, in my view, to convict.

Let me discuss each of these propositions. First, the purpose of administration policy with regards to Guantánamo. The administration, as Meg Satterthwaite has pointed out, uses the rhetorical language of war and purports to use the law of war, a body of law that, until very recently, was hardly known by either the public or judges in most courts in the United States. They used two devices, which I have dubbed, ‘rhetorical Jihad,’ and ‘rhetorical shell game.’ ‘Rhetorical Jihad’ is essentially “say it enough times and it must be true.” Say it assertively. For example, use the term ‘the war on terror.’ Say that 9/11 is connected to Iraq. Say that this administration doesn’t torture. Say these terrorists will receive a full and fair trial. In fact, as I was preparing my remarks, one of the articles I reviewed suggests that combat against terrorism has long been anticipated in

the Army field manuals dealing with criminal acts within the military. It's included under the topic - again, another wonderful military acronym - "MOOTW;" that is, Military Operations Other Than War. Take note: "Other Than War." That is where the legal concept of combating terrorism appears under the standard and traditional constructs of military law. In short, it needs no new paradigm or understanding other than the standard operation of traditional military law. As for the "rhetorical shell game," there are two versions. In the first, the terms are close to the prevailing legal understanding, but not quite the same. And in the second, the administration elides from one of multiple justifications to another as needed when one of their legal justifications is challenged.

For instance, in the first version of the "rhetorical shell game" the term "enemy combatant"—those who are detained at Guantánamo Bay—is not the same as "unprivileged belligerent". "Military commission" is not the same as a trial by court and judge with proper appeal. "Commission law" is not the law of war, but what the administration says that commission law is. And "war crimes" are not nearly as broad as those defined in commission law. In fact, there is a federal statute called "The War Crimes Act" which sets out exactly what war crimes are, and many of the war crimes included in commission law don't appear there.

The best example of the second version of "rhetorical shell game" is the administration's offered purposes for the detentions at Guantánamo. As needs be, the administration justifies it as a means to gain intelligence, a means to prevent return to combat, or a means to provide trial for crimes. Whenever its legal justification weakens on one ground, it simply moves on to another.

Now to the second proposition. The true purpose of military commissions is to provide a less fair trial than courts-martial or criminal trials. I wrote a short article last year examining the failed national trials of Abdullah Öcalan, the leader of the Kurdish Separatist Party, the PPK in Turkey, and a similar trial in Peru of Abimael Guzman, the leader of Sendero Luminoso, the Shining Path. Between the two of these alleged terrorists, tens of thousands of individuals died during the wars that they carried out domestically. In both cases, domestic military "terrorism" trials by ad hoc courts were found to be inadequate substitutes for available alternative civil processes. Both procedures and both convictions and sentences were found wanting by international tribunals sitting in review of their convictions. Both were granted retrials in a normal criminal process. The U.S. has repeatedly condemned the use of military commissions in countries such as Burma, China, Colombia, Egypt, Kyrgyzstan, Malaysia, Nigeria, Russia, and Sudan. Luis Joinet, a Special Rapporteur for the U.N., has said that military trials are never an appropriate substitute for the civil

courts for the trial of civilians, and even more so, for children under the age of 18.

While it is true that military commissions have been used in the U.S. since the Revolutionary War, they had been confined to use by necessity when the civil courts were not available. And the rules fashioned today are the same as those approved for use at the time of World War II, when notions of fair trial were quite primitive by comparison with what they are today, both domestically and internationally. At that time, there was no *Gideon*, and there was no *Miranda*. If we look at these military commissions against the provisions of Article 14 of the International Covenant on Civil and Political Rights (ICCPR) - one of the most detailed baselines for a fair trial found in the provisions of a human rights treaty - we can see that these commissions violate virtually every provision, from independent and competent tribunal at the beginning to adequate avenues for review at the end.

In fact, a recent report published two days ago by five U.N. rapporteurs concludes precisely that military commissions violate the fair trial provisions of Article 14. The report concludes by calling for the closing of Guantánamo.

The third and final proposition is that the true goal of military commission law is to convict. The actions by presiding military officers in commissions pretend the cases are starting on the day charges are formally made. The officers ignore the massive delays of prolonged incommunicado detention with aggressive and tortuous interrogations - certainly true in the case of our client - without counsel or indeed without any effective access to the outside world. Commission law is another acronymic soup, all too typical of the military vocabulary. It includes the PMO (Presidential Military Order), DOD directives, AARs, MCOs, MCIs and POMs. If you don't know what any of those are, neither did I until about a month ago. These provisions are a set of regulations adopted unilaterally, without outside comment, and subject to be rescinded as desired by the hierarchy within the Department of Defense. They purport to be the so-called common law of military commissions.

I will take the time to tell you just one story about our first session that is emblematic of how capricious the changes to commission law may be.

My colleague, Professor Ahmad, went to Guantánamo for the first hearing in this case on January 11th of this year. The day before the hearing, the commissions held a press conference in which both the prosecution and defense were permitted to talk to the press about the case. Professor Ahmad went first, talked about the mistreatment of our client over the previous two years, and the unfairness of commissions. The prosecutor got up and in a vitriolic, vicious attack, suggested that Omar Khadr was a terrorist, a killer, and that videos would show him gleefully making bombs to blow up

Americans. Any prosecutor who made such a statement prior to trial in the United States would be sanctioned ethically for inappropriate comment on the guilt of the accused before trial, where great care should be taken by the prosecutor to protect the presumption of innocence. We assumed this would be the case here. The following day we filed a motion challenging the prosecution's statements, and the presiding officer ordered briefing to take place for argument the following morning.

Following the argument the next day, the presiding officer concluded that Professor Ahmad had invited the remarks by the prosecution by suggesting that Omar Khadr had been mistreated; that the prosecution had made an appropriate response to defense statements about his mistreatment that invited a response that Omar is guilty.

In addition, Omar had appeared at his first hearing wearing a "Roots" T-shirt. "Roots" is the Canadian version of the American Gap. Omar is 19 now, and he's still a kid. He wore his Roots logo shirt to the courtroom, and the judge said, "You remove that. You come in dressed appropriately, and from now on, defense counsel should not refer to him as 'Omar.' Refer to him as 'Mr. Khadr.'" The presiding officer all but ordered the record to show that Omar is an adult, that we should remove all indicia that he ever was or might be a child. For all intents and purposes, he is defined as a man under commission law.

Three days ago, we received Presiding Officers Memorandum (POM) number 16. It concerns decorum of commission personnel parties and witnesses. One of its provisions explicitly states, "No clothing or accessories with visible logos of any type will be worn." It further provides, "Military participants, the Presiding Officer, and other members and witnesses will be addressed by their military rank and last or family name. The accused may be referred to as noted above, or as 'the accused'." Another provision states the following: "Counsel [both sides] shall not, during trial, assert any personal opinion as to the justness of the cause, the credibility of a witness, or the guilt or innocence of the accused." And finally, "No distractions are permitted during commission sessions to include, but not limited to, eating, chewing gum, or using tobacco products.... Carbonated beverages are not permitted."

This is "commission law." These memoranda can be changed at any time at the whim of the military officers who preside at trial. This particular one was written after the fact to justify a particular course of action, to increase the likelihood of conviction. These are the rules. This is the common law to which we are subject. The issues are unfolding; they're unprecedented, and they're unresolved. Maybe there never will be trials, as Joe suggests. I'm not at all that confident, as Joe seems to be. We are under the gun, and we are facing discovery and other pre-trial issues in our military commission trial with no stay in sight. Perhaps the U.S. Supreme

Court can stop the trial through its decision in the *Hamdan* case, to be argued in March and decided before the end of the term¹.

But there is a suggestion in Article 130 of the third Geneva Convention that the willful deprivation of a prisoner of war's right to a fair and regular trial is a grave breach of the law of war. Grave breaches of the Geneva Conventions, unlike murder by an unprivileged belligerent, *are* war crimes. Hopefully, history will reveal who should be in the dock as war criminals and who should not. Thank you.

1. After this article went to print, the Supreme Court decided the case of *Hamdan v. Rumsfeld*, No. 05-184, June 29, 2006, which struck down the military commissions as constituted under the presidential order discussed here.