

UNITED STATES OF AMERICA

Military Commissions Act of 2006 – Turning bad policy into bad law

In recent days, human rights violations perpetrated by the USA throughout the "war on terror" have in effect been given the congressional stamp of approval. With the passing of the Military Commissions Act of 2006 by the US House of Representatives on 27 September and the Senate on 28 September, Congress has turned bad executive policy into bad law. This document looks back on the evolution of the executive's "war on terror" detention policies, in order to illustrate the sort of violations in which Congress, through inaction and now legislation, has become complicit. Amnesty International will continue to campaign for the USA's "war on terror" detention policies and practices to be brought into full compliance with international law, and for repeal of any law that fails to meet this test.

On 21 September 2001, Amnesty International faxed a letter to President George W. Bush. The organization urged the President to put respect for human rights and the rule of law at the heart of his country's response to the crime against humanity that was perpetrated on 11 September 2001. "In the wake of a crime of such magnitude", the letter said, "principled leadership becomes crucial... We urge you to lead your government to take every necessary human rights precaution in the pursuit of justice."

Amnesty International deeply regrets that its appeal fell on deaf ears. The past five years have seen the USA engage in systematic violations of international law, with a distressing impact on thousands of detainees and their families. Human rights violations have included:

- Secret detention
- Enforced disappearance
- Torture and other cruel, inhuman or degrading treatment
- Outrages upon personal dignity, including humiliating treatment
- Denial and restriction of *habeas corpus*
- Indefinite detention without charge or trial
- Prolonged incommunicado detention
- Arbitrary detention
- Unfair trial procedures

Yet at the same time, US officials have continued to characterize the USA as a "nation of laws" and one that in the "war on terror" is committed to what it calls the "non-negotiable demands of human dignity", including the "rule of law".

It is tempting to resort to accusations of hypocrisy, particularly when the USA itself condemns the very same practices if carried out by other countries. But in seeking to challenge US conduct, perhaps it is more useful to consider how vulnerable the law is to elastic interpretation, manipulation or selective application by the state. And that, for better or worse, a government can use policy to drive the law rather than vice versa. In the USA's case, a long-held resistance to applying international law to its own conduct compounds the problem.

Under the US administration's selective application of the laws of war and outright dismissal of international human rights law, for example, the Guantánamo detention camp is the "most transparent facility in the history of warfare" according to the Pentagon, rather than the icon of lawlessness that many outside the USA perceive it to be.

In similar vein, with elastic interpretation of the law, secret detention becomes "legal". In his speech on 6 September 2006 confirming and defending the Central Intelligence Agency's program of secret detentions, President Bush emphasised that "this program has been subject to multiple legal reviews by the Department of Justice and CIA lawyers; they've determined it complied with our laws".

Again, there is a stark "disconnect" between the USA and the international community. After all, President Bush's speech came only weeks after two expert United Nations bodies – the Committee against Torture and the Human Rights Committee – told the US government that secret detentions violated the USA's international treaty obligations. In effect, the President was rejecting the conclusions of these UN bodies, as well as admitting that the USA had resorted to enforced disappearance, a crime under international law.

The US administration's interpretation of the law has been driven by its policy choices rather than a credible postulation of its legal obligations. One core policy choice was to frame its response to the 11 September attacks in terms of a global "war" rather than as a criminal law enforcement effort. The law would have to be made to fit this "new paradigm", as President Bush characterized the situation in a 7 February 2002 memorandum on detentions.

At a press conference in June 2004, with the administration seeking to quell the criticism of its policies following the Abu Ghraib torture revelations, then White House Counsel Alberto Gonzales recalled the administration's post-9/11 discussions thus:

"[S]ome questions we faced were, for example: What is the legal status of individuals caught in this battle? How will they be treated? To what extent can those detained be questioned to attain information concerning possible future terrorist attacks? What are the rules? What will our policies be?...Just as military theorists thought about new strategies and tactics to fight terrorists, so, too, did lawyers in looking at how this war fits into the current legal landscape."

From these questions flowed a number of memorandums written in late 2001 and early 2002 by administration lawyers concocting legal positions on a variety of issues. These issues included the limits of the prohibition on torture or other ill-treatment, whether the choice of Guantánamo as a location for detentions would keep detainees out of the reach of the US courts, and the use of military commissions, to quote a November 2001 Justice Department memorandum, as "entirely creatures of the President's authority as Commander-in-Chief". The White House Counsel himself drafted advice to the President suggesting that a benefit of not applying the Geneva Conventions to detainees picked up in the Afghanistan conflict would be that prosecutions of US personnel under the US War Crimes Act would become more difficult.

Sure enough, almost five years and numerous alleged war crimes later, there have been no prosecutions under the Act. Similarly there have been no prosecutions under the USA's extraterritorial anti-torture statute despite the widespread allegations of torture. With the USA's rejection in 2002 of the International Criminal Court, and its subsequent campaign to have other countries agree never to surrender US nationals to the ICC, a pattern of US impunity had been established even before the Military Commissions Act exacerbated the situation.

The legal advice in these early administration memorandums thus seemed tailored to fit desired policy outcomes. Precedents that suited the policy were emphasised, laws that did not were ignored or downplayed. The indefinite detention regime in Guantánamo and the denial of *habeas corpus* was one result. A less than absolute ban on torture or other ill-treatment was another. Secret detention was a third. And unfair trial by military commissions still threatens to be a fourth.

The government's policy of indefinite detention without charge, as practiced in Guantánamo and elsewhere, is thus a direct consequence of the war paradigm. Instead of treating these detainees as criminal suspects, the US authorities have branded them as loosely-defined "enemy combatants" in a global conflict. That the USA sees the world as the "battlefield" is illustrated by the fact that those currently held in Guantánamo include individuals picked up in Gambia, Bosnia, Mauritania, Pakistan, Egypt, Indonesia, Thailand, and United Arab Emirates, as well as Afghanistan.

Under the administration's conceptualization, such detainees are both a potential source of intelligence and a potential threat to national security. Access to lawyers is perceived as detrimental to the interrogation process. Access to the courts is seen as disruptive of military operations. In the version of the Military Commissions Act which President Bush sent to Congress on 6 September 2006, the administration argued that trials with lower standards of justice than apply in existing US courts were necessary because "the terrorists with whom the United States is engaged in armed conflict have demonstrated a commitment...to the abuse of American legal processes". In this argument, the administration seemed to be putting the US lawyers who have litigated on behalf of the Guantánamo detainees on the wrong side of President Bush's "with us or with the terrorists" divide. In this nation of laws, it seemed, you were either with the administration's lawyers or you were with the terrorists.

Although branded as "terrorists" and "killers" by the Commander-in-Chief, and as "evil" by Vice President Cheney, the Guantánamo detainees are not necessarily considered as individuals bearing responsibility for specific criminal conduct. Indeed, the question of trials of "alien unlawful enemy combatants" is viewed by the administration as an entirely separate issue, one that does not affect the detention regime itself. According to the administration, detentions may last until the end of the conflict, the definition and timing of which – like the detentions themselves – is a matter of executive discretion, and potentially indefinite. Even if acquitted by a military commission, a detainee could still be returned to indefinite detention as an "enemy combatant".

The vast majority of those held by the USA in the "war on terror" are unlikely ever to face US judicial proceedings. As noted above, that is not why they are detained. Even the small number of detainees who have been charged have not come to trial. Part of the reason is that the administration's policy-driven interpretation of the law has inevitably collided with that of much of the legal community, including judicial authorities such as the US Supreme Court in the *Hamdan v. Rumsfeld* ruling of 29 June 2006. But relatively narrowly-framed judicial decisions interpreted narrowly and in self-serving fashion by the executive make for slow progress towards full respect for human rights. Thus, more than two years after the Supreme Court ruled in *Rasul v. Bush* that the US courts had jurisdiction to consider *habeas corpus* appeals from the Guantánamo detainees, not a single one of them currently held there has had the lawfulness of his detention judicially reviewed.

The response of the US administration to the *Hamdan v. Rumsfeld* ruling has perhaps been even more shocking, although apparently not shocking enough to nudge Congress finally into calling the executive to account for "war on terror" abuses. Indeed, President Bush's defence of the CIA's program of secret detention and "alternative" interrogation techniques policy, which he said had been called into question by the *Hamdan* ruling and therefore needed congressional approval, showed an administration in assertively unapologetic mood.

Again, one can begin to trace the administration's manipulation of the law to fit its policy. According to a document recently issued by the Director of National Intelligence, after "high-value" detainee Abu Zubaydah was captured in Pakistan in March 2002 and handed over to the USA, he stopped "cooperation" with his US interrogators. In order to overcome this lack of cooperation, "over the ensuing months, the CIA designed a new interrogation program" and "sought and obtained legal guidance from the Department of Justice that none of the new procedures violated the US statutes prohibiting torture."

Any such claim of legality rings hollow. For until the Detainee Treatment Act was passed in December 2005 (in the face of executive opposition), Department of Justice lawyers took the position that because of the reservation attached to the USA's ratification of the Convention against Torture in 1994, the USA had no treaty obligation on cruel, inhuman or degrading treatment with respect to foreign nationals held in US custody overseas. In addition, in August 2002, the Justice Department provided legal advice in a memorandum which only came to light in mid-2004 after the Abu Ghraib torture revelations. It was reportedly written in response to a CIA request for legal protections for its interrogators. The memorandum stated among other things that interrogators could cause a great deal of pain before crossing the threshold to torture, that there were a "significant range of acts" that might constitute cruel, inhuman or degrading treatment but would not rise to the level of torture and be prosecutable under the US torture statute, and that the President could override international or national prohibitions on torture.(1)

The administration has not elaborated upon what the CIA "alternative" interrogation techniques have entailed, simply relaying the politically expedient claim that the resistance of Abu Zubaydah and the other detainees had been broken. Sued in court, the CIA has so far been successful in its ploy of refusing to confirm or deny the existence of an alleged presidential directive and an alleged Justice Department memorandum authorizing and outlining the secret detention program and its interrogation methods. However, the methods are widely reported to have included techniques that would clearly violate international law.(2)

Even now, more than two years after the Abu Ghraib revelations, the USA's protections against torture or other cruel, inhuman or degrading treatment are less than adequate. Among other things, the USA's treaty reservations mean that the USA considers itself, including under the Detainee Treatment Act, bound by the prohibition on cruel, inhuman or degrading treatment or punishment only to the extent that it matches existing US law. Under US Supreme Court jurisprudence, conduct is banned that "shocks the conscience". Justice Department lawyers reportedly view this as allowing consideration of the context in which abuse of detainees occurs. Under such consideration, if a detainee is believed to have information considered by the government to be important to national security, the "shocks the conscience" test could be interpreted by the government as permitting conduct that would be otherwise be unlawful. As Chairman of the House Homeland Security Committee, Representative Peter King, said: "If we capture bin Laden tomorrow and we have to hold his head under water to find out when the next attack is going to happen, we ought to be able to do that".(3) Or as Senator John Thune from South Dakota said in an earlier hearing of the Senate Armed Services Committee, "when you talk about humiliating or degrading or those types of terms and applying them to terrorists... I think that's not something that people in my state would be real concerned [about]".

Thus the USA adheres to a less than absolute ban on torture and other ill-treatment. It is clearly a long way from leading the world in fighting torture, as President Bush claimed in 2003.(4)

Indeed it would appear that the President himself remains at square one, namely the position articulated in his 7 February 2002 memorandum on detention policy. This memorandum indicated that for some detainees at least, the administration viewed humane treatment as a policy choice rather than a legal obligation, and one that did not apply to the CIA.(5) Four and a half years later, on 6 September 2006, President Bush justified the past use and continued existence of the secret CIA detention and interrogation program for use against certain "high-value" detainees on the grounds of necessity. He said that "it has been "necessary to move these individuals to an environment where they can be held secretly [and] questioned by experts" using unspecified "alternative" techniques to extract information from detainees allegedly resistant to interrogation. "Military necessity" has also been used to justify torture or ill-treatment at Guantánamo under at least one of two "special interrogation plans" authorized by Secretary of Defence Rumsfeld.(6)

In the lead-up to the 2002 congressional elections, President Bush requested authorization for use of force against Iraq. On 10 October 2002 Congress passed a broadly-framed and controversial resolution to this end.(7) The full ramifications of this resolution and the ensuing invasion of Iraq remain to be seen, but four years later, with congressional elections again looming, President Bush presented Congress with the Military Commissions Act. He

stated in his 6 September speech that as soon as Congress authorized military commissions acceptable to the administration, Abu Zubaydah and the 13 other men newly transferred to Guantánamo from years in secret CIA custody could "face justice", including the possibility of execution. It seems clear that the administration set out to use these high-profile detainees to apply pressure on legislators – in the context of mid-term elections and in the charged atmosphere of the fifth anniversary of the 11 September attacks – to adopt legislation authorizing a revised version of the military commissions struck down by the *Hamdan* ruling, and to endorse other aspects of the administration's detention policy. The resulting Military Commissions Act of 2006 is bad for the USA and bad for human rights.

The US system of government enshrines three separate branches of government – the executive, the legislature and the judiciary. In an opinion written eight decades ago, US Supreme Court Justice Louis Brandeis explained that: "The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."(8)

Friction or no friction, viewed from an international perspective, the executive, legislative and judicial branches of government all have roles to play in ensuring the USA's adherence to its international legal obligations. The executive has singularly failed to meet its obligations in this regard. The judiciary, headed by the Supreme Court, has moved to rein in executive excess but as already noted, its rulings on the relatively narrow questions brought before it are vulnerable to narrow and self-serving interpretations by the executive.

Three days after the 11 September 2001 attacks, Congress had the opportunity to put down a marker against executive excess in the "war on terror". It failed to do so when it passed the broadly framed Authorization for the Use of Military Force (AUMF), which has since been used by the administration to justify violations of international law. Amnesty International believes that Congress should repeal or substantially amend the AUMF. Congress has failed to establish a commission of inquiry into the USA's "war on terror" detention policies and practices, despite a compelling need for such an inquiry. In December 2005, Congress passed the Detainee Treatment Act, but included in it an impunity clause (§1004) and a severe curtailment of *habeas corpus* (§1005). Amnesty International has called for these sections of the Act to be repealed or substantially amended.

Now Congress has passed the Military Commissions Act. Amnesty International will work for the repeal of this legislation which violates human rights principles. Among other things, the Military Commissions Act will:

- Strip the US courts of jurisdiction to hear or consider *habeas corpus* appeals challenging the lawfulness or conditions of detention of anyone held in US custody as an "enemy combatant". Judicial review of cases would be severely limited. The law would apply retroactively, and thus could result in more than 200 pending appeals filed on behalf of Guantánamo detainees being thrown out of court.
- Prohibit any person from invoking the Geneva Conventions or their protocols as a source of rights in any action in any US court.
- Permit the executive to convene military commissions to try "alien unlawful enemy combatants", as determined by the executive under a dangerously broad definition, in trials that would provide foreign nationals so labeled with a lower standard of justice than US citizens accused of the same crimes. This would violate the prohibition on the discriminatory application of fair trial rights.
- Permit civilians captured far from any battlefield to be tried by military commission rather than civilian courts, contradicting international standards and case law.
- Establish military commissions whose impartiality, independence and competence would be in doubt, due to the overarching role that the executive, primarily the Secretary of Defense, would play in their procedures and in the appointments of military judges and military officers to sit on the commissions.
- Permit, in violation of international law, the use of evidence extracted under cruel, inhuman or degrading treatment or punishment, or as a result of "outrages upon personal dignity, particularly humiliating or degrading treatment", as defined under international law.
- Permit the use of classified evidence against a defendant, without the defendant necessarily being able effectively to challenge the "sources, methods or activities" by which the government acquired the evidence. This is of particular concern in light of the high level of secrecy and resort to national security arguments employed by the administration in the "war on terror", which have been widely criticized, including by the UN Committee against Torture and the Human Rights Committee. Amnesty International is concerned that the administration appears on occasion to have resorted to classification to prevent independent scrutiny of human rights violations.
- Give the military commissions the power to hand down death sentences, in contravention of international standards which only permit capital punishment after trials affording "all possible safeguards to ensure a fair trial". The clemency authority would be the President. President Bush has led a pattern of official public commentary on the presumed guilt of the detainees, and has overseen a system that has systematically denied the rights of detainees.
- Limit the right of charged detainees to be represented by counsel of their choosing.

- Fail to provide any guarantee that trials will be conducted within a reasonable time.
- Permit the executive to determine who is an "enemy combatant" under any "competent tribunal" established by the executive, and endorse the Combatant Status Review Tribunal (CSRT), the wholly inadequate administrative procedure that has been employed in Guantánamo to review individual detentions.
- Narrow the scope of the War Crimes Act by not expressly criminalizing acts that constitute "outrages upon personal dignity, particularly humiliating and degrading treatment" banned under Article 3 common to the four Geneva Conventions. Amnesty International believes that the USA has routinely failed to respect the human dignity of detainees in the "war on terror".
- Prohibit the US courts from using "foreign or international law" to inform their decisions in relation to the War Crimes Act. The President has the authority to "interpret the meaning and application of the Geneva Conventions". Under President Bush, the USA has shown a selective disregard for the Geneva Conventions and the absolute prohibition of torture or other ill-treatment.
- Endorse the administration's "war paradigm" – under which the USA has selectively applied the laws of war and rejected international human rights law. The legislation would backdate the "war on terror" to before the 11 September 2001 in order to be able to try individuals in front of military commissions for "war crimes" committed before that date.

Meanwhile the human rights violations continue. The CIA's secret detention and interrogation program retains the full support of President Bush. During the debates on the Military Commissions Act, members of Congress expressed their support for the program, despite the fact that it violates international law. Thousands of detainees remain in indefinite detention without charge or trial in US custody in Iraq, Afghanistan and Guantánamo. In passing the Military Commissions Act, Congress has failed these detainees and their families.

Those defending human rights should be prepared for a long struggle.

(1) "That memo represented the position of the executive branch at the time it was issued"; and: "It represented the administrative branch position". "I accepted the August 1, 2002, memo". Alberto Gonzales, White House Counsel, in response to oral questions from Senator Patrick Leahy and Senator Edward Kennedy and written questions from Senator Richard Durbin during the US Attorney General nomination hearings before the Senate Judiciary Committee, January 2005.

(2) CIA's harsh interrogation techniques described, ABC News, 18 November 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866>. (listing techniques grabbing, slapping, and: "Long Time Standing: ...Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours. Exhaustion and sleep deprivation are effective in yielding confessions... The Cold Cell: The prisoner is left to stand naked in a cell kept near 50 degrees. Throughout the time in the cell the prisoner is doused with cold water... Water Boarding: The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt."

(3) An unexpected collision over detainees, New York Times, 15 September 2006.

(4) "The United States is committed to the worldwide elimination of torture and we are leading this fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment." Statement by the President, 26 June 2003 <http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html>.

(5) "Our values...call for us to treat detainees humanely, including those that are not legally entitled to such treatment... As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely".

(6) See USA: Rendition – torture – trial? The case of Guantánamo detainee Mohamedou Ould Slahi, <http://web.amnesty.org/library/Index/ENGAMR511492006>. In the case of Mohamed al-Qahtani (see end of above report), the interrogation plan "outlines the military necessity for doing this [harsh interrogation]". Department of Defense Deputy General Counsel. Press briefing, White House, 22 June 2004. <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>.

(7) See, for example, chapter 5 of Neal Devins and Louis Fisher, *The Democratic Constitution*. Oxford University Press, 2004 ("...Congress chose to vote under partisan pressure with inadequate information, to pass an authorizing resolution. As with the Tonkin Gulf Resolution (in 1970, expanding intervention in Vietnam), Congress acted hurriedly in the middle of an election without the information it needed. The Iraq Resolution did not decide either for or against military action; it left that decision solely with the President...").

(8) Myers v. United States, 272 U.S. 52 (1926), Justice Brandeis dissenting.