> KABUL, Afghanistan, 24 Aug 09 — A young Afghan whose six-year detention at Guantanamo came to symbolize many of the problems of the Bush administration's war on terror detention policies arrived in his home country today, less than a month after a federal judge in Washington ordered his release.
>
> Mohammed Jawad, whose confession to throwing a hand grenade that wounded two U.S. soldiers in 2002 was rejected as coerced by torture, was helicoptered into Kabul from Bagram Air Base and taken to the office of the Afghan attorney general.
>
> One of his defense attorneys, Marine Major Eric Montalvo (the other defense attorney was David Frakt), said Jawad then met with President Hamid Karzai and afterwards was released to an uncle.
> http://www.mcclatchydc.com/homepage/v-print/story/74228.html

CLA wrote to congratulate David Frakt, with whom we had corresponded on this case, on securing Jawad's freedom. (CLA, at Frakt's request, provided a letter supporting detainees' rights to be treated justly).

Frakt responded:

'This was ultimately a victory for the rule of law because Jawad's freedom was obtained through the ancient and venerable writ of habeas corpus.
This episode also underscores the genius of the framers of the US Constitution in enacting a system of checks and balances to ensure that the Executive Branch does not simply have unchecked authority, as it was the judiciary which struck down the legislative efforts to limit the right to habeas corpus as unconstitutional and then refused to accept the government's pathetic efforts to justify the legality of Jawad's detention. It also can be seen as a victory for democracy as an evil and lawless government was replaced with one which respects the rule of law through a peaceful election.
Although it took longer than it should, ultimately justice prevailed.
This case showcased both the best and the worst of America:
- ***the worst** was the overreaction to 9/11 which allowed us to set aside civil liberties, the Geneva Conventions and the Rule of Law generally out of fear;*
- ***the best** was that military lawyers would risk their careers to defend an accused "terrorist" and uphold our oath to defend the Constitution, that a prosecutor like Lt Col Darrel Vandeveld would resign in protest rather than continue with an unethical prosecution, and that the judges who ultimately decided the case followed the law and followed the evidence where it took them, even when it required criticizing the actions of the government that employs them.'*

In a recent article, David Frakt has outlined how the USA, through its President, abandoned respect for the rule law. He explains why that creature of convenience, the Military Commission, should now be condemned to the legal textbooks as a cautionary tale.

Let the US military commissions die

A Guantanamo lawyer for tow detainees – Mohammed Jawad and Ali Hamza al Bahlul – explains why President Obama and the US Congress should not try to revive the failed military commissions system.

By David Frakt, August 2009

As President Obama considers reviving the military commissions, and Congress considers various revisions to the Military Commissions Act, they should do so with a clear understanding of why the military commissions of the Bush administration were created, why they were such a catastrophic failure, and whether there would be any useful purpose to reviving them.

The military commissions clearly failed to achieve their intended purpose. Not a single terrorist responsible for the planning or execution of a terrorist attack against the United States was convicted.

After more than seven years and hundreds of millions of dollars wasted, the military commissions yielded only three convictions. Two of the convicted, David Hicks and Salim Hamdan, received sentences of less than one year and were subsequently released.

And then there was my client, Ali Hamza al Bahlul, a low-level al-Qaida media specialist whom I began representing in late April 2008 as appointed military defense counsel. Six members of Hicks' jury from 2007, including the foreman, were recycled for his trial in 2008.

After being denied his statutory right of self-representation, Mr. al Bahlul refused to authorize me, his appointed military counsel, to put on any defense. Not surprisingly, he was convicted of all charges and received the maximum life sentence.

Why, with the entire resources of the Department of Defense, the Justice Department and the national intelligence apparatus at their disposal, were the military commissions such an abysmal failure? The answer is simple: They were built on a foundation of legal distortions and illegality.

The rules, procedures and substantive law created for the commissions were the product of, or were necessitated by, the abandonment of the rule of law by the Bush administration in the months after 9/11. In the United States of America, any such legal scheme is ultimately doomed to fail.

One of the first indications that the rule of law was to be abandoned was in President Bush's Military Order of Nov. 13, 2001: "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism." In this document, President Bush found: "it is not practicable to apply in military commissions ... the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

In other words, what we consider essential for a fair trial for us would not be required for them.

How did President Bush know, two months after 9/11, before a single major terrorist suspect had been caught, and before a single prosecutor had reviewed a single piece of evidence, that it would be impracticable to prosecute terrorism cases using existing rules and procedures? He didn't, of course. But having made this unsupported finding, President Bush and his senior advisors set out to make it a reality.

Another major step in the abandonment of the rule of law came on Feb. 7, 2002, when President Bush announced that the Geneva Conventions would not apply to "unlawful combatants" detained in the war on terror. The term itself was new and misleading. The president held not only that such persons were not entitled to be treated as prisoners of war, but also, shockingly, that they were not even legally entitled to be treated humanely.

The U.S. has recognized the Geneva Conventions as binding law since ratifying the treaty in 1955. With a stroke of the pen, the president wiped out the principal source of the law of war and the entire existing legal framework for the treatment of persons

captured in an armed conflict and replaced it with a policy preference for humane treatment, which could be readily discarded whenever it interfered with military or intelligence operations. The decision that humane treatment was preferred rather than required created confusion about what was permissible and cleared the way for the use of patently illegal and highly coercive "enhanced interrogation techniques."

The abandonment of the rule of law was compounded by the decision to house the "unlawful combatants" at Guantánamo Bay, Cuba, and to turn the detention facilities there into a legal black hole, a place where detainees were not even entitled to be informed of the basis for their detention, much less challenge it. Indeed, the Bush administration, aided and abetted by Congress, made a determined (and for several years, successful) effort to prevent detainees from gaining access to courts or legal representation.

In an environment with no judicial oversight or meaningful avenues for redress, the detainees were simply at the mercy of their captors -- and the captors were not in a merciful mood. The extraordinary pressure to produce "actionable intelligence" coupled with the vengeful mood of the times led inexorably to shameful abuses of detainees.

In 2002 and 2003, as Bush administration officials drafted the rules for the president's military tribunals, despite the hyperbole that the detainees represented "the worst of the worst," they were well aware that the vast majority of the detainees had no tangible connection with al-Qaida, and even fewer had any provable role in any terrorist attack. Many of the detainees were completely innocent of any wrongdoing, and had simply been turned in for bounty, or were caught in the wrong place at the wrong time. The worst that could be said about many of them was that they had fought against the U.S. and Coalition forces that had invaded Afghanistan, conduct that was not previously considered a war crime.

A small group of those captured were likely guilty of terrorism crimes, but not crimes of war. The administration was also keenly aware that, to the extent that there was some evidence of criminal acts by a small fraction of the detainees, much, if not most, of this evidence had been developed through highly coercive interrogations, which would not be admissible in a regular court of law.

The drafters of the original military commission rules resolved each of these problems by rewriting the law. First, the rules of evidence were rewritten to allow the introduction of coerced statements and to eliminate the rules barring the fruits of torture and abuse. Second, the laws of war were rewritten to create a number of previously unknown war crimes.

The most egregious examples of this were the invented crimes "Murder by an Unprivileged Belligerent," and "Destruction of Property by an Unprivileged Belligerent," which appeared in the original commission's list of offenses. These provisions made killing U.S. soldiers, destroying military property, or attempting to do so, a war crime. In other words, the U.S. declared that it was a war crime to fight back, even if the fighters observed the laws of war.

After protracted litigation, the original military commissions were invalidated by the Supreme Court in Hamdan v. Rumsfeld in the summer of 2006 before anyone was ever convicted. With nearly five years wasted, there was a great rush to put a new legal system in place. Within months, "new and improved" military commissions were authorized by Congress through the Military Commissions Act of 2006 (MCA).

While these legislatively created commissions were undoubtedly an improvement over those created by presidential decree, the hastily drafted and poorly considered MCA still incorporated some of the key distortions and departures from the rule of law featured in the invalidated version. Most disturbingly, Congress retained the rules of evidence (with minor variations) that permitted coerced evidence to be introduced.

Congress also retained the full list of war crimes (again with minor variations), including the invented ones, and even added new ones, such as the flexible catch-all "material support to terrorism." The Obama administration has now acknowledged that material support is not a traditional war crime, calling into question all three of the convictions thus far attained. (Hicks, Hamdan and al Bahlul were all convicted of material support. For Hicks and Hamdan, it was the only crime of which they were convicted.)

Although the military commissions were purportedly modeled on the Uniform Code of Military Justice, the best features of that system, such as a robust pre-trial investigation and equal access to evidence and witnesses, were removed or weakened. The implementing regulations produced by the secretary of defense, which could have corrected or mitigated some of the glaring problems with the legislation, served only to exacerbate them.

Despite all the obvious legal shortcomings of the military commissions, they might have succeeded but for one factor the Bush administration never anticipated: Many of the military lawyers assigned the roles of prosecutors, defense counsels and judges in the military commissions refused to collaborate.

Many of these judge advocates, officers with decades of expertise in the law of war, considered the military commissions an affront to the military justice system to which they had devoted their careers. Ethical and courageous military prosecutors such as Chief Prosecutor Col. Morris Davis and Lt. Col. Darrel Vandeveld took their oath to defend the Constitution seriously and resigned from the prosecution rather than be party to trials using coerced evidence.

Professional military judges refused to be bullied into endorsing the administration's strained interpretations of the law of war. Tenacious military defense counsel challenged the government at every turn, exposing the many flaws in this concocted legal system and the disgraceful brutality with which their clients had been treated.

Undoubtedly, the Military Commissions Act could be modified to create a fair, legitimate legal system, but this would require substantial revisions, far beyond any of the proposals currently being considered by Congress. In essence, it would require creating military commissions that mirror courts-martial, something that was authorized by statute in 2001 when this whole debacle began. Is there any point to trying?

I would argue there is not. As President Obama has stated, military commissions are a legitimate forum in which to try offenses under the law of war, but this begs the question of whether there are any law of war offenses to try.

Of the approximately 25 defendants charged in the military commissions, 99 percent are not charged with traditionally recognized war crimes. Rather, virtually all of the defendants are charged with non-war crimes such as criminal conspiracy, terrorism and material support to terrorism.

In fact, there has been only one legitimate war crime charged against any Guantánamo detainee, the charge of "perfidy" against Abdal-Rahim Al-Nashiri for his alleged role in the attack on the USS Cole in October 2000. But even though perfidy is a legitimate offense under the law of war, convicting Mr. Al-Nashiri of this offense requires accepting the dubious legal fiction that the United States was at war with al-Qaida nearly a year before 9/11, for the law of war only applies during a war.

Perhaps more to the point, Mr. Al-Nashiri was also charged with several other non-law of war offenses arising out of the same conduct, including multiple charges carrying the death penalty, making the charge of perfidy redundant. Even if there were legitimate war crimes to be addressed, traditionally, military commissions have been used only when regular civilian courts are unavailable. This is simply not the

case. The federal courts are open, and have a long track record of successful prosecutions of terrorism crimes.

The real reason the Bush administration created the military commissions was so that it could have a forum in which American standards of due process did not apply and convictions could be obtained under summary procedures using evidence that would not be admissible in a regular court of law. The Obama administration has now rightly concluded that constitutional due process standards should apply to military commissions. Modifying the military commissions to comport with due process and the rule of law will mean eliminating the very reason for their existence. Partially amending them will only result in many more years of protracted litigation.

Among the 200 plus detainees still at Guantánamo, there are perhaps a few dozen who have committed serious offenses. I have yet to hear any compelling reason why any of these men could not be prosecuted under existing law in federal court.

Of course, if the only evidence of criminality by an individual was obtained through torture and coercion, then that person is unlikely to be convicted in a federal court. But if that is all the evidence we have, then we shouldn't be prosecuting anyway, whether in a civilian court or a military commission. If the abandonment of the rule of law that resulted in the egregious abuse of detainees may mean that a few "bad men" cannot be prosecuted, perhaps that will serve as a deterrent to such deviations from our core values in the future.

The bottom line is that there are simply no advantages to military commissions and no compelling reasons to keep them. Military commissions are not faster, more efficient or less costly than the alternative. Military lawyers have no special expertise in prosecuting or defending complex international terrorist conspiracies. Try the terrorists where they should have been tried all along, in U.S. District Courts.

ENDS

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http://www.salon.com/opinion/feature/2009/08/04/military_commissions/
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