WORLDRIGHTS

Human Rights Advocacy Worldwide

HDIM.NGO/289/06
9 October 2006

ANALYSIS OF MILITARY COMMISSIONS ACT OF 2006 AND SYNOPSIS OF CURRENT LEGAL CHALLENGES UNDER U.S. AND INTERNATIONAL LAW

The Military Commissions Act of 2006 Strips the Courts of Their Historical and Constitutional Role as a Check on the Executive Branch

Section 6 of S. 3930 strips any alien deemed an "enemy combatant" of the right to be heard in court to establish his or her innocence, regardless of how long the person is held without charge. The Great Writ of habeas corpus is the foundation of our nation's limits on arbitrary executive power over any person. Ironically, if S. 3930 had been law three months ago, the detainee who was the petitioner in the Supreme Court case that found the military commissions illegal, *Hamdan v. Rumsfeld*, could not have brought his challenge to the president's illegal military commissions, and even a detainee who was being subjected to torture would never be allowed to seek relief from any U.S. courts. There is no reason to adopt this dangerously broad forfeiture of the traditional check of last resort on executive power. Denying access to the courts would also signal to the world that we so fear our own independent judiciary that we must cut off all access to it.

This provision has nothing to do with the military commission trials. In fact, its primary impact will be on the hundreds of detainees who are being held indefinitely and have never been charged with any war crime. While the bill does allow limited appeals for those who do go before a military commission or a Combatant Status Review Tribunal (CSRT), there is no guarantee that any person detained by our government be provided either a trial or a CSRT. Even when the government holds a CSRT proceeding, the government can make its decision based on coerced and hearsay evidence. Moreover, based on the reports from CSRT proceedings in Guantanamo, it appears that most, if not all, of the detainees are being held based almost entirely on evidence that they may never have seen. None of the detainees have been afforded any relief by the inadequate appeals process established for these CSRTs.

The ancient writ of habeas corpus is our check of last resort against arbitrary executive power, and the courts are using it in an appropriate, restrained matter....

These problems are compounded by the grant of unilateral authority, in paragraph 8(a)(3), that "the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions" and by the provision in paragraph 8(a)(2) that "no foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions" in the revised War Crimes Act--which eliminates the most significant sources of law for interpreting Common Article 3 of the Geneva Conventions. Both of these provisions bolster the kinds of bizarre interpretations made by the Administration during the past several years of American laws prohibiting torture and abuse.

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The Military Commissions Act of 2006 Gives Retroactive Immunity to Government Officials Who Authorized or Ordered Illegal Acts of Torture and Abuse

Section 8 of S. 3930 provides a "Get Out of Jail Free" card to government officials who authorized or ordered illegal acts of torture and abuse--and then backdates the card to nine years ago. Subsection 8(b) of S. 3930 revamps the War Crimes Act to replace the prohibition on all breaches of Common Article 3 of the Geneva Conventions with a less inclusive list of prohibited acts. Paragraph 8(b)(2) of the bill makes the revisions to the War Crimes Act retroactive to 1997, and also makes the prohibition on "serious and non-transitory mental harm (which need not be prolonged)" inapplicable entirely until the date of enactment of S. 3930.
As a result, of these provisions in section 8, government officials who authorized or ordered illegal acts of torture and abuse will not be subject to prosecution for many of the acts that they authorized or ordered. These provisions of the bill help fulfill the goal of then-White House Counsel Alberto Gonzales to avoid War Crimes Act prosecutions of government officials by advising the President to attempt to suspend Common Article 3 of the Geneva Conventions for many detainees.

Unless these retroactivity provisions are changed, the government's top torture officials may meet their objective of avoiding liability for authorizing and ordering illegal acts of torture and abuse. For example, in a January 25, 2002 draft memorandum for the President, Gonzales advised against application of the Geneva Conventions to al Qaeda and Taliban detainees. He wrote that a "positive" reason for denying Geneva Convention protections to these detainees was that denial of the protections would "substantially reduce[] the threat of domestic criminal prosecution under the War Crimes Act." Gonzales went on to highlight for the President that some of the War Crimes Act provisions apply "regardless of whether the individual being detained qualifies as a POW."

The last item on Gonzales' list of "positive" reasons for the President finding the Geneva Conventions protections inapplicable was the most disturbing. Gonzales stated to the President that, "it is difficult to predict the motives of prosecutors and independent counsels who may in the future decide to pursue unwarranted charges based on Section 2441 [the War Crimes Act]. Your [the President's] determination [of inapplicability of the Geneva Conventions] would create a reasonable basis in law that Section 2441 does not apply, which would provide a solid defense to any future prosecution." In other words, Gonzales specifically advised the President to find the Geneva Conventions protections inapplicable to these detainees as a way to block criminal prosecutions under the War Crimes Act.

In addition, reports about the development of the August 1, 2002 Justice Department's Office of Legal Counsel memorandum on the definition of "torture" (generally known as one of the "Bybee memos") similarly show the tremendous efforts of top government officials to avoid prosecution for acts that they authorized or ordered. The memo interpreted the word "torture" in the federal Anti-Torture Act and the U.S.-ratified Convention Against Torture to prohibit only a narrow band of acts. The interpretation of the criminal statute was so wrong that, on December 30, 2004, the Justice Department issued a new memorandum from its Office of Legal Counsel that rejected the earlier interpretation and found a much wider band of acts are criminal.

But for nearly two years, at least some persons in the Administration took the position that the criminal code did not prohibit certain acts that:

- cause severe pain, but do not cause pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death;"

- cause severe physical “suffering,” but do not cause severe physical pain;
- are taken with knowledge that severe pain or suffering is “reasonably likely to result from” the act, but the act was not taken with the “precise objective” of inflicting such harm; or
- are taken pursuant to presidential directive.

These discussions of how to avoid liability were not simply abstract exercises for obscure Office of Legal Counsel lawyers. In fact, a January 5, 2005 *Washington Post* article stated that one of the authors of the August 1, 2002 memorandum, then-Deputy Assistant Attorney General John Yoo, briefed Gonzales several times on the memorandum during its drafting. The Post also reported that Yoo also briefed Attorney General John Ashcroft, Vice President Cheney’s counsel, the general counsel for the Defense Department, and the acting general counsel for the CIA. In addition, the Post described a meeting that included detailed discussions of “methods that the CIA wanted to use, such as open-handed slapping, the threat of live burial and ‘waterboarding’--a practice that involves strapping a detainee to a board, raising the feet above the head, and dripping water onto the head . . . [which] produce[s] an unbearable sensation of drowning.”

<u>The Military Commission Act of 2006 Does Not Bar All Evidence Obtained by Torture and Abuse--Including Evidence Literally Beaten Out of a Witness, and Evidence Obtained in Torture Cells in Syria, Jordan, and Egypt</u>

Section 4 of S. 3930 explicitly authorizes the use of evidence obtained in violation of the provisions of the McCain anti-torture amendment, so long as the evidence was obtained prior to its enactment nine months ago. As a result, evidence that was literally beaten out of a witness--and evidence obtained in torture cells run by countries such as Syria, Jordan, and Egypt--could be the basis for a conviction of a detainee in an American proceeding.

Congress has never before authorized federal prosecutors to use evidence obtained by torture or abuse in any criminal trial. It would allow convictions based on statements made by persons who may have been willing to make up anything to have the torture and abuse stop. And it would allow evidence obtained by countries with horrific human rights records to be used in an American proceeding.

During several congressional hearings, the nation’s top Judge Advocates General for the four uniformed services all agreed that coerced evidence has no place in any American courtroom and no place in any American military commission...

SOURCE: ACLU

SYNOPSIS OF CURRENT LEGAL CHALLENGES TO ITS CONSTITUTIONALITY UNDER U.S. AND INTERNATIONAL LAW

CENTER FOR CONSTITUTIONAL RIGHTS FILES FIRST NEW CHALLENGES TO MILITARY COMMISSIONS ACT
CCR Files Habeas Petition for 25 Detainees Held Without Charge at Bagram Air Base, Afghanistan

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Synopsis

Opinions and Documents

Bagram Petition for Writ of Habeas Corpus (PDF) 865KB

On October 2, 2006, the Center for Constitutional Rights (CCR) announced that it had filed the first new legal challenges to key provisions of the Military Commissions Act (MCA) passed by Congress last week. CCR filed a habeas petition on behalf of 25 detainees held at Bagram Air Force Base in Afghanistan who have been detained without charge or trial. *Mohammed v. Rumsfeld* directly contests the MCA's denial of due process to non-citizens held in U.S. custody.

There are an estimated 500 men detained in U.S. custody at Bagram. Though some have been held for years, none of these men has ever received a hearing of any sort. Bagram has been the site of notorious examples of abuse - including abuses that led to the December 2002 deaths of two Afghan detainees.

Mohammed v. Rumsfeld raises challenges to the Military Commissions Act's sweeping definition of "unlawful enemy combatant," denial of due process, and rejection of accountability for torture and abusive interrogations:

- The MCA's sweeping definition of "unlawful enemy combatant" would include many people not engaged in hostilities against the United States. The MCA writes the term "unlawful enemy combatant" into law for the first time - and with a definition so expansive that it includes U.S. citizens and those who are not directly engaged in hostilities against the United States but who "materially support" hostilities. Further, the MCA sanctions the President or Secretary of Defense's unilateral declaration that an individual is an "unlawful enemy combatant." The MCA even attempts to deny due process to individuals who are not yet classified as unlawful enemy combatants under this broad definition, but also those who are "awaiting such determination" - a definition that could be read to include all non-citizens held in U.S. custody in the U.S. or abroad.
- Despite being held indefinitely in U.S. custody, all detainees at Bagram would be denied habeas relief - or any ability to challenge any aspect of their detention or treatment. The MCA purports to revoke the right of non-citizen detainees to bring a habeas petition to challenge the legality of their detention. For detainees not held at Guantánamo, the MCA further purports to deprive them of any right to challenge any aspect of their detention, treatment, trial or conditions of confinement through any means.
- The law severely limits accountability for torture and abusive interrogations for those detained in U.S. custody at Bagram and around the world. Common Article 3 of the Geneva Conventions prohibits violence to detainees and "outrages upon personal dignity, in particular humiliating and degrading treatment." The MCA permits the President to interpret any violations of the Geneva Conventions which do not constitute "grave breaches" and amends the War Crimes Act so that only grave breaches of Common Article 3 can be prosecuted. The President's prior interpretations prompt great concern about unchecked executive interpretations of Geneva Convention violations. As the MCA does not allow those held in U.S. custody to sue over the conditions of their detention, torture prohibitions such as the McCain Amendment to the Detainee Treatment Act will be unenforceable without habeas rights.

CENTER FOR CONSTITUTIONAL RIGHTS FILES HABEAS PETITION ON BEHALF OF MAJID KHAN, BALTIMORE MAN
TORTURED AND HELD IN SECRET CIA PRISON --

Opinions and Documents
Petition for Writ of Habeas Corpus (PDF) 952KB

Synopsis

On October 3, 2006, the Center for Constitutional Rights (CCR) announced it has filed a habeas corpus petition on behalf of Majid Khan in DC District Court, one of the 14 'ghost detainees' President Bush recently transferred to Guantánamo. Filed hours before the passage of the Military Commissions Act of 2006, the petition challenges the constitutionality of denying non-citizen detainees the right of habeas corpus. Mr. Khan was imprisoned in secret CIA detention for 3 1/2 years and subjected to "alternative interrogation methods" that amount to torture. He has never been formally charged with a crime or declared an enemy combatant.

Majid Khan immigrated with his family to the United States in 1996. They settled in Baltimore, where he attended Owings Mills High School, graduating in 1999. Majid was granted legal asylum in the U.S. in 1998 and subsequently worked for the State of Maryland. In 2002, he went to Pakistan to get married and then came home to the United States to continue working. Shortly after returning to his wife in Pakistan, Majid and other relatives were kidnapped from their residence.

In the middle of the night, on March 5, 2003, individuals identified as Pakistani security officials pounded on the door of the home of Majid's brother in Karachi, and rushed into the flat. The family members at home included Majid, his brother, his brother's wife and their month-old daughter. As the family was trying to wake up, the officials hooded and bound all of them before placing them in a vehicle. They were all taken to an unknown location.

Majid's sister-in-law and infant niece were imprisoned for a week. Pakistani officials imprisoned his brother for approximately one month. When Majid's brother was released, officials threatened him not to make any public statements or inquire after Majid. As a result of the threats, Majid's family in Baltimore and Karachi waited anxiously and fearfully for his return. He was never released or heard from again.

Back home in the U.S., Mr. Khan's family cooperated with U.S. authorities in every way they could; Majid's older brother, a U.S. citizen, was interviewed hundreds of times by the FBI and asked repeatedly about Majid's whereabouts. Nonetheless, Majid's family did not learn he was in U.S. custody or even that he was alive until a news reporter knocked on their door and told them President Bush announced Majid's name in a speech before the nation on September 6th.

Majid now has a young daughter he hasn't seen.