

“THE STATUS OF FAIR TRIAL NORMS”

Remarks by Rick Wilson

2006 AIUSA Lawyers’ Conference
University of Washington School of Law
February 18, 2006

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I too wish to acknowledge the memory and palpable presence here at this event of Prof. Joan Fitzpatrick, with whom I taught for several years in the Oxford-George Washington U. summer human rights program.

Our topic today is the status of fair trial norms. I have chosen to focus on the US government’s use of military commissions at Guantanamo Bay. There are two CLE documents that accompany my presentation, one called “War Crimes,” which appears in a New Zealand law review, and the recent petition we filed on behalf of our Guantanamo client, Omar Khadr, with the Inter-American Commission for Human Rights requesting that the US take precautionary measures to protect his rights as a child facing an unjust military commission trial. Two of my students will argue the petition before the Commission on March 13 in Washington, DC.

When I was a boy of 10 or 11 in Ohio, my young friends introduced me to a game they gleefully called TEGWAR. We played it with a deck of cards, and one of the boys explained

the rules as we started. I played hard and tried to follow the rules, but each time I thought I was gaining an advantage, the rules would change to favor the other players. After only one hand in which I was soundly trounced, the ruse was apparent. I shouted “What the heck IS TEGWAR?” They rolled on the floor laughing and said TEGWAR was an acronym for “The Exciting Game Without Any Rules”. I’d been duped.

Military commissions are this administration’s version of TEGWAR, and I’ve been duped again.

I will discuss three aspects of administration policy in its use of military commissions at Guantanamo Bay. Trial by commission was the explicit purpose for which the camp was created under the system for detentions and trials set out in the President’s military order of Nov. 13, 2001, and yet today, more than four years later, only 10 of some 520 detainees have been charged; none have come close to trial.

With another faculty member at American University’s law school, Prof. Muneer Ahmad, and newly assigned military defense counsel, I represent Omar Khadr, a detainee at Guantanamo Bay. Omar is the only Canadian citizen at Gitmo. 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 transported to Gitmo in October of that year, and he’s been at Guantanamo since. My faculty colleague and I began our representation in July 2004, just after the Rasul case was decided by the US Supreme Court. We’ve visited him at least 6 or 8 times in Camp Delta.

In November of 2005, 28 months after his capture, he was formally charged with what are portrayed as war crimes. The process is just beginning – his first hearing was in January of this year, so our exposure to the actual operation of MCs is just beginning. The most serious of the charges he faces, murder by an unprivileged belligerent, involve the alleged death of an American soldier in an incident in which Omar was severely wounded himself by air strikes and ground fire, and which he barely survived. Whatever else it is, it is not a war crime or crime against humanity of the dimension of the events we are discussing here today as part of the legacy of the Nuremberg trials. It was armed conflict involving a child of 15.

I should also advise you that I sought and obtained permission from the Appointing Authority to talk publicly about this case so that I could speak about commissions today. That requirement is one of many I found repugnant and have complied with under protest in order to be able to conduct the necessary defense of our client.

There is much to discuss about this administration’s corrupt and shameless treatment of the detainees at Guantanamo, and there are terrific reports from Amnesty and HRW on the specific failings of military commissions with regard to due process and fair trial norms of international law. Therefore, I won’t focus on the myriad specific shortcomings of commission in the fair trial context. They are all too well known.

Today, instead, I want to offer three brief reflections on administration actions there. They focus on the purposes of administration policy:

- First, what is the purpose of government policy regarding Gitmo?

- Second, what is the reason for the choice of military commissions as the vehicle for trial?
- Third, what is the content and goal of what is referred to by the convening authority of what is called “commission law”?

The purpose of administration policy regarding Guantanamo is to define the non-citizens detained there as beyond the law, in order to gain what they believe to be useful intelligence, and under the pretext that they are preventing these individuals from returning to combat against the US. All of the evidence of the latter points to the contrary.

The reason for the choice of military commissions is the administration’s misguided belief that these tribunals can be used to shortcut, curtail or eliminate the due process and fair trial norms that have been carefully crafted for use in courts martial or federal criminal trials.

The sole purpose of commission law is to convict.

Let me discuss each of these propositions.

First, the purposes of administration policy with regard to Guantanamo. Administration uses the language of war, and purports to use the law of war, a body of law little known by either the public or judges.

The government uses two devices which I will call “Rhetorical Jihad” and the “Rhetorical Shell Game”:

1. Rhetorical Jihad: say it enough times and with conviction and it must be true. Examples: “War on terror”, “9/11 is connected to Iraq,” “this administration does not torture,” “these terrorists will receive a full and fair trial.” By the way, combat against terrorism was long anticipated in Army field manuals: it is included under the topic of MOOTW – Military Operations Other Than War.
2. there are two versions of the Rhetorical shell game: In the first, the terms are close to their traditional legal meaning, but just off kilter enough to confuse the public and judges, and in the second, the administration elides from one of multiple justifications to another as needed when a particular reason is challenged.

Examples of the first:

- a. Enemy combatant is not same as unprivileged belligerent
- b. Military commission is not the same as trial by court and judge with proper appeal
- c. Commission law is not the law of war
- d. War crimes are not those defined in commission law (War Crimes Act, 18 USC 2441).

The best single example of the second version:

- e. The purposes of detention at Guantanamo are, by turns, to gain intelligence, prevent return to combat, trial for crimes.

Now for my second proposition: the purpose of military commissions is to provide a less fair trial than court martial or criminal trial.

1. I recently wrote an article on failed national trials of Abdullah Ocalan, leader of a Kurdish separatist party and movement, the PPK, in Turkey, and Abimael Guzman, leader of Sendero Luminoso in Peru. In both, tens of thousands died at the hands of

- alleged terrorists, and in both, military trials were found to be inadequate substitutes for available civil processes.¹
2. US has condemned similar processes in Burma, China, Colombia, Egypt, Kyrgystan, Malaysia, Nigeria, Russia and Sudan.
 3. Luis Joinet, one of the special rapporteurs for the UN, has said that military tribunals are never an adequate substitute for the trial of civilians by normal courts, and military courts are NEVER appropriate for children, whether child soldiers or not.
 4. While commissions have been used in history, since before the civil war, they are confined to use by necessity, and the rules fashioned today are same as those approved for use at the time of WWII, while notions of fair trial have advanced far beyond those days, both domestically and internationally. Then, no Gideon, no Miranda, etc.
 5. Review provisions of ICCPR, Art. 14, one of the most detailed and most-interpreted provisions, and these commissions violate virtually every provision, from independent and competent tribunal at the beginning to adequate avenues for review at the end. Recent report by 5 UN rapporteurs concludes exactly that it its call for the closing of Guantanamo.

Third and final proposition, the goal of commission law is to convict.

1. actions by commission judges pretend that cases are starting with charges and ignore massive delays of prolonged incommunicado detention, with aggressive and torturous interrogations, and without counsel, or indeed any effective access to the outside world.
2. what is commission law? An acronymic soup all too typical of military vocabulary: the PMO, DOD directives, AARs (appointing authority regs), MCOs, MCIs and POMs. What are these? Given and rescinded at will; purport to be the common law of MCs.
3. Tell the story of first commission session: press conference, arguments and decision, followed by POM 16: prosecution statements (video and terrorist), Roots shirt, and use of "Omar."

The issues in the commission, and indeed in regard to the general situation of the detainees continue to unfold. They are unprecedented, and to date, they are unresolved. The Hamdan case, now pending in the US Supreme Court, may give us some answers by the end of June.

Article 130 of the Third Geneva Convention asserts 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 are, without doubt, war crimes. Hopefully, history will reveal who should be in the dock as war criminals and who should not.

¹ Richard J. Wilson, *Can the U.S. Learn from Failed Military Commission Trials in Turkey and Peru?*, in *Human Rights Brief*, available at <http://www.wcl.american.edu/hrbrief/11/1wilson.cfm>.