Title:
"Individual Rights and the President's Military Tribunal System"

Abstract:
In response to the September 11th attacks, President George W. Bush created an unprecedented Military Tribunals procedure outside of all known systems of justice which justifies the indefinite detention of alleged terrorists and so-called 'unlawful enemy combatants.' The Administration has argued that unlawful enemy combatants are not entitled to the statutory procedural guarantees and rights provided by civilian and military courts and given to prisoners of war under the Geneva Conventions. Nonetheless, officials contend that the tribunals provide, in the words of the Geneva Convention, "indispensable judicial guarantees that are required by all civilized nations." This study ascertains what these judicial guarantees are and why they are important by looking at both the traditional civilian and military judicial systems, and then contrasts them with the procedures currently employed by the Military Tribunals. The examination shows that the Military Tribunal System is an invalid substitute for other judicial systems due to its lack procedural and substantive safeguards for the accused.

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Rights of the Accused and the President's Military Tribunal System

It is undeniable that the terror attacks of 9/11 exposed the grave threat that Islamic Radicalism poses to the security of America and the rest of the world; a threat which has the potential to disrupt the precarious balance of power between prominent Middle Eastern nation-states and the West. In the first major attack from foreign entities on the US mainland since 1812, the total number of casualties incurred on September 11th surpassed the number of Americans killed in all other domestic and international terrorist incidents from the previous 4 decades combined.[1] Such an act of aggression necessitated a swift response in order to punish al Qaeda, its affiliates, and co-conspirators for actions which constituted both federal and international crimes.[2] President George W. Bush responded by declaring a "War on Terror", which he explained would be a global effort employing every resource of military, law enforcement, intelligence, and diplomacy, which would not only dismantle Al Qaeda, but also capture and hold suspected terrorists indefinitely until they no longer pose a threat to national security.

Despite the strong rhetoric and ambitious goals of the President's declaration of "War," the objective benefits of his administration's counterterrorism efforts, including the administration's detainee detention program have been received with much criticism and consternation from both our enemies and allies.[3] Not only has the number of annual incidents of terrorism skyrocketed over the past 6 years, but the lethality of such attacks has risen as shown by chart 1. While several "top operatives" of the al Qaeda organization have reportedly been either captured or killed,[4] the Anti-American Jihad has become a full fledged *movement* that has evolved away from the need of hierarchical control and has become even more dangerous through the use of propaganda on the internet.[5] Al Qaeda and other loosely affiliated actors are

continuingly threatening the West, as recent attacks and foiled attempts in the United Kingdom and elsewhere attest.[6]

The President's response to September 11th has been marked by its unprecedented foregrounding of the military as the primary tool and vehicle for preventing terrorist attacks. What sets this current struggle apart is that while we are deploying our military abroad to deal with terrorists as has been done in a traditional war context, there is still a great number of persons who are being captured both domestically and internationally, treated as "unlawful combatants," a new and so far undeveloped category, and then detained within a newly formed, Military Commission structure, completely outside the familiar, well known Civil Criminal Justice system and Military Tribunals established by the Uniform Code of Military Justice (UCMJ). While this seminal role for the military would be expected when it came to disrupting terrorist cells in special forces operations or engaging terrorists within their foreign safehavens and on the battlefield, the President's choice of creating untested Military Tribunals or Commissions to prosecute those captured and accused of violating a wide range of terror-related offenses instead of using better known courts-martials or the civilian courts has generated much controversy. The new Military Commissions have been criticized for their failure to provide protections for the accused that are available in the civil system and under the UCMJ system, and some have called for the administration to instead refer terrorism cases to the civilian court system.[7]

The Military Commission Act (MCA) of 2006 was an attempt by Congress to address a prepondence of expert criticism and Supreme Court rulings which go against the unilateral nature of President's Military Order of November 2001 which initially created the Commissions to adjudicate those classified as unlawful enemy combatants (UECs). Although the short bill

does not delve into the substantive processes of the rules of the Commissions, it does address certain general principles that Congress felt should be included within the Department of Defense's subsequent regulations for the Commission System. Although other statues and official statements from the President and the Department of Justice have made clear that the prosecution of the War on Terror is not legally covered by the Geneva Conventions relating to Prisoners of War, Section 948b (f) of the MCA invokes Common Article 3 of the Geneva Conventions to assure the public that the new Commissions would be ─ in the words of the Geneva Convention ─ "regularly constituted court[s], affording all the necessary 'judicial guarantees which are recognized as *indispensable by civilized peoples*'[8] for purposes of common Article 3 of the Geneva Conventions." (Emphasis added)[9]

This paper will examine quite precisely what judicial guarantees can be called "indispensable" by looking at the judicial frameworks of both the Military (UCMJ) and Article III civilian branches of the American Judiciary, in light of the general requirements invoked by Congressional statute and Executive Branch statements, of the Geneva Convention's judicial guarantees for prisoners of war and other peoples captured during wartime. Unlike the current Military Commission System (MCS) under the auspicious of the President and the Defense Department, these two fields of the American Judiciary have been tested comprehensively through their use over the centuries. Although supposedly being the model for the current MCS these two Judicial bodies have several key differences with the MCS which have been cited by many within the United States and abroad, calling into question the juridical qualities of these tribunals. First we need to examine the two traditional systems in order to see how the new MCS system is different and unprecedented.

Legal Paradigm Shift

Traditionally, terrorism had been considered a criminal problem for the courts of most Western democracies including the United States; for example the perpetrators behind both the World Trade Center bombings of 1993 and the Oklahoma City bombings were detained and given sufficient sentences within US courts.[10] For decades, scholars and politicians alike saw that, although terrorism was unlike traditional crimes due to their focus on political concerns rather than material gain, that the non-state status of those that carry out terrorist violence meant that it would be easier to use existing criminal agencies to seek justice under existing laws rather than resort to ad hoc military devices.[11]

After America's entry into the "post-9/11 world" this-view was revised in large measure by the Bush Administration, contrary to many other nations. For example, in November 2006, a British man, thirty-four year old Dhiren Barot, was convicted by a British court of plotting to blow up the New York Stock Exchange and was sentenced within the Civilian Courts to life in prison; as of November 2006, one hundred criminal convictions have been achieved by Indian prosecutors against alleged terrorists; in June 2006, an Australian court convicted a 36-year old Australian, Faheem Khalid Lodhi, of planning to blow up the national electricity grid or a Sydney defense site and faces the maximum penalty of life in jail; in January 2007, a German court convicted a Moroccan, Mounir el Motassadeq, as an accessory to murder in the September 11, 2001 tragedy, sentencing him to the maximum 15 years in prison.[12] In February 2007, a Spanish special tribunal began a mass trial of 29 people suspected of the terror bombings of commuter trains in March 2004 that killed 191 people; on April 30 2007 a court in England found five men guilty of conspiring to use fertilizer bombs in November 2003 to blow up targets in the U.K. after a year-long trial and a month-long jury deliberation; and on July 11, 2007, four

men were sentenced by a British court to life imprisonment for conspiring to bomb the London transportation system on July 21, 2005.[13]

The Bush Administration and other politically conservative analysts and pundits viewed the civilian Criminal Justice System (CJS) as a hindrance when it came to the prosecution of terrorists for several reasons. First, many of the civil procedures of due process and protections for the accused were seen as too cumbersome and restrictive because they had the effect of hindering swift action. Many of the prohibitions against hearsay evidence, unreasonable search warrants, interrogations of detainees without being assisted by counsel and much of the recourses available for the accused during trial, such as the right to subpoena favorable witnesses and confront unfavorable ones, flew in the face of the sort of expedited justice that the administration felt was needed in light of the terrorist threat. Although many of these protections were put in place to ensure the uniformity of the criminal justice process in order to avoid lapses of judgment and protect justice from the excesses of governmental enforcement, these concerns understandably took a back seat during the aftermath of the 9/11 crises. Another concern over the use of traditional legal systems to adjudge alleged terrorists is the classified nature of much of the operations that involved the detainee's capture. Administration officials have argued that it would be detrimental to the country's national security and would comprise ongoing operations with government officials if it were forced to present classified information to prove some of the charges that they want to raise against these detainees.

While it was generally acknowledged that the traditional criminal system was inadequate, it was clear that some sort of adjudicatory body needed to exist in order to prosecute alleged terrorists that were captured during ongoing operations. For this reason the President created new informal military commissions because of their flexible structural and procedural

nature. The President justified this action by pointing to the substantial precedents of unilateral use of military commissions/tribunals by Presidents during every major military conflict since America's founding, especially Franklin Delano Roosevelt's creation of temporary Tribunals to prosecute 7 Nazi Saboteurs who entered by boat onto Long Island during WWII.[14]

Unlike in American criminal justice or military justice (courts martials), President Bush's Military Commission System is under total Executive discretion outside of a very limited appeals process available within the United States.[15] Initially created under a military order shortly after September 11th, the first version of enemy combatant military tribunals existed for 4 years without having any realistic input from Congress or the Judiciary, especially the Judiciary.[16] There was no recourse initially available for the detainees outside of the executive branch, with the tribunal's transcript being referred directly to the Secretary of Defense and then to the President for final review. It wasn't until the administration's commission system was faced with a series of adverse Supreme Court decisions in 2004[17] that the Commission System was reviewed and amended by Congress and the Department of Defense. The military order stated that in view of the grave threat that terrorism posed to the continuity of "the operations of the United States Government", the armed forces would be needed in order to distrupt and capture alleged terrorists, and that given the danger and nature of international terrorism "it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[18]

This meant that many rules and prohibitions universally acknowledged within the legal systems of the US and the international community would be relaxed in order to ensure the safety of the American people. In response to criticism of his decision to foreground military

force and justice, the President said that,"After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got."[19] The order goes on to delegate to the Secretary of Defense, who is subordinate to the President, the responsibility of constructing the structure of the commissions – including the number of judges, rules of conduct for prosecution and defense counsel, jury procedures, rules of evidence and the appeals process. Although the Commissions were created two months after the 9/11 attacks, there was no provision within the president's Military Order that made availability of these commissions for detainees obligatory; rather it is under the discretion of the Executive Branch as to who would be eligible for trial. It was not until the middle of 2005 that any detainees, two British citizens and an Australian,[20] utilized the military commissions. Since then, only 10 detainees out of the thousands acknowledged to be held by the US government in military prisons such as Guantanamo Bay and Abu Ghraib have been brought before a Military Commission to be charged with a violation of the terror-related crimes or the laws of war. While creating a cursory legal procedure which is inevitably constructed in favor of the government's interest to continually detain those who it asserts it must, its lack of obligatory or automatic jurisdiction over the status of detainees has the dual effect of creating a smoke screen because the administration is able to say that procedures have been put in place yet not have to actually *use* the said procedures!

All members of the commission process (except for the current possibility for the accused to obtain civilian counsel) are ranked members of the armed forces, pledging their allegiance to the Commander in Chief. In contrast, the civilian courts are completely independent from the executive branch, yet as can be seen in District Court proceedings involving national security issues or the FISA court, independent tribunals are also able to

provide the same level of protection for classified information that Military Commissions purport to provide. This calls into question the extent that the accused can receive a fair and unbiased trial when most every official within the court is engaged in the same military operations meant to capture the classification of people that they are adjudicating. Subsequent to heavy pressure from the public, the media, and the Supreme Court in its decision of *Hamdan v. Rumsfeld* which established that the President's unilateral action was unconstitutional, the Congress passed the Military Commission Act of 2006. The Department of Defense, as required by the Military Commissions Act, has finally issued a comprehensive manual for the military commissions, which attempts to closely spell out valid regulations for the procedures of the tribunals. This Manual for the Military Commissions addresses many of the issues of the rights of the "unlawful enemy combatants" which were primarily left out of the President's initial order to create commissions. Nonetheless, there are still questions of the validity and independence of such a military commission system and the fact of its nonexistent use, which will be addressed within this paper.

The Civilian Courts (See Chart 2 for complete overview)

As James Madison famously put it, "We are a nation of laws, not of men".[21] This can clearly be seen when looking at the Bill of Rights and observing how these safeguards are used within the federal court system as checks against governmental power in favor of protecting the rights of the accused. All the safe guards for the criminally accused are in place to stem against the arbitrariness of government, and while only 10% of all criminal cases[22] ever utilize the entire gamut of all the stages available, due to various factors such as plea agreements and acquittals, the fact that such recourses are available to everyone ensures that the system is generally viewed as both legitimate and effective among the population.

American Article III (of the Constitution) courts have their foundations deeply rooted within the separation of powers doctrine. Enforcement of the laws is separated from their legislation as well as their interpretation and adjudication. Montesquieu, the purported muse of James Madison on the issue of Separation of Powers, has said that "there can be no liberty where the legislative and executive powers are united in the same person… or if the power of judging be not separated from the legislative and executive powers."[23] Thus this is the very life-blood of the juridical processes within the civilian courts. While the people's representatives may pass statutes on an almost infinite range, the judicial branch has the ability of judicial review to assess the Constitutionality of such a statute against the powers given to the Congress within the Constitution and the effect any law may have on the Constitutional rights of individuals subject to the statute. Once the law is created, it is then up to the law enforcement agencies, who are subsections of the executive branches of the federal and state governments, to enforce these laws whether through prevention or apprehension of offenders. It is up to the law enforcement agency and the prosecutorial wing of the executive government to compile all evidence proving the guilt of the accused in front of an unbiased judge or panel of jurors. It is then within the courts that both the government and the accused are given a fair chance to present their cases and it is ultimately up to the courts to ascertain the questions of fact and of law.

This three step process of legislation, enforcement and adjudication is a measured approach which tries to rationalize the law enforcement function in a way which to the utmost extant possible is emotionally neutral and primarily logical and systematic. All the separation of tasks ensures is that the best possible decisions are made, balancing the interests of the state to protect "life, liberty and property" and the maintenance of law and order against the individual's interest in preserving their own liberty and property rights.

Take for example the anti-terror law which makes it a federal offense to give material support to terrorists punishable by a maximum of life in prison or deportation proceedings.[24] That law defines the parameters of what a terrorist is and what material support can be defined as, and then it is up to the federal and state law enforcement entities to *constitutionally* find those individuals that fall into the statute's parameters. The enforcement agencies know that they cannot violate the Constitutional prohibitions against unreasonable search and seizure, cruel and unusual punishment or other revocations of an individual's rights within the territory of the United States no matter how guilty or heinous the individual they are pursuing may be, because when such treatment is brought up during trial these executive violations of individual rights may compromise the government's ability to prosecute the offender.

Once apprehension is in the prosecutorial phase, the person accused of providing terrorists material support must rebut the compiled evidence and witnesses which go toward proving that they violated the law. The jury, with the aide of a judge who will inform them of the technical legal aspects of the situation, will weigh the arguments of both sides and then come to a conclusion based on the logic of reasonable people. If the government succeeds in proving that the accused is in fact guilty of what they said they are, it will be based solely on the evidence that they provide and their rebuttals to evidence provided by the defense. Guilt within the Civilian court is not grounded on any other calculations outside of the information provided. (Courts are not pressured by political exegesis, or the demands of quotas issued by the executive branch…. etc)

The Constitution covers all persons: namely, citizens, immigrants, and all other aliens within the territory of the United States.[25] This blanket coverage ensures not only that every person (outside the immunity granted to certain foreign dignitaries) can be tried in a court for

violating American laws, but that they are also extended certain civil rights to ensure that the correct decision is made in regards to the question of guilt or innocence of the accused. All entrants within the American criminal courts[26] are entitled to a slew of rights, starting with the protections against self-incrimination and the right to an attorney which are available immediately after the a suspect is approached or apprehended by police. Once in custody, within a reasonable frame of time a detainee is formally charged with the violation of a crime and is scheduled for a trial before a jury of his peers. The defendant can choose any lawyer(s) which are qualified to practice in the district that he/she is being held, and if he cannot afford counsel, one will be provided at the expense of the government.[27]

Defendants are presumed innocent before proven guilty, which is reflected in the weighting of evidence against the prosecution; i.e. the burden of proof usually rests upon the prosecution to prove the guilt of the accused. The burden then switches to the defendant once the prosecution establishes a basis for which to assert the Accused's guilt. This presumption of innocence can also be discerned from the emphasis on swiftly bringing the case to trial[28] and allowing for the posting of bail until the date of the trial, instead of prolonged detention, which could be seen as an *a priori* punishment before a sentence of guilt. At any point during the Accused's detention, a writ of habeas corpus can be filed within the district in which they are being held in order to compel the government to justify its treatment of the accused. The 'Great Writ' whose origins date back hundreds of years to the time of King Edward I, can be utilized to compel the government to show the evidence it has against the detainee and/or for the accused to argue against their treatment before trial.

Once in trial the accused is entitled to the opportunity to be present during the proceedings in order to submit evidence in their favor, call their own witnesses and cross-

examine the witnesses of the prosecution. These rights are fundamental to hearings, tribunals and trials of any character because without such recourses, it could not be assured that both sides of the story could be heard. In regards to the composition of the court, the defendant is entitled to a speedy public trial, overseen by an impartial decision maker, whether before a panel of judges (such as in the Supreme Court or in Appellate Courts) or within courts of original jurisdiction before a jury of their peers.

The impartiality of the decisionmaker is important because if the Judge or members of the jury had some sort of personal involvement with the apprehension of the accused, or somehow stands to gain through their prosecution, then the validity of their judgment could be called into question. In order to ensure that no decision maker is biased during trial, both the prosecution and the defense has the ability to ask the members of jury several questions to ascertain their ability to hear the case without bias. Both the prosecution and defense has a number of preemptory challenges[29] which it can utilize to remove members of the jury which they feel may not be able to fairly try the case. Also judges are obligated to recuse themselves within cases that they feel they may encounter a conflict of interest. If judges fail to recuse themselves and it is later found out about a bias they held that might have informed their judgment, such a revelation would be grounds for a re-trial and the judge may be impeached or punished accordingly. All these safeguards emphasizes the premium that the Founding Fathers and latter legislatures up until the present day have put on ensuring that judicial proceedings are tried impartially, giving equal weight to the testimony of both the defense and prosecution.

Although the Constitution lacks an enumeration of specific rules of procedure and evidence which are required during judicial proceedings, the Supreme Court has adopted extensive rules to regulate how counsel can present their cases and what motions can be called

for objection.[30] The Federal Rules of Evidence proscribes the inclusion of hearsay evidence, meaning that evidence cannot enter within the record unless it is qualified by a number of factors.[31] It wouldn't be enough for the prosecution to use a witness that said that she knew the accused had materially supported a terrorist, such a witness would have to show why they're testimony should be admitted, whether that is through documentary evidence corroborating her testimony or other factors such as their physical proximity to the issue being testified on or their being an expert within that field. Prohibition of hearsay evidence is not just a safeguard for the accused, it is a tool to help the decisionmaker ferret out truth from lies and without valid evidentiary procedures the validity of any such a ruling would be called into question.

Finally once a fair trial is carried out and a sentence is issued, either party to the suit may appeal the ruling on many grounds. The appellate brief must assert what area of law the judge or jury erred on, and the appellate court rests on a narrower set of facts or law which the appellant will try to prove in order to reverse the decision. The appellate court is constituted of a fresh set of judges who have not seen or heard the case before, with the same rules for the recusation of judges still applying. Unlike trial courts, appellate courts do not have a jury, and focus exclusively on the transcript of the trial proceedings and the opening statements and questions and rebuttal statements of both the prosecution and the defense. The judges during the appeal assume that all issues of fact ascertained within the trial are correct, and if ruled otherwise, they may call for a new trial. Appellate courts protect both parties of the original suit from perceived biases that might have affected the trial proceedings, and ensures that procedural violations or legal mistakes are re-examined by a new group of people. If the case originates out of a state court, then the case may be appealed to the state appellate court, and then possibly to the State's Supreme Court before it is picked up by Federal District or Appellate Courts on questions

arising out of federal jurisdiction. On the Federal Level, all cases are entitled to one appeal, and then the Supreme Court may choose through a writ of certiorari to hear the case. Once a case has been heard and a final ruling is made, the defendant can never again be prosecuted for the same crime.

Military Courts-Martial (See Chart 2 for complete overview)

Modeled after the civilian court system, the Courts-Martial is a special tribunal which is used primarily to prosecute American military personnel and their co-dependents during training and deployment. While held completely within the military, these courts are governed by Congressional statutes called the Uniform Code of Military Justice (UCMJ) and after a round of military appeals, allows for recourse to be regularly sought within the civilian courts. The UCMJ spells out the parameters of the courts – from the composition of the judges, jury and appellate process -, as well as the crimes which can be adjudicated within its bounds and the rules of evidence and procedures during trial.

Efforts to codify a concise law of war (rules and laws for soldiers and those captured during battle) date back as far as the 17th century, when in 1621 King Gustavus Adolphus of Sweden released a comprehensive Articles of War "explaining the proper conduct for soldiers and the punishment for violations."[32] These codes proscribed death for soldiers that aided the enemy, and outlined other prohibitions such as the attack of hospitals, churches, schools, and innocent civilians. Our modern courts-martial system initially modeled itself after British precedents which evolved out of early articles of these war and tribunals of the 17th century.[33] While much of these early precedents and the modern UCMJ deals with the conduct of allied forces, the code also extends to "Prisoners of war in custody of the armed forces, and persons serving with or accompanying an armed force in the field [during time of war]."[34]

The procedures available for those alleged criminals under the UCMJ are as substantial and robust as the protections provided by the Constitution and statutes in the civilian system. The UCMJ has a provisions which prohibit those subject to the articles to be detained without there being probable cause that they violated one of the articles therein,[35] and then once in custody the detention authorities must make "immediate steps…to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."[36] The Courts-Martial attempts again to ensure the impartiality of the members of the court by prohibiting any judge or juror from attending if they had had a direct hand in detaining the individual.[37] These tribunals also provide for a presumption of innocence[38], right to counsel (whether that be a judge advocate, or civilian counsel)[39], and various protections other protections as seen on chart 2.

While Courts-Martials are quite similar in character to the civilian courts, they have many benefits which are optimal in war-time instances. The fact that all proceedings are governed from within the military ensures that classified information can be protected and if needed to prove points, expounded upon during closed session. Another advantage of the Courts-Martial (CM) is its compact size; with general CMs consisting of a military judge and a panel of 5 officers and special CMs of only a military judge and 3 officers. CMs can be convened anywhere, and are generally open to the public, but can be easily held in more controlled circumstances without extreme media attention and scrutiny. CMs can be held quickly, but not without affording ample time for the accused to cross-examine witnesses and make his/her case and also being allotted two levels of review and possible review by the Supreme Court.

Court-Martials on the other hand have a difference with civilian courts as far as the degree of separations of powers is concerned. While there is an objective disconnection between the UCMJ and the trial of an alleged offender, the fact that the Military is the same body who has an interest in prosecution of the accused and is also the body conducting the Accused's trial can be an issue, especially when CMs are being used to adjudicate entities that are not members of the American military, such as POWs or enemy combatants. This problem is ostensibly mitigated by the UCMJ provisions mentioned above which keep those officers who were directly involved with the capture or detention of the individual in question, but due to the hierarchal rank system employed within the Armed Forces and the psychological nature of being at war[40] may somehow skew the results of the members of the courts who are supposed to be objective participants.

The courts-martial system seems to lie in the middle ground between civilian courts and the Bush tribunal system, and may be seen as an adequate substitute if one were to be sought. Courts-Martials could be easily extended to the class of individuals now being processed under the Bush Commissions by an amendment under the UCMJ. Such an amendment may create a slightly different procedure for those classified as enemy combatants due to issues of national security without compromising the "the necessary judicial guarantees" recognized by "all civilized nations."

Three-Pronged Military Tribunal System (See Chart 2 for complete overview)

The President's Military Tribunal system has three components, Combatant Status Review Tribunals (CSRTs), Administrative Review Boards (ARBs), and Military Commissions (MCs). The first two bodies are guaranteed administrative procedures, whose sole purpose is to ascertain whether the detainee is an unlawful enemy combatant through an initial CSRT hearing,

and then whether there is still a continued justification to detain the individual through annual ARB proceedings. Both of these administrative procedures were codified by Congress through the Detainee Treatment Act of 2005, which ordered the Department of Defense to issue rules of procedure for both processes, providing for a "periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee... [and] the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttal presumption in favor of the Government's evidence."[41] The latter Military Commissions are much closer in style and judicial procedure to the traditional criminal justice apparatus[42], but MCs are only available to enemy combatants, and only then upon a determination by a "Designated Civilian Official"[43] that such a detainee is entitled to a MC.

This, three-step tiered approach to dealing with the adjudication of detainees is quite informal and discretionary, with results invariably favoring the detention authority over the detainee.[44] The existence of the CSRTs and ARBs has superseded the use of even a Military Commission – which all detainees are not entitled to. Rather, subsequent to an enemy combatant determination, detainees are subjected to ongoing interrogations.

Upon entering into the custody of the Department of Defense, this class of detainees must be determined to be enemy combatants in order to justify their continued detention. The "enemy combatant" designation, as defined by the DoD order establishing Combatant Status Review Tribunals, refers to "individual[s] who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[45] This definition is broad enough to cover many groups outside of the Taliban and al Qaeda by using qualifying statements such as "associated forces" as well as including the US's "coalition partners" within the designation. By doing so, any group may be

pegged under the Unlawful Enemy Combatant classification regardless of whether they though these groups pose no direct threat to America or connection to the September 11th attacks, ranging from the national separatist groups of Spain (ETA) or Palestine (Hamas) to splinter groups opposed to the Communist regime in western China.

Those captured by the military or transferred to the military under the auspicious of the War on Terror, will have been previously designated as enemy combatants prior to the CSRT, thus this is why it is called a "Combatant Status *Review* Tribunal." The purpose of this tribunal is for the detainee to rebut his enemy combatant status, and under the DoD order codifying CSRTs, all detainees are assigned a military officer who shall act as their personal representative during the procedure. The detainee has no opportunity to choose their counsel, but is assigned one, and the officer must have "proper security clearance" in order to be eligible for assignment to a detainee. It is unclear how many officers are available for the CSRT process and subsequently whether such personal representatives end up representing large numbers of detainees. Once a detainee is assigned this counsel, the personal representative (PR) is "afforded the opportunity to review any reasonably available information in the possession of the DoD that may be relevant to a determination of the detainee's designation as an enemy combatant."[46]

The use of classified information may be pervasive within these proceedings, and when used during the trial only the detainee's counsel would be permitted to be present. Detainees only receive unclassified summaries of the charges and evidence against them, while the PR is privy to all the DoD's information. One scathing problem with the evidentiary part of the CSRT system is that the PR is limited only to information *provided* him by the DoD, and given the nature of detainee's capture, there may not be any opportunity for outside sources of information to be used. It may be reasonably inferred that if the DoD had made the initial determination to

capture an individual, they may only document the information justifying their initial choice to detain.

Thirty days after a detainee is assigned a representative, the members of the CSRTs are appointed by the designated "Convening Authority"[47], and consist of three commissioned officers of the US Armed Forces. There is no provision to ensure that the judges have any legal qualifications of any sort, them being commissioned officers is qualification enough. The Tribunal is also comprised of a senior officer, who acts as President of the tribunal, and a judge-advocate who acts as the Recorder.

The CSRT's rules of procedure allow for the detainee to testify on his behalf and cross-examine witnesses, but when it comes to the accused to call witness in his defense, the tribunal must assess the "reasonable availability" of such a witness. This provision goes on to say that if the witness is held by the US Armed Forces, "they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations."[48] There is no provision for the detainee to contend such a determination; it is merely an asymmetrical determination by the detaining authority. The Rules go on to state that the Tribunal is "not bound by the rules of evidence such would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful…At the discretion of the Tribunal, for example, it may consider hearsay evidence."[49]

During the deliberation stage of the tribunal, the three judges' legal standard is defined as a "preponderance of evidence". This is quite a low level of review in view of the anticipated ramifications of a ruling against the detainee. If found to be an enemy combatant, detainees may face an indefinite period of detention within an atmosphere of pervasive interrogation and isolation from the outside world, friends and family. It has been one of universally acknowledged

pillars of criminal justice adhered to by all Western democracies, and especially championed by American Jurisprudence over the centuries, that the legal standard required for a adjudicatory body to find a person guilty of criminal charges is the "*beyond a reasonable doubt"* standard.[50] Within the standard of "preponderance of evidence", the tribunal's panel could even possibly entertain *reasonable doubts* as to the enemy combatant status of the detainee and still rule against him. This is quite unconscionable in light of the abridgement of liberty which precedes such a low legal standard.

There is no internal appeals process for the CSRT. Once the CSRT makes a ruling, it is termed a "recommendation" which is then forwarded to a Staff Judge to be checked for legal validity. Finally, the recommendation of the tribunal is referred to the Convening Authority for a final decision, and he has the sole authority to implement the tribunal's decision, order a re-trial or to order some other action. This flies in the face of the separation of powers doctrine, and is a pale comparison to even the appeals process afforded military courts-martials which are conducted almost entirely within the control of the Armed Forces. Although the order requires that the detainee be informed of his right to file a writ of habeas corpus within the Courts of the United States, such provisions have been attempted to be superseded by statutory provisions passed by Congress.

The Military Commissions Act amended the Habeas Corpus Statute in order to prevent any court from hearing any motion pertaining to the detention "filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."[51] A habeas corpus appeal allows the accused to appeal the validity of their treatment, even while they are in the middle of a pending suit, but the Military Commission Act proscribes the detainee's ability to

appeal only after the *final* determination of the Convening Authority has been filed. The DTA limits the court's scope of review to only the question of whether the CSRT's decision was "consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals",[52] which as shown above are incredibly lax.

It was necessary to review the CSRT's substantive procedures closely, because the question of whether a detainee is classified as an enemy combatant is the paramount concern of all subsequent treatment of the detained. Once termed an enemy combatant, the detainee may not ever have another chance to refute his classification. Recently the DoD has implemented an annual Administrative Review, in order to assess the detainees' status in light of the passage of time, but ARBs are just as cursory and limited as CSRT, and by no means constitute a trial.

Although objectively Administrative Review Boards may allow for the release of detainees, the results of hundreds of ARBs for over three years have purportedly yielded only thirteen decisions of release in 2005, at least 200 hundred detainees being transferred to foreign prisons, and the overall preponderance of detainees still being held.[53] ARBs hinge its assessment of the appropriate action to take against detainees classified as enemy combatants through an analysis of whether the detainees "represent a continued threat to the US or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters, *and* whether there are other factors that could form the basis for continued detention (e.g. the enemy combatant's intelligence value and any law enforcement interest in the detainee)."[54] Thus according to the ARB's own procedural memorandum, the annual reviews are not reviewing whether the CSRTs were right in designating whether the detainee is an enemy combatant and thus "properly detained", but what *value* the detainee has for ongoing operations. It is needless to say that the ARBs are not a real opportunity for the detainee to prove his "innocence", because the CSRT's

ruling is deemed to be a conclusive determination, and from that point forward it is taken for granted that the detainee *is* an enemy combatant.

The CSRT's purpose is merely to "review" whether the detainee was properly classified and therefore no sentence with a clear prison term is assigned, because they are not being formally charged with a crime, but rather it's the DoD's *classification* which is being reviewed. While there is a Military Commission system, which is a much more robust replica of a trial, it has been used very seldom and there is no obligation that enemy combatants must have recourse in them. Military Commissions only have jurisdiction when they have (1) been convened by an official empowered to do so (i.e. the President or Secretary of Defense), and (2) when a person must is *referred* to the Commissions through specific charges laid against them.[55] It is irrelevant whether the MCs heretofore created by the MCA and DoD regulations provide substantive procedures which ensure the presumption of innocence, cross-examination of witnesses, and so on, because it is not being used. It may be advisable to analyze Military Commissions for their validity in view of "the necessary judicial guarantees" referred to by the MCA and Geneva Conventions, but the point is moot so long as the existence of MCs is merely a safeguard against criticism. The President doesn't need to formally charge these detainees, because it is so much easier to just utilize the CSRT and ARB process and proclaim that a semblance of legality has been preserved.

Thus after a CSRT determination, the "enemy combatant" has only the ARBs to fall back on. It is nowhere acknowledged within the circles of jurisprudence that a person should be found guilty without ever being sentenced, and then be held indefinitely pending their ability to provide the detention authorities information that may have questionable value due to the detainee's distance from any presumed terror connections he may have. Some may argue that the

classification of people who qualify to be enemy combatants don't deserve substantive due process, with full judicial protections, and this may be true if it could be made sure that that person is in fact an enemy combatant. It is logically contradictory that detainees would not be afforded full judicial trials until *after* they were deemed to be enemy combatants and been charged with violating the Laws of War and US anti-terror laws, but not during the proceeding (CSRT) which qualifies them as an enemy combatant. By excluding the question of the detainee's EC status from the Military Commission process, the administration has created a system which allows it to have the *choice* of either holding people indefinitely in order to milk them of their intelligence knowledge *or* prosecuting the alleged terrorist for violating crimes. It is possible that detainees could be held after the CSRT for years, and then be charged and brought before a Military Commission, but it is equally possible that they would never be released by ARB, or merely transferred to the custody of a regime who gave even less guarantees to the accused.

Presumably, the safeguard provisions of the civil criminal justice system and even the military system under the UCMJ exist because they are recognized as *indispensable by civilized peoples,'* it follows that since the military tribunal system lack these safeguards, it does not afford the necessary judicial procedures required by either the US Constitution or the Geneva Conventions. The Bush administration has decided to fight the war on terror, with all of our assets, including its military, using all deliberate force to kill alleged terrorists, but when brought into military custody the President refuses to treat those captured as Prisoners Of War or as criminals. The Military Tribunal legal complex is an overly complicated and convoluted system, which skews its rules and procedures to favor the government's agenda instead of the establishment of truth and justice. It is unclear whether the proper recourse for these maladies, is

referral of alleged “unlawful enemy combatants” into Article III courts, Courts-martials, or rather if an revision of the Military Commissions to become all encompassing and obligatory would be a better choice, but the current use of administrative hearings to justify pre-emptive punishment is clearly an unnecessarily arbitrary and punitive use of executive power.

CHARTS

CHART 1: TERRORIST INCIDENTS: 1968-9/10/2001 vs. Post-9/11 to Present

Terrorist Incidents > by Month		**Range:** 01/01/1968 - 09/10/2001	
Month	**Incidents**	**Injuries**	**Fatalities**
January	1118	2788	1349
February	1113	3362	785
March	1236	9654	1345
April	1069	3774	1111
May	982	1760	662
June	950	2317	1026
July	1114	2948	803
August	1193	8023	1343
September	1039	2793	1151
October	1042	2398	1030
November	903	2264	1076

Terrorist Incidents > by Month		**Range:** 09/12/2001 - 06/04/2007	
Month	**Incidents**	**Injuries**	**Fatalities**
January	1916	4937	2430
February	1809	6082	3583
March	1977	7729	3668
April	1731	5894	2841
May	1537	5356	2708
June	1660	4621	2587
July	1840	6315	3222
August	1718	6640	2957
September	1542	6110	2752
October	1801	6014	3152
November	1706	5556	2642

(Charts generated with the analytic report tool from The Terrorism Knowledge Base; funded by federally funded MIPT organization, that brings together all publicly available data regarding terrorism: www.tkb.org)

Chart 2: Judicial Guarantees and Their Relation to Article 3 Courts and the Tribunal Systems

Judicial Guarantee	*Civilian Courts*	*Courts-Martial*	*Combatant Status Review Tribunal (CSRT)*	*Adminstrative Review Board (ARB)*	*Military Commission (MC)*
Right to Notice of Charges	√ - *Amendment VI*	√ - *832. ART. 32.(b); 835. ART. 35 UCMJ*	X They are not formally charged with a crime.	X ARBs do not evaluate guilt or innocence	407, 601, 602 - Rules for Military Commissions (R.M.C.)
Right to Habeas Corpus	√ - *Writ of Habeas Corpus if not alleged enemy combatant*	√- *Writ of Habeas Corpus; 833. ART. 33* UCMJ	*X Amend. to Habeas Corpus Statute - 28 USCS*§2241	*X Amend. to Habeas Corpus Statute - 28 USCS*§2241	*X Amend. to Habeas Corpus Statute - 28 USCS*§2241
Right to Counsel	√ - *Amendment VI*	√ *832. ART. 32(b); 838. ART. 38(b) UCMJ*	√ Appointed "Personal Representative". X Not given a choice of independent counsel	√ Appointed "Personal Representative". X Not given a choice of independent counsel	√ Preamble - (1)(f)(2) R.M.C.
Presumption of Innocence	√ - *Amendment V, due process under the law*	√ - *851. ART. 51.(c) (1) UCMJ*	*X Indefinate detention suffered upon classification as 'enemy combatant'. CSRTs are merely reviews of DoD classification.*	*X Indefinate detention suffered upon classification as 'enemy combatant'*	*X Indefinate detention suffered upon classification as 'enemy combatant'*
Right to an Impartial Decision-maker	√ - *Amedment V, due process under the law*	√ *-806. ART. 6.(c); 826. ART. 26 842. ART. 42 UCMJ*	*X Same entity that has expressed interest in the detention is also the adjudicator (President, Sec. DoD)*	*X Same entity that has expressed interest in the detention is also the adjudicator (President, Sec. DoD)*	*X Same entity that has expressed interest in the detention is also the adjudicator (President, Sec. DoD)*
Right to a speedy, public trial	√ - *Amedment V*	√ *833. ART. 33. UCMJ*	√ CSRT within 30 days of apprehension. X Completely held in secret.	X Annual Review	*X No Vested Right to Commissions. Only DoD can convene MC*
Right to a trial by jury of one's peers	√ - *Amendment VII*	√ *825. ART. 25 UCMJ*	*X Trial by American Military Personnel*	*X Trial by American Military Personnel*	*X Trial by American Military Personnel*
Cross-Examine Witnesses and call Witnesses	√ - *Amendment VI*	√ - *832 ART. 32(b) (c); 846. ART. 46 UCMJ*	X only by CSRT's determination that witness is reasonablly avaliable.	X No witnesses can be called	√ *Yes. X Witnesses may be witheld if also in detention*
Right to Appeal	√ - *Amendment V - due process*	√ - *860. ART. 60; 862. ART. 62; 864. ART. 64; 866. ART. 66; 867. ART. 67; 867a. ART. 67a UCMJ*	X No Appeals Process	X No Appeals Process	√ Chapter XII R.M.C.
No Unreasonable Search and Seizure	√- *Amendment IV*	X No Applicable Procedure	X No Applicable Procedure	X No Applicable Procedure	*X No Applicable Procedure*
No Cruel and Unusual Punishment	√ - *Amendment VIII*	√ - *855. ART. 55; 856. ART. 56. UCMJ*	X Without charge, detainees are held indefinitely. Subjected to ongoing interrogation	X Without charge, detainees are held indefinitely. Subjected to ongoing interrogation.	√ Rules 104, 304 R.M.C.
No Double Jeopardy	√ - *Amendment V*	√ - *844. ART. 44 UCMJ*	X No Applicable Procedure	X No Applicable Procedure	*X No Applicable Procedure*
Separation of Powers	High	*Moderate*	Very Low	Very Low	*Low*
Legal Standard for Proving Guilt of the Accused	Beyond a Reasonable Doubt	Beyond a Reasonable Doubt	Proponderence of Evidence	Threat Assessment and Intelligence Value of the Detainee	Beyond a Reasonable Doubt

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[25] The due process requirements of the 5th and 14th Amendments are addressed to the benefit of persons, not solely citizens.

[26] While most of this discussion is focused on the rights and procedures afforded to individuals within a criminal context, much of the assertions can also apply to civil courts – such as chancery, equity, etc. – as well.

[27] *Powell v. Alabama*, 287 U.S. 45 (1932).; *Gideon v. Wainwright*, 372 U.S. 335 (1963).; *Escobedo v. Illinois*, 378 U.S. 478 (1964).

[28] US Constitution. 6th Amendment

[29] Actual number varies from state to state. Federal Cases allow for X preemptory challenges. Preemptory Challenges must not be based solely on race, religion, ethnicity or gender.

[30] "The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals. The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule is to become effective. Congress has the right to amend or otherwise change the rules as submitted." 28 U.S.C. §§ 2072 et,. seq.

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[36] §810 UCMJ

[37] §825(d)(1)&(2), (e); §826(d)&(e) UCMJ

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[41] Detainee Treatment Act of 2005, §1005(a)(3) & §1005(e)(2)(C)(i)

[42] Due in part to the DoD's issuance of Manual for Military Commissions as required by the Military Commissions Act of 2006.

[43] Deputy Secretary of Defense Gordon R. England is the current Designated Civilian Authority (DCO) designated to oversee the process of detainees in Guantanamo Bay during CSRTs, ARBs and Military Commissions. The DCO works concurrently with the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC), headed by Rear Adm. James M. McGarrah.

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[51] §7 Military Commissions Act of 2006, PUBLIC LAW 109–366, 120 STAT. 2600. (2006)

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[53] Based on two releases of information from DoD. On 6 Feb 2006, DoD reported that between the dates of Dec 14 2004 and Dec 23 2004, the DCO acted upon 463 recommendations of Administrative Review Boards (ARB), leading to the 14 releases (3%), 120 transfers (26%), and 329 continued detentions (71%) – DoD news release # 124-06 < http://www.defenselink.mil/releases/release.aspx?releaseid=9302>. On 6 March 2007, the DoD released a report on the second year of ARBs for detainees reported on in 2006. The DCO reportedly acted on the recommendations of 328 ARBs held between Jan. and Dec. of 2006, which yielded in the decision to transfer 55 detainees (17%), and to continue to hold 273(83%). – DoD news release # 253-07 < http://www.defenselink.mil/releases/release.aspx?releaseid=10582>. This newest report only deals with the results 2nd year ARBs, therefore the total number of detainees is reported to be approximately 383, with 80 detainees awaiting transfer to foreign custody.

[54] Emphasis Added. "Administrative Review of the Detention of Enemy Combatants at U.S. Naval Base Guantanamo Bay, Cuba." §1 Introduction, (c).

[55] United States of America. Department of Defense. Department of Justice. Manual For Military Commissions, Rule 201. (b)(3), (2007).