

USAWC STRATEGY RESEARCH PROJECT

GUANTANAMO BAY - UNDERMINING THE GLOBAL WAR ON TERROR

by

Colonel Gerard P. Fogarty, AM
Australian Army

Doctor Robert Murphy
Project Advisor

This SRP is submitted in partial fulfillment of the requirements of the Master of Strategic Studies Degree. The U.S. Army War College is accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools, 3624 Market Street, Philadelphia, PA 19104, (215) 662-5606. The Commission on Higher Education is an institutional accrediting agency recognized by the U.S. Secretary of Education and the Council for Higher Education Accreditation.

The views expressed in this student academic research paper are those of the author and do not reflect the official policy or position of the Department of the Army, Department of Defense, or the U.S. Government.

U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

Report Documentation Page

Form Approved
OMB No. 0704-0188

Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

| | | | | | |
|---|------------------------------------|-------------------------------------|----------------------------|--|---------------------------------|
| 1. REPORT DATE 18 MAR 2005 | | 2. REPORT TYPE | | 3. DATES COVERED - | |
| 4. TITLE AND SUBTITLE Guantanamo Bay Undermining the Global War on Terror | | | | 5a. CONTRACT NUMBER | |
| | | | | 5b. GRANT NUMBER | |
| | | | | 5c. PROGRAM ELEMENT NUMBER | |
| 6. AUTHOR(S) Gerard Fogarty | | | | 5d. PROJECT NUMBER | |
| | | | | 5e. TASK NUMBER | |
| | | | | 5f. WORK UNIT NUMBER | |
| 7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) U.S. Army War College, Carlisle Barracks, Carlisle, PA, 17013-5050 | | | | 8. PERFORMING ORGANIZATION REPORT NUMBER | |
| 9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES) | | | | 10. SPONSOR/MONITOR'S ACRONYM(S) | |
| | | | | 11. SPONSOR/MONITOR'S REPORT NUMBER(S) | |
| 12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited | | | | | |
| 13. SUPPLEMENTARY NOTES | | | | | |
| 14. ABSTRACT See attached. | | | | | |
| 15. SUBJECT TERMS | | | | | |
| 16. SECURITY CLASSIFICATION OF: | | | 17. LIMITATION OF ABSTRACT | 18. NUMBER OF PAGES 34 | 19a. NAME OF RESPONSIBLE PERSON |
| a. REPORT unclassified | b. ABSTRACT unclassified | c. THIS PAGE unclassified | | | |

ABSTRACT

AUTHOR: Colonel Gerard P. Fogarty

TITLE: Guantanamo Bay - Undermining The Global War On Terror

FORMAT: Strategy Research Project

DATE: 18 March 2005 PAGES: 36 CLASSIFICATION: Unclassified

Following 9/11, the US Administration invoked extraordinary wartime powers to establish a new forward-leaning system of military justice that it hoped would match a very different type of conflict. As the Administration sought to apply those powers in the detention and trial of what it termed 'unlawful combatants' on the US naval base at Guantanamo Bay, Cuba, it became mired in problems that it is still struggling to solve. Guantanamo Bay detention operations have produced operational benefits in the Global War on Terror (GWOT), but they have also generated a series of cascading problems for the Administration: angry foreign allies, a tarnishing of America's image and declining cooperation in the GWOT. This paper outlines the competing positions on the legal status of the detainees and concludes that in addition to undermining the rule of law, the consequences of the Administration's new system of military justice is to fuel global anti-Americanism, reduce cooperation and support for the GWOT and to deny the US the moral high ground it needs to promote international human rights in the future.

The attacks against the US on 9/11 were horrific and it is in the interest of all civilized nations that the perpetrators be tried and punished, but long-held US values on human rights must outweigh its desire for retribution. This paper recommends conducting tribunals in accordance with the Geneva Conventions to establish the Prisoner of War status of the detainees and then moving the trials of alleged war criminals into the international arena. A hybrid US/UN international tribunal similar to the international courts established in Sierra Leone and East Timor in 2000 is proposed. The paper argues that such action would recapture much needed international legitimacy for the Administration, enabling it to generate greater diplomatic space within which to harness broader cooperation in the GWOT. Moreover, the paper argues that such action is needed not just because it is the right thing to do, but because it is in the nation's and the world community's long-term interests to do so.

TABLE OF CONTENTS

ABSTRACT..... iii

GUANTANAMO BAY - UNDERMINING THE GLOBAL WAR ON TERROR 1

WHY THE NEED TO DETAIN AT GUANTANAMO BAY?2

LAWFUL OR UNLAWFUL COMBATANTS?3

 UNLAWFUL COMBATANTS.....3

 THE OPPOSING VIEW.....5

DUE PROCESS PROTECTIONS6

 MILITARY COMMISSIONS6

 THE OPPOSING VIEW.....8

THE CONSEQUENCES OF THE ADMINISTRATION'S ACTIONS9

 OPERATIONAL BENEFITS9

 UNDERMINING US INFLUENCE AND EFFECTIVENESS10

 UNDERMINING THE COALITION11

A MODIFIED MEANS12

CONCLUSION13

ENDNOTES 15

BIBLIOGRAPHY23

GUANTANAMO BAY - UNDERMINING THE GLOBAL WAR ON TERROR

The basic proposition here is that somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans, men, women and children, is not a lawful combatant. They don't deserve to be treated as a prisoner of war. They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process... [T]hey will have a fair trial, but it'll be under the procedures of a military tribunal... We think [it] guarantees that we'll have the kind of treatment of these individuals that we believe they deserve.¹

—Vice President Dick Cheney (14 Nov 2001)

Prosecution of the war against terror has resulted in the detention by the US of at least 650 citizens from over 43 countries² at military detention facilities on the US naval base at Guantanamo Bay, Cuba. Although the Bush Administration has held firm to the position outlined by the Vice President over three years ago, the legality of this position continues to elicit significant worldwide commentary and, most recently, the interest of the US Supreme Court.³ While the Administration's position has a number of prominent defenders,⁴ much international expert opinion has weighed in on the other side of the debate. Some of this opinion has been particularly critical. Justice Richard Goldstone,⁵ for example, stated in a BBC Interview in late 2003 that "a future American President will have to apologize for Guantanamo".⁶ The question of how to deal with the detainees in the on-going GWOT is, however, an extremely difficult issue. The issue has not only generated worldwide commentary, but deep rifts within the Administration itself.⁷ Following 9/11, the Administration invoked extraordinary wartime powers to establish a new system of military justice that would match a very different type of conflict. As the Administration sought to apply those powers it became mired in problems that it is still struggling to solve.

In this paper, the competing positions on the legal status of the detainees are assessed. First, the paper outlines why Guantanamo Bay was chosen as a location for detainee operations. It then outlines the competing positions on the Prisoner of War (POW) status of the detainees and the competing views on the due process protections that should be provided detainees charged with war crimes. The paper then discusses the wider effects the Administration's policies in Guantanamo Bay are having on the GWOT. The paper concludes with recommendations for an alternative approach to deal with the detainees. The recommended approach outlined in this paper aims to regain the initiative for the Administration.

It seeks to recapture much needed international legitimacy, thereby creating greater 'diplomatic space' within which opportunities to harness broader international support and involvement in the GWOT can be pursued.

WHY THE NEED TO DETAIN AT GUANTANAMO BAY?

The US and its coalition partners remain at war against al Qaida and its affiliates, both in Afghanistan and in further operations around the world. Since Usama bin Laden declared war on the US in 1996, al Qaida and its affiliates have launched repeated attacks that have killed thousands of innocent Americans and hundreds of civilians from other countries.⁸ The Administration states that the law of armed conflict governs what it terms 'the war between the US and al Qaida' and therefore establishes the rules for detention of enemy combatants.⁹ Interestingly, however, the US Congress has not formally declared war. Instead, the President has authorized the detention, treatment and trial of non-citizens in the GWOT under a Military Order¹⁰ derived from the constitutional authority vested in his position as the President and Commander in Chief of the Armed Forces of the US. In order to protect the US and its citizens, and for the effective conduct of military operations to prevent further terrorist attacks, the Administration states that it is necessary to detain certain individuals to prevent them from continuing to fight and, subsequently, to try those who violate the laws of war.¹¹

A leaked classified report prepared by Defense lawyers for Secretary Rumsfeld in 2003, appears to substantiate why Guantanamo Bay was preferred by the Administration as the location to detain individuals in the GWOT. The report cited the long-held view of the legal 'advantages' Guantanamo Bay offers the Administration due to its falling outside the jurisdiction of US Courts.¹² The legal advantages lie principally in the areas of removing detainee rights to question in US Courts the legality of their detention and to facilitate permissive interrogation techniques, which would otherwise be constrained by US Statutes. The leaked report was the outcome of a working group of Executive Branch lawyers appointed by the General Counsel of the Department of Defense to address, inter alia, the legal constraints on the interrogation of persons detained by the US.¹³

Some critics have linked the permissiveness of the legal interpretation for interrogation at Guantanamo that underpinned Secretary Rumsfeld's approval of 24 specific interrogation techniques at Guantanamo, including 'significantly increasing the fear level in a detainee', to abuses that unfolded late in 2003 at Abu Ghraib.¹⁴ The Administration has denied such a link despite the Department of Defense's investigation into Abu Ghraib that revealed that some of the techniques authorized for 'unlawful combatants' in Guantanamo Bay had been used in

Iraq.¹⁵ The recent release of Seymour Hersh's book 'Chain of Command: The Road from 9/11 to Abu Ghraib', which attributes the Abu Ghraib abuse to the Administration's interrogation policies in Guantanamo, continues to fuel the debate. Hersh's theory about Guantanamo and Abu Ghraib resonates with an increasingly critical domestic and international audience, and only lends credence to the claims of torture by the International Committee of the Red Cross¹⁶ and four former British detainees who have sued Secretary Rumsfeld and ten others in the military chain of command for mistreatment at Guantanamo.¹⁷

The Administration argued before the US Supreme Court in June 2004 its position that Guantanamo Bay lies outside the jurisdiction of US Courts. The Administration lost. The Supreme Court ruled that US Law extends to aliens detained by the US military overseas, outside the sovereign borders of the US.¹⁸ The ruling means that foreign detainees have the right to use a US Court to question the legality of their imprisonment, even though they are being held outside of the country. This finding impacts on all US detention facilities, not just Guantanamo Bay. Many critics advocate that Guantanamo is the best-known detention facility, but that there are others operated by the Administration in Afghanistan and elsewhere.¹⁹

LAWFUL OR UNLAWFUL COMBATANTS?

UNLAWFUL COMBATANTS

The official US position is that the detainees do not meet the criteria of legal combatants as outlined in the 1949 Geneva Conventions and are therefore 'unlawful combatants' not entitled to POW status and other privileges under the Geneva Conventions.²⁰ The detainees are not being treated as common criminals to be tried in civil courts as has previously been the case with terrorists in the US because criminal law is too weak a weapon.²¹ Instead, the detainees are being treated as members of a military force, either al Qaeda or the Taliban, and as combatants in an armed conflict against the US. Secretary Rumsfeld has advised that "... the detainees are not being labeled as prisoners of war because they did not engage in warfare according to the precepts of the Geneva Convention – they hide weapons, do not wear uniforms and try to blur the line between combatant and non-combatant".²² One of Rumsfeld's legal advisers, Ruth Wedgewood, adds that the detainees are not covered by the Geneva Conventions because they are not fighting for a state and that there has never been a recognized right to make war on the part of private groups.²³

The Administration has to date not differentiated between al Qaeda or Taliban detainees in its position that the detainees are unlawful combatants. Additionally, it has advocated from as early as 2002 that no doubt exists as to the status of each individual detainee.²⁴ The

Administration also advocates that under the law of armed conflict the detainees can be held at Guantanamo Bay until the conclusion of the war against terror²⁵ and without the full-dress procedure of criminal trials.²⁶ Detainees, therefore, have been held in Guantanamo since January 2002 without charges;²⁷ access to lawyers or, until recently when the Supreme Court intervened, the right to challenge the legality of their detention.

The Administration announced in June 2004 the release of 26 detainees after an internal legal review conducted by Pentagon lawyers in Guantanamo Bay determined that the individuals had been detained wrongly for the past two years.²⁸ The timing of this announcement was unfortunate for the Administration since it immediately preceded the Supreme Court hearing at which the Administration argued that detainee cases were being properly reviewed. Critics launched on this fact suspecting the Administration was releasing some individuals before the Supreme Court case in an attempt to demonstrate to the Court that it was reviewing the individual status of detainees.²⁹ More recently, the Administration announced that it has commenced reviewing the status of all detainees before an administrative tribunal.³⁰ While the intent of the internal review conducted early in 2004 may be debatable, the fact is that as a result of the June 2004 Supreme Court ruling the Administration is now reviewing the individual cases of all detainees.

The Administration announced in September 2004 the format for these reviews. The first is called a 'Combatant Status Review Tribunal', which aims to determine whether each detainee meets the criteria of an enemy combatant. The second is called a 'Detainee Administrative Review', which is an annual review to determine the need to continue to detain the unlawful combatant. Following this review a board will determine whether the detainee should be released, transferred or continue to be detained.³¹ As of 2 November 2004, 295 'Combatant Status Review Tribunals' have been conducted. Only one detainee was determined not to be an enemy combatant and was released.³² But once again, the Administration's procedures have attracted the attention of the US Courts. A Federal District Court Judge ruled on 8 November 2004 that the Administration must treat the detainees as POWs unless they appear before a special tribunal described in Article 5 of the Third Geneva Convention that determines they are not. The Judge ruled that the 'Combatant Status Review Tribunals' do not satisfy the Geneva Convention and are therefore insufficient to deny POW status.³³

The Administration has stated that despite its determination that the detainees are unlawful combatants, it has treated them humanely at all times and provided privileges similar to those that POWs are entitled to under the Geneva Conventions.³⁴ The principal area of difference between how an 'unlawful combatant' and a POW must be treated lies in more

permissible interrogation methods and a reduced entitlement to various due process provisions. POW status under the Geneva Convention prohibits various methods of interrogation, many of which have been authorized by the Administration for use at Guantanamo Bay, and demands a much higher level of due process protections than that which the Administration has planned for detainees charged with war crimes.³⁵ POW status demands the same due process protections, for example, that a US soldier would receive under a Courts-Martial proceeding.

THE OPPOSING VIEW

It has been reported, that in the days following the President's determination that the Geneva Conventions would not apply to detainees in the GWOT, Secretary Powell, supported by Secretary Rumsfeld and also the Chairman of the Joint Chiefs of Staff, General Myers, asked the President to reconsider applying POW status to the Taliban fighters.³⁶ Secretary Powell, and a wide-range of critics, believed that since the Taliban fighters were members of the regular armed forces of the de facto Government of Afghanistan, they met the criteria for POW status as outlined in the Geneva Conventions.³⁷ Secretary Powell was particularly concerned about the increased risk US troops would face in Afghanistan and future conflicts if the Administration disavowed the Geneva Conventions.³⁸ Amongst other things, POW status would entitle detainees to 'humane' treatment during interrogation and different procedural and evidentiary rights³⁹ to that which the Administration has established for its Military Commissions.⁴⁰

Secretary Powell's view about the POW status of the Taliban fighters is shared by many US and international experts⁴¹, including the UN.⁴² These critics also argue that any Al Qaeda detainees, who were acting as militia or volunteer corps members that formed part of the Taliban armed forces, are also entitled to POW status.⁴³ Moreover, even if the al Qaeda members do not qualify as members of the Taliban armed forces or as members of its integral militia, they may still qualify for POW status under the Geneva Conventions if they were part of an independent militia and meet the criteria⁴⁴ outlined in the Conventions.⁴⁵ Regardless, as the critics point out, the Geneva Convention and US Military Regulations that precede 9/11⁴⁶ require findings by a competent tribunal before detainees are deprived of POW status.⁴⁷ As discussed, tribunals are only just being convened by the Administration, but have been ruled by a Federal District Court Judge as insufficient to deny POW status.

DUE PROCESS PROTECTIONS

MILITARY COMMISSIONS

In the on-going war against terror, the Administration advocates that US civic ideals should not frustrate an effective defense.⁴⁸ To overcome the limitations of US criminal law, for example, and in keeping with the detainees' status as unlawful combatants, the Administration has established Military Commissions⁴⁹ to try designated detainees.⁵⁰ Military Commissions are a type of US military tribunal not used since WWII for the trial of spies, saboteurs and war criminals. These Commissions are applicable only to non-US citizens and are designed to protect the individual rights of the accused while also safeguarding classified and sensitive information used as evidence in the proceedings.⁵¹ The Administration outlines that the Commissions are recognized by the Geneva Conventions and have been used by many countries in the past.⁵² Research revealed that Egypt is a country that has used Military Commissions in the past. However, when Egypt did use this form of tribunal in 2000 it was openly rebuked in the US State Department's yearly report on human rights abuses. The State Department report, which was presented to Congress, stated that this type of military court deprived hundreds of civilian defendants of their constitutional rights.⁵³

The Administration's 'forward-leaning' system of justice for detainees charged with war crimes was crafted by a small group of young lawyers who were settled into important posts in September 2001 at the White House, the Justice Department and other agencies. The work was conducted under the direction of the Vice President and coordinated by the White House counsel, Alberto Gonzales. The work commenced little more than a week after 9/11.⁵⁴ The idea of using Military Commissions had been investigated thoroughly a decade before when options were being considered to try suspects in the bombing of Pan Am Flight 103 over Lockerbie, Scotland.⁵⁵ The inter-agency group investigated four options: Military Commissions, criminal trials, military courts-martial and tribunals with both civilian and military members, like the Nuremburg trials.

By October 2001, the White House lawyers had grown impatient with the 'dithering' of the interagency group and took over the work themselves. It has been reported that at this stage all options were abandoned and planning for Military Commissions moved forward more quickly, but with whole agencies, including Defense, being left out of the discussions completely.⁵⁶ The legal basis for the Administration's approach was laid out on 6 November 2001 in a confidential memorandum sent to Mr Gonzales by the Attorney General's Office. Attorney General Ashcroft had refused Congressional requests to provide a copy of the document, but its contents were

leaked and reported by the New York Times. The memorandum said that the President, as Commander in Chief, has 'inherent authority' to establish Military Commissions without Congressional authorization and that the Administration could apply international law selectively. In particular, the memorandum outlined the legal precedent under which due process rights do not apply to Military Commissions.⁵⁷

The Administration moved quickly after receiving the Attorney General's advice, releasing the Presidential Military Order on 'Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism' a week later on 13 November 2001. Rear Admiral Gutter, who was the Navy Judge Advocate General at the time, has commented that many of the Pentagon's experts on military justice were kept in the dark until the day before the order was issued, and when it was issued the order included none of their hastily prepared amendments.⁵⁸ It is also reported that senior staff from the National Security Council and the State Department were also excluded from the final discussions on the order, with the National Security Adviser and the Secretary of State finding out the detail of the order after it was issued.⁵⁹

In World War II, when the US last used Military Commissions, the tribunals were fashioned generally on the prevailing standard of military justice.⁶⁰ Following 9/11, however, the Administration saw no reason why it could not depart materially from current military justice standards and write new law for the Commissions. It believed a paradigm shift was needed to deal with terrorism. The Presidential Military Order outlined the concept for the revised approach, which enabled a lower standard of proof, expanded secrecy provisions, permitted a more liberal application of the death penalty and denied judicial review of convictions⁶¹. The Order announced that the exact rules were to be established later by Secretary Rumsfeld.⁶² Criticism of the Order was immediate, but not all the criticism came from outside the Administration. It is widely reported that the respective judge advocate generals within the Pentagon supported the use of Commissions, but argued strongly that the system would not be fair without amendment.⁶³ In the end, when Secretary Rumsfeld published the rules for the Commissions, it became obvious that he had compromised. He granted defendants a presumption of innocence and set 'beyond a reasonable doubt' as the standard for proving guilt, but did not allow judicial review of convictions by civilian courts.⁶⁴

On July 3 2003, the Administration designated six detainees for the first Commissions.⁶⁵ Two of the detainees were British. News of the men's prosecution became public in the U.K. just as British Prime Minister Tony Blair was beginning a major public relations campaign to overcome his unpopular support for the Iraq war. Under pressure from the British Parliament, Blair declared that any tribunals involving British citizens would follow "proper international

law".⁶⁶ Blair was under increasing pressure from his parliament to secure custody of a total of nine British detainees on Guantanamo. A series of negotiations involving the British Attorney General, Peter Goldsmith, and officials from the Administration were initiated quickly in order to agree on an acceptable process for the trial of the two British detainees. Lord Goldsmith would not budge from a basic demand that civilian courts review verdicts from the Commissions.⁶⁷ The Administration argued that such a change would render the Commissions unworkable. During a state visit to the U.K. in late November 2003, President Bush agreed to shelve the cases of the two British suspects for the foreseeable future.⁶⁸ It remains unclear how many detainees will ultimately appear before a Commission, but the Administration has indicated that most of the detainees will not face a Commission and will simply be released when they no longer pose a threat or remain interned for the duration of the GWOT.⁶⁹

THE OPPOSING VIEW

The Administration's intent to try selected detainees by Military Commissions has received widespread criticism. Spain, for example, has announced it will not extradite terrorist suspects to the US if they are to face the tribunals.⁷⁰ In essence, the opposing view characterizes the Commissions as providing second-class justice. Amnesty International has been most vocal in its criticism, but it has received extensive support from a wide-range of scholars and organizations.⁷¹ The critics argue the Commissions are discriminatory, because they do not apply to US nationals, they allow a lower standard of evidence than is admissible in ordinary courts, there is no right of appeal to an independent and impartial court and that the Commissions lack independence from the Executive.⁷² The 'Army Lawyer', a US Department of the Army periodical, published an article recently by a retired senior military lawyer that added weight to this view. It noted that the Commissions are a departure from long-standing military practice and they fail to provide the degree of fairness and due process expected in trials conducted by the US in the twenty-first century.⁷³

The US Constitution is designed to provide a system of checks and balances to prohibit, inter alia, unfettered power by the Executive. The recent Supreme Court ruling on Guantanamo Bay is a great example of the 'system' working, with the Judiciary deciding that the Executive does not have the authority to suspend the detainees' habeas corpus rights. Many believe the proposed Commissions provide unfettered and unchallengeable power to the Executive, which contravenes the most basic law principles of independence and impartiality.⁷⁴ Since the Commissions began, the most ardent critics have been the uniformed US lawyers assigned to the defendants.⁷⁵ These lawyers have been successful in halting the first of the Commissions,

gaining a Federal District Court Judge's ruling on 9 November 2004 that once again curtails the Executive's attempts to implement its 'forward-leaning' system of justice. The ruling throws into doubt the future of the Military Commissions, as the Judge ruled that President Bush had both overstepped his constitutional bounds and improperly brushed aside the Geneva Conventions in establishing Military Commissions.⁷⁶ The Administration is appealing the decision.⁷⁷

THE CONSEQUENCES OF THE ADMINISTRATION'S ACTIONS

For the past three years, the Administration has focused publicly on the operational benefits that detainee operations on Guantanamo Bay have generated while downplaying the cascading problems it has faced: angry foreign allies, a tarnishing of America's image and declining cooperation in the GWOT.

OPERATIONAL BENEFITS

The Administration believes that the interrogation of the detainees has improved the security of the US and coalition partners by expanding their understanding of al Qaida and its affiliates. This information is critical to disrupt the attack plans of al Qaida and its affiliates throughout the world. Interrogation has revealed al Qaida leadership structures, operatives, funding mechanisms, communication methods, training and selection programs, travel patterns, support infrastructures and plans for attacking the US and other nations.⁷⁸ The Administration states that Guantanamo detainees have provided the US with: information on individuals connected to al Qaida's efforts to acquire weapons of mass destruction; information on front companies and accounts supporting al Qaida; information on surface-to-air missiles, improvised explosives devices and al Qaida tactics and training; and detailed information on travel routes potentially used by terrorists to reach the US via South America.⁷⁹

Detention of enemy combatants during conflict is not an act of punishment; it is a matter of security and military necessity. The information being obtained from the detainees is clearly helping in the GWOT. It is enabling the US and its coalition partners to be more effective in the planning and conduct of counter-terrorist missions. It is also assisting in the development of countermeasures to disrupt terrorist activities and focusing information collection on al Qaida financing and network operatives. Perhaps the greatest operational benefit from interrogating Guantanamo detainees, however, lies in the expanded understanding the US now possesses of jihadist motivation, selection and training processes.⁸⁰ This information is essential to identifying the root causes of terrorism, which is arguably the key to winning the GWOT. The issue for the Administration is whether these benefits are worth the cascading problems that the detainee operations have also generated.

UNDERMINING US INFLUENCE AND EFFECTIVENESS

In March 2004, the PEW Research Center reported that the US prestige in the world community had dropped to its lowest level in history.⁸¹ This report was published before the Abu Ghraib incident. The PEW findings are supported by other international opinion surveys.⁸² The US Council on Foreign Relations found in 2003 that one of the things the Administration needs to do to reduce this rising anti-Americanism is to “improve its capacity to listen to foreign publics”.⁸³ Clearly, the international community, and individual rights groups and academics within the US, believe that the Administration is ignoring international law in its treatment of the detainees. One Colombian columnist has referred to Guantanamo as the US Gulag.⁸⁴

The Military Commissions empowered under President Bush’s military order are the exact types of trials that the US openly condemns in the international community.⁸⁵ In today’s media environment, inconsistencies such as this are highlighted, evaluated and then broadcast repeatedly to every corner of the globe. The effect of this apparent double standard is to deny the US the moral high ground it needs to censure other nations in the future for human rights abuses. Such double standards potentially place the Administration at odds with the values of the American people, thereby creating a fault line that if pressured in the future may degrade the domestic support base for what is going to be a generation-long GWOT. General John Gordon, a retired Air Force general and former CIA director who served as both the senior counter-terrorism official and homeland security adviser on President Bush’s National Security Council, best described this dilemma with the comment “...There was great concern that we were setting up a process that was contrary to our own ideals”.⁸⁶

The worldwide promotion of human rights is clearly in keeping with America’s most deeply held values.⁸⁷ Colin Powell has said “respect for human rights is essential to lasting peace and sustained economic growth, goals which American’s share with people all over the world”.⁸⁸ At the Human Rights Defenders of the Frontlines of Freedom Conference at the Carter Center in November 2003, former President Carter was disturbed to find that many participants believed the US is contributing directly to an erosion of human rights by its current policies with respect to the Guantanamo detainees. Moreover, President Carter deplored the indefinite detention of the suspects at Guantanamo and added “I say this because this is a violation of the basic character of my country and it’s very disturbing to me”.⁸⁹ The attacks against the US on 9/11 were horrific and it is in the interest of all civilized nations that the perpetrators be tried and punished, but long-held US values on human rights must outweigh its desire for retribution. As General Shalikashvili, a former chairman of the Joint Chiefs of Staff, has so accurately stated, “...the US has repeatedly faced foes in its past that, at the time they emerged, posed threats of a nature

unlike any that it had previously faced, but the US has been far more steadfast in the past in keeping faith with its national commitment to the rule of law".⁹⁰ To do otherwise only adds to the growing, worldwide anti-Americanism that undermines US credibility and, therefore, influence and effectiveness.

UNDERMINING THE COALITION

The US strategy for winning the GWOT is predicated on creating an international environment inhospitable to terrorists and all those who support them.⁹¹ There is a realization that in this war, the US does not have the option of going it alone. President Bush has stated that the US will "...constantly strive to enlist the support of the international community in this fight against a common foe"⁹² because success "... will not come by always acting alone, but through a powerful coalition of nations maintaining a strong, united international front against terrorism".⁹³ A senior official in US Central Command, the regional combatant command responsible for prosecuting 'Operation Iraqi Freedom' and 'Operation Enduring Freedom', has stated that the US's 'Achilles Heel' in these operations is coalition support. US Central Command sees shaping domestic opinion worldwide as essential to maintaining a strong coalition.⁹⁴

In South East Asia, an area described by the Asia Pacific Centre for Strategic Studies as a primary fault line in the GWOT, there are serious issues that limit greater cooperation with the US. The popular divide between anti-Americanism and largely pro-US governments is one issue that places serious limits on the abilities of governments to participate further in the GWOT. Democratically elected leaders must be responsive to their constituents and many constituents in South-East Asia remain skeptical about the GWOT, as these nations are faced with more pressing issues that affect their day-to-day well being.

The Administration, therefore, faces significant challenges in creating a shared understanding of the terrorist threat and in its essential task of extending cooperation in international counterterrorism efforts. The treatment of detainees at Guantanamo impacts significantly on the Administration's ability to undertake this task. General Shalikhshvili, and many others, have stated that Guantanamo operations have fostered greater animosity toward the US and undermined its efforts in the GWOT.⁹⁵ Many nations view Guantanamo Bay as the principal example of how the GWOT is to be fought; and people from these nations do not like seeing images of shackled detainees in orange jumpsuits or reading about allegations of abuse and violations of international law. Even governments from nations who are stalwart supporters of the GWOT are under siege from their populations. In Australia and the UK, for example, the

governments are under increasing pressure to withdraw from the coalition from populations that view America's treatment of Australian and British detainees as violating the very principles that the Coalition of the Willing aims to uphold.

A MODIFIED MEANS

The reviews of individual cases that the Administration is conducting in the wake of the June 2004 Supreme Court ruling have now been ruled as insufficient and must be modified in order to determine the POW status of the detainees.⁹⁶ The US cannot proceed with its Military Commissions without first modifying its Combatant Status Review Tribunals. Should a modified tribunal determine in due course that POW status is warranted, then as already discussed the Geneva Conventions demand for POWs higher levels of due process than that which is embedded into the Military Commissions. Given the Administration's views on the POW issue, the more likely outcome is that a modified Tribunal will determine formally in due course that POW status should be denied and Military Commissions should follow. It appears clear, however, that the outcomes of any Military Commissions will not be viewed as legitimate in the eyes of a world already deeply skeptical of the detentions on Guantanamo. The US can preserve the moral high ground by revisiting the initial inter-agency group's options and moving the trials into the international arena.

As discussed previously, the initial inter-agency group investigated four options: Military Commissions, criminal trials, military courts-martial and tribunals with both civilian and military members. Criminal courts would provide insufficient latitude without Congress toughening criminal laws and adapting the courts.⁹⁷ This may have been an option back in early 2002 when it was advocated by the Justice Department, but it is now too late given the fact that the detainees have been in custody for three years.⁹⁸ A Court-Martial offers some advantages. Foremost, it safeguards the Administration against potential domestic or international legal challenges attacking the trial process itself.⁹⁹ A Court-Martial meets all current standards of fundamental rights under the customary and written rules of law.¹⁰⁰ A Court-Martial also offers the Administration the distinct advantage of protecting any sensitive and classified material during the proceedings. The significant disadvantage to a Court-Martial, however, is that because the Administration has for the past two years created an atmosphere of legal ambiguity, the international community is conditioned to being skeptical and is therefore likely to be suspicious of any outcomes from a US Military proceeding.

This leaves the final option of tribunals. The UN has established in the past, on an ad hoc basis, tribunals to deal with individual responsibility for war crimes.¹⁰¹ These tribunals have

been empowered by the UN to deal with specific crimes during defined time periods.¹⁰² Relinquishing control of the trials to the UN is not without risk, however, and may in the end prove politically untenable for a US Administration. A more politically viable option would be to seek a UN authorized US Tribunal, similar to the special courts established in 2000 to try war criminals in Sierra Leone¹⁰³ and East Timor.¹⁰⁴ The respective governments and the U.N set up these Courts jointly. They were mandated to try those charged with war crimes, crimes against humanity and other serious violations of international humanitarian law. The Courts were international bodies, but staffed principally from within the respective countries.

The Tribunal would be established under special statute, agreed by the US and the UN. The statute could include, *inter alia*, the requirement for a balance of civilian and military, US and international judges and prosecutors. The significant advantage of this model, as opposed to the UN ad hoc tribunals, is that the US has greater control and it brings into the proceedings the values of US judges and prosecutors. Such action would be viewed as a legitimate form of justice in the international community and would therefore assist on-going US efforts in the GWOT. It would also send an important message to the international community about US beliefs on collective legitimization versus unilateralism, most notably that the US believes that the UN and the Security Council have not become irrelevant and still have a major role to play in international relations.¹⁰⁵ It would also do much to negate the pressure many coalition governments are facing from increasingly skeptical domestic populations. The principal benefit for the US, however, lies in the area of recapturing much needed legitimacy, and in doing so reducing widespread anti-Americanism. International legitimacy will generate greater diplomatic space for the Administration, providing opportunities to harness the broader international cooperation it needs to win the GWOT.

CONCLUSION

In the prosecution of the war against terror the Administration has sought to redefine the borders between civil liberties and public safety. The official position of the Administration remains that the detainees are unlawful combatants and not POWs, but that they are being treated in accordance with the law. The unlawful combatant status, and the due process protections, arbitrarily given by the Administration to the 650 foreign nationals detained at Guantanamo Bay have attracted significant domestic and international criticism. The international community, and individual rights groups and academics within the US, believe that the Administration is ignoring international law in its treatment of the detainees. These critics present a strong argument that the US is, in fact, breaking the law. The US Supreme Court,

and most recently a Federal District Court, has weighed into the debate with a ruling that curtails significantly the Executive's attempts to suspend select human rights in its response to 9/11.

In addition to undermining the rule of law, the consequences of the Administration's policy in Guantanamo Bay is to fuel rising global anti-Americanism that undermines US influence and effectiveness, degrade the Administration's domestic support base and to deny the US the moral high ground it needs to promote international human rights in the future. It appears clear that these costs have far outweighed the operational benefits that the detainee operations have generated. The Administration must now adjust its approach. The US can preserve the moral high ground by adjusting its Combatant Status Review Tribunals to determine adequately the POW status of the detainees. It must then move the detainees' trials into the international arena. This adjustment would be viewed as a legitimate form of justice in the international community and would do much to reduce the anti-Americanism that amongst other things is potentially undermining the Coalition in the GWOT. Such action is needed not just because it is the right thing to do, but because it is in the nation's and the world community's long-term interests to do so. In seeking to redefine the borders between civil liberties and public safety, the Administration need look no further for guidance than Benjamin Franklin, who once said "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety".¹⁰⁶

WORD COUNT=5990

ENDNOTES

¹ Remarks at the U.S. Chamber of Commerce (Nov 14, 2001). Anton L. Janik Jr., "Prosecuting Al Qaeda: America's Foreign Policy Interests Are Best Served By Trying Terrorists Under International Tribunals," *Denver Journal of International Law and Policy*, September 2002, available from <<http://static.highbeam.com/d/denverjournalofinternationallawandpolicy/september222002/prosecutingalqaedaamericashumanrightspolicyinteres.html>>; Internet, accessed 16 September 2004.

² The Administration has not announced publicly the total numbers of detainees and their countries of origin. Many sources cite different numbers. I have used the numbers cited in Lawyers Committee for Human Rights, "Imbalance of Powers," March 2003.

³ In June 2004, in response to a petition from relatives and 'friends' of 2 Australians, 2 Britons and 12 Kuwaiti detainees, the U.S. Supreme Court ruled 6-3 that foreign detainees have the right to use a U.S. Court to question the legality of their imprisonment, even though they are being held outside of the country. "Supreme Court Rules on Rasul v Bush," *International Law Update*, July 2004, database on-line: available from Lexis-Nexis, accessed 2 September 2004.

⁴ Most notably Ruth Wedgwood, a Yale Law Professor, Lloyd Cutler, the former White House counsel to Presidents Carter and Clinton, Bernard Meltzer, a Nuremberg Prosecutor and University of Chicago Law Professor and William Webster, a judge and chief of the FBI under President Carter and of the CIA under President Reagan.

⁵ Justice Goldstone is presently the William Hughes Mulligan Visiting Professor at Fordham Law School and a former South African High Court Magistrate and Chief Prosecutor for the International Criminal Tribunals in Yugoslavia and Rwanda.

⁶ Professor Alfred De Zayas, "The Status of Guantanamo Bay and the Status of the Detainees," The Douglas McK. Brown Lecture, University of British Columbia, Vancouver, 19 November 2003, 48; available from <http://www.law.ubc.ca/events/2003/November/McK_Brown_Lecture.html>; Internet, accessed 6 September 2004.

⁷ Tim Golden, "Administration Officials Split Over Stalled Military Tribunals," *The New York Times*, 25 October 2004, available from <<http://www.globalexchange.org/countries/unitedstates/democracy/2632.html>>; Internet, accessed 12 January 2005. This article outlines amongst other things the rift that developed between the Vice President and Ms Rice and Colin Powell over how the detainees should be handled.

⁸ 9/11, the US embassy bombings in Africa, the attack on the US Cole, the Jemaah Islamiyah bombings in Bali and Jakarta and the rail bombing in Spain, for example. US Department of Defense, 'Guantanamo Detainees,' available from <<http://www.defenselink.mil/news/detainees.html>>; Internet, accessed 1 November 2004.

⁹ Ibid., 1.

¹⁰ See George W Bush, "Military Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism," 13 November 2001, available from <<http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>>; Internet, accessed on 16 September 2004.

¹¹ Ibid., 1.

¹² Ingrid Arnesen, "Detainees Not Covered by Geneva Conventions," *CNN Online*, 9 June 2004, available from <<http://cnn.com/2004/LAW/06/09detention.report/>>; Internet, accessed 2 September 2004.

¹³ Sean D Murphy, ed., "U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison," *American Journal of International Law*, 98 (July 2004): 592.

¹⁴ Ibid., 593.

¹⁵ The Congressional Research Service report for Congress "Lawfulness of Interrogation Techniques under the Geneva Conventions," 8 September 2004, 1, available from <www.fas.org/irp/crs/RL32567.pdf>; Internet, accessed 17 November 2004.

¹⁶ Neil Lewis, "Red Cross Finds Detainee Abuse in Guantanamo," *New York Times*, 30 November 2004, available from <<http://www.nytimes.com/2004/11/30/politics/30gitmo.html>>; Internet, accessed 1 December 2004.

¹⁷ Charlie Savage, "4 Ex-Detainees Sue Rumsfeld, 10 Others," *The Boston Globe*, available from <<http://www.boston.com/news/nation/Washington/articles/2004/10/28/4>>; Internet, accessed 28 October 2004.

¹⁸ "Supreme Court Rules on Rasul v Bush," *International Law Update*, July 2004.

¹⁹ Lawyers Committee for Human Rights, "Imbalance of Powers," March 2003, 49, available from <http://www.humanrightsfirst.org/us_law/loss/imbalance/imbalance.htm>; Internet, accessed 2 September 2004.

²⁰ U.S. Department of Defense, "Guantanamo Detainees," 4.

²¹ Ruth Wedgwood, and Kenneth Roth, "Combatants or Criminals? How Washington Should Handle the Terrorists," *Foreign Affairs* (May/June 2004): 126. See also Bush, George W. "Military Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism," 13 November 2001, available from <<http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>>; Internet, accessed 16 September 2004, which outlines that it is 'not practicable' to apply the principles of law and the rules of evidence as recognized in criminal courts.

²² Janik, 118.

²³ Ruth Wedgwood, and MG Geoffrey Miller, Interview by Jeffrey Kaye, 22 January 2003, available from <http://www.pbs.org/newshour/bb/military/jan-june02/detainees_1-22.html>; Internet, accessed 6 September 2004.

²⁴ Zayas, 31.

²⁵ Ruth Wedgwood, and David Cole, Interview by Margaret Warner, 1 May 2002, available from <http://www.pbs.org/newshour/bb/terrorism/jan-june02/tribunals_5-1.html>; Internet, accessed 6 September 2004.

²⁶ Wedgewood, "Combatants or Criminals? How Washington Should Handle the Terrorists," *Foreign Affairs* (May/June 2004), 126.

²⁷ As of 6 January 2004, four of the detainees have been charged with crimes and are scheduled to appear before Military Commissions.

²⁸ Demetri Sevastopulo, "Guantanamo Prisoners Wrongly Held," *London Financial Times*, 19 June 2004, database on-line, available from Lexis-Nexis, accessed 2 September 2004.

²⁹ *Ibid.*

³⁰ Guy Taylor, "Tribunals set for Guantanamo detainees," *The Washington Times*, 17 July 2004, database on-line, available from Lexis-Nexis, accessed 2 September 2004.

³¹ As of August 2004, 156 detainees have departed Guantanamo either for release or for transfer to another government. For further details see U.S. Department of Defense, "Guantanamo Detainee Processes," available from <<http://www.defenselink.mil/news/detainees.html>>; Internet; accessed 1 November 2004.

³² Tony Locy, "Detainee Cases Show Another Side of GITMO," *USA Today*, 4 November 2004, p.19A.

³³ Neil Lewis, "Rules Bush Overstepped Bounds – Doubt Cast Over Tribunals," *The New York Times*, 9 November 2004.

³⁴ U.S. Department of Defense, "Guantanamo Detainees," 4.

³⁵ Congressional Research Service report for Congress "Lawfulness of Interrogation Techniques under the Geneva Conventions," 8 September 2004, available from <www.fas.org/irp/crs/RL32567.pdf>; Internet, accessed on 17 November 2004.

³⁶ Tim Golden, "After Terror, a Secret Rewriting of Military Law," *The New York Times*, 24 October 2004, available from <<http://207.44.245.159/article7122.htm>>; Internet, accessed 12 January 2005.

³⁷ Evan J. Wallach, "Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?" *The Army Lawyer*, 26.

³⁸ Tim Golden, "After Terror, a Secret Rewriting of Military Law."

³⁹ POW status would require detainees charged with war crimes to be given the same legal protections at trial that a US soldier charged with the same crime would be given. See Anderson, "Who owns the Rules of Law?" *The New York Times*, 13 April 2003, available from <<http://www.genocidewatch.org/WhoOwnstheRulesofWar.htm>>; Internet, accessed 12 January 2005.

⁴⁰ Janik, "Prosecuting Al Qaeda: America's Foreign Policy Interests Are Best Served by Trying Terrorists under International Tribunals," 118.

⁴¹ Experts such as the United Nations Commission on Human Rights, the International Federation for Human Rights, the International Committee of the Red Cross, the British High Court, the Bosnia-Herzegovina High Court, the Canadian High Court, The Governments of Malaysia and Germany, Amnesty International, Human Rights Watch, American Civil Liberties Union, U.S. Lawyers Committee for Human Rights, the U.S. Anti-Defamation league, the Association of the Bar of the City of New York, the Law Society of England and Wales, the U.S. National Association of Criminal Defense Lawyers and the Carter Institute, to name a few.

⁴² United Nations, "United Nations Rights Expert 'Alarmed' over United States Implementation of Military Order," 7 July 2003, available from <<http://www.unhchr.ch/hurricane/nsf/view01>>; Internet, accessed 6 September 2004.

⁴³ Wallach, "Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?," 26, available from <http://lawofwar.org/army_lawyer.htm>; Internet, accessed 6 September 2004.

⁴⁴ Among the criteria is the requirement that they report to a commanding authority, have a recognized military insignia, openly carry their arms and conduct their operations in accordance with the laws and customs of war. Janik, "Prosecuting Al Qaeda: America's Foreign Policy Interests Are Best Served By Trying Terrorists Under International Tribunals," 119.

⁴⁵ Wallach, "Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?," 26.

⁴⁶ AR 190-8 requires that a 'competent tribunal' determine the status of any person not appearing to be entitled to POW status. Wallach, "Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?," 29.

⁴⁷ Anderson, "Who owns the Rules of Law?"

⁴⁸ Wedgewood, "Combatants or Criminals? How Washington Should Handle the Terrorists," 127.

⁴⁹ COL Frederick L Borch, III., "Why Military Commissions Are the Proper Forum and Why Terrorists Will Have 'Full and Fair' Trials: A Rebuttal to Military Commissions: Trying American Justice," *The Army Lawyer* (November 2003): 10.

⁵⁰ George W Bush, "Military Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism," 13 November 2001.

⁵¹ Borch, 10.

⁵² U.S. Department of Defense, "Guantanamo Detainees," 8.

⁵³ U.S. State Department, "Egypt: Country Reports on Human Rights Practices 2000," 23 February 2001, available from <<http://www.state.gov/g/drl/rls/hrrpt/2000/nea/784.htm>>; Internet, accessed 16 September 2004.

⁵⁴ Tim Golden, "After Terror, a Secret Rewriting of Military Law."

⁵⁵ *Ibid.*, 4.

⁵⁶ Ibid., 6.

⁵⁷ Ibid.

⁵⁸ Ibid., 7.

⁵⁹ Ibid., 8.

⁶⁰ Ibid., 5.

⁶¹ CAPT Kevin J. Barry, (Ret), "Military Commissions: Trying American Justice," *The Army Lawyer* (November 2003), 1.

⁶² George W Bush, "Military Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism," 13 November 2001, 2-3.

⁶³ Admiral Gutter was the Navy Judge Advocate General at the time. After retiring he was a signatory to the 'Friends of the Court' brief in the June 2004 Guantanamo Supreme Court case. His views on the inadequacies of the rules for the Commissions and the limited role military lawyers were allowed to have in designing those rules can be found in Tim Golden, "After Terror, a Secret Rewriting of Military Law," 9.

⁶⁴ U.S. Department of Defense, "Commissions," available from <<http://www.defenselink.mil/news/commissions.html>>; Internet; accessed 1 November 2004.

⁶⁵ Ruth Wedgewood, "Justice, and Security Too," *Los Angeles Times*, 10 July 2003, available from <<http://www.beadorassociates.com/article/458.html>>; Internet, accessed 6 September 2004.

⁶⁶ Tim Golden, "After Administration Officials Split Over Stalled Military Tribunals."

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ruth Wedgewood, and David Cole, Interview by Margaret Warner, 26 May 2003.

⁷⁰ CAPT Kevin J. Barry, (Ret), "Military Commissions: Trying American Justice," 1.

⁷¹ The British High Court, the Canadian High Court, the Spanish Government and the Special Rapporteur on the independence of judges and lawyers of the UN Commission on Human Rights, to name a few.

⁷² Amnesty International, "USA – Military Commissions: Second Class justice," 22 March 2002, available from <<http://www.web.amnesty.org/library/Index/ENGAMR510492002.htm>>; Internet, accessed 2 September 2004.

⁷³ CAPT Kevin J. Barry, (Ret), "Military Commissions: Trying American Justice," 1.

⁷⁴ Jed Rubenfield, "The Two World Orders," *The Wilson Quarterly* (Autumn 2003); available from <http://wwics.si.edu/index.cfm?fuseaction=wq.essay&essay_id=56056>; Internet, accessed 5 January 2005.

⁷⁵ Tim Golden, "Administration Officials Split Over Stalled Military Tribunals."

⁷⁶ Lewis, A19.

⁷⁷ "White House to Appeal Guantanamo Ruling," *FindLaw*, 12 November 2004, available from <http://news.findlaw.com/ap_stories/a/w/1151/11-12-2004/20041112153004_26.html>; Internet, accessed 17 November 2004.

⁷⁸ U.S. Department of Defense, "Guantanamo Detainees," 3.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ CAPT Kevin J. Barry, (Ret), "Guantanamo: Disorder of the Day," 22 August 2004, available from <publicfolders/AY05seminarteamfolders/seminar10/documents/coursell/items/guantanamo>; Internet, accessed 24 August 2004.

⁸² Patrick Tyler, "The World Backs Kerry International Polls Indicate," *The New York Times*, 16 October 2004; available from <<http://www.jsonline.com/news/nat/oct04/267392.asp>>; Internet; accessed 5 January 2005.

⁸³ Independent Task Force on Public Diplomacy, Council of Foreign Relations, "Finding America's Voice: A Strategy for Reinvigorating U.S. Public Diplomacy," July 2002, available from <http://www.cfr.org/pdf/public_diplomacy.pdf>; Internet, accessed 16 September 2004.

⁸⁴ Michael Shifter, "The US and Latin America Through The Lens of Empire," February, 2004: In US Army War College, *International Fellows Course Three Readings*, Carlisle Barracks, US Army War College, 2004, 61.

⁸⁵ US State Department. "Egypt: Country Reports on Human Rights Practices 2000." 23 February 2001, available from <<http://www.state.gov/g/drl/rls/hrrpt/2000/nea/784.htm>>; Internet, accessed 16 September 2004.

⁸⁶ Cited in Tim Golden, "After Terror, a Secret Rewriting of Military Law."

⁸⁷ The U.S. National Security Strategy states on page three that "In pursuit of our goals, our first imperative is to clarify what we stand for: The United States must defend liberty and justice because these principles are right and true for all people everywhere." George W. Bush, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, September 2002), 3.

⁸⁸ Janik, "Prosecuting Al Qaeda: America's Foreign Policy Interests Are Best Served By Trying Terrorists Under International Tribunals," 132.

⁸⁹ The Carter Center, Conference Report. "Human Rights Defenders on the Frontlines of Freedom: Protecting Human Rights in the Context of the War on Terror," 11-12 November 2003, available from <<http://www.cartercentre.org/peaceprograms/shostaticdoc.asp?programID=13&docname=hrconference&submenu=peaceprograms.html>>; Internet, accessed 6 September 2004.

⁹⁰ These comments were included in a letter sent to the U.S. Senate Judiciary Committee in January 2005 by a dozen high ranking retired military officers. The letter expressed concern over the nomination of White House counsel Alberto Gonzales as attorney general given his role in shaping legal policies on detainee operations. Dan Eggen, "Gonzales Nomination Draws Military Criticism," *Washington Post*, 4 January 2005, available from <<http://www.washingtonpost.com/ac2/wp-dyn/A45727-2005Jan3>>; Internet, accessed 6 January 2005.

⁹¹ George W. Bush, *National Strategy for Combating Terrorism* (Washington, D.C.: The White House, February 2003), 11.

⁹² *Ibid.*, 2.

⁹³ *Ibid.*, 19.

⁹⁴ The ideas in this sentence are based on remarks made by a speaker participating in a formal discussion in Florida with International Fellows from the USAWC.

⁹⁵ Eggen.

⁹⁶ Lewis, A19.

⁹⁷ As an example, most of the information obtained during interrogations at Guantanamo would be inadmissible in a civil court, without significant modification to existing law.

⁹⁸ Tim Golden, "After Terror, a Secret Rewriting of Military Law," 5.

⁹⁹ As already discussed, challenges on the legality of the Military Commissions are already before the US Courts.

¹⁰⁰ Wallach, "Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?," 46.

¹⁰¹ The 1993 Tribunal to deal with war crimes committed in the Former Yugoslavia and the 1994 Tribunal to deal with the genocide in Rwanda.

¹⁰² Janik, "Prosecuting Al Qaeda: America's Foreign Policy Interests Are Best Served By Trying Terrorists Under International Tribunals."

¹⁰³ The Special Court for Sierra Leone was set up jointly by the Government of Sierra Leone and the UN. It was mandated to try those charged with war crimes, crimes against humanity and other serious violations of international humanitarian law. The Court is an international body, but staffed principally from within Sierra Leone.

¹⁰⁴ The Special Court for East Timor was set up jointly by the UN Transitional Administration in East Timor. For further information on the details of the Court see Michael Reisman,

"Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses," *The Yale Journal of International Law*, 29 (Summer 2004): 343-361.

¹⁰⁵ President Bush redefined US strategic and security policy goals in a formal address in Canada on 1 December 2004. He stated that his new term in office provided an opportunity to reach out to US friends and foster wide international consensus to building effective multinational and multilateral institutions. George W. Bush, "President Discusses Strong Relationship With Canada," Halifax, Nova Scotia, Canada, 1 December 2004; available from <<http://www.whitehouse.gov/news/releases/2004/12/20041201-4.html>>; Internet, accessed 6 January 2005.

¹⁰⁶ CAPT Kevin J. Barry, (Ret), "Military Commissions: Trying American Justice," *The Army Lawyer* (November 2003): 9.

BIBLIOGRAPHY

- "Affirmation of the Rule of Law." *The Canberra Times*, 30 June 2004 (787 words). Database on-line. Available from Lexis-Nexis. Accessed 2 September 2004.
- Alberts, Sheldon. "Top Court Backs Detainees: Ruling Says 'Enemy Combatants' Have Right to US Law." *Washington Dateline*, 29 June 2004 (718 words). Database on-line. Available from Lexis-Nexis. Accessed 2 September 2004.
- Amnesty International. "Guantanamo: Amnesty International Delegate To Observe First Military Commission Hearings." 19 August 2004. Available from <<http://www.web.amnesty.org/library/Index/ENGAMR511292004?open&of=ENG-381.htm>>. Internet. Accessed 2 September 2004.
- _____. "USA – Military Commissions: Second Class Justice." 22 March 2002. Available from <<http://www.web.amnesty.org/library/Index/ENGAMR510492002.htm>>. Internet. Accessed 2 September 2004.
- _____. "USA: Presidential Order On Military Tribunals Threatens Fundamental Principles of Justice." 15 November 2001. Available from <<http://www.web.amnesty.org/library/Index/ENGAMR511652001.htm>>. Internet. Accessed 2 September 2004.
- Anderson, Kenneth. "Who owns the Rules of Law?" *The New York Times*, 13 Apr 2003. Available from <<http://www.genocidewatch.org/WhoOwnstheRulesofWar.htm>>. Internet. Accessed 12 January 2005.
- Arend, Anthony Clark. "International Law and the Preemptive Use of Military Force." *The Washington Quarterly* (Spring 2003): 89-104.
- Arnesen, Ingrid. "Detainees not covered by Geneva Conventions." *CNN Online*, 9 June 2004. Available at <<http://cnn.com/2004/LAW/06/09detention.report/>>. Internet. Accessed 2 September 2004.
- Babbin, Jed. "Abu Ghraib's Kitty Kelly." 17 September 2004. Available from <<http://www.nationalreview.com/babbin/babbin200409170630.asp>>. Internet. Accessed 28 October 2004.
- Barry, CAPT Kevin J (Ret). "Guantanamo: Disorder of the Day." 22 August 2004. Available from <<publicfolders/AY05seminarteamfolders/seminar10/documents/courseII/items/guantanamo>>. Internet. Accessed 24 August 2004.
- _____. "Military Commissions: Trying American Justice." *The Army Lawyer* (November 2003): 1-9.
- "The Big Picture." *The Weekend Australian*. 28 August 2004 (886 words). Database on-line. Available from Lexis-Nexis. Accessed 2 September 2004.
- Borch, COL Frederick L., III. "Why Military Commissions Are the Proper Forum and Why Terrorists Will Have 'Full and Fair' Trials: A Rebuttal to Military Commissions: Trying American Justice." *The Army Lawyer* (November 2003): 10-16.

- "Bringing Hicks Home 'Impossible', Says Howard." 15 September 2004. Available from <<http://www.smh.com.au/articles/2004/09/15/1095221655341.html>>. Internet. Accessed 15 September 2004.
- Bush, George W. "Military Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism." 13 November 2001. Available from <<http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>>. Internet. Accessed 16 September 2004.
- _____. *The National Security Strategy of the United States of America*. Washington, D.C.: The White House, September 2002.
- _____. *National Strategy for Combating Terrorism*. Washington, D.C.: The White House, February 2003.
- _____. "President Discusses Strong Relationship With Canada," Halifax, Nova Scotia, Canada, 1 December 2004. Available from <<http://www.whitehouse.gov/news/releases/2004/12/20041201-4.html>>. Internet. Accessed 6 January 2005.
- The Carter Center. Conference Report. "*Human Rights Defenders on the Frontlines of Freedom: Protecting Human Rights in the Context of the War on Terror.*" 11-12 November 2003. Available from <<http://www.cartercentre.org/peaceprograms/shostaticdoc.asp?programID=13&docname=hrconference&submenu=peaceprograms.html>>. Internet. Accessed 6 September 2004.
- Carter, Phillip. "Cooking Up Excuses With the Pentagon." *Slate Magazine*, 10 June 2004 (1618 words). Database on-line. Available from Lexis-Nexis. Accessed 2 September 2004.
- "Cheney on Guantanamo Detainees." *Fox News*, 27 January 2002. Available from <<http://www.foxnews.com/story/0,2933,44082,00.html>>. Internet. Accessed 16 November 2004.
- Clausewitz, Carl Von. *On War*. Edited and translated by Michael Howard and Peter Paret. New Jersey: Princeton University Press, 1989.
- Coyle, Marcia. "Taking the Risks." *The National Law Journal*. 16 February 2004. Available from <<http://law.com/jsp/nlj/PubArticleNLJ.jsp?id=1076428323925>>. Internet. Accessed 2 September 2004.
- Cynthia Banham, Cosima Mariner, and Penelope Debelle. "No Justice for Hicks in flawed trial: QC." 16 September 2004. Available from <<http://www.smh.com.au/articles/2004/09/15/1095221669906.html>>. Internet. Accessed 16 September 2004.
- Eccleston, Roy. "Hicks Military Trial of Doubtful Legality." *The Australian*, 30 June 2004 (428 words). Database on-line. Available from Lexis-Nexis. Accessed 2 September 2004.
- Eggen, Dan. "Gonzales Nomination Draws Military Criticism." *Washington Post*, 4 January 2005. Available from <<http://www.washingtonpost.com/ac2/wp-dyn/A45727-2005Jan3>>. Internet. Accessed on 6 January 2005.
- Faiza, Rady. "Grooming Guantanamo." 4 August 2004. Available from <<http://weekly.ahram.org.eg/2004/701/in3.htm>>. Internet. Accessed 6 September 2004.

- Fein, Bruce. "War by Queensbury Rules?" *The Washington Times*, 1 July 2004 (922 words). Database on-line. Available from Lexis-Nexis. Accessed 2 September 2004.
- Golden, Tim. "After Terror, a Secret Rewriting of Military Law." *The New York Times*, 24 October 2004. Available from <<http://207.44.245.159/article7122.htm>>. Internet. Accessed 12 January 2005.
- _____. "Administration Officials Split Over Stalled Military Tribunals." *The New York Times*. 25 October 2004. Available from <<http://www.globalexchange.org/countries/unitedstates/democracy/2632.html>> Internet. Accessed 12 January 2005.
- "Guantanamo Bay Detainees." *BBC News Online*, 10 October 2003. Available from <<http://www.news.bbc.co.uk/1/hi/world/Americas/3180052.stm>>. Internet. Accessed 6 September 2004.
- Human Rights Watch. "United States: Guantanamo Two Years On: US Detentions Undermine the Rule of Law." 9 January 2004. Available from <<http://www.hrw.org/English/docs/2004/01/09/usdom6917.htm>>. Internet. Accessed 6 September 2004.
- Independent Task Force on Public Diplomacy, Council of Foreign Relations. "Finding America's Voice: A Strategy for Reinvigorating US Public Diplomacy." July 2002. Available from <http://www.cfr.org/pdf/public_diplomacy.pdf>. Internet. Accessed 16 September 2004.
- International Network of Engineers and Scientists Against Proliferation. "Force Above the Law: The New International Disorder?" Bulletin 20. Available from <<http://www.inesap.org/bulletin20/bul20art25.htm>>. Internet. Accessed 4 September 2004.
- Janik, Anton L., Jr. "Prosecuting Al Qaeda: America's Foreign Policy Interests Are Best Served By Trying Terrorists Under International Tribunals." *Denver Journal of International Law and Policy*. September 2002. Available from <<http://static.highbeam.com/d/denverjournalofinternationallawandpolicy/september222002/prosecutingalqaedaamericas-humanrightspolicyinteres.html>>. Internet. Accessed 16 September 2004.
- Lawyers Committee for Human Rights. "Imbalance of Powers." March 2003. Available from <http://www.humanrightsfirst.org/us_law/loss/imbalance/imbalance.htm>. Internet. Accessed 2 September 2004.
- Lewis, Neil. "Red Cross Finds Detainee Abuse in Guantanamo." *New York Times*, 30 November 2004. Available from <<http://www.nytimes.com/2004/11/30/politics/30gitmo.html>>. Internet. Accessed 1 December 2004.
- Locy, Tony. "Detainee Cases Show Another Side of GITMO." *USA Today*, 4 November 2004, p.19A.
- Malik, Mohan. "High Hopes: India's Response to US Security Policies." Asia Pacific Centre for Strategic Studies, March 2003. In US Army War College, *International Fellows Course Three Readings*. Carlisle Barracks: US Army War College, 2004, 248-255.
- Mariner, Joanne. "FindLaw Forum: The continuing debate over the legal status of Guantanamo detainees." 11 March 2002. Available from <<http://www.cnn.com/2002/LAW/03/columns/fl.mariner.detainees.03.11>>. Internet. Accessed 6 September 2004.

- Murphy, Sean D., ed. "US Abuse of Iraqi Detainees at Abu Ghraib Prison." *American Journal of International Law*, 98, (July 2004): 591-596.
- National Council of Churches, "Guantanamo Bay Detainees Have a Right to Due Process, NCC Asserts in 'Friend of the Court' Brief Filed Today with US Supreme Court." *NCC News Online*, 14 January 2003. Available from <<http://www.nccusa.org/news/04guantanamobrief.html>>. Internet. Accessed 6 September 2004.
- Powell, Colin. "Release of the Country Reports on Human Rights Practices for 2001." 4 March 2002. Available from <<http://www.state.gov/secretary/rm/2002/8635.htm>>. Internet. Accessed 16 September 2004.
- Rambourg, Gersende. "US Supreme Court Weighs legality of Guantanamo detentions." *Washington Dateline*, 20 April 2004 (615 words). Database on-line. Available from Lexis-Nexis. Accessed 2 September 2004.
- Reisman, Michael. "Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses." *The Yale Journal of International Law*, 29, (Summer 2004): 343-361.
- Rubinfeld, Jed. "The Two World Orders." *The Wilson Quarterly* (Autumn 2003). Available from <http://wwics.si.edu/index.cfm?fuseaction=wq.essay&essay_id=56056>. Internet. Accessed 5 January 2005.
- Savage, Charlie. "4 Ex-Detainees Sue Rumsfeld, 10 Others." *The Boston Globe*. Available from <<http://www.boston.com/news/nation/Washington/articles/2004/10/28/4>>. Internet. Accessed 28 October 2004.
- Sevastopulo, Demetri. "Guantanamo Prisoners Wrongly Held." *London Financial Times*, 19 June 2004 (547 words). Database on-line. Available from Lexis-Nexis. Accessed 2 September 2004.
- Shifter, Michael. "The US and Latin America through the Lens of Empire." February, 2004, 61. In US Army War College. *International Fellows Course Three Readings*. Carlisle Barracks: US Army War College, 2004, 52-58.
- Sommario, Emanuele. "Law and Disorder? The War on Terror and the International Legal System." *The International Spectator* 4/2002. Available from <http://www.iai.it/pdf/book_reviews/sommario.pdf>. Internet. Accessed 2 September 2004.
- The Special Court for Sierra Leone. "Basic Facts." Available from <www.sc-sl.org>. Internet. Accessed 25 October 2004.
- "Supreme Court Rules on Rasul v Bush." *International Law Update*, July 2004 (790 words). Database on-line. Available from Lexis-Nexis. Accessed 2 September 2004.
- Taylor, Guy. "Tribunals Set for Guantanamo Detainees." *The Washington Times*, 17 July 2004 (827 words). Database on-line. Available from Lexis-Nexis. Accessed 2 September 2004.
- Tyler, Patrick. "The World Backs Kerry International Polls Indicate." *The New York Times*, 16 October 2004. Available from <<http://www.jsonline.com/news/nat/oct04/267392.asp>>. Internet. Accessed 5 January 2005.

- United Nations. "United Nations Rights Expert 'Alarmed' over United States Implementation of Military Order." 7 July 2003. Press Release. Available from <<http://www.unhchr.ch/hurricane/nsf/view01>>. Internet. Accessed 6 September 2004.
- US Army War College. *Communicative Arts Directive*. Carlisle Barracks: US Army War College, 2004.
- US Congress. "Lawfulness of Interrogation Techniques under the Geneva Conventions." 8 September 2004. Available from <www.fas.org/irp/crs/RL32567.pdf>. Internet. Accessed 17 November 2004.
- US Department of Defense. "Fact Sheet: Department of Defense Order on Military Commissions." 21 March 2002. Available from <<http://www.defenselink.mil/news/Mar2002/d20020321fact.pdf>>. Internet. Accessed 16 September 2004.
- _____. "Guantanamo Detainee Processes." Available from <<http://www.defenselink.mil/news/detainees.html>>. Internet. Accessed 1 November 2004.
- _____. "Guantanamo Detainees." Available from <<http://www.defenselink.mil/news/detainees.html>>. Internet. Accessed 1 November 2004.
- _____. "Commissions." Available from <<http://www.defenselink.mil/news/commissions.html>>. Internet. Accessed 1 November 2004.
- US State Department. "Egypt: Country Reports on Human Rights Practices 2000." 23 February 2001. Available from <<http://www.state.gov/g/drl/rls/hrrpt/2000/nea/784.htm>>. Internet. Accessed 16 September 2004.
- Wallach, Evan J. "Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?" *The Army Lawyer* (November 2003): 18-47. Available from <http://lawofwar.org/army_lawyer.htm>. Internet. Accessed 6 September 2004.
- Wedgewood, Ruth and Kenneth Roth. "Combatants or Criminals? How Washington Should Handle the Terrorists." *Foreign Affairs* (May/June 2004): 126-129.
- Wedgewood, Ruth. "Let Military Rules Apply While The War Goes On." 2 December 2003. Available from <<http://www.beadorassociates.com/article/735.html>>. Internet. Accessed 6 September 2004.
- _____. "Justice, and Security Too." *Los Angeles Times*, 10 July 2003. Available from <<http://www.beadorassociates.com/article/458.html>>. Internet. Accessed 6 September 2004.
- _____. "The Rule of Law and The War on Terror." 23 December 2003. Available from <<http://www.beadorassociates.com/article/825.html>>. Internet. Accessed 6 September 2004.
- Wedgewood, Ruth and David Cole. Interview by Margaret Warner, 1 May 2002. Available from <http://www.pbs.org/newshour/bb/terrorism/jan-june02/tribunals_5-1.html>. Internet. Accessed 6 September 2004.

_____. Interview by Margaret Warner, 26 May 2003. Available from <http://www.pbs.org/newshour/bb/law/jan-june03/tribunals_05-26.html>. Internet. Accessed 6 September 2004.

_____. Interview by Ray Suarez, 12 June 2002. Available from <http://www.pbs.org/newshour/bb/law/jan-june02/limbo_6-12.html>. Internet. Accessed 6 September 2004.

Wedgewood, Ruth and MG Geoffrey Miller. Interview by Jeffrey Kaye, 22 January 2003. Available from <http://www.pbs.org/newshour/bb/military/jan-june02/detainees_1-22.html>. Internet. Accessed 6 September 2004.

"White House to Appeal Guantanamo Ruling." *FindLaw*. 12 November 2004. Available from <http://news.findlaw.com/ap_stories/a/w/1151/11-12-2004/20041112153004_26.html>. Internet. Accessed 17 November 2004.

Zayas, Professor Alfred De. "The Status of Guantanamo Bay and the Status of the Detainees." The Douglas McK. Brown Lecture. University of British Columbia, Vancouver, 19 November 2003. Available from <http://www.law.ubc.ca/events/2003/November/McK_Brown_Lecture.html>. Internet. Accessed 6 September 2004.