# The Two Faces of Terror

By Tom J. Farer*[*]

To know where we are, we have to see ourselves from a distance. Otherwise the remarkable becomes commonplace.

I see the Military Commissions Act of 2006 from a temporal distance, specifically from the era of state-terror regimes in Latin America during which I served for eight years (1976–1983) as a member of the Inter-American Commission on Human Rights, a principal arm of the Organization of American States (OAS). Those were the years in which governments scattered across the South American continent and the Central American isthmus, anticipating the policy views announced by United States Vice President Dick Cheney in an interview on "Meet the Press" in 2001, decided to go to what Cheney called the "dark side,"[1] or, in the case of those who had long made that side their principal area of operations, decided to move a larger proportion of their respective peoples into it. Throughout the period, reports about the hell on earth my six colleagues and I exposed (in the somewhat stilted idiom official agents are driven to adopt) would appear episodically in the American press. Their implicit subtext was that these horrors were perpetrated by brutes as alien to American life as the venues where they operated.

Occasionally, to be sure, journalists might note in passing a friendly connection between the terror regimes and the United States government, as when the Chilean intelligence service blew up the country's former foreign minister, Orlando Letelier, in

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Washington, D.C.'s tony ambassadorial neighborhood practically on the doorstep of the American Society of International Law. But despite the occasional reports of human rights organizations and journalists that documented within their limited means the connection between agents and agencies of the United States and the agents and agencies of terror regimes in places like Chile under Augusto Pinochet,[2] El Salvador under a shifting group of essentially identical actors,[3] and Guatemala under its military establishment,[4] the horror—to the extent Americans apprehended it—was something happening far away under exotic conditions perpetrated by another species of human being. Being distant, it remained remarkable.

Whether you are trying to locate yourself or your country, you have to look from the right distance: not too far, not too close. How can one gain perspective on one's own behavior from examining the behavior of others not similarly circumstanced? Means are the creatures of circumstance, some say. What may be remarkable and odious in the context of policing an unruly society may be a reasonable application of disciplined force in the waging of "war" on global terrorism.

Is Latin America in the time of state terror too far, too distant an analogy because, some might argue, whatever happened in places like Argentina and Chile and El Salvador and Guatemala, they were not at war? The argument may be fair enough, but its applicability in this instance is doubtful. In all of the countries just listed, the authorities,

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[1] Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106, 107.
[2] *See, e.g.,* JOHN DINGES, THE CONDOR YEARS: HOW PINOCHET AND HIS ALLIES BROUGHT TERRORISM TO THREE CONTINENTS (2004).
[3] *See, e.g.,* MARK DANNER, THE MASSACRE AT EL MOZOTE: A PARABLE OF THE COLD WAR (1994).
[4] *See, e.g.,* SUSANNE JONAS, THE BATTLE FOR GUATEMALA: REBELS, DEATH SQUADS, AND U.S. POWER (1991).

encouraged by the United States, regarded themselves as at war, not only with urban or rural insurgents, but with an international Communist conspiracy against capitalist governments or, as Latin state-terror regimes often put it, the "Christian West." In the words of a first-generation neoconservative, Norman Podhoretz, they were engaged in the "Third World War" just as now, according to the same cohort of ideologues, we are embarked on the Fourth.[5] General Pinochet, leader of the military junta that overthrew the democratically elected government of Chile, actually declared the country in a "state of war"[6] at the same time as he was successfully appealing to his friend, Secretary of State Henry A. Kissinger,[7] for political and material aid. The Argentine military offi!- !cers who seized power in 1976 and their civilian supporters often referred to their campaign of extermination against two well-organized insurgent groups as our "dirty war" (una guerra sucia).[8] In Argentina no fewer than six, and possibly as many as thirty thousand persons—two to ten times the number killed on September 11, 2001—died, not all at once, to be sure, but within a three-year period. And in every one of the countries listed, the entire national life was deeply affected by the respective conflicts. The conflicts penetrated to the marrow of each society.

Putting aside the war in Iraq (which most commentators now concede was launched with at most a tenuous tie to the struggle against transnational terrorism ignited by the events of 9/11), and considering the comparative threats to national security and the comparative material disruption of national life stemming from the U.S.

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[5] Norman Podhoretz, *How to Win World War IV*, COMMENTARY, Feb. 2002, at 19.

[6] Inter-American Commission on Human Rights [IACHR], Report on the Status of Human Rights in Chile, OEA/Ser.L/V/II.34, doc. 21, corr. 1, at 2 (1974).

[7] The observation is made from personal knowledge acquired while I served in 1975–1976 as special assistant to the assistant secretary of state for inter-American affairs.

counterterrorist or the Latin American counterinsurgent struggles,[9] the scale does not seem qualitatively different. And if there is a difference, in at least some of the Latin American conflicts the perceived threat to the security of the social order was arguably greater than it has thus far appeared to be for the United States. The three thousand 9/11 casualties, all innocent by any civilized moral metric, concentrated primarily in one place at one time, were appalling, but, when considered in terms of theoretically preventable deaths in the United States during the same year, less remarkable than the deaths experienced in Latin countries during the time of state terror.[10] As for the impact on social and economic life and the quotidian experience of most Americans, the continuing conflict can hardly be described as going to the marrow of society.[11]

But even if the analogy works from the perspective of the comparative threat to the existing social order or the security and diurnal well-being of individual citizens, is it nevertheless inapt because of certain qualities distinguishing the United States from Latin countries, such as the embeddedness of the former's democratic institutions and protections for individual rights, the traditional independence of its judiciary, and the belief of most of its people that they are citizens of a rule-of-law community? Obviously, those distinctions do not make it inapt—rather the contrary. For one would far more

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[8] The phrase was peppered into the discourse of many of the interlocutors of the Inter-American Commission on Human Rights during its visit to Argentina in 1979.

[9] A counterterrorism expert advising the U.S. Department of State sees the terrorist threat as a multitude of insurgencies. George Packer, *Knowing the Enemy*, NEW YORKER, Dec. 18, 2006, at 60, 62–65.

[10] In 2001 the United States experienced approximately thirty thousand suicides, sixteen thousand homicides, and eighteen thousand deaths caused by drunk drivers. LOUISE RICHARDSON, WHAT TERRORISTS WANT 147 (2006).

[11] Airline travel is high. *See* Micheline Maynard, *Airlines Find Help in Flights Overseas*, N.Y. TIMES, July 5, 2005, at C1. The stock market is higher than in 2000. *See* Paul J. Lim, *The Stock Market Is Still Pressing the Reset Button*, N.Y. TIMES, May 8, 2005, §3,

readily anticipate deviations from due process in societies with comparatively weak traditions of judicial review and other restraints on executive discretion than in the United States. It is precisely because of the historic difference between American and most Latin American societies that the military commissions appear remarkable and ominous.

Other points of identity mark the Latin American and the contemporary U.S. experience. In both instances, to the popular and official mind the "enemy" assumes the form of a broad class of people viewed with such hate and moral revulsion that members of the class are presumed guilty and beyond the protection of the normal moral and legal constraints on the exercise of official power.[12] To the Latin American terror regimes, the enemy was not simply the insurgents, but all who in the practice of their profession or in their speaking and writing and teaching supported them—lawyers defending persons accused of political crimes, for instance, and those who condemned the government for its violations of human rights or who called for sweeping economic reform. One Argentine general famously put it this way: "First we will kill all of the terrorists; then we will kill all who helped them, and then we will kill all who did not help us." His words corresponded to the deeds of the military in El Salvador who slaughtered the Jesuit officials of the Central American University,[13] and their Guatemalan death squad

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at 7. Taxes are lower. *See* David Firestone, *Dizzying Dive to Red Ink Poses Stark Choices for Washington*, N.Y. TIMES, Sept. 14, 2003, at A1. And so on.

[12] For an illustrative channeling of the popular mind on the American Right, see Ann Coulter, *Airport Security Acted Appropriately with Imams*, HUM. EVENTS, Dec. 4, 2006, at 6.

[13] *See* Lindsey Gruson, *6 Priests Killed in a Campus Raid in San Salvador*, N.Y. TIMES, Nov. 17, 1989, at A1; Robert Pear, *U.S. Official Links Salvadoran Right to Priests' Deaths*, N.Y. TIMES, Nov.18, 1989, at A1.

counterparts who assassinated Social and even Christian Democrats and decimated the ranks of the country's leading law faculty and its small trade union movement.[14]

To his credit, President George W. Bush has tried to distinguish between Muslims in general and an enemy variously defined as "radical Islam" or "Islamo-fascism." But not all officials have been as nuanced in their pronouncements. For instance, one general (rewarded by former secretary of defense Donald Rumsfeld with a high position in the Department of Defense) has toured the country in uniform, appearing in evangelical churches to reassure believers that because the Christian God is more powerful than the Islamic one, we will win the struggle against the terrorists.[15] Moreover, even distinguished scholars like the neoconservative icon and frequent television commentator Bernard Lewis see terrorist-generating pathologies in the Islamic world as a whole, or at least in its Arab venues.[16] In addition, the officially expressed fear of "sleeper cells," the periodic heavily publicized "discoveries" of terrorist plotters in venues ranging from Lackawanna[17] to Miami,[18] and the arrest of a Muslim army chaplain on suspicion of aiding Guantánamo detainees,[19] as well as the identification of the terrorist threat with Islamic organizations like Hezbollah and Hamas and with insurgents in Iraq and governments in Syria and Iran inevitably send the message that terrorists, rather than being tiny, isolated grouplets within the billion-person Islamic community, are a huge

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[14] *See generally* IACHR, Report on the Situation of Human Rights in the Republic of Guatemala, OEA/Ser.L/V/II.53, doc. 21, rev. 2, at 18–38 (1981).
[15] *See* R. Jeffrey Smith  Josh White, *General's Speeches Broke Rules: Report Says Boykin Failed to Obtain Clearance*, WASH. POST, Aug. 19, 2004, at A23.
[16] Bernard Lewis, *The Revolt of Islam*, NEW YORKER, Nov. 19, 2001, at 50.
[17] Dan Herbeck, *5 from Lackawanna Six Sent to Indiana Prison*, BUFFALO NEWS, Dec. 28, 2006, at B1.
[18] Mark Hosenball, Carmen Gentile,  Rebecca Wakefield, *Terror Plot Takedown: The Feds Foil a Homegrown Plan. Will the Charges Stick?* NEWSWEEK, July 3, 2006, at 42.

network operating from that communal base. The popularization of a sweeping Manichaean vision of the enemy creates an environment deeply inimical to due process. In such an environment, procedural safeguards of defendants' opportunity to refute the charges levied against them are particularly important.

The provisions and omissions of the Military Commissions Act of 2006[20] constitute the most up-to-date statement of the U.S. government's policies for handling persons suspected of conspiring to commit, or of facilitating or attempting to facilitate, acts of terrorism directed at the United States or those states it regards as allies. The commissions are criminal courts run by the U.S. armed forces to try "alien unlawful enemy combatants."[21] An unlawful enemy combatant is a person "who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents" or (circularly) anyone who "has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense."[22]

For the reasons sketched above, I find myself reading the Act in light of the conditions and policies my Latin colleagues and I observed and assessed during the period 1976 to 1983. In preparing reports following on-site observations in Argentina (fall 1979)[23] and Colombia (spring 1980),[24] we focused among other issues on the

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[19] Neil A. Lewis, *Lawyer Upset by Treatment of Ex-Chaplain for Detainees*, N.Y. TIMES, Oct. 25, 2003, at A14.
[20] Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 ( West 2006) (to be codified at 10 U.S.C. §§948a–950w and other sections of titles 10, 18, 28, and 42) [hereinafter MCA].
[21] 10 U.S.C. §948b(a).
[22] 10 U.S.C. §948a(1).
[23] IACHR, Report on the Situation of Human Rights in Argentina, OEA/Ser.L/V/II.49, doc. 19, corr. 1 (1980) [hereinafter Argentina Report], *available at* <http://www.cidh.org/publi.eng.htm>.

military trials of civilians conducted by both countries. In our internal deliberations, I urged the view that a military institution's trial of persons other than institution members failed by its very nature to provide accused persons with a fair opportunity to defend themselves. Even in democratic countries with constitutional traditions of civilian control of the armed forces, I argued, the military is a relatively closed, very hierarchical institution that powerfully indoctrinates its members with a view of themselves as a breed apart, a group of people peculiarly loyal to the idea of the Nation, a group marked by an unusual measure of dedication and courage and professional competence. Moreover, the military inculcates intense loyalty to the institution as such, with its sacralized traditions and achievements, and it fosters intense bonding, above all at the unit level (the "band of brothers"), but beyond that to all who have dedicated themselves to applying violence for the good of the state and to risking their lives when called upon to do so. Police forces have a similar ethos. I speak from some experience, having helped to train one.[25] Consider the probable fairness of trials of common criminals conducted by police officers on the basis of evidence marshaled by their colleagues.

A defendant in a military tribunal is an outsider brought before one set of officers by another set of officers who, having assessed the evidence usually gathered by still a third set of officers, have concluded that it confirms the defendant's guilt of some grave crime against the national interest and possibly against the institution itself. A finding of not guilty would constitute a rejection of the judgment of fellow officers in favor of the claims of the outsider, the stranger, the man or woman with whom they share no bond.

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[24] IACHR, Report on the Situation of Human Rights in the Republic of Colombia, OEA/Ser.L/V/II.53, doc. 22 (1981) [hereinafter Colombia Report], *available at id.*

By contrast, in the court-martial of a fellow officer, bonds of institutionalized fellowship connect the tribunal to the defendant as well as to the prosecution. Hence, even under the best of circumstances, the psychological dynamics are utterly different.

The circumstances in Argentina and Colombia compounded the due process risks of trial of outsiders by military tribunals. Politically conservative military establishments were engaged in violent struggles against clandestine insurgents whom they regarded as irreconcilable enemies of the capitalist and Christian social order they were sworn and emotionally bound to defend. The insurgents were variously described as "terrorists" and "subversive delinquents." At least in the Argentine case, as noted above, the active members of the insurgency were seen as the armed wing of a much wider conspiracy against "Christian civilization," supported by a still wider band of tractable, ideologically sympathetic fools. Given that perspective, the attribution of guilt by association was not a moral or tactical error.

My colleagues saw the issue clearly, but they noted that trials of civilians by military tribunals for crimes against the state or for acts particularly dangerous to society during states of emergency were common enough in Latin America, and some constitutions provided for them explicitly. Since the American Convention on Human Rights does not explicitly prohibit such trials and since they were precedented and recognized in some cases by national law at the time of the Convention's adoption, a Commission finding that they were in principle illicit under the American Convention might well be condemned as an excessive interpretive stretch.

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[25] From 1963 to 1964, I served as special assistant to the commander of the Somali National Police and as instructor in law and unarmed self-defense at the Police College in that country.

In the end, we agreed that it would be wiser to assess the fairness of military trials case by case. In each instance the question would be whether the constitution of the tribunal and its procedures enabled the accused to make an effective defense against the charges levied. We would look to such elements as the right of the accused to counsel of their choice, opportunities for cross-examination of witnesses, access of the defense to all of the evidence considered by the tribunal, exclusion of coerced testimony, a reasonable opportunity to prove coercion, and a right of appeal particularly to a civilian court.

The on-site observations in Argentina and Colombia provided the Commission with an early opportunity to apply these tests. For the most part, the Argentine military government chose to arrest, torture, and secretly murder persons perceived as implicated in the insurgencies, without any intervening process other than an ex parte finding by a regional commander, based on whatever information he deemed sufficient, that a person should be "disappeared." Still, the government did establish special military tribunals (not part of the regular courts-martial) to process a substantial number of cases, some involving persons who had been detained and held without trial by the preceding civilian government led by the widow of former president Juan Perón. Active-duty officers, who need not have had legal training, were assigned as counsel to the defendants. (Retired officers even of the highest rank, much less civilians, could not represent the accused.)

The entire process, closed to the public, consisted of bringing the defendant before one of these special tribunals and allowing him to make a statement. Thereafter, the tribunal, on the basis of such evidence as its members deemed appropriate, pronounced judgment, almost invariably one of guilt. The crimes falling within the tribunals' jurisdiction included, in addition to the general crime of involvement in

subversive activities, "incitement to mass violence and disruption of public order, assaults against transport and other public services, actions against water, food and medicine, and fire, explosion or any other similar means that may do harm to persons and property."[26] In light of the summary and opaque procedure, the absence of review by the civilian courts, the denial of counsel other than the aforementioned active officers (of course under military discipline), and the absence of any provision in the Argentine Constitution authorizing these special military commissions, the Commission found that convictions by these commissions violated the human right to a fair trial.[27]

In Colombia the Commission found a very different system governing the trial of civilians by military tribunals. To begin with, the tribunals were not ad hoc. The Colombian Constitution provided explicitly that military penal jurisdiction could be extended to civilians charged with crimes against the existence and security of the state and against the constitutional system, and, in addition, authorized the expansion of jurisdiction during a state of siege to "common crimes when they have some connection with the disturbance of public order or with the causes that have led to the unusual situation."[28] And under the Colombian system of justice, the tribunals were (and presumably remain) part of a hierarchy of civilian and military tribunals of first or second instance with the Supreme Court of Justice at its apex. In other words, their decisions and processes were ultimately subject to review by civilian judges of the country's highest court. Moreover, these military courts of first instance were required to comply with all constitutional guarantees relating to fair trial.

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[26] Argentina Report, *supra* note 23, ch. VI(C)(1), at 222 n.6.
[27] *Id.*, para. (2), at 223, Conclusions, sec. A(1)(d), at 263.
[28] Colombia Report, *supra* note 24, ch. V(C)(2), at 137.

During its on-site observation in Colombia, the Commission was given unconstrained access to defendants in the principal trial then under way, a proceeding against approximately one hundred members of the nationalist, non-Communist M–19 guerrilla group known more for its clever embarrassments of the armed forces than for its violence.[29] Many of them, probably a majority, testified to Commission members that in the period between the time of their capture and their transfer to civilian prisons, their military captors had abused them physically in an effort to extract information and confessions. Many had confessed to various crimes and those confessions were a principal part of the government's case against them. Defense counsel had demanded hearings on the issue of coercion and it appeared to the Commission that if the confessions were found by the tribunal to have been coerced, they would be excluded. Less clear was whether evidence secured as a result of the confessions would also be excluded.

By agreement with the Colombian government, the Commission maintained a presence in the country for months following the end of its visit so as to observe the ongoing proceedings and proceedings elsewhere in the country against members of one or another insurgent group. Although we felt that the Colombian government was probably attempting to meet the fair trial standards of the American Convention, our report on the situation of human rights in that country nevertheless found the process as a whole to be inadequate. Sometimes the system worked too fast, providing insufficient time for the preparation and conduct of an effective defense, and sometimes it worked too

[29] The M–19 subsequently accepted an amnesty, disarmed, and became active in electoral politics as a party of social and economic reform. Thereafter, many of its leading members were assassinated by right-wing death squads believed to be associated with the country's drug mafia.

slowly: the Commission had consistently maintained in its jurisprudence that long-term detention without a final judicial resolution of guilt or innocence was itself a punishment without due process of law. In addition, the Commission criticized the expansion of military jurisdiction to common crimes such as extortion, kidnapping, and robbery. We believed that all of these crimes could be tried in the civilian court system, which "provides greater procedural guarantees of due process."[30] One of those guarantees concerned interrogation. The Commission concluded that abusive interrogation, including "torture" after capture, was commonplace and that this practice in itself undermined the requisite fairness of the military proceedings.[31]

Recent declarations of the Commission suggest that its views on military tribunals remain essentially unchanged. The most relevant appears in its 2002 *Report on Terrorism and Human Rights:*

> Fundamental principles of due process and a fair trial applicable at all times also entail the right to be tried by a competent, independent and impartial tribunal as defined under applicable international human rights or humanitarian law. This requirement generally prohibits the use of ad hoc, special, or military tribunals or commissions to try civilians for terrorist-related or any other crimes. . . . [D]uring international armed conflicts, [a state's military courts] may try privileged and unprivileged combatants, provided that the minimum requirements of due process are guaranteed. Military courts may not, however, prosecute human rights

[30] Colombia Report, *supra* note 24, ch. V(G)(7), at 181.
[31] *Id*. at 181, Conclusions, para. 7, at 220.

violations or other crimes unrelated to military functions, which must be tried by civilian courts.[32]

With respect to prisoners of war, that is, combatants in an international armed conflict, the Commission has approvingly quoted Article 84 of the Third Geneva Convention which provides that "[i]n no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized."[33]

Guantánamo detainees include those who were members of the armed forces of the Taliban regime and were seized in the course of the U.S. intervention in Afghanistan, and also those who were arrested outside the combat zones or, although allegedly connected to Al Qaeda or the Taliban regime, were not in the usual sense of the word "combatants." Since the U.S. government deems the country to be at "war" with a vast geographically dispersed transnational movement or ideological network, it regards persons in both categories as combatants in an international armed conflict. If one accepts the conception of the counterterrorist struggle as without temporal or spatial limits, then trial by military tribunals of persons suspected of terrorist actions or conspiracies to act, or of materially assisting such actions or conspiracies, is not presumptively a violation of due process under the Commission's interpretation of international and regional human

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[32] IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, doc. 5, rev. 1, corr., Executive Summary, para. 18 (2002), *available at* <http://www.cidh.org/terrorism/eng/toc.htm>.

[33] *Id.*, pt. III, para. 104 n.291; *see also id.*, para. 256.

rights law. But as I have already suggested, persons falling into the second category of detainees are closely analogous to the clandestine insurgents who were hunted down by the Argentine and other Latin American military establishments.

The disparity in numbers and capabilities between the armed forces of the United States and its allies and the members of the groups and grouplets of Islamic radicals deemed to constitute the enemy in this conflict is far greater than the disparity between, for instance, the government of Argentina and the insurgents it sought to extirpate. In light of this disparity and the total absence of pitched battles between organized armed forces, the effort to bring those arrests and detentions under the heading of "armed conflict," when they closely resemble police operations against criminal groups in national societies and were executed in many cases by U.S. paramilitary intelligence agents, seems inappropriate, even absurd. In combat zones the normal legal institutions and processes for investigating crimes and trying alleged criminals are precariously situated, if functioning at all. That is hardly the condition of the United States today. Terrorists, including persons associated with Al Qaeda, have in fact been tried in the country's ordinary criminal courts.

In light of its observations and conclusions in the Argentine and Colombian cases, if the Commission as then constituted were currently fulfilling its mandate, how might it view the process established by the Military Commissions Act? From the Commission's conclusions in the Colombian case (1981), it is evident that although it felt unable to declare military trials of persons not members of the military establishment per se violations of due process, in part for the reasons I sketched above, it regarded them with

great skepticism. I think it is fair to say that in the mind of most, perhaps all Commission members, such trials presumptively violate due process.

That said, could it be fairly argued that the MCA system considered in context could overcome that presumption? I think not, even in the cases of persons detained in the course of military operations in Afghanistan, much less those arrested outside a combat zone. To be sure, unlike the U.S. Combatant Status Review Tribunals and the Argentine military tribunals, the military commissions will allow defendants counsel of their choice. In addition, defendants have a right of appeal to civilian courts, albeit only on issues of law. Aside from the brute fact that the commissions are military courts trying outsiders brought before them by fellow officers who have already concluded that the accused were engaged in executing or facilitating the projects of a worldwide conspiracy to murder Americans wholesale, the commissions deviate from civilian criminal courts in at least three important respects: admissibility of evidence obtained through coercive means, hearsay evidence, and use of classified evidence.

First, statements secured by cruel and inhuman means before the enactment of the Detainee Treatment Act on December 30, 2005, are admissible if the military judge finds that they are reliable and of sufficient probative value, and that their admission would serve the interests of justice.[34] Given the methods of interrogation now known to have been employed against many of the detainees, this provision alone is likely to affect a substantial number of trials.[35] Moreover, nothing in the Military Commissions Act appears to preclude the admission of evidence obtained through abusive interrogation

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[34] MCA, *supra* note 20, 10 U.S.C. §948r(c).

[35] The Defense Department has indicated that approximately eighty of the hundreds of persons who have been detained in Guantánamo, Afghanistan, and secret CIA-run

("fruit of the poisoned tree"); such evidence, secured by means that violate the Convention Against Torture, may then be used to support a finding that the confessions themselves are "reliable."

While statements resulting from "torture" are prohibited altogether, once again the Act does not indicate that evidence obtained through torture could not be used to validate statements obtained by cruel, inhuman, and degrading means. In addition, the Bush administration apparently continues to adhere to a definition of torture far narrower than the one most civilized governments and independent legal experts believe to have been intended by the drafters of the Convention Against Torture and other human rights instruments and to be recognized today as a result of the evolution of moral sentiments.[36] The Military Commissions Act itself defines torture to include only cases where the physical pain is "extreme" or there is "a substantial risk of death" or significant impairment of a body part or organ.[37] While this view is conceivably consistent with a quarter-century-old holding by the European Court of Human Rights,[38] it cannot be squared with a more recent decision of that prestigious body, which discarded its earlier view of torture as too narrow in light of the evolution of opinion and held the term applicable to a case in which the accused was repeatedly beaten.[39]

Actually, the Act seems to imply that physical coercion qualifying only as cruel and inhuman may also require that the pain inflicted be "severe." In reference to the admissibility of statements secured through "cruel, inhuman or degrading means," the

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detention centers since some time before December 30, 2005, will be tried by these tribunals.

[36] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100–20 (1988), 1465 UNTS 85.

[37] 10 U.S.C. §950v(b)(12)(B)(i).

[38] Ireland v. United Kingdom, 25 Eur. Ct. H.R. (1978).

Act invokes the definitional language of the Detainee Treatment Act, which in turn incorporates by reference "cruel, unusual, and inhumane treatment . . . prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution."[40] Presumably, that is an incorporation of Supreme Court interpretations of those provisions and would probably result in the prohibition of severe beatings, prolonged isolation under brutal conditions, cuffing in positions designed to result in sustained pain, and exposure to intense cold and other measures hitherto employed by U.S. interrogators of detainees. However, another provision of the Military Commissions Act, concerning the punishment of violations of common Article 3 of the Geneva Conventions of 1949 and listing both torture and cruel, inhuman, and degrading treatment as punishable acts, seems to require that physical pain in both cases be "extreme."[41] Moreover, the Military Commissions Act provides in the section on admissibility that in the case of statements where "the degree of coercion is disputed," the military judge may admit them if the judge finds that "the totality of the circumstances renders the statement reliable and possessing sufficient probative value" and "the interests of justice" would best be served by admission.[42] In short, then, statements obtained before December 30, 2005 (the effective date of the Detainee Treatment Act), by means that many legal experts regard as torture but the present administration does not could be admitted.

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[39] Selmouni v. France, 1999–V Eur. Ct. H.R. 149, para. 101.

[40] Detainee Treatment Act of 2005, Pub. L. No. 109-148, sec. 1003(d), 119 Stat. 2739 (to be codified at 10 U.S.C. §2000dd).

[41] MCA, *supra* note 20, sec. 6(b) (revising War Crimes Act to add new subsection prohibiting both torture and cruel or inhuman treatment as violations of common Article 3 [18 U.S.C. §2441(d)(1)(A)  (B)], and defining term "serious physical pain or suffering" for purposes of the latter as involving "extreme physical pain" [18 U.S.C. §2441(d)(2)(D)(ii)]).

[42] 10 U.S.C. §948r(c), (d).

In addition to repeated partial suffocation by water (so-called waterboarding),[43] methods that the administration apparently does not regard as torture, since it denies that torture has been tolerated, include prolonged exposure to extreme temperatures, prolonged chaining in stress positions, and repeated and prolonged interrogations to the point of exhaustion. These methods have been used. For instance, one FBI agent assigned to Guantánamo in 2004 reported to his superiors that "the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconcious [sic] on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night."[44] Another agent complaint to superiors states:

> On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated on themselves, and had been left there for 18, 24 hours or more.[45]

An army investigation stemming ultimately from the FBI complaints (or their publication) details the interrogation of a prisoner called Mohammed al-Qahtani at Guantánamo:

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[43] Douglas Jehl, *Questions Left by C.I.A. Chief on Torture Use*, N.Y. TIMES, Mar. 18, 2005, at A1.

[44] American Civil Liberties Union, FBI e-mail (Aug. 2, 2004), *available at* <http://www.aclu.org/torturefoia/released/FBI.121504.5053.pdf>. The FBI document, dated July 29, 2004, was released to the ACLU by the government on August 2, 2004, per a Freedom of Information request.

> [F]or eleven days . . . al-Qahtani was interrogated for twenty hours each day . . . He was kept awake with music, yelling, loud white noise or brief opportunities to stand. He then was subjected to eighty hours of nearly continuous interrogation until what was intended to be a 24-hour "recuperation." This recuperation was entirely occupied by a hospitalization for hypothermia that had resulted from . . . use of an air conditioner. . . . The prisoner slept through most of the 42-hour hospitalization after which he was hooded, shackled, put on a litter and taken . . . to an interrogation room for twelve more days of interrogation, punctuated by a few brief naps. He was then allowed to sleep for four hours before being interrogated for ten more days, except for naps of up to an hour. He was then allowed 12 hours of sleep . . . but for the next eleven days, [he] was only allowed naps of one to four hours as he was interrogated.[46]

That is one problem. Two others are the admissibility of hearsay[47] and the denial to defendants or their counsel of access to any classified information if the military judge determines that "disclosure would be detrimental to the national security."[48] Of course, the admission of hearsay is not a per se violation of due process. Undoubtedly, in some

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[45] *Id.*
[46] Steven Miles, *Medical Ethics and the Interrogation of Guantanamo*, AM. J. BIOETHICS, Mar. –Apr. 2007, at 1, 2.
[47] MCA, *supra* note 20, 10 U.S.C. §949a(b)(2)(E).

circumstances hearsay is highly credible and its use has respectable precedents. It is admissible, for instance, under the rules of the International Criminal Tribunal for the Former Yugoslavia, a tribunal scrupulous about defendants' rights almost to the point of absurdity given the public nature of the crimes over which it has jurisdiction.[49] But that is a tribunal open to public scrutiny in which independent judges preside. It contains a host of safeguards for defendants' rights and provides the latter with virtually unlimited time and broad opportunity to present exculpatory evidence. Among other safeguards, the defendants are aware in detail of all the evidence against them. And the hearsay, where it is allowed, will simply be a small part of the mountains of evidence marshaled before the Tribunal.

By contrast, the military commissions are not independent; they are mere emanations of the president and the secretary of defense who have publicly declared that prisoners held at Guantánamo are unlawful enemy combatants, the "worst of the worst."[50] Hence, for the commission to find any of the accused not guilty would be to repudiate not simply the fellow officers who have organized the prosecution, but also their commander in chief and the next highest figure in the chain of command, the secretary of defense. Such a finding, moreover, would seem to confirm implicitly the charge that by its actions in Guantánamo, above all its initial refusal to allow detainees access to judicial review of their cases, the administration has pitilessly compromised the human rights of innocent men. Furthermore, the implications for the commander in chief 's stature of a not-guilty

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48 *Id.* §949d(f).

49 Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?* 22 HUM. RTS. Q. 90, 94–95 (2000).

50 HUMAN RIGHTS WATCH, UNITED STATES: GUANTANAMO TWO YEARS ON—U.S. DETENTIONS UNDERMINE THE RULE OF LAW (2004), *available at*

finding would be aggravated if such a finding could be seen as stemming in large part from a commission's rejection of incriminating statements on the grounds that they were obtained by torture or means short of torture so cruel as to deprive the statements of credibility. Surely the members of the commissions (and the judges who review their findings) will not be blind to the fact that Guantánamo is a global cause célébre, a cudgel with which its critics beat the government of the United States, a weapon in the global struggle for hearts and minds. So even if the institutional and environmental circumstances in which these tribunals are enmeshed were no worse than I have just described, the claim that they are positioned to be impartial merits the Duke of Wellington's response to a man he encountered during a stroll in Hyde Park, who addressed the duke as "Mr. Smith, I presume." To which the duke is said to have responded: "Sir, if you believe that, you will believe anything."

Unfortunately, there are grounds for concluding that they are worse. Credible reports from persons who have received carefully guided tours of Guantánamo suggest that the violent animus toward detainees, the conviction of their guilt expressed in the statements of the highest officials of the executive branch, is not merely rhetorical. On the contrary, it appears to saturate the institutional environment. Returning from one such tour, Karen Greenberg, co-editor of The Torture Papers,[51] reported a briefing from Guantánamo's commanding officer, Rear Admiral Harry B. Harris Jr. "'Today, it is not about guilt or innocence. It's about unlawful enemy combatants . . . . And they are all

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<http://hrw.org/english/docs/2004/01/09/usdom6917.htm>; Tim Golden, *Voices Baffled, Brash and Irate in Guantánamo*, N.Y. TIMES, Mar. 6, 2006, at A1.

[51] THE TORTURE PAPERS (Karen J. Greenberg  Joshua L. Dratel eds., 2005).

unlawful enemy combatants.'"[52] This saturation affects Pentagon perceptions of the legal process it has been driven by Congress and the Supreme Court to construct. It can be observed on the ground in Guantánamo and well beyond it. Greenberg writes: "Our handlers use the term 'habeas lawyers' as a seemingly derogatory catch-all . . . both [for] defense attorneys—those who are defending their clients before the military commissions—and habeas attorneys, those who seek to challenge in U.S. courts the government's right to detain their clients."[53]

This institutional conviction of the detainees' guilt and a correspondingly naked hostility to anyone seeking to challenge that conviction extend far up the chain of command. On January 13, 2007, the New York Times reported that the deputy assistant secretary of defense for detainee affairs, one Charles D. Stimson, "was dismayed that lawyers at many of the nation's top firms were representing prisoners at Guantánamo . . . and [declared] that the firms' corporate clients should consider ending their business ties," a view of the lawyers' ethical obligations channeled thereafter by the Wall Street Journal 's editorial page, which, as a convenience to the paper's business readers, listed the firms previously cited by Stimson.[54]

Hostility to lawyers associated with efforts to protect the due process rights of detainees includes lawyers inside the military establishment. An Australian detainee, David Hicks, was the first person referred to the commissions for trial. Seized by forces of Afghanistan's so-called Northern Alliance, the coalition of ethnic groups that with the

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[52] Karen J. Greenberg, *Guantanamo Is Not a Prison: 11 Ways to Report on Gitmo Without Upsetting the Pentagon* (Mar. 9, 2007), *available at* <http://www.lawandsecurity.org/get_article/?id=67>.

[53] *Id.*

[54] Neil A. Lewis, *Official Attacks Top Law Firms over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1. Mr. Stimson resigned on February 2, 2007.

assistance of the U.S.-led coalition had defeated the Taliban, he was then turned over to U.S. troops and held in Guantánamo for five years. A proposal that he be indicted for "attempted murder" (apparently on the theory that as an unprivileged combatant he would have violated the laws of war had he shot anyone even while fighting as a regular member of the Taliban armed forces) was finally dropped and he was charged with one count of providing material support for terrorism. Hicks's military defense lawyer, Marine major Michael Mori, stated publicly that omission of the attempted murder charge was an admission that the charges that had previously been made to justify detention were baseless and that, since the new support-for-terrorism charge was previously unknown to the law of war, trying Hicks would constitute a violation of the fundamental rule against ex post facto criminal punishment. A senior military prosecutor countered by warning Mori that he himself was subject to charges of violating Article 88 of the Uniform Code of Military Justice, which prohibits the use of contemptuous language against the president, the vice president, the secretary of defense, and Congress.[55]

Hostility to lawyers, whether or not inside the government, intent on protecting detainees' rights or even simply protecting the legal order's integrity seemingly extends beyond the Department of Defense. According to Jesselyn Radack, while she was serving in the Department of Justice (she is now in private practice), she "received a call from a Criminal Division attorney who wanted to know about the ethical propriety of interrogating [the so-called 'American Taliban,' John Walker] Lindh without a lawyer being present." Radack was then told

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[55] David Nason, *Mori Charges Could Be Laid After Trial*, WEEKEND AUSTRALIAN, Mar. 3, 2007, at 3.

that Lindh's father had retained counsel for his son.

I advised that . . . Lindh should not be questioned without his lawyer. . . . [T]he FBI interviewed him anyway. At that point, I advised that the interview may need to be sealed and used only for intelligence-gathering or national security purposes, not criminal prosecution. Again, my advice was ignored.

Three weeks later, former Attorney General John Ashcroft announced that a criminal complaint had been filed against Lindh. "The subject here is entitled to choose his own lawyer," he said, "and to our knowledge, has not chosen a lawyer at this time." . . .

Two months later, I inadvertently learned that the judge presiding over the Lindh case had ordered that all DOJ correspondence related to Lindh's interrogation be submitted to the court. . . . The prosecutor said he had only two of my e-mails when I knew I had written more than a dozen. When I went to check the file, the e-mails containing my assessment that the FBI had committed an ethical violation in Lindh's interrogation were gone.[56]

Radack goes on to recount resigning from the department after she had managed to resurrect the missing e-mails from her computer archives. Then, after the department continued to assert that it had never believed that Lindh had a lawyer at the time of his interrogation, she "disclosed the [resurrected] e-mails to the media in accordance with the Whistleblower Protection Act." Whereupon, according to her, the government among other things successfully brought pressure on her firm to place her on indefinite leave, announced the launching of a criminal investigation into her activities, and brought complaints against her before the bar regulatory authorities in the states where she was admitted.[57]

The most troubling feature of her account is the erasure of her e-mails so that they were not available for inclusion in the material requested by the trial court judge. Her experience in this respect anticipates an occurrence in the criminal case against Jose Padilla, who like Lindh was initially held as an "enemy combatant" allegedly without legal rights and then moved into the regular criminal justice system. Here, a government attorney announced that a video tape of Padilla's last interrogation session by military authorities had mysteriously "disappeared."[58]

Perhaps the most persuasive evidence of the corrupting effects of the government's interest in demonstrating inerrancy when it comes to identifying enemy combatants are the proceedings of the Combatant Status Review Tribunals established by

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[56] Jesselyn Radack, *A Blacklist's Real Face*, NAT'L L.J., Feb. 19, 2007, at 23, 23.
[57] *Id.*

the Defense Department following the Supreme Court decisions in Rasul v. Bush[59] and Hamdi v. Rumsfeld,[60] which held that the Guantánamo detainees were entitled to access to the federal courts through the writ of habeas corpus. The CSRTs are alleged to constitute the "competent" tribunals called for by Article 5 of the Third Geneva Convention of 1949 in cases where there is any doubt about whether persons, having committed any belligerent act and then been captured, qualify for prisoner-of-war status.

Professor Mark Denbeaux of the Seton Hall Law School, counsel for two Guantánamo detainees, and a private lawyer, Joshua Denbeaux, aided by a group of Seton Hall law students, completed an analysis in late 2006 of the CSRT proceedings based on the records the U.S. government had produced, in almost all cases under the compulsion of court orders.[61] Full records were produced in only 102 of the 558 CSRT proceedings: those with respect to which habeas corpus petitions were filed. In response to an order arising from a Freedom of Information Act request, the Department of Defense produced the transcripts of all 361 processes in which detainees chose to participate.[62]

The Denbeaux report based on this analysis documents, inter alia, the following elements of the process. Detainees were denied counsel; instead, they were allowed a personal representative appointed by the military authorities who informed the detainee that "[n]one of the information you provide me shall be held in confidence and I may be

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[58] Michael Isikoff Mark Hosenball, *Terror Watch: The Case of the Missing Movie*, NEWSWEEK, Feb. 28, 2007, *at* <http://www.msnbc.msn.com/id/17389175/site/newsweek/>.

[59] Rasul v. Bush, 542 U.S. 466 (2004).

[60] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[61] Mark Denbeaux Joshua W. Denbeaux, No-Hearing Hearings—Csrt: The Modern Habeas Corpus? (Seton Hall Public Law Research Paper No. 951245, Dec. 13, 2006), *available at* <http://ssrn.com/abstract=951245>.

obligated to divulge it at the hearing."[63] In at least one case the representative testified against the detainee. Where detainees did seek personal representatives, meetings were brief and occurred shortly before the hearing. The detainee was also told by the personal representative that the government had already determined through multiple levels of review that he was an enemy combatant, that the government's finding rested upon classified evidence that he could not see, and that the tribunal would presume that the classified evidence was reliable and valid.[64]

The processes were consistent with their ominous foreshadowing.

> In the majority of the CSRT hearings, the Government rested on the presumption that the classified evidence was sufficient to establish that the detainee was an enemy combatant. The Government never called any witnesses and rarely adduced unclassified evidence. In the majority of cases, the Government provided the detainee with no evidence, declassified or classified, which established that the detainee was an enemy combatant. Instead, the Government provided the detainee merely with what purported to be a summary of the classified evidence. This summary was so conclusory that it precluded a meaningful response. The Government then relied on the

[62] *Id.* at 4–6.
[63] *Id.* at 15.
[64] *Id.* at 5.

> presumption that the secret evidence was reliable and accurate.[65]

According to the records analyzed by the Denbeaux, at least 55 percent of the detainees sought either to inspect the classified evidence or to present exculpatory evidence in the form of witnesses and/or documents. Naturally, all requests to inspect classified evidence were denied. Less naturally, all requests by detainees for witnesses not already detained in Guantánamo were denied. "Therefore, the only witnesses that were allowed . . . were presumed enemy combatants testifying in favor of other presumed enemy combatants."[66] The only documentary evidence that detainees were allowed to introduce in practice were letters from family and friends. Moreover, in cases where the detainee claimed that other documents would prove that the charges against him could not be true—documents such as passports, hospital records, and judicial proceedings—efforts to secure their admission into the record were rejected even when the documents were in the hands of the government.[67]

One poignant instance of the failure to secure the introduction of documentary evidence is the case of Hadj Boudella, a resident of Bosnia of Algerian descent. In October 2001, he had been arrested in Bosnia by local officials who accused him of plotting with others to blow up the United States and United Kingdom Embassies in Sarajevo. Three months later, the Bos!-!nian Supreme Court ordered his release on the grounds that the charges against him had not been substantiated. As he left the detention

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[65] *Id.*
[66] *Id.*

facilities, he was seized in front of his wife by agents of the U.S. government and whisked off to Guantánamo where he languished for three years before appearing before the CSRT. In response to his request that a copy of the Bosnian Supreme Court's decision be introduced in evidence, the tribunal told him that it was "unable to locate" a copy.[68] Informed of the tribunal's decision to confirm his classification as an unlawful enemy combatant, Boudella's wife wrote to the American lawyers she had secured for him (who had, of course, not been allowed to participate in the process) as follows:

> Dear Friends, I am so shocked by this information that it seems as if my blood froze in my veins, I can't breathe and I wish I was dead. I can't believe these things can happen, that they can come and take your husband away, overnight and without reason, destroy your family, ruin your dreams after three years of fight.[69]

The most disturbing revelation about the CSRT process concerns three documented cases where tribunals found the detainee to be "not/no longer" (which is unclear) an enemy combatant. Following the holdings in those cases, the Department of Defense simply ordered the convening of a new tribunal for the detainees concerned, none of whom were informed of the original decision. In two instances the second tribunal found the detainee to be an enemy combatant. In the third, the second tribunal came to the same conclusion as the first, whereupon the Defense Department convened

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[67] *Id*. at 6.

[68] Mayer, *supra* note 1, at 120.

yet a third tribunal, which finally found that the detainee was, indeed, an unlawful enemy combatant.

All in all, one can sympathize with the summary characterization of the process offered by Thomas Sullivan, a former United States Attorney who represents several Saudi nationals held at Guantánamo: “It’s a joke. It’s a sham.”[70] If the effort to eliminate habeas corpus review for Guantánamo prisoners is ultimately successful, this sham is all of the due process that a large majority of the prisoners at Guantánamo will ever receive. The fortunate remainder will get the military commissions.

In light of the profound institutional animus described above and the CSRT precedent, the provisions of the Military Commissions Act allowing the use of evidence secured by means short of torture, of hearsay evidence, and of summaries of classified evidence seem virtually certain to eviscerate a defendant’s ability to challenge the charges against him. For instance, it is striking that the Denbeaux could find no indication in the record that any of the CSR Tribunals considered the extent to which hearsay evidence was obtained through coercion.[71] With respect to inculpating detainee statements alleged to have been coerced through torture, in 18 percent of the cases analyzed by the Denbeaux, the detainee alleged torture. In most instances the tribunal noted the allegation and referred it to the convening authority, the Department of Defense, for investigation. But in every instance where such referral was made, the tribunal proceeded to decide the case before an investigation could have been conducted.[72]

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[69] *Id.*
[70] Jeffrey Toobin, *Killing Habeas Corpus*, NEW YORKER, Dec. 4, 2006, at 46, 52.
[71] Denbeaux  Denbeaux, *supra* note 61, at 36.
[72] *Id.*

Let us then imagine Hadj Boudella, the gentleman from Bosnia, being brought before a military commission and charged with plotting to blow up the U.S. Embassy in Sarajevo. The military trial counsel calls to the stand an official of the CIA, who testifies that he was informed by a very reliable employee of the CIA in Sarajevo that he overheard Boudella and four other men discussing means for acquiring explosives for bombing the U.S. Embassy. Under the statutory requirement that "[c]lassified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security,"[73] it appears inevitable that in my hypothetical but all-too-plausible case, the trial judge will uphold an objection by the trial counsel when, on cross-examination, defense counsel attempts to elicit the name of the CIA employee; the date of the alleged conversation; the place where it allegedly occurred; the distance of the employee from the men; how the informant managed to identify Boudella; why he is sure that, assuming he accurately overheard the alleged conversation, Boudella was one of the participants; and similar, rather obvious questions. The statute does provide that the "military judge may require trial counsel to present . . . , to the extent practicable and consistent with national security, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence."[74] But it seems very unlikely that a summary able to pass the national security test would provide much more detail than I have already hypothesized. If the CSRT process is prologue, it might well provide less. And even if the defense is armed with such details, because the CIA employee (who could be any informant who receives piecework compensation) who allegedly overheard

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[73] MCA, *supra* note 20, §949d(f)(1).

[74] *Id.* §949d(f)(2)(B) (emphasis added); *see also* §949j(c)(2).

the conversation and identified Boudella is not present and remains anonymous, neither his memory, his hearing, his eyesight, his incentives, nor his character can be probed.

Could Boudella be convicted on hearsay alone? Nothing in the legislation appears to preclude that possibility. Moreover, suppose we add a confession made during Boudella's detention in an unknown place before being brought to Guantánamo. He testifies that he made the confession after two weeks of eighteen-to-twenty-four-hour interrogation sessions during which he was frequently subjected to temporary suffocation in water, periodic dousing with ice-cold water while held in a refrigerated cell, restraining with strangulating handcuffs that caused his hands to swell, and being tied in positions that quickly caused horribly painful cramping; and that what finally broke him was the statement that if he did not sign a confession, his wife would be arrested and subjected to the same treatment. An official of the CIA concedes that Boudella was detained for two weeks but pleads the national security privilege in response to questions from defense counsel about the methods of interrogation employed in this or any other case.[75] He is prepared to say only that in the judgment of the persons who conducted the interrogation, who must remain anonymous, the confession was voluntary. Furthermore, Boudella was examined by a doctor shortly after arriving in Guantánamo and that doctor will testify that his body did not show signs of serious physical abuse.

Review of this case will be on questions of law, not fact, according to the statute. It seems doubtful that a conviction in such a case, where defendant's access to information was denied on the basis of statutory criteria and disputed evidence consistent with those criteria was admitted, could be overturned on appeal as a matter of law, since

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[75] David Johnston, *C.I.A. Tells of Bush's Directive on the Handling of Detainees*, N.Y. TIMES, Nov. 15, 2006, at A14.

the military commission, having heard the CIA officials testify and listened to the testimony of the defendant (assuming he testified), chose to believe the officials, and that would seem to settle the questions of fact.

In sum, I am certain in light of our findings in the cases of Argentina and Colombia that my colleagues on the Inter-American Commission, all of them jurists nominated by their respective governments, elected by vote of the member states of the OAS, and ranging ideologically from centrist to conservative, would have found the military commission system established by this recent legislation to violate the human right to a fair trial. But that is not all that would have concerned them about the system for handling detainees in the "war" against global terrorism of which the military commissions form a part. The Military Commissions Act's omissions help to illuminate systemic threats to basic human rights. The Act does not, for instance, require that detainees who are noncitizens of the United States be brought within a reasonable time following their arrest before a military commission for trial and judgment. Indeed, under the theory that they are combatants in an ongoing war, albeit not "prisoners of war" within the meaning of the Third Geneva Convention, they can be held without charge or trial, without any proceeding other than a cursory appearance before one of the CSRTs, which with what appears to be something close to automaticity[76] will classify them as

[76] *See* HUMAN RIGHTS WATCH, MAKING SENSE OF THE GUANTANAMO BAY TRIBUNALS (2004), *available at* <http://hrw.org/english/docs/2004/08/16/usdom9235_txt.htm>; *see also* Mark Denbeaux et al., Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data 10 (n.d.), *at* <http://law.shu.edu/aaafinal.pdf> (arguing that "[a]ccording to the Government, one can be a conscripted (and therefore presumably unwilling) member of the Taliban and still be an enemy combatant"); Denbeaux  Denbeaux, *supra* note 61.

unlawful combatants. So labeled, they can be held until the president determines that the war is over, a war that he believes could last a generation or two.[77]

The commissions, moreover, are set up only to try noncitizens. Where does that leave U.S. citizens determined to be unlawful combatants? They, at least, have undoubted rights under the U.S. Constitution. The restriction of the commissions' jurisdiction to noncitizens apparently reflects the views of the president (or whoever does his legal thinking for him) that those rights bar trial by the commissions and may require trial in the federal courts, if they are to be tried at all. The view of this administration still appears to be that as unlawful combatants, they can be detained without trial until the end of the war (whenever that happy event is determined by the president to have occurred), if, in the president's unchallengeable judgment, the national interest so requires. This view of presidential power reached its apogee or nadir, depending on one's perspective, when, at the time he signed into law the Detainee Treatment Act, which he and the vice president had long fought with great ferocity,[78] the president stated that of course he retained his constitutional power to authorize whatever measures he deemed necessary for the nation's security.[79]

A consistent theme of the Commission during my years as a member was the sinister consequences for human rights of unchecked executive power, a phenomenon

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[77] Doyle McManus  James Gerstenzang, *The Conflict in Iraq; Bush Delivers the News—With a Sobering Warning*, L.A. TIMES, June 9, 2006, at A1.

[78] Dana Priest  Robin Wright, *Cheney Fights for Detainee Policy: As Pressure Mounts to Limit Handling of Terror Suspects, He Holds Hard Line*, WASH. POST, Nov. 7, 2005, at A1.

[79] President Bush holds to this belief in his statement upon signing into law the Detainee Treatment Act on December 30, 2005. George W. Bush, Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Jan. 2, 2006).

that has haunted Latin American states since they achieved independence early in the nineteenth century. The Commission emphasized above all the necessity of judicial checks on that power. To avoid the appearance of imposing external norms on national societies (albeit norms made applicable to those societies by their governments' ratification of regional and international treaties), whenever possible we would express our concerns through favorable reference to statements coming from national institutions. For instance, in our Argentine report we quoted extensively from a daring 1977 intermediate appellate court decision in a habeas corpus case concerning a lawyer who had been held at the discretion of the executive for some three years without specific charge, much less trial.[80] What made the decision daring was its issuance at the height of the military junta's killing frenzy, which had touched persons and families from the influential classes including the Argentine ambassador to Venezuela who, while on home leave, had been seized in broad daylight on one of the main streets of Buenos Aires and was never seen again.[81] The quotation from the Argentine court's opinion which we incorporated into our report merits repeating today:

> It is unacceptable to sustain the theory put forth that the President is the only person empowered to evaluate the situation of persons held on his instructions. Although eminently political and non-judicial matters fall outside his sphere of jurisdiction, it is no less true that the judicial branch

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[80] Petition for Habeas Corpus on Behalf of Carlos Mariano Zamorano (Fed. Ct. App. in Crim. Correctional Matters, Buenos Aires, Apr. 1977). *See* Argentina Report, *supra* note 23, ch. VI(b)(6), at 229.

[81] *See* Juan de Onis, *Argentine Envoy Reported Seized*, N.Y. TIMES, July 20, 1977, at 4 (describing disappearance of Héctor Hidalgo Solá on July 18, 1977).

> is responsible for analyzing, in exceptional cases such as this, the reasonableness of the measures adopted by the Executive branch. . . .
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> The national interest and individual freedom must be made compatible so that it will not be possible even to assume that those who are deprived of their freedom on instructions from the Executive branch will be left to their fate and beyond any control by the judges of the Nation, no matter how long the arrest continues.[82]

Wherever it went during the awful time of state terror and whenever it issued a report revealing the atrocities committed in the name of national security, anticommunism, and the defense of Western civilization, the Commission would be charged by governments and their apologists with the necessity of making its assessments in light of the dire circumstances in which the government found itself. Typical was a statement to the Commission by the Argentine foreign minister prior to its visit. He said that the emergency measures adopted by the government had to be taken "in order to exercise the legitimate right to defense against the on-slaught of terrorism."[83] The Argentine report, concerning as it did grotesque violations of human rights by the government of one of the largest and most economically developed countries in Latin America, a country noted for its sophisticated culture and its skilled diplomats, seemed the appropriate occasion for a careful statement of the Commission's views about the indisputable tension that could arise between a government's obligation to protect the

[82] Argentina Report, *supra* note 23, ch. VI(E)(6), at 230 (translated from the original Spanish by the staff of the Commission).

security of its citizens and individual human rights. Given the contemporary resonance of that statement, it seems a fitting way to conclude these brief observations on the military commissions in the context of the Bush administration's overall record of concern for the human consequences of the processes it has established for the seizure, detention, and interrogation of persons suspected of involvement in terrorism:

> The Commission repeatedly has emphasized the obligation of governments to . . . preserve the safety of their inhabitants. . . .
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> In the life of any nation, threats . . . to the personal safety of its inhabitants, by . . . groups that use violence, can reach such proportions that it becomes necessary, temporarily, to suspend the exercise of certain human rights.
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> . . . .
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> However, it is . . . clear that certain fundamental rights can never be suspended, as is the case, among others, of the right to life, the right to personal safety, or the right to due process. In other words, under no circumstances may governments employ summary execution, torture, inhumane conditions of detention, or the denial of certain minimum conditions of justice . . . .
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> . . . .
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> Each government that confronts a subversive threat must choose, on the one hand, the path of respect for the rule of law, or, on the other hand, the descent into state terrorism.

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[83] *Id.*, ch. I(E)(1), at 23.

> . . . . In . . . extreme cases, persons may be detained for short periods without it being necessary to bring specific charges against them. It is true that such measures can ultimately pose the risk that the rule of law will be lost; but that is not inevitable provided that governments act responsibly; if they register arrests and inform the families of the detainees . . . ; if they issue strict orders prohibiting torture; if they carefully recruit and train security forces, weeding out sadists and psychopaths; and lastly, if there is an independent Judiciary to swiftly correct any abuse of authority.[84][85]

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[84] *Id.*, para. (4), at 26–27 (emphasis added).

[85] *Id.*, para. (4), at 26–27 (emphasis added).