Imagine the following scenario. Somewhere in the world, the United States fights a war and captures and detains enemy soldiers; somewhere in the world, the United States captures and detains people it claims are terrorists. Those detained may have been arrested because of an informant’s tip or because of someone receiving money for information regarding alleged terrorists; the tip and the information may or may not be reliable. Consequently, those arrested may be completely innocent. These people are flown to the United States Naval Base, Guantánamo Bay, Cuba, and are imprisoned for years. The captured soldiers are not accorded the rights of prisoners of war. The alleged terrorists are not charged with a crime. They do not have access to their families or attorneys.

Maybe, years later, a few will be released, others may remain in Guantánamo indefinitely, and others, possibly, will be tried by a special military commission. That trial may occur at Guantánamo, or wherever the United States chooses, even on an aircraft carrier. The trial may be entirely in secret. If they are found guilty, they may be executed and their bodies disposed of, possibly at sea. They might be found not guilty by the tribunal. However, even then, Secretary of Defense Rumsfeld has said that they may not be released. He has announced that the United States is engaged in a long war against terrorism; it may be a fifty-year war, and until that war is over, if it ever ends, some will remain imprisoned at Guantánamo. This scenario is not farfetched. Some of this is already occurring, and if the Bush administration is to be believed, the remainder may unfold.

One might think such governmental actions, so seemingly at odds with notions of fairness and liberty, could be challenged in the courts. One might believe that a court in the United States would make, at least, a determination as to the legality of the detentions and trials of those imprisoned. However, one would be wrong. In March 2002 a petition for a writ of habeas corpus was filed on behalf of the detainees in Guantánamo, but the petitioners lost. They lost not because the federal district court decided that what the government was doing was right, but because the U.S. court had no jurisdiction. The action was brought in a federal district court in New York, but the court has no jurisdiction over prisoners in Guantánamo. The court has no jurisdiction over the U.S. military in Guantánamo. An inmate at Guantánamo once said, “I’ve been in jail for 7 years, and I am still in jail. I have not been tried, nor will I be tried. I have not been convicted, nor will I be convicted. I am not guilty, nor will I be found guilty. But I will be in jail.”

Attorney General Alberto Gonzales, in a letter to the Senate on May 16, 2002, described the military tribunals as an ‘alternate’ system to the court system. He said, “We must be clear that these courts are not the same as the U.S. courts. We are talking about military commissions that have authority to try terrorist suspects and not U.S. citizens. These courts, which are not subject to judicial review, are designed to try non-citizens who are not subject to the laws of the United States.”

President Bush has said that “Untoward actions,” such as the current situation, are a consequence of the battle against terrorism. The president has said, “The United States is engaged in a long war against terrorism; it may be a fifty-year war, and until that war is over, if it ever ends, some will remain imprisoned at Guantánamo.” This scenario is not farfetched. Some of this is already occurring, and if the Bush administration is to be believed, the remainder may unfold.

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because the court decided it could not even hear the case and determine whether the detentions were legal. Even though the detainees are imprisoned by the United States, the district court refused to look into their detentions. The federal court has ruled that it will not and cannot hear cases on behalf of noncitizens imprisoned at Guantánamo. It is as if Guantánamo is on another planet, a permanent United States penal colony floating in another world.

The above described scenario illustrates three of the most worrisome aspects of the United States’ war on terrorism: the indefinite detentions at the United States Naval Base, Guantánamo Bay, Cuba; the lack of any judicial review of those detentions; and the plan to employ military commissions to try some of those detained. As of November 2002, approximately 625 persons from 44 countries have been jailed at Guantánamo, many of them since January 2002; this number was unchanged as of January 2003. Their names are kept secret, and the government has refused to permit visits by attorneys or family. No charges have been filed against them. Although many were captured on the battlefield, they are not being treated with the rights the Geneva Conventions accords to prisoners of war (POWs) and may be held indefinitely. The United States has vigorously opposed court review of these detentions. The serious threat the detentions raise is not just to the rights of those detained at Guantánamo, but to all of us. They raise the specter of executive detentions not subject to review by any court and without any basis in law. It is fundamental to freedom that detentions must be pursuant to law and that courts are to act as a check on unbridled executive power. The right to be free from executive detention is in serious jeopardy.

Attorney General Ashcroft has stated: “Foreign terrorists who engage in war crimes against the United States do not deserve constitutional rights.” Apparently, the attorney general has determined that the people he calls “suspected terrorists” are guilty before they are tried. Their guilt can then be confirmed by trials in front of military commissions that are more likely to convict because they do not fully protect constitutional rights. It’s reminiscent of the famous trial scene in Alice in Wonderland—“No, no!” said the Queen. “Sentence first—verdict afterwards.”

It is fundamental to freedom that those accused of crimes are tried before regularly constituted courts that are impartial, guarantee a defendant’s rights, are public, and allow appeal to a higher court. Yet, some of those detained at Guantánamo will apparently be tried before military commissions that will not fully
guarantee these rights. These special courts are ad hoc commissions in which the president designates the defendants for trial, the secretary of defense chooses judges (who are the jury as well), the trials can be closed, and no court appeal is permitted, even from a sentence of death. The employment of military courts could be widely expanded beyond those imprisoned at Guantánamo. The administration has already spoken of employing them against alleged terrorists in the United States. The last time military commissions were employed was almost sixty years ago, and those precedents have been widely criticized. Until recently, the United States itself was highly critical of countries such as Peru that employed such military commissions. Trial before such commissions represents not justice, but a threat to liberty.

Many in the United States do not seem concerned by this scenario. This is, in part, because the detentions are occurring outside of the United States with little or no press access to inform us of what is transpiring. Many people are unconcerned because it is not happening to them, but to noncitizen Muslims picked up from around the world. Many also believe those at Guantánamo must be guilty of something. In addition, in an environment in which we are all frightened of the next act of terrorism, many are willing to give the government more leeway, believing that its actions will make us safer.

This turning a blind eye to lawless action flowing from the government is dangerous, and not only for those imprisoned at Guantánamo. The government also has applied its detention policies to citizens, holding them without charges. Currently, citizens Jose Padilla, a suspected terrorist, and Yaser Hamdi, a suspected enemy combatant, are being held in military brigs in South Carolina and Virginia and have not yet had access to attorneys or family. Under the government’s rationale, it can treat citizens it imprisons in the United States the same way as it treats noncitizens at Guantánamo. It need simply label them as enemy combatants, whether citizens or not, as it has done with Hamdi and Padilla. That designation, according to the government, allows them to be held with the same lack of legal rights as are noncitizens on Guantánamo. The only difference is that Hamdi and Padilla, unlike the noncitizens detained at Guantánamo, can obtain minimal court review of their designation as enemy combatants. This minimal review may not be the result of their citizenship, but rather their presence in the United States. Were Hamdi and Padilla held in Guantánamo, they might not even be permitted that limited court review.
WHO WAS CAPTURED AND TAKEN TO GUANTÁNAMO?

On October 7, 2001, the United States and its allies began their war against the Taliban rulers of Afghanistan and Al Qaeda members who were present in that country. The United States allied itself with the Northern Alliance forces that had been opposing the Taliban for many years. The war was over relatively quickly. On December 17, the last Al Qaeda stronghold fell, and on December 21, the interim government of Hamid Karzai was sworn in. During that brief war, thousands of Taliban and Al Qaeda fighters were captured, primarily by the Northern Alliance. Many of these were detained in Mazar-e Sharif prison and in Shibarghan prison under appalling conditions. CIA and other United States officials carried out extensive interrogations of the prisoners. The Northern Alliance later freed some of them; others remain in prison in Afghanistan. Six hundred were killed in a major prison riot.

On January 11, 2002, the United States military began transporting some of these prisoners captured in Afghanistan to Camp X-Ray at the United States Naval Base, Guantánamo Bay, Cuba. There were allegations of ill treatment of some prisoners both in transit and at Guantánamo, including reports that they were shackled, hooded, and sedated during the twenty-five-hour flight from Afghanistan, and that their beards and heads were forcibly shaved.

I have had some personal experience with the living conditions in Guantánamo. In the early 1990s, I represented Haitian refugees who were held there, and I visited the base a number of times. Its land is bleak and hardscrabble; little grows there except cacti; the heat is intense, and scorpions, mosquitoes, and banana rats are abundant. When this new group of prisoners arrived at Guantánamo, the environment was much the same, but the conditions were harsher. They were housed in makeshift, small (8 feet by 8 feet), open-air, wire cages that failed to protect against the elements. The cages were surrounded with fences topped by razor barbed wire, and the compound was encircled with watchtowers. In this early period, the detainees remained shackled when using the portable toilets or showers, and temperatures frequently went above 95 degrees Fahrenheit. Halogen floodlights blazed all night so that they could be continuously monitored. The pictures released in January 2002 of the prisoners at Guantánamo show them kneeling in the blazing Cuban sun, wearing blackened goggles, masks, ear covers, and shackles. These photos caused a public outcry, as did the conditions under which the prisoners were being held.
Over the next months, more prisoners were taken to Guantánamo. It is assumed that most of these were associated with the Taliban or Al Qaeda and taken from Afghanistan or Pakistan. However, prisoners from other places have been imprisoned in Guantánamo, including five Algerians and a Yemeni from Bosnia. This later group was obviously not composed of combatants captured in the theater of war. They were suspected of planning attacks on the U.S. embassy in Sarajevo. These detentions indicate that Guantánamo will be used to hold not only those picked up in Afghanistan and Pakistan, but also others that United States officials suspect are dangerous, might have information, are allegedly involved in terrorism, or with Al Qaeda. At the end of 2002, while preparing for war with Iraq, United States officials suggested that some of those captured in any new war would also be sent to Guantánamo.

In late April, the United States transferred the prisoners to Camp Delta, a new longer-term prison camp within the Guantánamo complex that is designed to house as many as 2,000 prisoners. The cells are small (8 feet by 6 feet, 8 inches), but they have running water and apparently better protect the prisoners from sun and rain. Judging from the few photographs that have been released, the prison looks like rows of one-story, self-storage facilities. Little is known about this new prison, because reporters are not allowed into it; in fact, the press cannot now see the building, as a green screen has been erected to block any view. However, in September 2002, it was reported that there was trouble between the guards and the inmates concerning the treatment of the prisoners and claims by detainees of their innocence. This resulted in solitary confinement for eighty of the prisoners and suicide attempts by others, according to reliable press reports.

WHAT WE KNOW ABOUT THE DETAINEE

Not much is known about those imprisoned in Guantánamo; certainly, nothing is known publicly as to whether particular detainees have allegedly committed crimes, are affiliated with the Taliban or Al Qaeda, or are there by mistake. No attorneys, family, or press are allowed to visit, but the International Committee of the Red Cross has a regular presence in Guantánamo and presumably has visited the prison and the detainees. As is standard with the Red Cross, it has said nothing regarding particular detainees.

The Bush administration has made general statements regarding the alleged character of those detained, without allowing any of the detainees access to attor-
neys and without bringing anyone before any kind of trial proceeding that could determine their status or their involvement with terrorism. At the time of the transfers to Guantánamo, Secretary of Defense Donald Rumsfeld called the detainees “hardened criminals willing to kill themselves and others for their cause.” He emphasized their dangerousness: “Every time people have messed with these folks, they’ve gotten in trouble. And they are very well trained. They’re willing to give up their lives, in many instances.” The United States military officials in charge of the prison said they were told to expect “the worst of the worst.” “These are the worst of a very bad lot,” said Vice President Cheney. “They are very dangerous.”

There may well be a number of terrorists among those imprisoned. However, the Bush administration has refused to bring them before any kind of tribunal or court that can determine whether some are terrorists, POWs, or innocent. The October 2002 release of three Afghani men, after almost a year at Guantánamo, suggests that the administration’s sweeping rhetoric has been overblown. It should not have taken eleven months to determine that these men were not terrorists. One of the men released said that he was 105 years old. David Rhode, a New York Times reporter, described him: “Babbling at times like a child, the partially deaf, shrunken old man was unable to answer the simplest questions.” When asked if he was angry with American soldiers he said that he did not mind, because they “took my old clothes and gave me new clothes.” A second Afghani man, released at that time, said that he was 90 years old and was described as a “wizened old man with a cane” who had been arrested in a raid on his village.

A third younger man said that he had been cut off from the outside world for eleven months and had only received a letter from his family three days before he was to leave Guantánamo. He said he was kept in his cell twenty-four hours a day with only two fifteen-minute breaks for exercise a week. This third man admitted that he had fought with the Taliban, but said that he had been forced to do so. After he surrendered, he said, soldiers of the warlord Abdul Rashid Dostum falsely told the United States that he and nine others were officials of the Taliban. His release appears to confirm the essential elements of his story. These men are hardly the “worst of the worst.” Here were men, particularly the two aged detainees, who should have never been taken to Guantánamo, and yet they were imprisoned. Here were men who, had there been a hearing before some form of a tribunal, would have been freed long before.

Information about a few of the other detainees is also known from their rela-
tives and from delegations of officials from various countries. Some of the prisoners have been able to send short, censored letters through the Red Cross to their families. These letters appear to be few and far between. A few families that received letters have contacted lawyers, and lawsuits have been filed from which some information is known about the detainees.

For example, according to his family, Mamdouh Habib, an Australian citizen, traveled to Pakistan in August 2001 to look for work and a school for his two teenage sons. On October 5, 2002, just before he was about to return to Australia and two days prior to the war, Pakistani officials detained him. He was transported to Egypt, where Egyptian authorities detained him. Eventually he was turned over to the United States and taken to Guantánamo. Obviously, he was nowhere near the fighting in Afghanistan. A delegation from Pakistan that visited its citizens on Guantánamo for purposes of interrogation has also questioned the continued detention of many of the Pakistanis. The delegation concluded that almost all of the fifty-eight Pakistanis detained were low-level foot soldiers and had no link to Al Qaeda. Some of these may have been imprisoned because of United States reward money given to the members of the Northern Alliance in exchange for alleged member of Al Qaeda. On the basis of that visit, Pakistan requested the release of nearly all the Pakistani prisoners.

These stories of the innocent, of some detainees not involved in any fighting, of detainees who were no more then lowly foot soldiers, demonstrate the importance of a legal process for determining the status of those imprisoned on Guantánamo. It demonstrates the wisdom of those who insist that the rule of law requires treating people fairly.

LEGAL OBSTACLES TO THE RIGHTS OF PRISONERS ON GUANTÁNAMO

The United States Naval base at Guantánamo Bay occupies approximately thirty-one square miles of land in southeast Cuba, an area larger then Manhattan. The U.S. has occupied Guantánamo Bay since 1903, shortly after the end of the Spanish-American War, under a treaty that gives it “complete jurisdiction and control” over the area. The lease continues in perpetuity unless mutually abrogated. Despite claims of national sovereignty made by Cuba over the area, the United States insists its occupation is legal and that it will remain in Guantánamo in perpetuity or until the United States decides otherwise.
The naval base is a self-sufficient and essentially permanent city with approximately 7,000 military and civilian residents—an American enclave with all the residential, commercial, and recreational trappings of a small U.S. city. It has its own schools, generates its own power, provides its own internal transportation, supplies its own water, and has an airfield. Crimes committed by both civilians and foreign nationals living on the base are brought before courts in the mainland United States. Cuba and its courts have no authority over the base in any respect. The United States naval Web site accurately describes Guantánamo Bay as "a Naval reservation, which for all practical purposes is American territory." This is unlike any other base the United States has in a foreign country. The United States is essentially sovereign over Guantánamo.

From the government's point of view, imprisoning the detainees at Guantánamo has a number of advantages. It is close enough to the United States to be conveniently accessible to military and intelligence agencies. Yet, it is only accessible with the permission of the United States, which prevents news reporters from scrutinizing the treatment of the detainees except under the eyes of the government. No reporter has been in the prison, and no reporter has interviewed any prisoner in Guantánamo. The base also offers security advantages, which reflect a legitimate concern. To the extent that outsiders might attempt to either attack the base or free prisoners, that is almost impossible. It is far more secure, for example, than bases in Saudi Arabia or the Philippines.

A major advantage to the administration of jailing the detainees at Guantánamo is the government's view that no court in the United States—or in the world, for that matter—has jurisdiction to review the legality of the detentions or the government's treatment of the prisoners. Additionally, the Bush administration's position is that noncitizens held outside the United States—and it considers Guantánamo outside the United States—have no constitutional rights. These arguments stem from cases decided during World War II and from court decisions concerning Haitian refugees interned at Guantánamo during the early 1990s.

In the Haitian cases, the government asserted that no court in the world could review its treatment of the refugees. The cases in United States federal courts were divided on this question. To the extent those courts concluded that the naval base at Guantánamo was more akin to United States sovereign territory, they permitted review and determined that the refugees had some constitutional protection. However, to the extent courts deemed Guantánamo more akin to a foreign
country, review was denied and the refugees were found to have no constitutional rights. It should make no difference that those cases concerned refugees, and the current situation concerns alleged terrorists and combatants; the issue is still whether U.S. courts can hear cases concerning the rights of persons in U.S. custody at Guantánamo.

Considering the status of Guantánamo, which for all intents and purposes is United States–controlled territory, it is difficult to accept an argument that what occurs there should be exempt from United States court review. It is also difficult to accept the view that the United States can imprison people anywhere in the world and be free from judicial oversight. Yet, so far, as is discussed below, the courts have accepted the United States’ claim.

THE DETAINEE’S LEGAL STATUS AND THE RIGHT TO “COMPETENT TRIBUNALS”

The situation of the prisoners at Guantánamo needs to be examined under two bodies of international law. First is the law that applies in times of armed conflict, which is called humanitarian law. The primary sources for that law are the Geneva Conventions of 1949, treaties ratified by the United States and most of the countries of the world. The Geneva Conventions concern, among other topics, the treatment of people captured on the battlefield or in the theater of war. This body of law is applicable initially to those persons captured in the war with Afghanistan. This would include primarily the Taliban soldiers and militia fighting alongside them.

As to detainees from outside the theater of war, such as those Guantánamo detainees arrested in Bosnia-Herzegovina, the Geneva Conventions do not apply. International human rights law determines their rights. They must be formally charged, given access to counsel, and tried. This would include alleged international terrorists.

The key principle is that some body of law applies to every person detained and gives him or her a legal status and certain rights under international law. The international prohibition on arbitrary detention prohibits detentions in violation of existing law. No one can be treated in whatever manner a country decides.

The Geneva Conventions apply whenever there is an armed conflict between two or more parties to the conventions, even if one of the parties—here, the Tal-
iban—was not diplomatically recognized by the United States. The conventions establish that captured combatants, as POWs, have the “combatant’s privilege.” That privilege gives a soldier the right to shoot at soldiers of the enemy forces; without that privilege, a soldier could be tried for murder. POWs can be interned, but not imprisoned, unless it is demonstrated, on an individual basis, that there are security risks. They have significant rights to humane treatment as well as communication by letter with their families. POWs can still be questioned and they can be prosecuted for war crimes, but they retain their POW status. Importantly, POWs cannot be tried by military commissions for war crimes; they must be tried by the same courts as American soldiers would be tried. That would mean trial by courts-martial, which grant substantially more rights than military commissions.

Although resistant at first, the Bush administration finally grudgingly acknowledged that the conventions applied to those captured on the battlefield in Afghanistan, but with caveats that eviscerated the application of the conventions. The White House announced that although the United States would apply the Geneva Conventions to soldiers that it decided were from the Taliban, it would not extend the protections to prisoners it believed were members of Al Qaeda. However, in reality, the Bush administration would not apply the terms of the conventions to any of the Guantánamo prisoners. Specifically, the United States refused to apply Article IV of the Third Geneva Convention that requires that all regular members of a government’s army be granted POW status; and that members of a militia fighting alongside those armed forces would receive such status. This might well include members of Al Qaeda captured on the battlefield. So by refusing to apply this key provision, the Bush administration was in fact refusing to apply the Geneva Conventions in a meaningful way.

The United States’ decision that neither the Taliban fighters nor the militia fighting alongside them were POWs was made without following the procedures specified in Article V of the Third Geneva Convention. That article requires the convening of a “competent tribunal” to determine the status of each individual captured “should any doubt arise” as to his status. (Such “competent tribunals” are not the military commissions that the United States is establishing to try war crimes.) The United States never held such “competent tribunals,” but made a blanket determination that no one captured on the battlefield was a POW. The Third Geneva Convention also requires that all such prisoners be treated as
POWs pending such hearings. The United States has repeatedly refused the en-
treaties of the international community to treat all the detainees under the Article
IV and Article V procedures established under the Third Conventions.50

Nor was there any reason for the United States not to employ such tribunals.
Prior to the war in Afghanistan, the United States military had adopted regu-
lations for these tribunals, which are staffed entirely by its military personnel. Such
tribunals were used in Vietnam, and over a thousand such tribunal hearings were
held during the 1991 war against Iraq. Had such tribunals been held, it could have
been determined that some of those imprisoned on Guantánamo were wrongly
detained. As to the others, it would have been determined that they were POWs
with rights and protections afforded them under the Geneva Conventions.

The United States has tried to justify its position legally, but in a manner that is
inconsistent with international law. It has labeled those detained as enemy com-
battants, and claims that the military’s authority to capture and detain enemy
combatants is well settled. But, enemy combatants are a general category, not a
status under the Geneva Conventions. Under the Geneva Conventions, enemy
combatants are either prisoners of war with all of the rights that attach to that sta-
tus, or they are not, in which case they come under the protections of the Fourth
Geneva Convention.

The Fourth Convention treats such non-POWs as civilians, but if the person is
suspected of activities hostile to the state, he can be detained and denied certain
rights, such as the right to communicate (write letters). In addition, anyone cap-
tured, POW or otherwise, can still be criminally prosecuted. This means that
members of Al Qaeda and any other person captured in the theater of war and
found not to be a POW can still be detained. However, these determinations must
be made individually.

By deciding unilaterally that it would not apply the actual terms of the Geneva
Conventions to those captured in the theater of war, the U.S. has violated interna-
tional humanitarian law. Its position raises serious questions as to the legal au-
thority under which the Guantánamo detainees are being held. If, as the United
States claims, the detainees have no status under the Geneva Conventions, then
the rules of international human rights law apply. However, those rules require
that they be arrested, charged, represented by attorneys, and tried. Obviously this
is not occurring, since, as explained above, U.S. domestic criminal law is not being
applied. The United States is holding these people outside both international and
domestic law.
The Geneva Conventions were created to provide, among other things, humane conditions and limits on the duration of confinement. POWs, which is what many of those in Guantánamo appear to be, may only be detained until the "cessation of active hostilities." That circumstance has occurred with regard to the war in Afghanistan. As to non-POWs, they may be held until the "general close of military operations," which arguably has also occurred in Afghanistan.

The United States contends, however, that it was fighting not just a war against Afghanistan but also an international war against Al Qaeda that may not end for many years. This argument does not address the rights of former Taliban combatants now in custody. Furthermore, there is a serious question as to whether the efforts to disable and destroy Al Qaeda constitute a war under international law. A war, other than a civil war, is between states. It is not defined as between a state and a terrorist organization. That type of activity is an international law enforcement effort, akin to tracking down drug dealers, and is subject to international human rights law that requires charges and trials.

Detainees at Guantánamo who were captured outside the theater of the Afghanistan war are examples of the legal twilight surrounding the "war" on Al Qaeda. There is very little information available regarding these people, except for six prisoners who were arrested in Bosnia-Herzegovina and taken to Guantánamo. Five Algerians and one Yemeni were taken from a prison in Sarajevo in January 2002, despite a local court order releasing them for lack of evidence. The United States claims "their activity posed a credible security threat to U.S. personnel and facilities and demonstrated involvement in international terrorism." The Geneva Conventions do not apply to these six men, but their rights should remain protected under international human rights law.

The United States is trying to avoid treating these and others as human rights law requires by calling them all "battlefield detainees." This is obviously incorrect. The fact that the United States is or was fighting a war in one part of the world, Afghanistan, does not permit it to capture people anywhere in the world and label them combatants without showing they were involved in the armed conflict. These and others have been captured because of their alleged role in international terrorism. They are suspects. Their capture should be treated as a matter of criminal law.

There is one exception under which the United States could hold alleged international terrorists, including members of Al Qaeda, for some period without charges and trial. Article IV of the International Covenant on Civil and Political
Rights permits such detentions in a very narrow class of cases: during a public state of declared emergency threatening the life of the country. To avail itself of this exception, the United States must notify, through the U.N. secretary-general, the other countries that are parties to the treaty. The United States has neither declared such an emergency nor has it notified the secretary-general.

The administration has yet to announce charges or trials for any of the Guantánamo detainees, Taliban or otherwise, and has stated that some of these people may be held indefinitely. According to Secretary of Defense Rumsfeld, this means until the war against terrorism is over, which could be many years, that is, until "we feel that there are not effective global terrorist networks functioning in the world . . ." Military commissions may eventually try some of those at Guantánamo, but Rumsfeld has said that even if such commissions acquitted certain captives, the government planned to keep some at the base. In other words, the administration considers itself entitled to capture, arrest, and detain people from anywhere in the world, interrogate them, refuse them access to lawyers and family, not charge them or bring them before any courts, not release them even if tried and acquitted, and imprison them indefinitely.

LEGAL CHALLENGES

There have been three U.S. court challenges to the detentions at Guantánamo, one in the United Kingdom, and one before the Inter-American Commission of the Organization of American States. As of January 2003, the request to the commission by various human rights groups was the most successful. Although the commission is not a court, its mission is to enforce the principal regional human rights treaty, the American Declaration of the Rights and Duties of Man, the provisions of which protect the right to life, fair trial, due process, and freedom from arbitrary detention. In its decision of March 13, 2002, the commission called upon the United States to "take the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal." The commission explained that everyone who is captured by a state must have a legal status, and that it is for a tribunal and not a government to determine that status. In strong language, the commission found that the detainees remain entirely at the unfettered discretion of the United States government. Absent clarification of the legal status of the detainees, the Commission considers that the rights and protections to which they might be entitled under international
or domestic law cannot be said to be the subject of effective legal protection by the state.\textsuperscript{60}

Although the commission has ruled that member states of the OAS are under an “international legal obligation” to comply with its decisions, the United States has refused to comply. The commission reiterated its order mandating commissions in July 2002 and held a hearing on the United States’ failure to implement this ruling. As of April 2003, the United States has still not complied, and there is no power in the commission to compel compliance.

The challenge to the detentions filed in the courts of the United Kingdom was on behalf of one of the detainees, Ali Abbasi, a citizen of England. Although the British Court could not order a remedy for the detentions because the United States government was not a party to the lawsuit, it described the detention situation in stark terms: “[I]n apparent contravention of fundamental principles recognized in both jurisdictions [U.S. and U.K.] and by international law, Mr. Abbasi is at present arbitrarily detained in a ‘legal black hole.’”\textsuperscript{61} The court was especially critical of the U.S. government’s claim that there was no court in the United States that could review the indefinite detentions in a territory over which the United States had exclusive control:

We have made clear our deep concern that, in apparent contravention of fundamental principles of law, Mr Abassi may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.\textsuperscript{62}

The U.K. Court hoped the “anxiety that we have expressed [regarding the legal situation of the detainees]” will be “drawn to the attention of the appellate courts in the United States.”\textsuperscript{63} The Court took pains to say that it believed this “anxiety” was also felt by the federal district court in the United States that had ruled against the detainees and that it “believe[d] the United States courts have the same respect for human rights as our own.”\textsuperscript{64} As of January 2003, there has been no ruling by the U.S. appellate court.

The two cases filed in federal court in Washington, D.C., on behalf of Australian, English, and Kuwaiti citizens detained in Guantánamo are the critical cases, for the United States government must adhere to any final court rulings. As of this writing, the federal court decisions have been favorable to the U.S. government, but the appeals, which may ultimately be heard by the Supreme Court, have not been completed. In ruling on these cases, the federal judge accepted the government’s argument that her court had no jurisdiction to hear the cases and
therefore could not rule on the legality of the detentions. She found that American courts could not hear cases brought on behalf of aliens held by the United States outside the territory of the United States—thus determining that, despite the U.S. government's "complete jurisdiction and control" of Guantánamo Bay, the naval base was outside the U.S. courts' authority. The cases are on appeal. Without any court review of the legality of the detentions, there is no check on the actions of the government.

TRIALS BY MILITARY COMMISSIONS

On November 13, 2001, President Bush signed a military order establishing military commissions to try members of Al Qaeda and suspected international terrorists. Under this order, noncitizens, whether from the United States or elsewhere, who are accused of membership in Al Qaeda or of aiding international terrorism, can be tried before one of these commissions at the discretion of the president. The Bush administration has said that it will try some of those held on Guantánamo by these military commissions. As of December 2002, the Department of Defense was working on final preparations for the commissions.

Although military commissions were employed during and in the aftermath of World War II, their use was always restricted to defendants associated with the armed forces of a state who were alleged to have violated the laws of war. The military commissions established by the Bush administration include defendants who are not combatants on behalf of a state and who, therefore, as a matter of law, cannot commit violations of the laws of war. Violations of the laws of war, in general, can only be committed by state actors. If a nonstate actor, such as a member of Al Qaeda, or an alleged international terrorist murders people, it is a crime, but it is not a war crime. Such alleged criminals, terrorists or otherwise, should be tried by regular criminal courts and under U.S. criminal statutes of which the United States has abundance. To the extent the Bush administration plans to try alleged international terrorists by military commissions, whether they are members of Al Qaeda or not, it is proceeding contrary to law. No U.S. Supreme Court case and no rule of international law permits military commissions to try crimes that do not constitute war crimes.

A second major problem with the commissions is the procedures to be employed at the trials. The proposed commissions are not courts-martial, which provide far more protections for the accused—although less than those required
in civilian trials. Courts-martial require that arrests be made upon probable cause and mandate an investigation and hearing before a trial can occur. The accused can request a specific military counsel and can choose his civilian counsel. Hearsay evidence and involuntary confessions are not permitted. A unanimous verdict is required for offenses in which the death penalty is mandatory. Trials are public, and there are two levels of appeal, including an appeal to the U.S. Court of Appeals for the Armed Forces, which is composed of civilian judges. The defendant can request the Supreme Court of the United States to hear an appeal.\(^{67}\)

Although the Bush administration has said why it prefers military commissions rather than civil courts for trials of alleged enemy belligerents and alleged international terrorists, it has not fully explained why trial by courts-martial would not allay most of its concerns.\(^{68}\) Courts-martial, like commissions, do not require civilian jurors, judges, or courts, and can dispense justice relatively rapidly. Unlike military commissions, courts-martial are established courts and would not be subject to the criticism that they are ad hoc commissions set up as a means of obtaining convictions more easily.

By contrast to even the limited rights of courts-martial, the military commissions alter or eliminate many of these rights. This remains so even after the Department of Defense issued a set of procedures, in March 2002, that modified some of the more egregious aspects of the commissions as set forth in the president’s original order.\(^{69}\) Under the new procedures, the president still designates the suspects who are to be tried; there is no preliminary hearing or indictment. The secretary of defense appoints the judges, most likely military officers, who act as judges and jury deciding both questions of law and fact. Unlike federal judges who are appointed for life, these officers have little independence. Normal rules of evidence, which provide some assurance of reliability, do not apply. Hearsay and even evidence obtained from involuntary confessions is admissible. Defendants can be found guilty of a crime carrying a potential death penalty by a two-thirds vote of the judges, although unanimity is required to impose the death penalty. If a defendant can afford a civilian counsel (he is entitled to military counsel), that attorney must be determined by military authorities to be eligible for access to classified information. The only appeal from a conviction is to the president or the secretary of defense, although that appeal goes first to a three-person military review panel that then gives a “recommendation” to the secretary of defense or the president. Thus, there is no review by a civilian court, and the final decision remains in the hands of the president or secretary of defense.
Incredibly, the entire process, including the carrying out of the death penalty, can occur in secret. Although the procedures for the military commissions state that the proceedings will be open unless the presiding officer determines otherwise, the circumstances under which trials can be closed are broad and open to abuse. Trials can be closed in the interests of "national security" and other similar reasons. The trials can be held anywhere the secretary of defense decides, presumably even onboard an aircraft carrier. Access by the press is not guaranteed; the procedures state that the judge "may also allow attendance by the public and press." \(^{70}\)

These new commissions represent such a departure from fair and impartial courts that there has been a broad outcry against their use both in the United States and Europe. \(^{71}\) Even an important conservative American columnist, William Safire, was highly critical. \(^{72}\) This outcry was probably a factor in the government's decision to have the so-called twentieth hijacker, Zacarias Moussaoui, tried in a regular federal court in the United States.

While military commissions were used during and immediately after World War II, their use now would not comply with important international treaties. The International Covenant on Civil and Political Rights requires that persons be tried before regularly constituted courts established in accordance with preexisting laws. Further, the Third Geneva Convention requires that POWs be tried under the same procedures as United States soldiers for similar crimes, and United States soldiers are tried by courts-martial or civilian courts, not by military commissions. This may be one important reason the United States is refusing to classify the Guantánamo detainees as POWs: if they were considered POWs, the government would not be free to use military commissions.

Surprisingly, some law professors have argued in favor of these commissions, saying that secrecy is necessary for security. \(^{73}\) The primary argument is that it might be necessary to disclose classified information in order to obtain convictions. But, in fact, procedures for safely handling classified information in federal courts have been successfully used, as in the trial of those convicted in the 1993 bombing of the World Trade Center. The 1993 trials also demonstrate that trials of suspected terrorists do not require military commissions, but can safely be held in federal courts.

Trials before military commissions will not be trusted in either the Muslim world or in Europe, where previous terrorism trials have not required the total suspension of the most basic principles of justice. It would be much better to
demonstrate to the world that the guilty have been apprehended and fairly convicted in front of impartial and regularly constituted courts.

A NOTE ON THE USE OF TORTURE

In some way, those sent to Guantánamo may be the lucky ones: as far as we know, torture is not used on Guantánamo during interrogations. Since September 11, dozens of prisoners have been sent to third countries, including Egypt, Jordan, and Morocco, whose intelligence agencies maintain close ties to the CIA. As has been reported in the Washington Post, these people have been transported without going through normal extradition procedures, a process akin to kidnapping. Intelligence agencies in these countries use interrogation tactics such as torture and threats to families that are illegal in the United States and violate international human rights law. As one American official said of this practice of sending captives to foreign countries for interrogation: “We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.” In addition, thousands of others have reportedly been arrested with U.S. assistance and detained in foreign countries known for their brutal treatment of prisoners.

Even if U.S. officials are not themselves involved in the torture of detainees, they may be complicit in torture and guilt of a crime. The Convention Against Torture prohibits torture carried out at the “instigation of or with the consent or acquiescence” of officials. Handing someone over to a foreign intelligence service with the knowledge that the person will be tortured would fit within the prohibitions of the convention. One U.S. official who is involved with sending detainees to foreign countries admitted he knew they were likely to be tortured: “I . . . do it with my eyes open.” Torture is also a violation of U.S. criminal law and is punishable, in the United States, by death or life in prison.

According to press reports, it also appears that U.S. officials engage in treatment of detainees that may constitute torture. Witnesses have reported that captives are “softened up” by the U.S. military. The detainees are “blindfolded and thrown into walls, bound in painful positions, subjected to loud noises and deprived of sleep.” Although the Bush administration may regard this type of treatment as indispensable, there is resistance to the use of torture from some law enforcement officials. One former FBI chief of counterterrorism said in an Octo-
ber 2002 interview: “Torture goes against every grain in my body. Chances are you are going to get the wrong person and risk damage or killing them.”

CONCLUSION

With regard to the Guantánamo detainees, the Bush administration is openly disregarding a legal framework that is fundamental not only to defendants’ rights but to the rights of all people. Its assertion of the power to imprison people indefinitely, without charges and court review, is the very conduct the United States has forcefully condemned in other countries. The prohibition against executive detentions is the key to human liberty. It is no small matter to see an administration ignore that prohibition. The Bush administration’s plan to try some of the Guantánamo detainees and others by ad hoc military commissions undercuts a system of justice and procedures that is necessary to insure that only the guilty are punished. Finally, any use of torture or methods of interrogation akin to torture should be anathema to all societies that call themselves civilized. Without respect for the international and U.S. legal framework, the violations of the rights of Guantánamo detainees will continue, and will continue to threaten the rights of others who depend on the fair application of the law.