

A SHORT COMMENT ON CURRENT DETAINEE POLICY: ONE STEP FORWARD AND TWO STEPS BACK

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I. INTRODUCTION

This comment originates from a debate that the Akron Law Federalist Society at the University of Akron School of Law hosted. The participants considered the legalities of U.S. policies with respect to the detention, interrogation, and trial of detainees held in Guantanamo Bay. This Comment analyzes some of the legal issues discussed during that debate and also touches on recent issues related to the detention and trials of detainees held in Guantanamo Bay.

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II. LAW GOVERNING MILITARY COMMISSIONS¹

In the aftermath of 9/11, the U.S. Military, under President George W. Bush's Administration, began holding enemy combatants captured in the Global War on Terror, at the U.S. Naval base in Guantanamo Bay, Cuba.² On November 13, 2001, President Bush issued an Executive Order that laid the groundwork to bring some of these detainees to trial before military commission.³ Section four of that same order instructed the Secretary of Defense to draft rules governing Military Commissions.⁴ At a minimum, the President directed full and fair trials with a commission that decides both fact and law; allows the admission of any evidence having probative value to a reasonable person; protects classified information, provides for conviction and sentence by a two-thirds majority; and requires review of the trial record by either the Secretary of Defense or the President himself.⁵

Responding to the President, the Secretary of Defense then drafted Military Commission Order Number One, which succinctly set forth procedures for military commissions.⁶ Section five, entitled *Procedures Accorded to the Accused*, guaranteed the accused several rights, which included a copy of charges in the defendant's language; the presumption of innocence until proven guilty beyond a reasonable doubt; assigned defense counsel; provided access to information the prosecution intends to use at trial and any evidence tending to exculpate the defendant; guaranteed that the defendant is not required to testify against himself, but may testify on his own behalf (the right to remain silent); guaranteed the defendant's right to be present except when it violates laws governing classified information or when the defendant is disruptive; allowed the detainee access to information used in sentencing; afforded the right to present evidence and to make a statement at a sentencing

1. For a more detailed discussion of Military Commissions, see Kyndra Rotunda, HONOR BOUND: INSIDE THE GUANTANAMO TRIALS 147-63 (2008).

2. For a discussion of the historical, legal underpinnings of Military Commissions dating to the Revolutionary War, see Kyndra Rotunda, *A Comparative Historical Analysis of War Time Procedural Protections and Presidential Powers: From the Civil War to the War on Terror*, 12 CHAPMAN L. REV 449 (2009).

3. President's Military Order of November 13, 2001, 66 Fed. Reg. 67, 833 (Nov. 13, 2001).

4. *Id.*

5. Detention, Treatment & Trial of Certain Non-Citizens in the War Against Terrorism, 66 FR 57833 (Nov. 13, 2001).

6. DEP'T OF DEFENSE, MILITARY COMM'N ORDER NO. 1 (Aug. 31, 2005), available at <http://www.defense.gov/news/Sep2005/d20050902order.pdf>.

hearing; guaranteed open public trials; and afforded protection against double jeopardy.⁷

In the summer of 2006, the Supreme Court in *Hamdan v. Rumsfeld*⁸ invalidated military commissions on statutory grounds, holding that President Bush must first receive specific approval from Congress before using military tribunals to try suspected wartime criminals.⁹ The Court did not determine that military commissions were unconstitutional. Instead, the Court simply called on Congress to either approve the rules or to codify new ones. The Court interpreted Congress's "Authorization for the Use of Military Force" not to allow the President to hold Military Commissions and said that Congress must specifically approve Military Commissions.¹⁰ The Court added, "Nothing prevents the President from returning to Congress to seek the authority he believes necessary. . . . If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the constitution and other laws, it has the prerogative to do so."¹¹

Congress responded to the Supreme Court and specifically authorized Military Commissions by adopting a set of rules, which it codified in the Military Commissions Act of 2006.¹² The rules reflected much of what was already contained in the Military Commission Order Number One. Generally, the rules excluded information obtained by torture,¹³ guaranteed defendants the right to represent themselves,¹⁴ guaranteed that defendants cannot be excluded from their trials except when they are disruptive and only after being warned by the judge,¹⁵ and protected the sources and methods of classified information.¹⁶ Further, the rules allowed defendants to appeal their convictions to the District of Columbia Circuit Court, and, in some cases, ultimately to the United States Supreme Court.¹⁷

7. *Id.*

8. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

9. *Id.*

10. *Id.* at 636-37.

11. *Id.*

12. Military Comm'n Act of 2006, 10 U.S.C. § 948a (2006).

13. *Id.* § 948r(a) ("A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made").

14. *Id.* § 948a(b)(D).

15. *Id.* §§ 948a, 949d(e).

16. *Id.* §§ 948a, 949d(f).

17. *Id.* §§ 948a, 950(g).

III. MILITARY COMMISSIONS ACT OF 2009: DISCUSSION AND ANALYSIS

On January 22, 2009, shortly after assuming office, President Barack Obama issued an executive order closing (eventually) the United States military detention facility at Guantanamo Bay.¹⁸ He also criticized the procedures governing military commission and halted those trials that were then underway.¹⁹ The Executive Order also called for a committee to review whether and how Guantanamo Bay detainees should be prosecuted,²⁰ despite the fact that Congress had already codified the procedures in the Military Commissions Act of 2006.

A few months later, during a press conference on May 21, 2009, President Obama surprisingly endorsed Military Commissions as a legitimate means of trying war criminals. He commented, “Military commissions have a history dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war.” He stated that his changed view of Military Commissions did not constitute “a reversal on my part.”²¹

President Obama endorsed the use of Military Commissions but also proposed several amendments to the Military Commission Act, which he said would “bring military commissions in line with the rule of law.”²² The proposed reforms generally included: (1) banning the use of evidence obtained through cruel, inhuman, or degrading interrogation methods; (2) shifting the burden to prosecutors to prove that hearsay evidence is reliable (instead of placing the burden on opponents to prove it is *unreliable*); (3) giving “greater latitude” to defendants to select their own lawyers; and (4) generally providing “more protections” if defendants refuse to testify.²³

A. *Use of Potentially Coerced Statements*

The most substantive reform that President Obama proposed was the ban on certain types of evidence. One significant problem with the Military Commissions Act of 2006 is that it left open the door for prosecutors, in some instances, to rely on statements obtained through

18. Exec. Order No. 13492, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 74 F.R. 4897 (Jan. 22, 2009).

19. *Id.*

20. *Id.* § 4(c)(3).

21. The White House Office of the Press Sec’y, Remarks by The President on National Security (May 21, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (last visited Oct. 31, 2011).

22. *Id.*

23. *Id.*

coercion.²⁴ Specifically, the Military Commissions Act of 2006 included a provision that allowed statements, in which the degree of coercion was disputed, to be admitted, so long as the statement was reliable, probative, and conducive to the interest of justice.²⁵

Under the Act, statements that the prosecutors obtained before December 30, 2005 were treated differently than those made after that date. The Act barred the use of any statements made after December 30, 2005 if the interrogation method used to obtain the statement would violate the Fifth, Eighth, or Fourteenth Amendments to the U.S. Constitution.²⁶ But that bar applied only to statements made *after* December 30, 2005 (the date that Congress enacted the Detainee Treatment Act.)²⁷

The bizarre and unjust result of these two provisions is that they would allow prosecutors to rely on coerced evidence in some instances. The only trigger that would bar the use of such evidence was the passage of time. Thus, detainees interrogated on December 29, 2005 could be convicted based on evidence procured through coercive means.²⁸ In contrast, the law offered greater protections to a detainee interrogated on or after December 30, 2005.

The Obama Administration presumably realized that these conflicting provisions were unfair and could lead to unjust convictions. To that end, Congress amended this provision in the Military Commissions Act of 2009, which includes a clear and simple ban on the use of statements obtained by torture or by any means that would violate the Fifth, Eighth, or Fourteenth Amendments to the U.S. Constitution.²⁹ This prohibition mirrors U.S. law and is fairly categorized as a substantive amendment. It is, quite clearly, a step in the right direction and a significant improvement to the Military Commissions Act of 2006.

24. Military Comm'n Act of 2006, 10 U.S.C. § 948r (b)-(c) (2006).

25. 10 U.S.C. § 948r (c)(1)-(2) (2006).

26. *Id.* § 948r(d).

27. *Id.* § 948r(d).

28. Information that the Government obtained by coercion can be reliable. For example, in response to coercion, the detainee might say, "I buried the weapon under the Oak tree." The Government could then check under the Oak tree and find the weapon. That evidence is what is called "fruit of the poisonous tree." That is, the evidence is the product of coercion. Yes, the information can be reliable, but we should not admit that evidence because it is the product of coercion, and admitting it rewards the coercion. No Article III court will admit such evidence unless the defendant offered the testimony voluntarily after *Miranda* warnings.

29. Detainee Treatment Act of 2009, 10 U.S.C. § 948r(a) (2009).

B. *Latitude in Selecting Defense Lawyers*

While the categorical ban on evidence procured through coercion was an important and substantive amendment, other amendments that President Obama proposed and that Congress adopted are far less substantive. One might even think of them as window dressing.

For instance, the Obama Administration advanced amendments to the Military Commissions Act of 2006 that would provide “greater latitude for detainees to select their lawyers.”³⁰ However, a careful comparison of the 2006 and 2009 versions of the Military Commissions Act reveals that Congress adopted no substantive change to the law with respect to the detainees’ ability or right to select their lawyers.

Congress adopted one provision that requires the Secretary of Defense to separately promulgate rules to evaluate the performance of defense counsel in capital cases.³¹ However, JAG lawyers—like every Military Officer—already receive periodic evaluations (Officer Evaluation Reports) and, just like lawyers in the private sector, their performance is constantly evaluated by higher-ranking lawyers within the firm, or in this case, within the military. While it cannot hurt to more carefully, and more deliberately, review the work of defense lawyers involved in capital cases, the provision is duplicative and unlikely to significantly impact Military Commissions. This is particularly true because none of the cases pending before Military Commissions are capital cases.

The amended Military Commissions Act also includes a new provision that allows the detainee to request a particular military defense counsel by name, who will represent the detainee so long as that named defense lawyer is reasonably available.³² This provision will probably benefit some detainees, who are able to select a defense lawyer they regard as a good choice. However, there is nothing particularly substantive about this provision either. Randomly assigning defense counsel is a regularly accepted practice. Indeed, U.S. criminal defendants do not have their pick of the litter. The judge simply appoints a lawyer and, unless that lawyer has a legitimate conflict of interest, the trial proceeds with the appointed lawyer. Hence, this new procedure will give detainees greater rights than any criminal defendant tried in state or federal court.

30. Remarks by the President on National Security, *supra* note 21.

31. Military Comm’n Act of 2009, 10 U.S.C. § 948K (4)(c)(2) (2009).

32. 10 U.S.C. § 949c(2) (2009).

C. *Additional 5th Amendment Protections*

Both the Military Commissions Act of 2006 and of 2009 include Fifth Amendment protections, which make clear that no defendant shall be required to testify against himself or herself.³³ The only difference is that the language appears at a different place in the Military Commissions Act, and the 2009 version inserts the phrase “or herself”, presumably in an effort to clarify that the protection would apply to both male and female defendants—something that is already plainly clear.³⁴

The Military Commissions Act of 2009 includes additional restrictions on using statements of the accused that were properly obtained. These statements may be admitted as evidence if the judge finds that the statements are reliable and probative; that they were made incident to lawful conduct during military operations or upon capture; and that the interest of justice is served by admitting the statements or that the statement was voluntarily given. It specifies that whether a statement is “voluntary” will rest on a number of factors, including the circumstances; sophistication and education level of the individual detainee; and the lapse in time, change of place, or change of identity in the questioner.³⁵

While this provision helps to clarify the use of voluntary statements, it is only a more detailed telling of what already was the law. Under the Military Commissions Act of 2006, the judge already enjoyed discretion to admit statements based on the “totality of circumstances” that render the statement reliable,³⁶ which would clearly encompass the factors that are now spelled out in the 2009 version. Presumably, the outcome would be the same under both versions of the Military Commissions Act.

33. The Military Commissions Act of 2006 states “No person shall be required to testify against himself at a proceeding of a military commission under this chapter.” 10 U.S.C. § 948r(a) (2006). The Military Commissions Act of 2009 states “No person shall be required to testify against himself or herself at a proceeding of military commission under this chapter.” 10 U.S.C. § 948r(b) (2009).

34. 10 U.S.C. § 948r(b) (2009).

35. *Id.* § 948r(c)-(d).

36. *Id.* § 948r(a)-(d).

IV. INDEFINITE DETENTION AND THE GENEVA CONVENTIONS³⁷

The 2009 amendments to the Military Commissions Act, on the whole, provide additional procedural protections to the defendants. However, the problem is that these new rules are not generally applicable. They apply only to a particular subset of detainees. President Obama, through other measures, has recently excluded some detainees from being eligible for trial by Military Commissions. It seems that what he gives with one hand, he takes away with the other. What good is a robust body of law that can be set aside when the government thinks that it is inconvenient?

While the Obama Administration initiated reforms to the Military Commissions Act, it simultaneously excluded some detainees from coverage under the Act. The Obama Administration has determined that some detainees are too dangerous to ever be released, but that insufficient evidence exists to bring them to trial for their crimes.³⁸ These detainees are automatically ineligible for trial by military commission. Instead, these detainees will face indefinite detention without a trial.

Think about this: the class of detainees who have the least protection are those detainees who have the least amount of evidence against them. The government announces that they are dangerous, but the government does not have sufficient evidence to persuade a neutral fact-finder of that belief. The detention for this class of detainees is also indefinite. An administrative decision—not a trial—imposes indefinite imprisonment.³⁹

37. For more detailed analysis of the Geneva Convention's application to Guantanamo Bay, see Kyndra Rotunda, *Applying Geneva Convention Principles to Guantanamo Bay*, 43 U. RICH. L. REV. 1067 (2009).

38. Remarks by the President on National Security, *supra* note 21:

Now, finally there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. And I have to be honest here—this is the toughest single issue that we will face. We're going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country. But even when this process is complete, there may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States. Examples of that include people who've received extensive explosive training at al Qaeda training camps, or commanded Taliban troops in battle, or expressed their allegiance to Osama bin Laden, or otherwise made it clear that they want to kill Americans. These are people who, in effect, remain at war with the United States. Let me repeat: I am not going to release individuals who endanger the American people.

39. Exec. Order No. 13567, Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for the Use of Military Force (Mar. 7, 2011), *available*

This imposition of indefinite detention without trial raises serious concerns under both International Law and U.S. Law. Let us now turn to that issue.

Geneva Convention III, relative to the Treatment of Prisoners of War, requires that detainees be repatriated “without delay” at the end of hostilities.⁴⁰ The Official Commentary to that provision refers to the repatriation provision as “one of the most important Articles in the Convention,” observing that it is “intended to remedy very unsatisfactory situations.”⁴¹ Thus, the plain language of the Geneva Conventions makes clear that, at the end of active hostilities, all detainees not pending trial must be repatriated to their home countries.

Holding detainees until the end of the war does not mean that the U.S. government can hold them indefinitely. Neither the Geneva conventions nor international law provides for such discretion. It means that the Government can hold the detainees to the end of the war.

In a war like the present one, it is unclear when the war is over. We do not expect it would end in a typical fashion. It is unlikely that there will be a formal signing of a peace treaty with Al Qaeda. However, the Supreme Court has anticipated that question and had provided an answer. In *Hamdi v. Rumsfeld*,⁴² the Court held that the United States can hold detainees “for the duration of the conflict in which they were captured.”⁴³ Put another way, we can hold detainees until hostilities end and the troops come home. At some point, the troops will no longer be fighting in Iraq and Afghanistan. Whether they return home because the war is won or because we just decide to leave, when the troops come back, the war ends. At that point, international law provides that we must release the detainees.

It is doubtful that President Obama can authorize the *indefinite* detention of prisoners captured during a war once the war ends. The President appears to understand the problem. In understanding the problem, President Obama seeks to hold individual detainees who are, “in effect,” at war with the United States because of their individual

at <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava> (last visited Oct. 31, 2011).

40. Geneva Convention III, Relative to the Treatment of Prisoners of War, art. 118-119.

41. Jean De Preux et al., Commentary III, Geneva Convention Relative to the Treatment of Prisoners of War 541 (Jean S. Pictet ed., A.P. de Heney trans., 1960).

42. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

43. *Id.* at 518 (stating “We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use”).

desires “to kill Americans.”⁴⁴ Neither U.S. law nor international law recognizes that argument. When WWII ended, there may well have been individual Germans who still had a desire “to kill Americans,” but we would not have had the power to detain them indefinitely simply because we determined, without trial, that they had evil in their hearts.

A. *Indefinite Detention in U.S. Prisons*

President Obama has lobbied Congress for authority to move detainees from the detention camp in Guantanamo Bay to maximum security prisons in the United States. However, this plan has failed to gain traction with Congress. On the contrary, Congress responded on December 22, 2010. In responding, Congress inserted an amendment to the National Defense Authorization Act, which bans the use of federal funds to bring any detainee to the United States for trial or for detention.

This statute mirrors our international obligations. The Geneva Convention III, Relative to the Treatment of Prisoners of War, also prohibits housing detainees in U.S. maximum security prisons. Geneva Convention III, article 22 speaks to the issue, stating that detainees “shall not be interned in penitentiaries.” Furthermore, the Geneva Conventions also require particular conditions of detention, including the freedom of movement, access to a canteen, work opportunities, and payment in Swiss Francs.⁴⁵ Put simply, maximum security U.S. prisons are incompatible with the conditions of detention required under the Geneva Conventions.

V. PROVISIONS AUTHORIZING THE DETENTION OF ENEMY COMBATANTS: THEN AND NOW

The Bush Administration adopted several procedural rules for detaining enemy combatants during the war. These procedures responded to the plurality opinion in *Hamdi v. Rumsfeld*,⁴⁶ which reaffirmed the earlier World War II decision in *Ex parte Quirin*.⁴⁷ That case concluded that the United States may detain enemy combatants *during war time* without charging them with any crimes. The Supreme Court, in *Hamdi*, specified that the procedures to determine whether a detainee is an enemy combatant need not be elaborate. Indeed, the government can assume that the detainee is an enemy combatant unless

44. Remarks by the President on National Security, *supra* note 21.

45. Geneva Convention III, *supra* note 34, art. 21-68.

46. *Hamdi*, 542 U.S. 507.

47. *Ex parte Quirin*, 317 U.S. 1 (1942).

he or she presents compelling evidence establishing otherwise. The government can hold the detainee so long as the detainee has a fair opportunity to challenge his or her detention and present his or her view of matters.⁴⁸

Under President Bush, the Office of Review for Detained Enemy Combatants (OARDEC), established procedures for these hearings.⁴⁹ It held hearings called Combatant Status Review Tribunals (or CSRTS). Although not required by the Supreme Court, or by any other legal provision, the United States appointed each detainee a personal representative to assist with the hearing.⁵⁰ The United States also established Annual Review Boards, also under the direction of the Office of Review for Detained Enemy Combatants (OARDEC).⁵¹ It is an annual review board that hears detainee requests for release. The standard for release is that the detainee no longer poses a threat to the United States.⁵²

The Obama Administration recently adopted similar procedures for detainees that it plans to hold *indefinitely* without trial—as opposed to simply detaining enemy combatants during war time. Ironically, while the stakes are higher, and the result is indefinite detention, the Obama Administration affords fewer procedural protections for these hearings than the Bush Administration afforded to detainees undergoing CSRTS or ARBs.

Specifically, the new procedures provide that detainees will receive a hearing within one year.⁵³ At this hearing, they may have the assistance of an appointed representative. If they would prefer a lawyer, they may have one at their own expense.⁵⁴ The detainees will receive an unclassified version of the justification for continued detention and will have an opportunity to challenge that summary.⁵⁵ In some cases, when

48. *Hamdi*, 542 U.S. at 507.

49. Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* <http://www.defense.gov/news/Jul2004/d20040707review.pdf> (last visited Oct. 31, 2011).

50. *Id.* at (c) (stating “Each detainee shall be assigned a military officer, with the appropriate security clearance, as a personal representative for the purpose of assisting the detainee in connection with the review process described herein”).

51. Memorandum from Gordon England, Designated Civilian Official, Dep't of Def., Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (Sept. 14, 2004), *available at* <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf> (last visited Oct. 31, 2011).

52. *Id.* at Enclosure (3).

53. Executive Order, *supra* note 39, § 3(a).

54. *Id.* § 3(a)(2).

55. *Id.* § 3(a)(1).

the need to protect national security is particularly high, the detainees' representative will receive only a summary of information, as opposed to the underlying information that justifies continued detention.⁵⁶ After the initial hearing, detainees will then receive paper reviews every three years.⁵⁷ The standard for continued detention is whether that detention is "necessary to protect against a significant threat to the security of the United States."⁵⁸

The procedures used by President Bush and those used by President Obama are similar, except that detainees under President Obama will face indefinite detention, without trial, and will only be allowed to challenge their detention once every three years. The procedures, under President Bush, required annual reviews (hence the name Annual Review Boards) for all detainees simply to hold them during the war.

Although the Supreme Court has upheld the use of these basic procedures in order to hold detainees during wartime, it is unlikely that it would find that such procedures are sufficient to hold enemy combatants indefinitely—not during a time of war. Additionally, it is unlikely that the Supreme Court would permit fewer procedural protections for indefinite detention than what it required for detention during a time of war. What the Obama Administration proposes is novel, and unknown to either U.S. or international law.

Precedent suggests that the Supreme Court is unlikely to uphold the use of indefinite detention. President Obama maintains that the legal authority for his proposed "law of war detention" is "detention authorized by Congress under the AUMF, as informed by the laws of war."⁵⁹ That assumes a very broad reading of the Authorization for the Use of Military Force. However, in *Hamdan v. Rumsfeld*,⁶⁰ the Supreme Court considered whether Military Commissions under President Bush were a proper extension of the Authorization for the Use of Military Force. It found, contrary to earlier Supreme Court Precedent, that Congress's general permission to use force does not mean that Congress had also authorized the use of Military Commissions, and thus it invalidated the use of Military Commissions absent specific authority from Congress.

It is unlikely that a Court would accept a broad reading of the AUMF in this context. If a President does not have authority to hold

56. *Id.* § 3(a)(5).

57. *Id.* § 3(a)(8)(b).

58. *Id.* § 2.

59. *Id.* § 9(a).

60. *Hamdan v. Rumsfeld*, 548 U.S. 557, 557 (2006).

Military Commissions during a time of war without specific authority from Congress, then surely the Executive lacks authority to *indefinitely* detain enemy soldiers even after the end of hostilities.

VI. CONCLUSION

During the Presidential Campaign, President Obama promised to close Guantanamo Bay and to abandon Military Commissions. Shortly after taking office, he halted Military Commissions that were then underway, in order to explore other alternatives.⁶¹ Nearly three years later, Guantanamo Bay remains open, and President Obama has recently resumed Military Commissions.

With the exception of a lone amendment to the Military Commissions Act, the procedures governing Military Commissions under President Obama and those under President Bush are virtually indistinguishable. What is distinguishable is that now, under President Obama, many detainees will receive *no* procedural protections under the Military Commissions Act, but instead will face indefinite detention under rules that afford fewer procedural protections to detain someone for life than previously applied to temporarily hold detainees during war time. What good are procedural protections if they are only selectively applied, and when that decision is left only to the captor?

What the Obama Administration gives with one hand, it takes away with the other. Ironically, the Obama Administration affords fewer procedural protections to justify holding detainees indefinitely than President Bush authorized in order to hold detainees during a time of war.

President Obama proposes that, in those instances where insufficient evidence exists to bring detainees to trial, the United States may hold them indefinitely—even after the war ends. This declaration is a step backwards, and could potentially put U.S. troops—and even civilians—at risk for indefinite detention by dictatorial regimes. Take, for example, Iran's recent detention and of three U.S. college students who accidentally wandered into Iran while hiking between Iran and Pakistan. Ironically, Iran could have used American law to justify its own indefinite detention of our citizens.

Iran maintained that the hikers are in fact U.S. spies. The U.S. disagreed and repeatedly and rightfully, called for their release. (Iran

61. For additional analysis of President Obama's decision to halt trials, see Kyndra Rotunda, *Halting Military Trials in Guantanamo Bay: Can the President Call a Time-out?*, 19 MICH. ST. J. INT'L L. 95 (2010).

eventually released the hikers.) However, President Obama's decision to hold enemy combatants indefinitely in the United States, based on our unsupported, and untried declaration that they are a danger to the United States, opens the door for Iran and others to do exactly the same thing.

The United States holds itself out as a stalwart liberty and an advocate for procedural protections. We consistently criticize countries that hold prisoners in substandard conditions that lack fundamental procedural protections. It is difficult to understand how the United States can hold people it deems "dangerous" forever, while criticizing countries like Iran for doing the same thing to U.S. citizens. Just as we believe that detainees are "dangerous" to our interests, Iran maintained that U.S. hikers were dangerous to its interests. The United States should act cautiously when adopting provisions that allow indefinite imprisonment without a trial.

The United States took one step forward when it improved procedural protections contained in the Military Commissions Act, and simultaneously took two steps back when it decided to exclude detainees from these same procedural protections and indefinitely detain them without any trial.