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SHINING THE LIGHT IN THE DARKNESS OF GUANTANAMO: THE U.S. CRIMINAL DEFENCE BAR TAKES ON THE UN-AMERICAN MILITARY COMMISSIONS

John Wesley Hall[*]

We, as criminal defence lawyers, know that we must stand by our clients, regardless of the offenses under which they are accused. Indeed, the first principle of criminal defence in the American justice system is that every accused has the right to be represented by competent counsel. It is a core value of American law. The U.S. Constitution does not specifically mention a prosecutor or a trial court,[1] but so important is the role of criminal defence counsel in the protection of constitutional liberties that we are mentioned in the Sixth Amendment of the U.S. Constitution: "In all criminal prosecutions, the accused shall enjoy the right […] to the assistance of counsel for his defence."

In our role as criminal defence lawyers, we are the people who enforce freedom and justice by making sure that the Government plays by the rules and respects the law, including the U.S. Constitution. It has disturbed many American lawyers to watch the serial efforts of two administrations, with a complicit Congress, to change the substantive and procedural criminal law with the singular goal of depriving fundamental rights to its detainees in the so-called "War on Terror".

Though we, the American criminal defence bar, have been victorious now four times before the U.S. Supreme Court in our efforts to counter various governmental attempts to deprive our detainees of due process of law, and even originally the right to counsel,[2] the struggle unfortunately continues.

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1 Trial courts and prosecutors are other officers that may be created by statute. At the time the U.S. Constitution was ratified and became effective (September 17, 1789), it was up to the First Congress to create trial courts and prosecutors, which it did. The Sixth Amendment was added to the Constitution as a part of the Bill of Rights on its ratification on December 15, 1791.

2 *See Boumediene v, Bush*, 128 S. Ct. 2229 (2008) which rejected government argument that federal courts have no jurisdiction over persons deemed "enemy combatants" by U.S. military forces held at Guantanamo or elsewhere overseas; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) which held that the *Detainee Treatment Act of 2005* cannot deprive detainee of right to federal court review of habeas petition; *Rasul v. Bush*, 542 U.S. 466 (2004) which held that federal district court has jurisdiction under Federal Habeas Statute to hear detention challenges of aliens held at Guantanamo Bay and which found habeas rights, necessarily holding right to counsel for non-U.S. citizen detainees; and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) which held that a U.S. citizen held at Guantanamo and designated an "enemy combatant" is "absolutely" entitled to counsel.

President Barak Obama has revived the military commissions at Guantánamo Bay, Cuba, beginning with the prosecution of Omar Khadr of Canada, the first child soldier to be tried for war crimes in modern United States history. The commissions, initially conceived by President George W. Bush and now governed by a statute titled the *Military Commissions Act of 2009* (MCA),[3] are neither civilian courts nor traditional U.S. military tribunals long governed by existing U.S. law. They are an artificial construct with new procedures and a lack of protections that run counter to American principles of justice and due process. They are, to any notion of American justice and fair play, a further stain on the U.S., beyond the arbitrary and unconscionable treatment of these detainees.

We in the defence bar do not call them "trials". If we did, the Government would have accomplished something akin to calling a propaganda machine the "Ministry of Truth". Quite simply, these are not trials in any sense that American justice or that rights-respecting people around the world understand that term.

First, beyond the flag and the trappings of a trial, an MCA tribunal bears little resemblance to either a U.S. court-martial or a criminal trial in a courtroom. Secret evidence can be used, with the accused having no opportunity to see or confront it. Hearsay, including the rankest form — the product of coerced and presumptively unreliable custodial interrogations of other present or former detainees which cannot even be cross-examined — incredibly is admissible. And inculpatory statements by the defendants themselves may be used even if the statements were the product of coercion. Previous iterations of the MCA even permitted the use of statements obtained through what the Bush administration euphemistically called "enhanced interrogation techniques" — techniques such as waterboarding that most civilized people immediately recognize as torture.

The next problem with these proceedings is the embarrassing lack of resources provided defence counsel under the MCA. U.S. law governing civilian court prosecutions guarantees that indigent defendants have the resources "necessary for adequate representation," including the provision of expert, investigative, and other services to the defence.[4] The MCA, however, provides no such guarantee.[5] Instead, the military judges and "Convening Authority" responsible for overseeing the commissions have systematically denied counsel the fundamental building blocks necessary to mount a defence. As of September, 2009, 46 of the 56 defence requests for experts have been denied, including requests for mitigation specialists, mental health experts, and competent translators.[6]

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3 Military Commissions Act of 2009, Pub. L. 111-84, Title XVIII (2009).

4 18 U.S.C. § 3006A(e).

5 The 2009 MCA alludes to this problem in Sec. 1807, stating that "the fairness and effectiveness of the military commissions system … will depend to a significant degree on the adequacy of defence counsel and associated resources for individuals accused …". This "Sense of Congress" calls for parity between the MCA and civilian systems but has no binding legal effect. As in the 2006 MCA, § 949j governs the provision of defence resources and requires only a "reasonable opportunity" to obtain witnesses and evidence. 10 U.S.C. § 949j(a).

6 Petition for Writ of Mandamus or Writ of Prohibition at 27, *In re Mustafa Ahmed Al Hawsawi*, No. 09-1244 (D.C. Cir. Sept. 17, 2009).

This problem is only magnified in those cases designated as death penalty cases, such as the aborted prosecution of five "high value detainees"[7] charged with plotting the attacks of September 11, 2001. In accordance with a previous version of the MCA, these men were entitled to only one military lawyer apiece. The statute did not provide for any additional counsel, let alone one qualified to handle a death penalty case, obviously a distinct sub-specialty of criminal defence work. In fact, although the military lawyers assigned to the five detainees are women and men of great courage and dedication to the rule of law and protection of the innocent, they were quite candid in acknowledging that they were not qualified by training or experience to handle a capital case, especially one the Government has been preparing for years, and in which no resources are being made available for the defence for mitigation of punishment. If this were a civilian court or court-martial, these detainees would have been entitled to the full panoply of the minimum requirements, now rights, in a death penalty case. Although the current MCA now mandates one "death qualified" lawyer for each defendant charged with a capital offense, the statute still fails to provide for the minimally acceptable defence team required by the American Bar Association (ABA) guidelines that govern American capital cases[8] and which have been endorsed by the U.S. Supreme Court as minimum standards in an American courtroom, civilian or military.[9] A cynic might think that the Government was intentionally seeking to hobble the defence in these cases to insure that the death penalty will be meted out for those it thinks deserve the ultimate punishment.

Worse than the stacked rules and the shamefully inadequate defence resources is the process. From the first appearance of the "high value detainees" on June 5, 2008, it is plain that the Government had no intention of providing anything that resembles a fair trial. The detainees were confined incommunicado for up to six years under extreme conditions, the full details of which the public may never know due to the Government's classification policies. Nevertheless, they were deprived of access to any lawyer until just days before their arraignment, amounting to a denial of adequate time to prepare.

Despite the fact that what the detainees tell their lawyers is deemed so "top secret" that the lawyers cannot disclose it, the detainees — many potential co–defendants — were conveniently permitted by the authorities at Guantanamo to confer among themselves prior to the presentment of charges against them. Then, in

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7 "High value detainees" is a reference used by the Bush Administration to refer to 14 detainees held until 2006 in secret CIA prisons. <http://www.defenselink.mil/news/NewsArticle.aspx?ID=721>.

8 *Amercian Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (1989), online: American Bar Association <http://www.abanet.org/deathpenalty/resources/docs/1989Guidelines.pdf> [ABA Guidelines]. The guidelines require that a defence team include no fewer than two attorneys duly trained and experienced in capital defence, an investigator, a mitigation specialist, and at least one team member qualified by training and experience to screen for the presence of mental or psychological disorders or impairments. Guideline 4.1 (The Defence Team and Supporting Services)). *See also* ABA Guidelines 5.1, 8.1 & 10.4. (at least two lawyers are required, one of whom is experienced in death penalty litigation; defence gets full resources for an adequate defence).

9 *Wiggins v. Smith,* 539 U.S. 510, 522 (2003).

three of the five cases, the presiding officer accepted a waiver of the right to counsel after a cursory examination of the accused, something that would never happen in a U.S. civilian or military court. Impassioned pleas from lawyers for more time to discuss the case with the clients fell on deaf ears. Imagine a court in these death penalty cases — in which the Government has had exclusive control of the accused for years and has subjected him to endless interrogation and who knows what physical and psychological abuse he went through — accepting a waiver of counsel at the first appearance of ideologues who would love to be martyrs even if they were innocent, and after counsel has had perhaps only one or two opportunities to meet the defendant and no opportunity to review the evidence!

Consider also how the U.S. Government is using classification restrictions to impede defence preparation. Discovery can be reviewed only in a Secure Compartmentalized Information Facility (SCIF). Defence lawyers are searched going in and out. Additionally, any briefs or motions that rely on classified information must be written in their entirety inside a SCIF, access to which is severely limited. For example, the SCIF at Guantánamo is too small to accommodate all the defence teams and it is available only from 7:00 a.m. to 6:00 p.m. Also, bear in mind that even when traveling to Guantánamo on a special military flight, it took the lawyers 13 hours (one way) to see their clients. When special flights are not available, travel each way consumes two days. It almost seems that the Government is trying to make it as inconvenient as possible on the lawyers and their clients.

The most pervasive obstacle to mounting a defence is the Government's manipulation of the classification restrictions to gain unfair advantage and impede the defence. Everything a client tells counsel is presumptively classified information, and much of the discovery relevant to the defence will be classified as well. How does a lawyer prepare a defence or investigate a capital case, with the need for extensive investigation of mitigation, if the lawyer cannot discuss the evidence or the client's version of events? While specific statements may be declassified upon request of the military, the official who must process this request has not been appointed. Classified information can be discussed only in the SCIF, and attorney notes on the classified information cannot be removed by attorneys from the SCIF. Finally, if the lawyers go back to the mainland of the United States, they cannot discuss any classified information with anybody, not even co-counsel, outside of the SCIF without themselves committing a crime. Imagine trying to prepare a case for trial under these conditions.

Faced with these stacked evidentiary rules and the woefully limited defence resources provided under the MCA, we in the defence bar could not stand idly by. Together, the National Association of Criminal Defense Lawyers (NACDL) partnered with the American Civil Liberties Union (ACLU) to create the "The John Adams Project",[10] an effort to augment the woefully inadequate defence resources provided

[10] For more on the project, visit: American Civil Liberties Union, <http://www.aclu.org/safefree/detention/johnadams.html>. The project is named after John Adams, second president of the United States (1797-1801), who was a lawyer in colonial Boston before the United States' Revolutionary War. On March 5, 1770, British soldiers garrisoned in Boston were the target of rocks and sticks thrown by

by the military for the detainees under the MCA. Legal teams have worked to vigorously assist in the defence of individuals detained by the U.S. Government. In the tradition of John Adams, who lives in all American attorneys,[11] as part of our constitutional role and duty in American society, we will continue to shine the light brightly on each and every aspect of these un-American proceedings for all to see.

Unfortunately, when all is said and done, the entire process of detainees defending themselves, and teams of attorneys representing them in these fatally flawed military commissions, may well be nothing but an exercise. The law, as the administration sees it, will not compel the U.S. Government and the Defence Department to release anyone who is acquitted, or completes serving any sentence, as a result of proceedings under the MCA. The administration has made it clear that even under these circumstances, the decision to release detainees still lies with the Executive Branch.[12] I am reminded of *Alice in Wonderland*: "'No, no!' said the Queen. 'Sentence first—verdict afterwards.'"[13]

These are sad times for freedom and justice in the United States. But, the work of criminal defence lawyers for over two centuries on behalf of these detainees and, indeed, on behalf of everyone inside the U.S., even accused terrorists, shows a constitutional commitment to fair and just proceedings ensuring due process to each and every accused. This, I am proud to say, must and will continue undaunted.

John Adams said in the closing argument of the trial of the Boston Massacre:

> [It] is of more importance to the community that innocence should be protected than it is that guilt should be punished, for guilt and crimes are so frequent in the world that all of them cannot be punished. […] But when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, it is immaterial to me whether I behave well or ill, for

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an angry mob of colonists, and some soldiers shot into the crowd, killing five. The commanding officer of the group and four of his soldiers were charged with murder, and they were jailed pending trial. Friends of the British soldiers tried to find them a lawyer in Boston, but to no avail because nobody wanted to take the case. Finally, somebody contacted Adams, and he went to visit them in jail and agreed to represent them. In a hard fought trial in Suffolk County, Massachusetts court late November 1770, Adams won a victory that resulted in an acquittal for three and reduction of charges against two. They were allowed to leave the country after the verdict.

[11] Adams' representation of the British soldiers became the highlight of his career before he was elected President. On the third anniversary of the Boston Massacre, Adams wrote in his diary, reflecting on his representation of the soldiers, that it was "one of the most gallant, generous, manly, and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country." David McCullough, *John Adams*, 1st ed. (New York: Simon & Schuster, 2001) at 68. This is the tradition of American lawyering.

[12] <http://www.fas.org/irp/congress/2009_hr/doj-qfr.pdf> (page 51) ("Where we have legal detention authority, as the President has stated, we will not release anyone into the United States if doing so would endanger our national security or the American people").

[13] Lewis Caroll, *Alice in Wonderland* (Mineola, New York: Courier Dover Publications, 2001) at 101.

> virtue itself is no security, and if such a sentiment should take place in the mind of the subject, there would be an end to all security whatsoever.[14]

There is some of John Adams in all American lawyers. It's who we are. It's what we do.

[14] Frederic Kidder & John Adams, *History of the Boston Massacre, March 5, 1770* (Albany, New York: J. Munsell, 1870) at 232.