

RECLAIMING THE PROPHETIC VOICE

an interfaith network of clergy and people of faith in Connecticut

How the Military Commissions Act of 2006 “Legalizes” Torture

Not surprisingly, the new Military Commissions Act of 2006ⁱ (MCA) does not have a section called “Decriminalizing Torture.” Instead, its real effect is hidden away in sections called “Implementations of Treaty Obligations” (Section 6), “Habeas Corpus Matters” (Section 7), and “Revisions to Detainee Treatment Act of 2005 Relating to Protection of Certain United States Government Personnel” (Section 8). These sections amend the War Crimes Act, strip detainees of the 800-year-old right of *habeas corpus*, and provide retroactive impunity for past war crimes.

1. The MCA amends the War Crimes Act of 1996 to severely limit the range of acts that may be prosecuted as war crimes by “striking paragraph (3) of subsection (c) of Section 2441 of Title 18 of the United States Codeⁱⁱ.” It replaces broad language that includes “any violation of Common Article 3” of the Geneva Conventionsⁱⁱⁱ with a specific list of actions defined as “grave breach[es] of Common Article 3”. That list includes a category called “Torture”, which is more narrowly defined than in the UN Convention Against Torture^{iv}. But the interaction of this change with other provisions within these three sections renders even this narrowly defined prohibition essentially ineffective.
2. The President is granted the power to “interpret the meaning and application of the Geneva Conventions” and decide which specific interrogation techniques qualify as “grave breaches” – such as torture – and which ones do not. The MCA also declares that “no person may invoke the Geneva Conventions...as a source of rights in any court of the United States, or its States or Territories.”
3. “Waterboarding” is widely reported to be one of the “alternative techniques” used by the CIA in its “secret prison” program^v. In 1947, a Japanese officer, Yukio Asano, was convicted of a war crime and sentenced to 15 years of hard labor for waterboarding an American prisoner^{vi}. Key US Senators have said that the new law prohibits waterboarding. The MCA, however, does not require the President to reveal his decisions about which techniques to allow, and so far the Administration has refused even to state publicly whether it considers “waterboarding” to be a violation of the law, maintaining, according to the Washington Post^{vii}, that “it would be wrong to tell terrorists which practices they might face.”
4. The MCA grants retroactive immunity to civilians who carried out waterboarding and other coercive interrogation techniques after 9/11, as well as to those who ordered or tolerated such abuses. This provision of the Act (in Section 8), effectively decriminalizes US war crimes – including torture – committed between 9/11/01 and 12/30/05, the date the McCain Amendment against torture took effect^{viii}.

5. The MCA grants the President and even the Secretary of Defense the authority to declare anyone – even US citizens – an “unlawful enemy combatant^{ix}.”
6. By stripping *habeas corpus* rights from all “unlawful enemy combatants” who are not US citizens, the MCA denies these individuals the right to challenge in a court of law, the fact or conditions of their detention – including whether or not they have been subjected to torture. Thus, the MCA authorizes the President to arrest any individual anywhere on the globe as an “unlawful enemy combatant” and detain any non-citizen indefinitely without charges – and the public will never know how they have been treated. This effectively makes the prohibition on torture unenforceable because there is no accountability^x. Since this provision of the law is also retroactive, it means that hundreds of pending *habeas corpus* cases filed on behalf of current detainees will likely be thrown out, continuing their detention indefinitely and preventing any court from acting upon reports of past abuse and from learning about any additional instances of torture or abuse.

Senator Lieberman and others have argued that the detainees are “dangerous” and that “the last thing we should do is release them^{xi}.” We know, however, that many former “unlawful enemy combatants” have been released because there was no evidence to convict them of any crime. The Pentagon’s own records show that less than half of the detainees at Guantánamo Bay are “accused of committing hostile acts against the United States or its allies^{xii}.” And we have recently seen a Canadian legal process establish at least one example of a person seized by US officials, shipped to a foreign country, and tortured, with no evidence, no legal procedure, no appeal – and, according to the Canadian government’s investigation, with no justification whatsoever^{xiii}. By gutting the War Crimes Act, the MCA eliminates legal barriers that would make such actions a crime.

In summary, while the language of the Military Commissions Act of 2006 does not declare torture to be legal, it grants impunity to those who authorized, tolerated and perpetrated torture since 9/11, and it denies past and potential victims of abuse the fundamental protections of American and international law. Passage of the MCA means that torture is no longer effectively illegal. This law will keep torture hidden and make it extremely difficult, if not impossible, to prosecute future torturers.

ⁱ Complete text of the Act as passed by Congress is available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf.

ⁱⁱ Title 18 is the Federal Criminal Code.

ⁱⁱⁱ Paragraph (3) of subsection (c) of Section 2441 defined a “war crime” as any act “which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict.”

^{iv} The United Nations Convention Against Torture defines torture as “ Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a

public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

^v Walter Pinkus , “Waterboarding Historically Controversial” 10/05/06, http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005_pf.html.

^{vi} Ibid.

^{vii} Ibid.

^{viii} See, for example, Stephen Rohde, “Military Commissions Act Shames the Constitution and Weakens America”, The Los Angeles Daily Journal, 10/06/06, http://www.truthout.org/docs_2006/101106P.shtml (Stephen Rohde is a constitutional lawyer and partner in the Los Angeles firm of Rohde & Victoroff), and Scott Horton, “When Lawyers are War Criminals,” 10/08/06, <http://balkin.blogspot.com> (Scott Horton is the head of the International Human Rights Committee of the New York City Bar Association, Adjunct Professor at Columbia University).

^{ix} The Act defines an “unlawful enemy combatant” as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States” or anyone who “has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense of the United States.” The definition makes no reference to citizenship.

^x See, for example, Center for Constitutional Rights <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=ZjQ6uNAGGI&Content=850>.

^{xi} Quotations taken from a letter from Senator Lieberman to his constituents, dated October 11,2006.

^{xii} Lolita C. Baldor, “Lawyers: Many Gitmo Detainees Not Accused,” 2/8/05, <http://www.commondreams.org/headlines06/0208-02.htm>.

^{xiii} Meagan Fitzpatrick, “Ottawa launching ‘formal protest’ over U.S. treatment of Maher Arar,” 10/06/06, <http://www.canada.com/edmontonjournal/news/story.html?id=d1fd2f75-cd03-43a2-8abc-f77952ce6b7e&k=20570>