

Defense Lawyers at Guantánamo

The Difficulties and Ethical Dilemmas Facing Defense Lawyers Representing Detainees at Guantánamo

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Abstract

The Bush administration expanded the executive's powers in the "war on terror". This gave the president, according to the administration, authority to detain "enemy combatants" indefinitely at the US naval base in Guantánamo. The official purpose of the detention centre at Guantánamo was that the suspected terrorists were to be tried in military commissions. The administration bypassed the criminal legal system and the military courts under the Uniform Code of Military Justice and instead created a new legal system. This system allowed, among other things, the use of secret and hearsay evidence and evidence obtained through coercion. A number of scholars have contended that there has been a politicization of justice in the cases concerning the detainees at Guantánamo and the independence of the legal system there has been questioned.

Not until more than two years after the opening of Guantánamo were defense lawyers allowed at the base. Because of the nature of the legal system at Guantánamo, there were rules imposed on the defense lawyers that in many ways constituted challenges for them. This thesis examines those challenges and thereby sheds light on the Bush administration's policies at Guantánamo.

Key words: Guantánamo, Defense Lawyers, war on terror, military commissions, political trials

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1 Introduction

In the “war on terror”, the Bush administration expanded the executive power vested in the presidency. They created a new legal system that placed the detainees at the detention center in Guantánamo Bay [henceforth Guantánamo], outside of justice, beyond the normal legal system and beyond basic rights and freedoms. By creating this new legal system the Bush administration could justify the indefinite detentions at Guantánamo and the initial denial of the detainees’ rights to lawyers and opportunities to challenge their detention in US courts. The military commissions system at Guantánamo included rules which allowed the use of secret and hearsay evidence and evidence obtained through coercion.

1.1 Purpose and Research Problem

By creating new laws to govern the detentions and the rights of the detainees the administration also imposed rules on the lawyers who decided to defend the detainees. The purpose in this thesis is to examine if these rules affected the lawyers in their work. I will examine this by looking at two aspects of the lawyers’ situation at Guantánamo: firstly I will discuss whether or not there were practical problems imposed on the lawyers that affected their ability to defend their clients, and secondly: if the lawyers felt that there was an ethical dilemma in deciding to participate in a system where rules that you cannot find in the regular criminal justice system were imposed on them.

By focusing on the situation of the defense lawyers, one can discuss many of the larger problems of the administration’s policies in the “war on terror”. Even though not often explicitly mentioned in this paper, its underlying purpose is the treatment of the detainees and the injustices that have been meted out in this “war”.

The questions I will focus on are:

- Did the executive intrude in the judicial process and thereby violating the separation of powers rule?
- If there was such an intrusion, did this affect the lawyers’ ability to defend the detainees at Guantánamo? This will be discussed by looking at the two aspects mentioned above: practical problems and the ethical dilemma

1.2 Theory

I will use a discussion on political trials and political justice as a tool of analysis in order to examine the defense lawyers' situation at Guantánamo. The theories on political justice and political trials discuss the relationship between law and politics and are therefore helpful when examining whether or not the separation of powers rule was violated in the "war on terror". One potential outcome from such a violation is that the judiciary does not remain independent. If this happens, it can affect the lawyers working in that system.

The discussion of the theories on political justice and political trials in this thesis is twofold. First I will discuss the more general ideas of the concepts and secondly the more recent theories on the subject that specifically deal with the "war on terror". Especially interesting for this thesis is Christiane Wilke's theory. She contends that the post 9/11 cases are instances of political justice. The politicization of justice in the "war on terror" has happened, according to Wilke, through two mechanisms: the executive's intrusion in the judicial process and the vilification of one party.

1.3 Method and Material

This thesis is a qualitative study of the relationship between politics and law at Guantánamo with a case study of the defense lawyers. The case study will serve as an illustration of the Bush administration's policies at Guantánamo. I have chosen to do a qualitative study because I wanted to get a deeper understanding of the lawyers' situation.

The thesis is divided into three parts: first, a discussion of theories on political trials and political justice; secondly, a part where the legal situation of Guantánamo is outlined, and lastly a specific discussion on the situation of the defense lawyers.

In the first part, different aspects and views of the concepts of political justice and political trials are discussed. The theories on these concepts deal with the relationship between law and politics. Since the independence of the legal system set up by the executive at Guantánamo can be questioned, a discussion of political trials and political justice can serve as a tool for analysis when examining the situation of the lawyers. This section is a literature study on the existing theories on the issue. I have here used both first hand sources and secondary sources.

The second part is an outline of the Bush administration's actions and policies at Guantánamo. It describes the legal framework at Guantánamo and is important in order to understand the conditions under which the defense lawyers worked.

I have gathered information for my case study by doing interviews with two lawyers who have defended detainees at Guantánamo: Joseph Margulies and Richard Wilson:

Mr Margulies is an attorney with the MacArthur Justice Center and an Associate Clinical Professor at Northwestern University Law School in Chicago. He was the lead attorney in the Supreme Court case *Rasul v Bush*, the first important habeas case in the Supreme Court concerning the detainees at Guantánamo. Although his main involvement in the legal proceedings concerning Guantánamo has been in the habeas cases, he has also defended detainees in the military commissions.

Mr Wilson is Professor of Law and founding director of the International Human Rights Law Clinic at American University's Washington College of Law, in Washington, DC. He represented Omar Khadr in his habeas matter and also as his civilian defense counsel in Khadr's first military commission. He now represents Polad Sirajov and Salem Gherebi, who were both early arrivals at Guantánamo.

I have complemented the interviews with articles and books that describe other defense lawyers' views of the situation. One article that I have used extensively is David Luban's *Lawfare and Legal Ethics in Guantánamo*, which is based on in depth interviews with defense lawyers at Guantánamo.

1.4 Delimitations

I have limited this thesis to focus on the Bush administration and will therefore not discuss the Obama administration's policies in Guantánamo. Therefore I have used a past tense throughout the paper. However, this does not mean that the problems at Guantánamo have been solved or that the situation for the defense lawyers has completely changed.

The thesis is also limited to dealing with the civilian defense lawyers and does not discuss the challenges for the military defense lawyers.

The focus in this thesis is on Guantánamo. It does not deal with the so called "ghost detainees". However, Guantánamo has in many ways, become the foremost symbol of the Bush administration's policies in their "war on terror". In this thesis therefore, Guantánamo should also be seen as a symbol for, and part of, the administration's broader detention policies in their "war on terror". I regret that the more personal stories of the detainees at Guantánamo are not to be found in this thesis. Mr Margulies expressed a concern that sometimes too much focus has been placed on the defense lawyers and how the policies in Guantánamo have affected them. Instead, he points out, the focus should be on the detainees. However, I believe that the examination of the situation of the lawyers illustrates the overall issues in the Bush administration's policies. But again, the underlying purpose of this paper is to shed some light on those policies that have denied so many people their fundamental rights and freedoms.

2 Political Justice and Political Trials

According to Barbara J. Falk there has been a promotion of politicisation of justice and an eventual use of political trials in the “war on terror” (Falk 2008 p. 49). If the judicial branch is not kept separated enough from the other branches of government there is a risk that the court system loses its independence. The meaning of the separation of powers rule is that the different branches of government can check one another so that there is no abuse of power. The theories on political trials and political justice discuss the relationship between law and politics, and can therefore be used when examining the separation of powers and the independence of the judiciary system.

2.1 Separation of powers

The separation of powers doctrine is one of the fundamental rules for the US government. It separates the powers of the executive (the President, the Vice-President and the departments), the legislative (the House and the Senate) and the judicial branch (federal courts and the Supreme Court). The reason for the separation is for the different branches of government to balance and check each other so that there is no abuse of power and so that basic freedoms and rights are safeguarded (Encyclopaedia Britannica). However, the functions of the three branches overlap, e.g. the executive must be able to set up rules with legal effect in order to carry out congressional mandates and Congress has to be able to hold hearings and carry out direct sanctions in order to check the power of the executive or judiciary. According to Abel and Marsh, these features do not violate the separation of powers rule (Abel & Marsh 1994 p. 7f). However, according to Barbara Falk, one should not take for granted the separation of law and politics even in democracies (Falk 2008 p.2).

2.2 Definition of Political Trials

2.2.1 Is a definition possible?

A simple straight forward definition of political justice/political trials could be: “A trial that addresses political questions, involves political officials, or serves political agendas. In certain circumstances the term is used in a pejorative sense to criticize a particular trial or proceeding as unfair or unjust” (Free Dictionary).

However, in the academic literature the concept appears more problematic. There is a debate whether or not a definition even can be formulated. According to Abel and Marsh one can identify two broad ideas in the discussion of the definition of political trials. They call these two ideas the “simple idea” and the “complex idea” (Abel & Marsh 1994 p. 31f.).

2.2.2 The “simple idea”

The “simple idea” contends that there are certain conditions to be met to identify a political trial and they are therefore easy to recognize. This view is often held by people who think that “no political consideration ever justifies bringing, prosecuting or concluding a trial” (Abel & Marsh 1994 p. 31).

Ron Christenson divides political trials into 1) political trials under the rule of law, which are fair despite their political agenda and 2) political trials that are partisan and that “carry the stamp of despotism”. Partisan trials “proceed according to a fully political agenda with only a façade of legality” (Christenson 1989 p. 9f.). The difference between these two can be compared to Aristotle’s classification of constitutions: 1) the polities where the decisions are made for the common good and 2) the polities where decisions are made for the benefit of the ruler’s interests (Christenson 1989 p. 10).

Falk criticises Christenson’s division: “It is too simplistic to suggest that fair trials are those which occur in a regime operating under the rule of law. There are gradations of trial fairness within the rule of law, and not all partisan trials are equally ‘despotic’” (Falk 2008 p. 35).

2.2.3 The “complex idea”

The “complex idea” considers the matter as more problematic: there are different degrees of “politicalness” in different political trials. The degree of “politicalness” depends on the ongoing social order and political trials are therefore more or less justifiable in different situations (Abel & Marsh 1994 p. 32).

Theodore L. Becker defines political trials according to a fourfold typology: 1) political trials: the crime is political, and the trial is about the elimination of the political foe; 2) political “trials”: the charge is still political, but the independence of the court is in question; 3) “political” trials: the indictment may not be political but is a camouflage for the otherwise political aspects of the case; and 4) “political trials”: a combination of both a political “trial” and a “political” trial, therefore the most pervasively politicised sort. This latter sort of political trials “indicate that the system itself – and those who control it – is [sic] behaving dishonestly. Trumped-up charges are combined with a ‘simultaneous implosion of judiciousness’ in the courtroom” (Falk 2008 p. 15f).

Barbara J. Falk argues in a similar way: no determinative definition can be made. Instead she proposes that political trials should be seen as being along a continuum where they are defined as more or less political; much in accordance with Becker. She lists eight criteria which can be used to understand when justice has been politicised¹ (Falk 2008 p. 3). None of the criteria is, according to Falk, singly determinative (Falk 2008 p. 58).

Falk believes that political trials are more likely to occur “when political conflict takes on multiple dimensions and several factors are in play: a contest of competing ideologies; military conflict or the heightened threat of it; and a climate of hysteria and widespread public fear, often stoked by the media, political elites, and those perceived as the enemy” (Falk 2008 p. 8).

Though Abel and Marsh agree with the “complex idea”, they agree with the “simple idea’s” claim that having an independent judicial system is the best way to check political institutions. If it is not independent there is a risk that the government will be one of men, not one of law (Abel & Marsh 1994 p. 32).

2.2.4 Kirchheimer and the classic definition; political struggle

Otto Kirchheimer, by many considered one of the authorities in the field, claims that the aim of political justice is “to enlarge the area of political action by enlisting the services of courts in behalf of political goals” (Kirchheimer 1961 p. 419).

¹ 1) Obvious political motive for the prosecution; 2) The accused are political foes or regime adversaries; 3) Charges can be about the potential for future action; 4) The trial is ideologized and sensationalized by media and political elites as representative of a broader conflict; 5) The trial has a broader pedagogical function beyond the function of innocence or guilt of the accused; 6) The trial is accompanied by widespread public fear; 7) There is a fixation on the confessions of the accused, and suspicious circumstances concerning how they were obtained; 8) Usage of secret evidence (Falk 2008 p.58).

Kirchheimer's definition of political justice is focused on trials as a means of "eliminating a political foe of the regime according to some prearranged rules" (Falk 2008 p. 11).

William Minor criticised Kirchheimer for having a narrow conception of political justice. According to Minor, Kirchheimer's "conception of political justice was limited to political trials, ignoring the possibility of political justice being meted out by police or correctional authorities" (Minor 1975 p. 392). Minor writes that there are more instances than in political trials where one can speak of political justice; discretionary power has been documented in other instances in the criminal justice process. He writes that "the 'machinery of criminal justice' includes lawmaking, police practices, bail setting, imprisonment, parole procedures, and all other activities of the criminal justice system, not just the criminal trial" (Minor 1975 p. 393).

2.2.5 Political Trials as a legitimization of policies

Christiane Wilke disagrees with Kirchheimer: though some political trials are about the struggle for political power, not all of them are. As an example she refers to the case of the al-Qaeda suspects. What the state really wants in these instances is, according to her, to get approval for their strategy in dealing with a perceived threat, not to criminalize a political party (Wilke 2005 p. 650).

Christenson believes that there is a danger in defining political trials from a motive aspect or from the argument "that the judge, prosecutor or the entire court system is out to get the defendant". He is critical of the use of this aspect because it means that you have to guess what the underlying motives are and since these often are numerous and various, you would find yourself in a difficult situation trying to evaluate them (Christenson 1986 p. 25).

A question that arises in both Falk's and Christenson's texts is: if a trial is completely political, why then have a trial at all? Kirchheimer contended that even if a political trial has prearranged rules in order to convict the defendant, the application of the law is never completely deserted. Even if there is just an appearance of justice, this can help create a sense of legitimacy (Falk 2008 p. 13).

2.2.6 Political Trials and the Public

Abel and Marsh points out that we often maintain the view that law is above politics and political strife. We trust the courts because we believe that they embody the "truth" (Abel & Marsh 1994 p. 2). According to Kirchheimer the compliance of the courts in aiding repressive political aims is not rare. If there is an ongoing political strife in a democracy sometimes the courts are used as a means to eliminate political adversaries or foes (Falk 2008 p. 13). Because of the trust in the courts and their "truth", people tend to believe that had the state's policies been wrong, the court would surely have struck them down. In this way courts can be

used by the state as a means to justify and legitimize its actions and policies to the people (Abel & Marsh 1994 p. 9).

According to Christenson a partisan trial is worse than no trial at all because of the use the government can have of it. In such a trial “guilt, innocence, the truth, and the rule of law are irrelevant. What is relevant in a partisan trial, and the only relevant agenda, is political expediency. Expediency can manufacture a lie that those in power can market as a substitute for truth” (Christenson 1989 p. 25f.).

Abel and Marsh discuss the “habit of chilling a lawyer’s duty” (making it hard for a lawyer to take on a controversial case, or defending the “bad side”), which according to them is bad enough when it happens in the public, but even worse when it is encouraged by government activity (Abel & Marsh 1994 p. 25).

2.2.7 Can Political Trials be Positive?

According to Abel and Marsh, it is the political nature of courts that they reflect the political context in which they exist and function. The socio-political function of trials is that they can stimulate and restrain political change. In order to fulfil these functions, courts sometimes use political trials as a mean. The writers suggest that most often political trials are seen as something negative, a phenomenon that only exists in Third World dictatorships, but if we see them as only that we miss the positive aspect of them as “possibilities for resistance and counterattack from all sides upon those holding power”. Political trials can in this way serve as people’s check on the power holders (Abel & Marsh 1994 p. 2f).

Christenson similarly believes that political trials can be positive, even necessary. He claims that they make positive contribution to open democratic societies in that they become a forum for confrontation between issues that constitute controversies in society. In this way the body of law advances (Christenson 1989 p. 1, 8). He sees law not just as a system of rules, but as stories, and it is from these stories that our perception of justice is formed (Christenson 1989 p. 7).

2.2.8 Political Trials and the “War on Terror”

Abel and Marsh wrote in their book *In Defense of Political Trials* published in 1994, long before 9/11, that “the history of summary arrest and detention in America [...] clearly demonstrates how easily a patriotic concern² for preserving our institutions sweeps everything before it and breaks down every constitutional barrier. In its ceaseless search for subversion, our patriotism has suspended the writ of habeas corpus, and swooped down on ‘radical hangouts’, arresting everyone in sight [...]. It has [...] halted jury trials, forbidden cross examination, for-

² With “patriotic concern” they do not mean patriotism in itself, but refer to “mindless, undirected and uncontrolled patriotic activity” (Abel & Marsh 1994 p. 21).

bidden the confrontation of adverse witnesses, and forbidden the right to appeal [...]. Without the usual guarantees of counsel, habeas corpus, notice, juries, cross examinations and appeals, the power of our government is completely uncontrolled” (Abel & Marsh 1994 p. 21).

Falk sees many similarities between the trials in the “war on terror” and the ones during the Cold War (in both the US and the Soviet Union). She writes: “political trials were not simply about dispensing justice: they were elaborate exercises in legitimization, addressed to domestic and international publics alike” (Falk 2008 p. 9). Another similarity between the trials in these two periods of time is, according to Falk, that they established guilt, not only based on what has happened in the past, but on what might happen in the future. The “enemy combatants” in the “war on terror” are presumed to be dangerous because of what they might do in the future (Falk 2008 p. 50). Krylenko, the chief prosecutor in Stalin’s show trials, said on the matter: “we protect ourselves, not only against the past, but also against the future” (Christenson 1989 p. 27).

2.2.9 Wilke’s Theory: Political Justice in the post 9/11 cases

According to Christiane Wilke the post 9/11 cases³ constitute cases of political justice. Wilke proposes a two stage model to recognize cases of political justice (Wilke 2005 p. 639). The first stage is that there are always cases that are politically contentious (likely to cause disagreement because they deal with politically salient issues) (Wilke 2005 p. 651). For a case to be politically contentious it does not need to challenge the political system, but can be concerning such varied issues as equal opportunity to education and the right to abortion (Wilke 2005 p. 650). The fact that a case is politically contentious does not mean that it automatically turns into political justice.

The second stage is when a case does turn into political justice. Wilke proposes two mechanisms that turn politically contentious cases into instances of political justice; a) the judicial process in the case violates the separation of powers rule, usually through intrusion by the executive in the judicial process. If the executive values winning a case more than he values the independency of the judiciary, the separation of powers might collapse (Wilke 2005 p. 652f.); b) the public vilification of one party in the case heightens the stakes and shapes the outcome of the case. The portrayal of the defendant as the “enemy” implies that he should not be treated as a “friend” (Wilke 2005 p. 657f.). Wilke writes: “war is not lawless, but in some legal and political imaginaries, lawless and ruthless enemies have to be fought without the constraints of the law. They are beyond the law and their

³ Here Wilke includes three groups of cases: 1) criminal trials for terrorism and siding with the enemy. These criminal trials were, initially after 9/11, waged in criminal courts in the US (the cases against Richard Reid, John Walker Lindh and Zacarias Moussaoui), 2) the executive detention of US citizens designated as “enemy combatants” and 3) the executive detention of non-US citizens designated as “enemy combatants”, i.e. the detainees at Guantánamo Bay (Wilke 2005 p. 638)

treatment is not dictated by their rights as persons but by policy concerns”. Both dimensions do not need be present for a politically contentious case to turn into an instance of political justice, but Wilke argues that both these dimensions have been present in the post 9/11 cases (Wilke 2005 p. 639).

2.3 Summary

Theories of political justice and political trials examine the relationship between law and politics and thereby also the separation of powers rule and potential violations of that rule. They can in this thesis therefore be used as a tool for analysis. There are important aspects in the more general discussion of these two concepts to be considered when thinking of Guantánamo and the situation of the defense lawyers, such as: questions on the proper relationship between law and politics and how to recognize when trials serve the power holders’ political agenda and have little to do with justice. On a more specific note, Christiane Wilke’s theory is helpful since she discusses the post 9/11 cases as instances of political justice.

3 Legal Background of Guantánamo

This chapter outlines the legal framework that has been created in the “war on terror”. It examines the Bush administration’s immediate response in the wake of 9/11, which set the tone and the basis for the justification of the measures taken thereafter. It also describes the Bush administration’s redefinition of legal concepts, signing them into new laws, in order to justify their policies. It is of importance to understand the legal background to be able to understand the situation for the lawyers defending the detainees.

3.1 The Wake of 9/11

3.1.1 The Bush administration’s definition of the 9/11 attacks

In the past the dominant American response to terrorist attacks has been to prosecute the perpetrators in criminal courts. This happened after the World Trade Center bombings in 1993 and after the Oklahoma bombings in 1995 (Englerth 2008 p. 399). However, the Bush administration interpreted the attacks of 9/11 as military attacks, which accordingly needed a military response. Terrorists were not to be considered ordinary criminals and the existing criminal law was believed to be too weak to be used. Because of this unprecedented threat, the traditional laws of war were not considered applicable and the creation of a new legal framework was considered needed (Englerth 2008 p. 400).

Bush defined the attacks as a declaration of war against the United States and announced a “war on terror” in response (McGoldrick 2004 p. 11). The Bush administration defined the attacks, and the following “war on terror”, as an international armed conflict. They argued that even though it is not a conflict between two states⁴, the destruction after the 9/11 attacks were of such a large scale that it justified defining the situation as such (Englerth 2008 p. 401f.).

In addition, the administration also defined international terrorism as an armed conflict. This definition of terrorism has been of importance to the Bush administration in their attempt to justify Guantánamo because, according to Englerth,

⁴ The definition of an international armed conflict in Article 2 of each four Geneva Convention: “[...] all cases of declared war or of any other armed conflict which may arise between two or more of the high contracting Parties” (ICRC)

this definition enables preventive detention and trial by military commissions. The Bush administration has justified the preventive detentions by referring to article 118 of the Third Geneva Convention which states that detention of prisoners of war (POWs) until the “cessation of active hostilities” is allowed. Article 118 is meant to make it possible to prevent combatants from re-entering the battlefield during wartime (Englerth 2008 p. 402). However, Englerth points out the paradox of the Bush administration’s legal “pick and choose”: the administration has claimed rights under international humanitarian law that are associated with international armed conflict, but has at the same time refused to grant rights under these laws to the other side (Englerth 2008 p. 402).

3.1.2 Definition of the detainees

In the beginning of 2002 President Bush decided that none of the captives could be defined as POWs and that the Geneva Convention therefore did not apply to them (Cutler 2008 p. 35).

Secretary of Defense Donald Rumsfeld gave the following statement on the day Guantánamo opened: “They [the detainees] will be handled not as prisoners of war, because they’re not, but as unlawful combatants. Technically unlawful combatants do not have any rights under the Geneva Convention. We have indicated that we do plan to, for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent that they are appropriate” (Worthington 2007 p. 128).

Donald Rumsfeld described the men captured and sent to Guantánamo as “the worst of the worst”. But about 85% of the men held at Guantánamo were not picked up by US troops, but by the Northern Alliance, Afghani warlords or Pakistani Security Service (CCR Restore 2009 p. 4). These capturers were often rewarded with bounties for the men they seized and no evidence of whether the men were al-Qaeda or Taliban or not was needed. Many of the men in Guantánamo did not engage in any combat, were not picked up on the battlefield and were not “the worst of the worst” (CCR Restore 2009 p. 4). Some men were even named by other captives under torture (Luban 2008 p. 1987). Joseph Margulies writes that according to the Pentagon’s own data, “[t]here are only a very few individuals who are actively engaged in any activities for al-Qaeda or the Taliban” (Margulies 2007 p. 168).

3.1.3 Congress’ Authorization for Use of Military Force

Three days after 9/11, Congress passed the Authorization for Use of Military Force (AUMF) (Margulies 2007 p. 20) which stated that the President had the power “[...] to use all necessary and appropriate force against those [...] he de-

termines planned, authorized, committed, or aided the terrorist acts [...] on September 11, 2001” (Cornell.edu). The AUMF would become the legal basis for “Operation Enduring Freedom”.⁵ The exact scope of the power the President has in wartimes has always been debated and the latitude of it is ill defined (Margulies 2007 p. 11). The Bush administration interpreted the AUMF as the President having extensive executive powers in the “war on terror”. The Bush administration saw it fit to expand the president’s executive powers (Margulies 2007 p. 13).

3.1.4 Bush’s Military Order of 2001

Military commissions are courts that are used during periods of hostilities “for the more efficient execution of the war powers vested in Congress and the President” (Egan 2007 p. 548). But the military commissions set up at Guantánamo have been harshly criticized for not fulfilling standards for full and fair trials.

Domestically a war situation is the time for the executive to step up (Englerth 2008 pg 400) and as President Bush now was a “wartime president” he looked to the authorities the president has in such times (Kassop 2003 p. 510). On November 13, 2001, President Bush issued a military order which established military commissions to put terrorist suspects on trial for war crimes (Cutler 2008 p. 34). The order stated that the president could “[...] designate any non-US citizen as an international terrorist”, detain them and try them in military commissions that were outside the jurisdiction of US courts (Worthington 2007 p. 126). The order states that they [the detainees] shall “[...] not be privileged to seek any remedy or maintain any proceedings in any court of the United States, or any State thereof, any court of any foreign nation, or any international tribunal” (Otterman 2007 p. 138). Bush issued this legislation in the capacity of Commander-in-Chief without consulting Congress (Worthington 2007 p. 126). By creating the military commissions President Bush bypassed the criminal justice system and the military courts under the Uniform Code of Military Justice (UCMJ).

Michael Ratner, the President of The Center for Constitutional Rights (CCR), describes the situation as follows: “The President decided that he was no longer running the country as a civilian president. He issued a military order giving himself the power to run the country as a general. Under the order he claimed the absolute power to arrest non-citizens anywhere in the world, even in the United States, and hold them indefinitely and without charges or a lawyer until the so-called War on Terror was over, which could be fifty years or forever” (Worthington 2007 p.126). The NACDL⁶ (National Association of Criminal Defense Lawyers) issued an Ethics Opinion where they strongly opposed the military commis-

⁵ The US military response to the attacks of 9/11: the use of force against Afghanistan.

⁶ NACDL is a Professional Bar Association. Members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges. Their mission is “[...] to ensure justice and due process for persons accused of crime or other misconduct” (www.nacdl.com)

sions, partly “on the basis that the President was not empowered by law to unilaterally create these commissions” (www.nacdl.com).

The location the Bush administration chose for these military commissions was the US naval base at Guantánamo Bay, Cuba.

3.2 Guantánamo and the Supreme Court Decisions

3.2.1 The opening of Guantánamo

On January 11, 2002, the first detainees were flown to the US naval base in Guantánamo Bay (Worthington 2007 p. 125). The main reason for choosing Guantánamo as the location for the detention center was because of its unsettled legal status, which was interpreted by the Bush administration to place it outside of any US court’s jurisdiction (Cutler 2008 p. 34). The US government has leased the naval base in Guantánamo Bay from the Cuban government since 1903 (Englerth 2008 p. 400). Although it is under the US’ “complete jurisdiction and control” it is still Cuba that has the “ultimate sovereignty” over the territory. This is what it says in the lease, but the definitions are controversial and the specifics what the terms actually embodies is not completely clear (Margulies 2007 p. 49). In a classified memoranda (sometimes referred to as the “jurisdiction memo”) from John Yoo and Patrick Philbin⁷ dated December 28, 2001, the question of jurisdiction in Guantánamo was being dealt with. One of the problems for the Bush administration was the issue of habeas corpus⁸. They sought to find a location where the detainees could be interrogated and held indefinitely, but the longstanding right to the writ of Habeas stood in the way (Margulies 2007 p. 46). The jurisdiction memo did therefore “[...] not ask whether the proposed detentions at Guantánamo would be legal, but whether a federal court would even have the authority to ask the question” (Margulies 2007 p. 47). Yoo and Philbin interpreted the lease as such that foreign detainees would not have the right to file habeas petitions, since the base is in the “sovereign territory of Cuba” (Otterman 2007 p. 139).

The CCR states in their report *Restore. Protect. Expand. Ending Arbitrary Detention, Torture and Extraordinary Renditions* that Guantánamo was chosen as the location because the administration planned to engage in activities that are illegal under domestic law and that go against international treaties (CCR Restore 2009 p. 3). The main point of Guantánamo was to create a situation where the de-

⁷ John Yoo and Patrick Philbin were at the time with the Office of Legal Counsel. This and other classified memos were leaked to the press and public in May and June 2004 (Margulies 2007 p. 45).

⁸ Habeas corpus is the right to challenge one’s detention. The English law the Habeas Corpus Act of 1689 is to protect people from arbitrary detention (amnestyusa.org)

tainees could be interrogated without the interference of the law. The majority of the detainees were not even expected to have any kind of legal process (Margulies 2007 p. 48).

Michael Ratner writes in his book *Guantánamo: What the World Should Know*: “We have gone back to a pre-Magna Carta medieval system, not a system of laws, but of executive fiat, where the king – or in this case the president – simply decides, on any particular day, I’m going to throw you into some prison. You are not going to have access to a lawyer or anybody else, or even know if there are any charges against you, or if you will ever be released from this prison” (Ratner & Ray 2004 p. 6).

3.2.2 Rasul v Bush and the CSRTs

The struggle to challenge the Bush administration’s legal regime at Guantánamo began on the first day of the detention facilities. A habeas corpus petition was filed on behalf of the detainees. One of these detainees was Shafiq Rasul and his case became one of the first landmark cases against the administration. His petition challenged the legality of the Military Order of 2001 because its authorization of indefinite detention without due process (Worthington 2007 p. 257). On June 28, 2004 the Supreme Court ruled that the men detained at Guantánamo had the right to challenge their detention in federal court (CCR Restore 2009 p. 5).

As a result of Rasul, administrative hearings, the so called Combatant Status Review Tribunals (CSRTs), were set up by the Pentagon and then Undersecretary of State Paul Wolfowitz (Luban 2008 pg 1987) on July 7, 2004 (Margulies 2007 p. 159). These tribunals were established as tribunals where the detainees could challenge their “enemy combatant” status. The CSRTs provided even less rights to the defendant (Stafford Smith 2007 p. 152). However, the CSRTs created an impression that the administration had fixed the problems presented in Rasul (Margulies 2007 p. 169). Article 5 of the Third Geneva Convention requires that doubts about a prisoner’s status should be resolved in a competent tribunal (Margulies 2007 p. 160). However, there was harsh criticism against the CSRTs that they did not meet the standards of such tribunals. Among other things, the detainees were not entitled to lawyers, but were to be represented by non-lawyer military officers who could not give legal advice (Margulies 2007 p. 167). Joseph Margulies calls the CSRTs a “mockery of military justice” (Margulies 2007 p. 146).

The decision in Rasul made, according to Margulies, no difference in the way the administration viewed their policies at Guantánamo and so it did not make them re-examine them. Rather they were trying to limit the damage the Supreme Court decision would have on the policies (Margulies 2007 p. 157f). According to Margulies the tribunals were established only to provide an already determined outcome (Margulies 2007 p. 169).

3.2.3 Hamdan v Rumsfeld June 2006

The first military commissions were held at Guantánamo for Salim Hamdan, David Hicks, Ali Hamza al-Bahlul and Ibrahim al-Qosi. Observers reported deficiencies in the legal system at Guantánamo, among other things that the jury did not have any legal experience, problems with the quality of the interpreters and stark differences between the resources of the defense and the prosecutors (Worthington 2007 p. 266). Hamdan's case made its way up to the Supreme Court. The Supreme Court decision in *Hamdan v Rumsfeld* came on June 29, 2006. The decision struck down the whole military commissions system at Guantánamo with the motivation that the system had not been authorized by Congress and was therefore unlawful (Margulies 2007 p. 256). The court judged against the administration's policy that Common Article 3 did not apply in the conflict with al-Qaeda, determining that they were protected against "cruel treatment and torture" and "humiliating and degrading treatment" (Margulies 2007 p. 257). A memo was released by the Pentagon on July 6, 2006, saying that the administration would abide by Common Article 3. Even though this could be seen as a major shift in policy, in reality it was not. The administration simply said that that was what they had done the whole time and therefore the policies did not need to be changed (Margulies 2007 p. 258).

3.2.4 Military Commissions Act of 2006

The Military Commissions Act (MCA) was the Bush administration's response to the decision in *Hamdan* (Margulies 2007 p. 259). The MCA limited the jurisdiction of US courts over Guantánamo. It was passed in Congress and was signed into law by President Bush on October 17, 2006 (Luban 2008 p. 1987).

The MCA reinstated the military commissions and set up the rules for the procedures. It impacted the role of everyone involved in the military commissions (Egan 2008 p. 547). It mentioned Common Article 3, but gave the right to the President to define and apply it as he saw fit (Worthington 2007 p. 288). The Act was described by the administration as fair and lawful, containing many safeguards in order to be so. These safeguards were said to include the presumption of innocence, inadmissibility of statements obtained through torture and lawyer/client privilege (Egan 2008 pg 548). According to the MCA a military defense counsel, was to be assigned for each military commission, but in addition the accused could also have a civilian lawyer. However, the civilian lawyers had to sign an agreement that he or she would comply to the rules set up in the MCA (Egan 2008 p. 548).

There were substantial criticism against the MCA because, among other things, even though it did not allow statements obtained through torture, statements obtained through coercion were accepted (Egan 2008 p. 548). This in itself is worrying, but it became even more worrying drawing on the narrow way that the Bush administration has defined torture. Other worrying parts of the act were that hearsay evidence was admissible and that there were limitations on the defen-

dant's right to examine government evidence (Egan 2008 p. 548). Also in the MCA the Bush administration once again asserted that the detainees did not have the right to habeas corpus (Egan 2008 p. 548). Worthington describes the MCA as a: "[...] blatant attempt to erase the prisoners' history [...] designed to smooth the way for around eighty prisoners to be tried by Military Commissions without the interference of civilian lawyers and without any inconvenient allegations of torture" (Worthington 2007 p. 289).

In Boumediene/Al Odah the legality of the MCA was challenged. On June 26, 2008 the Supreme Court ruled in Boumediene, for the third time total, that the detainees at Guantánamo had the right to habeas corpus (CCR Boumediene).

3.3 The True Purpose of Guantánamo

Richard Wilson makes three reflections on the administration's policies at Guantánamo; 1) the true purpose of Guantánamo was to detain people beyond the law in order to be able to gather intelligence; 2) the true reason for the establishment of military commissions was the administration's wish to eliminate due process and fair trial norms; and 3) the true purpose of the commissions was to convict (Wilson 2006 p. 65). The Bush administration knew what they wanted the outcome to be in the trials. Margulies compares the commissions to death penalty cases;

I mean what you got is a pervasive sense that capital cases are so egregious; that you need to smooth down the difficulties imposed by the law in order to make it easier to get a conviction, and that fundamentally is the same thing that goes on in the commission stuff. Fundamentally it's the idea that the guys are so bad to rig the system in a way to ensure a conviction, not to afford, in other words to be fair (Margulies 2009)

In Binyam Mohamed's military commission three of the prosecutors, who were all chosen by the government, resigned. Captain John Carr wrote to his superior saying: "you have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees". Carr described the commissions as a "process that appears to be rigged". The other two prosecutors resigned because they felt they couldn't take part of a proceeding that was not full and fair (Stafford Smith 2007 p. 92). Similarly, the chief prosecutor Morris Davis quit complaining about politicization and that his superiors wanted to use classified evidence (Luban 2008 p. 2023).

3.4 Summary

By defining the situation after 9/11 as a war, the administration expanded the executive's power in the "war on terror", intruding in the judicial process in a way that can be said to have violated the separation of powers rule. They created a new legal system that made it possible for them to detain people, denying them the right to habeas corpus. The official purpose of Guantánamo was that eventual there were going to be trials, but the real purpose was to create a place for intelligence gathering. However, with the Supreme Court decision in *Rasul v Bush*, defense lawyers were finally allowed at the base.

4 Defense Lawyers at Guantánamo

This part examines if the defense lawyers were affected by the Bush administration's policies at Guantánamo.

The complex legal part of Guantánamo is that there have been multiple different processes going on (Wilson 2009). Therefore, there were also different kinds of lawyers involved. David Luban divides the lawyers into three categories; the civilian habeas lawyers, civilian defense lawyers for potential defendants in military commissions and the military lawyers (Luban 2008 p. 1988).

4.1 Challenges at the Base

The defense lawyers' struggle for the detainees began just days after the opening of Guantánamo. After the decision in *Rasul* the first defense lawyers were allowed to visit detainees at Guantánamo. The Bush administration had said already in 2002 that they were going to charge at least some of the detainees with crimes, but before *Rasul* they had not begun that process at all. Only later did they start developing charges (Wilson 2009).

4.1.1 Security Clearance

The defense lawyers at Guantánamo had to have a US government security clearance. This gave them permission to see "secret" evidence (Wilson 2006 p. 194). Richard Wilson and his colleague, Muneer Ahmad, represented Omar Khadr as his civilian defense lawyers in his habeas petition and later in his military commission under the Military Order of 2001. However, Khadr's family in Toronto wanted Omar to have Canadian lawyers and in the spring of 2007 Dennis Edney and Nate Whittling took over as Khadr's civilian lawyers. Edney and Whittling had fought for more than two years to attain security clearances to be able to go to Guantánamo and visit Khadr. Since defense lawyers in Guantánamo had to be American citizens, and neither Edney nor Whittling were, they were not called civilian counsel but "foreign legal counsel". This meant that they were not allowed to speak in court, they could not sign any legal documents on behalf of Khadr and they could not take any legal action on his behalf. Therefore, the only lawyer allowed to speak in court on behalf of Omar was his military lawyer William Kuebler (Wilson 2009).

4.1.2 The Trust Issue

In order to give one's client effective defense one of the most important things for a criminal lawyer is to have a trusting attorney-client relationship. There were several attempts at the base to sow mistrust among the clients towards the lawyers (Luban 2008 p. 1992).

The lawyers could not share classified information with their clients. Much of this information was about the detainees' detainment and much of it was information that was crucial in attempting to defend the client. Not only did this entail a practical problem for the lawyers, but it also interfered with the ability to create trust with the client (Luban 2008 p. 1994).

In the beginning when the lawyers were allowed at the base, some of the interrogators tried to interfere with the attorney-client relationship in order to diminish the detainees' trust in their lawyers. Some of the interrogators pretended to be lawyers or they would tell the detainees things about the lawyers that they thought would make them suspicious towards them. For an example, drawing on perceived Muslim prejudice, they told some of the detainees that their lawyers were Jewish and represented the state of Israel or that they were homosexual (Stafford Smith 2007 p. 11). Both Margulies and Wilson confirm that these were things that happened in the beginning, but that they do not happen anymore. Margulies believes that it was a desperate attempt to prevent the lawyers from coming down to the base, but it was never very successful (Margulies 2009).

Even though a lawyer once gained a client's trust it was easy to lose it (Stafford Smith 2007 p. 12).

It feels to me as though every time I visit I'm climbing the same mountain. It's as though when you disappear and come back you're the same stranger that you were the first time you walked in to meet them. They often times have conversations with their friends, they hear that this lawyer is doing this and why doesn't your lawyer do this and it's not a particularly friendly culture to lawyers and law cause the US courts haven't done very much for them, so they often times come in in the second or third visit [...] more suspicious than they were the first time (Wilson 2009)

4.1.3 "Chilling the Lawyers' Duty"

David Luban points out that there has been a pattern of "injustice of policies and practices that harass, silence or hamper the lawyers". However, he does not suggest an orchestrated conspiracy: some of it might be deliberate, some might not be (Luban 2008 p. 1986).

In an interview in January 2007, Charles "Cully" Stimson, then Deputy Assistant Secretary of Defence for Detainee Affairs, attempted to pressure the lawyers to stop defending the Guantánamo detainees: "I think quite honestly that when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists and representing reputable firms" (Luban

2008 p. 1981f.). The Defence Department stated that they did not condone Stimson's statement, and he lost his job three weeks later. However, his remarks, according to Luban, still reflect upon the administration's overall policy on habeas rights. The habeas lawyers were never welcomed at Guantánamo by the Bush administration (Luban 2008 p. 1983) and according to Clive Stafford Smith, even the guards had been lectured on avoiding the lawyers (Stafford Smith 2007 p. 89).

4.1.4 Guards, escorts and interpreters

When the lawyers arrived in Guantánamo Bay, they were quartered in a hotel by the airport on the other side of the bay, separated from the actual detention center. This was to keep them out from doing anything that was related to the detainees or the rest of the community at Guantánamo. When they went to visit their clients, they took the ferry over to the other side of the bay, where they were met by a military escort. The lawyers were supposed to stay with this person at all times. When they got to the facilities they first had to go through a search to get in to the area where they met with their clients. According to Wilson, these searches were entirely random and it all depended on what guard you got on which day. The rules limited the lawyers to take in items that related to the attorney-client relationship, but even then, if the guards decided there was something you could not take in, there was not much the lawyers could do. Wilson says he once tried to take in some books but they were taken from him since they had sharp edges and the detainees might attack someone with them (Wilson 2009).

Another security measure was that all the notes the lawyers took in their meetings with their clients were presumptively classified. At the end of the day the notes had to be turned in, in a sealed envelope which went into the mail. The notes then got sent to a secure facility outside of Washington DC where the lawyers could go and read them or if they wanted to take them with them, a group of people called the privilege team would have to make a decision whether the notes could be declassified or not (Wilson 2009).

There were other practical challenges while visiting clients at the base; there were not interpreters in all the languages of the clients and conversations with clients could be recorded and/or videotaped (Wilson 2009).

4.2 Civilian Lawyers and the Ethical dilemma

4.2.1 The NACDL's Ethics Opinion

In order to be involved in the military commissions the defense lawyers had to file forms that "basically required them to sign away a lot of things that many lawyers would be very reluctant to do" (Wilson 2009).

NACDL's Ethics Advisory Committee issued an Ethics Opinion on August 2, 2003, in which they opposed the military commissions established by Bush's Military Order of 2001 and in which they stated that they found it "[...] unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation. Defense counsel cannot contract away his or her client's rights, including the right to zealous advocacy, before a military commission [...]" (NACDL Opinion 03-04).

Wilson thought it was an interesting ethical question, but decided to get involved in the process because he felt that it was more important to represent the detainees. However, before entering Khadr's proceedings in the commission, he filed a letter saying that he was entering in protest, stating similar reasons as were set forth in the NACDL's Ethics Opinion (Wilson 2009).

What the NACDL was referring to was the participation in the military commissions, which by the time of the issuing of the ethics opinion was a worse system than the one later created under the MCA. Margulies participated in the military commissions but his principal involvement was in the habeas matters, on behalf of people who had not been charged in the military commissions system. In the habeas cases, Margulies says, there was no ethical dilemma at all "because if you don't do it, the guys got no lawyers at all". But he also says that even though he understands the NACDL's position, he did not think that there was any dilemma in representing the people in the commissions either. As an old death penalty lawyer, he compares it to that system and points out that

in many jurisdictions [...] the capacity for you to get a fair trial is almost as stacked against you as in the military commissions system. You can't take the position that you're not going to participate, because then you just allow them to steamroll this guy and execute him [...]. And so your objective is to litigate by exposing the flaws in the system and so the way you achieve some parity between prosecution and defence is to attack the very unfairness of the system rather than to attempt to represent your guy within the restraints imposed on you by an unfair system. [...] That's the response to the ethical problem (Margulies 2009)

The NACDL has changed position and is now supporting the defense lawyers through a project that they have started together with the American Civil Liberties Union (ACLU). This project sponsors the military defense lawyers with counsel and financial aid (Reiner 2008)

4.2.2 The most frustrating thing about Guantánamo

Margulies thinks that the practical difficulties and burdens imposed on the defense lawyers at Guantánamo, such as getting access to and interviewing the clients, were not something that hindered him in doing his job, but were rather inconveniences. He feels like these aspects often has been misunderstood and overblown. However, he points out, the circumstances at the base were a disturbing reality.

He writes: “I have never been to a more disturbing place than the military prison at Guantánamo Bay. It is a place of indescribable sadness [...]” (Margulies 2007 p. 214).

What for him was the most frustrating part of the situation was not how the lawyers were treated at the base, but the legal system in itself. He says:

I have been involved in this litigation for [...] over seven years and so that is exceedingly frustrating. But that is a professional frustration related to, you know, the position the government took in court, not the position the government took with us at the base (Margulies 2009)

Wilson expresses a similar frustration:

look at the trajectory here, these guys have been in custody now for 7 years some of them, since 2002 [...]. All my guys, Gherebi and Sirajov, were both early arrivals. 7 years – what has the US courts done for them? Zero. They’ve gotten out? No. Has any lawyer handed them a document saying that congratulations – you win this? No. Does it change their life daily that really makes a difference for them? Absolutely not! Because the lawyers aren’t looking at the conditions of their confinement, so much; do they get a shower, whether they get to go out to exercise, if they get a book every once and a while. Those are tiny details in the big strategy of dealing with the legal questions and those are the things that are most important for them. Well, how is my quality of life? How am I surviving in this hell? And that’s not something that lawyers have a lot of influence over – I mean you can write nasty letters and you can complain, but it’s not something you can generally go to court and stop except for the most brutal excesses like torture, and even then, [...] in Omar Khadr’s case, the judge we had was a conservative appointee from George Bush who agreed with everything he was doing and did nothing for us, wouldn’t stop his interrogations, wouldn’t order that he’d be prevented to be sent to a country where he would be tortured, wouldn’t order medical examinations independent from what they said were good examinations” (Wilson 2009)

Stafford Smith describes a feeling of helplessness: when he visited the base in June 2005, many of the detainees were on hunger strike, protesting against their conditions at the base. His clients were dispirited and even though the Supreme Court decision in Rasul had been an important step forward no detainees had been ordered released by any court. It was like “we lawyers seemed to have achieved nothing” (Stafford Smith 2006 p. 189).

4.3 Summary

There were rules imposed on the defense lawyers at Guantánamo that, whether they constitute inconveniences or problems, should not exist. The hampering or hindrance of the defense can be seen as a warning sign that the independence of the judicial system is in question. Therefore, it is useful to analyse the situation of the defense lawyers at Guantánamo by having the discussions on political trials and political justice in mind.

5 Conclusion

By defining the situation after 9/11 as a war, the Bush administration laid the theoretical foundation for their justification of the detention policies at Guantánamo. They referred to the special powers that are vested in the presidency in times of war. With the help of their lawyers, the Bush administration created legal documents that supported an expansion of the executive powers. The powers that a president has in war times are ill defined in the US constitution, but war is not lawless and does not mean that the executive can do whatever he pleases, being able to set aside values and legal standards that have been in place for centuries. But that was what the Bush administration did.

The official purpose of Guantánamo was that the suspected terrorists were going to be tried in military commissions. However, the real purpose of Guantánamo was to create a “legal black hole”, a place of intelligence gathering where the methods of interrogations could be beyond legal regulations and beyond the reach of the interference of the courts and the defense lawyers.

Kirchheimer contended that only an appearance of justice will suffice to create a sense of legitimization. Such an appearance existed at Guantánamo, because of the official statement that trials were to take place, and that after Rasul there were trials held for some of the detainees. But it was only an appearance or a façade of legality as Christenson calls it. After Rasul, when the administration had to start holding trials, the outcomes seemed to have been decided beforehand. There is not a determinative definition of political trials in the academic literature, but what is clear in the case of Guantánamo is that the detention policies were driven not by justice, but by political expediency. It is disturbing that there are similarities between a legal system set up in the 21st century by a democracy and legal systems set up by dictatorships that history has deemed truly unjust.

The independence of the courts in the cases of the detainees at Guantánamo can surely be questioned and the charges can be seen as, not concerning actual crimes committed, but more concerning political issues. This description is in accordance to Becker’s “political trials”: the most pervasive sort of political trials.

Christiane Wilke believes that the politicisation of justice in the 9/11 cases happened through two mechanisms: the executive’s intrusion in the judicial process and the vilification of one party. The Bush administration intruded in the judicial process by bypassing the normal criminal justice system and the military courts under the UCMJ. Instead they created a legal system which was set up to gain their purposes. This system violated both domestic and international law concerning, among other things, detention policies, habeas rights and full and fair trial procedures. After the attacks on 9/11, the administration expanded the executive’s powers through legal memoranda. The first military commissions under the Military Order of 2001 can be seen as an example of this expansion. They were

struck down in Hamdan partly because they had not been authorized by Congress, the legislative branch according to the separation of powers rule, and were therefore unlawful.

The second of Wilke's mechanisms is the vilification of one party. Rumsfeld described the men at Guantánamo as the "worst of the worst". Drawing on the threat of another terrorist attack and the public fear of this happening, the men in Guantánamo were portrayed as too dangerous to be set free. The fact that the administration designated them as "enemy combatants" and not as POWs shows us that they were considered a different kind of enemy, one that does not deserve to be treated according to existing laws, which should be encompassing all human beings. As in so many other situations in the world, the dehumanization of a person makes it easier to treat him differently, and this can be used to legitimize policies that in a normal state of affairs would not be tolerated.

Surely if a judicial process is not independent, but the system is rigged and the outcome is decided beforehand, the designation of it as a political trial must be fairly unanimously used. Even though there are different views of the definition of political trials and political justice, these cases seem to me to be a clear instance of political justice. Whether you call it a partisan trial, a "political trial" or which degree of "politicalness" you give them, the trials and the policies at Guantánamo were at least not about justice.

Joseph Margulies feels like the problems that the rules created for the lawyers at the base have often been overstated, that they did not hinder him in doing his job, but were rather inconveniences. The treatment of the defense lawyers in a legal system can be telling of the health of that system. A defense lawyer's zealous advocacy for his or her client provides an important safeguard against state power and so the hindrance or hampering of defense lawyers can be seen as particularly appalling. Whether or not such things as the interrogators' and the guards' conduct towards the lawyers at the base was a deliberate overall strategy or not, the system at Guantánamo was not pro-lawyers. The lawyers were not there because they were welcomed, but because of their struggle and eventual win in Rasul. So even though the rules were more like inconveniences they are disturbing signs of an overall policy that does not respect and value the detainees' rights to a full and fair trial.

In 2003, the NACDL found it unethical for a defense lawyer to participate in the military commissions, since it meant that the lawyers had to sign away many of the usual professional standards. Joseph Margulies said that you cannot take a position that you are not going to participate, because then the defendant stands an even lesser chance. Instead, you have to adjust to the system - you have to "litigate by exposing the flaws in the system". Richard Wilson's letter of protest can be seen in a similar way: by putting the letter on the record, he too protested against the system from within the system. Margulies explicitly states that he did not think it was a dilemma participating in the military commissions. Wilson says that he thought the NACDL expressed an interesting aspect, but felt it was more important to be able to represent Mr. Khadr. Even though the concerns in the Ethics Opinion were correct, there seems to be other ethics that are above them: defending people against the abuse of state power.

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