

NO TO TORTURE
CONFERENCE/WORSHIP/PLENARY SESSION, A COMPILATION

By Gail Brown

LEGAL ISSUES OF DETAINEES/TORTURE

Historically, terrorist acts have been treated as criminal acts - in other words, the terrorists were tried for murder or conspiracy to commit murder in a criminal court having jurisdiction. The laws of war did not apply to these individuals. After September 11, and the Congressional grant of authority for the Iraq War, the President sought to treat terrorists under the laws of war, but sought to "pick and choose" which laws of war might apply. In a January 25, 2002 memo to the President, then Counsel A. Gonzales argued that the provisions of the Geneva Conventions should not apply to detainees from Afghanistan, since: 1) it would be easier if the US did not need to determine status on a case by case basis, 2) the war on terror renders the Geneva Convention "obsolete," and 3) not applying the Geneva Convention makes it much less likely any of the government players will ever face prosecution under the War Crimes Act. Ultimately, the President relies primarily on presidential war powers as the basis for most detentions.

Detainees have sought legal recourse in the federal courts through the filing of a writ of habeas corpus. A writ of habeas corpus is essentially a request to a court to order an official authority responsible for the imprisonment of an individual to justify the lawfulness of the imprisonment. (28 U.S.C. Section 2255, 28 U.S.C. Section 2241). In the federal court system, a party may appeal a decision of a federal district court to a federal circuit court. From there, a party may file a writ of certiorari with the Supreme Court (i.e. a document asking that the Court hear the appeal). The Supreme Court receives thousands of such writs every year and grants a small percentage. In 2004, the Court heard three cases, often referred to as the "enemy combatant cases."

In *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), the Supreme Court held that the government could detain those captured in Afghanistan as enemy combatants, even if they are US citizens. But, the Court also found that Hamdi had a right to challenge his designation as an unlawful combatant and that he must be granted counsel and have the right to present his case to a neutral decision maker.

In *Rasul v. Bush*, 124 S.Ct. 2686 (2004), the Court ruled, in a 6 to 3 majority, that alien enemy combatants, captured in Afghanistan and held at Guantanamo were held under the "plenary and exclusive jurisdiction" of the US and could pursue habeas corpus writs in federal court.

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In *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004), the Court considered the case of Jose Padilla, a US citizen, who was seized as he got off a plane in Chicago in 2002. He was initially held as a material witness, but thereafter President Bush classified him as an enemy combatant, because he allegedly had made inquiries into a "dirty bomb." He was held at a military brig in South Carolina for over two years without charges and without access to a lawyer. The district court accepted the government's argument that the President had authority to detain citizens captured in the US as enemy combatants during a time of war. The Second Circuit reversed on the merits, holding that the President lacked the power to detain Padilla militarily. The Supreme Court (5-4) held that Padilla filed his suit in the wrong district court and needed to file his writ in federal court in South Carolina.

Since the 2004 Decision: Padilla thereafter filed suit in the district court in South Carolina, which denied relief. He then took his appeal to the Fourth Circuit Court of Appeals. The Fourth Circuit held that the district court must hear the matter of whether Padilla was properly designated as an enemy combatant, but upheld his detention otherwise. Padilla filed a writ of cert. in the Supreme Court, but the Justice Department quickly sought to file criminal charges against him and to transfer him to civilian custody. The Fourth Circuit, in an opinion filed on December 21, 2005, denied the government's motion to move Padilla, noting that the facts represented by the government to detain Padilla militarily were very different from those in the criminal indictment filed against Padilla, and that it suspected the government was seeking to avoid review. In *Hanft v. Padilla*, S.Ct. No. 05A578, the Supreme Court ordered that Padilla be transferred to criminal detention in Miami. As of January 15, Padilla remains in criminal custody in Miami.

There is one additional case which will be heard by the Supreme Court this year - *Hamdan v. Rumsfeld*, Ct. Appeals DC Circuit No. 04-5393. Salid Ahmed Hamdan was captured in Afghanistan in 2001, and he was then transferred to Guantanamo Bay. In 2003, the President determined that Hamdan was a member of Al Qaeda and he was designated for trial before a military commission. He filed a writ of habeas corpus in April 2004, in response to which the government argued that the *Hamdi* decision required only that the issue of whether Hamdan was indeed an enemy combatant be heard by a "neutral decision maker" and that the issue could be heard by a military commission. The District Court found that the rules of these military commissions were lacking, in that Hamdan could be excluded from the trial, that he was not entitled to see evidence against him, and that questionable evidence was allowed. The District Court held that the commission must change its procedures, consistent with its opinion. The government appealed to the Circuit Court of Appeals for the DC Circuit. The DC Circuit

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reversed the trial court, holding that Hamdan was not entitled to relief under the Geneva Conventions, that he was not entitled to POW status, and that he could be tried before a military commission as a "competent tribunal." Hamdan filed a writ of cert. with the US Supreme Court, which was granted on November 7, 2005. The appellant's brief, as well as the amicus briefs filed in support, are due in the first week of January, 2006. However, the Graham Levin amendment, passed after the Court granted cert. in this case, may prevent the Court from hearing this appeal.

Graham/Levin Amendment

This law takes the enforcement "teeth" out of the McCain Amendment banning torture, and would prevent detainees from objecting to torture, or to the use of evidence obtained by torture, in the US federal courts. The Graham Levin Amendment would limit federal habeus corpus rights of detainees to a very limited circumstances: 1) after a status review finding by a tribunal, the detainee could seek an appeal on the basis that the military tribunal failed to follow its own rules or that application of the rules violated the Constitution or other statute, or 2) if a detainee was actually tried and sentenced to more than 10 years in prison or to death, he may appeal that sentence on narrow grounds. This language is very troublesome for the review of the *Hamdan* case before the Supreme Court. The amendment is silent as to detainees who are not given combat status determination or who are determined not to be enemy combatants but are held anyway.

What To Do

1. Push for more access to detainees. This would allow more information on conditions of detention to become known.
2. Ask Congressperson or Senator to restore habeus corpus.
3. Ask Congressperson or Senator to pass laws calling for penalties and accountability for those engaging in torture.
4. Push for criminal prosecutions under the War Crimes Act.
5. Ask clergy to speak out against torture from the pulpit.
6. In the next election, support candidates who support laws calling for penalties and accountability for those engaging in torture.