

THE BUSH MILITARY TRIBUNAL ORDER IS UNCONSTITUTIONAL AND ILLEGAL

By Charles B. Gittings Jr.

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny."

— James Madison, *The Federalist Papers*, #47

There are no legitimate grounds for the Bush presidential order authorizing military tribunals (Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism; 13 November 2001); neither in the Constitution, nor law, nor precedent, nor any rational concept of moral philosophy. The order is manifestly unconstitutional, unnecessary, dangerous, and illegal under existing international law.

To wit:

(1) The presidential oath requires the President to faithfully execute his office and to PRESERVE, PROTECT, AND DEFEND the Constitution. To circumvent or suspend the Constitution, or to obstruct the legitimate powers of the legislative and judicial branches of the federal government are all obvious breaches of that oath.

[Article II. Section I

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."]

(2) As Commander in Chief, the president may direct the military operations of the armed forces. This does not exempt him from obeying the law. Further, he is expressly granted the power to pardon or commute an offense, which carries with it the clear implication that had it been intended he should have the power of life and death in the manner of a Roman emperor, such would have been stated explicitly.

[Article II. Section. 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their

respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.]

(3) The Congress has the sole power to define the rules of the military, including the Universal Code of Military Justice (UCMJ).

[Article I. Section 9.

To make Rules for the Government and Regulation of the land and naval Forces;]

(4) There is no provision in the Constitution for amending the Constitution by executive or legislative fiat, nor any provision for suspending the Constitution. Further, the Congress has no power to suspend or modify the Constitution except by the amendment process.

(5) The Constitution explicitly states that the judicial power of the United States is vested in the Supreme Court, and that the power to "ordain and establish" inferior courts resides in the Congress.

[Article III. Section. 1. The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. (...)]

(6) The Constitution explicitly states that ALL crimes are subject to judicial jurisdiction except cases of impeachment; that judicial jurisdiction extends to both crimes committed outside US territory and crimes committed by non-citizens; and that only Congress may authorize exceptions. The Bush order attempts to usurp all of these powers by executive fiat.

Further, the Constitution expressly includes Treaties within this jurisdiction, which extends to the UN Charter and Geneva Convention as they touch upon the affairs of the United States.

[Article III. Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;-- between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases

affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.]

It may be noted in passing that conservatives such as Mr. Ashcroft or Mr. DeLay, et al, have long maintained that international law should not take precedence over the Constitution, despite the obvious intent of the Framers that we should faithfully adhere to all treaties duly ratified by Congress.

(7) The Fifth Amendment protects all PERSONS (and NOT just citizens) "...except in cases IN the land or naval forces, or IN the militia, WHEN IN ACTUAL SERVICE. The UCMJ applies to our own forces exclusively, not to enemies or civilians in the power of our forces; in all other cases, all persons enjoy the protection of due process as defined by the Constitution. Further, the power to define or modify the UCMJ rests with the Congress, not the President.

[Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.]

One might grant that in cases of military occupation where no competent court is available the military might rightly assume the judicial function locally, but even then, only in accordance with relevant international law. And one must question whether it could conceivably be the case that a competent court could ever be thought unavailable given the fact of global air transport in the modern era, the US military being fully capable of providing air transportation to and from anywhere in the world in less than a day, weather permitting.

(8) The executive branch has the discretion to not prosecute a crime under US law. The executive branch also has the discretion to prosecute a crime under international law, in which case the relevant authority resides in the United Nations Charter, the Geneva and Hague Conventions, and all other existing international agreements to which the United States is a party.

In each case, the relevant legal corpus constitutes a WHOLE which applies to the ensuing judicial process IN TOTO. The notion that any executive or prosecuting official may

pick and choose which parts of the legal corpus shall apply or not apply in any particular case at law is absolutely contrary to rational concepts of justice, and exhibits an absolute contempt for legitimate judicial authority: such are exclusively the methods of TYRANTS.

When the Bush administration claims that this order is "absolutely necessary" to afford them an urgently required procedural option, they ignore the plain fact that they already have two obvious procedural options, namely to proceed under either US or international law.

In truth, the various claims set forth in the order are a web of false assertions and fallacious argument, which, whether by intent or delusion or some combination, are aimed at concealing or falsely justifying the various elements of an agenda which entails:

- a) Legitimizing the selective application of fragments of both US law and international law to individual cases in an egregiously prejudicial manner for the purpose of predetermining and/or manipulating the verdicts.
- b) Asserting the necessity of assuming tyrannical powers that are expressly and absolutely excluded under both US and international law.
- c) Acting to usurp the legitimate authority of both the Congress and the Supreme Court in a manner that has the character of a coup.
- d) Openly conspiring to commit crimes against humanity as specified by the accepted definitions of international law.

This being the case, the President is guilty of a flagrant violation of his oath of office that warrants impeachment on the grounds of usurpation and frustration of the lawful powers of Congress and the Supreme Court. An examination of the UCMJ concerning the duties of military personnel in time of war and in the presence of an armed enemy will show that there are also substantial grounds on which the President might be held to be in dereliction of his duties as Commander in Chief.

(9) International law makes it absolutely clear that the order is illegal.

The UN Charter states:

Article 55.

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (...)

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

And the Universal Declaration of Human Rights is decisively explicit:

Article 6.

Everyone has the right to recognition everywhere as a person before the law.

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

(10) The precedents that the Bush administration cites are without merit.

In the first place, all of the precedents they cite date to 1942 or earlier. Since that date is prior to the ratification of the UN Charter (1945), the Geneva Convention (1949), and the vast majority of relevant international law, all are presumptively superseded by those treaties, which were negotiated and agreed by Presidential authority and ratified by Congress, pursuant to the Treaty provisions of the Constitution.

One of them took place prior to 1787, and may be presumed to have been superseded by the Constitution itself. Further, in that instance, Washington was acting not as president, but as Generalissimo of a force engaged in an insurrection.

In the second place, all of them involve cases where agents of an enemy state entered the territory or military precincts of the United States in civilian clothing in the course of a declared war between states.

Finally, all these precedents speak to the Law of War, which is customary rather than statutory or based on effective international agreements, this being much the same manner that the common law is customary rather than statutory. But where the common law is based on hundreds of years of judicial precedent and custom in the course of jurisprudence based on the concepts of reason and reasonable conduct, the law of war is based on the basest of all human institutions, war, which is expressly outlawed by the UN charter. That being the case, the law of war is a dead letter.

An adjunct of incidental interest is that the law of war is largely grounded in the customs of European nations, having grown up mainly during the 500 or so years in which they were about the business of global aggression and colonial exploitation which was the primary source of the geopolitical nightmares we are facing today. And note well that the customs of Islam are by no means identical.

(11) A precedent that the Bush Administration ignores entirely is the Declaration of Independence, with its list of specific charges against the English Crown. Several of these have a direct bearing on the order:

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has affected to render the Military independent of and superior to the Civil power.

For depriving us in many cases, of the benefits of Trial by Jury:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

One must also ask how it is possible to reconcile the famous preamble with the notion that it is proper to have one set of rights for US citizens, and yet another wholly inferior set of rights for the rest of the world. The language is plain on this point:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

This is especially significant when it is remembered that this was written by men who were engaged in the practices of slavery and genocide. Should we not aspire to better conduct rather than worse?

How far back into the gruesome past would the Bush administration have us retreat? To Andrew Jackson's forced removal of the Cherokees from their lands in contempt of an order of the Supreme Court? To the French and Indian War? Shall we pay bounties for scalps as we did then? So much for a man, so much for child, a woman, etc? Or to the sack of Carthage perhaps? Shall we slaughter all the men, sell all the women and children into abject slavery, and sow the ground with salt?

Expedience and tyrannical power are to politicians as heroin is to a junky.

The mere fact that the Bush administration has advanced such arguments as they have is a very telling reflection of their true character: the most charitable inferences being panic, intellectual impotence, and sheer moral degeneracy. Their arguments are an insult to the intelligence of anyone that has not been misled, or terrorized into a frenzy by selfish agendas, fear, rage, and opinion polls. Be not deceived: the policies of this administration are woefully misguided and malevolent. They are acting the part of a lynch mob.

All the precedents that the Bush administration cites are bad ones. The President has no implied or expressed power to cut corners from or omit either the law or the Constitution in the name of convenience. In every prior instance where such expedients have been employed, the action was grounded in willful ignorance, political malfeasance, lazy thinking, financial greed, and public hysteria.

That the Congress and the Courts have from time to time acquiesced to such practices in the heat of the moment is merely a reflection of how much those institutions are themselves prone to the corrupt influences of politics and wealth. Far from supporting the notion that such precedents legitimize the practice of Presidential Fiat, they compellingly

demonstrate the urgent need for the Courts and the Congress to oppose such actions resolutely.

Why do they need to kill Osama Bin Laden or any other captive without a fair trial? And why fear him communicating with anyone? I could see our way clear to giving him a comfortable cell complete with a telephone. In war it is often better to listen and LEARN than it is to charge blindly in rage. Perhaps if that had been better understood by our leaders over the past 20 years we wouldn't be in this mess now.

What threat could any captive pose to us that would require execution without a fair trial or the protections of just laws and due process? The Bush administration aims to convict and punish on suspicion alone, and the logical end result of such thinking is the preventative extermination of entire populations. "The only good Indian is a dead Indian" was once a common sentiment in this country. Hitler said no less of the Jews. "Kill them all and let God sort them out" is a popular sentiment in certain quarters of the far right. No one can pretend that such things represent anything civilized or just or necessary.

The Administration pretends to want options, even as they ignore the valid options they have. One that they seem not to have given the slightest thought is to simply recognize the enemy as a legitimate belligerent and proceed with level headed resolve. That worked fairly well in WW2 with a few notable exceptions like the treatment of the German saboteurs and the internment of US citizens of Japanese descent. If they are so incompetent that they cannot handle their jobs they should simply resign and be gone from the public trust. Their policies betray their impotence: never in history has any great power had so many resources at its disposal, yet they bewail their incapacity to meet the challenges before them.

The UN Charter, the Universal Declaration of Human Rights, and the Geneva Conventions are clear enough if one only takes the time to give them an honest reading. All of them specify that basic human rights are to be respected, and specify what those rights are. Yet the Bush administration turns them a blind eye-- not because they hinder any legitimate purpose of national security, but because they expose the actions of the administration to public scrutiny and criticism. They are afraid to expose their hypocrisy, greed, dishonesty, and sheer incompetence to the light of day. The basic methodology of the Bush administration is fraud, deceit, and back room manipulation of the political process. That's how they ran their election campaign, it's been their approach to domestic policy, and it is how they are managing our foreign relations in the present crisis.

The truth of the matter is that the enemy has legitimate grievances and delivered a brilliantly effective attack. How much conventional war making would have been required to inflict similar damage on us? The advantage of recognizing them is that we would then have the OPTION of negotiation. We have 4,000 years of history that shows how utterly ineffective revenge and retribution are. That's not to say we should be timid or weak; but flexible, objective, smart, progressive, open, and above all else, just.

During the Second World War both sides sent thousands of aircrews on bombing missions which killed civilians in vast numbers far in excess of the 4,000 or so who lost their lives on 11 September 2001. Many of those aviators were captured, but relatively few were executed, and most were simply interned as POW's.

The administration has assumed the character and powers of a Junta. This tendency was manifest well before 11 September 2001, and has become ever more blatant since. The order of 13 November claims to make the entire population of the World, excepting only US citizens (for the time being at least), subject to the absolute will of the President acting in the guise of a dictator meting out life or death however he pleases, under the pretence of fighting a war on evil itself; yet it is they themselves who represent the greatest evil confronting us today. That the greatest power in the history of the world should fall into the hands of a tyrant is a danger far greater than Osama Bin Laden and Al Qaeda. The Bush Junta must be brought to heel within the law if we are to have any hope of sustaining the principles we claim to hold dear, and not be made to appear as abject hypocrites in the eyes of the entire world.

May God preserve us from such tyranny.

Oakland, California
26 November 2001

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The Honorable Barbara Lee
9th Congressional District of California
United States House of Representatives
Washington, DC 20515

Dear Ms. Lee,

I am writing to you in regard to the order signed by President Bush on 13 November 2001 entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism". It is my belief that this order is both unconstitutional and illegal under international law, and that it represents a grave threat to the safety and well being of both the nation and the world.

Furthermore, while I recognize the political realities implicit in the current composition of the Congress, and of public opinion in the present crisis, it is also my belief that by the very act of signing this illegal order the President has committed high crimes and misdemeanors such as would warrant his immediate impeachment and removal from office, together with any and all members of his cabinet or administration having complicity in these crimes.

Enclosed is a document which sets forth in detail my reasons for holding these beliefs. Pursuant to the First Amendment of the United States Constitution, I am invoking my right as a citizen of the United States to petition the Congress in this matter. I respectfully and urgently request that you convey copies of this letter and the enclosed document to the leadership of both parties in both the House and the Senate, and to the Chief Justice of the United States Supreme Court. I urge all of them to take immediate action by every avenue available to them under the law to prevent the executive branch from acting on this order.

Human lives and fundamental human rights are at stake here, together with the honor, integrity, and safety of our nation. Speed is of the utmost essence.

Sincerely,

/s/

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