Military Tribunals

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Hypothetical Scenario

The fictional character Zacharia Abdul Alstafani, a native resident of Iraq, was captured in 2005 while supposedly fronting operations for the organization known as Al'Quaeda. He was arrested and imprisoned in an undisclosed location until two weeks ago when he was transferred to Guantanamo, Cuba under the order of the President of the United States. Alstafani has already spent more than a year in detention without trial or recourse in any civilized form of court. In Guantanamo, Alstafani faces trial by military tribunal. He has not yet been appointed council because all lawyers designated as defense for suspected terrorists must be cleared by the US Department of Defense. Alstafani now faces a situation in which he does not know where he will be tried, when he will be tried, who will represent him, and most importantly, he does not have any formal charges against him nor supporting evidence to back such charges. Theoretically, as the Military Order currently states, Alstafani could remain imprisoned indefinitely without trial. If a military tribunal is convened to hear his case, Alstafani could face the death penalty from a system in which he will not be allowed to choose his own defense, nor will he be allowed to view and refute much of the evidence presented against him. Although this is simply a hypothetical situation, the facts and circumstances of such a case are real.

Defining Military Tribunals

Military commissions were established in special circumstances in which courts-marshal was not sufficient. A military tribunal is an inquisition based on charges brought by military counsel, tried in a military court, judged by military officers, and sentenced by the same military officers against a member of an adversarial force ("Military Tribunals: Historical Patterns and Lessons."). The main purpose of such proceedings is to provide defendants with a trial while protecting the ongoing security interests of the prosecuting nation, especially in times of war. Where the United States is concerned,

military tribunals were last notably used in World War II. In 1942, eight German soldiers were tried by military commission. The trial was conducted in secret, and six of the eight men were sentenced to death based on the conclusions of the court ("EX PARTE QUIRIN. 317 U.S. 1 (1942)."). Procedures in military tribunals vary greatly from that of a traditional court system.

The current Military Order, first proposed in 2001 by the Bush Administration, has recently been under tremendous controversy. In June 2006, the Supreme Court ruled that President Bush did not have the authority to run military commissions as the military order explicitly states. The court did state that President Bush could proceed with such tribunals if Congress gave him the permission to do so ("U.S.: Military Tribunal Ruling Second Setback for Bush."). There are many controversial procedures under the Military Order, three of which are most pertinent to this paper.

The Great Writ

A writ of habeas corpus is a court order addressed to a prison official (or other custodian) ordering that a detainee be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he or she should be released from custody ("'Habeas Corpus' Defined & Explained."). In order to detain a suspect, a convening authority must present sufficient evidence to justify continued incarceration of a prisoner against his/her will. Traditionally, most countries use a thirty-day standard for detention of prisoners at which time they are afforded the right to contest their imprisonment in a court of law. Suspected terrorists in Guantanamo have not been afforded this right under the Military Order. In the hypothetical scenario, Alstafani could conceivably be detained against his will for an indefinite period of time without Habeas Corpus protections. In fact, some prisoners have been in the custody of the CIA since September 11, 2001.

Defendant's Right to View and Refute Evidence

All defendants in modern criminal procedures are afforded the right to see the evidence against them and thereby are provided an opportunity to refute this evidence.

Defendants generally argue against evidence presented through the use of cross examination and direct examination. The current Military Order does not explicitly give defendants this right. Framers have considered allowing a defendant's council to view the evidence; however, the actual defendant is not privileged to all of the information presented against him. By not explicitly granting the right to see the evidence in its entirety, the Military Order has made it possible to deny a defendant this right in situations they feel could negatively impact national security. Although proponents of the bill claim that such a situation is rare, it is still outrageous to think that there is ever an instance in which such measures should be taken.

Hearsay and Unsubstantiated Evidence

Most civilizations have laws in place to protect defendants against invalid and inadequate forms of evidence. The United States for example, is regarded as having the strictest requirements for what evidence can be included in a court of law (Westen). This is ironic because the same country is also proposing a system in which coerced testimony and hearsay evidence would be admissible. The Military Order states that under certain circumstances, evidence acquired through coercion and hearsay could be admissible during the proceedings.

Ethical Concerns

Zacharia Abdul Alstafani is the embodiment of the suspected terrorists currently facing gross violations of human rights. He faces a system in which he could be detained indefinitely and, if tried, he could be subjected to a system where he is not permitted to refute the evidence against him. Furthermore, this evidence is often acquired through actions deemed inappropriate by civilized courts such as torture, coerced testimony, and the admission of hearsay evidence. Such a situation raises serious ethical concerns about the protection of human rights.

Fairness and Justice Embedded in Society

Great documents of the world such as the Bill of Rights, the Declaration of the Rights of Man, and the Geneva Convention were written in the interest of an ethical

ideal; each of these documents is a direct representation of what the global society values most. Here, many of the proceedings contained in current Military Tribunals are in direct contradiction with the very ethical foundation that has been created. Such core values are designed to protect all people from injustice and cruelty while making no distinction as to who qualifies. Therefore, the issue of classification and labeling with regard to terrorism or terror suspects is irrelevant. Regardless of how defendants are labeled, these terrorists are human beings and still deserve the right to be treated fairly in a judicial system amongst their fellow human counterparts. Failure to respect such principles is a violation of the very values that human society and law are founded upon.

Aristotle and other Greek philosophers have contributed to the idea that all people should be treated equally (Westen). Today, this idea is used to say that ethical actions treat all human beings equally or, if unequally, fairly based on some standard that is defensible (Westen). This is the basic foundation for an ethical framework on fairness and justice. When evaluating an ethical issue based on fairness and justice, the question "does the ethical action treat people equally, or if unequally, does it treat people proportionately and fairly," must be asked. (no citation)

Many governments, created on the basis of freedom and democracy, apply concepts of fairness and justice. For example, the United States incorporated the Bill of Rights using the principles of fairness and justice. The 14th Amendment extended many basic rights to African Americans in the United States because it was widely felt that the current laws treated African-American citizens unfairly. The tradition was continued in the 19th Amendment whereby women were given suffrage and equal protection under the law. This is clearly in support of the claim that fairness and justice is one of the underlying values at play in US law. Furthermore, on a global scale, the Geneva Convention's framers used fairness and justice principles when they created laws protecting human beings during times of war. For example, the Geneva Convention protects prisoners of war from unreasonable treatment. It is important to consider not what the Geneva Convention says or whom it protects, but the underlying reason for its creation in the first place. It goes back to the golden rule first stated in the bible: "*Treat others as you wish to be treated*". Framers of the Geneva Convention felt that it was necessary to implement guidelines in which all human beings are protected against

injustice, regardless of their circumstances or which side they fought for. Consistent amendments to the Constitution and creation of the Geneva Convention are merely two classic examples of the value modern society places on fairness and justice.

Habeas Corpus Within Fairness and Justice

Habeas Corpus and the ethical framework of Fairness and Justice are interrelated. Habeas Corpus was first implemented in English history with the creation of the Magna Carta in 1215. In the 1600s, there was a famous case where the King of England imprisoned five men in the Tower of London without trial. The men petitioned to Parliament who found that it was unfair and unjust to imprison men against their will without sufficient reason. Habeas Corpus was therefore created as a protection against a ruling powers ability to imprison individuals without justification ("Unit One: 1600-1763.").

Under traditional circumstances, when a person is imprisoned for a crime, the convening authority must have justification for doing so. In the United States, suspending the Writ of Habeas Corpus is considered an extreme alternative to normal application of the law. The fact that such a right has only been suspended four times clearly substantiates the notion that Habeas Corpus is taken very seriously. The "*Great Writ"* as described by the likes of John Marshall and Sandra Day O'Connor is embedded in the very foundation of common law ("Unit One: 1600-1763."). In contrast to the precedent, Military Tribunals have not upheld this value since they stipulate a possible suspension of this right under certain circumstances.

In the scenario provided, Alstafani has not been given the right to file a Writ of Habeas Corpus. As a result, he has been detained against his will for over a year and could continue to be detained indefinitely. The Military Order's suspension of the writ is neither fair nor impartial by most civilized standards, nor is it orthodox by the standards of the civilized world. The convening authority, in this case the United States, has failed to provide sufficient justification for suspending a fundamental right considered impervious to government intrusion. Simply designating someone as an "unlawful combatant" does not necessarily provide an adequate reason for suspending one's right to trial.

Minimum Standards of Evidence should be Protected

Fairness and justice govern the basic principles of evidence and dictate how it is presented in a trial. Many rules and procedures have been created in the interest of upholding fairness and justice to protect defendants from inadequate information that could be used to convict them. Modern courts have created specific procedures for addressing evidence presented in a case. Defendants are explicitly given the right to address the evidence against them. This basic right did not ground itself firmly in the legal system without an ethical explanation. While Parliament decided Habeas Corpus was necessary in England, other countries, including the US, using similar ideals of fairness and justice, have shown that it is unfair to convict a person of a crime on the basis of unsubstantiated evidence. A legacy of cross-examination within the civilized court system is a testament to the idea that evidence is only accurate once it has been reviewed and corroborated.

Military Tribunals do not allow defendants to view evidence against them in certain circumstances when national security is at stake ("Military Tribunals: Historical Patterns and Lessons."). National security interests include protection of ongoing anti-terrorist operations, protection of undercover operatives, and the protection of another country's classified information. The defendant's right to see the evidence presented in a case is firmly grounded in modern society's legal framework and values. There is no circumstance in which such a right should ever be infringed upon. The interest of national security is not sufficient grounds for taking away a human being's fundamental right to defend his or herself.

Furthermore, all evidentiary procedure follows the same ethical principles under fairness and justice. The underlying theme is that a person cannot be convicted of a crime on the basis of evidence that has not been validated and proven to be accurate. It is not ethical to sentence someone to death (often the case with suspected terrorists) on the basis of uncorroborated evidence. Hearsay and coerced testimony must follow this ethical guideline.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. A party is offering a statement to prove the truth of the matter asserted if the

party is trying to prove that the assertion made by the declarant (the maker of the pretrial statement) is true ("Hearsay Exceptions."). Although there are exceptions, most traditional courts consider hearsay evidence to be inadmissible.

Coerced testimony generally refers to evidence and confessions gained using torture. By traditional standards, this form of testimony is deemed highly inadmissible and in fact, law enforcement agencies in the U.S. could be prosecuted if they were found to have implemented methods of coercion. Hearsay evidence and coerced testimony are both highly controversial and it is very disappointing that the Bush Administration would even consider allowing such testimony in a court of law.

Currently, the Military Order contains very lax guidelines on the admission of hearsay and coerced testimony ("Justice at Last or More of the Same?"). In comparison to traditional trial courts, where such testimony is rarely included, military tribunals are somewhat radical. In the stated scenario, Alstafani could conceivably be convicted on a confession acquired through torture. Principles of fairness and justice would dictate that such a situation should not occur. Even if people disregard the idea that a person was tortured, which is another issue in and of itself, it is not ethical for a person to be convicted of a crime on testimony that may have been coerced and potentially invalid.

Classification: An Elaborate Trick

Advocates for Military Tribunals argue that terrorists and unlawful combatants do not qualify for the same protections as civilized lawful combatants. This entire defense is an elaborate ploy to disengage themselves from the ethical implications of their actions. Moral disengagement is frequently written about in the ethical arena. Using clever tactics such as dehumanization, people and societies have found ways to circumvent the fact that what they are doing is wrong. Albert Bandura, a professor at Stanford University, addresses the issue of dehumanization: "The process of dehumanization is an essential ingredient in the perpetration of inhumanities" (Bandura). While Bandura stated this regarding soldiers on a battlefield, the same circumstances apply in the case of Military Tribunals. Denying defendants' basic rights in a trial and/or sentencing them to death qualifies as unethical.

Very few articles and discussions in the news today address the issue of whether or not the treatment of suspected terrorists is ethical. They constantly bicker about whether or not these people qualify as lawful or unlawful combatants, whether they are protected under the Geneva Convention, and whether or not they are protected under US law. The government, the media, and society have created this overwhelming belief that terrorists are barbarians or savages that do not deserve protections under law and in doing so have avoided the underlying injustice of the situation. This is a form of dehumanization and an elaborate tactic to dance around the fact that denying a person a fair trial is ethically and morally wrong.

Conclusion

The world community holds fairness and justice at the core of its values. The Bill of Rights and the Geneva Convention are testaments to fact that society values a fair system of criminal procedures under the framework of fairness and justice. The ethical framework of fairness and justice must apply to all people regardless of the circumstances. Habeas Corpus, the right to see evidence presented against an individual, and limitations on hearsay and coerced testimony, are all fundamental legal rights that society believes to be of the utmost important. There are no grounds on which a convening authority has the authority to deny a human being these fundamental rights. Regardless of who they are, what they have done, or who they are affiliated with, the individuals held in Guantanamo Bay are human beings and therefore must be given the same rights and protections that society has shown over time to be invaluable.

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