FOR OTHER PURPOSES

By Michael Ventura
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Sept. 28, 2006: Remember the date. It seems to have passed mostly unnoticed. A few editorials, some angry e-mails. No banner headlines. No dramatic footage. No conspiracy theories. It happened in public and on the record: On Sept. 28, key rights guaranteed by our Constitution, plus the central tenet of the Magna Carta, were nullified by an act of Congress – specifically, the Military Commissions Act of 2006, "to authorize trial by military commission for violations of the law of war, and for other purposes." It's those "other purposes" you have to watch out for.

The bill decides the fate of "unlawful enemy combatants," who are defined as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States" (Sec. 948a.1.A.i). Foreigners are not specified; a "person" can be any U.S. citizen. "Purposefully and materially"? In law beware of vague language which can mean whatever the government wants, an intent proven in the next clause (ii): An unlawful enemy combatant "has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense." The president and the secretary of defense suddenly have the right to establish tribunals to determine who's "unlawful." No standards are defined for this "determination." In other words, the president can say, "Tag, you're it."

The Fourth Amendment guarantees a "speedy and public trial." But a commission judge "may close to the public all or part of the proceedings" for reasons of national security, which he alone gets to decide (Sec. 949d.2). Among "provisions [that] shall not apply" is "any rule ... relating to a speedy trial" (Sec. 948b.1.A). In addition, "the military judge can exclude any evidence ... by considerations of undue delay, waste of time" (Sec. 949.a.2.F.ii). A trial can be secret if the judge chooses. A defendant can wait forever for a trial; but when that trial takes place, any defending evidence may be quashed if the judge decides it may cause "undue delay." By this law, the trial is whenever and whatever the government wants it to be.

The Fifth Amendment states that "no one shall be compelled ... to be a witness against himself"; the Eighth forbids "cruel and unusual treatment." The new law: "Statements ... in which the degree of coercion [torture] is disputed may be admitted only if the military judge finds that (1) the total of the circumstances renders the statement reliable and possessing sufficient probative value; (2) the interests of justice would best be served by admission of the statement into evidence; and (3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment." (Sec. 948r.d). That "and" is not inclusive; the judge may act on any of the three clauses. The bill states elsewhere that torture is prohibited but supplies a loophole: The judge has power to decide otherwise and admit a self-incriminating statement spoken under "coercion"; "evidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person" (Sec. 949a.2.A).

The Fourth Amendment ensures "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and that "no warrants shall issue without probable cause." Not for these trials: "Evidence shall not

be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization" (Sec. 949a.2B). That section continues (2D), "evidence shall be admitted as authentic as long as (i) the military judge ... determines that there is sufficient basis." Evidence, so-called, can be introduced without citing sources or proving the integrity of its evidentiary trail. The judge determines what constitutes "a sufficient basis." And (Sec.949d.f.2.b): "The military judge ... shall permit trial counsel to introduce otherwise admissible evidence ... while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that (i) [those] sources, methods, or activities ... are classified, and (ii) the evidence is reliable." The judge decides whether the evidence is reliable. The defendant has no rights. The government can do as it pleases.

The Sixth Amendment: "In all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against him." "All" no longer includes these trials: "hearsay evidence not otherwise admissible under the rules of evidence ... may be admitted in a trial by military commission if the proponent of the evidence makes [it] known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence." (Sec. 949a.2.E.ii). Hearsay is permissible. "A fair opportunity to meet the evidence" is vague language, its meaning determined by the judge.

Then there's habeas corpus, a core of Western law since the Magna Carta, defined as "the demand for legal justification for one's imprisonment" (*Los Angeles Times*, online, Sept. 29). The Constitution, Article 1, Section 9-2: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." "Rebellion" and "invasion" are exact words; an "attack," by itself, is neither. Sec. 7.e.1: "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States." So now the United States reserves the right to act upon foreign nationals beyond the law. They can be arrested for any reason and not told why. If nations behave as nations usually do, others may now behave that way toward Americans.

And, for citizens and noncitizens alike, the bill allows no judicial recourse. "No court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever ... relating to the prosecution, trial, or judgment of a military commission." (Sec. 950j.r.b). The balance of powers has been upended. The military commission is a law unto itself.

Then there's Section 6-3: "Interpretation by the President." "A – As provided by the Constitution [a dubious assertion] and this section, the President has the authority to interpret the meaning and application of the Geneva Conventions and ... B – The President shall issue interpretations ... by Executive Order. ... Any Executive Order published under this paragraph shall be authoritative ... as a matter of United States law." The president, too, is a law unto himself. The president has the sole authority to interpret international treaties; he can determine who is an "unlawful enemy combatant"; and his secretary of defense can determine all procedures of the Military Commissions Act.

In fact, the law stipulates that the secretary of defense can change the law at will. Phrases like "under such limitations as the Secretary of Defense may prescribe," "the Secretary of Defense shall prescribe regulations," and "pursuant to regulations prescribed the Secretary of Defense" appear in this bill, by my count, 20 times. The procedures by

which this villainous bill is administered are solely the province of the secretary of defense. He may even appoint to the court not a lawyer, not a judge, but "a civilian who ... is otherwise qualified to practice before the military commission pursuant to regulations prescribed by the Secretary of Defense" (Sec. 948k.b.2.B). Anyone he wants. The secretary must submit an annual report to the congressional Committee on Armed Services "on any trials conducted by military commission" (Sec. 948.e.a-b). All the secretary need do is report. There is no mechanism for reviewing or investigating the truth of his report.

In matters of detention, interrogation, and investigation, the administration of George W. Bush has flagrantly violated the law since 9/11. Congress has exercised virtually no oversight. Outlawed procedures have been tacitly allowed until they've become, as they say, "the new normal." So normal, in fact, that this outrageous bill passed with no filibuster, no real fight, no more protest than a few irritated editorials. With almost no fuss at all, America has defiled – and abandoned – its Constitution. And it happened in the bright light of day.

You won't notice it at first, but now it's as though we live in Mexico, Russia, Iran, Thailand, China, Indonesia, or any land that more or less has the rule of law until someone powerful targets you and: Tag, you're it. Yes, that's been true here, too, but then it was a crime, and it was possible to struggle back to the letter of the law. Now the law itself is the enemy.