The Right's Made-up 'Constitution'

For Tea Partiers and libertarians, it is an article of faith that the Constitution tightly constrained the federal government and gave broad powers to the states. But that is bogus history – mere propaganda – and suggests that the Right's rank-and-file has never read or understood the document, says historian Jada Thacker.

By Jada Thacker

The Cato Institute's *Handbook for Policy Makers* says, "The American system was established to provide limited government." The American Enterprise Institute states its purpose to "defend the principles" of "limited government." The Heritage Foundation claims its mission is to promote "principles of limited government." A multitude of Tea Party associations follow suit.

At first glance the concept of "limited government" seems like a no-brainer. Everybody believes the power of government should be limited somehow. All those who think totalitarianism is a good idea raise your hand. But there is one problem with the ultra-conservatives' "limited government" program: it is wrong. It is not just a little bit wrong, but demonstrably false.

The Constitution was never intended to "provide limited government," and furthermore it did not do so. The U.S. government possessed the same constitutional power at the moment of its inception as it did yesterday afternoon.

This is not a matter of opinion, but of literacy. If we want to discover the truth about the scope of power granted to federal government by the Constitution, all we have to do is read what it says.

The Constitution's grant of essentially unlimited power springs forth in its opening phrases: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

As might be expected in a preamble to a founding document, especially one written under supervision of arch-aristocrat Gouverneur Morris, the terms are sweeping and rather grandiose. But the point is crystal clear: "to form a more perfect Union." If the object of the Constitution were to establish "limited government," its own Preamble must be considered a misstatement.

Enumerated Powers

Article I establishes Congress, and Section 8 enumerates its powers. The first clause of Article I, Section 8 repeats the sweeping rhetoric of the Preamble verbatim. While it provides for a measure of uniformity, it does not so much as hint at a limit on the federal government's power to legislate as it sees fit:

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States"

No attempt is made here, or at any other place in the Constitution, to define "general Welfare." This oversight (if that is what it was) is crucial. The ambiguous nature of the phrase "provide for thegeneral Welfare" leaves it open to widely divergent interpretations.

Making matters worse for federal government power-deniers is the wording of the last clause of Article I, the so-called "Elastic Clause": Congress shall have power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Thus the type, breadth and scope of federal legislation became unchained. When viewed in light of the ambiguous authorization of the Article's first clause, the importance of the "necessary and proper" clause truly is astonishing. Taken together, these clauses restated in the vernacular flatly announce that "Congress can make any law it feels is necessary to provide for whatever it considers the general welfare of the country."

Lately there has been an embarrassingly naive call from the Tea Party to require Congress to specify in each of its bills the Constitutional authority upon which the bill is grounded. Nothing could be easier: the first and last clauses of Article I, Section 8 gives Congress black-and-white authority to make any law it so desires. Nor was this authority lost on the Founders.

"Limited government" advocates are fond of cherry-picking quotes from *The Federalist Papers* to lend their argument credibility, but an adverse collection of essays called the *Anti-federalist Papers* unsurprisingly never gets a glance. Here is a sample from New Yorker Robert Yates, a would-be founder who walked out of the Philadelphia convention in protest, written a month after the Constitution had been completed:

"This government is to possess absolute and uncontrollable power, legislative,

executive and judicial, with respect to every object to which it extends. The government then, so far as it extends, is a complete one. It has the authority to make laws which will affect the lives, the liberty, and the property of every man in the United States; nor can the constitution or the laws of any state, in any way prevent or impede the full and complete execution of every power given."

Yates, it must be emphasized, took pains to identify the "necessary and proper" clause as the root of the "absolute power" inherent in the Constitution well over a year before ratification.

The Tenth Amendment

A particular darling of secession-prone, far-Right Texas Gov. Rick Perry, the Tenth Amendment is often claimed as the silver-bullet antidote for the powers unleashed by the "general welfare" and "elastic clauses." Here is the text of the Amendment in its entirety: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Superficially, the Tenth seems to mean "since certain powers are not delegated to the federal government, then those powers are reserved to the states or the people." This would seem to be good news for champions of limited government. But this is not the case.

The Tenth does *not* say that important powers remain to be delegated to the United States. It merely says that powers "not [yet] delegated" are "reserved" to the states or the people. This sounds like a terrific idea until we realize, of course, that all the important powers had *already* been delegated in 1787, four years before the Tenth Amendment was ratified.

As we have seen, the first and last clauses of Article I, Section 8 made the Tenth Amendment a lame-duck measure even as James Madison composed its words in 1791 and so it remains today. The sweeping powers "to make all laws necessary and proper" in order to "provide for the general welfare," had already been bestowed upon Congress. The Johnny-come-lately Tenth Amendment closed the constitutional pasture gate after the horses had been let out.

This apparently has never occurred to the likes of Gov. Rick Perry and his far-Right cohorts who believe a state may reclaim power by withdrawing its consent, in effect repossessing their previously delegated power through state legislation. Superficially, the logic of this position seems sound: if the states had the legal authority to delegate power, then they may use the same authority to "un-delegate" it by law.

But a close re-reading of the Tenth's wording nixes such reasoning. Oddly, the

Tenth Amendment does not say the *states* delegated their powers to the federal government although it may be argued that it probably ought to have said so. It says "The powers not delegated to the United States *by the Constitution* are reserved to the States. "

Thus, according to the Tenth Amendment, the Constitution *itself* delegated the power to the federal government. States, in other words, now have no standing to "reserve-back" what they had never "delegated-away" in the first place.

Had it been possible to "un-delegate" the powers of the United States by invoking the Tenth, the Old South would have simply done so and spared itself the bother of secession not to mention the bother of being annihilated by a series of subsequent Northern invasions. The fact that the South did not even attempt such a strategy attests to the toothlessness of the Tenth Amendment.

No other instance in law would be a better example that we should choose our votes carefully. For in ratifying the Bill of Rights, which included the Tenth Amendment, the American people endorsed the legal fiction that the Constitution not the original 13 states, or "We the People" authorized the power of the United States *because the Constitution itself said so*. If the Constitution has an Orwellian twist, this is it no matter which side of the aisle you're on.

The states and the people may amend the Constitution. But they may not do so by nullification (according to the logic inherent in the wording of the Tenth Amendment), or by the judgment of state courts (according to the "supremacy clause" of Article VI), nor may any Amendment be made without the participation of the federal government, itself (according to Article V.) If the Founders had meant to
ensure "limited government," there is no trace of such intent here.

Paucity of Rights

If the Constitution were intended to provide "limited government," we might expect it to be chock full of guarantees of individual rights. This is what Tea Partiers may fantasize but this is not really true. In fact, the Constitution is amazingly stingy in reference to "rights."

—The word "right" is mentioned *only once* in the Constitution as ratified. (Art. I, Sec. 8 allows Congress to award copyrights/patents to ensure their holders "… Right to their respective Writings and Discoveries.")

—The word "right" somewhat counter-intuitively appears only six times in the ten Amendments called the "Bill of Rights."

Almost a century later, the first of seven other rights were added under

pressure from Progressive activists almost all of which were intended to create and extend democratic participation in self-government.

–Amendment XIV (sanctions against states denying suffrage); XV (universal male suffrage); XIX (women's suffrage); XXIV (denial of poll tax); and XXVI (18 year-old suffrage); and twice in Amendment XX, which gives Congress the "right of choice" in presidential succession.

–In grand total, the word "right" appears only 14 times in the entire Constitution, as it exists today (including the two rights conferred *to government*).

Did we all notice that the "Constitution of the Founders" did not include the "right" for anybody at all to vote? Notable, too, is the absence of language implying that any "rights" are "unalienable" or "natural" or "endowed by their Creator." All such phraseology belongs to the Declaration of Independence, which apparently unbeknownst to Tea Partiers everywhere bears no force of law.

The word "power," by the way, occurs 43 times in the Constitution, each time referring exclusively to the prerogative of government, not right-wingers. Since "individual" rights are mentioned only 12 times, this yields a ratio of about 4:1 in favor of government power over individual rights. Without the efforts of those pesky, democracy-mongering Progressives, who fought for universal voting rights, the ratio would be more than 6:1 today or 50 percent higher.

This statistical factoid is not as trivial as it may appear. Expressed in practical terms, Michele Bachmann, Sarah Palin or Clarence Thomas would almost certainly never have achieved public office had they lived under the "limited government" designed by the Founders they so revere.

The Bill of Rights

So what exactly are our non-patent/copyright "rights," under so-called "limited government?"

–Amendment I the right of people "peaceably to assemble, and to petition the government for redress of grievances"

–Amendment II the right "to keep and bear arms, shall not be infringed"

–Amendment IV the right "to be secureagainst unreasonable searches or seizures"

–Amendment VI the right "to a speedy and public trial"

–Amendment VII the right "of a trial by jury"

—Amendment IX enumeration “of certain rights” shall not deny “others retained by the people”

That’s it. What happened to the famous rights of free speech, religion or press? The way the First Amendment is worded does not enumerate these as positive rights that people possess, but rather as activities the government may not infringe upon. If Bill of Rights author James Madison had meant to stipulate them as positive “rights” all he had to do was write it that way, but he did not.

Bear in mind Madison (then a federalist) wrote the Bill of Rights under political duress. Since anti-federalists (recall the skepticism of Robert Yates) flatly refused to ratify the Constitution unless it guaranteed *something*, Madison had to write *something.* In effect, the amendments were the pig the anti-federalists had bought in the poke, three years after ratification had paid for it.

Madison, at the time of writing, had little incentive to take pains with what he wrote because federalists did not believe a Bill of Rights was necessary, or even good idea (with Alexander Hamilton arguing a Bill of Rights would be “dangerous.”) This may account for the fact that some of what Madison wrote seems vague, or even ambiguous, as in the case of Amendment II.

Amendment IX, for example, actually makes little sense, which may account for the fact nobody ever seems to mention it: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

This sounds “righteous” enough, until we recall the Constitution to which this Amendment pertains had “enumerated” only a single right in the first place! Even if Amendment IX applies to the Bill of Rights (to include itself), then all it says is “the people may have more rights than the half dozen mentioned so far, but we’re not going to tell you what they are.” (So if Amendment X is Orwellian, Amendment IX verges on Catch-22.)

Of course the idea was to calm suspicions that people would possess only the half-dozen rights enumerated in the Bill of Rights (plus patents!) and no others. Even so, Amendment IX did not guarantee any un-enumerated rights; it just did not peremptorily “deny or disparage” any.

And what sense should we make of the crucial Amendment V one of the four Bills of Rights not actually containing the word “right” at all?

“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 offence 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." [Emphasis supplied]

Thus, life, liberty and property are *not* expressly granted status as fundamental "rights," but only as personal possessions that may be deprived or taken according to "due process." The crucial implication is that Amendment V exists *in order to stipulate how the government may deny* an individual claim to life, liberty or property. *With* due process, you life, liberty and property may be toast. That is what it plainly says.

It is interesting, too, that the Bill of Rights does not speak to the origin of rights, but only to their existence. Moreover, the Constitution never speaks of granting rights, but only protecting them. There is a good reason for this: excepting the Progressive suffrage Amendments, none of the guaranteed rights were American inventions, but had for centuries been considered the rights of the English nobility.

For those who want to believe in "American Exceptionalism" as the basis of "limited government," this is not encouraging news. Moreover, the Constitution, including the Bill of Rights, hardly includes any "right" that had not already been recognized at one time or another by medieval English monarchs or in ancient Rome and Greece.

Property Rights and 'Republic'

The strict libertarians among us claim the sole legitimate power of government is that which is necessary to protect private property rights. On this score, however, the "limited government" of the Founders is practically mute. Except for the aforementioned Article I, Section 8 provision for patents and copyrights, private "property" is only mentioned twice in the Constitution, both times in a single sentence of the "right"-less Amendment V quoted above:

"No person shall be deprived of life, liberty or **property** *without due process of law*; nor shall private **property** be taken for public use, *without just compensation*." [Emphasis supplied]

Once again, Amendment V fails to guarantee personal immunity from the power of the state, but rather details the way state power may be used to dispossess individuals of their property. And we must bear in mind these words were not penned by Marxists, socialists, or Progressives.

Whether by design or happenstance, the original “Constitution of the Founders,” or the Bill of Rights, or even the Constitution with all its Amendments does not grant any irrevocable “right of possession” to property. Even the Second Amendment’s “right to keep” arms, is subject to the terms by which property may be taken under terms of Amendment V, and it always has been.

Tellingly, the word “democracy” does not appear in the Constitution. This intentional oversight is often smugly celebrated by anti-democrats among us, who insist that the United States of America was founded as a “republic.” No doubt this is true, given that the Constitution was written by an exclusive, hand-picked cadre of oligarchs, whose number did not include a single woman, person of color, or wage-earner.

Unfortunately for the pro-republic “limited government” crowd, the Constitution does not contain the word “republic” either. The word does appear as an adjective, but only once, (Article IV, Section 4): “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them from Invasion”

Typically for the Constitution, which defines few of its terms, the word “Republican” also remains unexplained. The ambiguity of the term turned out to be handy, however, as Radical Republicans continuously and egregiously violated Article IV, Sec. 4 from 1865-1877 as they enforced blatantly unconstitutional military occupation of former Confederate states during the gross misnomer of “Reconstruction.”

It should be obvious that the “Constitution of our Founders,” including the Bill of Rights, may not protect as many rights as many wish to believe. Moreover, we have already noted the Constitution dropped all revolutionary talk of “unalienable” rights and “Creator endowed” liberty. This was not an oversight.

The revolutionary bit about “consent of the governed” posed an especially delicate problem for the Founders. Almost all owned slaves or were masters of property-less tenants or domestic servants, including their wives none of whom could offer their legal consent even if they wished to do so. Thus the Founders shrewdly considered it unnecessary to include any voting rights in the new republic they planned to rule, uncontested by the disenfranchised lower castes.

Did this result in the land of the free, with liberty and justice for all? Let’s see.

Under the U.S. Constitution, Americans were sentenced to death for protesting unfair taxes; journalists and citizens imprisoned for criticizing government officials; citizens’ property seized illegally; workers murdered by government

agents; thousands jailed without the “privilege” of *habeas corpus*; entire states deprived of civilian courts; untold numbers of American Indians defrauded of liberty and property; debt-peonage and debtors’ prisons flourished, as did slavery and child labor; and the majority of the public was denied the vote.

All this was considered constitutional by the Founders. None of these outrages, please note, was the result of “progressivism,” which had yet to be articulated, and all were common prior to the New Deal and the advent of so-called Big Government. Was this the face of “limited government?”

No, it was not. The concept of a democratically “limited government” was not for a moment entertained by our Founders, nor is it by those who idolize them today. With few exceptions, the Founders were Eighteenth Century patricians who took a revolutionary gamble meant chiefly to perpetuate their privileges, free from English colonial overlord-ship. It should come as no surprise these elitists drafted a Constitution that posed no threat to aristocracy.

‘Limited Government’ as Act of Faith

The original Constitution of the United States of America was just so much ink on paper. The Constitution, as it stands today, is just a lot more ink on paper.

But the Constitution’s ink is important and deserves respect because it represents nothing less than the collective civic conscience of the American people. A great many Americans have dedicated their lives in trust to that conscience on battlefields, in classrooms, in everyday civic life, and even a few in the halls of power.

It is evident that most of the Amendments to the original Constitution as well as the Supreme Court’s decisions interpreting its scope and purpose were made because the document had over the course of time been found wanting by the American people, whose common interests it was not originally intended to serve. As the collective civic conscience of the people changed, so too did their interpretation of self-government.

But the entire concept of social evolution (much less biological evolution) is something the ultra-Conservative rank-and-file likely does not comprehend and it is not something their leaders encourage them to consider. The reason for this may have less to do with politics than with fundamentalist faith.

An anecdote in point: the editor-in-chief at Random House once asked the extremist libertarian Ayn Rand if she would consider revising a passage in one of her manuscripts. She reportedly replied, “Would you consider revising the Bible?”

Ergo, that which is sacrosanct neither requires nor will tolerate change to include the fantasized “limited government” of the immortalized “Founding Fathers.” The fact that Rand was a noted atheist only underscores the point that fundamentalist faith is not restricted to any particular brand of fanaticism.

Yet the Constitution’s conception was anything but immaculate. It was not carted down from the Mount in tablets of stone, nor is it the product of some mysterious Natural Law interpretable only by libertarian gurus. And whether its meaning is best exemplified by the Tea Party flag depicting a talking snake (“Don’t Tread on Me”), perhaps only Eve could judge with authority.

The Constitution is not a holy book, and there is no good reason for anybody to treat it like one. The men who wrote it were not prophets, nor were they particularly virtuous, though some could turn a pretty phrase. In fact, the Constitution’s most unholy-book characteristic is its most welcomed attribute: its readers are not required to believe in its infallibility in order for it to make sense to them.

But we are required to read the Constitution if we want to know what it says. The ultra-conservatives’ obsession with a constitutionally “limited government,” which has never actually existed, suggests they do not understand the Constitution as much as they merely idolize it.

These constitutional fundamentalists along with the American public in general would do better to pick the document up and read it sometime, not fall on bended knee before it and expect the rest of us to follow their example.

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Gitmo’s Kafkaesque Kangaroo Courts

The Military Commissions for trying alleged al-Qaeda terrorists always had the risk of becoming Kafkaesque kangaroo courts with little credibility among people around the world, a danger that has become more and more acute as the process moves forward, Marjorie Cohn writes.

By Marjorie Cohn

It is a bedrock principle of our system of justice that everyone who is charged

with a crime is presumed innocent unless and until proven guilty. That includes “high-value detainees” awaiting trial in GuantÃ¡namo’s military commissions. Yet pre-trial hearings held June 17-21 in the cases of five men charged with planning the 9/11 attacks revealed a clear presumption of guilt on the part of the government.

Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak bin ‘Attash, Ramzi bin al Shaibah, Ammar al Baluch, and Mustafa Ahmed Adam al Hawsawi have been charged with crimes for which they could be sentenced to death. Regardless of the emotions surrounding the terrorist attacks, these defendants must be treated fairly, in accordance with the law.

The issues litigated in the hearings included undue influence exerted on the military commission by political leaders, defects in the charging process, government violation of the attorney-client privilege, the right of the accused to exculpatory evidence in the hands of the International Committee of the Red Cross, and the exclusion of the accused from some pre-trial hearings.

Judge James Pohl, who presides over these cases, took the motions under advisement. That means he postponed ruling on them until later. Although one defendant filed a motion to prevent the government from force-feeding him, that motion was not heard.

Defense attorneys argued that high government officials exerted undue influence on the charging of their clients. The Military Commissions Act (MCA) expressly prohibits “any person” from unlawfully influencing or coercing the action of a military commission. Yet top U.S. officials proclaimed the guilt of some of the defendants before they were charged and their cases set for trial in the military commissions.

President George W. Bush made more than 30 public statements directly implicating Khalid Shaikh Mohammad in the 9/11 attacks; some of Bush’s statements also named Ramzi bin al Shaibah and Mustafa Ahmed Adam al Hawsawi. Defense Secretary Donald Rumsfeld and White House Press Secretary Ari Fleischer made similar statements.

President Barack Obama, Vice President Joe Biden, and Attorney General Eric Holder referred to the defendants as “terrorists.” Holder named all five defendants as “9/11 conspirators.” Obama and White House Press Secretary Robert Gibbs specifically referred to Mohammad, as did Sens. John McCain, R-Arizona, and Lindsey Graham, R-South Carolina. The guilt of the defendants, all of whom face the death penalty, was pre-determined.

Defects in the charging process

Mohammed al Qahtani was charged in 2008 along with the five defendants in the present case. But Susan Crawford, the former Convening Authority (CA) – who decides whether and what to charge against defendants in military commissions – determined that al Qahtani's case should not be referred for prosecution. The CA found that "[w]e tortured [Mohammed al] Qahtani … His treatment met the legal definition of torture. And that's why I did not refer the case" for prosecution.

Torture of the present defendants may well have affected the decision to charge them as well, and particularly, whether to seek the death penalty (capital charges). CA Adm. Bruce MacDonald testified that a capital referral was not a foregone conclusion. But defense counsel were prevented from effectively developing that information.

The Sixth Amendment to the Constitution assures the right to effective assistance of counsel when the government is considering whether to pursue the death penalty. Yet the period preceding the formal charging of these defendants was replete with insurmountable obstacles to "learned counsel," making their assignment meaningless.

Under the MCA, defendants have the right to learned counsel, who are learned in applicable law relating to capital cases, to ensure defendants are effectively represented. But several roadblocks to their representation rendered their assignment mere window-dressing.

Learned counsel were denied timely security clearances, so they were unable to meet with their clients or read 1,500 pages of classified documents. The denial of access to the clients damaged the attorney-client relationship and prevented the defense from building rapport, which is essential in eliciting from the accused facts and circumstances that could lessen his culpability or establish actual innocence.

Because professionals known as "mitigation specialists" were also denied security clearances, they, too, could not meet with the accused to assist in the gathering of information the defense could submit to prevent their clients from being charged with the death penalty.

According to American Bar Association Guidelines, a mitigation specialist is considered: "an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have."

Furthermore, the accused were denied qualified and security-cleared translators, and one defendant had no case investigator until weeks before the charges were referred to the commission. Finally, there was a total obstruction of privileged

attorney-client communications.

Thus, counsel were stymied in their efforts to effectively communicate with their clients about their detention, interrogation and torture by the U.S. government, life history, current and past mental statuses, current location of their family, and the whereabouts of any educational, medical, or other records.

Violation of Attorney-Client Privilege

The attorney-client privilege is the oldest privilege for confidential communications in the common law. Yet defense attorneys are prevented from bringing written work product to client meetings without revealing the contents to the government, unless they are signed or written by the defense team. Counsel are forced to rely on their memories to discuss complex legal issues.

Because of the government's ongoing interference with the attorney-client privilege, bin 'Attash had not received written privileged communication from his defense counsel from October 2011 until May 2012, when counsel filed a motion barring invasion of attorney-client communications. This caused "profound damage to the relationship between Mr. bin 'Attash and his counsel."

In addition, prison authorities established a "privilege team" to screen items prisoners could have in their cells to prevent their possession of "informational contraband"(which is given such a broad definition it could include media reports on efforts to close GuantÃ¡namo). But the review team includes intelligence agents, and they need not keep the information confidential.

Lawyers are forbidden from talking about "historical perspectives or [having] discussions of jihadist activities" or "information about current or former detention personnel" with their clients. Thus, Mohammad's lawyer cannot ask his client why he may have plotted against the United States or who might have tortured him in the CIA black sites.

Al Baluchi's attorney is precluded from comparing his client's alleged role in the offense with conspirators in other acts of terrorism who have and have not faced the death penalty. This is a serious interference with the defendant's ability to present a defense.

Judge Pohl will likely issue new rules regarding attorney-client communications as early as this month.

Red Cross Material

The International Committee of the Red Cross (ICRC) is an independent, neutral

and impartial humanitarian organization. The Geneva Conventions contain a mandate for the ICRC to provide protection and assistance to victims of armed conflict and other situations of violence. ICRC's confidential information must be kept confidential.

All recipients of ICRC reports, including U.S. authorities, are obligated to protect and abide by ICRC's confidentiality. They are precluded from disclosing any confidential information in judicial or other legal proceedings.

Since 2002, the ICRC has visited detainees at GuantÃ¡namo. The ICRC engages in a confidential dialogue with the government about the conditions of confinement at GuantÃ¡namo. It also engages in confidential private interviews with detainees. The ICRC maintains its access, and its status of neutrality, because it guarantees confidentiality. But the ICRC can decide to turn over some of its material at its discretion.

The defense made a motion to compel the government to produce all correspondence between the ICRC and the Department of Defense regarding the conditions of confinement of the accused, including all ICRC reports, records and memoranda.

The prosecution argued "somewhat presumptuously" (in the ICRC's words) that it should be able to review all confidential ICRC material to determine what should be provided to the defense.

There is a tension between the ICRC's insistence on confidentiality, the government's security concerns and the defendants' right to exculpatory evidence under the Due Process Clause. The Supreme Court ruled in Brady v. Maryland that prosecutors must disclose materially exculpatory evidence in the government's possession to the defense. That includes any evidence that goes toward negating a defendant's guilt, that would reduce a defendant's potential sentence, or evidence bearing on the credibility of a witness.

Moreover, defense counsel argued that since this is a death case, there should be more favorable procedures for the defense. The prospect of an execution, without full disclosure of mitigating evidence, would shock a foreign government as much, if not more than, the provision of ICRC materials.

Excluding the Accused

Defense counsel objected to the exclusion of their clients during closed pretrial proceedings. The prosecution maintained that defendants must be excluded from hearings in which classified material is discussed.

The Military Commissions Act guarantees the right of the accused to be present at all hearings unless he is disruptive or during deliberations. The defense

argued that defendants should be allowed to attend hearings in which classified information is discussed, if the information came from the accused himself.

For example, Mohammad's attorney wants his client to be present when they discuss his torture. The government waterboarded Mohammad 183 times at the CIA black site. Hearings were held from which the accused were excluded.

Learned counsel for Hawsawi filed a motion to prevent the government from force-feeding his client, or in the alternative, to be notified in advance and given an opportunity to be heard before any force-feeding is employed. Hawsawi has been participating in the hunger strike at GuantÃ¡namo, but has not yet been force-fed.

His counsel argued that "Mr. Hawsawi has been peacefully protesting by refusing food, on and off, for months now. Given his slender build and already relatively low body weight, it is entirely plausible that forced feeding is imminent." This motion was not argued at the hearings because the judge found it premature, as Hawsawi is not being force-fed yet.

Of the 166 detainees remaining at GuantÃ¡namo, 104 are participating in the hunger strike, and 44 are being force-fed. The written procedures refer to force-feeding as "re-feeding." Although they contain a few redactions (material blacked out), the pages that describe the procedure for "re-feeding" are totally redacted.

In 2006, the United Nations Human Rights Commission concluded that the violent force-feeding of detainees at GuantÃ¡namo amounted to torture. The Obama administration is also violently force-feeding detainees. The Constitution Project's Task Force on Detainee Treatment found that "improper coercive involuntary feedings" were being undertaken with "physically forced nasogastric tube feedings of detainees who were completely restrained."

Boston University Professor George Annas, who co-authored a recent article in The New England Journal of Medicine, characterized the method of force-feeding being used on Democracy NOW!, as a "very violent type of force-feeding." The American Medical Association and the World Medical Association have declared that force-feeding should not be used on a prisoner who is competent to refuse food.

On May 1, 2013, the Office of the United Nations High Commissioner on Human Rights wrote to the US government:

"[I]t is unjustifiable to engage in forced feeding of individuals contrary to their informed and voluntary refusal of such a measure. Moreover, hunger strikers should be protected from all forms of coercion, even more so when this

is done through force and in some cases through physical violence.

“Health care personnel may not apply undue pressure of any sort on individuals who have opted for the extreme recourse of a hunger strike. Nor is it acceptable to use threats of forced feeding or other types of physical or psychological coercion against individuals who have voluntarily decided to go on a hunger strike.”

Four detainees filed a motion in a Washington D.C. federal court on June 30 to stop them from being force-fed and force-medicated with Reglan, a drug that can cause severe neurological disorders. Reprieve brought the motion on behalf of Shaker Aamer, Nabil Hadjarab, Ahmed Belbacha and Abu Wa’el Dhiab, all of whom have been cleared for release from Guantanamo.

Trials in these cases will not begin before 2015. President Obama should halt all military commission proceedings and announce that the trials will be held in federal civilian courts, which have shown they are more than capable of prosecuting terrorism cases.

As demonstrated in both this piece and the one I wrote about al Nashiri’s pretrial hearings, justice is impossible to achieve in military commissions, where guilt is a foregone conclusion.

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Another ‘War on Terror’ Casualty

Attorney Lynne Stewart aggressively defended alleged terrorists, making her a target of President George W. Bush’s “war on terror.” After 9/11, she was prosecuted for violating special security rules for dealing with a client and is now dying of cancer in federal prison, denied compassionate release, reports William Boardman.

By William Boardman

In the American justice system, even when a prisoner is not sentenced to be

executed, the bureaucrats of the U.S. Justice Department's Federal Bureau of Prisons still have extrajudicial ways of making sure a politically targeted prisoner will die in jail.

A recent example: Kathleen Kenney, general counsel for the Bureau of Prisons, informed the husband of Lynne Stewart, a 73-year old woman who is dying of cancer, that her request for "compassionate release" was denied because her "health is improving she does not present circumstances considered extraordinary and compelling at this time."

From her office in Washington D.C., Kenney countermanded the April 26 recommendation of the prison warden at the Carswell Federal Medical Center at the Naval Air Station in Fort Worth, Texas, that Stewart be released.

According to Ralph Poynter, Stewart's husband, writing at lynnestewart.org: "This claim [by Kenney] is at once cynical and false. Lynne Stewart's cancer continues to spread in her lungs. She remains in isolation as her white blood cell count remains so low that she is at risk for generalized infection. She weakens daily."

Lynne Stewart a mother, a grandmother, a great-grandmother, a librarian and a lawyer (until disbarred by her conviction) spent most of her 32-year professional life representing clients who might otherwise have been unprotected from the justice system. She has had cancer for several years. It has metastasized.

The United States case against her is also a cancer, and it too, metastasized. In the 1990s, Stewart represented Omar Abdel-Rahman, also known as "the blind sheikh," in his defense against terrorist conspiracy charges. Rahman was convicted in 1995 and is now serving a life sentence.

Stewart continued to represent him in appealing his conviction, but she agreed to follow "special administrative measures" imposed by the Justice Department. These measures are bureaucratically imposed conditions that, among other things, allowed the government to monitor Stewart and her client without regard to attorney-client privilege.

Stewart acknowledges she sometimes violated these special administrative measures, but the Clinton administration chose not to bring charges against her for those violations. However, in its deep panic of overreaction to 9/11, the Bush administration indicted Stewart in 2003. Those charges were dismissed.

Within months, the Bush administration re-indicted her, and publicly proclaimed her guilty. Attorney General John Ashcroft went on the David Letterman Show to announce the indictment, charging her before millions of viewers with conspiring

to provide material aid to terrorists. There was no one there to defend her. In ordinary circumstances, Ashcroft's behavior is a serious violation of legal ethics, but he was never sanctioned.

In 2005, after a nine-month trial, Stewart and two co-defendants were convicted. She faced a sentence of up to 30 years. She was already undergoing treatment for breast cancer. Judge John G. Koetl, saying he did not want to impose a death sentence, gave her 28 months. Stewart commented that she could do it standing on her head.

A Cousin of the President

Nevertheless, Stewart appealed the decision to the Second Circuit Court of Appeals in Manhattan, where one of the judges was related to President Bush. As the Center for Constitutional Rights reported it:

"Judge John Walker, George W. Bush's first cousin, sits on that court. His family made their fortune selling munitions during WWI. *He wrote that the 28 months was 'shockingly low.'*

"Judge Koeltl [had been] given his orders. The seemingly kindly boyish-looking jurist about whom it was said that he walks to work and looks after an elderly mother, not exactly a sadistic old lady killer, then reversed himself and *on the same evidence* nearly quadrupled the sentence, putting a seventy-year-old grandmother on chemotherapy away for ten years and two years' probation after that for good measure." [emphasis added]

Lynne Stewart, who has been a federal prisoner since Nov. 19, 2009, appealed again to the Second Circuit, which upheld her conviction and the re-sentencing that it had ordered. She has not appealed to the U.S. Supreme Court.

In April of this year, Chris Hedges wrote: "Lynne Stewart, in the vindictive and hysterical world of the war on terror, is one of its martyrs. A 73-year-old lawyer who spent her life defending the poor, the marginalized and the despised, including blind cleric Sheik Omar Abdel Rahman, she fell afoul of the state apparatus because she dared to demand justice rather than acquiesce to state sponsored witch hunts.

"And now, with stage 4 cancer that has metastasized, spreading to her lymph nodes, shoulder, bones and lungs, creating a grave threat to her life, she sits in a prison cell at the Federal Medical Center Carswell in Fort Worth, Texas, where she is serving a 10-year sentence. Stewart's family is pleading with the state for 'compassionate release' and numerous international human rights campaigners, including Archbishop Desmond Tutu, have signed a petition calling for her to be freed on medical grounds."

Showing Little Mercy

In November 2010, Human Rights Watch published a report, taking the U.S. to task for how seldom it grants any prisoner a compassionate release. Stewart asked for one anyway. The Bureau of Prisons showed her no compassion. Officially, and without credible explanation, the United States has expressed its preference to see a political prisoner suffer and die in prison, all because she didn't take the government's special administrative measures seriously enough.

This is the government we have now. There was a time when it was thought that justice should be done, *and* justice should be seen to be done. Now it's apparently good enough that what the government alleges to be justice just be seen to be done harshly. We're Americans, we don't do compassion.

Or as Fox News commentator Michelle Malkin, articulating state-assimilated heartlessness, put it in early April:

"The jihadists' favorite American lawyer, Lynne Stewart, reportedly has stage-4 breast cancer. Her radical friends, ranging from the 'Party for Socialism and Liberation' and 'Workers World' to Pete Seeger, Archbishop Desmond Tutu and convicted cop-killer Mumia Abu-Jamal, want her freed from jail. There's only one decent response to the Lynne Stewart Fan Club's criminal-coddling demand: No, hell, no."

This is not the way attorney Kenney would put it, surely. And it's not the way Attorney General Eric Holder would put it, or President Obama. But Malkin's voice is their voice all the same, praising official cruelty in a voice turned up to high screech.

That may be the dominant voice of our day, but it is not the only voice possible. Other possible voices include Lynne Stewart's on June 25, reacting to the denial of her compassionate release and telling her "friends, supporters, comrades" on her website: "I know we are all disappointed to the marrow of our bones and the depths of our hearts by the news that the Bureaucrats, Kafka like, have turned down my request for compassionate release.

"The letter from [attorney Kenney] is flawed, to put it mildly. Both factually and medically it has major problems. We intend to go to court and raise these in front of my sentencing Judge Koeltl. At the first sentencing he responded to a query by one of the lawyers that he didn't want me to die in prison, we'll see if he can now live up to that.

"In the meantime, once again, I grieve for my children and grandchildren who love me so much and had such great expectations of enjoying life together again in our beloved NYC and not just trying to, in the prison visiting room. My

Ralph, too, whose dedication and love are only exceeded by the work he does on my behalf, but he is a born fighter and although he hurts, it all comes more naturally to him."

"I have been fortunate to have lived a charmed life," she wrote from prison on a recent occasion, grateful for her parents, her children, her husband, and concluding:

"I have enjoyed good friends, loved cooking, had poetry and theater for a joy. I could go on and on BUT all of this good fortune has always meant only one thing to me, that I have to fight, struggle to make sure EVERYONE can have a life like mine. That belief is what will always sustain me."

William Boardman lives in Vermont, where he has produced political satire for public radio and served as a lay judge. [Reader Supported News is the publication of origin for this work.]