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## **Adhering to rule of law**

Nat Hentoff (Op-Ed)  
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The November 8 decision by Federal District Judge James Robertson to stop the military trial in Guantanamo Bay of prisoner Salim Ahmed Hamdan was based, he said, on the failure of the Bush administration to provide fair hearings for detainees there who are brought before military tribunals. Needed is a tribunal, he added, with the competence to decide whether such prisoners are entitled to be considered prisoners of war with legal protections under the Geneva Convention.

The president and his legal advisers have contended that these non-citizen Guantanamo Bay detainees are "enemy combatants," and therefore do not qualify for the protections accorded prisoners of war.

"The president is not a 'tribunal,'" said Judge Robertson cuttingly. "The government must convene a competent tribunal," which, for example, would assure that the prisoner can see all the evidence against him, and be in the courtroom during all proceedings.

The decision of the Washington-based jurist is being emphatically appealed by the government, and may well be finally decided by the Supreme Court. In June, the Supreme Court vigorously rebuked the president's claim that he had the unilateral authority to hold American citizens indefinitely and without charges as "enemy combatants." Said Justice Sandra Day O'Connor: "We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens." Judge Robertson, speaking similarly about the rights of non-citizen detainees at Guantanamo Bay, denied "the government's argument that the president has untrammelled power to establish military tribunals," as he and his legal advisers see fit.

George W. Bush, as any president, must stay within the rule of law.

Mr. Bush has too often been ill-served by his legal advisers, and not only with regard to the rights and non-rights of citizens and non-citizens and our courts. On Sept. 28, U.S. District Judge Victor Marrero declared unconstitutional Section 505 of John Ashcroft's cherished Patriot Act, which the president insists must be kept intact despite its "sunset clause" that permits Congress to review sections of it by December of next year.

Section 505 greatly expanded the government's use of National Security Letters that allow the FBI to obtain personal information about those connected to telephone companies and Internet service providers without obtaining any judicial approval. For one of many examples, the judge noted, "the FBI could use a National Security Letter to discern the identity of someone whose anonymous Web log, or blog, is critical of the government." Then there were the memoranda rationalizing the use of torture of non-citizen detainees and how to evade the Geneva Convention that came from Ashcroft's Justice Department and other government lawyers, including White House counsel and possible future Attorney General Alberto Gonzales. These memos are shown, dated and in sequence, in a valuable new book, "Torture and Truth: America, Abu Ghraib And The War on Terror" by Mark Danner (published by New York Review Books).

As for torture, there is former Deputy Assistant Attorney General John Yoo writing to Ashcroft; and an astonishingly detained letter on permissible torture written to Gonzales by former Assistant Attorney General Jay S. Bybee (now a judge on the 9th Circuit Court of Appeals).

Some of these memoranda were later repudiated by the administration but, as Abu Ghraib demonstrated, they had an effect, and may well have influenced treatment of prisoners in secret CIA interrogation centers elsewhere.

Human Rights First (formerly Lawyers Committee for Human Rights) has published an article, "Whom Do Government Lawyers Serve?" by Philip Lacovara, who was counsel to Watergate special prosecutors Archibald Cox and Leon Jaworski. "Watergate", he writes, "was all about establishing that even the highest officials are bound by the rules of law, even when they find those rules inconvenient." The same allegiance to the rule of law surely also applies to the lawyers who advise the highest officials of the present government. In his second term, President Bush should consider evaluating the ethical standards of the legal advice he gets from the White House Counsel and the Departments of Justice, Defense and Homeland Security.

There are lawyers outside the government with the track record to tell the president how to do that. When he leaves office, among his achievements, I believe, will be enabling Iraq to be free of the horrors of Saddam Hussein. But the president's record on adhering to the law of the Constitution will be far from resplendent. Since there is time for improvement, he ought to think about remedying that.