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OP-ED COLUMNIST

## Leading to Low Ground

By BOB HERBERT

“We are different from our enemy and we must remain so.”

— Elisa Massimino

The United States had complete command of the moral and ethical high ground in the immediate aftermath of Sept. 11, 2001. Most of the world was with us.

For some reason, the Bush administration deliberately abandoned those heights to pursue policies that were not just morally questionable, but reprehensible. Administration officials have fought like tigers to retain the right to torture. They have imprisoned people willy-nilly, without regard to whether they had actually committed offenses against the United States. They set up a system of kangaroo courts at Guantánamo Bay, Cuba, that was such an affront to the idea of justice that it should have sent shudders of shame down the spines of decent Americans.

In fact, most Americans never bothered to notice.

The administration’s descent into barbarism hit a speed bump last month when the Supreme Court ruled that the kangaroo courts, otherwise known as military commissions, were an unmitigated outrage. They were patently illegal. They had not been authorized by Congress. They violated the Geneva Conventions. They stomped all over the rights of the defendant.

The inquisitors of the Middle Ages would have smiled knowingly at Guantánamo.

Elisa Massimino is the Washington director of Human Rights First. She testified yesterday before the Senate Armed Services Committee, which has held hearings as part of the effort by Congress and the White House to come up with a system for trying prisoners at Guantánamo that would replace the outlawed commissions.

“Part of the problem,” she told me in an interview, “is that we’ve got these detainees in custody, and the rhetoric about them for four years now has been so elevated that people want to create a system that will guarantee their conviction. But that’s not worthy of this country. That’s not how justice is done. That may be how other countries do it, but that’s never been how we’ve done it.”

In her testimony, Ms. Massimino discussed some of the requirements of the Supreme Court ruling. Among other things, she said, “We cannot have rules permitting one person or branch of government to

be the judge, jury and prosecutor.” She said, “Defendants must have the right to be present at trial.” She said, “A defendant must have the right to know the evidence being used against him, to respond to it, and to challenge its credibility or authenticity.”

Americans are used to taking these sorts of things for granted. How is it possible that the president of the United States could set up a system in which these kinds of fundamental rights were held in complete contempt?

But there’s more. The administration was not satisfied with rigging the system against the defendant. As she continued discussing the requirements of the Supreme Court ruling, Ms. Massimino said: “Testimony cannot be compelled. ... This means not only that a person cannot be forced to testify, but also that information or witness statements obtained through torture, cruelty or other coercion cannot be used as evidence.”

That rumbling you hear is the sound of the founding fathers spinning in their graves. Incredibly, under the trials originally authorized by President Bush, prosecutors would have been allowed to introduce evidence obtained through torture and other forms of coercion. The Bush administration didn’t just leave the moral and ethical high ground. It sped away with great enthusiasm.

What is interesting is the common ground on this issue that is being found by human rights groups and the highest-ranking lawyers of America’s armed forces. Testifying last week before the same committee that Ms. Massimino addressed yesterday, top lawyers from the Army, Navy, Air Force and Marines all endorsed proceedings that would give more rights and protections to detainees than the administration had been willing to give.

In her testimony, Ms. Massimino urged the committee to use the existing Uniform Code of Military Justice as the basic system for trying detainees. In his appearance before the committee last week, Brig. Gen. Kevin Sandkuhler, the top lawyer for the Marines, described that code as “the gold standard.” After a while you get the sense that real progress could be made, if only the Bush administration would get out of the way.