US defends “evidence” obtained through torture at hearing for Guantanamo prisoners

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11 January 2005

At his confirmation hearing before the US Senate Judiciary Committee on January 5, Alberto Gonzalez, chief legal counsel to President Bush and his nominee for attorney general, purported to express abhorrence of torture. A few days earlier, the Department of Justice trotted out a new legal opinion claiming the government would continue to honor US and international legal prohibitions on torture. This new opinion departed from the 2002 position of the Justice Department, solicited by Gonzalez, that the president, in time of war, could ignore such restrictions.

The actual position of the US government on the subject of torture was on display the previous month during hearings in federal court on habeas corpus actions brought by 54 prisoners at the US military base in Guantanamo Bay, Cuba. The prisoners are challenging their continued detention after three years without charges or trial.

The government’s position at these hearings was that evidence obtained by means of torture can be used in determining whether to detain a foreign suspect indefinitely as an “enemy combatant” in the “war on terror.”

Last June, the US Supreme Court in the *Rasul* case ruled that the detainees were entitled to some judicial process to challenge their detention. But in the *Hamdi* case decided at the same time, the Court suggested a military tribunal might be sufficient to determine whether a US citizen may be held as an enemy combatant.

In response to these decisions, the US military set up combatant status review tribunals for the Guantanamo detainees. In those proceedings, three colonels preside and decide the government’s claim that detainees are members or supporters of Al Qaeda, the Taliban or other “terrorist” groups.

The detainees are not permitted access to lawyers in the status review tribunals. The government also refuses to reveal to detainees evidence against them it considers secret.

There are over 550 detainees at Guantanamo. As of December 2004, at least 450 had had their status reviewed. Only one was found not to be an enemy combatant and freed.

The Supreme Court’s June decisions left unclear to what extent normal guarantees of due process would be required in proceedings to determine the status of the detainees. In their habeas actions, pending in Washington DC, the detainees argue that the review tribunals have failed to provide a meaningful opportunity to challenge the government’s classification of them as enemy combatants. The government disagrees, seeking to dismiss the detainees’ suits.

Lawyers for some of the detainees have argued that their clients were detained mainly on the basis of statements obtained from them or others by torture. At a hearing on December 1, US District Judge Richard J. Leon asked the government’s lawyer whether a detention based solely on evidence obtained by torture would be illegal, because, in the judge’s words, “torture is illegal. We all know that.”

Principal Deputy Associate Attorney General Brian Boyle responded that if a status review tribunal determines that such evidence is nevertheless reliable, “nothing in the due process clause (of the Constitution) prohibits them from relying on it.”

Judge Leon then asked whether there were any limitations on the use of evidence obtained through torture. Boyle said that the US would never implement a policy that would ban using information gathered by torture carried out by a foreign power.

In other words, the US can turn over alleged terrorists to repressive foreign governments to be tortured, and then feel free to use the tainted results thus obtained. It is well known that the CIA has used other governments to detain and interrogate hundreds of detainees in this fashion.

This exchange reveals the real attitude of the Bush administration to torture.

In his exchange with Judge Leon, Boyle claimed torture was against US policy, and that allegations of torture would be forwarded through command channels. Boyle further asserted that nothing "remotely like torture has occurred at Guantanamo." But two days earlier, the International Committee of the Red Cross said it had provided a confidential report to the Bush administration describing the physical and psychological coercion at Guantanamo as "tantamount to torture." The American Civil Liberties Union has since obtained documents confirming these charges.

Statements given under torture have not been admissible as evidence in US courts for over 70 years. Originally, courts reasoned that such evidence was highly unreliable, since tortured persons will often say anything to alleviate their suffering. Later, the US Supreme Court issued rulings based on the unacceptability of the brutality and lack of fairness in the extraction of such statements, and affirming the principle that confessions are of value only if uncoerced.

Boyle's statements reveal just how far the US government has gone in rejecting longstanding guarantees against arbitrary confinement. He underscored this position in a similar hearing held on November 30 before US District Judge Joyce Hens Green, who is handling the bulk of the law suits filed by the Guantanamo detainees. Boyle argued that the detainees "have no constitutional rights enforceable in this court." That statement amounts to a rejection of the ruling of the Supreme Court in June in *Rasul*. It shows that the executive branch of the government refuses to be bound by rulings on constitutional questions by the judicial branch.

Michael Ratner, a prominent human rights lawyer with the New York-based Center for Constitutional Rights, immediately reacted to Boyle's statements: "Never in my 30 years of being a human rights lawyer would I have ever expected to be in the state we've arrived at now."

The enemy combatant status itself is a suspect and nebulous classification concocted by the Bush administration, spearheaded by Gonzalez, in keeping with its refusal to recognize the application of the guarantees of the Geneva Conventions and other international treaties that protect human rights. The government asserts the right to detain any foreign person indefinitely, whether or not that person has been involved in hostile action against the US, or even is claimed to pose a threat to US interests.

At the November 30 hearing, Judge Green expressed skepticism about the absence of meaningful limits on the definition of an enemy combatant. She asked Boyle, "If a little old lady in Switzerland writes checks to what she thinks is a charitable organization for Afghanistan orphans, but it's really supporting . . . Al Qaeda, is she an enemy combatant?" Boyle responded in the affirmative. In other words, the longstanding legal requirement of wrongful intent in committing an offense is no longer required to incarcerate someone.

In response to another hypothetical question from Judge Green, Boyle asserted the military could imprison a Muslim teacher merely because his class included a member of a family with Taliban connections. Boyle also asserted the government could detain a man who did not report his suspicions that his cousin might be an Al Qaeda member. Judge Green pointed out that the Supreme Court in *Rasul* authorized the military to detain people only for the express purpose of preventing their return to the battlefield and preventing them from continuing to wage war. Regarding Guantanamo prisoners acknowledged by the government to have been arrested or seized in Britain, Bosnia or Zambia, Green queried, "What's the purpose of detaining someone who never came within 1,000 miles of a battlefield? What, quote, 'battlefield' is the United States trying to prevent the detainees from returning to? Back to Africa? Back to London? Back to some acreage of land somewhere?" Boyle responded that the boundaries of a war on terrorism are unlimited.

The consistent thread through all of the executive branch's arguments is its continuing assertion that it is the ultimate arbiter of issues normally determined by the judicial branch of government; that its decision to label someone a terrorist and incarcerate him indefinitely should not be subject to judicial scrutiny. This, in effect, tosses out limits on arbitrary confinement by the sovereign that date back to the Magna Carta.