Obama and Guantánamo

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During his presidential campaign, Barack Obama pledged to close the infamous prison at Guantánamo Bay, Cuba and try detainees charged with crimes in American courts rather than in military commissions. Obama reiterated his intention to close Guantánamo in an appearance on the "60 Minutes" television program last Sunday, but he and his spokespeople have been less than forthcoming about what will be done with the 250 prisoners still housed at the prison.

Around 80 of them have been deemed eligible for trial under the military commissions established by the US Congress in the 2006 Military Commissions Act. Some 125 prisoners fall into a no-man's land—they are considered too dangerous to release but not guilty enough to prosecute. The remaining 50 or so have been cleared for release or transfer, but in many cases returning them to their home countries may subject them to further incarceration or torture.

An article appearing in the November 14 *New York Times* reported that within the Obama camp there is an intense debate on these matters. According to the *Times*, "people with ties to the Obama transition team say [what] is worrying them most: What if some detainees are acquitted or cannot be prosecuted at all?"

This is a reference to those whose prosecutions are irretrievably tainted by alleged confessions or testimony obtained through torture or other coercive means, or regarding whom specific evidence of war crimes is otherwise sorely lacking.

According to the *Times*, "even some liberals" are pushing the new administration to seek congressional authority for preventive detention of terrorism suspects deemed too dangerous to release, even if they cannot be successfully prosecuted. The *Times* quotes Ken Gude, a national security scholar at the liberal Center for American Progress, who says that the introduction of preventive detention and other issues related to the handling of alleged terrorist detainees and terrorist suspects has inspired "a very hot and serious debate."

A new law authorizing preventive detentions would be fully in line with Bush administration policy and practice. In July Bush's attorney general, Michael Mukasey, called on Congress to pass a new law reaffirming that the US remains in a state of "armed conflict," and that for the duration of that conflict the president may detain as enemy combatants those who have "engaged in hostilities or purposefully supported Al Qaeda, the Taliban and associated organizations."

In 2004, the US Supreme Court accepted the Bush administration's assertion of the power to detain so-called "enemy combatants." The ruling, which accepted as legitimate a "war on terror" with no limits as to time or geography and never formally declared by Congress, cited international laws of war that uphold the authority to governments to hold captured enemy fighters until the completion of a conflict. But the court at that time rejected the Bush administration's attempt to deny detainees the right under the Geneva Conventions to appear before a tribunal to challenge the classification.

The US Congress twice passed laws revoking the authority of American courts to hear habeas corpus challenges to government detention filed by alleged enemy combatants. But in 2007 the Supreme Court ruled that detainees had a constitutional right to a habeas corpus challenge to an enemy combatant status determination, and that the Combatant Status Review Tribunals (CSRTs) set up by the US military to make such determinations were insufficient for due process purposes.

In practice, the CSRTs had prevented detainees from gaining access to lawyers and deprived them of an opportunity to present evidence or witnesses in their defense or to see or hear classified evidence against them. In 2007, US intelligence veteran Lt. Col. Stephen Abraham, who worked on the tribunals, denounced them as nothing more than a front to rubber-stamp the military's prior designation of detainees as enemy combatants.

The overwhelming majority of detainees had been brought in as a result of bounties paid by the US military in Afghanistan and Pakistan. Many had no Taliban or Al Qaeda connection at all, or had only tangential connections.

After several detainees were found not to be enemy combatants, the military eliminated that innocence option and began requiring the term "no longer an enemy combatant" for those held for no apparent reason. Annual Administrative Review Boards (ARBs), the successors to the CSRTs, whose stated aim was to determine whether the prisoners still constituted a threat to the US, rapidly dispensed with the claim that prisoners were "no longer enemy combatants."

According to British journalist Andy Worthington, who has carefully followed Guántanamo developments, of 207 prisoners approved to leave Guantánamo after the first three rounds of the ARBs, only 14 were regarded as "no longer enemy combatants." The rest were still explicitly regarded as "enemy combatants" who were approved only for transfer from Guantánamo—to continued custody in their home country or a third country.

In voting against the 2006 Military Commissions Act, Senator Obama told Congress that it did not allow detainees a fair opportunity to prove their innocence and did not develop a system of justice to sort

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out suspected terrorists from those accidentally accused. He stated at the time: “We have a bill that gives the terrorist mastermind of 9/11 his day in a [military commission] court, but not the innocent people we may have accidentally rounded up and mistaken for terrorists—people who may stay in prison for the rest of their lives.”

But Obama’s transition team is now considering a law to grant statutory authority to detain persons indefinitely through an unspecified review process.

The short rejoinder to any attempt to authorize indefinite detention by law is that after upwards of seven years of detention, if someone cannot be proven guilty of actual terrorism or other criminal acts by means consistent with basic due process, there is no legal justification to detain him further.

In July Attorney General Mukasey also asked Congress for a law that would funnel detainee habeas corpus challenges into a special court that would, among other things, bar bringing detainees into US courtrooms for hearings and shield classified evidence from the detainee and his counsel. Such an approach could also conceivably include placing the burden of proving innocence on the detainee rather than the government, and curtailment of the right to appeal. The behind-the-scenes discussion in Obama’s transition team is likely exploring similar approaches.

While the military commissions have been so widely discredited that Obama may feel impelled to junk them in order to curry favor with international opinion, it is likely that an alternative special court is being considered to try such charges. That is an approach Attorney General Mukasey floated during his Senate confirmation hearings last year.

Raised here is a serious threat—the establishment of a parallel court system, a national security court, where normal constitutional guarantees are denied in the interests of government secrecy and the so-called “war on terror.”

In practice, military commission prosecutions thus far have proven to be a fiasco for the government. In the first case brought to trial this summer, a military jury acquitted Osama Bin Laden’s driver Salim Ahmed Hamdan of a conspiracy charge, instead convicting him of a lesser charge of supporting terrorism. The jury handed out a five-and-a-half-year sentence rather than the 30 years the government prosecutor requested, with credit for the five years he has already been detained. That prompted the Defense Department to threaten to continue to hold Hamdan as an enemy combatant after his sentence was served.

The second trial, of alleged Bin Laden bodyguard and video propagandist Ali Hamza al-Bahlul, resulted in a life sentence in October. But the entire case rested solely on prosecution evidence, since al-Bahlul sat silently in protest. His appointed lawyer, Maj. David Frakt, was bound by ethical requirements to honor his client’s wishes, so he also refrained from participating at trial. The jury never heard the defendant’s allegations that he had been tortured, nor his counsel’s contention that al-Bahlul was not an operational combatant and had no role in planning or carrying out terrorist activities.

A year ago, chief prosecutor Colonel Morris Davis resigned because he concluded that “full, fair and open trials were not possible” under the deeply politicized system in place. Lt. Col. Darrel Vandeveld, the prosecutor in the case of Afghani Mohamed Jawad, who claims his confession to throwing a grenade at two US soldiers when he was a juvenile was extracted through torture, also recently resigned. Vandeveld blistered the system as one designed to prevent disclosure of essential defense evidence.

In Jawad’s case, this included suppression of evidence that Jawad was drugged before the attack and that two other men had confessed to the act. To avoid further charges from Vandeveld, the government then dropped charges against five other prisoners he was prosecuting.

Other incidents have further laid bare the farcical nature of the military commission proceedings. In the case of Canadian Omar Khadr, the Pentagon removed the trial judge because he had made rulings favorable to the defense. Air Force Brig. General Thomas Hartmann, the legal advisor to Susan Crawford, the Defense Department appointee overseeing the military commissions, was “reassigned” after three military judges removed him from any role in the Hamdan, Jawad and Khadr cases due to his naked pro-prosecution basis.

Hartmann is now subject to investigations by the Air Force and the Defense Department’s Office of the Inspector General for trying to ram trials though on absurdly short time frames and for pushing the use of evidence obtained through torture over objections from prosecutors.

The list could go on.

The procedures Congress enacted in 2006 for conducting the prosecutions further lay bare the absence of fundamental guarantees of fairness. These include restrictions on public access to the trial proceedings and defense access to allegedly sensitive evidence and witnesses, and the discretionary use of coerced and hearsay testimony.

It is not unlikely that the Obama administration will take steps to rehabilitate the commission process in the eyes of the world. But those with illusions that he intends to repeal the Military Commissions Act outright or to give all the accused the full panoply of rights accorded criminal defendants in regular American courts are likely to be badly disappointed.

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