Obama claims right to imprison "combatants" acquitted at trial

Bill Van Auken
10 July 2009

In testimony before the US Senate Tuesday, legal representatives of the Obama administration not only defended the system of kangaroo military tribunals set up under Bush, but affirmed the government's right to continue imprisoning detainees indefinitely, even if they are tried and acquitted on allegations of terror-related crimes.

This assertion of sweeping, extra-constitutional powers is only the latest in a long series of decisions by the Democratic administration demonstrating its essential continuity with the Bush White House on questions of militarism and attacks on democratic rights.

The testimony, given to the Senate Armed Services Committee by the top lawyer for the Pentagon and the head of the Justice Department's National Security Division, came in the context of a congressional bid to reconfigure the military tribunal system set up under the Bush administration.

In 2006, Congress passed the Military Commissions Act in an attempt to lend legal cover to the system of drumhead courts set up to try so-called "enemy combatants," which had been found unconstitutional by the US Supreme Court. The high court subsequently ruled against the congressionally revised system as well.

This latest effort, like the one carried out three years ago, is aimed at fending off successful court challenges to the system. The Senate Armed Services Committee introduced new military commission legislation last month as part of the 2010 military spending bill.

As the committee's Democratic chairman, Carl Levin of Michigan, put it, the aim was to "substitute new procedures and language" that would "restore confidence in military commissions."

As the administration's lawyers made clear, however, any changes will amount to mere window dressing in an Orwellian system where the government decides who is entitled to trial, whether defendants are brought before military or civilian courts, and even whether or not to free those who are found not guilty.

The Justice Department attorney, David Kris, told the Senate panel that civilian and military prosecutors are still debating whether scores of detainees who have been marked for trial will be brought before a military tribunal or a civilian court.

"This is a fact-intensive judgment that requires a careful assessment of all the evidence," Kris said. He acknowledged that some form of trial was preferable to simply continuing to hold the detainees as "unlawful combatants."

What is clear, however, is that this "fact intensive" process is aimed at determining which detainees can be convicted in a civilian court, which of them must be sent to military tribunals because of the weakness of the evidence against them, and which will simply be held without trial because there is no evidence that would stand up in either venue. In such a system, all must be found guilty—the only question is by what means.

Undoubtedly another major concern is keeping out of open court cases which could make public the heinous crimes carried out by the US military and intelligence apparatus in the "war on terror," including acts of "extraordinary rendition," torture and murder.

The Obama White House has repeatedly demonstrated its determination to cover up these crimes, including by defying a court order to release Pentagon torture photos and the Justice Department's attempts to quash legal challenges to the criminal practices of the Bush administration, including rendition, torture and illegal domestic spying.

Appearing with Kris was Jeh Johnson, the chief lawyer of the Defense Department, who made the case for the president's supposed power to continue holding detainees without bringing them before any court and to throw men acquitted back into prison without new charges or trials.

"There will be at the end of this review a category of people that we in the administration believe must be retained for reasons of public safety and national security," Johnson said. "And they're not necessarily people that we'll prosecute."

He continued: "The question of what happens if there's an acquittal is an interesting question—we talk about that often within the administration. If, for some reason, he's not convicted for a lengthy prison sentence, then, as a matter of legal authority, I think it's our view that we would have the ability to detain that person."

Johnson indicated that such extraordinary powers—which continue the Bush administration's repudiation of habeas corpus, the bedrock right to challenge unlawful imprisonment—stemmed from the 2001 Authorization for the Use of Military Force passed in the wake of the September 11 terrorist attacks. This is the same all-purpose legal pretext used by the Bush administration to justify unconstitutional measures.

One member of Congress accurately described as "show trials" a system in which prosecutions are carried out in civilian or military courts based on where they are assured convictions, and, in the

unlikely event that a defendant manages to escape conviction, he can be sent back to jail anyway.

"What bothers me is that they seem to be saying, 'Some people we have good enough evidence against, so we'll give them a fair trial,'" Representative Jerrold Nadler (Democrat of New York) told the *Wall Street Journal*. He continued: "Some people the evidence is not so good, so we'll give them a less fair trial. We'll give them just enough due process to ensure a conviction because we know they're guilty. That's not a fair trial, that's a show trial." Nadler chairs a House Judiciary subcommittee which held a hearing Wednesday on military commissions.

In his testimony, Kris of the Justice Department acknowledged that there are "serious questions" about whether charges of "material support for terrorism" can be brought before a military tribunal, which, according to Obama, will exist solely to prosecute violations of the laws of war.

But Kris made it clear that the administration's lawyers had determined that the "material support" charge could be brought before military commissions, and, in most cases, lumped together with conspiracy charges that would help convictions stand up on appeal.

The point was a significant one, as the great majority of those held at the US Navy prison in Guantanamo Bay, Cuba—as well as the thousands more who have been thrown into military prisons in Iraq and Afghanistan as well as CIA "black sites" around the world—have not been accused of any specific terrorist act. Rather, with little or no evidence, they are charged with support for or association with terrorists.

"Material support for terrorism" has also been the principal charge figuring in a succession of frame-up trials in the US itself, where dozens of individuals have been ensnared by government agent provocateurs in FBI "terror plot" sting operations.

The Pentagon and Justice Department lawyers claimed that both the administration and the Senate panel were on the same page in barring the use of confessions extracted under torture to convict those brought before military tribunals. However, differences emerged between the Justice Department lawyer Kris and a top uniformed legal official who also testified.

While Kris warned that the use of "involuntary" confessions could lead to convictions being overturned on appeal, Vice Admiral Bruce MacDonald, the navy's judge advocate general, argued that a military judge should be able to evaluate the "reliability" of "coerced statements" in deciding whether they can be introduced as evidence.

The administration's lawyers also backed the provision in the legislation passed by the Senate panel that allows the use of hearsay evidence, which would be excluded from a civilian court. As Kris put it, the use of such evidence is necessary "given the unique circumstances of military and intelligence operations."

The testimony of the Pentagon lawyer, Jeh Johnson, also further called into question Obama's pledge to close down the Guantanamo prison by January 22, 2010. He allowed that many of the cases would not be ready by next January and declined to state where the military tribunals would be held, saying the administration was considering "various options." Earlier this year, Congress blocked funding for transferring detainees to the US.

Testifying before a House panel Wednesday, a former Guantanamo prosecutor delivered a scathing indictment of the military tribunal system, including in the revamped form proposed by the Obama administration.

Lt. Col. Darrel Vandeveld, appearing before a House Judiciary subcommittee, said that he was the seventh Guantanamo military prosecutor to resign because he could not "ethically or legally prosecute the defendant within the military commission system."

The Senate legislation, he charged, left in place a system that is "illegal and unconstitutional," serving to "undermine the fundamental values of justice and liberty."

Describing himself as having gone to Guantanamo as a "true believer," Vandeveld said his view was radically changed by the case of the young Afghan he was assigned to prosecute, Mohammed Jawad.

He described the basic elements of the case brought against Jawad, who may have been as young as 12 when captured by US troops in Afghanistan: "a confession obtained through torture, two suicide attempts by the accused, abusive interrogations, the withholding of exculpatory evidence from the defense, judicial incompetence, and ugly attempts to cover up the failures of an irretrievably broken system."

The Obama administration continues to hold the youth, who has faced imprisonment, torture and abuse for nearly seven years, on the basis of the confession extracted under torture.

What becomes increasingly evident is that the current administration is maintaining and expanding the police-state infrastructure created by its predecessor, with the phony claims of revived "due process" serving only to give this extra-legal system a veneer of legitimacy.

This system will not only affect the 229 detainees held at Guantanamo—though this is no small question, given that innocent men have been imprisoned and tortured there for seven years. It will be in place to deal with future detainees abducted by the US military and the CIA around the world, as well as anyone whom the president of the United States—whether Obama or his successors—deems a threat to national security, including American citizens.

Should such an "enemy combatant" prove his innocence in court, no matter! The all-powerful president can simply ignore the verdict and continue imprisoning him anyway. This is a textbook definition of dictatorship.