

Obama administration to step up prosecutions in Guantánamo tribunals

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The Obama administration is preparing to bring a number of detainees at the US prison in Guantánamo Bay, Cuba, before military tribunals, while formally subjecting others to indefinite and arbitrary detention without trial, according to a report published in the *New York Times* Thursday.

According to the *Times*: “Defense Secretary Robert M. Gates is expected to soon lift an order blocking the initiation of new cases against detainees, which he imposed on the day of President Obama’s inauguration. That would clear the way for tribunal officials, for the first time under the Obama administration, to initiate new charges against detainees.”

Last May, the Obama administration allowed the tribunals to resume prosecution in 13 cases that were already under way when a January 20 executive order suspended the process. Despite a few cosmetic changes in their rules and procedures, these tribunals remain extra-legal bodies that are designed to deny defendants both constitutional rights under US law and the rights of prisoners of war under the Geneva Conventions.

Among those who are now reportedly to be brought before the military-run kangaroo courts is Abd al Rahm Nashiri, the alleged organizer of the 2000 suicide bombing of the US Navy destroyer the USS Cole.

He would be the first of the so-called “high-value detainees” held for extended periods in secret prisons by the CIA. Nashiri’s case poses a number of problems. First, he was subjected to sustained and extensive torture after being captured by the CIA in 2002. He was one of the last of the terror suspects whose waterboarding and other torture was videotaped by the CIA. After a tortured detainee died in Iraq, the agency determined that such tapes could become evidence in criminal proceedings against its torturers and stopped the practice. In 2005, the existing tapes were destroyed.

In addition to waterboarding, Nashiri was subjected to mock executions and threatened with a power drill. These methods induced him to confess not only to the Cole attack, but to a number of other things that were patently false, including his supposed knowledge that Osama bin Laden

possessed a nuclear weapon.

Another issue in his prosecution before a military tribunal is the fact that his alleged offense was committed before September 11, 2001 and the congressional resolution authorizing the use of military force against those deemed responsible for the terrorist attacks on New York and Washington. The Bush administration’s claim to ostensible legitimacy for the military tribunals—rejected by the US Supreme Court in 2006—is that they were created under the authority of the congressional resolution to deal with alleged war crimes carried out under conditions of the “global war on terrorism” begun in the wake of the attacks. Congress then passed legislation explicitly authorizing the so-called military commissions.

While the Cole bombing was initially treated as a terrorist crime to be pursued by prosecution in civilian courts, the government now claims that it was an act of war, based on the theory that Osama bin Laden had declared war on the US in a *fatwa* he issued in 1996.

Two of Nashiri’s alleged co-conspirators were indicted in a federal civilian court in 2003. Nashiri’s military lawyer, Navy Lt. Cmdr. Stephen Reyes, charged that “Nashiri is being prosecuted at the commissions because of the torture issue,” which prevents the government from bringing his case to federal court as it did with the other defendants.

The military tribunals also grant the prosecution the ability to utilize hearsay evidence that would be thrown out of a civilian court.

While the Obama administration has supposedly barred the use of confessions extracted under torture, it is expected that military prosecutors will be able to exploit loopholes allowing them to do just that.

According to the *Times*, also slated for new cases before the military tribunals are Ahmed al-Darbi, a Saudi charged in a plot to bomb oil tankers that was never carried out, and Obaydullah, an Afghan accused of hiding bombs.

While stepping up the prosecutions before the military tribunals, the Obama administration is also set to issue an executive order that will explicitly authorize the detention

without charges of at least 50 detainees held at Guantánamo. In an attempt to lend this illegal practice a phony veneer of due process, the Obama administration is creating a system to give the cases of these men jailed without charges or trials a “periodic review.” These prisoners cannot be brought before military tribunals, much less civilian courts, because the only evidence against them consists of confessions extracted through torture.

The executive order creating this pseudo-legal fig leaf, which the *New York Times* likened to a “parole board” (a body which considers cases only after a defendant has been convicted of a crime), will mark a further institutionalization of detention without trial and a direct assertion of the president’s power to lock up anyone indefinitely on his sole say-so that the individual is a “terror suspect.”

The American Civil Liberties Union denounced the plan to step up prosecutions before the military commissions. “Trying Guantánamo detainees in a system that is designed to ensure convictions, not fair trials, strikes a major blow to any efforts to restore the rule of law,” said the ACLU. The organization charged that the commissions “are being used as a forum to hide the use of torture and base convictions on evidence that would be too untrustworthy to be admitted in any real court.”

At total of 173 men remain detained at Guantánamo, many of them for the better part of a decade. Only three of them have been convicted of war crimes in the military’s drumhead tribunals.

This Saturday will mark the second anniversary of Obama’s signing of an executive order to close Guantánamo. Issued amid great fanfare during his first days in office, the order was meant to dispel Washington’s image as an international pariah, infamous for torture, extraordinary rendition and contempt for international law, all of which were symbolized by the infamous detention camp at Guantánamo. Obama promised that the prison would be closed before the end of his first year in office.

Two years later, Obama’s executive order has become a dead letter. Earlier this month, the president signed into law a \$725 billion Pentagon appropriations bill funding the wars in Iraq and Afghanistan that included measures, passed by the then-Democratic-led Congress, that effectively ensure Guantánamo’s continued operation.

These included a provision barring the military’s use of funding to transfer detainees from Guantánamo to the US and restrictions on transferring detainees to any other countries.

This effectively stymied the Obama administration’s plans to open a “Guantánamo north” at a prison facility located in Illinois. This proposal served to expose the proposed closure of the prison camp in Cuba as an empty gesture. Its real

effect would have been to further legitimize arbitrary detention by bringing the practice onto US soil.

Obama could have vetoed the bill. Or he could have done as his predecessor George W. Bush did repeatedly—implement it while issuing a signing statement making clear that he considered the attempt by Congress to abridge his executive power unconstitutional, and ignore the restrictions.

The Democratic president has done neither because he has adopted and deepened the anti-democratic “war on terrorism” agenda of the Bush administration and has no intention of conducting a political battle over what his administration has always viewed as the largely symbolic issue of Guantánamo.

In an interview broadcast on NBC television this week, Obama earned backhanded praise for this policy from former Vice President Dick Cheney.

In March 2009, Cheney and Obama engaged in what amounted to an extraordinary public debate in the form of dueling speeches, delivered the same day, on the “war on terror,” torture and Guantánamo. At that time, Obama declared his commitment to “the rule of law and due process,” which, he charged, the previous administration’s policies had undermined. Cheney, for his part, explicitly defended torture, illegal detention and all of the crimes committed by his administration, warning that Obama’s questioning of these actions threatened to aid terrorism and undermine “national security.”

In his televised interview this week, Cheney noted that Obama, as a candidate, had been “all for closing Gitmo” and “very critical of what we’d done on the counterterrorism area to protect America.”

Now, the ex-vice president continued, “all of that’s fallen by the wayside.” Obama, he said, “has learned that what we did was far more appropriate than he ever gave us credit for while he was a candidate...he’s learned from experience.”



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