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Obama's Collapse: The Return of the Military Commissions

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For T.S. Eliot, April was the cruelest month, but for the prisoners at Guantánamo it is January — from the dashed hopes of January 2009, when President Obama swept into office issuing an executive order in which he promised to close the prison within a year, to January 2010, when, having failed to do so, he added insult to injury by issuing a moratorium preventing the release of 29 Yemenis cleared for release by his own Guantánamo Review Task Force, after his opponents seized on the revelation that a failed plane bomber on Christmas Day 2009 had apparently been recruited in Yemen.

This year the president's bitter surprise for the prisoners was two-fold. The first was his failure to veto a military spending bill passed by Congress, which contained <u>cynical and unconstitutional provisions</u> preventing the transfer of any prisoner to the U.S. mainland, in which lawmakers also demanded the power to prevent the release of prisoners to countries regarded as dangerous.

While these were evidently unacceptable assaults on presidential authority, dashing the administration's hopes of holding federal court trials for any of the remaining 173 prisoners and confirming the intent of Congress to enshrine the Yemeni moratorium in legislation, and also to prevent any prisoners from being released to other countries including Afghanistan, Obama refused to veto the bill, feebly claiming that he would try to negotiate with Congress, but thereby conceding that there was no way that the prison would close in the foreseeable future — or, very probably, in the rest of his term in office.

The return of the military commissions

The second bitter surprise for the prisoners was the announcement last week, first mentioned by the <u>New York Times</u> that, although federal court trials have effectively been suspended, specifically derailing the administration's <u>stated intention</u> to prosecute Khalid Sheikh Mohammed and four other men accused of involvement in the 9/11 attacks in federal court, the administration is preparing to push ahead instead with trials by military commission for at least some of the 33 men recommended for trials by Obama's Task Force.

This decision is particularly disappointing because it hands victory to the most ideologically misguided Republicans, who like the idea of military commissions because they reinforce their false notion of terrorist suspects as "warriors" in the Bush administration's "war on terror," while enraging many of Obama's own supporters, who are opposed to trials by military commission because they represent a second-tier system of justice, inferior to federal court trials, and, in particular, because they contain "war crimes" specifically invented by Congress.

As Lt. Col. David Frakt, a law professor and the military defense attorney for two prisoners at Guantánamo, <u>explained in congressional testimony</u> in summer 2009:



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If one were to review the charges brought against all of the approximately 25 defendants charged [under President Bush] in the military commissions, as I have, one would conclude that 99% of them do not involve traditionally recognized war crimes. Rather, virtually all the defendants are charged with non-war crimes, primarily criminal conspiracy, terrorism and material support to terrorism, all of which are properly crimes under federal criminal law, but not the laws of war.

The decision to revive the commissions is also disappointing because, as <u>ProPublica reported</u> in a follow-up to the *Times'* story, last August, when "President Obama's national security advisers, including Secretary of Defense Robert Gates, Attorney General Eric Holder and Secretary of State Hillary Clinton, met in the White House situation room to decide whether and how to go forward with trials for some Guantánamo prisoners," they reportedly "left the White House that August day committed to moving forward simultaneously with prosecutions in federal court and military commissions." As ProPublica stated explicitly, "No military trials would be held anywhere unless trials in federal courtrooms were held at the same time."

The only glimmer of hope, as ProPublica also reported, is that:

[S]ome experts have suggested that the restrictions [on moving prisoners to the U.S. mainland] affect only the Pentagon. Justice Department funds could still be used to move prisoners to the United States. If that is the White House view, it will be known only when a prisoner is moved to the United States for trial. And only then will it be clear whether the White House policy to move simultaneously on prosecutions in federal court and military commissions still holds.

However, given Obama's history of bowing to Republican pressure on almost everything to do with Guantánamo, it strikes me as highly unlikely that he would willingly invite an avalanche of criticism to descend on him by stealthily moving prisoners to face trial to the United States using Justice Department funds.

If that were the case, he would already have robustly defended federal court trials, whereas the sad truth is that, when tested, he withdrew from the fray. That test came in October and November, during the trial and conviction of Ahmed Khalfan Ghailani, the only man to be moved by the Obama administration from Guantánamo to the U.S. mainland to face a federal court trial (a move that took place in May 2009, before Congress decided to do all it could to usurp the president's powers). When the jury in Ghailani's case convicted him on just one count of conspiracy in connection with the bombing of the U.S. embassy in Dar-es-Salaam, Tanzania, in August 1998, and cleared him of 284 other charges, Obama refused to speak up to defend the court system, allowing his distorted critics to behave as though Ghailani had somehow beaten the system, even though he faces a minimum prison sentence of 20 years, and may, when his sentence is delivered this week, receive a life sentence.

The sad history of the military commissions

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With the commissions back in play, therefore, the only hope for those who believe, correctly, that federal courts are the only legitimate venue for trying offenses related to terrorism, is that the system first dragged from the grave by Dick Cheney in November 2001, and revived by Congress in the fall of 2006, and again in 2009 (under Obama), after the Supreme Court ruled in June 2006 that Cheney's version violated both the Geneva Conventions and the Uniform Code of Military Justice, will be as much of a failure as it has on all its other previous outings — the three convictions under Bush, and the two under Obama:

- David Hicks, an Australian, who, in March 2007, accepted a plea deal and was a free man nine months later:
- Salim Hamdan, a Yemeni, and one of several drivers for Osama bin Laden, who was cleared of conspiracy charges by his military jury, and was a free man five months after being <u>convicted and sentenced</u> for providing material support to terrorism in August 2008;
- Ali Hamza al-Bahlul, a Yemeni who made a promotional video for al-Qaeda, and received a life sentence in November 2008 after a one-sided trial in which he refused to mount a defense:
- Ibrahim al-Qosi, from Sudan, a sometime chef for al-Qaeda members in a compound used by Osama bin Laden, who <u>accepted a plea deal</u> in July last year, and is expected to be freed in July 2012; and
- Omar Khadr, a Canadian, and a former child prisoner, who was put forward for a trial by Obama despite his former status as a child (which should have guaranteed that he was rehabilitated rather than prosecuted), and who agreed to a plea deal in October, which involves him serving one more year in Guantánamo, and then being repatriated to serve seven more years in Canada.Of these, the trial of Omar Khadr ought to have been the biggest humiliation for the Obama administration, and a sure sign of troubles to come, as his guilty plea involved the spurious war crimes invented by Congress, and it was both depressing and shameful to watch as Obama presided over a system in which Khadr was obliged to accept that he was an "alien unprivileged enemy belligerent," whose participation in or presence at the fire fight in July 2002 that led to his capture was illegal.

The men scheduled to face trials by military commission

As the *New York Times* explained last week, the men scheduled to face trials include three of the five men mentioned by Attorney General Eric Holder on November 13, 2009, on the same day that he announced the federal court trial of Khalid Sheikh Mohammed and his alleged 9/11 co-conspirators. With al-Qosi and Khadr dealt with, the remaining three are Noor Uthman Mohammed, Ahmed Mohammed al-Darbi, and Abd al-Rahim al-Nashiri. A fourth man is Obaidaullah, an Afghan. All of these men (like al-Qosi and Khadr) are holdovers from the Bushera commissions, when 29 men in total were charged, but only three trials took place, as mentioned above.

Noor Uthman Muhammed

In the case of Noor Uthman Muhammed, accused of being the deputy emir of a training camp in



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Afghanistan, the main problems were <u>summarized in a report</u>from his most recent hearing at Guantánamo in September last year, by Raha Wala, a Georgetown fellow in law and security, who attended the hearing on behalf of Human Rights First, and elaborated on some of the failures of the commissions that I mentioned above. Wala wrote:

One reason Noor's case is a bad fit for a war crimes prosecution is that it's unclear whether a military commission can even exert jurisdiction over Noor for crimes that the government says he committed. Most of the criminal acts Noor allegedly committed took place from the mid-1990's to 2000, purportedly before the United States was at war with anyone. Yet the military commissions were originally created in response to the September 11th terrorist attacks to try individuals for war crimes, raising questions about whether the military commission even has jurisdiction to hear Noor's case. The crimes Noor allegedly committed — material support of terrorism and conspiracy — are not traditional law of war violations typically tried in military commissions. Moreover, attempts by Congress to codify material support and conspiracy as war crimes may very well be seen as imposing *ex post facto* punishment, with military commissions serving as a venue for trying individuals like Noor for "war crimes" that simply didn't exist at the time these alleged unlawful acts took place.

Similarly, Noor must be considered an "unprivileged enemy belligerent" for the military commission to assert jurisdiction over him. This means that the prosecution needs to show that Noor was unlawfully taking part in hostilities during an armed conflict. Yet, as was mentioned above, the United States was not at war in the 90's during Noor's alleged crimes. And Noor denies that he was affiliated with any armed forces, although the U.S. government claims he was providing support for a Taliban training camp [actually the Khaldan camp, which was independent of both the Taliban and al-Qaeda]. Even if the U.S. government's accusations are accurate, it's not clear that the Taliban was involved in any armed conflict during the time of Noor's alleged unlawful acts either.

Other problems for the government are that Muhammed's case relates to two others that the administration ought be extremely wary of publicizing: that of <u>Abu Zubaydah</u>, the supposed "high-value detainee" for whom the CIA torture program was first developed, who, it turned out, was not a significant figure in al-Qaeda at all, and that of <u>Ibn al-Shaykh al-Libi</u>, the emir of Khaldan, who was flown to Egypt by the CIA, tortured until he confessed to non-existent links between Saddam Hussein and al-Qaeda, which were used to justify the invasion of Iraq in March 2003, and later returned to Libya, where he died in mysterious circumstances in May 2009. Despite this, in September, prosecutors in Muhammed's case declared their intention to use Abu Zubaydah's diaries as evidence when his case comes to trial.

Ahmed Mohammed al-Darbi

In the case of Ahmed Mohammed al-Darbi, a Saudi seized in Azerbaijan in June 2002 and rendered to US custody in Bagram, Afghanistan, before being sent to Guantánamo, the main problem for the government is that his case is tainted with torture. He is accused of plotting to



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attack a ship in the Strait of Hormuz, meeting Osama bin Laden, and attending a training camp in Afghanistan, but at a hearing in September 2009, his civilian lawyer, Ramzi Kassem, urged that all of the 119 statements that al-Darbi made to interrogators should be ruled out, because they were obtained through the use of torture and abuse, including beatings, threats of rape, sensory deprivation, sleep deprivation and sexual humiliation, both at Bagram, where al-Darbi was held for eight months, and at Guantánamo (a full statement by al-Darbi is available here).

Abd al-Rahim al-Nashiri

The most troubling case is that of Abd al-Rahim al-Nashiri, one of 14 "high-value detainees" transferred to Guantánamo in September 2006, after being held in from secret CIA prisons for nearly four years. I have written about the problems with al-Nashiri's case since he was <u>originally charged in June 2008</u>, and these were summarized last week, when the *New York Times* noted that:

[His case] would attract global attention because he was previously held in secret Central Intelligence Agency prisons and is one of three detainees known to have been subjected to the drowning technique known as waterboarding.

Lt. Cmdr. Stephen Reyes of the Navy, a military lawyer assigned to defend Mr. Nashiri, declined to comment on any movement in the case. But he noted that two of Mr. Nashiri's alleged co-conspirators were indicted in federal civilian court in 2003, and he made clear that the defense would highlight Mr. Nashiri's treatment in CIA custody.

"Nashiri is being prosecuted at the commissions because of the torture issue," Mr. Reyes said. "Otherwise he would be indicted in New York along with his alleged co-conspirators."

The *Times* might also have mentioned that, shortly after al-Nashiri's capture, he was threatened with a gun and a power drill in a secret CIA prison in Thailand, and was then moved to Poland, where, in September last year, he was granted "victim" status in an ongoing investigation into Polish complicity in the establishment of a secret CIA prison at Stare Kiejkuty, near Szymany.

Obaidullah

For the last of the men, Obaidullah (also spelled Obaydullah), the decision to proceed with a trial by military commission demonstrates how, as under President Bush, the commissions' ill-conceived dragnet not only includes alleged terrorists, but also minor figures in the Afghan insurgency, whose connection to terrorism is only justifiable under the absurd terms of the "war on terror," which treats terrorists and soldiers equally, and attempts to criminalize soldiers, while denying criminal trials for accused terrorists.

A year ago, when <u>Eric Holder announced</u> that Obaidaullah had been charged, <u>I revisited an article I wrote</u> when he was first charged under President Bush in September 2008, noting not



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only that he had plausible complaints that he was tortured by U.S. forces in Bagram, but also that he was

charged with "conspiracy" and "providing material support to terrorism," based on the thinnest set of allegations to date: essentially, a single claim that, "[o]n or about 22 July 2002," he "stored and concealed anti-tank mines, other explosive devices, and related equipment"; that he "concealed on his person a notebook describing how to wire and detonate explosive devices"; and that he "knew or intended" that his "material support and resources were to be used in preparation for and in carrying out a terrorist attack."

As I also explained:

It doesn't take much reflection on these charges to realize that it is a depressingly clear example of the U.S. administration's disturbing, post-9/11 redefinition of "war crimes," which apparently allows the U.S. authorities to claim that they can equate minor acts of insurgency committed by a citizen of an occupied nation with terrorism.

In conclusion, while the charges against Obaidullah remain incomprehensible, there is no reason to suppose that the invented war crimes misapplied to the other men will ensure that their trials by military commission — also dogged by evidence of torture — will secure credible convictions, or be regarded as legitimate outside the United States.

January really is the cruelest month, at least for those still languishing at the Pentagon's prison at Guantanamo.