Reviving the Military Commissions

One of the most important issues Congress is expected to address in the next two weeks is how to try the terrorism suspects currently being held at Guantánamo Bay. President Barack Obama promised to close the military detention center at Guantánamo by January 2010, which would be an important step towards restoring the reputation of the United States as a nation that adheres to the rule of law. However, in May, he announced that he planned to revive the widely discredited military commissions to try some of the Guantánamo detainees in proceedings similar to the Bush administration's military commissions, but with some procedural changes designed to provide more due process. It is our view that these changes would be insufficient, and that reviving the military commissions in any form would be an enormous mistake.

Because of their tainted history, the commissions, if employed, would continue to be stigmatized as substandard and unfair, would be plagued by controversy and delay, and would make it impossible to put the terrible legacy of Guantánamo behind us. The military commissions were created by the Bush administration to quickly try terrorism suspects and achieve guilty verdicts without regard to legal standards. Historically, military commissions have been used in wartime when the normal mechanisms of criminal justice are not operational. Since the normal mechanisms of criminal justice, US federal courts, are perfectly capable of trying such crimes, there simply is no need to create military commissions.

The military commissions under the Bush administration were so lacking in fundamental due process guarantees that several prosecutors stepped down or resigned, citing ethical issues with the system. In addition, in the eight years since they were first announced, the military commissions have secured only three convictions, only one of those a truly contested case, none of them high-level terrorist suspects. US federal courts, by contrast, have secured well over 100 terrorism convictions in that same timeframe, including 9/11 conspirator Zacarias Moussaoui and shoe bomber Richard Reid.

Federal courts have shown themselves capable of trying terrorism suspects in a manner that is consistent with the US Constitution, the laws of war and American values. The Guantánamo military commissions, even with some improvements, can never meet that standard. Federal criminal courts have undergone many years of practice and litigation so as to ensure fairness and to guard against erroneous convictions. Departing from them would result in a second-class system of justice that would lack legitimacy to the American public and around the world.

Some have argued for the continuation of the military commissions as a way to address the issue of "tainted evidence," i.e., evidence derived through torture and abuse. But the reason such evidence is excluded from US courts is not only that torture is wrong and illegal, but because such evidence is inherently unreliable. Federal prosecutors should be able to collect and prove their cases with reliable evidence. It would be a grave mistake to create a whole new legal system to accommodate past policies that permitted torture, which would only lead us further down the road that strays from our most basic laws and values.

While we strongly believe that the commissions should be disbanded and terrorism cases tried in federal courts, the military commissions, if continued to be used, must have requisite procedural safeguards regarding constitutional due process and must minimize legal confusion and delay. There are currently proposed amendments to the Military Commissions Act in the US Senate. While the amendments improve the existing system by making it harder to introduce coerced evidence and hearsay, they still depart in fundamental ways from the trial procedures used in US federal courts. In fact, the Department of Justice has said that some of the procedures in the proposed legislation do not meet constitutional requirements.

The Obama administration itself has also suggested changes to the commissions. At the very minimum, we believe Congress should make the changes, but we also believe it should address the other serious constitutional defects that we have raised with lawmakers and the administration.

Below is a summary of the differences between the current legislation proposed in the Senate and what the administration wants:

1. Coercion
    - The Senate bill would bar the admission of statements obtained by cruel, inhuman, or degrading treatment but would not bar all coerced statements.
    - The administration wants to adopt the "voluntariness" standard used by federal courts that takes into account the challenges and realities of the battlefield and armed conflict. This would not mean soldiers will be required to give Miranda warnings to enemy forces captured on the battlefield -- voluntary but non-Mirandized statements in military commissions would be admissible. The administration believes that military commissions that allow involuntary statements to be used as evidence would eventually be struck down as unconstitutional.

2. Sunset provision
    - The Senate bill contains no sunset provision.
    - The administration believes the military commissions should be temporary.

3. Hearsay
    - The Senate bill restricts the use of hearsay, while preserving an important residual exception for certain circumstances where production of direct testimony from the witness is not available given the unique circumstances of military and intelligence operations, or where production of the witness would have an adverse impact on such operations.
    - The administration agrees with that, but wants a different standard as to when the exception should apply, based on whether the hearsay evidence is more probative than other evidence. Adopting this standard would bring the rule more closely in line with the evidentiary standards used in federal court.

4. Subject matter jurisdiction

- The Senate bill allows the military commissions to try non-law of war violations, such as material support for terrorism or terrorist groups, and conspiracy to commit terrorism.
- The administration recognizes that there are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war and considers it very likely that appellate courts will conclude that it is not, thus reversing convictions. We strongly believe the military commissions should not include the crime of conspiracy or material support. In his May 21 speech on national security, President Obama affirmed that military commissions should be limited to law of war violations. Both the Nuremberg Tribunal and the International Criminal Tribunal for the former Yugoslavia considered and rejected prosecuting the crime of conspiracy and we believe conspiracy convictions could be overturned on appeal for this reason.

In addition, we are concerned by several other military commissions issues that the administration has not addressed

1. Children
   We believe that child offenders should be excluded from trial before the military commissions. This is not a hypothetical concern. The government has initiated proceedings before military commissions against two defendants who were children at the time of the alleged offenses. International law requires that trials of juveniles be conducted in a manner that takes account of their age and the desirability of promoting their rehabilitation. This means that trials of juveniles should be conducted differently than those of adults, which is normally accomplished by juvenile courts.

2. Defense resources
   Defense teams at the military commissions have operated under onerous resource constraints that violate the right to effective assistance of counsel guaranteed by the Sixth and Eighth Amendments, and would not be tolerated in any federal courtroom in America. Congress should ensure that defense counsel have access to the resources they need to defend their clients, including investigatory, legal, and translation support. In the United States, everyone accused of a crime, no matter how heinous the crime may be, is allowed the ability to mount an adequate defense.

3. Discrimination

By singling out foreign nationals to be subject to the jurisdiction of military commissions, the draft legislation arbitrarily discriminates on the basis of citizenship, violating US obligations under international human rights law and contravening the Equal Protection Clause of Constitution. In 2004, the UK House of Lords struck down a comparable distinction, ruling that legislation that subjected only alien terrorist suspects to indefinite detention arbitrarily discriminated on the basis of citizenship.

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