

Imprisonment without trial: The continuing Guantanamo injustice

Obama's Policy is at odds with his proclaimed commitment to be faithful to the rule of law

By Owen Fiss

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The firestorm of criticism over the trial of Khalid Sheikh Mohammed, the alleged mastermind of the 9/11 attacks, should not obscure a darker truth: Trial is only one prong of Obama's Guantanamo strategy. Some of the Guantanamo prisoners, including those who have been detained for seven or eight years, will remain imprisoned indefinitely with no prospects of ever seeing the inside of a courtroom. Obama's much-lauded intention to close Guantanamo will not change the fate of these prisoners, who will be transferred to other prisons in the United States or abroad, and as a result, the president will perpetuate one of the most troubling policies of the Bush administration. If Obama does not repudiate this policy, it will define what the government can do in the future.

Imprisonment without trial is an affront to the Constitution and is at odds with Obama's proclaimed commitment to be faithful to the rule of law and to fight terrorism within the terms of the Constitution. At issue is nothing less than one of the core values of our constitutional system – the principle of freedom. That principle is enshrined in our political traditions and stands as one of our greatest achievements as a nation. It is rooted in the Fifth Amendment's requirement that the liberty of no person shall be denied without due process of law. This provision of the Bill of Rights, along with the guarantee against the suspension of the writ of habeas corpus, denies the government the power to incarcerate anyone who had not been charged with a crime and swiftly brought to trial.

At its heart, the principle of freedom seeks to ensure that only those who have committed a crime are denied their liberty. To that end, the principle mandates a trial with time-tested procedures designed to protect the innocent and arrive at the truth of the charge against him. These procedures, which require the government to prove its case in open court and allow the accused to defend himself, reflect the government's commitments to fairness and are a source of its legitimacy.

The principle of freedom has exceptions, but they are very few in number and should be strictly construed. War is one of these exceptions. The power to wage war, fully recognized by the Constitution, allows the United States to kill enemy soldiers on the battlefield and to capture and imprison them for the duration of the hostilities. This exception was pushed to new limits by President Bush, who not only claimed that the fight against Al-Qaeda after 9/11 was a war but also asserted that he had virtually unlimited power to try or to imprison those he believed to be Al-Qaeda's agents. By continuing to detain some of the Guantanamo prisoners without placing them on trial, President Obama is in effect claiming this same power.

Although President Obama has repeatedly claimed that we are at war with Al-Qaeda, he has not sufficiently recognized that it is no ordinary war. Al-Qaeda is not a nation-state confined to some discrete geographic area, but rather a far-flung international organization that operates in secret. Our battle against Al-Qaeda has no end in sight – even if Bin Laden is captured, there will remain many terrorist units throughout the world capable of acting without his direction. Just as it is unthinkable to treat every place on earth where Al-Qaeda fighters might be found as a battlefield, it would be unthinkable to allow the government to hold Al-Qaeda suspects until the war between that organization and the United States has concluded. Allowing the government this power would expand the war exception to the principle of freedom so as to swallow the principle itself and defeat its underlying values. It would mean the president could decide when and where the principle of freedom should apply virtually without constraint.

As a matter of circumstance, the Obama detention policy applies only to foreign nationals, since there are no Americans detained at Guantanamo, but the threat to the principle of freedom applies with no less force. The Constitution's Due Process Clause, the primary source of the principle, by its very terms protects the liberty of any person. It should be read as defining the authority of United States officials wherever they act and against whomever they act. In fact, the Supreme Court's most recent ruling on Guantanamo, *Boumediene v. Bush*, correctly recognized that the Guantanamo prisoners are not beyond the reach of the Constitution. In that decision, the court denied Congress the power to deprive these prisoners the right to habeas corpus and, in so doing, implied that the prisoners possessed other constitutional rights. While the court did not specify what those rights might be, they presumably include rock-bottom constitutional rights – not just the right against torture, but also the right to personal liberty.

To Obama's credit, unlike Bush he has indicated that he is using the power to imprison without trial only reluctantly. In announcing his Guantanamo policy in May, Obama called the prospect of prolonged, indefinite incarceration "one of the toughest issues we will face." Yet rather than accept responsibility for making the choice to imprison without trial, Obama stated without explanation that some of the prisoners "cannot be prosecuted." He did not explain why trials were not an option. Certainly it cannot be the case that American law is incapable of dealing with Al-Qaeda agents or terrorism in general. Bush tried and convicted a number of Al-Qaeda terrorists during his presidency, and Obama is poised to do the same.

Many have speculated that Obama's refusal to try some of the prisoners stems from concerns that the evidence against them is the product of torture, and thus tainted.

This kind of evidence has long been inadmissible at trial under what is known as the "exclusionary rule," which prohibits the use of evidence that has been acquired in violation of the Constitution. But if this is Obama's reasoning, he has effectively bifurcated the exclusionary rule, creating a regime where evidence secured through torture cannot be used at trial but can be used as the basis for incarcerating a suspect, even for the rest of his life.

Such a bifurcated exclusionary rule would create all the wrong incentives. Government interrogators will know that a confession secured through torture may

serve as the basis for prolonged incarceration, despite the fact that Obama issued an order banning torture when he took office. This rule also would compound the wrongs suffered by some of those Guantanamo prisoners who were themselves tortured: They were subjected to excruciating pain, and now the fruits of that abuse will keep them in prison with no end in sight. The Constitution should not allow any deprivation of liberty to be based on evidence procured through torture, regardless of whether that deprivation is the result of a trial or the president's unilateral decision.

Alternately, the concern animating Obama's reluctance to go to trial may not be the use of tainted evidence but rather the disclosure of secret evidence in the course of prosecution. The government is, of course, entitled to a measure of secrecy, but that should not, and in fact never has, justified imprisonment without a trial. In a good number of criminal prosecutions touching on national security, defendants have sought information that the government deemed top secret. Courts have been more than capable of accommodating these concerns, typically by examining the evidence in private without the accused or his lawyer and evaluating its relevance to the case. If the judge determines that the evidence is important, the government can hand it over to the accused, offer a substitute, or drop the case. The remedy has never been to suspend the trial and incarcerate the prisoner indefinitely.

Nor can Obama's detention policy be justified on the ground of preventing some extraordinary harm, such as the detonation of a radioactive bomb. None of the Guantanamo prisoners are accused of conspiring to engage in such a crime. Even if they were, however, the burden would remain on the government to prosecute them for that crime, even if that carries a risk of acquittal. If the government is prepared to try an individual as dangerous and as committed to harming the people of this country as Khalid Sheikh Mohammed, how can it justify indefinite imprisonment of anyone else? The exceptions to the principle of freedom do not arise from the president's assessment on a case-by-case basis of the gravity of the threat posed if the prisoner is acquitted.

Neither torture, nor secrecy, nor the risk of acquittal excuse Obama from the choice he has made to imprison without trial. In the end Obama's assertion of his power to do so is no different than that of his predecessor. Perhaps sensing this, Obama initially sought to distance himself from Bush's unilateralism by promising to develop a system of "judicial and congressional oversight" of any executive decision to incarcerate a suspect indefinitely without a trial. As he said then, "in our constitutional system, prolonged detention should not be the decision of any one man." It is doubtful whether an oversight system, which would review only whether the president had acted reasonably, could ever satisfy the principle of freedom. But the sad fact is that Obama has not carried through on this promise and now presides over the very horror he himself had the courage to denounce.

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