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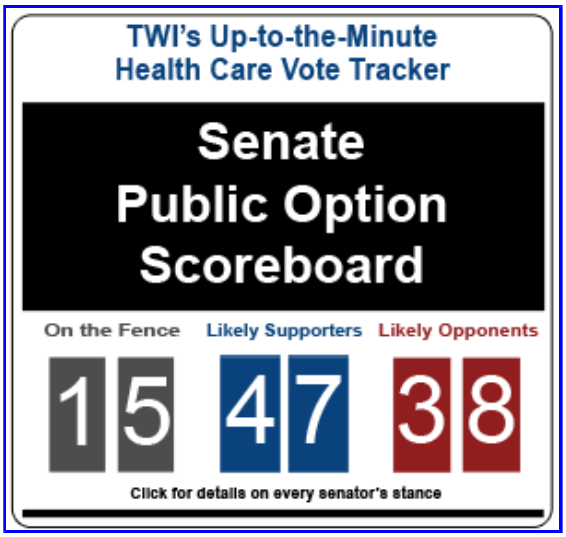

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COMMENTARY

Obama Legacy: A Parallel Justice System?

New Law Could Allow Military Commissions to Continue Indefinitely

DIGG TWEET By Daphne Eviatar 10/29/09 6:00 AM

President Barack Obama (WDCpix)

In signing the Defense Authorization Act, which, among other things, amends the laws governing military commissions, President Obama confirmed Wednesday that he plans to keep the controversial military commissions alive. The effect is to deny at least some suspected terrorists — now called "unprivileged enemy belligerents" — the right to a trial in a civilian federal court. And though Obama has promised to use the commissions sparingly, the new law sets up a parallel justice system that could outlive the Obama administration and leave an indelible stamp on its legacy.

Image by: Matt Mahurin

So how different are the new military commissions from the old ones?

Even those who fiercely oppose trying suspected terrorists in military commissions acknowledge that the months of wrangling over the legislation in Congress led to significant improvements over the Bush-era military commissions approved in the Military Commissions Act of 2006. Still, there are many lingering concerns. The new commissions allow the admission of coerced evidence in certain narrow circumstances.

They allow the government to try children as war criminals. And, the new law would allow trials by military commission for offenses that are not traditionally considered war crimes. Those provisions leave even the new-and-improved military commissions vulnerable to constitutional challenge, and their verdicts open to reversal on appeal. And that could undermine the entire purpose of creating military commissions, which is ordinarily to provide swift justice when ordinary courts are not available.

Many legal experts and human rights advocates say the improvements over the 2006 Military Commissions Act are significant.

Under the amendments, an "unprivileged enemy belligerent" — what the Bush administration used to call an "enemy combatant" — is entitled to competent, experienced defense counsel, particularly if the suspect might face the death penalty. The previous commissions did not provide for defense lawyers with significant experience handling capital cases.

The new commissions also require that most statements of the accused must have been "voluntary" to be admitted at trial. That's in addition to the requirement that the statements were not solicited by torture, or by cruel, inhuman or degrading treatment, as defined by the Detainee Treatment Act. Of course, the Detainee Treatment Act was interpreted by the Bush administration's lawyer very liberally, so even extreme sleep and food deprivation, stress positions, threatening dogs and confinement with an insect in a small box was deemed lawful under that standard. But adding that the statement must also be "voluntary" — a change pressed by the Obama administration at several Congressional hearings — raises the bar significantly higher.

On the other hand, there is an exception. Statements are admissible even if not "voluntary" if "the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence." It remains to be seen how narrowly a judge will construe that.

The admission of hearsay evidence has been narrowed as well. The new law requires whoever introduces the evidence to give the other side enough advance warning to see the evidence and prepare a response, and the judge, in weighing the evidence, must "take into account all of the circumstances surrounding the taking of the statement, including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne…" Then, in addition, the judge has to find that the statement is relevant and probative of a fact of the case, that it's impractical to get direct testimony from the witness, and that "the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence." That essentially mirrors the hearsay exception for evidence provided in a civilian federal court.

As for the admission of classified evidence, the military commission has to follow the same procedures a civilian federal court would to determine how and if the evidence can be used, and to what extent and in what form the accused and his lawyer are entitled to see it.

But if the procedural safeguards are so similar to those in federal court, then why have the military commissions at all? The question is even more important because Congress, in passing this law, defined the court's jurisdiction to include crimes that are not traditionally war crimes, such as conspiracy, and suspects who are not traditionally considered war criminals, such as those who provide "material support" for terrorism. Even Assistant Attorney General David Kris, testifying before Congress, testified that it's not clear that those crimes — which are commonly charged against terror suspects in civilian federal courts — can constitutionally be brought before a military commission. Justice Stevens, in the case of *Hamdan v. Rumsfeld*, in an opinion joined by three other justices, specifically notes that "conspiracy" has not traditionally been considered a war crime. (The court did not ultimately rule on that basis, so it's not clear how a majority would rule on it now.) Therefore, defense lawyers could argue that for Congress to make it a war crime after the suspect's crime was committed would be an unconstitutional "ex post facto" law, says Shayana Kadidal, senior managing attorney of the Guantanamo Global Justice Initiative at the Center for Constitutional Rights.

For the administration to bring a terrorism case before a military commission and be sure to avoid this issue, then, it would have to avoid charging conspiracy and substantial support for terrorism. Those charges are made in almost all terrorism cases.

Which raises the question, why bring cases in military commissions at all?

Justice John Paul Stevens in *Hamdan* argued that the purpose of military commissions is "military necessity." Yet in this situation, as many legal experts have pointed out, it's not at all clear that these commissions are necessary.

As the ACLU's Jameel Jaffer said in a statement released yesterday after the President signed the new law: "The commissions remain not only illegal but unnecessary – the federal courts have proven themselves capable of handling complex terrorism cases while protecting both the government's national security interests and the defendants' rights to a fair trial."

Many other lawyers and advocates agree. A study conducted by former prosecutors for Human Rights First, for example, found that civilian federal courts had successfully prosecuted more than 214 terrorism cases since September 11, 2001. Prosecutors won 195 convictions, and successfully handled the challenges of unavailable witnesses, classified evidence, undercover informants and other complexities that arise in terrorism cases, the report found. By contrast, the military commissions created by President Bush after the 9/11 attacks and subsequently authorized by Congress tried only three cases. In only one of those did the defendant even put on a defense. In that case, Salim Hamdan, Osama bin Laden's driver, was sentenced to only five and a half years in prison, with credit for the more than five years he'd already served. He was released to his home country of Yemen in January.

Part of the reason the military commissions have been so ineffective is because they were vulnerable to constitutional challenge. But legal experts say that even the new commissions would be vulnerable. As ACLU attorney Chris Anders put it, "they've narrowed the gap, but they still fall far short of the due process guarantees in Article III courts, which will still make them vulnerable to reversals."

"This is a brand-new system, for the third time," said Kadidal, referring to the two earlier incarnations of the military commissions during the Bush administration. The first commission system was invalidated by the U.S. Supreme Court, and the second was suspended by the Obama administration.

"This lesser degree of process is not justice," said Virginia Sloan, president of the bipartisan Constitution Project, in a statement released yesterday. "Furthermore, these modest improvements cannot save the irretrievably tainted military commissions."

The Obama administration surely knows that these cases are vulnerable to challenge, particularly since Congress included provisions in them that Justice Department lawyers admitted were legally questionable. And it's not clear that it wants to bring important cases in the military commissions, and risk having convictions of major terrorists reversed on appeal.

What's more, there's no "sunset provision" in the legislation, so the military commissions can exist indefinitely. That's also contrary to what the administration itself asked for. David Kris, testifying before the Senate Armed Services Committee, noted that traditionally, "military commissions have been associated with a particular conflict of relatively short duration." Buy contrast, the current conflict "could continue for a much longer time."

The result is that the military commissions could outlast the Obama presidency, raising another potentially sticky point that the Obama administration might prefer to avoid. "By not having a sunset provision," said Kadidal, "this system will be a permanent part of President Obama's legacy."

Center for Constitutional Rights Executive Director Vincent Warren yesterday made the point even more starkly: "These are now President Obama's military commissions: he owns them and all of the problems

that come with them, and their inevitable failure will scar his legacy and embolden our critics in the world. Military commissions are an unnecessary, jury-rigged creation, second-rate in comparison to our legal system. Obama is tinkering with the Constitution for no good reason."

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